



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case No: 194/2024

In the matter between:

MUGIYO ULRICH MABUNDA

APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: *Mabunda v The State* (194/2024) [2026] ZASCA 127
(29 September 2026)

Coram: MATOJANE, GOOSEN and MOLEFE JJA

Heard: 25 November 2025

Delivered: 29 September 2026

Summary: Section 17(2)(f) of the Superior Courts Act 10 of 2013 – reconsideration of a refusal of leave to appeal – threshold of grave failure of justice or bringing administration of justice into disrepute – Criminal Law Amendment Act 105 of 1997 – premeditated murder – delivery of conviction in accused’s absence – s 158(1) of the Criminal Procedure Act 51 of 1977 – whether irregularity vitiated the proceedings – s 322(1) of the

Criminal Procedure Act – erroneous statutory reference – reconsideration application granted – compelling reason to grant leave to appeal – proceedings not vitiated by delivery of verdict in absence of accused – accused correctly convicted of premeditated murder – s 51(1) of the Criminal Law Amendment Act – no substantial and compelling circumstances – sentence of life imprisonment confirmed – appeal dismissed.

ORDER

On application for reconsideration: (referred to the Court by the President in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013:

- 1 The application for reconsideration is granted.
 - 2 The order of this Court refusing leave to appeal is set aside and replaced with an order granting leave to appeal to this Court.
 - 3 The appeal is dismissed.
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JUDGMENT

Molefe JA (Matojane and Goosen JJA concurring):

[1] This is an application for reconsideration of an order by two judges of this Court, refusing an application for leave to appeal against the judgment and order of the Mpumalanga Division of the High Court, Mbombela (the high court).

[2] The applicant, Mr Mugiyo Ulrich Mabunda, was convicted of premeditated murder, read with the provisions of s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA), and sentenced to life imprisonment. Mr Mabunda's applications for leave to appeal the conviction and sentence to the high court and thereafter to this Court were refused. On 10 April 2025, the President of this Court referred the application for reconsideration in terms of s 17(2)(f) of the Superior Courts

Act 10 of 2013 (the Superior Courts Act).¹ The jurisdictional threshold is that a grave failure of justice might otherwise result if the order refusing leave to appeal is not reconsidered or that the administration of justice may be brought into disrepute.

[3] The application for leave to appeal was premised on four grounds. First, it is contended that the high court committed a fatal irregularity by delivering its judgment on the conviction of the applicant in his absence, in contravention of s 158(1) of the Criminal Procedure Act 51 of 1977 (the CPA) and s 35(3)(f) of the Constitution of the Republic of South Africa 1996. Second, that the trial also proceeded in the applicant's absence on 14 October 2021, and that the high court's refusal to make a special entry in terms of s 317 of the CPA in respect of that irregularity was wrong. Third, that the indictment was defective by reason of an erroneous statutory reference. Fourth, that the high court misdirected itself in finding premeditation on the evidence, and that the sentence of life imprisonment is, in any event, shockingly inappropriate.

Factual background

[4] On 14 May 2020, the applicant shot and killed his wife, Ms Tebogo Dikeledi Auspicious Mabunda (Ms Mabunda), at their home in Stonehenge residential estate in Mbombela, in the presence of their three children. After shooting her, the applicant shot himself three times in the chest. Ms Mabunda was pronounced dead at the scene. The applicant was conveyed to the hospital, was later arrested and charged with murder.

¹ Section 17(2)(f) of the Superior Courts Act 10 of 2013 provides that where leave to appeal has been refused by the two judges of the Supreme Court of Appeal, the President of the Supreme Court of Appeal may refer the decision for reconsideration and, if necessary, variation.

[5] The applicant was arraigned before the high court on 4 October 2021, on one count of murder read with s 51(1) of the CLAA. He initially pleaded not guilty. After the State led evidence from two witnesses, he changed his plea to guilty on 8 October 2021. He pleaded guilty in terms of s 51(2)(a) of the CLAA and tendered a plea explanation in terms of s 112(2) of the CPA, admitting that he had unlawfully and intentionally caused his wife's death by shooting her, but it was not premeditated. The State declined to accept the plea on the basis that the murder had been premeditated. The high court entered a plea of not guilty under s 113 of the CPA, and the trial continued.

[6] During the trial on 11 October 2021, the applicant's counsel informed the high court that the applicant, who was on bail, was ill and unfit to attend court until 15 October 2021. The applicant's counsel handed a medical certificate to the court. The court issued a warrant for the applicant's arrest and ordered him to provide a medical certificate specifying the diagnosis and prognosis of his condition.

