**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case no: 854/2024

In the matter between:

**JEFFREY MATJWELA MOAGI** **APPLICANT**

and

**THE STATE** **RESPONDENT**

**Neutral citation:** *Moagi v The State* (854/2024) [2025] ZASCA 188 (11 December 2025)

**Coram:** MBATHA, KATHREE-SETILOANE, KEIGHTLEY and UNTERHALTER JJA and KUBUSHI AJA

**Heard**: 8 September 2025

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 11 December 2025.

**Summary:** Sentence – failure to pronounce on common purpose where conviction is in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 – failure vitiates sentence – whether s 51(2) is a default sentencing regime where sentence under s 51(1) is set aside – sentence considered in terms of the common law.

## ORDER

**On appeal from:** Limpopo Division of the High Court, Polokwane (Semenya DJP, Mangena AJ and Makweya AJ, sitting as court of appeal):

1 The application for special leave to appeal is granted.

2 The appeal against sentence is upheld.

3 The order of the full court is set aside and replaced with the following:

'3.1 The sentence of life imprisonment imposed in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 on Count 3, is set aside and replaced with the following:

'The Accused is sentenced on Count 3 to 25 years' imprisonment, ante dated to 29 January 2019, in terms of s 282 of the Criminal Procedure Act 51 of 1977.'

3.2 The sentences on Counts 1, 2 and 4 are confirmed, and are ordered to run concurrently with the sentence of 25 years' imprisonment on Count 3.'

## JUDGMENT

**Kubushi AJA (Mbatha, Kathree-Setiloane, Keightley and Unterhalter JJA concurring):**

### Introduction

[1] On 31 October 2016, the applicant in the company of members of the Letaba Taxi Association (the group) went on a rampage and assaulted members of the Oaks Taxi Association at Ga-Maroshi. The group arrived at Ga-Maroshi in 12 taxis. During the attack Mr Moses Mitsileng (the deceased), a queue marshal at Maroshi taxi rank, was fatally assaulted. The deceased was hit with stones and when he fell down, the applicant, Jeffrey Matjwela Moagi (Mr Moagi), was seen assaulting the deceased several times with a pick handle on the head. A certain Mr Rabbie Sekgobela (Mr Sekgobela) was also caught by other members of the group whilst fleeing after leaving the taxi he was driving at the police station, and severely assaulted. Karabo Davis

Ledimo (Mr Ledimo), a passenger in the taxi driven by Mr Sekgobela, tried to flee, but was grabbed by Mr Moagi who hit him (Mr Ledimo) with a pick handle on the forehead. After he fell down he was further assaulted by other members of the group with a sjambok and baseball bat several times on the body and left for dead. Mr Moagi searched him and took his cell phone and R200.

[2] Emanating from these events, Mr Moagi was arraigned in the Limpopo Division of the High Court, Polokwane (the high court), on two counts of attempted murder, one count of murder, one count of theft, and one count of unlawful possession of a firearm, alternatively possession of a prohibited firearm. He pleaded not guilty to all the charges, but was convicted on all counts except the charge of unlawful possession of a firearm, alternatively possession of a prohibited firearm. In respect of one of the charges of attempted murder he was convicted on the basis of a competent verdict of assault with intent to do grievous bodily harm. Mr Moagi was sentenced, among other punishments, to life imprisonment.

[3] Mr Moagi appealed the sentence of life imprisonment to the full court of the Limpopo Division (the full court). The basis of the appeal was twofold: first, that Mr Moagi's right to a fair trial had been infringed by the failure of the high court to inform or warn him during the plea stage of the proceedings about the possibility of the application of the doctrine of common purpose; second, he challenged the high court's finding that there are no substantial and compelling circumstances to justify a deviation from imposing a life sentence on the murder conviction. The full court dismissed Mr Moagi's appeal and found on the first issue that the allegation of common purpose was made in the summary of substantial facts, it was supported by the evidence of eye witnesses, and that Mr Moagi's legal representative had conceded during argument on sentence that s 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) was applicable in this case. As regards the second issue, the full court reasoned that the high court's finding that Mr Moagi's personal circumstances had to recede against the gravity of the offences, could not be faulted.

[4] Mr Moagi has on petition to this Court applied for special leave to appeal the dismissal, by the full court, of his appeal against the sentence of life imprisonment imposed by the high court, on the conviction of murder. The application for special

leave to appeal was referred by this Court for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013. The parties were directed to be prepared to argue the merits of the appeal should they be called upon to do so. The question that this Court has to decide is whether Mr Moagi has met the threshold for the granting of special leave to appeal. If so, this Court has to consider the merits of the appeal.

