

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 321/2025

In the matter between:

LWAZI NGEWANA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ngewana v The State* (321/2025) [2026] ZASCA 151 (12 November 2026)

Coram: MATOJANE ADP, KATHREE-SETILOANE and COPPIN JJA, BLOEM and MOOKI AJJA

Heard: 10 September 2026

Delivered: 12 November 2026

Summary: Criminal Law and Procedure – sentence – special leave – s 309 of the Criminal Procedure Act 51 of 1977 (the CPA) – leave to appeal refused by the magistrate – petition in terms of s 309C of the CPA refused by the High Court – leave to appeal against dismissal of the petition granted by this Court – test is whether the appellant has shown reasonable prospects of success on appeal – appeal dismissed.

ORDER

On special leave from: Eastern Cape Division of the High Court, Mthatha. (Dawood J and Myataza AJ, sitting as court of appeal):

The appeal against the dismissal of the petition by the Eastern Cape Division of the High Court, Mthatha, in terms of s 309C of the Criminal Procedure Act 51 of 1977, is dismissed.

JUDGMENT

Kathree-Setiloane JA and Mooki AJA (Matojane ADP and Coppin JA and Bloem AJA concurring)

[1] This is an appeal against the refusal by the Eastern Cape Division of the High Court, Mthatha (the high court) to grant the appellant leave to appeal against the sentence imposed by the Regional Division of the Eastern Cape, Butterworth (the regional court). The appellant was charged with possession of an unlicensed firearm (count 1), breach of a protection order (count 2), and assault with intent to do grievous bodily harm (counts 3 to 5). The firearm was a Vektor Z88 9 mm Parabellum semi-automatic pistol (the firearm).

[2] The charges against the appellant emanate from two incidents at his home in June and July 2021. On 26 June 2021, the appellant asked Mrs Lulama Ngewana (Mrs Ngewana), his wife, to lend him an expensive decorative mat. When she questioned the need for the item, the appellant assaulted Mrs Ngewana by grabbing

her, banging her head against a wall, thrusting his finger into her nose, and forcefully pushing her against a wall, causing injury to her face.

[3] A second incident occurred on 6 July 2021. Mrs Ngewana found the appellant assaulting an employee, Mr Sinoxolo Mbiza (Mr Mbiza), during an altercation over keys and whether a house on the property, in which Mr Mbiza lived, was locked. Despite her intervention, the appellant continued his violent assault on Mr Mbiza, repeatedly punching him until he managed to escape. When Mrs Ngewana attempted to record the incident on her cellphone, the appellant turned his aggression towards her, seized her and head-butted her with such force that the back of her head struck a windowsill.

[4] The firearm charges stemmed from a family decision, following upon the death of Mr Jonase, to sell his firearm. At the end of June 2021, Mr Mafuya, a representative of the Jonase family, handed the firearm to the appellant for valuation of its price. On 29 July 2021, two members of the South African Police Service (the SAPS), Warrant Officer Sindisile Masindwa and Sergeant Sinethemba Gwadiso (the police officers) executed a search warrant at the appellant's home and found the firearm in a locked safe in his bedroom. They found the keys to the safe hanging on a door in the bedroom. Before they opened the safe, the appellant informed them that it contained a firearm belonging to his relative, the late Mr Jonase. He explained that he intended to purchase the firearm, and had kept it in the safe pending a valuation of its price. The appellant was not licensed to possess the firearm. Although he had previously possessed a licensed firearm, he was compelled to surrender it following the issuance of a domestic violence protection order arising from his acts of domestic violence against his wife.

[5] The regional court found that the appellant unlawfully possessed the firearm and had assaulted Mrs Ngewana and Mr Mbiza. It convicted him of possession of an unlicenced firearm on count 1 and, on counts 3 and 4, it convicted him of common assault. He was acquitted on counts 2 and 5. The regional court sentenced the appellant to five years' imprisonment for the possession of an unlicenced firearm, and 12 months each for assault common in counts 3 and 4. The regional court ordered that the sentences in the latter two counts run concurrently with the sentence in count 1, as envisaged in s 280(2) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act). It, accordingly, sentenced the appellant to an effective term of five years' imprisonment. It also declared the appellant to be unfit to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000 (the Firearms Control Act).

