

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Appeal Case Number: A304/2017
Trial Case Number: SS50/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
21/08/2025	
DATE	SIGNATURE

In the matter between:

RALPH MAZIBUKO

Applicant

and

THE STATE

Respondent

JUDGMENT

STRYDOM, J

- [1] This is an application to correct an appeal judgment of the Full Court of this division, pursuant to the terms of Rule 42(1)(b) of the Rules of this Court. Further or alternative relief was also sought.

- [2] Mr Guarneri from Legal Aid South Africa appeared for the applicant and Ms Moseki on behalf of the National Prosecuting Authority (the state). Further, Prof PG Du Toit appeared as an *amicus curiae*. He was in terms of a previous court order duly appointed in such capacity and is also an admitted advocate. I thank counsel and Prof Du Toit for their heads of argument and legal arguments advanced to assist this court.

Background

- [3] At the outset it should be stated that the relief which was sought by the applicant was not opposed. Having said that, the question remains whether this court, sitting as a single judge, is competent to grant the relief to correct the judgment of the Full Court of this Division. I was not part of that Full Court.
- [4] In these proceedings there are opposing views on whether Rule 42(1)(b) is applicable in orders made in criminal matters. The parties argued that should this court find that Rule 42(1)(b) was not applicable to correct a judgment in criminal matters the common law and/or legal precedent could provide a remedy, rendering it unnecessary to refer the matter to the Supreme Court of Appeal to consider the correction of the judgment and order of the Full Court.
- [5] From the facts set out below it would become clear that there was a patent error in the judgment and order of the Full Court when comparing it with the reasoning in the body of the judgment. There are some ambiguities and other errors which do not affect the substance of the judgment.
- [6] The parties agreed to the factual matrix of this matter on a prepared joint practice note. I will refer to the contents of this document to set out the facts of this matter.
- [7] On 28 September 2015 the applicant was convicted of one count of racketeering (count 1), 3 counts of robbery with aggravating circumstances (counts 3, 11 and 13), and on one count each of the unlawful possession of a firearm (count 8) and ammunition (count 9). The applicant was accused 7 in the trial.
- [8] On 25 May 2016, the applicant was sentenced as follows:
- a. count 1 (Racketeering in terms of the POCA):15 years imprisonment;

- b. count 3 (Robbery with aggravating circumstances): 20 years imprisonment;
- c. count 11 (Robbery with aggravating circumstances): 20 years imprisonment;
- d. count 13 (Robbery with aggravating circumstances): 20 years imprisonment; and
- e. counts 8 and 9 (Unlawful possession of firearm and ammunition were taken together for the purposes of sentence): 5 years imprisonment.

- [9] The sentences on counts 11 and 13 were ordered to run concurrently with the sentence on count 3. The sentences on counts 1, 3, 8 and 9 were to run consecutively. Accordingly, the effective sentence of the applicant was therefore 40 years imprisonment.
- [10] The applicant was granted leave to appeal and subsequently his appeal was heard by the Full Court, under appeal number A340/2017 which was presided over by the Judge Monama and Acting Judges Thobane and Ratshimvumo (as he then was). The applicant was appellant 6 in the appeal. Judgment on appeal was handed down on 22 November 2019.
- [11] In the appeal judgment, it was correctly stated in paragraph 5.6 that the applicant has been convicted on one count of racketeering, 3 counts of armed robberies and one count each of the unlawful possession of a firearm and ammunition. However, below this paragraph the appeal judgment incorrectly, between brackets, refers to counts 1, 5, 8, 9, 14, 15, 20, 23 and 26. This would mean that counts were added and others on which the appellant was convicted were not mentioned.
- [12] The appeal judgment also incorrectly stated that the applicant had been sentenced by the trial court as follows:
- a. Count 1: 15 years imprisonment
 - b. count 5: 15 years imprisonment
 - c. count 6: 20 years imprisonment

- d. count 7: 15 years imprisonment
- e. counts 8 and 9: were taken together for purposes of sentence- 5 years imprisonment
- f. count 21: life imprisonment
- g. count 22: 20 years imprisonment.

[13] The references to the counts to which the applicant was convicted were wrong as it differed from the order of the trial court which convicted and sentenced the applicant on counts 1,3,8,9,11 and 13. It further differs from the already incorrect charges mentioned between brackets in paragraph 5.6 of the appeal judgment.

