



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 086/2023

In the matter between:

JAMES MUSA MOTSITSI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Motsitsi v The State* (086/2023) [2026] ZASCA 44 (02 April 2026)

Coram: MEYER and COPPIN JJA and VALLY AJA

Heard: 10 March 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 02 April 2026.

Summary: Criminal Law and Procedure – conviction – common purpose – dissociation from common purpose – Criminal Law Amendment Act 105 of 1997 –

whether the high court erred in its application of the doctrine of common purpose – whether the high court erred in failing to find that the appellant’s conduct of sitting in the small compartment was a clear indication that he never associated in common purpose with other persons – whether the appellant ought to have performed any other act to frustrate or prevent the completion of the crime – whether the late filing of the appeal should be condoned and whether the appeal should be reinstated.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Sithole AJ, sitting as a court of first instance):

- 1 The appellant's application for condonation for the late filing of the heads of argument is granted.
 - 2 The appellant's application for condonation for non-compliance with the time periods set out in rule 7(1)(b) of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa is dismissed.
 - 3 The appellant's application to reinstate the appeal is dismissed.
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JUDGMENT

Vally AJA (Meyer and Coppin JJA concurring):

Introduction

[1] The appellant was accused 4 in a trial where he and his co-accused were indicted for three counts of murder, 28 counts of attempted murder, 31 counts of endangering lives as a result of an explosion which contravened s 1 of the Explosives Act 26 of 1956, one count of unlawful possession of unauthorised explosives, destruction and damaging of property as a result of unlawful use of unauthorised explosives, and one count of escape from lawful custody. The doctrine of common

purpose was invoked in the indictment. The appellant, together with his co-accused, was found guilty on all the charges and appropriately sentenced. While he was sentenced separately for each of the counts in the indictment, the effective sentence he is required to serve is life imprisonment. The appellant secured leave to appeal on a very narrow point, namely, whether it is reasonably possible that another court would find that he had actively dissociated from the common purpose before the crimes were committed. This was an error on the part of the trial court as leave can only be granted against an order and not against any of the grounds upon which the order is based.

[2] The appellant's leave to appeal has lapsed due to his failure to comply with rule 7(1)(b) of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa (the SCA Rules). He has failed, in particular, to lodge a notice of appeal with the registrar and the court a quo within one month of the date of the order granting leave to appeal. The appellant now requires this Court to grant condonation for such non-compliance and to reinstate his appeal.

Condonation

[3] The appellant was convicted by the Gauteng division of the High Court, Johannesburg (the high court), per Sithole AJ, on 9 October 2014 and sentenced on 20 November 2014. He secured leave to appeal to this Court on 3 December 2014. The notice of appeal, taking into account *dies non*, had to be lodged on or before 2 February 2015. The appellant failed to comply. Had he done so he would have had to file the full record of the proceedings in the high court with the registrar of this Court by at least by 2 May 2015. This too, the appellant did not do. As a result of the said non-compliance, the appeal lapsed. The appellant filed an application to reinstate his appeal on 12 September 2019. That application seems to have gone

amiss. It was, nevertheless, four years late. He then failed to file his record within three months. He only filed it on 9 December 2024, five years after his application to reinstate the appeal was made. On these facts, the appellant applies to reinstate his appeal.

[4] The appellant says that upon being granted leave to appeal on 3 December 2014, he instructed his attorney to prosecute the appeal. His attorney, he later learned, did not do anything to prosecute the appeal. During February 2015, he instructed a new attorney to prosecute the appeal. The new attorney's mandate was placed in jeopardy, as neither he nor his family were able to procure the necessary funds to pay for the transcription of the proceedings in the high court. When he was ready to proceed with the appeal, his 'attorney was informed that [his] application for leave to appeal had lapsed and that [he had to] institute proceedings to reinstate it'. And, without giving any further detail he says that '[t]his process lasted for about three years'.

[5] His version is challenged by the State. The State did not file an opposing affidavit to his application for condonation. However, it presented alternative facts in its heads of argument. Since no affidavit was deposed to and the appellant was not given an opportunity to respond thereto, they must be disregarded. Only the facts deposed to by the appellant will be considered.

