



Reportable:	YES/ NO
Circulate to Judges:	YES/ NO
Circulate to Magistrates:	YES/ NO
Circulate to Regional Magistrates:	YES/ NO

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION - MAHIKENG**

**CASE NO: CA14/25
REGIONAL COURT CASE: RC 15/23**

In the matter between:

THAPELO ALFRED MALEKUTU

APPELLANT

and

THE STATE

RESPONDENT

*Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail and released to SAFLII. The date that the judgment is deemed to be handed down is **13 April 2026 at 16h00.***

Summary

Summary: Criminal Procedure – Appeal – Automatic right of appeal in terms of s 309(1)(a) of the Criminal Procedure Act 51 of 1977 – Condonation for late noting of appeal – Proper forum – Section 309(2) of the CPA – Magistrate's Court Rules, Rule 67(5) – Magistrate's statement of reasons – Peremptory requirement – Failure to comply – Appeal struck from roll.

Held: An application for condonation for the late noting or prosecution of an appeal from a magistrates' court must be brought to the magistrate in terms of s

309(2) of the CPA. The High Court is not a court of first instance for such applications. Further, Rule 67(5) of the Magistrates' Courts Rules peremptorily requires the magistrate to furnish a written statement of reasons. The absence thereof renders the appeal not properly before the High Court. Appeal struck from the roll.

ORDER

1. The appeal is struck from the roll.
2. The appellant is granted leave to:
 - (a) Approach the Regional Court for condonation in terms of section 309(2) of the Criminal Procedure Act 51 of 1977.

JUDGMENT

MATLHAPE AJ

Introduction

[1] The appellant was arraigned in the Regional Court, Itsoseng, on a charge of contravening the provisions s 3 read with ss 1, 55, 56(1), 57, 58, 59,60 and 61 of the Criminal Law Amendment Act (Sexual Offences and Related Matters) Act¹ read with ss 256, 257 and 281 of the Criminal Procedure Act² ('CPA'), further

¹ Criminal Law Amendment Act (Sexual Offences and Related Matters) Act 32 of 2007.

² Criminal Procedure Act 51 of 1977.

read with the provisions of s 51(1) of Schedule 2 Part 1 of the Criminal Law Amendment Act³ ('CLAA') as amended as well as s 92(2) and 94 of the CPA. He was also charged with the contravention of the provisions of s 5(1) read with ss 1, 56A, 57,58,59,60 and 61 of the Sexual Offences and Related Matters Amendment Act⁴ as well a charge of assault with intent to do grievous bodily harm. The appellant was also charged with kidnapping.

[2] On 29 January 2025, the appellant was found guilty as follows: Count 1 (Rape) and was sentenced to life imprisonment; Count 2 (sexual assault) and sentenced the 5 years imprisonment; Count 3 (Assault with intent to do grievous bodily harm) sentenced to two years imprisonment; and Count 4 (Kidnapping) and was sentenced to 2 years imprisonment.

[3] The aforesaid sentences were ordered to run concurrently in terms of s 280 of the CPA.

[4] Additionally, the trial court declared the appellant unfit to possess a firearm in terms of the provisions of s 103 (1) of the Firearms Control Act⁵.

[5] The appellant appeals both the conviction and sentence in terms of his automatic right of appeal in terms of s 309(1) (a) of the CPA, having been sentenced to life imprisonment by a regional court. The first proviso to s 309(1)(a) affords an appellant sentenced to life imprisonment by a regional court under s 51(1) of the CLAA the right to note such an appeal without having to apply for leave.

³ Criminal Law Amendment Act 105 of 1997.

⁴ Supra, fn 1.

⁵ Firearms Control Act 60 of 2000.

[6] The notice of appeal was filed with the Registrar of this Court on 4 July 2025, accompanied by an application for condonation for what was termed the late filing of the appeal. In terms of the provisions of Magistrate's Court Rule 3 Criminal Law Amendment Act 105 of 1997, 4 67(5A)(a)(i), the appellant had to file a notice of appeal within ten days after the passing of the sentence

The Proper Noting and Prosecution of the Appeal

[7] Before the merits of this appeal may be considered, this Court is duty-bound to satisfy itself that the appeal has been properly noted and is properly before us. The Full Bench of this Division has recently, in a series of judgments, provided clear and binding guidance on the procedural requirements for criminal appeals arising from a magistrate court. These authorities compel a preliminary inquiry into the procedural regularity of every appeal.