[14] It appears as if the Full Court at some stage in the judgment confused the sixth appellant (the applicant) with the seventh appellant.

[15] The Full Court upheld the applicant's appeal against his convictions on the unlawful possession of a firearm (count 8) and ammunition (count 9) and reduced the sentences on counts 3,11 and 13 from 20 to 15 years imprisonment.

[16] In paragraph [77] of the appeal judgment, the court found that the trial court's order for some of the sentences to run concurrently to avoid the excessive effect of consecutive sentences is reasonable and appropriate. This was no doubt a reference to the trial court's order that the sentences on counts 11 and 13 were ordered to run concurrently with the sentence on count 3, with which order the Full Court agreed.

[17] In the appeal judgment an order was made that the sentences would be as follows:

- a. count 1: 15 years imprisonment
- b. count 3: 15 years imprisonment
- c. count 6: 15 years imprisonment
- d. count 11: 15 years imprisonment

e. count 13: 15 years imprisonment

- [18] The order stated that the effective sentence is 30 years. This is in contrast with the sentences on the counts, as per the order by the Full Court. Apart from the fact that the order contained counts on which the applicant was not charged for or convicted of, the Full Court neglected to order some of the sentences to run concurrently. In relation to the other appellant, orders were made that sentences were to be served concurrently. The only way in which the effective sentence of the applicant could have been 30 years imprisonment is if an order was made for some of sentences to be served concurrently.
- [19] To get to the effective sentence of 30 years imprisonment, the reduced sentences on counts 11 and 13 should have been ordered to run concurrently with the reduced sentence imposed on count 3.
- [20] The applicant was never charged and therefore never convicted and sentenced on count 6. The reference to count 6 in the order was a patent error in the appeal judgment and order. It should not have been referred to at all.
- [21] The sentence of the applicant, according to the judgment but not the order, was reduced from 40 years to 30 years imprisonment. If the individual sentences contained in the order of the court on sentence is considered the total sentence amounts to 75 years imprisonment.
- [22] The Department of Correctional Services was bound by the order and therefore obliged to implement the sentence of the applicant, premised on the incorrect order. The Department of Correctional Services realised the incorrectness of the sentence and referred the matter to the High Court to correct the mistake.
- [23] The parties are *ad idem* that the intention of the Full Court was to reduce the effective sentence from 40 years imprisonment to 30 years imprisonment, and not to increase the sentence from 40 years to 75 years imprisonment. Further, the parties are *ad idem* that it is clear from a reading of the appeal judgment that the court intended to have the sentences to run concurrently in the same way as

it has been ordered by the trial court, with the result that the effective sentence should have been 30 years imprisonment.

- [24] The parties are further *ad idem* that the appeal judgment is ambiguous as it stated that the effective sentence would be 30 years imprisonment, but the individual sentences (without an order of concurrency and the inclusion of count 6, which the applicant was never convicted of) amounts to 75 years imprisonment.
- [25] The parties were *ad idem* that the Full Court erroneously referred to wrong counts in the judgment and order.
- [26] Thus, what is clear is that the sentences should be corrected as was envisaged in the appeal judgment itself.

The current application.

- [27] The current application is for a correction to be made pursuant to the terms of Rule 42(1)(b). This rule provides as follows:

“(1) The court may, in addition to any other powers it may have, *mero motu*, or upon the application of any party affected, rescind or vary:

(a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;

(b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

(c) An order or judgment granted as the result of a mistake common to the parties.”

- [28] Rule 42 provides a remedy when there is an ambiguity, or patent error or omission in a judgment. The question, however, remains whether this rule finds application in criminal matters.

- [29] In *S v Andrew Mohifefe*¹ Mosopa J found that Rule 42 does not find application in criminal matters. I agree with this view for the following reasons:

¹ [2024] ZAGPPHC 509 (17 May 2024).

