THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case no: 1290/2016

In the matter between:

LUNGISA GWABABA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Gwababa v The State* (1290/2016) [2018] ZASCA 152 (08 November 2018)

Coram: Cachalia, Saldulker and Mbha JJA and Matojane and Rogers AJJA

Heard: In chambers (November 2018)

Delivered: 08 November 2018

Summary: Criminal law - refusal of leave to appeal by Supreme Court of Appeal - reconsideration of decision of two judges of the court refusing leave to appeal in terms of s 17(2)(*f)* of the Superior Courts Act 10 of 2013 - principles in relation to application of the doctrine of common purpose to be considered - reasonable prospect of success that another court may arrive at a different conclusion.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Bam J sitting as court of first instance):

The decision of this court dated 25 August 2016 is set aside and the applicant is granted leave to appeal his conviction to the full court of the Gauteng Division of the High Court, Pretoria.

JUDGMENT

Saldulker JA (Cachalia and Mbha JJA and Matojane and Rogers AJJA concurring):

[1] This case arises from a decision of the then Acting President of this court, (Maya P) in terms of s 17(2)(*f*) of the Superior Courts Act 10 of 2013 (the Act) to refer a decision of two judges of this court, dismissing an application for leave to appeal, for reconsideration by this court.

[2] The applicant, Mr Lungisa Gwababa, who was at all relevant times a member of the South African Police Service, was the sixth accused in a criminal trial in the Gauteng Division of the High Court, Pretoria (Bam J) in which he, together with eight other accused, faced a charge of murder. The applicant and seven of his co-accused were all convicted as charged on 25 August 2015 and each sentenced on 11 November 2015 to 15 years' imprisonment. Accused 9 was found not guilty and discharged. Applications by the applicants for leave to appeal their convictions and sentences were dismissed by the trial court on 11

December 2015.

[3] Aggrieved by this decision, the various accused petitioned this court in separate applications. This court has already granted the following of the present applicant's co-accused leave to appeal to a full court of the Gauteng Division against their convictions and sentences: accused one, accused five, accused seven and accused eight in *S v Malele & others* [2017] ZASCA 173; 2017 JDR 1956 (SCA case no 723/16 and 724/16, judgment on 1 December 2017); accused four in *S v Bongamusa Mdluli*, case no 348/16 (on 24 May 2016); accused three in *S v Percy Mnisi* (case no 1332/17 on 8 March 2018); and accused two in *S v Thamsanqa Ngema,* (case no 23/17 on 9 March 2017).

[4] However, an application by the present applicant for leave to appeal against his conviction and sentence to this court was refused on 25 August 2016 by two Judges of this court. The applicant then sought a referral of that order for reconsideration, to Maya P, in terms of s 17(2)(*f*) of the Act and if necessary, variation. She decided in his favour, and it is that decision that has culminated in the matter before us.

[5] I turn briefly to consider the particular facts of this case. It is common cause that on 26 February 2013, the deceased, Mr Silvesta Jossefa Marcia was arrested for a traffic violation near a taxi rank in Daveyton, Benoni. The applicant and his co-accused were all said to have been involved in his arrest. During the arrest, handcuffs placed on the deceased were attached to a steel bench at the back of the police vehicle. The applicant who was the driver of the police vehicle then drove off after the police felt threatened by the crowd that had gathered there. Mr Marcia was still attached to the bench at the back of the vehicle with part of his lower body being dragged on the ground. Subsequently, the deceased was transported to the Daveyton Police Station and placed in the holding cells,

where he later died. The version of the applicant was that he did not look at the rear view mirrors, and drove off believing that the deceased was inside the vehicle until he noticed, when he was about 200 metres ahead, that his colleagues behind him were flashing their vehicle's lights indicating that he must stop. It is only when he stopped that he discovered that the deceased had fallen out of the vehicle. According to the medical evidence presented in the trial court, the cause of the deceased's death was said to be extensive soft tissues injuries and hypoxia. According to the State pathologist, Dr Skosana, this was caused by a combination of the injuries the deceased had sustained during his first scuffle with the police when he resisted arrest, when he was dragged behind the police vehicle and violence to which he was allegedly subjected in the police cells.

[6] The trial court found that the State had proved beyond reasonable doubt that the applicant and his co-accused all knew that the deceased was being dragged behind the vehicle, and thus, they foresaw that in being dragged behind the vehicle the deceased would sustain serious injuries which could result in his death, yet they persisted in their conduct clearly reconciling themselves with the eventual result. The trial court found that the accused assaulted the deceased in the police cell thereby seriously injuring him, and that there could be no doubt that they foresaw that the injuries may result in his death. The trial court rejected the applicant's version that he was unaware that the deceased was being dragged behind the vehicle when he drove away.

[7] Maya P prepared a judgment setting out her reasons for referring the decision refusing leave to appeal for reconsideration. She expressed doubts about the trial court's application of the doctrine of common purpose as enunciated in *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I–706B; and confirmed by the Constitutional Court in *S v Thebus & another* 2003 (2) SACR 319 (CC). She agreed with the observations made by the court in *S v Malele*

(para 3 above) that there could be no doubt on the evidence that the deceased was assaulted after he had been placed in the holding cells. She had misgivings about the trial court's finding that it was accused two to eight who assaulted the deceased in the cells, when in fact the direct evidence on behalf of the State was that of a single witness, Warrant Officer Ngamlana, who stated that the deceased was surrounded by accused two to eight, but that he could not see what was happening and who, it must be said, did not identify any of the accused specifically in relation to the alleged assault on the deceased in the holding cells. Maya P stated that it was not clear from the judgment whether only one or more of the policemen within the cell assaulted the deceased, a view also shared by the court in *S v Malele*.

[8] Furthermore Maya P had difficulty with the trial court's rejection of the applicant's version ie that he was unaware that the deceased was being dragged behind the police vehicle as he drove away, especially taking into account the circumstances prevailing at the scene of the deceased's arrest, including the threatening crowd, and the subsequent succession of events. She also questioned the trial court's conclusion that the applicant's form of intent (*mens rea*) was *dolus eventualis*. In her view, another court might find differently.

[9] For all the aforegoing reasons, Maya P concluded that a grave injustice may result if she were to refuse to refer the decision of 25 August 2016 dismissing the applicant's application for leave to appeal for reconsideration and if necessary, variation. That in itself constituted exceptional circumstances enabling her *mero motu* to refer the decision for reconsideration.

[10] Maya P also recorded that in separate applications the other accused have been granted leave by this court to appeal against their convictions and related sentences to the full court of the Gauteng Division, Pretoria. The applicant also

relies on the fact that his co-accused have been successful in their applications in terms of s 17(2)*(f)* upon facts and questions of law similar to those upon which his own conviction is based. It is necessary to record that the State in its heads of argument has conceded that it is in the interests of justice that leave to appeal be granted.

[11] Although we share Maya P's misgivings in relation to the findings and assessment of the evidence, we make no final evaluation. To do so would be to usurp the role of the court adjudicating the appeal. The sole question therefore is whether leave to appeal should be granted to the applicant. In our view there is a reasonable prospect of success that another court may arrive at a different conclusion in the circumstances.

[12] For the reasons set out above, the following order is made:

The decision of this court dated 25 August 2016 is set aside and the applicant is granted leave to appeal his conviction to the full court of the Gauteng Division of the High Court, Pretoria.

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H K Saldulker

Judge of Appeal

Appearances

For Appellant:	F van As Instructed by: Pretoria Justice Centre c/o Bloemfontein Justice Centre
For Respondent:	G D Mosetlha Instructed by: The Director of Public Prosecutions, Pretoria c/o The Director of Public Prosecutions, Bloemfontein