[6] There is also an application for condonation for the late filing of the heads of argument by his legal representative, the Legal Aid Office. The explanation for the late filing is that there was some misunderstanding within its office. Little purpose would be served by scrutinising the explanation for the late filing in the light of the view I take in this matter.

[7] The application for condonation for non-compliance with rule 7(1)(b) of the SCA rules and his application for the reinstatement of the appeal is altogether a different matter. Here, the application stands or falls on a consideration of a number of factors considered cumulatively. They are: ‘the extent of his non-compliance with the provisions of the rule, his explanation for it, his prospects of success in the appeal, the importance of the case, the respondent’s interests in the finality of the case, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.’¹ These considerations, though not exhaustive, are time-honoured. The Constitutional Court has indicated that they can neatly be captured under the rubric of ‘interests of justice’.²

[8] This Court has on many occasions admonished litigants, including convicted persons, that a condonation application should be brought as soon as the litigant realises that his appeal is out of time or that he has failed to comply with one or other rule of this Court. It has reminded them that ‘condonation is not to be had merely for the asking’.³

[9] The appellant’s non-compliance with the provisions of rule 7(1)(b) of the SCA rules is particularly disconcerting. He delayed filing the notice of appeal for four years, followed by another five years before lodging the record. While his status as a prisoner may have restricted access to necessary resources for pursuing the appeal, such an extended delay cannot be overlooked lightly. It materially prejudiced the

¹ *S v Mogorosi* [2010] ZASCA 147 para 8.

² *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (2) SA 837 (CC); 2000 BCLR 465 para 3; *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 20.

³ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA); [2003] 4 All SA 37 (SCA); 66 SATC 265 para 6.

State's interest in bringing the matter to finality. Moreover, his explanation for his non-compliance is devoid of detail, and unhelpful in understanding his plight. The explanation, quite frankly, is woefully inadequate. As for his prospects of success in the appeal, these, as I demonstrate below, are non-existent.

The State's evidence against the appellant

[10] The case against the appellant was that he, his co-accused and other prisoners were detained in the D-section of the Johannesburg Correctional Centre (the prison). The next day, they were all transported to the Randburg Magistrate's Court for their appearance. During their appearance, their matter was postponed and they were all remanded in custody and immediately detained in one of the court's holding cells, awaiting transfer to the prison. The appellant and his co-accused formed a group. Mr Loyiso Gladman Maqungu (Mr Maqungu) was detained in the same cell. A police officer arrived at the cell and had a private conversation with one of the appellant's co-accused, who was arraigned as accused 5 on the same charges that are the subject of this appeal. After the conversation, accused 5 returned to the group. The appellant was at all times present as part of the group. A short while later, the same police officer returned and took accused 5 out of the cell. They both returned with the police officer holding a backpack, which he handed to accused 5. Accused 5 returned to the group. The group huddled together. Mr Maqungu moved closer to the group to see what it was that they had received in the backpack. He saw the appellant and his co-accused remove the contents, revealing small boxes wrapped in a brown paper. He also saw sellotape and rods. The appellant and his co-accused placed each box on a bench. Mr Maqungu saw that copper wires protruded from each of the boxes. These boxes, it was later revealed, were actually commercial explosives commonly used in the mining industry.

[11] The appellant and his co-accused then performed a ritual ceremony intended to provide them with protection. The ritual ceremony involved one of the co-accused pouring a substance on each of the accused's hands. Mr Maqungu referred to the substance as 'muti' – a form of a traditional medicine sometimes utilised to protect the user from possible future harm. The substance was then placed on the mouths of each of the five accused. They all walked to the corner of the cell, chanted an incantation and spat out the substance. In this case the possible future harm was anticipated to be by the detonation of the explosives. This was all part of a carefully orchestrated, if peculiar, scheme to escape from lawful custody. Soon after, all the prisoners from the cell, including the appellant and his co-accused, boarded the truck that transported them back to the prison.