[7] On 13 October 2021, the applicant attended court. He was ill during the proceedings and could not participate meaningfully. The high court ordered that he be placed in the custody of the investigating officer, conveyed to Rob Ferreira Hospital for medical examination, and that the attending medical practitioner report on his fitness to stand trial on 14 and 15 October 2021. The court further ordered that the doctor who had issued the medical certificate on 11 October 2021, attend court on 14 October 2021 with the applicant's medical records.

[8] On 14 October 2021, the applicant was unable to attend court. The medical practitioner who issued the medical certificate duly attended court

and testified regarding the applicant's medical condition. The court also received and considered a medical report from the attending doctor at Rob Ferreira Hospital. Counsel for the applicant placed on record that the proceedings were being conducted in the applicant's absence and that he was unable to receive instructions from his client. The high court, having considered the medical evidence, was satisfied that the applicant was not fit to continue with the trial and postponed the matter to 2 November 2021.

[9] When the trial resumed on 2 November 2021, the applicant's counsel brought an application for a special entry for irregularity or illegality in terms of s 317 of the CPA,² on the ground that the high court received medical evidence in the applicant's absence on 14 October 2021. Counsel sought an order setting aside the proceedings and remitting the matter to start *de novo* before a different judge. The high court dismissed the application, finding that it was not brought *bona fide* and that the proceedings on 14 October 2021 were interlocutory in character.

[10] When both the State and the applicant had closed their cases, the matter was postponed to 12 August 2022 for judgment on the merits, with the applicant duly warned to appear on that date. On 10 June 2022, the clerk of the court emailed the parties' legal representatives, advising them that the judge intended to deliver judgment on 24 June 2022 instead of 12 August 2022. This email was sent to the incorrect email address for the

² Section 317(1) of the Criminal Procedure Act: 'If an accused is of the view that any of the proceedings in connection with or during his or her trial before a High Court are irregular or not according to law, he or she may, either during his or her trial or within a period of 14 days after his or her conviction or within such extended period as may upon application ... on good cause be allowed, apply for a special entry to be made on the record ... stating in what respect the proceedings are alleged to be irregular or not according to law, and such a special entry shall, upon such application for a special entry, be made unless the court to which or the judge to whom the application for a special entry is made is of the opinion that the application is not made *bona fide* or that it is frivolous or absurd or that the granting of the application would be an abuse of the process of the court.'

applicant's attorney, who became aware of the date change only on 22 June 2022, when the prosecutor forwarded the email to him.

[11] On 24 June 2022, both counsel for the applicant and the prosecutor placed on record that the applicant was not present in court. Counsel indicated that he did not know his client's whereabouts and had been unable to secure his attendance. The high court proceeded to deliver its judgment and convicted the applicant of murder in his absence.

[12] On 17 February 2023, the high court imposed a sentence of life imprisonment, finding that no substantial and compelling circumstances existed to justify a departure from the prescribed minimum sentence under section 51(1) of the CLAA. Leave to appeal was refused by the high court and subsequently by this Court.

The reconsideration application

[13] The reconsideration of the application for leave to appeal raises the following issues for determination: (a) whether the proceedings on 14 October 2021 constituted an irregularity warranting a special entry; (b) whether the delivery of the conviction in the applicant's absence failed justice under s 322(1) of the CPA; (c) whether the defect in the indictment caused prejudice to the applicant; (d) whether the high court misdirected itself in finding premeditation; and (e) whether the life sentence requires interference. As will appear, the threshold question that governs all these issues is whether a grave failure of justice would otherwise result or the administration of justice may be brought into disrepute, for purposes of s 17(2)(f) of the Superior Courts Act.

[14] Section 158(1) of the CPA provides:

‘Except as otherwise expressly provided by this Act or any other law, all criminal proceedings in any court shall take place in the presence of the accused.’

[15] Section 35(3) of the Constitution guarantees every accused person the right to a fair trial, including the right to be present at trial.³ These two provisions must be read together.

[16] The consequence of a breach of s 158(1) is governed by s 322(1) of the CPA.⁴ A conviction is not to be set aside by reason of any irregularity unless it appears that it is of such a nature as to amount to itself to a substantial miscarriage of justice.⁵ The enquiry is therefore in two stages. First, was there an irregularity? Second, did it produce a failure of justice? The first question does not answer the second. Not every breach of a procedural rule, even one with a constitutional dimension, vitiates the conviction.⁶

[17] The authorities identify a category of irregularities so gross that a failure of justice is presumed – cases where the accused cannot properly be said to have been tried at all.⁷ A breach of s 158(1) of the CPA does not automatically fall within that category. The court must consider the totality

³ Section 35(3)(e) of the Constitution of the Republic of South Africa.