[6] In sentencing the appellant, the regional court took into account his personal circumstances, including that he was 59 years old at the time of sentencing, married to the complainant (Mrs Ngewana), held a Senior Teacher's Diploma as well as B.A. and B.Ed. degrees, was employed by the Department of Education as an educational specialist, and suffered from diabetes. In relation to the two assault convictions, the regional court considered their gravity, particularly because the one involved acts of gender-based violence against his wife. It noted his lack of remorse. It had regard to the gravity of the offence of possessing an unlicensed firearm and that it carries a prescribed minimum sentence. The regional court also took into account the probation officer's report and her recommendation that a non-custodial sentence of correctional supervision would be appropriate. However, it concluded that due to the seriousness of the offences committed by the appellant, such a sentence would be unduly lenient.

[7] The appellant applied to the regional court, in terms of s 309B of the Criminal Procedure Act, for leave to appeal against both his convictions and the sentences. That application was refused. He thereafter petitioned the high court in terms of s 309C of the Criminal Procedure Act. Following the dismissal of that petition, he applied to this Court for special leave to appeal, in terms of s 17(2)*(b)* of the Superior Courts Act 10 of 2013 (Superior Courts Act), against the high court's refusal to grant leave. This Court (per Schippers and Baartman JJA) granted special leave to appeal, but only in relation to the high court's refusal to grant leave to appeal against the sentence imposed by the regional court (the Supreme Court of Appeal order).

[8] The appellant however construed the Supreme Court of Appeal order as granting him leave to appeal against the sentence, directly to this Court. At the outset of the hearing, his counsel submitted that this Court lacked jurisdiction to entertain the appeal against the sentence imposed by the regional court. Notwithstanding that contention, counsel urged this Court to invoke its power, under s 173 of the Constitution, to amend the Supreme Court of Appeal order so as to grant the appellant leave to appeal the sentence to the full court of the high court.

[9] It is correct that this Court has no jurisdiction to hear an appeal directly from the regional court. An appeal against a decision of a regional court would only lie to this Court after it has been considered and determined by the high court.[1] The appellant has, however, misunderstood the nature of the appeal before this Court. To resolve any uncertainty concerning the appeal, it is important to emphasise that an order of a division of the high court dismissing a petition for leave to appeal in terms of s 309C of the Criminal Procedure Act against a conviction and/or sentence

[1] Section 309(1)*(a)* of the Criminal Procedure Act 51 of 1977 (The Criminal Procedure Act). See *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 para 26; *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) paras 5-6;

in the regional court constitutes a 'decision' as contemplated in s 16(1)*(a)* and *(b)* of the Superior Courts Act.[2] That order is appealable with the special leave of this Court, in terms of s 17(2)*(b)* on petition. If this Court is minded to grant special leave to appeal against the dismissal of the s 309C petition in the high court, it must do so to this Court.

[10] To place the meaning of the Supreme Court of Appeal order beyond doubt, it is necessary to consider the relief sought by the appellant in his petition to this Court: He sought the following relief:

'Granting Applicant special leave to appeal to the Supreme Court of Appeal against the whole of the Judgment and Order of the Eastern Cape Division Court of Appeal, Mthatha, which Judgment was delivered on 5 November 2024.'

In substance, the appellant sought special leave to appeal against the high court's dismissal of his petition in terms of s 309C of the Criminal Procedure Act. A reading of the Supreme Court of Appeal order clarifies that special leave was granted in respect of the high court's dismissal of the s 309C petition. It reads:

'E. SPECIAL LEAVE TO APPEAL GRANTED

…

AGAINST THE DISMISSAL OF A PETITION IN TERMS OF S 309C OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

Special Leave to Appeal is granted to the Supreme Court of Appeal, *only against sentence*.' (My emphasis.)

The italicised portion of the order reflects an insertion made by this Court. It is this insertion that has given rise to the confusion regarding the meaning of the order. However, when the Supreme Court of Appeal order is read in its proper context, it is clear that this Court granted the appellant special leave to appeal against the high court's refusal to grant him leave to appeal against the sentence only. The Supreme

[2] Section 16(1)*(b)* of the Superior Courts Act provides that an 'an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.'

Court of Appeal order cannot reasonably be construed as granting the appellant leave to appeal against the sentence itself.

