



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
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: K/S 18/2022

In the matter between:

REUBEN PHAKISO MOTSIE

APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: Motsie RP v The State. Case No: K/S18/2022. Application for leave to appeal (29 July 2026)

Coram: MAMOSEBO J

Heard: 27 May 2026

Delivered: 29 July 2026

Summary: Leave to appeal- Murder read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 – Intention to kill – application considered under s 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 – whether the envisaged appeal has reasonable prospects of success – whether there is some other compelling reason why the appeal should be heard – compelling reason exist- leave granted to the SCA.

ORDER

1. Condonation for the late noting and prosecution of the appeal is granted.

2. The application for leave to appeal is granted to the Supreme Court of Appeal.

JUDGMENT

MAMOSEBO J

[1] On 01 August 2023 this court convicted the applicant of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (the CLAA) having tendered a guilty plea in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA). He was sentenced to life imprisonment on 03 August 2023. He now seeks leave to appeal to the Full Court of the Northern Cape Division against both his conviction and sentence. The applicant sought condonation for the late filing of this application which the respondent did not oppose. Condonation is granted. The respondent is also not opposing the leave application.

[2] In terms of s 17(1)(a)(i) and (ii) of the Superior Courts Act¹ leave to appeal may only be granted if:

- (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.²

¹ 10 of 2013

² See *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2; *Mont Chevaux Trust v Goosen* 2014 JDR 2325 (LCC) para 6; *S v Notshokovu* 2016 JDR 1647 (SCA) para 2; *S v Smith* 2012 (1) SACR

- [3] The grounds upon which the applicant relies in seeking leave to appeal are that the court erred in:

Conviction

- 3.1 not granting the application by the State to amend the indictment that the murder be read with the provisions of s 51(2) of the CLAA.
- 3.2 not granting the parties an opportunity to address the court prior to judgment regarding the form of intent in terms of s 175 of the CPA.
- 3.3 not granting the parties an opportunity to address the court before judgment whether the murder was planned or premeditated pursuant to the provisions of s 175 of the CPA.
- 3.4 finding that the murder was committed with the intent form of *dolus directus* despite the fact that the plea tendered and accepted by the State admitted the form of intent being *dolus eventualis*.

Sentence

- 3.5 not making a finding whether the applicant is convicted of murder read with the provisions of s 51(1) or 51(2) of the CLAA prior to the sentencing phase.
- 3.6 finding that there are no substantial and compelling circumstances to deviate from the prescribed minimum sentence.

3.7 that the sentence imposed is disproportionate to the crime, the criminal and the interests of society.

[4] In the 'Notice of Trial' notice was given to the accused in terms of s 144(4)(a)(ii) of Act 51 of 1977³ that the accused is arraigned on a charge of murder, read with section 51(1) of Act 105 of 1997, as amended. The indictment repeated the same.

[5] Contained in the summary of substantial facts is the following:

1. The accused and the deceased were living with each other at Gawie Steyn Boerdery compound, Kanoneiland.
2. The State will allege that late evening of 22 June 2019, the accused started to assault the deceased and that he assaulted her with various instruments, including a broken broom stick and/or a metal fork and/or a metal wire object and/or a metal bar.
3. The State will further allege that the deceased was screaming during the prolonged assault, begging the accused to stop assaulting her.
4. One of the neighbours, Thabang Jamba, went to their closed front door and talked to the accused in the early morning hours of 23 June 2019. He tried to convince the accused to stop from further assaulting the deceased.
5. At sunrise on 23 June 2019, Charmaine Koper entered the accused's room and saw blood on the deceased's head and all over the room. The deceased was then lying with her back facing the door. The accused was not in the room.

³ **144 Charge in superior court to be laid in an indictment**

(4)(a) An indictment, together with a notice of trial referred to in the rules of court, shall unless an accused agrees to a shorter period, be served on an accused at least ten days (Sundays and public holidays excluded) before the date

6. The accused entered the room from the outside and took the witness, Charmaine Koper, by her arm and said to her that she should leave, since the deceased was in a drunken stupor.
7. Later that same morning, it became apparent to Thabang Jamba that the deceased was dead, and the relevant authorities were called.
8. The deceased had multiple injuries all over her body, indicative of an assault with multiple objects. Incisions were made by a sharp object or objects. The bruises, contusions, abrasions and lacerations were indicative of blunt force trauma.
9. The State will allege that she was assaulted with various objects including a cylindric object, as well as a forklike object and a metal wire object.
10. Her cause of death was consistent with head injuries, according to Dr Adin Don Surtie, who conducted the medico-legal autopsy of the deceased.
11. The State will further allege that the accused acted in a planned and/or premeditated way when he assaulted the deceased over a period of time, during the night of 22 to 23 June 2019, using various objects to assault her with.'