**Special leave to appeal**

[5] The test for special leave to appeal is well known. It requires something more than reasonable prospects of success. The applicant must also establish special circumstances. Special circumstances, as expounded in our case law, may include, among other things, a substantial point of law, or where the matter is of great importance to the parties or of great public importance, or instances where the prospects of success are so strong that the refusal of leave would likely result in a manifest denial of justice.[1] The question is whether the application before this Court discloses any one of the said jurisdictional facts amounting to special circumstances warranting the granting of special leave to appeal. For Mr Moagi to succeed in his application for special leave to appeal, he must not only show the presence of reasonable prospects of success on appeal, but, in addition, some factors establishing special circumstances should be shown to exist. For the reasons that follow, I find that Mr Moagi has met the required threshold.

[6] Mr Moagi appeals the sentence of life imprisonment imposed on him by the high court. The sentence was imposed following upon his conviction for murder read with the provisions of s 51(1) of the CLAA. The indictment stated that Mr Moagi was charged with 'murder read with the provisions of Section 51(1) of [the Criminal Law Amendment] Act 105 of 1997', a reference to the minimum sentencing regime. However, crucially, for purposes of this application, the State failed to indicate in the indictment the basis upon which it pleaded that the CLAA applied in respect of the murder charge. It was only in the summary of substantial facts filed in terms of s 144(3)*(a)* of the Criminal Procedure Act 51 of 1977 (the CPA) that the State averred that the offences were committed in furtherance of a prior criminal agreement or, as it

[1] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-I.

is commonly referred to, with common purpose. The summary of substantial facts was not read out in court. Nor did the trial Judge warn Mr Moagi, before he pleaded to the charges, that if he was convicted the prescribed minimum sentence regime would apply in respect of the charge of murder, and that he faced the prospect of a sentence for life. He did not inquire of Mr Moagi whether he understood the implications of s 51(1). Nor did he ask Mr Moagi's legal representative whether he had explained these issues to Mr Moagi.

[7] The issue of common purpose only surfaced at the end of the trial. This occurred when the prosecutor in response to a question from the court stated that:

'[t]he state alleged that the accused acted in the furtherance of a *common purpose* which falls under Schedule 1 which is 51(1) and the evidence proves that accused together with others indeed they acted in a common purpose and during the murder of the deceased as he should be convicted in terms of Section 51(1).' (Emphasis added.)

The precise basis upon which Mr Moagi was convicted is also not apparent from the judgment of the high court. In its judgment on conviction, the high court does not specifically state that Mr Moagi was convicted of murder committed in the furtherance of a common purpose. When convicting Mr Moagi on the murder charge, the high court simply stated that:

'On count 3 this is the murder of Moses Mtsileng. On this the state has shown beyond reasonable doubt that the accused has committed the offence and he is accordingly found GUILTY OF MURDER READ WITH THE PROVISIONS OF SECTION 51(1) OF ACT 105 OF 1997.'

[8] Furthermore, in the judgment for leave to appeal, the high court seemed to be in doubt about the premise upon which it convicted Mr Moagi on the murder charge and subsequently sentenced him in terms of s 51(1) of the CLAA. This is so because in that judgment, the high court stated that it imposed the sentence of life imprisonment based on the fact that the offence fell within the purview of Part 1 of Schedule 2 of the CLAA, '[i]n that when the offence was committed it was in the execution of a common purpose', or there was an element of premeditation. The high court also stated that the circumstances leading to the killing of the deceased were such that there may not have been a direct intention to kill, but death ensued as a result of intention in the form of *dolus eventualis*.

[9] Based on the above summation, I am in agreement with the submission made on behalf of Mr Moagi that the proposed appeal raises a substantial question of law. I, however, do not agree with the line of argument that was used in support thereof. The issue that was raised on behalf of Mr Moagi in establishing special circumstances pertains to his constitutional right to a fair trial. The argument was that the failure by the trial court to warn Mr Moagi of the application of the prescribed minimum sentencing regime and that he was facing a possible sentence of life imprisonment, impacted his constitutional right to a fair trial. This argument, in my view, does not follow.