[11] This Court has repeatedly held, most notably in *S v Matshona*, [3] that where special leave is granted to appeal against a high court's refusal of a petition under s 309C of the Criminal Procedure Act, the issue before this Court is whether leave to appeal should have been granted, not whether the conviction or sentence by the regional court should be overturned. Accordingly, this Court's enquiry is confined to whether there are reasonable prospects of success in the contemplated appeal, or another compelling reason for leave to be granted. It does not extend to a determination of the merits of the appeal itself.[4]

[12] With the meaning of the Supreme Court of Appeal order now settled, I turn to consider the appeal. The question for determination in the appeal is whether the high court erred in refusing to grant the appellant leave to appeal against the sentence imposed by the regional court.

[13] The appellant's principal contention is that the high court erred in refusing to grant him leave to appeal against the sentences imposed, as they are grossly disproportionate and induce a sense of shock. He argued that having regard to the appellant's personal circumstances, in particular that he was 59 years old, worked as an educational specialist in the Department of Education, and was a diabetic requiring chronic medication, the regional court should have imposed a non-custodial sentence. The respondent argued, to the contrary, that given the gravity

[3] *S v Matshona* [2008] ZASCA 58; [2008] 4 All SA 68 (SCA); 2013 (2) SACR 126 (SCA) paras 5-7. *De Klerk v S* [2023] ZASCA 172; 2023 JDR 4586 paras 3-4; *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 6; *Dipholo v S* [2015] ZASCA 120; 2015 JDR 1980 (SCA); [2015] JOL 33987 (SCA) paras 4-5; *Mvubu v S* [2026] ZASCA 62; 2026 JDR 2004 (SCA); [2026] JOL 75726 (SCA) para 7 ; *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA); [2011] JOL 26908 (SCA) paras 2-3;*Vumani Oscar Ntuli v S* [2023] ZASCA 150; 2023 JDR 4306 (SCA) para 6 and *S v Kriel* [2011] ZASCA 113; 2012 (1) SACR 1 (SCA) paras 11-12.
[4] *Matshona* at paras 5-6.

of the crimes committed by the appellant, a non-custodial sentence would be too lenient, particularly in view of the appellant's acts of gender-based violence against his wife, and the need for the courts to protect victims against such abuse.

[14] The appellant has already served the two 12-month sentences imposed for the assault convictions. Bearing in mind that there is no appeal against the appellant's conviction, an appeal against the high court's refusal to grant leave to appeal against the two sentences imposed for assault, has become academic. The appellant has already served those sentences and, consequently, granting leave to appeal them would have no practical effect.[5] The appellant properly conceded this during argument. Accordingly, the only sentence that remains in issue is the sentence imposed for the unlawful possession of a firearm.

[15] The appellant was charged with the unlawful possession of a firearm in contravention of s 3, read with ss 1, 103, 117, 120(1)*(a)* and 121, read further with Schedule 4 of the Firearms Control Act, and s 250 of the Criminal Procedure Act. In *S v Motloung*, [6] this Court settled the debate on whether offences under the Firearms Control Act are governed by the sentencing regime under the Firearms Control Act or the minimum sentencing regime established by the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act). It held that the minimum sentencing regime of the Criminal Law Amendment Act applies to such offences. [7]

[16] Section 51(2) of the Criminal Law Amendment Act prescribes a minimum sentence of 15 years' imprisonment for a first conviction involving the unlawful

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[5] Section 16(2)*(a)* of the Superior Courts Act provides that an appeal may be dismissed on that ground alone.
[6] *S v Motloung* [2016] ZASCA 96; 2016 (2) SACR 243 (SCA); [2016] JOL 36048 (SCA); paras 20-23 (*S v Motloung*); *S v Thembalethu* [2008] ZASCA 9; 2009 (1) SACR 50 (SCA); [2008] 3 All SA 417 (SCA) paras 11-15.

possession of an automatic or semi-automatic firearm, unless substantial and compelling circumstances, as contemplated in s 51(3), justify the imposition of a lesser sentence. However, in this matter, the regional court did not apply the minimum sentencing regime under the Criminal Law Amendment Act because the prosecution did not give notice in the charge sheet that it intended to rely on the provisions of s 51(2). The prosecution had only raised its reliance on s 51(2) for the first time, during argument, on sentence in the trial. The regional court's decision on this aspect is sound and is, correctly, not challenged by the appellant.[8] The Firearms Control Act prescribes a maximum sentence of 15 years' imprisonment for the unlawful possession of a semi-automatic firearm.[9] The firearm found in the appellant's possession fell into this category.

