



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: SS148/2007

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| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: NO |

D. MLAMBO

22 MAY 2025

In the matter between:

FOX SHIKUNWELA SITHOLE

First Applicant

EDDIE UBISI

Second Applicant

and

THE STATE

Respondent

Heard: 10 March 2025

Delivered: This Judgement was handed down electronically by circulation to the parties' legal representatives by email and by uploading to Caselines and release to SAFLII. The date and time for hand down is deemed to be 10:00 am on 22 May 2025.

Summary: Leave to appeal – issue: concurrence of eight year sentence with a sentence reduced on appeal – two sentences passed by different trial Courts – life sentence reduced to twenty five years on appeal - concurrence of sentences to be considered at the appeal stage - Leave to appeal dismissed – no misdirection shown

ORDER

1. Condonation is granted for the late filing of the application for leave to appeal.
 2. The application for leave to appeal is dismissed.
 3. Each party is ordered to pay their own costs.
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JUDGMENT

MLAMBO, JP

Introduction

[1] This is an application for leave to appeal accompanied by an application for condonation for the late initiation of the application. The application for leave to appeal is in terms of Section 316 of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act).

[2] The applicants are Mr Fox Shikunwela Sithole and Mr Eddie Ubisi ("the applicants"). They were accused numbers 1 and 2 respectively, in the trial proceedings, in this Court, in a matter that was presided over by Coetzee J. Judge Coetzee retired some years ago and is not available to hear the application. I took on the responsibility to hear the application in line with the proviso in section 316(2)(a) of the Criminal Procedure Act. I must also mention that the trial court file as well as the record have not been found within the Court archives, despite diligent search. The Judgments on conviction and sentence, by Coetzee J, were provided by the applicants in this application. Despite the absence of the Court file and trial record, I don't think this prejudiced the applicants, in any way.

[3] The factual matrix of the matter set out in what follows, is furnished by the applicants and there is little controversy in that regard between them and the State.

[4] In 2006, the applicants were convicted for murder, attempted murder and aggravated robbery in the KwaZulu-Natal Division of the High Court, sitting in Pongola

by Combrink J. On 29 June 2012, they were sentenced to life imprisonment, by that Court. They lodged an appeal against their conviction and sentence. In an unrelated matter, they were subsequently, in the same month, convicted on a charge of attempted robbery, by this Court (Coetzee J) and on 20 July 2012, the learned Judge sentenced them to eight years imprisonment.

[5] The appellants state that after the passing of their sentence, their legal representative at the time, notified Coetzee J that they intended to apply for leave to appeal the sentence imposed. They allege that Judge Coetzee opined that no leave was necessary as the sentence imposed by this Court would automatically run concurrently with the life sentence imposed by the KwaZulu-Natal Division. They pointed out that upon hearing this, they abandoned their intention to seek that order. This allegation is backed by no evidence, documentary or otherwise. What is clear from the Judgment handed down by Coetzee J is that when he convicted and sentenced the applicants, he was aware of the applicants' conviction and sentence imposed, by the KwaZulu-Natal High Court.

[6] Their appeal against the life sentence was successful in the Supreme Court of Appeal (the SCA), which reduced their sentence to twenty-five years. They state that during 2023, they were informed by Correctional Services officials that their eight-year sentence became added to their sentence of twenty-five years and as such they were liable to serve a total of thirty-three years. It is this eventuality that has spurred the applicants to now approach this Court, with the present application. They allege that they sought legal advice but were unsuccessful. They then decided to launch this application and were assisted by a fellow inmate who is a Master of Laws graduate. They were however represented by Counsel during the hearing of this application.

[7] The applicants acknowledge that that this leave to appeal application was filed late hence the application for condonation. They state that their circumstances are unique in that Judge Coetzee's intention was to order that their sentence run concurrently with the sentence of life imprisonment, but with the reduction of that sentence, the Judge's intention was thwarted. They submit that they seek to have that intention adjusted in this application. They submit that even without any proof of Judge Coetzee's intention, their cumulative sentence of thirty-three years is shocking and

inappropriate and induces a sense of shock. Such a sentence, they say, would amount to an inhumane sentence that cannot be countenanced if one takes on board the totality principle mentioned below and under our constitutional order.