- a. When a rule contained in the Rules of Court is made applicable to criminal proceedings, such a rule specifically refers to criminal proceedings. For instance, Rules 51, 52, 54 and 55 provide that these Rules apply to criminal matters. Rule 49A deals with criminal appeals. The exception where a rule maybe applicable to both criminal and civil matters, without stating so much is Rule 53, which deals with reviews from "*any inferior court*". I am, however, not required to pronounce on the issue of whether this rule is applicable in criminal matters originating from an inferior court.
- b. Rule 56 (2) provides that certain sub-rules of Rule 39 shall *mutatis mutandis* apply to all proceedings in criminal cases. This is an indication that all the rules contained in the Rules of court do not, *mutatis mutandis*, apply to criminal matters.
- c. Sections 176 and 298 of the Criminal Procedure Act 51 of 1977 (Criminal Procedure Act) specifically deal with situation where a judgment on the merits and on sentence may be corrected. In this regard, section 298, similarly worded as section 176, provides as follows:

"When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence."

- [30] It is worth noting that section 298 Criminal Procedure Act is limited in its application as the correction should be made immediately, which implies that it should be made soon after the judgment was delivered. Thus, in a case where the mistake is only established sometime after the judgment was delivered, this section would not assist a court to correct its judgment.
- [31] Does this now mean that the judgment could not be corrected and should be sent on appeal to a higher court to do the correction? In my view, this would lead to unnecessary costs and delay. Where the mistake is glaring and does not affect the substance of the judgment it should be correctable by the court who made the mistake, even in cases where the mistake is only discovered some time after the judgment and order was delivered. Circumstances may be as such to explain the delay.

- [32] In this matter, the Full Court was not aware of the errors. The senior judge of the Full Court, Judge Monama, has passed away. It is not even known if at this stage the other members of the Full Bench are aware of the errors. I would think that they are not aware.
- [33] Our courts have recognized that it is in limited circumstances permissible for a court to change, amend or supplement his or her or their pronounced judgment to correct errors, omissions and ambiguities provided that the sense or substance of the judgment is not affected.²
- [34] In the matter of *Firestone South Africa (Pty) Ltd v Gentiruco AG*³ Trollip JA pointed out that the general principle, now well established in our law, is that, once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased.
- [35] Trollip JA went on to find that even in the absence of an application brought in terms of Rule 42 or the common law, there are, however, a few exceptions to the above-mentioned rule.⁴ One of the exceptions was that the court may correct a clerical, an arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. A further exception recognized in *Firestone* was that the court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "*the sense or substance*" of the judgment or order.
- [36] In this matter of the applicant there are ambiguities and errors pertaining to the calculation of the sentences in the judgment and order of the Full Court.

² See *S v Wells* 1990 (1) SA 816 (A) 819J-820H.

³ 1977 SA (4) 298 (A) at 306F-G.

⁴ *Id* at 306C-308A.

Consequently, the court which made these mistakes would be entitled to correct its judgment and order.

- [37] In *Hendricks v S*⁵ a criminal appeal was upheld in part on 18 February 2015 by the Full Court in which the computation of sentences imposed were wrongly ordered. Similar to this matter, the Department of Correctional Services drew the attention of the Registrar of Court to the inconsistency in the sentence. The Full Court, recognizing that the terms of section 298 of the Criminal Procedure Act could not be applied, because of a long delay, nevertheless made corrections.
- [38] Gamble J, in a written judgment referred to as a "Correction Of Sentence" relied on the common law and referred to the matter of *Wells* at 820C-D for the Full Court's entitlement to correct the sentence. The Full Court found that the tenor of their order on sentence was not altered by the correction.
- [39] In my view, the tenor of the findings of the Full Court in this matter would not be altered if the corrections to the judgment and orders are affected.
- [40] At the outset of the hearing of this application I questioned my authority as a single judge to correct the judgment of the Full Court. In this view, I was supported by the submissions of the *amicus curiae*.
- [41] In the matter of *S v Guca*⁶ the appellants had been sentenced in the Regional Court held at Benoni. They subsequently had an appeal heard in the North Gauteng High Court, Pretoria where Patel J and Kruger AJ had presided. The appeal against sentence was successful resulting in the appellant's sentences from the Regional Court being set aside and replaced with another sentence on appeal. However, the High Court in substituting the sentences imposed by the trial court committed an error in the computation of the sentences. The effect of the error is that the sentences imposed by that court became unclear. In her judgment Tshiqi JA stated the following:

"Counsel for the state initially sought to argue that the error in the computation of the sentences was no longer relevant as it had already been rectified through a

⁵ [2015] ZAWCHC (18 February 2015).

