Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 80/2019

In the matter between:

DUMISA JOZI BONGINKOSI Appellant

and

THE STATE Respondent

DATE OF HEARING : 03 SEPTEMBER 2021

DATE OF JUDGMENT : 10 SEPTEMBER 2021

FOR THE APPELLANT : ADV. KEKANA

FOR THE RESPONDENT : ADV. NONTENJWA

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10h00 on 10 September 2021.

ORDER

(i) The appeal against the conviction and sentence succeeded.

(ii) The conviction and sentence are set aside.

JUDGMENT

HENDRICKS DJP

[1] The appellant appeared in the Regional Court, Rustenburg on charges of murder and attempted murder. He was convicted on the murder charge but acquitted on the charge of attempted murder. He was sentenced to life imprisonment on the 25th July 2013. An automatic right of appeal follows *ex lege*. It was only on 29th of April 2021 that the Notice of Appeal was filed with the Office of the Registrar, after seven (7) years and nine (9) months, against the conviction and sentence; hence the appeal.

[2] Coupled with the Notice of Appeal, is an application for condonation for the late prosecution of the appeal. An affidavit deposed to by the appellant as applicant was also filed. To say the least, this affidavit

contains large periods of time that are unexplained. The delay in prosecuting this appeal timeously is not at all satisfactorily explained in any detail.

[3] Condonation is not for the mere asking. Neither is an applicant entitled to be granted the requisite condonation as of right as though it is for the mere taking. This Court stated in **Shabalala vs Goudini Chrome (Pty) Ltd and Another** (M342/2016) [2017] ZANWHC 77 (2 November 2017) that:

> *"[3] Condonation is not for the mere asking. It is incumbent upon an applicant in an application for condonation to prove that (s)he/it did not wilfully disregard the timeframes provided for in the Rules of Court. Furthermore, that there are reasonable prospects of success on appeal. In Melane v Southern Insurance Co Ltd 1962 (4) SA 531 (AD) at page 532 B-E, the following is stated about the factors that will be taken into account when considering a condonation application:*
>
> *"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are prospects of success there would be no point in granting*

condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[4] In **Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others** (619/12) [2013] ZASCA 5 (11 March 2013), the following is stated:

"[11] 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 (per Holmes JA in Federated Employers Fire & General Insurance Co Ltd & another v McKenzie 1969 (3) SA 360 (A) at 362F-G). I shall assume in Dentenge's favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors.

[12] In Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) para 6 this court stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'"

[5] In **Mtshali & others v Buffalo Conservation 97 (Pty) Ltd** (250/2017) [2017] ZASCA 127 (29 September 2017), the following is stated:

"[37] The approach of this court to condonation in circumstances such as the present is ell-known. In Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others Ponnan JA held that factors relevant to the discretion to grant or refuse 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'.

[38] In Darries v Sheriff, Magistrate's Court, Wynberg & another these general considerations were fleshed out by Plewman JA when he stated:

'Condonation of the non-observance of the Rules of this Court is not a mere formality. In all cases, some acceptable explanation, not only of, for example, the delay in noting an appeal, but also, where this is the case, any delay in seeking condonation, must be given. An appellant should whenever he realises that he has not complied with a Rule of Court apply for condonation as soon as possible. Nor should it simply be assumed that, where non-compliance was due entirely to the neglect of the appellant's attorney, condonation will be granted. In applications of this sort the applicant's prospects of success are in general an important though not decisive consideration. When application is made for condonation it is advisable that the petition should set forth briefly and succinctly such essential information as may enable the Court to assess the appellant's prospects of success. But appellant's prospect of success is but one of the factors relevant to the exercise of the Court's discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.'

[39] Reference was made in the passage I have cited above to it being an erroneous assumption that if the cause of the delay in complying with the rules is the conduct of the appellant's attorney, condonation will be granted. That assumption was dispelled in no uncertain terms in Saloojee & another NNO v Minister of Community Development. In that matter the notice of appeal, the record and the condonation application were

filed some eight months late. After considering the explanation given for the delay and concluding that it was not even 'remotely satisfactory' Steyn CJ proceeded to hold:

> *'I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordiam should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.'*

[40] While the various factors that have been listed in the cases should be weighed against each other, there are instances in which condonation ought not to be granted even if, for instance, there are reasonable prospects of success on the merits. This was alluded to in the passage that I cited from the Darries matter. In Tshivhase Royal Council & another v Tshivhase & another; Tshivhase & another v Tshivhase & another Nestadt JA said that this court 'has often said that in cases of flagrant breaches of the Rules, especially where

there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal are' and that this applies 'even where the blame lies solely with the attorney'.