[10] It is trite that the failure to explain the provisions of the CLAA does not automatically lead to an unfair trial. The court has first to investigate the facts of the case to determine whether there is unfairness or prejudice.[2] This Court in *Livanje v S*[3] held that:

'[i]n terms of s 322(1)*(a)* of the CPA, an appeal court may allow an appeal if satisfied, on any ground, there was a failure of justice. A conviction may be set aside or altered by reason of an irregularity in the proceedings if it results in the failure of justice. … an irregularity only occurred at the sentencing stage, which cannot be said to be so gross an irregularity to have resulted in the failure of justice. The test is whether the appeal court on the evidence and on the credibility findings (if any), unaffected by the irregularity, considers that there is proof of guilt beyond a reasonable doubt.'

In this matter, Mr Moagi did not appeal his conviction. It is clear that his guilt was proved beyond reasonable doubt.

[11] The main question of law in respect of the application for special leave to appeal, in my view, turns on whether there was a legal premise for the sentence that the high court imposed. Section 51(1) of the CLAA provides that '[n]otwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part 1 of Schedule 2 to imprisonment for life'. Thus, a sentence in terms of s 51(1) is triggered when a person

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[2] See *S v Moodie* 1961 (4) SA 752 (A) at 758E-H; *S v Mnyamana and Another* 1990 (1) SACR 137 (A) at 141 and *S v Maputle and Another* 2003 (2) SACR 15 (SCA) para 6.
[3] *Livanje v S* [2019] ZASCA 126; 2020 (2) SACR 451 (SCA) para 24.

is convicted of an offence set out in Part 1 of Schedule 2 of the CLAA. Specifically for the purpose of this matter, in accordance with Part 1 of Schedule 2, murder committed in the furtherance of common purpose, triggers sentencing in terms of s 51(1).

[12] In this matter, Mr Moagi was convicted of murder. The State had sought to rely on common purpose to trigger Mr Moagi's sentencing in terms of s 51(1). This Court in *S v Legoa* (*Legoa*)[4] stated that the elements of the offence together with its scheduled features must be proven before the verdict. The court making the finding of guilt must also pronounce itself on that. Therefore, all the elements of murder together with the fact that such murder was committed in the furtherance of a common purpose, should have been pleaded and proven as the basis of the conviction. In addition, the high court ought to have made a pronouncement at the time of conviction that it found Mr Moagi guilty of murder read with the provisions of s 51(1), in that the murder was committed in the furtherance of a common purpose. As already stated, the high court did not make a finding that Mr Moagi was convicted of murder in the furtherance of a common purpose, nor did it pronounce itself as to the premise upon which Mr Moagi was found guilty of murder read with the provisions of s 51(1). Had this been done, the high court could competently have applied the sentencing regime under the CLAA in Mr Moagi's case.

[13] In *Legoa*,[5] this Court stated that the sentencing court's power to impose a prescribed minimum sentence exists only when the trial evidence proved the elements of the relevant scheduled offence, as well as the features described in the Schedule. It follows that the high court in the present matter, had no power to invoke the provisions of the CLAA and to sentence Mr Moagi in terms of s 51(1), in circumstances where the evidence adduced at trial proved only the elements of the murder charge without features described in the Schedule. Thus, the high court misdirected itself in sentencing Mr Moagi to life imprisonment in terms of s 51(1), and, the full court, in turn, erred in upholding the sentence imposed by the high court. On this basis, leave to appeal ought to be granted and this Court is at liberty to deal with the merits of the appeal.

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[4] *S v Legoa* [2002] 4 All SA 373 (SCA); 2003 (1) SACR 13 (SCA) para 14.
[5] Ibid para 18.

**Merits of the appeal**

[14] As I have found that the high court had misdirected itself, I find, also, that the misdirection was material and calls for reconsideration of Mr Moagi's sentence.[6] Having found that this Court is entitled to interfere with the sentence, the question then is what sentencing regime applies where the sentence has been vitiated by the incorrect application of the minimum sentencing regime. Ordinarily, where the minimum sentencing legislation is not applicable, the fall-back position should be the common law. It was, however, argued on behalf of Mr Moagi that in circumstances where s 51(1) was found not to be applicable, s 51(2) applies. It was contended that since the conviction was for murder, without any of the features under s 51(1), the high court should have considered and pronounced on the provisions of s 51(2). The question that then arises is whether s 51(2) is a default section for s 51(1). Put differently, the question is whether where s 51(1) does not apply, does s 51(2) automatically finds application? Even where the court finds that the murder conviction is based on *dolus eventualis*, such a conviction can attract the minimum sentence provisions of either s 51(1) or s 51(2) of the CLAA depending on the specific circumstances of the case.