[6] On 31 July 2023 Adv Pillay addressed the Court to this effect before charges were put to the accused:

'Adv Pillay: The State would like to make an application for the amendment of the charge of s 51(2) of Act 105 of 1997.

Court: What will the State be amending?

Adv Pillay: The charge, in terms of s 51(2) before I put the charge.'

[7] Mr Fourie, for the applicant, seems to raise as one of the grounds that before the accused could plead, the State applied for an amendment of the charge to read murder read with the provisions of s 51(2) instead of

51(1) but the Court refused to grant the application. Neither the State nor the defence proffered any explanation why this amendment was sought or why the provisions of s 51(2) should apply. Mr Fourie does not expatiate on this either in his heads except to state that the court should have allowed the amendment when sought by the prosecutor. In *S v Kekana*⁴ Makgoka JA wrote:

‘...a cryptic, unexplained reference to s 51(2) such as the one in the present case, is certainly not sufficient to mutate the sentencing regime from the purview of s 51(1) to s 51(2). It must be emphasized in this regard that even where such facts are stated, the discretion of the court to consider and impose an appropriate sentence remains extant.’

- [8] What seems patently clear is that Ms Pillay does not seem to appreciate the fact that s 51(1) and 51(2) are not part of the crime and do not constitute a new crime. The accused was before court on a charge of murder. The State was not altering the crime of murder but attempted to fetter the court’s sentencing discretion. The salutary remarks by Makgoka JA in *S v Kekana*⁵ bear repeating:

‘As a general proposition, where the minimum sentences provided for in the CLAA are applicable, an accused is not entitled to pre-determine or pre-empt his or her sentence by referring, without more, to s 51(2)⁶. If he or she wishes for that subsection to apply, and for the resultant lesser sentence to be considered, he or she must set out the facts from which such conclusion can be premised. Without such facts, the court is not restricted to a lesser sentence merely because the accused had made reference to s 51(2). To accept otherwise would lead to absurd consequences.’

⁴ Ibid para 27

⁵ 2019 (1) SACR 1 (SCA) para 19

⁶ Except in the limited circumstances permitted by law, for example, when entering into a plea bargain in terms of s 105A of the CPA.

[9] The accused tendered a plea of guilty in terms of s 112(2) of Act 51 of 1977, which Adv Maroke confirmed on the record that it accords with his instructions. Adv Pillay, for the State, accepted the plea and confirmed that it is in accordance with the facts at the State's disposal. The accused has, in actual fact, pleaded guilty to murder in the context of an indictment which expressly invoked s 51(1) of the CLAA. The State's attempted amendment did not alter the factual allegations contained in the indictment and did not detract from the notice given to the accused that the State relied upon s 51(1).

[10] Below is the accused's statement in terms of s 112(2) of the CPA for a clearer perspective:

"I, the accused, Reuben Phakiso Motsie, an adult black male plead guilty to the charge of murder.

1. I plead guilty to the charge as set out in the indictment freely, voluntarily and without any undue influence on the count of murder. In that on or about the period between 22 and 23 June 2019 and at or near Gawie Steyn Boerdery, Kanoneiland, in the district of ZF Mgcawu, I Reuben Phakiso Motsie unlawfully and intentionally killed Aldine Godeverdien Titus, an adult female person.
2. I admit the offence was committed within the jurisdiction of this honourable Court.
3. I, the accused, confirm my legal representative, Adv Maroke, explained the minimum sentence as provided in Act 105 of 1997 to me as amended. I confirm I am fully aware of the minimum sentence.
4. On 22 to 23 June 2019 that Aldine Godeverdien Titus, (herein referred to [as] the deceased) and I [were] in a relationship, and we were living together at Gawie Steyn Boerdery in one room. I was employed general worker on the farm. The deceased was not employed at the farm.
5. Earlier that day the deceased and I [were] at the tavern, and we consumed alcohol. Later that evening we went back to our home where we consumed alcohol with our neighbours. We then went to our room.
6. I had a good relationship with the deceased prior to this unfortunate night; I had an altercation with the deceased over money.
7. I confronted her about her behaviour of demanding money when I get paid whenever she is under the influence of alcohol. It is not her money as she

[did] not work. This behaviour infuriated me because I did not understand why she demanded the money when there was no money left and, without thinking straight and out of anger, I assaulted the deceased by hitting her with various objects, including a broomstick, cylindrical iron rod objects, as well as a fork like object and a metal wire object.