[41] In the present case we did not hear argument on the merits. Counsel were asked to make their submissions on the assumption that an appeal would have reasonable prospects of success. The appellants' counsel went further, submitting that his clients' prospects of success on the merits – the peremption point aside – were strong. An assumption to this effect does not change the outcome on the particular facts of this case."

[6] In **Mathibela v The State** (714/2017) [2017] ZASCA 162 (27 November 2017) the following is stated:

"[5] This Court recently stated the following in Mulaudzi v Old Mutual Life Insurance Company Limited & others, National Director of Public Prosecutions & another v Mulaudzi:

'[34] 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. This was not done in the present case: indeed, the application does not contain even a bare averment that the appeal enjoys any prospect of success. It has been pointed out that

the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration.'

(My emphasis)

[6] The same principles apply in the context of criminal cases as restated in Mogorosi v State where this Court said:

> *'[3] . . . [G]iven that the appellant was seeking an indulgence he had to show good cause for condonation to be granted. In S v Mantsha 2009 (1) SACR 414 (SCA) para 5 Jafta JA stated that "good (or sufficient) cause has two requirements. The first is that the applicant must furnish a satisfactory and acceptable explanation for the delay. Secondly, he or she must show that he or she has reasonable prospects of success on the merits of the appeal'*
>
> *[8] A court considering an application for condonation must take into account a range of considerations. Relevant considerations include the extent of non-compliance and the explanation given for it; the prospects of success on the merits; the importance of the case; the respondent's interest in the finality of the judgment; the convenience of the court and the avoidance of unnecessary delay in the administration of justice. (See S v Di Blasi 1996 (1) SACR 1 (A) at 3g.)'*

[7] The appellant provided no reasonable explanation for his non-compliance with the rules of this Court. The delay in prosecuting his appeal in this Court alone amounted to one

year and one month. In total ie in both the court a quo and this Court it took the appellant eight years and one month to prosecute his appeal. Even if I take into account the fact that he was unrepresented at times during the prosecution of his appeal, that can hardly compensate for the inordinate delay in his application.

[8] *As pointed out in Uitenhage Transitional Local Council v South African Revenue Service the requirements for granting an application for condonation are the following:*

> *'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preperation of appels to this Court: condonation is not to be had merely for the asking:*
>
> *a full, detailed and accurate account of the causes of the delay and its effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'*

[9] *As was the case in Mulaudzi, as is apparrent, the founding affidavit is singularly unhelpful in explaining the long delay. The explanation is not in the least satisfactory. Even worse, no explanation was provided for the third application for condonation and reinstatement of the appeal. This delay is unreasonable and there is no cogent explanation for it. It remains to consider whether the prospects of success on the merits justify the granting of condonation."*

[7] Much as condonation is not for mere asking, I am of the view that it should be granted in this case because there are reasonable prospects of success.

[8] The facts of this matter on the evidence produced can be succinctly summarized as follows. On 11th May 2007 the body of a deceased person was found near the kitchen at Wonderkop Mine Hostel in Rustenburg. The name of the deceased as it appears on the record is that of Dezani (or Danie) Nkosi Nxingwa. Copies of the charge sheet annexures specifying the charges are not attached as part of the record. The late Regional Magistrate in his judgment stated the names of the deceased as Lukwa Nkosinathi Natwa, which are totally different from the names that appears on record.

[9] On 12th May 2007, the appellant went to Longmill Mine, Limpopo, in search of employment. He met a recruitment officer Mr. Pela. The appellant was not offered a job and because he was destitute, he slept in his motor vehicle until Mr. Pela ultimately took him in and provided him with accommodation. Upon observing strange behaviour of the appellant, Mr. Pela asked him what is wrong. This was after a passage of some days. The appellant then made a “confession” to Mr. Pela that he and someone else shot and killed someone near the kitchen at Wonderkop Mine Hostels, because that person (deceased) used to give them little food and even assaulted them in the presence of their

foreman. Mr. Pela also said that the appellant told him that he and his co-perpetrator were paid for killing the deceased.

