



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

CASE NO: CC32/2023

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. 

SIGNATURE

26 JUNE 2025
DATE

In the matter between

DAVID JOSEPHUS NEL

APPLICANT

v

THE STATE

RESPONDENT

JUDGMENT: LEAVE TO APPEAL

THOBANE AJ,

Introduction

[1] This is an opposed application for leave to appeal the judgment and order of this court which judgment was handed down on 26 September 2024. The appeal lies against conviction only. The order that was handed down reads as follows;

“After evaluating all the evidence tendered by the state including evidence that was tendered by and on behalf of the accused, I am satisfied that the guilt of the accused has been established beyond a reasonable doubt. The accused is found guilty as charged.”

The reading of the notice of application for leave to appeal does not suggest that there are *“other compelling reasons why the appeal should be heard”*, as contemplated in section 17(1)(a)(ii) of the Superior Courts Act 10 of 2013. The application therefore is brought and will be adjudicated in terms of section 17(1)(a)(i) of the Superior Courts Act. This means that the applicant is of the view that the appeal would have a reasonable prospect of success.

[2] The application for leave to appeal is accompanied by an application for condonation for the late filing thereof. In the notice of application, the applicant seeks leave to appeal to the full court in this Division.

[3] The application for condonation as well as the application for leave to appeal were set down for hearing on 02 April 2025 in open court. At the commencement of the hearing it became apparent that structurally and otherwise the papers of the applicant were not in order, among others for the following reasons; the Power of Attorney was unwitnessed and the Notice of Application for Leave to Appeal did not set out succinctly the grounds of appeal. The application for condonation was not on affidavit but was supported by a statement by counsel for the applicant, which was not under oath. Most importantly, however, the application was prepared without the benefit of either the transcript of proceedings or the judgment handed down by the trial court. Counsel confirmed that he relied on his memory as well as the notes he kept in court in the preparation thereof. Counsel further confirmed that he only received the judgment on either the 12th or the 17th of February 2025, after the leave to appeal papers were lodged. Although counsel was prepared to stand and fall by

his papers, in the end it was agreed that in the interest of justice counsel should be afforded an opportunity to prepare proper papers, amend and/or supplement them.

[4] The applicant has now filed a new application for leave to appeal as well as a new application for condonation of its late prosecution. It is therefore convenient that the application for condonation get attention first.

Condonation Application

[5] The thrust of the application is that after judgment was handed down in open court, the applicant's counsel requested a copy thereof but was informed that it will be sent at a later stage. Further, that several follow ups were made by the applicant with various court staff, in an endeavor to secure the judgment but in vain. A historical perspective is necessary.

[6] There is a notice titled 'FILING SHEET APPLICATION FOR CONDONATION AND LEAVE TO APPEAL AGAINST CONVICTION', which is accompanied by an affidavit deposed to by counsel for the applicant. The Filing Sheet bears the stamp of both the Registrar of this court as well as that of the National Director of Public Prosecution – Pretoria. Both stamps bear the date of 11 November 2024 but the Sheet itself is undated.

[7] Attached to the Filing Sheet is an affidavit deposed to by counsel for the applicant and commissioned on 31 October 2024 at Bloemfontein. In the affidavit counsel lists, in very scant terms, the steps he took after judgment was delivered, to obtain a copy thereof. Although he indicates who he spoke to, he does not state exactly when he spoke to those persons that are referred to in the affidavit. The nub of the affidavit though is that the main reason why the application could not be prosecuted on time is that neither the transcript nor the judgment was available. Counsel does not in the affidavit detail any efforts made to secure the transcript of proceedings in light of the frustrations he says he experienced in attempting to obtain the judgment. This leads to unexplained time gaps between delivery of the judgment and the launching of the application for leave to appeal.

[8] With regards to the degree of lateness and prospects of success counsel stated the following;

“24. DEGREE OF LATENESS

25. This application was not necessitated by tardiness on the part of the applicant but is rather a result of systemic logistical problem.

26. There can be no prejudice on the part of the respondent

27. PROSPECTS OF SUCCESS

28. It is respectfully submitted that the Applicant has excellent prospects of success in this application for leave to appeal.”