⁶ 2012 JDR 2318 (SCA).

document termed 'Variation of order in terms of rule 42(1)(b)', dated 31 August 2008, by Kruger AJ, one of the judges who had heard the appeal. He was, however, constrained to concede that it was not so because the judge concerned was, on that date already *functus officio*, Patel J had since passed away and the reliance on uniform rule 42(1)(b) was misplaced. What Kruger AJ did is a nullity and has no effect on the sentence. It is in the circumstances open to this court to determine the sentences afresh."

[42] Thus, the court in *Guca* found that a judgment could not be corrected by a single judge who presided with another judge in an appeal matter as he would be *functus officio*. One of the judges had passed away. The court found that reliance on rule 42(1)(b) was misplaced. It is somewhat unclear whether Tshiqi JA found that no correction would be permissible by the judges at all. No reference was made to possible exceptions, introduced into our law, as was referred to in the *Firestone* matter.

[43] From a reading of the judgment of Tshiqi JA, it is clear, however, that it would not be competent for a single judge to correct the judgment of a Full Court or of a Full Bench. In the case of a Full Court judgment the correction should be made by that court.

[44] It is indeed so that this matter cannot be referred back to the three judges who constituted the Full Court. Judge Monama, who was presiding over the Full Court, has passed away. I am aware that the other two acting judges are still available. Acting Judge Thobane still takes up acting positions and Judge Ratshimvumo is now the Deputy Judge President in Mpumalanga.

[45] The *amicus curiae* referred me to the terms of section 14(5) of the Superior Courts Act 10 of 2013 (Superior Courts Act) which provides a solution where a Full Court can no longer sit as a three judge's court. This section provides as follows:

"If, at any stage during the hearing of any matter by a full court, any judge of such court is absent or unable to perform his or her functions, or if a vacancy among the members of the court arises, that hearing must—(a) if the remaining judges constitute a majority of the judges before whom it was commenced, proceed before such remaining judges; or (b) if the remaining judges do not constitute such

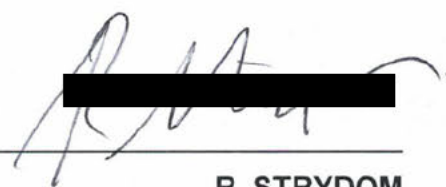
a majority, or if only one judge remains, be commenced *de novo*, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of the remaining judges or of the one remaining judge as the decision of the court.”

- [46] In my view, the power bestowed upon a court, in this instance the Full Court on appeal, to correct its earlier order is the result of a continuation of the appellant exercising the right to appeal. As such it constitutes a mere continuation of the appeal hearing. There can therefore be no reason not to employ the provisions of section 14(5) of the Superior Courts Act in the present matter. Such an interpretation would promote the spirit, purport and object of the Bill of Rights as contemplated in section 39(2) of the Constitution of South Africa, 1996 (Constitution).
- [47] It was, for instance, held that section 39(2) of the Constitution may in appropriate circumstances be used to extend the right to appeal to unfinalized criminal proceedings that are not ordinarily appealable but which the interest of justice require should nevertheless be subject to an appeal before termination of such proceedings.⁷
- [48] The interest of justice is promoted by interpreting section 14(5) of the Superior Courts Act to include orders correcting patent errors of a Full Court where all the judges are no longer available. It is counterproductive to expect an appellant to lodge a further appeal when he or she cannot be blamed for the order mistakenly given; when the parties agree that such an error has occurred; when the patent error is evident from the record; and when the conclusion to the proceedings is required.
- [49] Commensurate with my view that I do not have the authority to correct the judgment and order, the matter should be referred to the two available members of the Full Court to correct the judgment. I have requested the Acting Deputy Judge President of this division to allocate this matter to them to consider the corrections required.

⁷ See *S v Western Areas Ltd and Others* 2005 (1) SACR 441 (SCA).

[50] For this reason, I make no order in this matter.

[51] I want to express my thanks to counsel and the *amicus curiae*, for well researched heads of argument which I found to be of great assistance.



R. STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 7 August 2025

Delivered on: 21 August 2025

Appearances:

For the Appellant: Adv. E. Guarneri

Instructed by: Legal-Aid South Africa (Johannesburg)

For the Respondent: Adv. E. Moseki

Instructed by: National Prosecuting Authority

As Amicus: Professor P. Du Toit

From: North West University