[17] The regional court sentenced the appellant to five years' direct imprisonment for the unlawful possession of a firearm. In imposing that sentence, the regional court properly considered the well-established triad set out in *S v Zinn*,[10] namely the appellant's personal circumstances, the seriousness of the offence, and the interests of society. As concerning his personal circumstances, the regional court took into account the appellant's educational background, employment history, and that he was a chronic diabetic. In relation to the latter, chronic diabetes does not exempt an offender from incarceration as it is a manageable disease. For chronic diabetes to constitute a mitigating factor, it must be shown that the prison system is completely incapable of managing the offender's condition or that imprisonment would amount to a disproportionately harsh and life-threatening punishment. The appellant did not provide the regional court with any such evidence.

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[8] *Motloung* at para 19.
[9] Sections 120(1)*(a)* and 121 read with schedule 4 of the Firearms Control Act.
[10] *S v Zinn* 1969 (2) SA 537 (A); [1969] 3 All SA 57 (A) 540G-H.

[18] The regional court was, therefore, justified in rejecting the probation officer's recommendation that a non-custodial sentence of correctional supervision should be imposed. Such a sentence would have been unduly lenient and disproportionate to the seriousness of the offence. It would furthermore have failed to give due weight to society's legitimate interest in deterring the unlawful possession of firearms, particularly automatic and semi-automatic firearms, the proliferation of which poses a significant threat to public safety and to the constitutional rights of members of society to life and bodily integrity.

[19] An important factor in determining an appropriate sentence for the unlawful possession of a firearm is the accused's explanation for possessing it. The appellant provided none. Instead, he denied possessing the firearm, despite evidence that it was found in a locked safe in his bedroom, and had been entrusted to him for evaluating the price as he intended to buy it. Indeed, he admitted as much to the police officers who discovered the firearm in his locked safe. Yet at the trial he unequivocally denied ever having possessed it.

[20] In the course of his argument the appellant's counsel criticized the regional court's rejection of the appellant's denial, whilst simultaneously contending that his possession of the firearm for the purposes of evaluation, diminished his culpability, and that the regional court had failed to attach sufficient weight to this fact. Not only is this submission irreconcilable with the appellants original stance but it also lacks candour. Moreover, that the firearm was possessed for a purpose other than the commission of a serious offence, does not absolve the appellant of the moral blameworthiness associated with its unlawful possession.

[21] The appellant is an educated and accomplished individual who worked in the field of education. He knew that his possession of the firearm was unlawful and

was aware, even before receiving it from Mr Mafuya, that he was prohibited from possessing a firearm. In this regard, he had previously been required to surrender his licensed firearm pursuant to a domestic violence protection order. Despite this, he retained possession of the firearm for almost a month and neither evaluated it nor surrendered it to the SAPS. These are significant aggravating factors. This notwithstanding, the regional court exercised a measure of mercy by ordering that the sentence of five years' imprisonment run concurrently with the two sentences of 12 months' imprisonment imposed for the assault convictions. Against this background, the effective sentence of five years' imprisonment cannot be said to be shockingly disproportionate or inappropriate.

[22] Accordingly, the appeal against the high court's refusal to grant leave to appeal the sentence must fail. The appellant has failed to demonstrate that there are reasonable prospects of another court reaching a different conclusion, or that any other compelling reason exists for leave to appeal to be granted.

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

The appeal against the dismissal of the petition by the Eastern Cape Division of the High Court, Mthatha, in terms of s 309C of the Criminal Procedure Act 51 of 1977, is dismissed.

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F KATHREE-SETILOANE

JUDGE OF APPEAL

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O MOOKI

ACTING JUDGE OF APPEAL

Appearances

For appellant:	T M Jikwana
Instructed by:	Graham Mpeto & Associates Inc, Mthatha
	Gcasamba Inc Attorneys, Bloemfontein
For respondent:	A Bikitsha and S Maarman
Instructed by:	The Director of Public Prosecutions, Mthatha.