[8] The Respondent does not oppose the condonation application. However, the application for leave to appeal is opposed. I do not deem it necessary to traverse the condonation aspect as it is not contested. In the applicants' favour is the fact that they became aware in 2023 that their eight-year sentence would not run concurrently with the twenty-five-year sentence and I accept their explanation of the efforts they initiated to initiate this application.

Leave to appeal

[9] The procedures relating to appeals in the criminal procedure context are found in section 316. Section 17 of the Superior Courts Act 10 of 2013 governs the considerations applicable regarding applications for leave to appeal in Superior Courts. Section 17(1)(a) provides:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

- (a) (i) the appeal would have a reasonable prospect of success; or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”

[10] The meaning of this provision and the test applicable are the subject of a long line of cases which I do not deem necessary to traverse. In fact, the SCA in *MEC for Health, Eastern Cape v Mkhitha*¹ held that “section 17(1)(a) of the Superior Courts makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.”²

[11] In *Mont Chevaux Trust v Goosen*,³ the Land Claims Court stated:

¹ [2016] ZASCA 176.

² *Id* at para 16.

³ 2014 JDR 2325 (LCC).

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”⁴

[12] The test of a reasonable prospect of success dictates that a court will refuse a leave to appeal application in circumstances where there is absolutely no chance of a successful appeal, or where the court is certain beyond reasonable doubt that the appeal will fail.⁵ Furthermore, when a court considers an application for leave to appeal, the court should not view it as a challenge to the court concerned to justify its decision. The court should rather reflect dispassionately upon its decision and decide whether a higher court could reasonably come to a different conclusion.⁶

[13] In the context of sentencing, as highlighted in *S v McLaggan*,⁷ a Court considering an application for leave to appeal against sentence will bear in mind that an appeal Court is generally reluctant to interfere with the trial Court's discretion in sentencing. However, where the exercise of such discretion depends on the findings of fact regarding the existence of substantive and compelling circumstances, and the court hearing the application is of the view that another court may come to a different finding in that regard, leave should be granted.⁸

Merits

[14] The applicants have not stated what aspects of the sentence imposed by Judge Coetzee, are under attack in this application. Their true objective in this application is to obtain an order that their sentence of eight years, be ordered to run concurrently with the sentence imposed by the SCA, when their appeal against the life sentence

⁴ *Id* at para 6.

⁵ See *Rex v Ngubane* 1945 AD 185 at 186 –7 or *Oliphant and Another v S* [2021] ZAGPPHC 691 at para 7.

⁶ See *S v Mabena* [2006] ZASCA 178; [2007] 2 All SA 137 (SCA); 2007 (1) SACR 482 (SCA) at para 22.

⁷ [2012] ZAECHGHC 78; 2013 (1) SACR 267 (ECG).

⁸ *Id* at para 16.

succeeded. As I have said, no misdirection of any sort has been pointed out by the applicants against Coetzee J when he imposed the eight-year sentence. Not only are the applicants not asserting that the sentence was inappropriate or shocking, they have not challenged any aspect of Coetzee J's reasoning in imposing that sentence. As I will show in the following paragraphs, Coetzee J can also not be faulted in any way for not ordering that sentence run concurrently with the life sentence.

[15] This requires me to consider the application of a number of provisions in the Criminal Procedure Act, which are relevant to the applicants' real objective. Section 280 of the Act addresses cumulative or concurrent sentences. The following subsections are relevant *in casu*:

- “(1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.
- (2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.”⁹

[16] In light of this provision, the default position is that sentences run consecutively unless the Court directs otherwise. However, this section has been interpreted in line with the "totality principle," which aims to prevent unduly harsh cumulative sentences and protect human dignity. This is in accordance with the judgment of *S v Chake*,¹⁰ where Murray AJ explained that the aim of section 280 is to protect human dignity by applying the “totality principle”, stating also that, disregarding this principle may lead to inhumane and unfair sentences.¹¹

⁹ Section 280(1)(2).

¹⁰ [2015] ZAFSHC 185; 2016 (2) SACR 309 (FB).

¹¹ *Id* at para 8.

[17] Thus, the principle behind section 280, serves as a preventative measure to avoid the severe cumulative effect where more than one sentence is imposed,¹² a concern that was echoed by the SCA in *Zondo v S*,¹³ where the court cautioned against sentences that are excessively long. The court said this kind of sentences only serve to appease public opinion, rather than achieving the aims of punishment.

