IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:___________

In the matter between:

ALFRED DISCO NKOSI APPLICANT

And

THE STATE RESPONDENT

N O T I C E O F S E T - D O W N

KINDLY TAKE NOTICE THAT, the abovementioned matter has been set-down for hearing on ____ day of ______________ 2014 at ______________________________.

The following parties will be briefed to appear

- ☐ The Director of Public Prosecutions

Signed and dated at PRETORIA on this 15 day of August. 2014.

APPLICANT

A.D.

3.

On **12 November 2012** leave to appeal against the conviction and the sentence was granted to the FULL COURT of NORTH WEST HIGH COURT, MAFIKENG and was dismissed on the **18th April 2013.**

Petition was lodged with the Supreme Court of Appeal against both conviction and the sentence and was refused on the **06th August 2013.**

I have only the following documents to support my application:

3.1 Judgment on refusal of leave to appeal by the full bench as attached.

3.2 Court order from Supreme Court of Appeal.

4.

Wherefore I humbly submit that condonation be granted for non-compliance with the requirements of the Uniform Rules of the Court in not obtaining the following:

4.1 Judgment on conviction and the sentence

4.2 Court order of full bench

4.3 Judgment on refusal of leave to appeal from the Supreme Court of Appeal, before the Honourable SHONGWE AJ et MEYER AJA.

4.4 The record of the trial proceedings are voluminious.

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5.

AD ARGUMENT

Introduction

5.1 The rules governing the admissibility of hearsay evidence under the provisions of Law of Evidence Amendment Act[1] in the context of the right to a fair trial specifically, the need to prevent procedural abuse among other things.

5.2 The issue concerning the admissibility of extra-curial statements of an accused against a co-accused in a criminal trial.

5.3 The grounds for Direct Access rest on the constitutionality of the proceedings committed by the trial court.

6.

AD CONDONATION

6.1 I am advised that it is necessary to refer to the reasons why there is such a large time lapse between my refusal of my petition and Direct Access application and I am doing so herewith.

6.2 It is worth mentioning that I have no legal knowledge whatsoever and did not know what to do in order to raise my concerns about the Court of trial and the Supreme Court of Appeal. At prison no one was able to assist me in order to raise this matter.

6.3 Because of this, I wrote to the Legal Aid Board in Pretoria to assist me.

[1] Act 45 of 1998, which came into effect on 3 October 1998. The relevant provisions are contained in section 3.

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6.4 After a period of approximately a year passed and I heard nothing, I started telephone enquiries but also without any success.

6.5 I tried to raise funds with the help of my family in order to instruct a legal practitioner on my behalf since I received no assistance from the Legal Aid Board South Africa and failed in this effort as well.

6.6 I met a certain offender who was studying 'LLB' with UNISA to read the record of my trial proceedings and he then advised me after reading that.

6.6.1 However, upon advice which I accepted, I am of the considered view that there is indeed a prospect of success and that condonation should be granted for the late filing of this application.

7.

Factual Background

The facts have been summarized in the judgment of the trial court and full bench as per attached documents. The applicant Mr. Nkosi was accused number four (4) at the trial. He was indicted and convicted of various counts[2] with six (6) other accused in the High Court. It was alleged that: In the evening of 03rd August 2002 at Mothutlung, Warrant Officer Dingaan Makuna, arrived at his house. His service pistol was tucked on his waist. In his premises were two (2) motor vehicles i.e. a bakkie and a Toyota Camry. Before he could enter the house he was surprised by two men who entered the premises on foot, each armed with a firearm. He was then shot thrice and died in

[2] Namely: Murder, Robbery with aggravating circumstances, possession of unlawful firearms and ammunition

A.A.

hospital later that night during an emergency operation. Immediately after the deceased was shot, the Camry car alarm went off. The deceased's service firearm was never seen again. Accused number 1, 3, 7 and 8 made statements in this matter.

8.

HIGH COURT PROCEEDINGS:

Accused number four (4) pleaded not guilty to all counts, made formal admissions[3] and tendered his alibi.

In the court of trial it was transpired that accused number 1, 3, 7 and 8 made statements. The statements gave the version of how the robbery and murder was orchestrated and several other alleged members of the group involved in the robbery and murder.

When the statements tendered at the trial, an objection was taken to its admission. The admissibility of all statements were challenged on the ground that it had not been proved to have been made freely, voluntarily and without undue influence, within the meaning of section 217 of the Criminal Procedure Act 51 of 1977 (CPA).

The High Court conducted a trial-within-a-trial and heard evidence regarding the admissibility of the statements made by accused number 1, 3, 7 and 8.

[3] In terms of section 220 of the CPA. These admissions included the following: The name of the deceased on count1, photo albums, various forensic laboratory and Ballistics evidence, and the key and sketch plan of the scene of the crime.

A-D.

9.

An objection was raised to the admissibility of all statements made by the four (4) accused on the basis that they were forced and precipitated by the number of assaults. At the conclusion of the trial-within-a-trial, the court admitted the statements provisionally against accused and reserved reasons for its ruling.

[Record page 478]

10.

At the close of the state's case Counsel for applicant unsuccessfully applied for discharge in terms of section 174 of the Criminal Procedure Act. In the cause of making ruling the Judge remarked: "The certain name that appears in the statement of accused 1 (one) does refer to accused number four (4) (the appellant)".

