**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: A128/2017**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.
(4) DATE. **11 June 2021**

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In the matter between:

**MAELANE, LEKALE** Appellant

V

**THE STATE** Respondent

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## JUDGMENT

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**SPILG, J:**

## INTRODUCTION

1. The appellant was convicted of assault with intent to do grievous bodily harm. He was sentenced to a fine of R12 000 or six months imprisonment. The learned

magistrate granted the appellant leave to appeal both the conviction and sentence. The case is one arising from domestic violence during the time when he and his wife were still living together.

2. Although the appellant was granted leave to appeal on 6 March 2013 the first step he took to prosecute the appeal was in January 2015 when he attempted to obtain a transcript of the proceedings at the Magistrates' Court without success. A formal notice of appeal was only signed on 4 February 2020 and the application for condonation was signed on 13 February 2020.

3. Due to the extraordinary delay it is necessary to deal with the application for condonation first.

**APPLICATION FOR CONDONATION**

4. The test for granting condonation is well settled: it requires the person in default to show good cause. This in turn involves a consideration by the court of whether an adequate explanation for the delay has been furnished and whether there are prospects of success.[1]

5. In the present case there are four distinct periods of delay which the appellant must deal with. The first is the period of almost two years between the date when he was granted leave to appeal and when he first approached the Magistrates Court to obtain a transcript. The next period is from then until he was informed by counsel at the beginning of March 2016 that the record was incomplete. The third period is from then until he contacted the senior prosecutor on 8 May 2018 to assist him in tracking the prosecutor who had dealt with the matter. The final period is from then until the notice of appeal was signed at the beginning of February 2020.

[1] Ponnan JA set out in detail the factors which are to be taken into account in *Dengetenge Holdings (Pty) Ltd v Southern Mining and Development Company (Pty) Ltd [*2013] 2 All SA 251 (SCA) at para 11.

**The first period**

6. The appellant's explanation for failing to take any steps to prosecute the appeal until he attended at the Magistrates' Court in February 2015 was that he was severely depressed after being retrenched from his work (this being unrelated to his conviction but rather due to company restructuring), was unable to find work due to his criminal record and not being able to contest the custody of his children.

7. The difficulty the appellant faces is the inordinate length of time he delayed in prosecuting the appeal once leave was granted by the presiding Magistrate and his failure to take the court into his confidence as to when he was retrenched, let alone when he was informed of the restructuring, whether he was offered a package or whether it was an involuntary retrenchment.

8. Instead the appellant makes the vague allegation that "*Shortly after I was sentenced in March 2013, my division was restructured and consequently I was retrenched".* The statement without specifics suggests a restructuring process that only commenced after he was granted leave to appeal and at a time when he was a Fund Manager at one of the top financial institutions. He also states that he applied for "*numerous job vacancies at several profitable companies after retrenchment".* This does not suggest a person desperate to get a job, but rather someone who was waiting for a suitable position.

9. Accordingly the explanation is inadequate as the court is left in the dark as to whether the *dies* for filing a notice of appeal had expired before the restructuring had commenced, let alone when he first decided to apply for other jobs. In other words there is nothing before the court to indicate whether the events which triggered the depression set in after the *dies* expired. Moreover, if he attended job interviews one would have expected him to have told them that he was pursuing an appeal and demonstrate to them that this was the case by reference to a notice of appeal.

10. It also does not assist the appellant that during this period he was sufficiently composed to enrol for an LLB at UNISA, albeit with the financial assistance of his parents. But then again he does not suggest that they would not have helped him financially or emotionally to pursue the appeal.

11. Despite applying for leave to appeal on the date of sentence, no steps were taken to prosecute the appeal within the required time and there is no action taken by the appellant to suggest that he was persisting with the appeal as opposed to being content to accept the conviction and live with paying an admission of guilt fine in due course. The only answer given is one of severe emotional distress. However not enough is revealed on the papers, as it should have been, to support this.

**Second Period**

12. In late January 2015 the appellant went to the Magistrates' Court to obtain the transcripts of the proceedings so that he could pursue his appeal. This appears from his schedule[2].