⁴ Section 322(1) of the CPA determines in relevant part as follows: ‘. . . notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.’

⁵ *S v Moodie* 1961 (4) SA 752 (A) at 758 E-H, cited with approval in *S v Moagi* [2025] ZASCA 188; [2026] 1 All SA 301 (SCA); 2026 (1) SACR 457 (SCA) fn 2.

⁶ *S v Kapa* [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC)(*Kapa*) para 27, see also *S v Jaipal* [2005] ZACC 1; [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) para 38-39; *Tuta v S* [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) para 30.

⁷ *Kapa* para 75, with reference to a footnote in *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 para 42.

of the proceedings to determine whether the trial's substantive fairness was compromised.⁸

[18] It is not disputed that the delivery of a criminal verdict forms part of the trial proceedings for purposes of s 158(1) of the CPA. The right of an accused to be present at that moment cannot be waived by counsel acting in their absence.⁹

[19] The judgment convicting the accused was delivered in his absence. This is highly unusual and breaches s 158(1) of the CPA and potentially the accused's right to a fair trial. Careful consideration of the facts and legal principles is required. If non-compliance with s 158 of the CPA per se renders the trial unfair, then grave injustice may arise if the order refusing leave to appeal is not reconsidered. We therefore hold that the jurisdictional facts for reconsideration are met and turn to the application for leave to appeal.

The application for leave to appeal

[20] Once the Court establishes that the jurisdictional threshold for reconsideration is met, it steps into the shoes of the judges who considered the petition. This means that the test for leave to appeal applies.

[21] On conviction, the applicant's absence when the verdict was delivered raises a compelling reason to consider whether the conviction was sound. There is plainly an arguable point of law that, on the facts of

⁸ *S v Cupido* [2024] ZASCA 4 (16 January 2024)(*Cupido*) para 51, citing *Thebus and Another v The State* [2003] ZACC 12; 2003 (2) SACR 319 (CC); 2003 (6) SA 505; 2003 (10) BCLR 1100; [2003] ZACC 12 para 74.

⁹ *S v Roman* 2006 (2) SACR 490 (C) para18. The court held that the right under s 158(1) is not waivable by counsel in the absence of the accused. Even so, the consequence of a breach depends on s 322(1) of the CPA and whether a failure of justice resulted.

the case, such absence might vitiate the proceedings. I am similarly of the view that there is an arguable point of law regarding the fair application of the applicable minimum sentence statutory regime. Accordingly, leave to appeal ought to be granted in relation to both conviction and sentence.

The appeal

[22] The applicant's absence at the delivery of the verdict had no bearing on the evidence. The trial closed with the record complete. Everything that was before the high court when it convicted the applicant, every witness, every document, every submission had been received in his presence. Nothing in the judgment on the merits could have been affected by his absence on 24 June 2022. The high court's assessment of all the evidence led by the State, its evaluation of the evidence of the two key witnesses, and its conclusions on premeditation were all arrived at on a complete record of evidence which was received in the presence of the applicant throughout the evidentiary proceedings. The verdict was the product of that record, not of the delivery hearing.

[23] Second, the absence was not deliberate. The applicant's counsel was in court, placed his absence on record, and confirmed that he did not know his client's whereabouts. In its leave to appeal judgment, the high court characterised the applicant as obstreperous and having disregarded a reasonable request by the court. The record does not support that characterisation. The applicant was not notified through any direct channel that the judgment date had been moved. He cannot be found to have been voluntarily absent from a hearing of which he has no notice.

[24] Third, and most importantly, the applicable test asks whether, on the evidence, unaffected by the irregularity, there is proof of guilt beyond a

reasonable doubt.¹⁰ The irregularity here concerns how the trial was formally concluded. It did not taint any evidence, introduce procedural unfairness, or prevent the applicant from participating at any stage that mattered to the outcome. He was present for every day of the trial, heard every witness, gave instructions to his counsel, and had the full opportunity to challenge and adduce evidence. The question that s 322(1) of the CPA poses is whether the irregularity failed justice, not whether a procedural norm was departed from. Based on these facts, the answer is that it did not.