It is trite that good prospects of success compensate for a poor explanation for the delay in the filing and the prosecution of the application for leave to appeal. It is clear that counsel has not meaningfully engaged with the degree of lateness as well as prospects of success of the appeal in the application for leave to appeal.

The application for leave to appeal

[9] The application for leave to appeal and the reasons therefor are set out in a notice headed ‘APPLICATION FOR LEAVE TO APPEAL AGAINST CONVICTION’. In the notice the applicant seeks, leave to appeal, condonation for late filing of the application for leave as well as alternative relief.

[10] What follows thereafter are the grounds of appeal. I do not plan to traverse all of them. In general terms however they amount to a summary of evidence led at the trial interspersed with evidence that was not led at the hearing that counsel for the applicant contends, had it been allowed, would have caused the court to find the applicant not guilty. It is contended therefore that there are reasonable prospects that another court would find differently than the trial court. The approach in this regard is not in accordance with case law nor is it congruent with section 17 (1)(a)(i) of the Superior Courts Act.

[11] The notice, which is oddly signed by counsel on behalf of Legal Aid South Africa, is also accompanied by a Power of Attorney referred to above. In it, counsel deals with the testimonies or evidence, with which he and the applicant do not agree. The

breakdown comprises testimonies of four witnesses as well as that of the applicant. Counsel also deals with evidence not tendered at the trial which in his view if tendered, would have swayed the court's findings in favour of the applicant. Counsel however conceded that the grounds of appeal were prepared without the benefit of the judgment or the transcript of the proceedings but was constructed from memory and from counsel's own notes. Due to the fact that the grounds of appeal were possibly subject to change upon reading of the judgment by counsel, it was agreed that the application be removed from the roll. The merits of the redrafted condonation application as well as the application for leave to appeal will be dealt with below after setting out the law.

The Law

Condonation application

[12] As it is often said, condonation is not for the mere asking. The law pertaining thereto can be best summarised by what Holmes JA said in *Melane v Santam Bank Insurance Co. Ltd*¹:

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon the consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation thereof, the prospects of success, and the importance of the case. Ordinarily, those facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. Or the importance of the issue and the strong prospects of success may tend to compensate for a long delay.'

¹ *Melane v Santam Bank Insurance Co. Ltd* 1962 (4) SA 531 (A) at 532 B-E. See also *Wynberg and Another* (1998) SACR 18, 1998 (3) SA 34 (SCA).

[13] Many a case law has repeatedly confirmed that principle of our law right up until the highest court in the land. In *Grootboom v National Prosecuting Authority*² the following is stated:

‘It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.’

[14] The Supreme Court of Appeal in *Mulaudzi v Old Mutual Life Assurance Company (SA) Limited*³, restated the factors that are to be given due consideration in a condonation application as set out in *Melane*. The court stated the following:

‘Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation thereof, the importance of the case, the respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.’

Application for leave to appeal

[15] It is now trite that the threshold in an application for leave to appeal since the advent of the Superior Courts Act has been raised. That much was said in *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others*⁴, where Bertelsmann J held as follows:

‘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.....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’.

² *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at paragraph [23].

³ *Mulaudzi v Old Mutual Life Assurance Company (SA) Limited* 2017 ZASCA 88.

⁴ *The Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* LCC14R/2014, 2014 JDR 2325 (LCC) at para 6. See also *Acting National Director of Public Prosecutions and Others v Democratic Alliance* [2016] ZAGPPHC 489 (24 June 2016).

[16] The full court of this Division in *Fairtrade Tobacco Association v President of the Republic of South Africa*⁵ likewise held that-

‘As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognisant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might, find differently on facts on law.’

[17] The SCA in *Smith v S*⁶, per Plasket AJA, as he then was, had occasion to consider what constitutes reasonable prospects of success as envisaged in section 17(1)(a)(i) and held:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[18] It is with the aforesaid principles and case law in mind that this court approaches the application for condonation as well as the application for leave to appeal on the grounds that are considered in turn below.