[10] Furthermore, the appellant told Mr. Pela that the deceased was buried on the Saturday, whereupon the appellant burst out crying. He asked Mr. Pela for help to take him to a traditional healer and to a prophet for cleansing. This was what the family of the appellant said he should do. Thereafter, Mr. Pela telephoned the investigating officer, Warrant Officer (W/O) Meko who confirmed that someone was shot and killed at Wonderkop Mine Hostel's kitchen and that no suspect had been apprehended.

[11] Mr. Pela made a copy of the identity document of the appellant from the appellant's personal file which he had access to. This, he faxed to W/O Meko. This ultimately led to the arrest of the appellant. The appellant denied the allegations levelled against him and put the State to the prove thereof. The conviction of the appellant was mainly premised on the alleged confession that he made to Mr. Pela. Therefore, the evidence of Mr. Pela is vitally important to determine whether the State succeeded in proving the guilt of the appellant beyond reasonable doubt.

[12] During cross-examination, it emerged that there were a number of discrepancies between the *viva voce* evidence of Mr. Pela and the

statement which he made to a police officer. The discrepancies relates to the date of the demise of the deceased. In the statement it was written that the appellant told Mr. Pela about the date whereas Mr. Pela testified that he did not. The date was supplied by the investigating officer W/O Meko. Furthermore, the name of the deceased was not supplied by the appellant nor the name of his companion. To add, according to the post-mortem report that was handed in by consent, the body of the deceased sustained five (5) gunshot wounds whereas according to Mr. Pela, the appellant told him that he and his companion each fired two (2) shots at the deceased.

[13] The amount of money which the appellant allegedly told Mr. Pela he and his companion received was also uncertain. Mr. Pela contradicted himself by stating that it was R10 000.00 which they shared at R5 000.00 each. This subsequently changed to R20 000.00, each getting R10 000.00 for killing the deceased. It then changed to killing three (3) members of the National Union of Mineworkers (NUM), which was not mentioned during the evidence-in-chief of Mr. Pela. The name of the deceased as contained in the statement was also supplied by the police.

[14] According to W/O Meko, Mr. Pela phoned him and told him that "*there is a person at Ad HOC Mines confessing to him that he shot a person at Wonderkop kitchen on the 11th of May 2007….*" Quite obviously this cannot be correct as Mr. Pela said he did not supply the date but the

police (Mr Meko) told him about the date that the deceased was shot. This is a contradiction between their evidence. Second, this report contained no detail whatsoever and does not serve as any corroboration for the testimony of Mr. Pela. The “confession” that was made to Mr. Pela is not at all an unequivocal admission of guilt that would amount to a plea of guilty in a court of law.

[15] It was put to W/O Meko that the results of the report of the firearm of the appellant, which was sent for ballistic analysis was negative, to which W/O Meko had no reply. This is a vital important aspect that was overlooked by the trial court. Over and above the shortcomings with regard to the confession allegedly made to Mr. Pela by the appellant, this is an aspect which needed to be taken into account. The fact that it was overlooked amounts to a misdirection on the part of the trial court.

[16] The version of the appellant was to the effect that when he knocked off duty, he walked pass the kitchen and saw the body of a person lying on the ground. He was told by bystanders that the deceased was shot and killed. This version of the appellant is reasonably possibly true. The onus is on the State to prove the guilt of the appellant as an accused beyond reasonable doubt. There is no onus on the appellant (accused) to prove his innocence. His version need only be reasonably possibly true to be given the benefit of the doubt and be acquitted.

[17] It will be remiss of me not to express any disquiet about the status of the record. The record is incoherent. There seems to be some inaudibles that were not corrected by the presiding Regional Magistrate, who had subsequently passed away and it cannot be done anymore. The exhibits are not attached to the record neither were the annexures of the charge sheet attached. Despite these shortcomings, the record is sufficient and adequate to dispose of the appeal. This I mention because had the appeal been prosecuted as soon as possible after 25th July 2013 and not waited almost eight (8) years to do so, same could have been rectified.

See: **S v Schoombie and another** 2017 (2) SACR 1(CC).

[18] I am of the view that the appeal should succeed. The conviction must be set aside. It follows axiomatic that if the conviction is set aside, then the sentence should likewise be set aside. This was conceded to by **Adv. Nontenjwa** on behalf of the respondent (State), which concession was indeed correctly made.

Order

[19] Resultantly, the following order is made:

(i) The appeal against the conviction and sentence succeeded.

(ii) The conviction and sentence are set aside.

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R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

I agree

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A M MTHEMBU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG