THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 524/07
No precedential significance

In the matter between:

EDMUND GUGULETHU MZIZI **APPLICANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Mzizi v The State* (524/2007) [2009] ZASCA 32 (30 March 2009)

Coram: Mthiyane, Van Heerden, Jafta, Ponnan et Mlambo JJA

Heard: 16 March 2009

Delivered: 30 March 2009

Summary: Condonation – good cause – the requirements of good cause restated. Special entry in terms of s 317 of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: Mmabatho High Court, Bophuthatswana Provincial Division (Leeuw J)

The following order is made:

1. Condonation is refused.
2. The matter is struck off the roll.

JUDGMENT

JAFTA (Mthiyane, Van Heerden, Ponnan et Mlambo JJA)

[1] The applicant was arraigned in the Mmabatho High Court before Leeuw J on a charge of murder and unlawful possession of a firearm and ammunition. He was convicted of murder and acquitted on the other charges. On 6 February 2001 he was sentenced to 30 years imprisonment. On 14 March 2003 his application for leave to appeal was refused.

[2] On 26 January 2007 the applicant applied in terms of s 317 of the Criminal Procedure Act 51 of 1977 (the Act) for four special entries to be made on the record by the court below. The application was heard on 2 March 2007 and judgment was delivered on 19 July 2007. The trial judge made only one special entry in the following terms:

'The admission of the statement "That's Gugu" uttered by the deceased Captain Tatisi after he was shot and before he died on the 10th December 1998, is hearsay which is inadmissible and that the court ought not to have admitted it as evidence.'

[3] Although the papers were prepared and filed in the court below earlier, the applications were only lodged in this court during February 2008. The applicant asks this court to grant leave to appeal generally against his conviction and sentence; to make further special entries on the record on those matters in respect of which the trial judge had declined to do so; to allow him to lead further evidence and to consider the merits of the special entry already made on the record by the trial court. As these applications were lodged late the applicant seeks condonation. The judges who considered his petition in terms of s 316 of the Act referred it to the hearing of oral argument in open court.

THE FACTS

[4] On 10 December 1998 Captain Tatisi (the deceased) and a colleague (Inspector Lepedi) pursued a suspect who was seen walking past the Mmabatho police station in the North West Province. On noticing the policemen approaching, the suspect fled and the policemen chased after him. During the pursuit, Inspector Lepedi handed his fire-arm to the deceased who fired warning shots in an attempt to stop the fleeing suspect. The suspect stopped running and stood in a dark spot under a tree which overhung the street. When the deceased was three paces away from the suspect, the latter fired a shot which hit the deceased, causing him to fall to the ground. The suspect escaped while Inspector Lepedi summoned help. Shortly thereafter Sergeant Ramakgolo

arrived at the scene in a vehicle which was used to convey the deceased to hospital.

[5] As he was being lifted into the vehicle, the deceased uttered the words: ‘That’s Gugu’. He was certified dead on arrival at the hospital.

[6] At the trial the only issue which was in dispute was the identity of the suspect who had fled and thereafter fired the shot that killed the deceased. In seeking to establish the identity of the perpetrator, the prosecution led the evidence of the following three witnesses. Sergeant Mogwere identified the suspect who had been pursued by the deceased and his colleague as the applicant, whom he had previously seen in the police cells where he was detained for two weeks. Although the applicant’s identification occurred at night, the street on which he was walking was illuminated by street lights and Sergeant Mogwere was about 33 paces away from him. Inspector Lepedi stated that the deceased’s killer was the suspect that they were chasing. Ms Modiegi Cebisa – the applicant’s former girlfriend – testified that the applicant had reported to her that he had shot one ‘Titus’ in self-defence. She also said that the applicant was also known by the name Gugu. The applicant denied that on the day in question he had walked past the police station or fired shots at the deceased. He was on the day referred to by Ms Cebisa

[7] The trial court accepted the evidence of the state witnesses, including the report given by Ms Cebisa, as proof of the fact that the applicant was the person who had shot and killed the deceased. It also accepted that the utterance made by the deceased referred to the applicant and admitted this as part of the evidence material to establishing his guilt.

He was convicted on the basis of all of the evidential material including hearsay evidence, namely the utterance ‘that’s Gugu’.

CONDONATION

[8] In so far as the application for leave to appeal is concerned, the applicant was obliged to lodge such application in this court within 21 days from the date on which the order refusing leave issued.[1] An application made outside the prescribed period can only be entertained upon good cause for the delay being shown by the applicant. The same requirement applies to applications for special entries, following upon a refusal by the trial court.[2] In the case where a special entry was made on the record, the applicant had to appeal to this court within 21 days from the date of such order, failing which the appeal lapses unless the period is extended upon good cause shown.[3] Since none of the present applications had been timeously made, condonation was necessary. The granting of condonation depends on whether the applicant has established good cause for the delay in each instance.

