THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 478/2020

In the matter between:

EDWARD MNTAMBO **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Edward Mntambo v The State* (Case no 478/2020) [2021] ZASCA 17 (11 March 2021)

Coram: MOCUMIE, DLODLO and MBATHA JJA and WEINER and POYO-DLWATI AJJA

Heard: By agreement, matter disposed of without oral hearing in terms of s 19*(a)* of the Superior Courts Act 10 of 2013.

Delivered: The order was handed down on 22 February 2021. This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to have been at 10h00 on 11 March 2021.

Summary: Criminal law – practice and procedure – charge of murder – appointment of assessors in terms of the proviso to s 93*ter* (1) of the Magistrates' Courts Act 32 of 1944 not complied with – appellant not afforded opportunity to elect whether the magistrate should sit with or without assessors – court not properly constituted – fatal misdirection which vitiates the proceedings.

ORDER

On appeal from: Regional Court sitting at Verulam, KwaZulu-Natal (Magistrate Mr Jacobs):

1 The appeal is upheld and the conviction and sentence are set aside.

2 The appellant is to be released from custody with immediate effect.

JUDGMENT

Weiner AJA: (Mocumie, Dlodlo and Mbatha JJA and Poyo-Dlwati AJJA concurring)

[1] The appellant was convicted of murder by the Regional Court, sitting at Verulam, KwaZulu-Natal on 27 September 2012. He was sentenced to fifteen (15) years' imprisonment. The Regional Court and the KwaZulu-Natal Division of the High Court, Pietermaritzburg refused leave to appeal on 27 September 2012 and 14 May 2013 respectively. He petitioned this Court on 25 October 2016 and was granted special leave to appeal against both the conviction and sentence on 19 December 2016. The appellant has been incarcerated for over eight years.

Condonation

[2] The appellant failed to comply with rules 7(1), 8 (1) and 10 (1) of this Court's rules in that he filed his notice of appeal, copies of the record and his heads of argument out of time. He has filed an application for condonation and for the appeal to be re-instated.

[3] In dealing with this issue, it is useful to refer to the judgment in this Court in *Mulaudzi v Old Mutual Life Assurance company (SA) Limited*,[1] where Ponnan JA stated that:

'Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.[2]

In applications of this sort the prospects of success are in general an important, although not decisive, consideration. As was stated in *Rennie v Kamby Farms (Pty) Ltd*, it is advisable, where application for condonation is made, that the application should set forth briefly and succinctly such essential information as may enable the court to assess an applicant's prospects of success.'[3]

[4] The reasons for the appellant's non-compliance with the abovementioned rules are set out in detail by the appellant. For purposes of this enquiry, it is unnecessary to give a detailed account. Suffice it to state that the inordinate delay of over five years was apparently caused by his erstwhile attorney providing inadequate service and his inability to raise funds to pursue the appeal after the Legal Aid Board refused his application for legal assistance, which resulted in the notice of appeal, copies of the record and his heads of argument being filed out of time. He was saved by his current attorney in ensuring that the appeal be reinstated. The attorney filed an affidavit confirming this explanation. For that reason, although the delay of over five years is inordinate and would ordinarily not be countenanced, his explanation is accepted as reasonable for the purposes of assessing whether good cause has been made out for condonation. On the prospects of success, a necessary requirement for condonation to be granted, I will deal briefly with the facts leading to the appellant's conviction.

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[1] *Mulaudzi v Old Mutual Life Insurance Company (South Africa) Limited and Others, National Director of Public Prosecutions and Another v Mulaudzi* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA).
[2] Ibid para 26.
[3] Ibid para 34.

[5] The appellant contended that he was convicted on the basis of the evidence of the deceased's mother and her grandson. Both alleged that on the fateful night two men entered their home while they were sleeping and shot the deceased. The deceased died later in hospital. The deceased's mother said that she identified the appellant as the assailant that pulled the trigger. She insisted that she identified him through a light from the screen of a cell phone. However, in her statement to the police she stated that she could not identify him. She saw him again the following day and told her grandson that the appellant was the perpetrator. The magistrate dealt with the grandson's evidence as that of a single witness.

[6] The State's evidence suffered from the typical shortcomings of evidence of a single identifying witness. In the absence of any *aliunde* evidence which could pin the appellant to the commission of the murder, he ought to have been discharged upon an application brought under s 174 of the Criminal Procedure Act 51 of 1977. The evidence of the State was simply not satisfactory. For these reasons, I have serious doubts about the correctness of the accused's conviction on the count of murder, but in the view I take of the matter, it is not necessary to say more in that regard.

[7] Having regard to the explanation the appellant has provided and the applicable legal principles, the appellant has established good grounds for condonation and the re-instatement of the appeal. The State does not oppose the application for condonation for non-compliance with the rules of this Court and the re-instatement of the appeal. Condonation is accordingly granted and the appeal is re-instated.

Section 93*ter* (1) of the Magistrates' Courts Act No 32 of 1944 (the Act)

[8] The appellant has raised the challenge that there was non-compliance with the provisions of the proviso to s 93*ter* (1) of the Act, which provides that, when

facing a murder charge, assessors must be appointed by the magistrate unless the accused waives such right. The section reads:

'**93***ter* **Magistrate may be assisted by assessors**

1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-

(a) before any evidence has been led; or

(b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: *Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him*.' [Emphasis added]

[9] Until the judgment in *S v Gayiya*[4] there were conflicting judgments in relation to the interpretation of s 93*ter*(1). This Court in *Gayiya* referred to *Chala and Others v Director Of Public Prosecutions, KwaZulu-Natal and Another*,[5] stating that the conflicting authorities had been succinctly dealt with in that case. In *Gayiya*, it was held that the appointment of assessors was peremptory, unless the accused requests, prior to him pleading to a charge of murder, that the trial should proceed without assessors. Mpati P stated:

'In my view the issue in the appeal is the proper constitution of the court before which the accused stood trial. The section is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder (as in this case) *shall* be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused, before the

[4] *S v Gayiya* [2016] ZASCA 65; 2016 (2) SACR 165 (SCA).
[5] *Chala and Others v Director of Public Prosecutions, Kwazulu-Natal and Another* 2015 (2) SACR 283 (KZP).

commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors.

. . .

In the present matter, the quorum prescribed by the proviso to ss (1) of s 93*ter* of the Magistrates' Courts Act was three members, namely the regional magistrate and two assessors, unless the accused had requested that the trial proceed without assessors, in which event in his discretion the regional magistrate could, sitting alone, have constituted a quorum. No such request was made by the accused.'[6]

[10] The court held that the failure to comply with the proviso resulted in the court not being properly constituted and it set aside the conviction and sentence. In *Shange v S*,[7] Lewis JA referred to and endorsed *Gayiya.* She stated:

'In *S v Gayiya* 2016 (2) SACR 165 (SCA) this court, referring to *Chala v DPP, KwaZulu-Natal* 2015 (2) SACR 283 (KZP) and the authorities discussed there, considered that where the regional magistrate had not sat with assessors, and the accused had not requested that the trial not proceed with assessors, the court was not properly constituted and that the convictions and sentences had to be set aside.'

[11] In the present matter, it is clear from the record of the proceedings that the appellant was not afforded an opportunity by the magistrate to decide whether to request that the trial proceed with or without assessors before he was asked to plead. It is common cause that there was non-compliance with the proviso to s 93*ter* (1) of the Act in that no assessors were appointed in terms of the proviso to the section and the appellant did not waive his right to such appointment. This is a fatal misdirection which vitiates the proceedings. The State properly conceded the point and accepted that the conviction and sentence should be set aside and the appellant immediately released from prison. The appeal must therefore succeed.

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[6] *Gayiya* fn 4 paras 8 and 11.
[7] *Shange v S* [2017] ZASCA 51.

[12] Accordingly:

1 The appeal is upheld and the conviction and sentence are set aside.

2 The appellant is to be released from custody with immediate effect.

SHARISE WEINER
ACTING JUDGE OF APPEAL

Represented by:

For appellant:	S Matthews
Instructed by:	Johan Jooste & CO Attorneys, Durban
	Spangenberg Zietsman Attorneys, Bloemfontein
For respondent:	DA Paver
Instructed by:	The Director of Public Prosecutions, Pietermaritzburg
	The Director of Public Prosecutions, Bloemfontein