13. By 2 February 2015 recordings of six of the hearing dates had been located, leaving another four outstanding. However the first set of recordings were only obtained a year later in February 2016. The appellant then consulted with counsel who advised that three of the outstanding transcripts were important as they dealt with the first day of the complainant's evidence, the reading out of the judgment and with sentencing.

14. It does not appear to be a coincidence that the appellant's attendance at the Magistrates' Court coincided with him commencing employment as a candidate attorney a month earlier at the appellant's attorneys of record.

15. While there is no attempt to provide a reason for the delay in obtaining the transcripts that were available, or to indicate whether enquiries were being made

[2] The affidavit mentions the first attempt being in February 2015 but annexure LM2 to the affidavit indicates that he had already attended the magistrates' court in late January.

as to progress in transcribing the record, I am prepared to accept that at the time litigants in general were experiencing difficulty in obtaining transcripts of records.

**Third Period**

16. After counsel informed him of the need to obtain that the outstanding recordings of evidence, the appellant returned to the Magistrates' Court during the course of the same month. With the assistance of the clerk of the court was able to locate the outstanding recordings. He also took other steps, on the advice of counsel, to pursue the appeal by consulting a psychiatrist. This was in order to assess his emotional state at the time of the incident.

17. The clerk of the court only reverted in late September 2016, and despite locating the recording of the judgment on 3 October he was unsuccessful in locating the balance of the recordings.

    This prompted the appellant to approach the senior prosecutor at the Randburg Magistrates' court in order to obtain the contact details of the prosecutor who had dealt with the matter. This was on 8 May 2018 as is confirmed by the prosecutor's affidavit of that date.

18. I am satisfied that no fault can be attributed to the appellant during this period. He was in the hands of the court administration who were doing their best to locate the missing recordings for transcription purposes.

**Fourth period**

19. It was not possible to locate the prosecutor in questions and subsequently the presiding Magistrate was requested to assist with the reconstruction of the record. The Magistrate advised that due to numerous relocations she had mislaid her notes. This was confirmed in an affidavit of 2 August 2019. The defence counsel who had represented the appellant at the trial was also asked to assist but he failed to respond.

20. The appellant alleges that a copy of the court book was obtained in a further attempt to reconstruct the record. However the clerk of the criminal court's stamp reveals that the copies were obtained in April 2015 which would coincide with the attempts made by officials to confirm all the hearing dates and the court where they took place

21. The appellant does not explain why it took so long to communicate with the presiding Magistrate or why nothing further appears to have taken place aside from abortive attempts to contact his erstwhile counsel. No attempt had been made to have his attorneys contact the complainant to see if she had a copy of the J88.

**Conclusion**

22. It is evident from the fact that the appellant throughout the second to fourth periods was obtaining documents and affidavits from the clerk of the court, the Magistrate and the prosecutor that he intended during those periods to pursue his appeal albeit that during the last period it may have been with less vigour.

23. However there is no acceptable explanation presented on the facts to support the appellant's contention that he intended to pursue the appeal during the most critical of all these periods, namely the first one. It appears that the motivation to pursue the appeal came about when he set his heart on becoming a legal practitioner; until then he was content to have a leave to appeal in place and when called upon, to pay the fine.

24. There is also prejudice to the victim and to society at large where delay results in an inability to fully reconstruct the record. An appellant cannot assume that he can enjoy a benefit which can be derived on an appeal where there is an incomplete record and where, had he pursued his appeal timeously there would be every reason to believe that a full record would have been timeously located with all exhibits, or at worst, that the presiding Magistrate, prosecution and defence counsel would have been able to reconstruct the record. In the present case a vital exhibit which could not be located is the J88.