[25] This conclusion is consistent with recent authority. In *Kapa*,¹¹ the Constitutional Court affirmed that not every irregularity, including one with a constitutional dimension, vitiates the right to a fair trial. The relevant question is whether the proceedings, viewed as a whole, were substantively fair. Viewed as a whole, these proceedings were fair. The applicant had a full trial, conducted with legal representation, on a complete record, over an extended period. The verdict delivered in his absence, attributable to an administrative error in notifying his attorney of the changed date, did not alter that assessment.

[26] Not every irregularity vitiates proceedings entirely. However, the high court's approach in this case is not acceptable. The peculiar circumstances and facts warrant our finding on appeal. It should not be taken as an endorsement of the proposition that a trial court can proceed to deliver a verdict in the absence of the accused.

¹⁰ *Cupido* para 38, quoting from *Thebus and Another v S* 2003 (2) SACR 319 (CC); 2003 (6) SA 505; 2003 (10) BCLR 1100; [2003] ZACC 12 para 74: '... the applicable test is whether, "on the evidence, unaffected by the defect or irregularity, there is proof of guilt beyond reasonable doubt".'

¹¹ *Kapa* para 27.

Premeditated murder

[27] The applicant's case is that the murder was committed on the spur of the moment and was not premeditated. He alleged that he was overcome by anger upon discovering that the deceased was on a telephone with what he believed to be a romantic partner, and acted without premeditation. This account informed the explanation tendered in the s 112 of the CPA statement.

[28] The high court convicted the applicant primarily on the evidence of two witnesses: Khenso Matsane (Khenso), who is the applicant's stepson and was 15 years old at the time he testified, and the testimony of the deceased's lawyer Ms Tersia Marshall (Ms Marshall), a practising attorney in Mbombela who had been retained by the deceased to institute divorce proceedings. The high court applied the appropriate caution in evaluating both the evidence of a single witness and the evidence of a child witness.

[29] Khenso testified that on the day in question, the deceased came home from work, and the applicant asked to speak with her outside. The applicant and the deceased moved to the area near the garage to speak privately, leaving the children inside. The applicant then returned to the house, moved along the passage to the guest room, and emerged with a firearm, which Khenso heard him cock as he walked past. Khenso followed the applicant toward the garage, but the applicant closed the door with a remote control. He returned to his bedroom and heard gunshots. He ran outside and found the deceased on the ground, gravely injured and gasping for breath. The applicant was also on the ground with gunshot wounds. Khenso testified unequivocally that there was no shouting or fighting in the house before the shooting. He denied in cross-examination that he might have imagined the sound of a firearm being cocked.

[30] Ms Marshall testified that the deceased had instructed her to institute divorce proceedings, that the applicant knew about the intended divorce and had discussed it with his family. The deceased had, in the days before her death, expressed serious fear for her safety. On 14 May 2020, the deceased telephoned Ms Marshall at 17h26. She was crying and reported that the applicant had tried to assault her. While the call was in progress, Ms Marshall heard the deceased scream, followed by two gunshots. The call then terminated. Ms Marshall immediately went to the deceased's home and found that she had been shot dead.

[31] The applicant's counsel argued that the high court misdirected itself in finding premeditation. The argument was that the killing occurred in the heat of the moment, triggered by the applicant's belief that the deceased was speaking to a lover on the phone. That account, it was argued, requires the court to accept that the applicant, upon hearing his wife on the telephone, spontaneously went to a separate room of the house, retrieved a firearm, loaded and cocked it, walked back along the passage past his children's bedroom, and shot her, all without any intervening reflection. The evidence does not support that account.

[32] A finding of premeditation does not require facts of extended planning. Even a few minutes of deliberate resolve suffices, provided that there was a formed intention to kill before the act was carried out.¹² Khenso's evidence precisely establishes that. The applicant left the deceased, went to collect a firearm, armed it, and returned to kill her. The deceased was on the telephone with her attorney when he did so; an

¹² *S v Kekana* [2018] ZASCA 148; 2019 (1) SACR 1 (SCA); [2019] 1 All SA 67 para 37, quoting from *S v Kekana* [2014] ZASCA 158 para 13.

attorney instructed to obtain a divorce. The context of the relationship (the deceased expressed fear for her safety), and the applicant's knowledge of the impending divorce are all consistent with a deliberate and formed intention to kill rather than a spontaneous act.

[33] The high court correctly found the murder to have been premeditated. It committed no misdirection. The conviction of premeditated murder must stand.