[18] Section 39(2)(a) of the Correctional Services Act 111 of 1998,¹⁴ and section 280 of the Criminal Procedure Act, set cumulative sentencing as the standard, but on the other hand, section 39(2)(a)(i) provides that a determinate sentence runs concurrently with a life sentence. It appears that the alleged *obiter dictum* statement by Coetzee J was based on this provision. However, this provision was of limited duration following the applicants' successful appeal of the life sentence.

[19] I have already pointed out that the applicants have not pointed out any misdirection by Coetzee J when he imposed the eight-year sentence. In fact, the learned Judge could not order that the eight-year sentence run concurrently with the

¹² See *Mutsweni v S* [2021] ZAGPPHC 532 where the court was referencing Terblanche (The Guide to Sentencing in South Africa (2013), Chapter 7 at para 2.2.1), who stated that "When a sentence is imposed for each offence, a cumulative effect may develop. In other words, the combined punishments may become too severe. This was well explained by Reynolds J in *S v Mpofu*[3] : "in all multiple crime cases the courts pay regard to what Thomas describes as 'the totality principle'. (The Court) must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences.' ... In effect, the accused normally receives a 'discount' for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole."

¹³ [2013] ZASCA 51 at para 9.

¹⁴ This section provides: "(2) (a) Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the National Commissioner may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently but-

(i) any determinate sentence of incarceration to be served by any person runs concurrently with a life sentence or with a sentence of incarceration to be served by such person in consequence of being declared a dangerous criminal;

(ii) one or more life sentences and one or more sentences to be served in consequence of a person being declared a dangerous criminal also run concurrently;

(iii) no placement or release of a dangerous criminal may take place other than in terms of section 286B of the Criminal Procedure Act; and

(iv) any determinate sentence of incarceration to be served by any person runs concurrently with a sentence of imprisonment to be served by such person in consequence of a person being declared a habitual criminal: Provided that where the determinate sentence is longer than 15 years or where such sentence is imposed after a person is declared a habitual criminal, the balance of such determinate sentence must be served after the term of 15 years has been completed."

life sentence. In terms of section 280 of the Criminal Procedure Act, the eight-year sentence automatically ran concurrently with the life sentence.

[20] This is not a case where leave to appeal is required or necessary. This is so as no misdirection has been pointed on the part of Coetzee J. In my view, it was at the stage when the twenty-five year sentence was imposed that a decision should have been made whether there would be concurrence in the sentences. When the applicants' life sentence was before the SCA, that Court not only had the power to reduce the life sentence (which it did to 25 years) but also to determine whether any other sentence should run concurrently or consecutively with it. Had the applicants asked, the SCA could have—consistent with s 39(2)(a)(i) of the Correctional Services Act—ordered that the eight-year term imposed by Coetzee J run concurrently. The SCA appeal was their only “live” challenge to their sentences. That proverbial horse has now bolted. Permitting re-litigation of concurrency at this stage would undermine the finality principle and encourage strategic silence on crucial sentencing issues.

[21] Clearly, this application is a non-starter. There is no basis for an application for leave to appeal the eight-year sentence. By not seeking concurrent-sentence relief before the SCA, the applicants lost the opportunity to have a higher Court address the interplay between their various terms. In this Court now, no misdirection by Coetzee J in imposing eight years has been pointed to, nor any error as to the concurrency question. Absent a point of law or fact demonstrating that Coetzee J erred, nor any error as to the concurrency question, the application must fail.

[22] In so far as costs are concerned, the applicants were clearly ill advised to bring this application. For that reason, I'm not inclined to award costs against them. An appropriate order is that each party should pay its own costs.

Order

[23] In the result the following order is made:

1. Condonation is granted for the late filing of the application for leave to appeal.

2. The application for leave to appeal is dismissed.
3. Each party is ordered to pay its own costs.



D MLAMBO
JUDGE PRESIDENT
GAUTENG DIVISION OF THE HIGH COURT

Heard: 10 March 2025
Judgment: 22 May 2025

Appearances

For Applicants: E Pako
instructed by Pako Law Chambers Inc.

For Respondent: AK Mathebula
instructed by the Office of the Director of Public Prosecutions