11.

It became apparent during the proceedings and in the context of the admissibility of statements by accused 1, 3, 7 and 8 against the applicant that Counsel of the prosecutor was aware of the decision in:

S v Ndhlovu and Others 2002 (6) SA 305 (SCA), 2002 (2) SACR 325 (SCA), [2002] 3 all SA 760 (SCA).

The admissibility of the statements by accused 1, 3, 7 and 8 against the applicant was considered for the first time and as a "critical issue" only in the court of the judgment on the merits and after the applicant testified. The trial court admitted the statements

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against the applicant on the basis of the probative value of the evidence and that the interest of justice required its admission.

12.

IN THE COURT: GROUNDS FOR DIRECT ACCESS

12.1 The applicant's first constitutional challenge was that *Ndhlovu* had the effect of general discriminating against accused person because of the differentiation accorded between confessions and admissions. The differentiation violates section 9 of the Constitution.

12.2 The applicant's contention is that the statements of accused should have been recognized as confessions and that confessions of an accused cannot be used as evidence against co-accused. Accordingly all four (4) statements should not have been used as evidence against him.

12.3 The applicant challenges the timing of the ruling on the admissibility of the statements as evidence against him and argued that his right to adduce and challenge evidence, enshrined in section 35 (3) (i) of the constitution, was violated. If the evidence of the statements was inadmissible against the applicant, it was argued, the admissible evidence could not sustain his conviction.

13.

The appellant submit that without any view on the correctness or otherwise of *(Ndhlovu)* the trial court did not comply with the approach enunciated in the case: among other things that

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(i) The reception of the hearsay evidence should not come at the end of the trial when the accused is unable to deal with it and that,

(ii) The accused must understand the full evidentiary ambit of the case against him.

And the provision under section 3 (1) of the Act, thereby resulting in an improper admission of inadmissible evidence against the applicant.

14.

Needless to say, that resulted in fundamental prejudice to the applicant, thus not affording him a fair trial. Accordingly, everything said out of court by all the statement makers incriminating the applicant ought to have been and must be disregarded entirely.

15.

The applicant submits that there is no onus on the applicant to prove his innocence. A mere suspicion, strong as it might be, is not adequate to confirm his conviction. Conviction based on suspicion or speculation, as the court stated in **S v T 2005 (2) SACR 318 (E) at para 37,** are "the hallmark of a tyrannical system of law" and "South Africans have a bitter experience of such a system and where it leads to. That system cannot and ought not, in our constitutional democracy be countenanced".

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16.

Indeed, the adherence to the accepted principles regarding the admissibility of hearsay evidence and confessions may well result in the acquittal of an accused against whom the evidence, if admitted, would make a strong case for his guilt. However, if the only admissible evidence which the accused knew he had to meet cannot on its own sustain conviction; the conviction must be set aside. This result must follow however strong the suspicion of his complicity in the commission of crime might be the right of the accused at all important stages to know the ambit of the case he or she has to meet goes to the heart of a fair trial.

17.

Furthermore the appellant submit that the record in this matter reveals a number of material misdirections by the trial court which resulted in the proceedings not being in accordance with justice. On a conspectus of all the admissible evidence, the state failed to discharge its onus in respect of the applicant. Consequently, the conviction of the applicant should be set aside.

17.1 Condonation for the late filing be granted.

17.2 That leave to appeal against conviction and the sentence be granted in respect of all charges as they relate from one same incident.

17.3 That the order of trial and Supreme Court of Appeal be set aside.

17.4 That the conviction and the sentences of the appellant be set aside

A.D

Signed and dated at PRETORIA on this 15 day of August 2014.

APPLICANT

Thus signed and sworn to before me by the deponents, having acknowledged that they know and understand the contents of this declaration and that they have no objection against taking the prescribed oath, which they consider binding on their conscience

COMMISSIONER OF OATH

FULL NAMES Milton Mkateko SURNAME Golele

EX OFFICIO: REPUBLIC OF SOUTH AFRICA

RANK/DESIGNATION: CO3

ADDRESS: KGOŠI MAMPURU II CENTRAL CORRECTIONAL CENTRE

PRIVATE BAG X 45 The honourable court "a quo" had erred

PRETORIA

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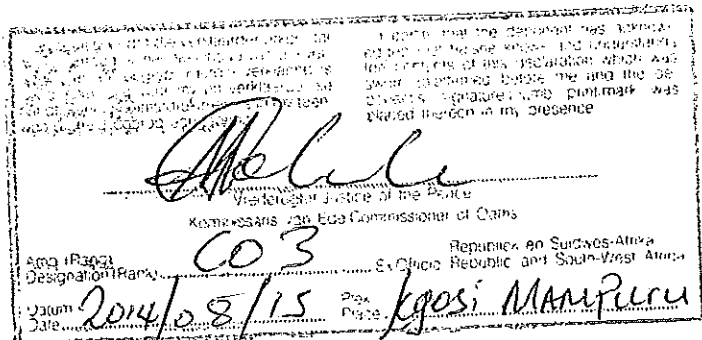

HEAD CORRECTIONAL CENTRE
Kgoši Mampuru II Management Area: Central CC
2014 -08- 15
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