



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable/Not Reportable

Case No: CC44/2020

In the matter between:

DERICK KALMEYER

Applicant

and

THE STATE

Respondent

Coram: ANDREWS AJ

Heard on: 09 December 2025

Delivered on: 17 December 2025

Summary: Condonation - Section 316(1)(b) of the Criminal Procedure Act, 51 of 1977 - application must be made within 14 days after passing of sentence. Section 316(1)(b)(ii) - the application may be made within such extended period as the court may on application and for good cause allow - a full explanation for the delay, which must cover the entire period of delay and be reasonable. The granting or refusal of condonation is a matter of judicial discretion - a court to make a value judgment

based on the facts. Delay occasioned by Applicant's Counsel – public scrutiny and public interest - the standard for considering an application for condonation is the interest of justice.

Leave to appeal - The test to be applied - Section 17(1)(a) of the Superior Courts Act - reasonable prospect of success or there are some other compelling reasons why the appeal should be heard - mere possibility of success is insufficient and falls short of the criteria envisaged. No substantial and compelling circumstances individually or cumulatively existed to depart from the prescribed minimum sentence ordained - it could not depart from for flimsy reasons.

ORDER

1. Application for condonation is granted; and
 2. The appeal against conviction and sentence is dismissed.
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JUDGMENT

ANDREWS, AJ:

Introduction

[1] The Applicant seeks leave to appeal against both conviction and sentence. The Applicant was arraigned on two counts of attempted murder read with Section 94 and 266 of the Criminal Procedure Act 51 of 1977 ("the CPA"); two counts of murder read with the provisions of Section 51(1) and 51(2) read with Schedule 2. Part I and Part II of the Criminal Law Amendment Act 105 of 1997, as amended and one count of contravening Section 67(1)(a) read with Section 1 of the South African Police Service Act 68 of 1995, to wit, resisting arrest. On 17 March 2024, he was found guilty on count 1, on the competent verdict of assault with intent to do grievous bodily harm; counts 3 and 4, murder, read with the provisions of Section 51(1) of the

Criminal Law Amendment Act, as well as count 5, resisting arrest. He was found not guilty on count 2.

[2] On 24 June 2024, the Applicant was sentenced to 5 years' imprisonment on count 1, life imprisonment on counts 2 and 3 respectively and 2 years' imprisonment on count 5. By operation of law, the sentences imposed on counts 1 and 5 automatically run concurrently with the sentences of life imprisonment, in terms of Section 39(2) of the Correctional Services Act 111 of 1998.

Condonation

[3] The Applicant seeks condonation for the late filing of the application for leave to appeal. In terms of section 316(1)(b) of the Criminal Procedure Act 51 of 1977, an application referred to in s 316(1)(a) must be made within 14 days after passing of sentence. In terms of s 316(1)(b)(ii), the application may be made within such extended period as the court may on application and for good cause allow.

[4] The reasons postulated by the Applicant for the late filing of the application for leave to appeal are as follows:

- (a) Due to the complexity of the matter, counsel sought it fit to apply his mind and ensure the grounds for this application are set out thoroughly due to the serious nature of the charges;
- (b) Numerous attempts and interventions to secure the judgment of the proceedings were unsuccessful until the Registrar supplied the Applicant with a copy of the trial judgment and the sentencing judgment; and
- (c) Upon receipt of the record, further steps were then taken to bring this application.

[5] Counsel for the Applicant contended that he had to think long and hard about the matter as there were numerous points that he had to reflect upon and as such preparing for the leave to appeal was not an easy task. In addition, because this matter was widely reported in the press and received public scrutiny, public interest

was a factor more particularly, as the matter fell within the more serious scale of matters because the victims were children.

[6] The Respondent, in opposition, submitted that the degree of lateness is not sufficiently explained by the Applicant as required by law. Additionally, the reasons put forward by Applicant's Counsel are not satisfactory as he had to have taken notes to enable him to prepare and as such, the reasons for the delay as articulated is not satisfactory, warranting a dismissal of the application for condonation.

[7] It is trite that an applicant to a condonation application must give a full explanation for the delay, which must cover the entire period of delay and be reasonable. In this regard, the Supreme Court of Appeal ("SCA") in *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi*¹ ("*Mulaudzi*") stated:

'What calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. An appellant should, whenever he realises that he has not complied with a rule of this court, apply for condonation without delay.² A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility.³ Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a 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.^{4,5}

¹ (98/2016, 210/2015) [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA) (6 June 2017).

² *Commissioner for Inland Revenue v Burger* 1956 (4) SA 446 (A) at 449G-H.

³ *Uitenhage Transitional Local Council v South African Revenue Service* [2003] ZASCA 76; 2004 (1) SA 292 (SCA) para 6.

⁴ *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11.

⁵ At para 26; See also *Uitenhage Transitional Local Council v South African Revenue Service* [2003] 4 All SA 37 (SCA) para 6, the Supreme Court of Appeal ("the SCA") held that 'an application for condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished to enable the court to understand clearly the reasons and to assess the responsibility.' The court further remarked that 'if the non-compliance is time-related, then the date, duration, and extent of any obstacle on which reliance is placed must be spelled out.'

[8] The court in *Mulaudzi* elucidated further consideration, namely the prospects of success:

‘In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*,⁶ it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success. This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success.⁷ It has been pointed out⁸ that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.’⁹

[9] If regard is had to the reasons proffered by the Applicant for the lateness of this appeal, it is my view that there are manifest shortcomings. It has however, been held that where there has been flagrant disregard of the rules in circumstances where there is no acceptable explanation, the indulgence for condonation may be refused, irrespective of the merits of the appeal.

[10] Having regard to the outlined grounds for condonations aforementioned, it is my view that the delay is indeed unreasonable and the explanation for the lateness is left wanting, justifying a refusal of the indulgence sort. However, the Applicant cannot be prejudiced as it is evident that the late filing of this application was not due to any fault on the part of the Applicant himself, but that of his Counsel. This court is mindful that it is an established legal principle that the granting or refusal of condonation is a matter of judicial discretion.

⁶ *Rennie v Kamby Farms (Pty) Ltd* [1988] ZASCA 171; 1989 (2) SA 124 (A) at 131E.

⁷ *Moraliswani v Mamili* [1989] ZASCA 54; 1989 (4) SA 1 (A) at 10E.

⁸ *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein & others* [1985] ZASCA 71; 1985 (4) SA 773 (A) at 789C.

⁹ At para 34.

[11] It is trite law that the standard for considering an application for condonation is the interest of justice.¹⁰ Thus, an application for condonation should be granted if it is in the interests of justice and refused if it is not.¹¹ This matter attracted significant public interest which in my view, enjoins this court to make a value judgment based on the facts of the case before it.¹² I, therefore, deem it to be in the interest of justice to nonetheless deal with the grounds of appeal and prospects of success. There is a plethora of case law dealing with the requirements that an applicant for leave to appeal must satisfy, essentially with a view to curtailing unmeritorious and frivolous appeals.¹³

Legal Framework

[12] The test to be applied in an application for leave to appeal is set out in Section 17(1)(a) of the Superior Courts Act¹⁴ which 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;
- (b) the decision sought on appeal does not fall within the ambit of Section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’

[13] This provision envisages that a Judge, in deciding whether to grant an applicant, leave to appeal, ought to formulate the view that an appeal would have a

¹⁰ *S v Mecer* 2004 (2) SA 598 (CC) at para 4.

¹¹ *Brunner v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC) at para 3.

¹² *Grootboom v National Prosecuting Authority and another* 2014 (2) SA 68 (CC) at para 35.

¹³ *Valley of the Kings Thabe Motswere (Pty) Ltd and Another v A L Mayya International* [2016] ZAECHC 137 at para 4 ‘There can be little doubt that the use of the word “would” in section 17 (1) (a) (i) of the Superior Courts Act implies that the test for leave to appeal is now more enormous. The intention clearly being to avoid our Courts of Appeal being flooded with frivolous appeals that are doomed to fail. . . It seems to me that a contextual construction of the phrase “reasonable prospect of success” still requires of the judge, whose judgment is sought to be appealed against, to consider, objectively and dispassionately, whether there are reasonable prospects that another court may well find merit in arguments advanced by the losing party.’

¹⁴ Act 10 of 2013.

reasonable prospect of success or there are some other compelling reasons why the appeal should be heard.¹⁵ More particularly, the mere possibility of success is insufficient and falls short of the criteria envisaged. What is required is that there must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.¹⁶

Ad Conviction in respect of Counts 3 and 4

[14] The grounds of appeal are predicated on *inter alia*, the failure by the prosecutor to put the state's version to the accused; that no blood was on the Applicant; that there was no evidence that Applicant changed his clothing; whether the Applicant remained at the premises after speaking to Mr. Riaan Fiennies; that no timeline was established as to when the Applicant left the Wendy House; that one of the other two men perpetrated the crimes could not be excluded; the issue of leaving the children unattended; hearsay evidence; the credibility of Ms. F[...] A[...] and Ms. Christolene Orion; issues pertaining to the beer bottle and the iron object; the failure to call Mr. Riaan Fiennies to testify.