[12] There were 32 prisoners in the truck. The back of the truck was divided into at least a large and two smaller compartments. Some of the appellant's co-accused chose to occupy the large, main compartment. Two of his co-accused squatted at the door of the truck. They arranged the explosives by the door. Two of the co-accused were talking loudly on cell phones to someone. They were relaying the location of the truck as it travelled towards the prison. A stampede ensued thereafter as some of the prisoners rushed away from the door. An explosion followed, causing a huge hole by the door of the truck. Many of the prisoners were injured. There was blood all over the inside of the truck. The truck continued moving. One of the co-accused and another prisoner jumped out of the moving truck. Gunshots were fired by police officers who were in a car that happened to be behind the truck. The truck made it to the Johannesburg prison where they all alighted. Many prisoners, including the appellant and Mr Maqungu, were injured and three prisoners were killed as a result of the explosion. All the other prisoners saw the bodies of the deceased after they

alighted from the truck. Witnessing the victims lying motionless with their gruesome injuries proved traumatic for Mr Maqungu.

[13] The injured prisoners were transported to the hospital. At the hospital Mr Maqungu met one of the appellant's co-accused who had tried to jump out of the moving truck. He is the same person that placed the explosive at the door of the truck before the explosion. Mr Maqungu was subsequently imprisoned in the same cell at Mondeor police station as the appellant and his co-accused. He was questioned about the incident during this time, and fearing for his life, he denied all knowledge of it. Subsequently, he decided to reveal all and to testify at the trial. He was, he said, tormented by the sight of the injuries sustained by the prisoners who died from the explosion, and he therefore decided that he could not remain silent.

The appellant's defence in the high court

[14] The appellant testified in his defence. He denied all culpability. He denied knowing any of his co-accused, except for one, and testified that he only met them in the cell at the Mondeor police station after the explosion. He claimed that he was only made part of the five accused because he and one of the other accused (accused 2) were charged together in another matter. They were awaiting trial prisoners when the incident occurred. He denied that any of the events referred to by Mr Maqungu occurred. In particular, he denied that any of his co-accused had received the explosives from a policeman while in the holding cell at Randburg Magistrates' Court, and that any ritual ceremony was conducted there. He denied any knowledge of any of his co-accused talking on a cell phone while they were in the truck, and knowledge of any of his co-accused placing explosives at the door of the truck while it was transporting them to the prison. After the explosion, he was unconscious. During his cross-examination he claimed that upon entering the truck

he chose to sit in a small compartment rather than in the main compartment. In essence, his defence was: ‘I was not part of any group with designs to commit any of the crimes listed in the indictment, I saw nothing, I heard nothing, I know nothing.’

The high court’s conclusion

[15] The State was not able to give precise details of ‘when, where or in what terms’ all the accused formed the common purpose. Its case that the accused acted with common purpose was predicated on the testimony of a single witness; that the single witness – Mr Maqungu – was consistent, credible and candid in every material respect; that he had no ulterior motive in testifying against any of the accused; that the State had proven beyond reasonable doubt that the appellant had acted with common purpose with his co-accused. Accordingly, he was guilty of the offences listed in the indictment, as the offences were all integral to, or interconnected with, the detonation of the explosives in the extremely confined space of the locked truck. The effect thereof was that the occupants were unable to disembark before the explosion occurred.

The appellant’s case in this Court

[16] The appellant continued with his claim that no common purpose between himself and his four co-accused was proven beyond reasonable doubt. He insisted that he was not part of the group – which according to the State, consisted of the five accused, including himself. He reiterated his position in the high court, that he was not involved in the crimes committed by his co-accused. It was further submitted on his behalf that, should this Court find against him on whether the State proved that he acted with a common purpose with his co-accused, he ought nonetheless to be acquitted on the basis that he had actively disassociated himself from their plan and

conduct just prior to the detonation of the explosives. His disassociation was manifested, so it was submitted, by him entering into and sitting in a small compartment in the truck rather than the main compartment where the explosion occurred.