25. Fortunately the prosecutor had read into the record that part of the J88 which identified the injuries observed by the medical practitioner. [3]

26. In the result the appellant has not satisfied the requirement of demonstrating no wilful default. In cases such as *Darries v Sheriff Magistrates' Court, Wynberg and another* 1998(3) SA 34 (SCA) at 40H-E the Supreme Court of Appeal has held that where the failure to observe the rules has been flagrant and gross, especially where there has not been an acceptable explanation, an application for condonation should not be granted irrespective of the prospects of success. merits.

27. However if I am wrong then it is necessary to consider the merits of the appeal which I will do in the following sections..

28. Before doing so, I take the view that the consequences to an appellant of finding that he must pursue an appeal with an incomplete record because he did not bring the appeal timeously, is that he cannot make a virtue of such default if it is based on personal reasons, as in this case, and not on circumstances beyond his control.[4]

    In the present case photographs taken the day after the incident reflecting the injuries sustained by the complainant are said to be irretrievably lost as has her statement to the police. These are serious *lacunae* in the record and in appropriate circumstances may tip the scales in refusing condonation.

    On the basis that it would be wrong to refuse condonation, the appellant is obliged to accept the Magistrate's finding that the photographs corroborate the complainant's version. Insofar as one of the grounds of appeal contends that the complainant's testimony contradicted her statement, the appellant 's submissions must be confined to what can be gleaned from the record.

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[3] This does not mean that other relevant information may have been contained in the J88. *Adv. Carstens* for the appellant confirmed in her written response to queries raised by the court that she was bound by the available record with regard to the contents of the J88.

[4] See also *Tshivase Royal Council and another v Tshivase and another* 1992 (4) SA 852 (AD) at 852E-F.

Accordingly the mere fact that the appellant's counsel put to the complainant in broad terms that she had contradicted herself without referring to the actual words used or without the context in which it was said being clear then, provided it is reasonable, the complainant's clarification or explanation must carry the day.

Similarly if the alleged contradictions put to a witness are peripheral yet there is no attack on the material elements of a statement that has been handed up as an exhibit. Without the appeal court having before it the full statement which had been handed up, it will not be in a position to determine whether the material facts to which the witness testified accorded with the statement given. In appropriate circumstance an appeal court would be entitled to assume that those parts of the witness' testimony which are material were not dealt with by the cross-examiner precisely because they accord with the contents of the lost exhibit statement.

**GROUNDS OF APPEAL**

29. The appellant raises the following grounds of appeal, some of which can be dealt with perfunctorily at this stage.

30. The first is that the court incorrectly identified the date of the incident as 21 September 2010 and considered that the events in respect of which the appellant was charged occurred over two days whereas he was charged only with having assaulted the complainant on 21 October 2010.

Neither point is good. The magistrate can be forgiven for incorrectly identifying the date. The trial was run sporadically from 22 March to 14 November 2012 with judgment being delivered two months later on 25 January. The events described in the judgment clearly related to two incidents. The one on 20 October which did not result in any injury to the complainant but to the baby she was holding. The other occurred on the following evening and is the only incident in respect of which the appellant was charged.

Furthermore the Magistrate's reference to the incident of the previous night was dealt with both as part of the *res gestae* and as evidence of the appellant's general conduct towards the appellant, which was relevant to explaining her being fearful of the appellant's reactions and inability to control his anger. She had already taken out a restraining order against him.

It should be added that in response to written questions *Adv. Carstens* on behalf of the appellant confirmed that there was only one incident in respect of which the appellant had been charged and that on occasion the Magistrate had confused the date of the incident as being in September.

31. The appellant also criticised the Magistrate for failing to apply the cautionary rule to the evidence of a single witness, bearing in mind further that the State did not call corroborating witnesses. This ground overlooks the clear statement by the Magistrate when evaluating the State's case. The Magistrate said "… *the complainant is a single witness … And our law requires that her evidence be treated with caution".* The Magistrate did not stop there but expanded on this aspect. Albeit that this part of the record was indistinct it is evident from what was audible that the Magistrate applied her mind to the issue of a single witness.[5]

    The Magistrate also had regard to the contents of the J88. The contents of the J88 was not put in issue. As will be seen from the description of the injuries which the doctor observed and recorded on the form (see below), the injuries mentioned in the report corroborate the complainant's testimony regarding the form the assault on her took.

