

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

Case: Appeal Case

A23/2023

Reportable: No

Of interest to other Judges: No

Revised: No

SIGNATURE

Date: 02/12/2025

In the matter between:

S[...] L[...] C[...]

Appellant

and

THE STATE

Respondent

JUDGEMENT

MOOKI J

1 The appellant appeals both his conviction and sentence by the Regional Court, Pretoria. The Learned Magistrate S F Ntlati was the Presiding Officer (The Regional Court). The appellant was convicted on 11 June 2024 on two counts. Count 1 being attempted murder and count 2 being rape, in contravention of section 3 of Act 32 of 2007. The appellant pleaded not guilty.

2 The appellant was sentenced on 25 September 2024 to 10 years direct imprisonment on count 1, and to life imprisonment, on count 2. The Regional Court ordered the sentences to run concurrently. The appellant was also declared unfit to possess a firearm.

3 It is material to first address certain aspects in relation to trial proceedings. The appellant was a Staff Sergeant with the South African National Defence Force at the time of the incidents that form the subject-matter of the charges raised against him.

4 Count 1 was premised on the appellant having had unprotected sexual intercourse with the complainant, and having not only exposed the complainant to the risk of being infected with HIV, but in fact having caused the complainant to be infected with HIV, such infection having placed the complainant at the risk of developing AIDS or a similar immune deficiency illness which had the real potential to kill the complainant.

5 The State, in relation to count 2, alleged that the appellant, during the specified period, unlawfully and intentionally and under false pretences and/or by fraudulent means, committed acts of sexual penetration with the complainant without the complainant's consent. It was further alleged that the appellant misrepresented to the complainant that he was HIV negative and that this misrepresentation made the complainant believe that the appellant was HIV negative and which belief further moved the complainant to consent to having sexual intercourse with the appellant on more than one occasion; when the appellant well knew that he was in fact HIV positive.

6 The Regional Court examined the appellant in relation to the section 115 statement. The Regional Court enquired of the appellant whether the appellant confirmed the statement and that the appellant elected not to give an explanation.

7 The prosecutor, following the plea, raised the fact that the State issued a section 212B(1) notice. There was a debate whether the appellant had replied to the notice. The prosecution contended that, at worst, the appellant admitted paragraphs

1 and 5 of the section 212B notice, with the result that the content of those paragraphs became proven fact.

8 Paragraph 1 read as follows: "That the accused was at all times relevant to the charges, employed as a Staff Sergeant by the South African National Defence Force." Paragraph 5 read as follows: "The accused was immediately after the outcome of the subsequent testing done, since 8 October 2007 up until 14 March 2014 became available informed by the SANDF staff, of his positive status."

9 The appellant's attorney confirmed to the court that the notice was received and responded to. The attorney also confirmed to the Regional Court that paragraphs 1 and 5 were not in issue. The Regional Court then enquired from the attorney whether the appellant admitted that the appellant was at all times, relevant to the charges, employed as Staff Sergeant by the SANDF. The attorney confirmed to the Regional Court. The Regional Court then enquired from the attorney whether, in relation to paragraph 5, it was not in dispute that the appellant was (indistinct] after the outcome of subsequent testing done since 8 October 2007 up to and including 14 March 2014, became available and informed by the SANDF medical staff, of his positive HIV status. The attorney confirmed that this was not in dispute.

10 The Regional Court, following the confirmation by the appellant's attorney, ruled as follows:

I accept the notice, that was furnished by the defence to the state, in response to the section 212B notice, from the prosecution, and the following facts will be regarded as being proven, and that there will be no need for the state to prove them by leading evidence. They will stand as evidence against the accused.

Firstly, and this is in terms of paragraph (a) of the notice from the state, (1) the fact that the accused was at all times relevant to the charges, employed by the SANDF as a Staff Sergeant. And paragraph (5) in that the accused was immediately after the outcome of the subsequent testing done since the 8th of October 2007 up until the 14th March 2014 became available, was informed

by the SANDF medical staff of his positive HIV status. Those facts will be regarded as proven.

11 The Regional Court did not have any further exchanges with the appellant or his attorney about the section 212B notice after the ruling. The Regional Court proceeded to hear evidence.

12 The Regional Court found the appellant guilty on both counts. The appellant was sentenced as detailed in paragraph 2 above. The appellant appeals against both the conviction and sentence.

13 The appellant raises several grounds of appeal. Those include that the Regional Court failed to comply with section 212B(5), thus rendering the proceedings a miscarriage of justice. Section 212B(5) stipulates that:

If a notice was forwarded or handed over by a prosecutor as contemplated in subsection (1), the prosecutor shall notify the court at the commencement of the proceedings of such fact and of the reaction thereto, if any, and the court shall thereupon institute an investigation into such of the facts which are not disputed and enquire from the accused whether he or she understands his or her rights and the implications of the procedure and where the legal adviser of the accused replies to any question by the court under this section, the accused shall be required by the court to declare whether he or she confirms such reply or not.

14 It is submitted on behalf of the appellant that the Regional Court did not comply with section 212B(5), in failing to enquire from the appellant whether the appellant understood his rights and the implications of the procedure for when certain facts will be taken as proven. The Regional Court is also said to have failed to request the appellant to declare whether the appellant confirmed his attorney's replies to questions put by the Learned Magistrate. The appellant contends that the failure to carry-out an investigation was a material irregularity that amounted to a denial of a fair trial.

15 It was submitted on behalf of the State that the appellant confirmed to the Regional Court that paragraph 5 was not disputed and that the appellant placed the fact that he tested HIV positive and was informed of his status in 2007 not in dispute. The State also submitted that the Regional Court held an investigation as contemplated in section 212(B)(5). I cite the submissions in this regard in full:

The Court asked many questions which were all answered and confirmed by the Appellants (sic) attorney (at the time) whereafter the Court *a quo* asked the Appellant whether he confirmed. The record clearly indicates that the Appellant himself also confirmed that the allegation contained in par 5 of the s212B Notice was not in dispute. As the Appellant was legally represented, the Court *a quo* did not need to explain the process or implications of the process to the Accused (Appellant). The Court *a quo* merely had to confirm with the Appellant that he confirms the fact is not disputed, which that Court did. The Court *a quo* nevertheless, in her ruling, explained the implication of the failing to dispute to the Appellant.

16 I consider that it is unnecessary to recite the evidence during the proceedings for purposes of this appeal. I also consider that it is unnecessary to address other grounds of appeal raised by the appellant. The ground of appeal pertaining to how the Regional Court dealt with section 212B is determinative of the appeal.

17 The record does not support the submissions on behalf of the State regarding how the Regional Court dealt with the section 212B proceedings. There is no mention of the Appellant admitting paragraph 5 of the notice. There is no mention of the Regional Court requesting the appellant to confirm what the Appellant's attorney said to the Regional Court. It is not the case that the Regional Court did not need to explain the process or implications of the section 212B process to the appellant. This is precisely what the statute demands. The ruling by the Regional Court could not constitute compliance with what is required of a court where section 212B is engaged.

18 The proceedings in relation to the section 212B procedure were material to the decision-making by the Regional Court, leading to the conviction and sentence imposed by that court.

19 The Regional Court, in its judgement, stated that the evidential material placed before the court was made-up of the following: the complainant's oral evidence, exhibits C to E, the HIV test results, evidence by the complainant's mother, evidence by Professor Rossouw, section 212 affidavits on the health assessment of the appellant between 2007 and 2016, and evidence by the appellant. It bears pointing out that the Regional Court did not include paragraphs 1 and 5 of the section 212B notice as part of the evidence.

20 The Regional Court recited and analysed the evidence. The court then framed the issues as follows:

20.1 whether the appellant was HIV positive when he engaged in sexual activity with the complainant and, if so, whether the appellant was aware and knowingly concealed that information from the complainant.

20.2 whether the complainant was misled into believing that the appellant was HIV negative and consented to sexual activities with the appellant based on that belief.

21 The Regional Court stated that the court was presented with contradictory versions. The court then stated that the appellant did not make a good impression, unlike the complainant, and that:

"There are aspects of his evidence against which criticism needs to be expressed. The accused's version is rippled (sic) with discrepancies. For instance, ... [...]. The defence placed on the record that para 1 and 5 of the State's 212B notice are not disputed. The accused, during his testimony, he made au-turn, distancing himself from that admission."

22 The Regional Court stated that the appellant instructed his attorney that paragraphs 1 and 5 were not disputed; that attorneys do not create instructions, and that paragraphs 1 and 5 were facts that had been placed beyond dispute.

23 The Regional Court held that the evidence of the appellant equalled lies made-up to suit the appellant's version. This was contrasted with the evidence by the complainant. The Regional Court found that there was no basis to reject the version of the complainant.

24 It is manifest that the Regional Court considered the outcome of the section 212B procedure in its decision-making. The court held it against the appellant that the appellant admitted paragraphs 1 and 5, but then changed his evidence, denying what the Regional Court said were "facts placed beyond dispute."

25 The Regional Court erred in concluding that paragraphs 1 and 5 were "facts placed beyond dispute" absent the Regional Court having conducted an investigation within the terms of section 212B(5). There was no such investigation. The Regional Court did not, contrary to the submissions for the State, enquire from the appellant whether the appellant understood his rights and the implications of the section 212B procedure. The Regional Court did not inform the appellant of his rights that could be implicated by the procedure. The Regional Court did not inform the appellant of the implications of the procedure. The Regional Court, equally, did not request the appellant to declare whether the appellant confirmed answers that his attorney gave to the court.

26 The Regional Court could not, therefore, have taken the outcome of the section 212B procedure into account in determining the contradictory versions by the appellant and the complainant. The fact that the appellant elected not to re-open his case, following the further leading of evidence by the State in introducing the section 212 statements, does not undo the Regional Court's fundamental misdirection. This is because the Regional Court relied on paragraphs 1 and 5 of the section 212B as self-standing grounds in that court's overall consideration of the evidence.

27 The outcome may have been different had the Regional Court, in its evaluation of the evidence, not referenced the outcome of the section 212B(5) procedure. The relevant evidence would then have been limited to the status of the various section 212 affidavits which the State introduced as evidence after the State re-opened its case. The Regional Court's reliance on paragraphs 1 and 5 of the section 212B notice irremediably poisoned the evidence, leading to a miscarriage of justice.

28 The State, in criminal matters, takes up the cudgels for "the public", through the person of a complainant. This requires the State to do right by a complainant. This entails, at a minimum, officers of State involved in the criminal justice system following the law, including as to procedure in court proceedings.

29 The procedure for the admission of facts as proven in criminal proceedings has long been part of the statute. Section 212B(5) prescribes the procedure to be followed. The Parliament ensured that specific processes be followed where facts in criminal proceedings were to be admitted as proven. That is because the admission of such facts may have dire consequences for an accused. This is more so because an accused person is not obliged to give evidence in his trial.

30 The Regional Court, in not following the law regarding the procedure required in section 212B(5), did not do right by the complainant. It was a miscarriage of justice for the Regional Court to have relied on paragraphs 1 and 5 of the section 212B notice in condemning the appellant. The State equally failed the complainant.

31 The appellant sought condonation for the late filing of the appeal. I am satisfied that condonation be granted.

32 The appeal must succeed. I make the following order:

- (1) The appeal against conviction and sentence succeeds.
- (2) The conviction and sentence of the appellant are set aside.

O MOOKI
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:

S N I MOKOSE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Counsel for the appellant: H Moldenhauer (attorney)
Instructed by: Moldenhauer Attorneys

Counsel for the respondent: E van der Merwe
Instructed by: Director of Public Prosecutions, Pretoria

Date heard: 6 November 2025
Date of judgment: 2 December 2025