

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 1290/16

In the matter between:

LUNGISA GWABABA

Applicant

and

THE STATE

Respondent

Neutral citation: *Gwababa v S* (1290/16) [2016] ZASCA 200 (7 December 2016)

Coram: Maya AP

Heard: In Chambers

Delivered: 7 December 2016

Summary: Leave to appeal – refusal of application by two judges of the SCA in terms of s 17(2) of the Superior Courts Act 10 of 2013 – application to the President of the SCA in terms of s 17(2)(f) to refer the decision to the court for reconsideration and, if necessary, variation – a grave injustice constitutes exceptional circumstances.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bam J, sitting as court of first instance):

1. Condonation is granted to the applicant for the late filing of his application.
2. The decision of this court dated 25 August 2016 dismissing the applicant's application for special leave to appeal against his conviction and sentence is referred to the court of reconsideration and, if necessary, variation, in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013.
3. The applicant is directed to lodge with the registrar of this court six (6) copies of his application in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013, as well as six (6) copies of his initial application (case no. 578/16) to this court for special leave to appeal, within one month of the date of this order and thereafter to comply with the rules of this court relating to the conduct of appeals.

JUDGMENT

MAYA AP

[1] This judgment concerns an unopposed application lodged in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act). The applicant, Mr Loyiso Gwababa, was the sixth accused in a criminal trial in the Gauteng Division of the High Court, Pretoria (Bam J), in which he, together with eight others, were all convicted as charged on 25 August 2015 and each sentenced, on 11 November 2015, to 15 years' imprisonment. Accused 9 was found not guilty and discharged. The applicants' application for leave to appeal was dismissed on 11 December 2015.

[2] However, on 24 May 2016 this court granted the erstwhile accused 4, Mr Bonginkosi Mdluli, special leave to appeal against his conviction and sentence. And, on 13 September 2016, the Acting President of the court, in *Malele v S* (723/16) and *Ngobeni v S* (724/16) ZASCA 115, referred to the court for reconsideration and, if necessary, variation a prior order of this court dismissing the application for special leave to appeal against conviction and sentences of the erstwhile accused 1 and 5, in terms of s 17(2)(f) of the Act.

[3] On 25 August 2016 two judges of this court dismissed the applicants' application for special leave to appeal against his conviction and sentence, in case 578/2016. He now seeks a referral to the President of this court of that order for reconsideration in terms of s 17(2)(f) of the Act, and if necessary, variation and the condonation of the late filing of the application.

[4] The applicant relies heavily on the fact that Mr Mdluli was granted special leave to appeal to the Full Court of the Gauteng Division against his conviction and sentence upon facts and questions of law similar to those upon which his own conviction and sentence were based and that former accused 1, 5, 7 and 8 were successful in their applications in terms of s 17(2)(f).

[5] As was pointed out in *Malele v S*, the fact that the applicant's former co-accused's applications for leave to appeal were successful does not necessarily mean that he should, without more, also be granted leave to appeal. I am enjoined to determine his application on its own merits and consider if the applicant has established exceptional circumstances warranting the reconsideration and, if necessary, variation of the order

refusing him special leave.

[6] In its judgment the trial court set out the summary of the substantial facts relating to the murder charge as follows:

‘[I]t is all alleged that on [26 February 2013] the deceased [Mr Silvesta Jossefa Marcia], a taxi driver, was confronted by accused 1 and 2 concerning a traffic rule violation, in that he was obstructing other traffic. An argument ensued during which the deceased’s driver’s licence was taken and his vehicle attached. Back-up assistance of about 6 other policemen was obtained. The deceased was handcuffed to a police bakkie whilst his body remained outside. The police vehicle then drove off dragging the deceased behind it, with another police vehicle following. Between the time of the deceased being dragged and the time he was booked in at the Daveyton Police Station, the deceased sustained injuries to which he succumbed whilst in custody. It was further alleged that, at all relevant times the accused acted with a common purpose.’

[7] The trial court recorded the ‘final diagnostic analyses on the cause of death’ to include the following:

- ‘(i) Back lap dissection on second post mortem showed extensive soft tissue injuries which in a dark-skinned person would not be apparent.
- (ii) the scrotal eversion technique from inside the pubes showed injuries to the testes which were not visible from the outside examination.
- (iii) The toxicology results done by Dr G Perumal states as follows: Cerebral oedema and generalised congestion of the brain and lungs.

The pathologist, Dr Solly Skhosana, concluded that the cause of the deceased’s death was ‘extensive soft tissue injuries and hypoxia’.

[8] In relation to the time and place where the injuries were sustained by the

deceased, the trial court said (at para 46):

‘Apart from the soft tissue injuries the deceased could have sustained during the struggle, [ie during the arrest] it is clear that no other injury was directly inflicted by the policemen [accused 1 and 2].’

And further:

‘Accordingly, it has to be inferred that the majority of the injuries could only have been sustained during the dragging episode and later in the cells. It necessarily follows that the fact that blood was later noticed in the bakkie means that the deceased was probably bleeding from an injury sustained during the dragging episode.’