    The record also shows that a witness, identified in the record as Thato Maligan, was in court at least on the second day of hearing (20 September 2012)[6]. She presumably had attended court under subpoena on the first day, although the record of that day is lost, as well as having to be at court on 22 March 2012.[7]

[5] Record p122
[6] Record p30
[7] Record p 30 line 19

This witness was alleged to have seen the mark on the complainant's face on the day after the alleged assault and had suggested that the complainant cover up her bruises with foundation as they would be going to the school concert on the following day. This witness allegedly also enquired about the broken door handle when she went to the bathroom of the appellant and complainant's home and suggested that the complainant come over to her place with her children, which she did. It was then that the complainant apparently related what had occurred.

The prosecution expressly elected not to call this witness claiming that there was no reason to do so[8]. That was a risk it took, presumably electing to rely on the J88 and a view of the evidence the appellant was likely to give based on the cross examination of the complainant and the extent of the challenge to her testimony. The prosecution placed on record that it was making the witness available to the appellant[9]. While that cannot change the incidence of the cautionary rule or weight of evidence, once these aspects are satisfied then the defence cannot rely on the State's failure to call in order to tilt the balance back again in its favour.

32. The appellant also argues that the Magistrate erred in not placing proper weight on the contradictions between the complainant's evidence and her statement. She also should have taken into account that the appellant only laid her complaint some three months after the incident.

Allied to this is the further ground that the magistrate erred in finding that the appellant had not disputed that as a result of pushing the complainant while she was holding the baby, its head was knocked against the door- whereas he had in fact done so. In this regard a further ground raised was that the complainant's statement had not mention it.

33. Finally it was argued that the Magistrate erred in finding that the appellant's version was contrived.

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[8] Record p 74
[9] Ibid

In this regard the Magistrate found that relevant parts of the appellant's evidence which contradicted the complainant's testimony had not been put to her. The question therefore arises whether the Magistrate correctly found that the appellant had changed his version.

34. There are therefore only two substantial grounds which still require consideration. They amount to the trial court having erred in accepting the complainant's version as true beyond a reasonable doubt and rejecting the appellant's version of events as not reasonably possibly true.

**THE EVIDENCE LEADING UP TO AND INCLUDING THE INCIDENT**

35. The complainants' first day's testimony, which according to the court clerk's records was some 55minutes in length, is missing from the record. The appellant accepts that it cannot be reconstructed. It would have covered the incident of the 20th and 21st October.

36. Insofar as the incident of 21October is concerned, it is evident from the available record that the complainant had alleged that after the assault she curled her hair for the school play in a way that, together with the foundation her friend had given her, managed "*to hide the marks and bruises"* on the left side of her face.

She testified that the bruises were still visible at least two days after the incident. When asked to identify the extent of the injuries, she said that there was a bruise on the left side of her face on the jaw and a long scratch mark on the inside of her left arm as well as blue marks on her arms. These were in the form of fingerprint marks. She also mentioned that her head and back were sore.

37. The complainant stated that she went to the Rosebank police station on the day after the incident and they wrote up the incident in the occurrence book. They also gave her a J88 form which she took with her to the doctor, whom she saw on the same day. The J88 was admitted into evidence as exhibit A. As already mentioned it is one of the missing exhibits.

38. At the request of the court the relevant part relating to the injuries was read into the record by the prosecutor. Under "*Clinical findings*" the examining doctor recorded (and, save for obvious error of referring to a *"medical aspect"* instead of "*median aspect"* I am repeating it as the prosecutor read it out):

> "*Assault by husband on 21 October 2010 at plus minus 21h00 in the evening*
>
> *First finding: Contusions,*
>
> *Circular contusions on right forearm x 3. All in diameter of 10mm plus minus 2.5cm apart*
>
> *Contusion on the left median aspect of upper arm. 2cm x 20cm in diameter*
>
> *Third one: Superficial abrasion linear of left median aspect of upper arm, 7cm long*
>
> *Superficial abrasion to the right mandibular area lateral to the chin, 5cm long*
>
> *Tenderness over the occipital. no contusion seen*
>
> *Tenderness over the lower back,, para spinal area and spinal area of L3 and L5. No contusion seen. Patient has normal range of motion*