[8] In *Mothoa v S*⁶, Petersen ADJP (with Hendricks JP concurring) conducted a comprehensive examination of the appeal procedure. The court held that s 309(2) of the CPA, in its current form, provides that the magistrate against whose decision the appeal is to be noted may, on application and on good cause shown, extend the period for the noting or prosecution of the appeal. Section 309(2) reads:

‘An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court: Provided that the magistrate against whose decision or order the appeal is to be noted, or if he or she is unavailable any other magistrate of the court concerned, may on application and on good cause shown, extend such period.’

⁶ *Mothoa v S* [2025] ZANWHC 187 (16 September 2025).

[9] The court in *Mothoa* held that there is no provision for the High Court to grant condonation for the late noting of an appeal. The court stated⁷:

‘The present version of s 309(2) of the CPA differs materially from the 1977 version. There is no provision for the High Court to grant condonation for the late noting of an appeal (sic late filing of an appeal). There is therefore no need for any application for condonation, termed ‘for the late filing of the appeal’

[10] The Full Bench further emphasised that where the magistrate’s court refuses a condonation application, the appellant’s remedy lies in petitioning the Judge President of this Division under s 309C(2)(a) of the CPA. Section 309C(2)(a) provides for the following:

‘(2)(a) If any application

(i) for condonation;

(ii) for further evidence; or

(iii) for leave to appeal,

is refused by a lower court, the accused may by petition apply to the Judge President of the High Court having jurisdiction to grant any one or more of the applications in question.’

[11] The High Court is not a court of first instance for such applications. Also, in *Botlhokoane v S*⁸, Wessels AJ (with Matlhape AJ concurring) addressed the identical issue. The court traced the legislative history of s 309(2) and concluded definitively⁹:

‘The conclusion to be drawn is that the CPA provides for access to this Court on petition if an application for condonation in the Regional Court is refused. I can come to no other conclusion

⁷ *Op cit* para 4.

⁸ *Botlhokoane v S* [2025] ZANWHC 186 (11 September 2025).

⁹ *Ibid* para 16.

but to find that the application for condonation cannot be entertained by this Court, at least not as a court of first instance.'

[12] The court in *Botlhokoane* struck the appeal from the roll, finding that the appellant had made no application for condonation to the Regional Court but instead applied directly to the High Court. This, the court held, rendered the condonation application incompetent.

[13] In the present matter, the appellant has similarly approached this Court directly for condonation for the late prosecution of his appeal. There is no indication on the record that any application for condonation was made to the Regional Court, nor that such application, if made, was refused. The condonation application before us is, therefore, incompetent and cannot be entertained.

[14] Additionally, this Court must be satisfied that the appeal has been properly noted. In *Botlhokoane*, the court emphasised that noting and prosecuting an appeal are distinct concepts, carried out in different forums. While an appeal is noted in the Regional Court, prosecution occurs in the High Court. The Court held that if the notice of appeal has not been filed with the court a quo, the appeal would not have been properly noted.

[15] The notice of appeal filed in this matter does not bear the stamp of the Assistant Registrar of the Regional Court, Itsoseng. This Court is therefore unable to satisfy itself that the appeal was properly noted in terms of Rule 67(5A)(a) of the Magistrates' Courts Rules, which requires an appellant to note an appeal in writing to the registrar or clerk of the court within 10 days after the passing of sentence. Rule 67(5A)(a) provides:

'(5A)(a) A person contemplated in the first proviso of section 309(1)(a) of the Criminal Procedure Act, 1977, who wishes to appeal against his or her conviction or sentence or order, shall do so in writing to the registrar or clerk of the court within 10 days after the passing of the sentence or order following on the conviction and shall also send a copy of such notice of appeal to the director of public prosecutions concerned or in a case in which the prosecution was not at the public instance, to the prosecutor concerned.'