Analysis

[19] It is clear from the application for condonation that the applicant engaged and interacted with staff of the court with the view to obtaining the judgment very early after its delivery. This is apparent from the details of e-mail communication as well

⁵ *Fairtrade Tobacco Association v President of the Republic of South* (21688/2020) [2020] ZAGPPHC 311 (24 July 2020).

⁶ *Smith v S* 2012 (1) SACR 567 (SCA) at para 7. See also *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 at para 17.

as cellular exchanges. Systemic and logistical problems simply made it difficult for him to prosecute the application for leave to appeal timeously. For that reason, I am of the view that condonation should be granted.

[20] The grounds of appeal as set out in the first notice of application for leave to appeal are not too different or dissimilar to the current one. I will now briefly deal with the grounds as set out in the notice with reference to the witnesses.

Mr. de Wit

[22] The applicant states that the evidence of this witness cannot be relied upon as he was a single witness, he made contradictory affidavits which he disavowed in court. This is blatantly untrue. Mr. de Wit never disavowed the affidavits in court. He explained that he was requested to come and sign the affidavits and he did so. The affidavits are not in any event, substantively contradictory. Secondly, the applicant makes reference to evidence that was not led in court and is therefore not on record. Thirdly, the applicant argues that the testimony of a private investigator should have been allowed and that the ruling made by the court that it was irrelevant was wrong. He again makes reference to evidence that is not on record. Mr. de Wit did not testify that he was hungry as argued by counsel for the applicant. His testimony was that he lied to the applicant and informed him that he was hungry so as to get an opportunity to get away and go to the police station. Besides, nothing turns on his testimony on this aspect. On the private investigator, there is just no basis in law for the proposition that a private investigator should just be permitted by a court to investigate a murder case and thereafter present his findings as evidence in court. Even present exculpatory evidence. It would simply amount to mockery of the criminal and justice system and generally criminal investigations to allow that to happen. Evidence uncovered by any person should be presented to the police for them to investigate. I do not believe any court would find otherwise. There is just no merit in this ground of appeal.

[23] On at least two occasions the court ruled that character evidence as well as similar fact evidence, which was sought to be introduced by counsel for the applicant

was inadmissible. Counsel was however persistent and kept on seeking to introduce inadmissible evidence. That prompted an adjournment and a discussion in chambers. Counsel was then warned that he could not seek, repeatedly, to introduce evidence which the court had ruled inadmissible. The applicant advances no reason or case law in support of his argument that the court was wrong in its ruling that testimony of a private investigator about the character of a witness was in fact admissible.

[24] During the trial, counsel for the applicant wrongly relied on the provisions of section 227 of the Criminal Procedure Act 51 of 1977, in arguing that evidence as to the character and history of Mr. de Wit was admissible. He further wrongly relied on the case of *S v. Zuma*⁷ a rape matter where the court permitted limited cross examination on the sexual history of the complainant. There is simply no authority for the proposition that evidence of the character of a witness and similar fact evidence, of a witness on a matter unrelated to the one *in casu*, can be admissible in terms of section 227 of the Criminal Procedure Act, in a murder trial. I am not persuaded that this ground of appeal has reasonable prospects of success.

Dr. Soul

[25] It is incorrect to submit that after the footage of the applicant strangling the deceased was viewed in court, it was found that the deceased was not gagged. What is clear is that counsel for the applicant insisted that there was no gagging, visible as it was in the footage. His views were, however, noted on the record, despite what Dr. Soul, the court and the state counsel observed. It is clearly a mischaracterization of evidence and I dare say misleading, to submit that a finding was made that the deceased was not gagged. It remains the position and the view of this court that the testimony of a neurologist about the ability or otherwise of the applicant to tie knots is irrelevant as that information is within the knowledge of the applicant only and nobody else. The testimony of Dr. Soul does not detract from that. It is my view that this ground of appeal lacks merit and no other court will find otherwise.