[15] I find that s 51(2) is not a fall back provision for s 51(1) for the following reasons. First, each of the sections deals with specific offences with specific prescribed sentences. Section 51(1) provides for offences that fall under Part 1 of Schedule 2 and carries a mandatory minimum sentence upon conviction to life imprisonment. The offences include murder executed in the furtherance of a common purpose. On the other hand, s 51(2) provides for different offences referred to in Parts II, III and IV of Schedule 2 that carry a different set of mandatory minimum sentences. These offences include 'murder in circumstances other than those referred to in Part I'.

[16] Second, both sections prescribe sentences that are mandatory in nature and, they operate independently of each other. Section 51(1) of the CLAA provides:

'Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court *shall* sentence a person it has convicted of an offence referred to in Part I of

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[6] *Botha v S* (901/2016) [2017] ZASCA 148 (8 November 2017) para 39.

Schedule 2 to imprisonment for life.' (Own emphasis.) Section 51(2) of the CLAA addresses offences in Parts II, III and IV of Schedule 2, and provides:

'Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court *shall* sentence a person who has been convicted of an offence referred to in *(a)* Part II of Schedule 2, in the case of (i) a first offender, to imprisonment for a period not less than 15 years.' (Own emphasis.)

[17] It is trite that the word 'shall' when used in a statute is generally peremptory, unless there are other circumstances which negate this construction.[7] In the present matter, nothing negates the construction that the word 'shall' in ss 51(1) and 51(2) denotes that the provisions of the sections are peremptory. It is imperative, upon conviction of the offences referred to either in Part 1 of Schedule 2 or Parts II, III and IV of Schedule 2 of the CLAA that the sentencing court has no choice but to impose the sentences referred to in the respective sections except where there are substantial and compelling circumstances.[8] In that sense, the two sections operate independently of each other.

[18] Lastly, besides the language of the said provisions, the purpose thereof is, also of paramount importance. The separate provisions of ss 51(1) and 51(2) indicate the different classification of offences and the specific prescribed minimum sentences which they attract. A further challenge would be that the high court could not *mero motu* apply s 51(2) without having warned Mr Moagi of its implications. As a result, I find that s 51(2) does not find application in Mr Moagi's case due to the failure to appraise Mr Moagi of the application of common purpose. In fact, the CLAA does not apply to this case at all. The common law sentencing regime applies.

[19] Additionally, it was submitted on behalf of Mr Moagi that if s 51(2) did not find application, then the matter ought to be remitted back to the high court for the resentencing of Mr Moagi. Counsel for Mr Moagi argued that the information before this Court was not adequate for this Court to arrive at an appropriate sentence. It was contended that remitting the matter back to the high court would give Mr Moagi an

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[7] *Sutter v Scheepers* 1932 AD 165 at 173–174; *Pio v Franklin NO and Another* 1949 (3) SA 442 (C) at 451.

[8] See *Ndlovu v S* [2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC).

opportunity to adduce further evidence on sentence. This was required, so it was argued, because previously he had not given evidence under oath on sentence. The evidence in mitigation of sentence was merely presented from the bar by his counsel. This argument stands to be rejected. As will be shown hereunder, this Court is in as good a position as the high court to determine sentence afresh as all the relevant evidence is contained in the appeal record.

[20] There is a fine line between substantial and compelling circumstances and ordinary mitigating and aggravating factors. The elements required to prove substantial and compelling circumstances are those that are generally considered when sentence is assessed. They include the gravity and nature of the crime, the interest of society and the personal circumstances of the offender.[9] These are the same factors that are considered when sentencing under the common law. It cannot, therefore, be said that the factors that were provided by Mr Moagi in proving the substantial and compelling circumstances are not the same as those he will provide in mitigation and aggravation of sentence under the common law.

[21] Mr Moagi's personal circumstances are on record as follows: he was 37 years old at the time of sentencing; he had four children; his wife was unemployed; he was the sole breadwinner and was responsible for the maintenance of his family and mother; he was a taxi owner and earned a net income of R10 000 *per* month; he was servicing a mortgage bond (which means that he had property) at R4 000 *per* month. He was not a first offender. He has convictions of robbery, public violence, two convictions of assault, two convictions for malicious damage to property and three convictions for theft. In all these convictions, he was granted suspended sentences. The high court correctly made a finding that he is clearly a man prone to violence and that he had been very lucky for having escaped incarceration for any of these convictions.

[22] In aggravation of sentence the high court concluded that the offences were well planned given the types of weapons used. The court also took a dim view of the fact that the offences were committed during taxi violence which ultimately led to a loss of

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[9] *S v Zinn* 1969 (2) SA 537 (A) (*Zinn*) at 540G.

life, and innocent members of the community were also victims. The role played by Mr Moagi as a co-perpetrator in the commission of the crimes is clear from the evidence. He assaulted the deceased (Mr Mitsileng) several times with a pick handle on his forehead. The injuries sustained from the attack were so brutal and grievous that he eventually died from them. Mr Moagi also repeatedly assaulted Mr Ledimo, a passenger, and Mr Sekgobela, a taxi driver, with a pick-handle.

[23] From the above, it is clear that the mitigating and aggravating factors as well as Mr Moagi's role as a co-perpetrator are set out sufficiently for this Court to reconsider sentence. There is, thus, no need to remit this matter back to the high court. I have already held that there is a material misdirection in this matter and that such misdirection vitiated the high court's sentencing discretion. This Court is thus at large to consider the question of sentence afresh as if it were the court of first instance. The guidance provided by this Court in *Malgas* is instructive, where it held that:

'…Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large.'[10]

I, therefore, proceed to reconsider the sentence under the common law.

[24] The traditional sentencing factors apply to sentencing under the common law: the personal circumstances of the offender (this would include mitigating factors and aggravating factors); the nature and gravity of the offence; and the interests of society.[11] In determining the sentence to be imposed, the purpose of sentencing, being prevention, retribution, reformation and deterrence, must also be taken into account.[12] In mitigation of sentence, I have taken into account Mr Moagi's personal circumstances as they appear on record. I have also considered the following aggravating circumstances: the offences Mr Moagi was convicted of occurred during the taxi violence between rival taxi associations. Mr Moagi was part of the group that went on a rampage and attacked members of a rival taxi association. Their attack was well-planned. The group arrived in 12 taxis and were armed with a variety of dangerous

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[10] *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) para 12.
[11] *Zinn* fn 9 above at 540G.
[12] *S v RO and Another* 2010 (2) SACR 248 (SCA) para 30.

weapons. Mr Moagi, in particular, was armed with a pick-handle. The attack on the rival group led to the loss of life of Mr Mitsileng, a queue marshal, and grievous injuries to others. The victims were innocent; the attacks were unprovoked and callous. The victims were assaulted even as they tried to run away, and had fallen down and were defenceless. Mr Ledimo, an innocent passenger, was left for dead after he was brutally assaulted. Taxi violence is a scourge to society. It is a form of vigilantism where taxi owners like Mr Moagi, take the law into their own hands. Conduct of this nature cannot be countenanced and must be punished appropriately. Despite his propensity for violence, Mr Moagi has been spared incarceration on several occasions. This did not deter him as he, again, committed acts of violence.

[25] Mr Moagi's personal circumstances do not outweigh the brutality of the offence committed. Thus, having regard to his personal circumstances, the gravity of the offence and the interests of society, I find that a lengthy sentence of imprisonment will be appropriate. Not only will it give him an opportunity to rehabilitate himself, but it will, also, have a retributory effect. Society requires protection from persons like Mr Moagi. A life was taken. The victim's children have been left without a breadwinner. The fact that he was a family man who was gainfully employed, does not detract from the fact that he committed a violent crime for which he must be punished.

[26] Consequently, I find that a sentence of imprisonment of 25 years is the only appropriate sentence that can be imposed in this matter.

**Order**

[27] In the circumstances, the following order is issued:

1 The application for special leave to appeal is granted.

2 The appeal against sentence is upheld.

3 The order of the full court is set aside and replaced with the following:

'3.1 The sentence of life imprisonment imposed in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997 on Count 3, is set aside and replaced with the following:

'The Accused is sentenced on Count 3 to 25 years' imprisonment, ante dated to 29 January 2019, in terms of s 282 of the Criminal Procedure Act 51 of 1977.'

3.2 The sentences on Counts 1, 2 and 4 are confirmed, and are ordered to run concurrently with the sentence of 25 years' imprisonment on Count 3.'

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E M KUBUSHI

ACTING JUDGE OF APPEAL

**Appearances:**

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|---|---|
| For the applicant: | P F Pistorius SC |
| Instructed by: | Anita Campbell Attorneys, Polokwane |
| | Symington De Kok Attorneys, Bloemfontein |
| For the respondent: | N Chauke |
| Instructed by: | Director of Public Prosecutions, Polokwane |
| | Director of Public Prosecutions Bloemfontein. |