8. I cannot say how many times I assaulted her with the different objects that [were] in our room at the time. I was stabbing and hitting her until she was unconscious and bleeding. I then placed her in the bed and covered her with a blanket and left her and went to another tavern to drink. This was in the early hours of 23 June 2019.
9. The deceased was not in possession of any weapon neither was she posing any danger to me or my life during the time I attacked her.
10. On the morning of the 23 June 2019 one of the neighbours found her and contacted the police and ambulance.
11. I heard the police [were] looking for me I then fled the scene by going to Welkom as I knew I was the last person with the deceased and I left her unconscious and bleeding.
12. I was arrested in Welkom about a month after the deceased's death.

Admissions

13. I admit that when I was assaulting the deceased, I did not have any grounds [of] justification to do so and I knew that there was a possibility that the deceased could die from such assault, and I recklessly proceeded with my actions. I thus admit my intention was in the form of *dolus eventualis*.
14. I admit even though I consumed alcohol prior to commissioning of the offence, I admit the alcohol I consumed did not affect me to such an extent that I did not know what I was doing.
15. I admit that when [I] acted as set out above, I appreciated the wrongfulness of my actions and I further admit that I was capable of acting in accordance with that appreciation.
16. The body of the deceased was correctly identified as Aldine Titus, an adult female and that the deceased's body did not sustain any further injuries from the time that her body was removed from [the] scene up until the postmortem examination conducted by Dr Adin Don Surtie on 26 June 2019.
17. I admit the postmortem examination was conducted on 26 June 2019 by Dr Adin Don Surtie, a medical officer in forensic pathology and employed by the Northern Cape Department of Health, indicating the cause of death to be consistent with head injuries as well as the additional injuries sustained as reflected in the additional report to the postmortem to be true and correct cause of her death.

18. I admit that my actions directly caused the death of the deceased, and I knew my actions were wrongful and punishable. I have no defence to the charge against me.

19. I am remorseful for my actions.’

[11] Mr Fourie seems to raise these further two grounds that I deal with together. First, because in the accused’s plea he admitted to the form of intent as *dolus eventualis*, which was accepted by the State, the court erred in finding his intent to have been *dolus directus* without giving prior indication thereto. In my view, the court upon considering what was placed before it did not pronounce on the form of intent until after consideration of all the facts. This is what was clarified by Dambuza JA, then, in *Director of Public Prosecutions, Gauteng Division, Pretoria v Hamisi*⁷:

‘It is clear therefore that a court considering a statement made in terms of s 112(2) exercises its discretion to determine whether the statement admits all the elements of the offence in question. If it is not satisfied that that is so, it must question the accused as set out in s 112(1)(b) to clarify a matter raised in the written plea. If it determines that the statement is satisfactory and admits all the elements of the offence, it shall convict the accused on the plea of guilty. When the written plea detailing the facts on which the plea is premised is accepted by the prosecution, it constitutes the factual matrix on the strength of which an accused will be convicted and the sentence imposed. *The written plea is aimed at ensuring that the court is provided with an adequate factual basis to make a determination on whether the admissions made by an accused support the plea of guilty tendered.*’ (own emphasis)

[12] It therefore follows that the form of intent is not a fact but a legal point to be determined by the court after a consideration of all the facts. The Court cannot be bound by the respondent’s concession in this regard which is clearly wrong. The Constitutional Court in *Matatiele*

⁷ 2018 (2) SACR 230 (SCA) para 8

*Municipality and Others v President of the RSA and Others*⁸ made this instructive remark:

‘Here, we are concerned with a legal concession. It is trite that this Court is not bound by a legal concession if it considers the concession to be wrong in law.’

- [13] Mr Fourie also raised the ground that the Court committed a procedural irregularity by not affording the State and the defence an opportunity to address the Court on the merits as contemplated in s 175 of the CPA.⁹ A distinction needs to be drawn between a trial where evidence of several witnesses was heard as opposed to where the accused pleads guilty in terms of s 112(2) and is convicted on the basis of his plea of guilty. Section 112(2) regulates guilty pleas made in writing by stipulating:

‘If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.’

It therefore follows that the submission by Mr Fourie is misplaced.

- [14] Mr Fourie seems to have concluded that because the court sentenced the accused to a term of life imprisonment, despite the accused’s 112 (2) statement being silent on whether the murder was planned or

⁸ 2006 (5) SA 47 (CC) para 67

⁹ 175 **Prosecution and defence may address court at conclusion of evidence**

- (1) After all the evidence has been adduced, the prosecutor may address the court, and thereafter the accused may address the court.
- (2) The prosecutor may reply on any matter of law raised by the accused in his address, and may, with leave of the court, reply on any matter of fact raised by the accused in his address.

premeditated, the court should have allowed the accused to address it on this aspect. The judgment did not expressly refer to the murder being planned or premeditated. Mr Fourie's submission in this regard is tangential. A crucial aspect that seems to have been missed by both the applicant and his counsel is that the sentencing court is not deprived of its duty to determine whether the facts admitted in the s 112(2) statement bring the matter within the ambit of s 51(1) of the CLAA. The characterization adopted by the parties is not decisive. In any event, as highlighted by Dambuza JA, then, in *Aliko v The State*¹⁰ premeditation is not an element of the offence of murder. It is a factor in the assessment of the sentence to be imposed. In *casu*, I wish to reiterate that there was no mention of premeditation in the court's judgment on the merits.

- [15] Lastly, what is seemingly a factor which warrants leave to be granted to the Supreme Court of Appeal (SCA) is that Mr Fourie attached a copy of the Full Court judgment *Tumaeletse*¹¹ to this application without any explanation. Although not expressly articulated, the attachment of the judgment appears intended to draw attention to the Full Court's treatment of similar issues. After *Tumaeletse* had pleaded guilty in terms of s 112(2) of the CPA to murder read with s 51(2) of the CLAA I convicted and sentenced him to life imprisonment. He noted an appeal which served before the Full Court of this Division. The Full Court in *Tumaeletse* analysed the facts in that case against the backdrop of *Kekana 1*¹² and *Kekana 2*¹³ and held:¹⁴

¹⁰ *Aliko v The State* (552/2018) [2019] ZASCA 31 (28 March 2019)

¹¹ *Thataone Tumaeletse v The State* (K/S 08/2019) unreported judgment of the Full Court of the Northern Cape Division delivered on 23 March 2023

¹² *S v Kekana* 2019 (1) SACR 1 (SCA)

¹³ *Kekana v S* (629/13) [2014] ZASCA 158 (1 October 2014)

¹⁴ Para 23 of the Full Court judgment

‘In both *Kekana 1 and Kekana 2* there is a qualitative difference in the respective section 112(2) statements that clearly support a finding of premeditation on the respective facts of those cases. That is not the case in the present appeal. The reasoning of the court a quo, substantively summarised above is not supported by a proper reading of the section 112(2) plea explanation, the relevant portion is quoted above verbatim.’

In *casu*, the applicant pleaded guilty to s 51(1) as the Court did not grant the amendment sought. The accused was convicted of murder read with the provisions of s 51(1). Although I remain of the view that the admitted facts justified the finding of *dolus directus*, the question whether a court may, following a plea under s 112(2), depart from an accused's expressed characterisation of his intention as *dolus eventualis* and substitute *dolus directus* constitutes a compelling reason for consideration by the Supreme Court of Appeal.

- [16] Having carefully and dispassionately considered the application for leave to appeal in order to determine whether there are reasonable prospects that another court would come to a different finding than this court had reached or whether there is some compelling reason why the appeal should be heard, I find that the different approaches with regards to the implementation of s 51(1) and 51(2) particularly where the considered sentencing option is life imprisonment warrants the attention of the Supreme Court of Appeal. The fact that the applicant admitted his form of intention to have been *dolus eventualis* but the Court found it to have been *dolus directus* relying on Snyman's¹⁵ definition of *dolus directus* as comprising in a person ‘directing his will towards achieving the prohibited results or towards performing the prohibited act’. I find this to be a compelling reason for this court to grant leave to the Supreme Court of Appeal.

¹⁵ SV Hooror Snyman's Criminal Law 7ed (2020) at 160

Although I remain of the view that the admitted facts justified the finding of *dolus directus*, the question whether a court may, following a plea under s 112(2), depart from an accused's expressed characterisation of his intention as *dolus eventualis* and substitute *dolus directus* constitutes a compelling reason for consideration by the Supreme Court of Appeal.

[17] In the result, the following order is made:

1. Condonation for the late noting and prosecution of the appeal is granted.
2. The application for leave to appeal is granted to the Supreme Court of Appeal.


MAMOSEBO J
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the applicant: Mr P Fourie
Instructed by: Legal Aid South Africa

For the Respondent: Adv L Pillay
Instructed by: Office of the Director Public Prosecutions