IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A209/11

DATE: 2 December 2011

In the matter between:

ENKOSI KUPE Applicant

and

THE STATE Respondent

JUDGMENT

CLOETE, AJ

On 20 July 2010 the appellant, who had pleaded not guilty, was convicted in the Blue Downs Regional Court on one count of murder. On the same date he was sentenced to eight years direct imprisonment. With the leave of the trial court he initially appealed against both his conviction and sentence, but no longer persists with his appeal against sentence. The appellant was legally represented throughout the trial.

The appellant has failed to prosecute his appeal timeously and seeks condonation from this Court. In an application for condonation filed on 18 November 2011 he explains that he had appointed an attorney in private practice to prosecute the

appeal on his behalf. However he could not afford to retain the attorney's services due to lack of funds. He was not advised that he could obtain representation through the Legal Aid Board and only became aware of this in July 2011. On 1 August 2011 the appellant successfully applied for Legal Aid and as a consequence of these events his heads of argument were filed out of time.

Whilst the appellant's reasons for his failure to prosecute the appeal timeously are *prima facie* accepted by this Court that is not the end of the matter, since we must nonetheless be satisfied that the appellant has a reasonable prospect of success on the merits if condonation is granted. I accordingly turn to the merits of the case.

The appellant is one of four persons who were alleged to have murdered the deceased in broad daylight on 3 June 2007 at Mfuleni after they had accused him of stealing a bicycle. The State relied on the evidence of two witnesses, a Mr Ntombela and Ms Siheya. Both of these witnesses were present at the scene, and both identified the appellant as one of the perpetrators. Mr Ntombela testified that he was attending a street committee meeting at a fellow member's home at approximately 2 pm on the day in question when they heard a group of people shouting nearby. When they investigated he

saw the appellant and three others assaulting the deceased. They were armed with an iron rod, a sjambok, wooden planks, a knife and other weapons. When one of the perpetrators pulled out a knife the women onlookers started to scream and cry. Mr Ntombela then went back to his fellow member's home to call the police. When he returned the four perpetrators were still assaulting the deceased. Mr Ntombela was standing approximately two metres away. Despite the deceased begging for mercy the four persisted in the assault. The witness saw the appellant hitting and kicking the deceased and shouting that "the dog must die". The four then dragged the deceased towards a concrete wall where there was a tap. The appellant started slamming the deceased against the wall. The deceased eventually succumbed to his injuries. Mr Ntombela knew all four of the perpetrators and knew the appellant by name.

During cross-examination Mr Ntombela stuck to his version, and also testified that when the police arrived at the scene the deceased was already dead and some of the bystanders took the police to where they could find the appellant and one of the other perpetrators.

Ms Siheya, another street committee member, testified that in the early afternoon on the day in question she was visiting a

friend, Rachel, when the deceased's mother called her reporting that her child was being assaulted. Ms Siheya accompanied the deceased's mother to the scene where she saw the deceased lying on his back on the ground with his hands tied behind him. She saw four men assaulting the deceased with various weapons including an iron rod and a "kierie" in the presence of a number of bystanders. She knew the perpetrators. The four had attended meetings chaired by the street committee in the past. She asked the four why they were assaulting the deceased and they told her to ask the deceased, which she did. He confirmed that the four suspected him of having stolen a bicycle. He was bleeding heavily and swallowing blood. The four perpetrators then dragged the deceased towards a tap fixed into a concrete wall where they continued to assault him. When the deceased passed away the perpetrators left the scene. The witness waited until the police arrived and informed them of the identities of the perpetrators. She was one of the bystanders who accompanied the police to the homes of the appellant and his co-accused where they were arrested and brought back to the scene.

During cross-examination Ms Siheya likewise stuck to her version of events.

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The appellant testified on his own behalf. It was common cause that the deceased had been murdered at the place and on the date in question in the manner alleged. However the appellant denied any involvement and claimed that he only arrived on the scene after the deceased had already passed away. He also claimed that he did not even know the State witnesses, although this had not been put to them in cross-examination. He also did not know his co-accused who was accused number 2 in the trial, and alleged that he had only seen the latter for the first time when they had appeared together in court.

The appellant's co-accused gave a version similar to that of the appellant. Accordingly the only issue was whether the appellant was one of the perpetrators. The magistrate carefully evaluated the evidence. He remarked that the two State witnesses were older, respectable people and correctly found that they corroborated each other's evidence in all material respects. There was no evidence before the court *a quo* to indicate that the two State witnesses had any motive to falsely implicate the appellant. It was also highly unlikely that two independent witnesses would have coincidentally and erroneously singled out the same four perpetrators from the crowd which had gathered at the scene. The magistrate thus correctly found that the appellant's version was of such a

nature that it could not be reasonably possibly true. He correctly convicted the appellant as charged.

Returning now to the appellant's application for condonation, it is clear from what I have already found that the appellant does not have any reasonable prospect of success on the merits. Accordingly his application for condonation should be dismissed. However in S v Gopal 1993(2) SACR 584 (A) the Court found that where a High Court refuses an a application for condonation solely on the basis of any prospect of success on appeal such a decision is not made on appeal as contemplated by Section 20 (4) of the Supreme Court Act 59 of 1959. Accordingly leave to appeal to the Supreme Court of Appeal is not required and the latter court, despite the provisions of the Criminal Procedure Act 51 of 1977, may nonetheless entertain the appeal in terms of Section 20 (1) of the Supreme Court Act.

The Supreme Court of Appeal considered this issue in S v Farmer 2001(2) SACR 103 (SCA) at 104 h-i. NAVSA, JA said that it is thus clear that the refusal of an application for condonation solely on the basis of an absence of any reasonable prospect of success on appeal may have undesirable consequences. This result may be avoided by the High Court disposing of the appeal on its merits.

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In my view the particular circumstances of this case dictate that the appeal should be decided on its merits. To refuse the appellant's application on condonation on the basis that he has no reasonable prospect of success on the merits of the appeal might well result in the Supreme Court of Appeal having to determine the merits of the appeal at a later stage. As I have said, I am satisfied that the magistrate correctly convicted the appellant. In the result, little would be achieved by not dismissing the appeal as a whole.

In the result I propose the following order:

1. The appellant's APPLICATION FOR CONDONATION IS GRANTED;
2. The appellant's APPEAL AGAINST HIS CONVICTION IS DISMISSED. The conviction is confirmed.

CLOETE, AJ

I agree, it is so ordered,

BAARTMAN, J

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