⁷ *S v Zuma* (JPV325/05 , JPV325/05) [2006] ZAGPHC 45; [2006] 3 All SA 8 (W); 2006 (7) BCLR 790 (W); 2006 (2) SACR 191 (W) (8 May 2006)

Professor Sokudela

[26] It was never the defence of the accused that he was under the influence of a benzodiazepine drug and that as a result his ability to resist was impaired. The questions that counsel for the applicant was denied from exploring, about the effects of a date rape drug were equally irrelevant. In fact, the applicant's own testimony during cross examination was that he was mildly under the influence of alcohol and crystal meth. He went on to confirm that he was aware of what he was doing and could distinguish right from wrong. He stated that he could fully appreciate what he was doing. It is baffling to understand why in such circumstances evidence of the effects of a date rape drug would be relevant. This ground is equally unmeritorious.

Professor Bronkhorst

[27] The applicant submits that it was common cause at the trial that the applicant consumed two tablets. That again is mischaracterization of evidence. The testimony of Mr. de Wit was to the effect that the applicant took a handful of pills. Common cause is made when all concerned agree about a set of facts. It therefore can never be common cause that he took only two or a couple of pills. That was simply the applicant's own version.

[28] The applicant criticizes the trial court in its finding that the testimony of Professor Bronkhorst amounted to conjecture and speculation. It is not mentioned in the notice of application for leave to appeal why such a proposition is made. Professor Bronkhorst did not know the accused from a bar of soap. She met him for the first time on the day of her testimony. Even at that consultation or meeting, she met him for about 5 minutes, she confirmed. She never evaluated the applicant or analysed what he had to say. She did not obtain insight about the amount of alcohol that the applicant consumed or the amount of drugs and even the quantity of the medication he took, his appearance and how that would have been impacted by the consumption of drugs. Yet, the applicant is of the view that her evidence to the effect that he, the applicant, could not have appreciated what he was doing at the time of commission of the crimes, should be accepted over that of the experts at Weskoppies who observed the applicant over a period of time and whom the law, confers the

responsibility and empower to make a determination about whether or not the applicant at the time of the commission of the crimes was in a position to appreciate and tell the difference between right and wrong, and act in accordance with that appreciation, should be accepted. It is an absurdity to expect the court to accept the evidence of Professor Bronkhorst who observed the applicant for 5 minutes, over that of the experts at Weskoppies, such evidence as credible.

Fair trial

[29] The applicant contends that the court erred when it turned down an application for a trial within a trial. There was never such an application made in court during the trial. Counsel for the applicant applied to recall a witness and indicated that he was personally remiss in that he omitted to deal with a statement made by the witness, Mr. de Wit. Despite objections by the state counsel, the court allowed the recalling of that witness on clear and circumscribed parameters. Once the witness was in the witness box, counsel then sought to explore other issues which were outside the parameters that were determined by the court for the recall of that witness. The court ruled that counsel could not explore such issues as the court had already on at least two or three occasions made a ruling, on the admissibility of the evidence counsel wished to explore. Counsel asked the court to listen to the evidence and thereafter make a determination whether to admit such evidence or not. It was at that point that the court mentioned that such a proposition was untenable in that “... *the court will have difficulty in disabusing itself of what it has heard*”. It is an absurdity to submit, as the applicant does, that this in itself can render the trial a nullity.

[30] I do not believe there is merit in the submission that the applicant was not allowed to cross-examine witnesses on crucial aspects. Apart from the fact that the applicant does not indicate in the notice of application for leave to appeal, what those specific crucial aspects are, the trial court in my view was correct in not allowing irrelevant and inadmissible evidence to be tendered. Character evidence as well as similar fact evidence of a witness remains inadmissible. I am further of the view that the applicant was never impeded by the trial court to seek and gather evidence. Equally, the prosecutor did not contravene the Code of Prosecutors, as alleged, in

the presentation of the state case. These grounds do not have reasonable prospects on appeal.

Order

[31] Having heard both counsel and having considered the matter, the following order is made;

1. the application for condonation succeeds;
2. the application for leave to appeal is refused.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

ON BEHALF OF THE STATE	:	ADV. CRONJE
ON BEHALF OF THE ACCUSED	:	ADV. SWANEPOEL
DATE HEARD	:	26 JUNE 2025
DATE OF JUDGMENT	:	26 JUNE 2025