[9] Regarding the applicant, the trial court recorded the following. The applicant was a member of the back-up squad. He accompanied accused 1, 5 and 4 to the scene where accused 1 pointed out the deceased, who was encircled by a crowd. The applicant instructed the deceased to get into the police bakkie and when he refused he grabbed him by his belt, assisted by accused 2. The deceased resisted and during the ensuing struggle both the deceased and the applicant fell down. Accused 5 succeeded to put handcuffs on only one hand of the deceased. The applicant then managed to cuff both hands of the deceased's body with another pair of hand cuffs. But because he resisted arrest it was impossible to cuff his hands behind his back in accordance with the relevant standing order. The crowd also contributed to the chaos by threatening to burn the police vehicle. The policemen finally managed to get the deceased into the bakkie with his hand cuffed in front of his body, but in a position above and behind his head secured to the leg of a bench inside the bakkie. At that stage several policemen were moving about behind the bakkie. More members of the

community, shouting and causing a ruckus, gathered and surrounded the bakkie and in the melee, a shot was fired, apparently in the air. Accused 8 tried to pick up the deceased's right leg. The applicant reversed the bakkie for a short distance, causing the deceased's upper body to be pushed partly underneath the rear of the bakkie. Accused 7 went to the driver's side of the bakkie, stood near the driver's door for a short while and walked away. At that time, the window of the driver's door of the bakkie was open with accused 6's elbow visible. The applicant then drove off, dragging the deceased behind it. As the vehicle drove off, accused 2 and 8 picked up the deceased's legs and moved with the bakkie for a short distance, but fell behind when the vehicle increased its speed. The bakkie, dragging the deceased behind it, drove away following by another police vehicle, driven by accused 4.

[10] According to the applicant, he feared for his life and therefore only focussed only on the crowd and what was happening in front of him in order to get away to safety. For that reason he said he did not look at the rear view mirrors and drove on believing that the deceased was inside the bakkie until he noticed, when he was about 200 metres away, that his colleagues behind him were flickering their vehicle's lights indicating that he must stop. It is only when he stopped that he discovered that the deceased, who did not appear to have sustained serious injury, had fallen out of the vehicle. The applicant assisted accused 4 to load him back in the bakkie. He delivered him at Daveyton police station and left him in the custody of the station's police.

[11] The trial court rejected the applicant's version that he was unaware that the deceased was being dragged behind the bakkie as he drove away. Having considered

the evidence before it the trial court found that ‘accused 2 to 8 assaulted the deceased in the cell, thereby seriously injuring him’. It also found that ‘[t]here can be no doubt that they foresaw that the injuries may result in his death’.

[12] I agree with the observations made by the Acting President in *Malele v S* that there can be no doubt on the evidence that the deceased was assaulted after he had been placed in the police cell, where it was later discovered that he had died. But, the single witness to the assault, Warrant Officer Ngamlana, testified that when the deceased fell down inside the cell he was surrounded by the policemen (accused 2 to 8) and that he could not see what was happening, but heard what sounded like open hand claps. It is therefore not clear from the judgment whether only one or more of the policemen inside the cell assaulted the deceased. The basis for the finding that ‘accused 2 to 8 assaulted the deceased in the cell’ is, therefore, not clear from the judgment of the trial court.

[13] The trial court, however, made the following finding in respect of the dragging incident:

‘There can be no doubt that all the accused foresaw that in being dragged behind the bakkie the deceased would sustain serious injuries which could result in death, yet they persisted in their conduct of not stopping, or preventing it to continue, thereby clearly reconciling themselves with the event and the eventual result.’

[14] With respect, it seems doubtful that the doctrine of common purpose as enunciated in *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I-706B; *S v Jama & others* 1989 (3) SA 427 (A) at 536D-H; *S v Thebus & another* 2003 (2) SACR 319

(CC) was applied properly by the trial court in this matter and it is likely that another court may find differently in this regard. I also have a difficulty with the trial court's rejection of the applicant's version, that he only focussed ahead and relied on his colleagues behind the vehicle to ensure that everything was in order, as unrealistic and improbable' taking into account the circumstances prevailing at the scene of the deceased's arrest, including the threatening crowd and the quick succession of events. I also question the trial court's conclusion that the applicants' form of intent (*mens rea*) was *dolus eventualis*. In my view, another court might find differently.

[15] But it is not necessary to say more on this aspect. In my view, and considering what has been said above, a grave injustice may otherwise result were I to refuse to refer the decision of 25 August 2016 dismissing the applicants application for special leave to appeal to the court for reconsideration and, if necessary, variation. That in itself constitutes exceptional circumstances enabling me, *mero motu*, to refer the decision of 25 August 2016 to the court for reconsideration.

[16] In the result, I make the following order:

1. Condonation is granted to the applicant for the late filing of his application.
2. The decision of this court dated 25 August 2016 dismissing the applicant's application for special leave to appeal against his conviction and sentence is referred to the court of reconsideration and, if necessary, variation, in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013.
3. The applicant is directed to lodge with the registrar of this court six (6) copies of his application in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013, as

well as six (6) copies of his initial application (case no. 578/16) to this court for special leave to appeal, within one month of the date of this order and thereafter to comply with the rules of this court relating to the conduct of appeals.

MML MAYA

Acting President

APPEARANCES

For the Applicant: Alexander Montano Attorneys,

Johannesburg

Kramer Weihmann & Joubert Attorneys,

Bloemfontein