[9] Good cause is a well-known test applicable to condonation applications. It has two requirements. First, the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that there are reasonable prospects of success on the merits of the appeal.[4] If there are no prospects of success the court may refuse leave even if the explanation given is satisfactory, for it would be futile

[1] Section 316(8) of Act 51 of 1977.
[2] Section 317(5) of Act 51 of 1977.
[3] Section 318(1) of Act 51 of 1977.
[4] *S v Mohlathe* 2000(2) SACR 530 (SCA).

for the court to grant condonation where it is clear that, on the merits, the case would fail.

[10] The applicant gave the following explanation for the delay. Although he could not afford to pay for legal services and he had been represented by advocates appointed by the Legal Aid Board at his trial and at the application for leave to appeal stage, he had dismissed those advocates because he had lost confidence in them. He does not furnish any reason for losing confidence in Advocate Benjamin who represented him in the application for leave to appeal. With regard to Advocate Kneen, who represented him at the trial, his complaint was that he 'handled the mater completely incompetently and ineffectively as is apparent from the trial record'.

[11] According to the applicant he only became aware of Mr Kneen's incompetence and ineffectiveness when he perused and discussed the record of the trial – apparently with his current legal representatives – after the dismissal of the two advocates had occurred. He said:

'[A]part from [Kneen's] incompetent handling of the case he did not properly consult with me and take full instructions, so he was not properly prepared for the case. I [am] not a professional person with any knowledge of law or legal procedure, and I did not appreciate this at the time. Indeed as I said it was only after I had discussed after reading the transcription of the record, that I realised how poorly my case was handled, and how at fault Mr Kneen was in not arranging to take proper and full instructions from me'.

[12] As the applicant only became aware of Mr Kneen's alleged incompetence after the termination of the latter's mandate, that could not have been the reason for his dismissal. The fact that the applicant was

unable to raise funds to timeously engage a legal representative does not constitute a reasonable excuse in the circumstances of the present case.

[13] Following the dismissal of Messrs Kneen and Benjamin the applicant, so he alleged, could not engage counsel of his choice for two reasons. First, he had no funds from which he could pay legal fees. He relied on the financial support of his mother who was only able to pay the final instalment for fees on 5 October 2006. Secondly, Mr Shapiro – counsel of his choice – was also not available to take up his case until 6 October 2006. He was advised that, as soon as counsel became available, the application would be lodged because he was already out of time and that an application for condonation was necessary.

[14] But there was a further delay before the application for the special entries to be made on the record was lodged on 26 January 2007. As stated earlier, the application was heard on 7 March and judgment was delivered on 19 July 2007. The applicant ought to have lodged the present applications in this court within 21 days from the date of delivery of the judgment in the court below. The explanation for his failure to do so is the following:

'My Attorney and Advocate practise in Johannesburg. Orders of Court had to be obtained from Mmabatho, and I understand that the Registrar of the Bophuthatswana High Court took some considerable time to provide the Orders of Court which were only obtained on 3rd August 2007. Once the papers had been prepared they had to be served on the Registrar of the High Court in Mmabatho and Director of Public Prosecutions in Mafikeng respectively, as well as the Registrar of this Honourable Court in Bloemfontein, and so the logistics are very complicated. Accordingly, I respectfully maintain that we have acted with as much due diligence as we could in

the circumstances and that there has been no negligence or fault by anyone concerned with my side of the appeal.'

[15] The applicant's attempt to apportion blame to the registrar of the high court for the delay is untenable. If the order was available on 3 August, then the delay is attributable to the applicant and his legal representatives. That date fell within the prescribed period of 21 days within which the applicant had to lodge the present applications. They were only served on the Director of Public Prosecutions and the registrar of the high court on 7 January 2008 and later lodged in this court. In my view, the explanation given for the delay is unsatisfactory.

[16] In the circumstances of this case the unsatisfactory explanation furnished is however not fatal to condonation. In a matter such as this condonation may still be granted if there are strong prospects of success on the merits.[5] This is the issue to which I now turn. I will consider each application separately.

PERMISSION TO LEAD FURTHER EVIDENCE

[17] Ordinarily this court will permit the leading of further evidence on appeal only in exceptional circumstances and where certain basic requirements are met. It is indeed not in the interest of justice that duly concluded criminal trials be reopened to receive further evidence at the stage of appeal. The public is entitled to finality of criminal proceedings and therefore the leading of further evidence ought not to be allowed in a case where the acceptance of such evidence will not affect the verdict

[5] *Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others* 1985 (4) SA 773 (A); *Rennie v Kamby Farms (Pty) Ltd* 1989 (2) SA 124 (A) at 131H-J.

reached.[6] In *S v De Jager*[7] Holmes JA laid down the following requirements:

'(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be prima facie likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial'.

[18] In this matter the applicant seeks to lead the evidence of his mother to the effect that he and Ms Cebisa were not on good terms at the time the latter testified. He blames his counsel for not calling his mother who was available to testify. I am willing to accept that the applicant and Ms Cebisa were not on good terms and that her evidence falls to be treated with caution. Even so, as counsel for the applicant conceded during argument, there was no warrant for the rejection of Ms Cebisa's evidence. It follows that the evidence sought to be adduced does not advance the applicant's case and consequently the leading of such evidence cannot be allowed.

