



SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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STATUS Immediate

Please note that the media summary is for the benefit of the media and does not form part of the judgment.

Mthembu v The State **(206/11) [2011] ZASCA 179 (29 September 2011)**

The Supreme Court of Appeal (the SCA) today dismissed an appeal by Simange Wiseman Mthembu against the sentence of 18 years' imprisonment imposed on him for his conviction on one count of murder.

The appellant was convicted on a charge of murder by Nicholson J in the Durban High Court and sentenced in terms of s 51 of the Criminal Law Amendment Act 105 of 1997 (the so-called minimum sentencing legislation) to imprisonment for a term of 18 years. His appeal against both conviction and sentence to the full court, Pietermaritzburg, was unsuccessful. The full court in dismissing the appeal held that an earlier decision of that court, namely *S v Mbatha* 2009 (2) SACR 623 (KZP), had been wrongly decided. Because of those discordant decisions, special leave to appeal to the SCA was granted by this court in respect of sentence only.

The issue on appeal was the correctness of the decision in *Mbatha*, which had held that the failure to apprise the defence that a sentence higher than the statutory minimum was being contemplated was a defect in the proceedings. The appellant argued that the defence should be warned by the court at the outset of the sentencing phase that a sentence higher than the statutory minimum was being contemplated because an accused person may conduct his or her case differently if forewarned.

The SCA, after a careful consideration of s 51 held that it fetters only partially the sentencing discretion of the court. The SCA stated that while it was understandable that the state should forewarn an accused person of its intention to invoke the minimum sentencing provision, no such duty could be imposed on a court. It added

that no such duty existed prior to the commencement of the Act and no such duty could be sourced in the Act itself. The SCA refused to endorse the approach of the court in *Mbatha* that the failure to apprise the defence of the fact that a higher sentence than the minimum was in contemplation constitutes a defect in the proceedings.

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