Sentence

[34] The applicant attacks the life-imprisonment sentence on two bases. First, that he acted with diminished responsibility and that this constitutes a substantial and compelling circumstance. Second, that his status as a first offender warranted a departure from the prescribed minimum sentence of life imprisonment.

[35] On diminished responsibility, no psychiatric or psychological evidence before the court establishes any clinical diagnosis or impairment of the applicant's cognitive faculties at the time of the offence. The submission amounts to the proposition that the applicant was angry and emotionally disturbed by the state of the marriage. Emotional disturbance arising from a domestic dispute, without more, cannot constitute diminished responsibility in the legal sense.

[36] Regarding his status as a first offender, the absence of prior convictions is a mitigating factor that must be weighed in the sentencing. Here, the high court considered it. It does not, in itself and in a case such

as this, constitute a substantial and compelling circumstance sufficient to displace a sentence of life imprisonment.¹³

[37] The aggravating features in this case are substantial. The applicant killed his wife in a premeditated act, in the sanctity of her home and in the presence of their children. The deceased had expressed fear for her life to her attorney in the days before her death. She was shot while she was on the telephone seeking legal protection from him. Women are entitled to live free from fear of lethal violence from those who are meant to protect them, including in their own homes.¹⁴ The deceased was denied that entitlement in the most absolute way. Even if the applicant's account of the perceived infidelity, which the high court correctly rejected, were to be accepted, it would afford no basis for mitigation. The appeal on sentence must also fail.

The proceedings of 14 October 2021 and the s 317 special entry

[38] The expert evidence led on 14 October 2021 related to the applicant's medical fitness to stand trial. It did not touch on the merits of the case. The applicant could not attend the trial due to illness, and the proceedings were postponed. Although the high court's own characterisation of the proceedings as interlocutory was an incorrect basis for rejecting the s 317 application, the result was correct. No irregularity is established in respect of the proceedings on 14 October 2021.

¹³ *S v Malgas* [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) para 12; *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA); [2010] 2 All SA 424 (SCA) para 13.

¹⁴ *S v Chapman* 1997 (3) SA 341 (SCA); [1997] 3 All SA 277 (A) at 345A-B. See also *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA) para 1; *S v Tshabalala and Another* [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) Introduction fn 1.

The defective indictment

[39] The indictment charged the applicant with murder read with s 51(1) of ‘the Criminal Law Amendment Act 51 of 1997’. Act 51 of 1997 is the Environment Laws Rationalisation Act, which clearly has nothing to do with the murder charge. The correct reference is s 51(1) of the Criminal Law Amendment Act 105 of 1997. The indictment correctly cited the sentencing provision in Act 105 of 1997, and the applicant was explicitly advised of its provisions and the prescribed minimum sentence at the commencement of the trial.

[40] A defect in the indictment does not vitiate a conviction where the accused suffered no prejudice.¹⁵ In *Director of Public Prosecutions, Gauteng Division, Pretoria vs Buthelezi*,¹⁶ this Court held that an erroneous statutory reference that is merely a typographical error does not amount to a misdirection where the accused knew the charge, understood the applicable sentencing regime, and was not misled.

[41] The applicant tendered a plea of guilty in terms of s 51(2) of the CLAA, which the State refused, and the entire trial proceeded on the basis that premeditation under s 51(1) was alleged. His defence was conducted with a full understanding of what was at stake. The error in the statutory reference caused him no prejudice.

[42] I therefore find that the applicant was correctly convicted on the evidence before the high court. The high court exercised its sentencing discretion correctly. Therefore, the appeal must fail.

¹⁵ *S v Legoa* [2002] 4 All SA 373 (SCA); 2003 (1) SACR 13 (SCA) para 22. The test remains whether the accused had a fair trial.

¹⁶ *Director of Public Prosecutions, Gauteng Division, Pretoria v Buthelezi* [2019] ZASCA 170; 2020 (2) SACR 113 (SCA) para 15.

[43] As a result, the following order is made:

- 1 The application for reconsideration is granted.
- 2 The order of this Court refusing leave to appeal is set aside and replaced with an order granting leave to appeal to this Court.
- 3 The appeal is dismissed.

D S MOLEFE
JUDGE OF APPEAL

Appearances:

For Appellant: P F Pistorius SC

Instructed by: Coert Jordaan Inc., Attorneys, Mbombela
Giorgi & Gerber Inc, Bloemfontein

For Respondent: M Magwanyane (with T S Msibi)

Instructed by: The Director of Public Prosecutions, Mbombela.