[15] Counsel for the Respondent argued that the Applicant failed to overcome the burden of showing that the appeal would have a reasonable prospect of success. More particularly as all the aspects raised in appeal were thoroughly canvassed during the trial which the court had already addressed. In addition, it was submitted that the court is to have regard to the interests of the victims and the families.

¹⁵ *MEC For Health, Eastern Cape v Mkhitha and Another* (1221/2015) [2016] ZASCA 176 (25 November 2016) at paras 16 - 17; See also *R v Baloyi* 1949 (1) SA 523 (A) at 524; *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 (29 January 2021) at para 18 'Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17 (1) (a) (i) and 17 (1) (a) (ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. . . It is manifest from the text of s 17 (1) (a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success or, alternatively, that 'there is some compelling reason why an appeal should be heard.' Accordingly, if neither of these discreet requirements is met, there would be no basis to grant leave'. See also *S v Ackerman and Another* 1973 (1) SA 765 (A) at 765 G-H.

¹⁶ *Ramakatsa & Others v African National Congress & Another* [2021] ZASCA 31 (31 March 2021) at para 10.

[16] The provisions of 17(1)(a) of the Superior Courts Act envisage that a Judge, in deciding whether to grant an applicant leave to appeal, ought to formulate the view that an appeal would have a reasonable prospect of success or there are some other compelling reasons why the appeal should be heard.

[17] I have carefully considered the grounds of appeal as comprehensively set out in the Applicant's Notice of Application. It is a fundamental legal principle that the court is required to postulate an impartial position by reflecting on whether it may have erred on the facts or the applicable law in its judgment as stated in *S v Smith*¹⁷ that '*[t]he test for reasonable prospects of success is a dispassionate decision based upon the facts and the law that a Court of Appeal can reasonably arrive at a conclusion different to that of the trial Court.*'¹⁸

[18] Notwithstanding the efforts by Counsel for the Applicant in an endeavour to persuade this court that another court may reasonably arrive at a different conclusion, I respectfully stand by my judgment in respect of the above-mentioned matters raised. These issues were dealt with fully in my judgment and comprehensive reasons were articulated for the findings made. Therefore, for reasons already given in my judgment, it is my view, that another Court will not reach a different decision regarding the conviction.

[19] Consequently, I am not persuaded that the Applicant has satisfied the requirement that he has a reasonable prospect of his appeal succeeding in respect of the conviction. In the result leave to appeal in respect of the convictions is dismissed.

Ad sentence

¹⁷ 2012 (1) SACR 567 at para 7: See also *S v Mabena* 2007 (1) SACR 492 at para 22.

¹⁸ *S v Smith* at para 7, 'In order to succeed therefore, the defendant 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... There must in other words be a sound, rationale basis for the conclusion that there are prospects of success on appeal.'

[20] It was contended *inter alia*, that the court erred in finding that there were no substantial and compelling circumstances and that the imposition of two consecutive life sentences was disproportionate to the offences and that a lesser sentence should have been imposed. Counsel for the Respondent argued that the sentence was not inappropriately shocking if regard is had to the respective ages of the victims as well as the nature and seriousness of the offences.

[21] This Court delivered a comprehensive judgment on sentence, where it considered *inter alia*, the applicable legal principles, the Applicant's personal circumstances, the DNA Report, the Applicant's previous convictions, the Probation Officer's Report and three Victim impact statements. It is trite that the imposition of a sentence is a discretion of the trial Court and a Court of appeal will be slow to interfere with this discretion for frivolous reasons unless the Court has exercised its discretion to do so unreasonably.

[22] I found that the Applicant's violent, repugnant and heinous behaviour was demonstrative of someone who is highly dangerous; more especially because he had not displayed any guilt or remorse. I was not persuaded that the Applicant could be rehabilitated, given the opportunities that he had been afforded in the past.

[23] I respectfully stand by my finding that no substantial and compelling circumstances, individually or cumulatively existed to depart from the prescribed minimum sentence ordained by the legislation. This court was mindful that it could not depart from the same for flimsy reasons. Therefore, I remain of the view that the sentences imposed were neither shocking, startling nor disturbingly inappropriate. Consequently, I am not satisfied that the Applicant has persuaded this court that he has reasonable prospects of success on sentence. As a result, leave to appeal application in respect of the sentence imposed is dismissed.

Order

[24] After having heard Counsel for the Applicant and Counsel for the Respondent:

- (a) Application for condonation is granted; and

(b) The appeal against conviction and sentence is dismissed.

P ANDREWS

ACTING JUDGE OF THE HIGH COURT

Appearances

For Applicant:

Adv. M B Sibda

Instructed by:

High Court Chambers, Cape Town

For Respondent:

Adv. M Koti

Instructed by:

Office of the Director of Public Prosecutions:
Western Cape