[16] Furthermore, Rule 67(5) of the Magistrate's Court Rules imposes peremptory obligations upon the clerk of the court and the judicial officer following the noting of an appeal. Rule 67(5) provides:

'Upon an application for leave to appeal being granted the registrar or clerk of the court shall prepare a copy of the record of the case, including a transcript thereof if it was recorded in accordance with the provisions of rule 66(1), and place such copy before the judicial officer who shall within 15 days thereafter furnish to the registrar or clerk of the court a statement in writing showing—

- (a) the facts he or she found to be proved;*
- (b) his or her reasons for any finding of fact specified in the appellant's statement of grounds of appeal; and*
- (c) his or her reasons for any ruling on any question of law or as to the admission or rejection of evidence so specified as appealed against.'*

[17] The clerk is required to prepare a copy of the record and place it before the judicial officer, who must, within 15 days, furnish a written statement setting out the facts found to be proved, reasons for findings of fact, and reasons for rulings on questions of law specified in the grounds of appeal. The record before us does not reflect compliance with these provisions.

[18] In *Mothoa*, the Full Bench held that it is peremptory that subrules 67(5), (6) and (7) of the Magistrate's Court Rules be complied with before a matter is transmitted on appeal to the High Court. This lack of compliance results in this appeal not being properly before this Court.

[19] The Constitutional Court in *Strategic Liquor Services v Mvumbi NO and Others*¹⁰ emphasised the indispensability of reasoned judgments to the appeal process. In this regard, the Constitutional Court held¹¹:

‘...a reasoned judgment is indispensable to the appeal process. Judges ordinarily account for their decision by giving reasons – and the rule of law requires that they should not act arbitrarily and that they be accountable. Furnishing reasons

“explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal Court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters”.

[20] The principles enunciated in *Strategic Liquor Services* are directly applicable to the present matter. This Court cannot properly adjudicate an appeal without the benefit of the magistrate's reasoned statement under Rule 67(5). The absence of such reasons, or at the very least having provided the magistrate with the opportunity to furnish further reasons, constitutes not merely a procedural irregularity but an infringement of the appellant's right to a fair appeal, and indeed an impediment to this Court's ability to discharge its appellate function.

¹⁰ *Strategic Liquor Services v Mvumbi NO and Others* (CCT 33/09) [2009] ZACC 17; (2009) 30 ILJ 1526 (CC); 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC); [2009] 9 BLLR 847 (CC) (18 June 2009).

¹¹ *Ibid* para 16.

[21] Section 35(3) of the Constitution guarantees every accused person the right to a fair trial, which includes the right of appeal to a higher court. A fair appeal requires that the appeal court be placed in a position to properly evaluate the correctness of the court a quo's decisions.

[22] The appellant's legal representative is reminded of the duty incumbent upon legal representatives to acquaint themselves with the rules of this Court and the peremptory provisions of the CPA and Magistrate's Courts Rules governing appeals.

[23] The procedural shortcomings identified in this appeal are not mere technicalities. They go to the jurisdiction of this Court to entertain the appeal. As held in *Mothoa* and *Botlhokoane*, an appeal that does not comply with these peremptory requirements is not properly before the High Court and falls to be struck from the roll.

Conclusion

[24] In light of the foregoing, this Court cannot proceed to consider the merits of the appeal. The appeal is not properly before us, and the condonation application is incompetent.

[25] It bears emphasis that the procedural requirements set out in the CPA and the Magistrate's Courts Rules are not empty formalities. They serve the vital purpose of ensuring that appeals are properly constituted, that the court a quo has the opportunity to explain its reasoning, and that this Court is placed in a position to adjudicate appeals on their true merits. The failure to comply with these requirements undermines the proper administration of justice and cannot be countenanced.

Order

[26] Consequently, the following order is made:

1. The appeal is struck from the roll.
2. The appellant is granted leave to:
 - (a) Approach the Regional Court for condonation in terms of section 309(2) of the Criminal Procedure Act 51 of 1977.




B MATHLAPE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree




M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Appearances

For appellant :Mr TR Semino

Instructed by :Legal Aid South Africa

:Mahikeng

For respondent :Adv BT Chulu

Instructed by :Director of Public Prosecutions North West

:Mahikeng