39. On the Friday following the incident the complainant obtained a protection order against the complainant. That was on 28 October. The order was returnable on 25 November. On that date the appellant 's attorney challenged the J99 and the matter appears to have been postponed out to mid-January 2012. In the meanwhile the complainant had moved to Cape Town at the end of November and the Magistrate who granted the order indicated that it would not be effective in Cape Town and therefore she had to withdraw the interim protection order in Johannesburg[10]. It was only on her return to Johannesburg that she could

[10] Record p 39

formally lay a charge, since this could not be done at any police station in Cape Town. The charge was laid on either 12 or 13 January 2011.

40. The complainant testified that this was not the first incident where the appellant had assaulted her. She claimed that he had kicked her and she had told the appellant's mother about it[11]. Moreover she had gone to an attorney on 22 October and was conflicted between attempting to make the marriage work, bearing in mind her children and taking a stand against the appellant and reclaiming what he took from her.[12]

41. By 26 October which was their second wedding anniversary the complainant was uncertain as to whether to try and save the marriage or leave.

42. The complainant described that she had been in an abusive relationship, both physically and emotionally. On 21 October she attempted to deal with issues that were causing their relationship to fall apart. He however refused to engage in any meaningful discussion to move the relationship forward, first telling her to get out the house. She refused. He then left and returned at between 2 to 3am.

43. On the day of the incident after she returned from work the complainant approached the appellant to sort out what was happening to their relationship. As she put it; "*I did not want to go into my second anniversary agitated and regretting marrying him"*[13]*.* The anniversary was on 26 October and she felt that they had the five intervening days to attempt to iron out whatever issues were between them so that "*we can just either call it quits or move forward as a couple and seek help …"*[14]

That evening after putting their baby to bed she sat next to him on the couch because she really wanted to discuss their relationship as she did not want to go into their anniversary upset. The appellant said "*You know what, I am not going to talk about it now. I am going to talk about it when I am ready ".* She replied

[11] Record p 34
[12] Record p39. See also p 44
[13] Record p 51
[14] Record p 52

that she wants to have the discussion now and said that this, meaning his aggression and domineering way, needs to stop. [15]

He said no. there was some silence between them. She then asked for the TV remote because he was just flipping through the channels. He threw it at her aggressively. She turned the volume down

44. He then got up and put the volume of the TV up. She then also got up and said that in this marriage there are two people and he must give her a hearing, and not just when he decides because then it will never happen. She told him that they needed to discuss what is happening in their relationship and why she was being accused of being insecure and everything else. [16]

45. The constant theme adopted by the appellant, through his counsel, in cross examination was that he was simply minding his own business and that it was the complainant who was being confrontational and acted aggressively towards him whereas he did not want to get into a confrontation with the complainant [17] and this culminated in a shoving match where she inadvertently slipped and sustained her injuries.

46. She however persisted that she was not being confrontational but was insisting on having a discussion between husband and wife because otherwise they would never be able to resolve anything, that it was necessary to do so then for the sake of their relationship and whether it was capable of weathering the storm or was at an end.[18]

47. At this stage they were both standing in front of the TV and the appellant then pushed her away and she pushed him back. They both were shoved back by the other. She claimed that he then grabbed her and shoved her through the bathroom door and against the basin and then started to punch her. she tried defending herself by covering her face and avoid the blow because that was

[15] Record p 56
[16] Record p 56
[17] Record pp 52 and 54
[18] Record at pp 57 and 58

where his blows were being directed. His punch however landed on her chin She fell against the bath, got up and before he could hit her again she shoved him and said "*You know what, go ahead and just do whatever". [19].*

48. In attempting to discredit here evidence counsel had admitted into evidence the statement the complainant had made. What is that even after the incident in the bathroom she told him that his actions were unacceptable, that he was not a man for doing so, to which he responded by telling her that if she cannot keep her mouth shut he will, hit her again. She then went to the room where her children were asleep[20]. He then went into a different room to sleep.