FURTHER SPECIAL ENTRIES

[19] The applicant seeks special entries to be made in respect of certain parts of the evidence of Ms Cebisa, Inspector Mogwere and Inspector Mogotsi. First, he contends that Inspector Mogotsi was responding to a leading question by the trial court when he testified that the deceased was also known as 'Titus'. In this regard the record reads:

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[6] *S v Nofomela* 1992 (1) SACR 277 (A) and *S v M* 2003 (1) Sa 341 (SCA) para 16 and the authorities there cited.

[7] 1965 (2) SA 612 (A) at 613C-D.

‘Do you know the name Titus? … Yes his full names are Moses Gopolang Tatisi …. but he was commonly known as Titus.’

Plainly, that was not a leading question.

Second, in respect of Inspector Mogwere, the subject-matter of the proposed special entry is the following statements: ‘He [Inspector Lepedi] told me that during the chase Captain Tatisi did not have his firearm with him. As they were chasing the accused, Captain Tatisi then took Lepedi’s firearm and he fired shots.’ The short answer to this alleged irregularity is that the State called Lepedi to testify as well and he confirmed Mogwere’s evidence on that score.

Third, with regard to Ms Cebisa, the applicant sought a special entry on the admissibility of her evidence in relation to the report made to her by him, on the basis that it was hearsay. What Ms Cebisa testified to was an account of events given to her by the applicant – she at that stage was not to know the significance of the report. It is true that that report contained an important admission, but it was also exculpatory and raised the spectre of the applicant having acted in self-defence. The possibility of him having acted in self-defence, counsel unwisely sought to advance on appeal as an alternative to the bare denial that had been proferred in the trial court. Even if the report is left out of account of the evidence implicating the applicant, sufficient evidence remains (on the record) which support his conviction.

[20] While it is true that s 317 of the Act permits a special entry to be made ‘unless the court to which …. 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’, an appeal court would be entitled to refuse to make a special entry on the basis that the irregularity concerned

does not result in a failure of justice. Section 322 of the Act prohibits interference on appeal with a conviction on the basis of an irregularity, unless such irregularity or defect leads to a failure of justice.

[21] The other special entries sought related to the alleged incompetence of Mr Kneen as counsel for the applicant and the fact that the trial court took judicial notice of the streets where the suspect was pursued and the shooting occurred. The latter was not pursued with any vigour before us – rightly so. In view of the applicant's denial that he was at the scene, it could not have been irregular for the trial court to have taken judicial notice of what must have been a notorious fact, namely the layout of the streets where the chase and shooting occurred. As to the former, the fact that the applicant's current counsel might have adopted different tactics and strategies at the trial does not render the representation by Mr Kneen so inadequate as to vitiate the proceedings. After all, we are all wiser after the event. None of the alleged special entries sought ought to be made. Nor, even if they were to be made, would they, in my view, affect the verdict.

THE GRANTED SPECIAL ENTRY

[22] As mentioned earlier, the court below made a special entry in respect of its admission of the utterance: 'That's Gugu'. This was regarded as a dying declaration by the deceased. Since s 216 of the Act – which permitted the admission of common law exceptions to hearsay evidence was repealed - the admission of hearsay evidence is now governed by s 3 of the Law of Evidence Amendment Act 45 of 1988. This section lays down the requirements for admission of hearsay evidence. There can be no doubt that the statement uttered by the

deceased, if it was admitted to prove the identity of his killer, constitutes hearsay evidence.

[23] Although it is arguable that the statement in question was admitted in compliance with the requirements of s 3(1)(c), for purposes of this judgment, I am willing to assume in the applicant's favour that its admission did not comply with that section. I am willing to assume further that such failure amounted to an irregularity. For, if the utterance by the deceased is discounted from the body of evidence implicating the applicant, the remaining evidence would still be sufficient to sustain his conviction. It cannot therefore be argued that the irregularity concerned nullifies the verdict. Put differently, such irregularity did not lead to a failure of justice and it is only in that event that this court would be entitled to interfere with the conviction or the sentence imposed.

LEAVE TO APPEAL

[24] In so far as leave to appeal generally is concerned, in respect of the conviction no new grounds were advanced. Instead the applicant contented himself with a regurgitation of the alleged irregularities already alluded to. As I have demonstrated, each of those is without substance. Regarding sentence, counsel for the applicant argued that it was exceedingly harsh. But he could not point to any misdirection committed by the trial court in exercising its sentencing discretion. The appeal court's power to interfere with a sentence imposed by the trial court is circumscribed. Interference can only take place if one of the recognised grounds is shown to exist. In my view the sentence imposed in this matter is not 'excessively harsh' or 'disturbingly inappropriate', nor was it

vitiated by any misdirection of the kind which would justify interference by this court.

[25] It follows that the applicant has failed to establish that he has any prospects of success in any of the applications. In the result the application for condonation must fail.

[26] The following order is made:

1. Condonation is refused.
2. The matter is struck off the roll.

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C N JAFTA
JUDGE OF APPEAL

APPEARANCES:

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None
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