The doctrine of common purpose

[17] The doctrine of common purpose is fully entrenched in our law.⁴ Common purpose takes two forms: prior agreement amongst all the perpetrators before the commission of the offence, or active association by each perpetrator in the conduct of the group of perpetrators. The former may involve an express agreement or an implied one based on what was contemplated by the group. The latter while not derived from a prior agreement, ‘can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design’,⁵ as held in *S v Safatsa and Others*,⁶ and entails participation ‘with the requisite blameworthy state of mind’,⁷ as articulated in *S v Thebus and Another*.⁸ Should the State rely upon ‘active association’ to establish common purpose, it is required to prove beyond reasonable doubt with regard to each individual perpetrator that he:

‘. . . [M]ust have been present at the scene where the violence was being committed . . . must have been aware of the assault on the [victims] . . . must have intended to make common cause with those who were actually perpetrating the assault. . . must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. . . must have had the requisite *mens rea* [ie, in the case of murder] . . .

⁴ *S v Thebus and Another* 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (*Thebus*); 2003 (2) SACR 319; *S v Safatsa and Others* [1988] 4 All SA 239 (AD); 1988 (1) SA 868 (A) (*Safatsa*); *S v Mgedezi and Others* [1989] 2 All SA 13 (A); 1989 (1) SA 687 (A) (*Mgedezi*).

⁵ *Safatsa* at 898A-B.

⁶ *Ibid.*

⁷ *Thebus* para 19.

⁸ *Ibid.*

he must have intended [the consequences of the offence] or must have foreseen the possibility of [the person being killed] and performed his own act of association with recklessness as to whether or not death was to ensue.’⁹

Did the State prove that the appellant entered into a prior agreement with his co-accused or actively associated with them?

[18] The State relied exclusively on the evidence of Mr Maqungu. This implicated the appellant as being part of the group that huddled together in the waiting cell at the Randburg Magistrate’s Court; that received the explosives from the policeman; that engaged in placing the explosives on a table; and that partook in the ‘muti’ ritual prior to boarding the truck. If accepted, the evidence considered as a whole clearly implicates him in the activities of the group. On this evidence, the State had proven beyond reasonable doubt that he, by prior agreement, had joined in the plans to acquire explosives and to detonate them in order to escape from lawful custody.

[19] Having denied being part of the group and partaking in its activities, including the ‘muti’ ritual, he was left with no option but to attempt to discredit the evidence of Mr Maqungu. His attack on the testimony of Mr Maqungu was that Mr Maqungu never claimed that only he, or only the members of the group, went to see what items accused 5 was given by the policeman and brought into the cell. All the awaiting trial prisoners went to investigate and thus the fact that he was one of them is of no moment. It does not demonstrate that he associated with his co-accused. It was accused 3 that arranged the explosives on the concrete bench in the cell, not himself. Furthermore, Mr Maqungu could not discern what members of the group who had huddled together had said, and lastly, the members of the group were not always in each other’s company – there were times when they were separated from each other.

⁹ *Thebus* para 20. See also *Mgedezi* at 705I-706A.

[20] There is no substance in his attack. Mr Maqungu did not flinch from saying that the group was not at all times sitting in one place separate from all the other prisoners. He testified that the only times they were together was when accused 5 received what turned out to be the explosives – and when they conferred and conversed as a group, even though he does not have any knowledge of what the conversation was about, and that they all partook in the ‘muti’ ritual. Mr Maqungu’s evidence was not gainsaid. The appellant did not, and could not, attack the credibility of Mr Maqungu. Mr Maqungu did not know any of the accused prior to meeting them in prison. He had no negative encounters with any of them. He did not embellish his evidence to implicate any of them. He testified candidly on what he saw each of them do. The substance of his evidence was not damaged by cross-examination. There are no inherent improbabilities in his evidence. A careful reading thereof shows that its truthfulness cannot be doubted whatever minor criticisms may be levelled against it, such as that he initially told the police that he knew nothing about the explosives or of their detonation. He adequately explained the inconsistency between his initial police statement and his subsequent evidence by claiming, not unrealistically, that the former (false) one resulted from a real fear for his life. He had a change of mind because he was tormented by the devastation he witnessed after the explosion.