49. Of importance is that aside from testing her evidence the appellant's counsel did not put a version of what the appellant would say actually occurred. And at best his challenge was to nit-pick and maintain the theme that the complainant was aggressive while the appellant attempted to avoid a confrontation. However it is clear from the evidence that it was the appellant who sought to evade a discussion which was vital to their continued marriage relationship and refused to do so to the point that he became aggressive. When she for the first time stood her ground by pushing him back after he had pushed her he then escalated his aggressive behaviour by grabbing her with sufficient force to leave his fingerprint marks on her and also tried to hit her as her defensive wounds on her arms indicate. Furthermore it was not challenged that he had punched the complainer and that one of the punches managed to strike her chin despite her attempts to defend herself and avoid his blows.

50. However, when the appellant testified he denied punching the complainant but could give no acceptable explanation for her injuries. He claimed that they might have scratched each other but really had no idea how the abrasions were caused. [21]

[19] Record p60
[20] Record p70
[21] Record p82

51. The complainant had taken photographs of her injuries the day after the incident. It is evident from the record that they were handed up in evidence[22]. These photographs are also missing. However, the Magistrate in her judgment found that the photographs corroborate the complainant's version. [23]

**WHETHER THE COMPLAINANT'S EVIDENCE WAS CONTRADICTORY**

52. I am satisfied that on the material allegations concerning the assault the complainant's evidence was not contradictory. Moreover the appellant's counsel did not put a version to the complainant which effectively challenged her account of the actual assault.

53. The complainant's statement is missing. However, such extracts as are mentioned in the record support the material facts. It must also be recalled that there would be no reason for the police to take down any details regarding the events of the night preceding the incident nor are they relevant to the charge of assault against the complainant on the following evening.

54. That leaves the contention that the Magistrate failed to take into account that the charges were only formally laid some three months later. However the evidence regarding the nature of the assault by reference to the J88, her making a report at the Rosebank police station and taking photographs which, it is not disputed, corroborates the complainant's version of the nature of the assault, is more than sufficient to dispel any doubt about the assault having taken place.

    The reason for the appellant not laying charge formally at the only police station where she could prior to when she did is also adequately explained and can be readily adduced from the facts set out earlier both as to her own emotional situation regarding the continuation of the marriage and the fact that she had then relocated to Cape Town with the children.

[22] Record p72
[23] Record p 122

55. The nature of the assault leaves no doubt that it was with intent to do grievous bodily harm. The appellant had pushed the complainant through the bathroom door and inter alia had directed punches to her head. That suffices for elevate the incident to beyond a simple common assault.

56. The appellant has wisely not pursued the issue of sentencing and nothing has been placed before us to suggest that the sentence imposed was inappropriate in so far as the appellant is concerned. It mat-y well have been lenient considering the history of the appellant's conduct towards the complainant which had not been disputed during the course of her evidence and included her being kicked by him.

57. Accordingly, whether by reference to the question of the appellant satisfying the court that there are reasonable prospects of success on appeal (if considered by reference to the grant or otherwise of condonation) or even if condonation did not come into the reckoning, there is no grounds for appealing the Magistrate's conviction of the appellant or the sentence imposed.

**ORDER**

58. In the result the appeal is dismissed with costs

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**SPILG, J**

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**DLAMINI AJ**

**Electronically submitted therefore unsigned**

**Delivered:** This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email. It will also be released for publication on SAFLII. The date for hand-down is deemed to be 11 June 2021.

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| DATE OF JUDGMENT: | 11 June 2021 |
| FOR APPELLANT: | Adv. T Carstens |
| | Meltz Le Roux Motshekga Attorneys |
| FOR THE STATE: | Adv. M Mashego |
| | Office of the Director of Public Prosecutions Gauteng Local Division, Johannesburg |