[21] The appellant further contended that, as Mr Maqungu was the sole witness whose testimony implicated him, that evidence should carry little weight. As his evidence was that of a single witness, it should be treated with caution. This contention, raised so often in the criminal courts, is misplaced. That the evidence comes from a single witness does not, in and of itself, make it unreliable or untruthful. His evidence was simple, limited to what he saw and encountered, free

from embellishment and clinical in its content as well as in its presentation. The fact that it was not contradicted by other evidence does not make it necessarily true,¹⁰ but there is nothing before Court in this case to doubt its veracity.

Did he succeed in showing that he actively disassociated from the group?

[22] It is a settled principle, in civil proceedings, that '[a] litigant can plead, but not testify, in the alternative'.¹¹ This is exactly what occurred here, albeit in a criminal setting. The appellant, having been informed of Mr Maqungu's statement and then having to endure his testimony, was impaled on the horns of a dilemma: either he denied any and all involvement in the activities of the group or he admits to being involved in those activities up to a point where he decided to disassociate himself from them. He simply could not have it both ways. He could not say that he shared no common purpose with the group while, at the same time maintain that he was a party to that common purpose, at least initially, and that he dissociated from that common purpose at the point when he chose to sit in the small compartment. The two statements cannot simultaneously be true. On the former version he was a stranger to the whole enterprise, unknown to his co-accused, ignorant of their plans, and entirely uninvolved. On the latter version (the one his disassociation defence requires) he was an insider who knew the plan, participated in it, and later withdrew. The two versions are irreconcilable. In fact, he chose the former version and having chosen he must live with its consequences.

[23] During his testimony in the high court, he relied solely on the defence that he was not involved in the decisions and conduct of his co-accused. He never once claimed before the high court that he actively distanced himself from them by seating

¹⁰ *Da Mata v Otto*, N O 1972 (3) SA 858 (A) at 869B-E.

¹¹ *McDonald v Young* [2011] ZASCA 31; 2012 (3) SA 1 (SCA) para 23.

himself in the small compartment. During his testimony, he did not even attempt to explain his decision to take a seat in the small compartment rather than the large one. There was nothing before the high court about his state of mind when he chose to sit in the small compartment. Simply put, he never once claimed that his seating choice was a deliberate decision to disassociate himself from his co-accused. In short, it was never his case during the trial that he actively disassociated from the common purpose of the group. That contention only surfaced during his application for leave to appeal in the high court. And having secured leave, it was pursued in this Court, but only as an alternative to his main defence that there was no common purpose between him and his co-accused. The case for the disassociation was founded exclusively on his choice of seating in the truck. It is, so it was argued on his behalf, concrete evidence of his active disassociation. However, to succeed on the defence of active disassociation, he needed to convincingly show to this Court that his choice of seating was not just a passive decision, but a deliberate one intended to distance himself from the plans and conduct of his co-accused. This, as mentioned, he did not do and could not do because of his main defence. Hence, there simply was no evidence of active disassociation in this case.

[24] To conclude, once it was proven that he actively associated with the group that acquired and detonated the explosives in the truck, that was the end of the matter. His guilt for the offences resulting from the detonation was then proven beyond any reasonable doubt. He is, therefore, guilty of the offences with which he was charged and of which he was convicted by the high court. His appeal has no prospects of succeeding.

[25] Accordingly, condonation for non-compliance with the provisions of rule 7(1)(b) of the SCA rules and his application for the reinstatement of his appeal stands to be refused.

Order

[26] The following is ordered:

- 1 The appellant's application for condonation for the late filing of the heads of argument is granted.
- 2 The appellant's application for condonation for non-compliance with the time periods set out in rule 7(1)(b) of the Rules Regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa is dismissed.
- 3 The appellant's application to reinstate the appeal is dismissed.

B VALLY
ACTING JUDGE OF APPEAL

Appearances

For appellant:

M P Milubi

Instructed by:

Legal Aid, Johannesburg Local Office

Legal Aid, Bloemfontein

For respondent:

R Barnard

Instructed by:

Director of Public Prosecutions,

Johannesburg

Director of Public Prosecutions, Bloemfontein.