

SOUTH AFRICA / JUDGMENT

Shabangu and Others v S (R113/19) [2020] ZAMPMBHC 34 (10 June 2020)

[2020] ZAMPMBHC 34

COURT

Mbombela High Court, Mpumalanga

BEFORE

B M Ngoepe, C Pretorius, Mangke

CASE / FILE NUMBER

R113/19

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION MBOMBELA (MAIN SEAT)

CASE NO: R113/19

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

DATE HEARD: 2 June 2020

DATE DELIVERED: 10 June 2020

In the matter between

BLUES EXCELLENT SHABANGU

1st Applicant

MANDLA SHAKOANE

2nd Applicant

STHEMBISO NGUJANA

3rd Applicant

PATRICK NGUJANA

4th Applicant

NAOMI A ENGELBRECHT (Regional Court President) 5th Applicant

and

THE STATE

Respondent

In re: the special review between:

THE STATE

versus

ERNEST MAVIMBELA & VARIOUS OTHER MATTERS

NGOEPE AJ (Retired Judge President), C PRETORIUS AJ (Retired Judge) and MANKGEAJ

Judgment

on Application for Leave to Appeal

[1] This is an application for leave to appeal to the Supreme Court of Appeal against our judgment handed down on 22 April 2020. The applicants before us are Blues Excellent Shabangu, Mandia Shakoane, Sthembiso Ngujana and Patrick Ngujana ("the accused"), being first to fourth appellants respectively. Another applicant, we are told, is Ms N A Engelbrecht, the Regional Court President (RCP) of Mpumalanga Province. The facts of the case and the issues involved are fully set out and discussed in our judgment; there is therefore no need to repeat them. This judgment would have been brief but for some issues that emerged at the hearing of the application.

The merits of the application.

[2] Our judgment dealt fully with the reasons why we held that the RCP was wrong in her interpretation of the relevant Government Notices and other legislation, as also in respect of her understanding of

Section 8(4)(c) of the Superior Courts Act 10 of 2013 in relation to the Directives issued by the Judges President. It is clear from our judgment that regarding the application of Section 8(4)(c), it conveys that each case would depend on its own facts as to whether or not a JP's Directive is within his/her authority. Regard being had to the facts of this particular case, there is no reasonable prospect that another court would come to a different conclusion. We were told that the matter was of public interest; but that was precisely why the Judge President constituted a Full Bench. The submissions, in essence, came down to saying that it would be good if the Supreme Court were to speak on the matter. The real test is whether we are satisfied that the appeal would have reasonable prospects of success; given the undisputed facts before us, we are not so satisfied. We cannot simply send a non-meritorious matter to the Supreme Court for the purpose of obtaining the Seal of that court.

We might just as well deal with issues of locus standi as well as claims of irregularities, all of which were raised for the first time at the hearing of this application.

- [3] After receipt of the applications, we issued a Directive advising the parties to prepare themselves to make submissions firstly, on whether the first to the fourth applicants had any locus standi. Secondly, as the RCP's Notice of Appeal gave an impression that she was noting it in her personal capacity, whether she had locus standi to do so given the fact that when she gave the judgment which was the subject of the review, she was doing so in her official capacity as a Judicial Officer. In response to the Directive, the attorneys for the RCP sent a letter dated 20 May 2020 in which it was stated that she was noting an appeal in her official capacity, although they added that she also had the right to do so in her personal capacity. At the hearing, Mr Mokhari SC, who appeared for the RCP, confirmed that the RCP was noting an appeal in her capacity as a Judicial Officer.

The accused's locus standi

- [4] Paragraph 28(c) of the Order leaves intact the RCP's decision to transfer the accused's cases to Mhala, as they had wished, as opposed to being transferred to Skukuza. The Order did not therefore change their position. Their counsel, Mr Shakoane SC, argued that they would be prejudiced if our Order were to stand. Pressed to show any prejudice to the accused which might give them locus standi to prosecute an appeal, he argued that attending the Skukuza Court would be inconvenient for the accused because of, inter alia, the small size of the courtroom and difficulties in accessing the Kruger National Park. The argument is fundamentally flawed. It

overlooks the fact that in her judgment the RCP made no findings on issues of inconvenience, nor is her ruling based on that. They

therefore want the Supreme Court of Appeal to adjudicate a point on which the RCP made no ruling, and on which we therefore did not either. The second difficulty for them is that the alleged inconveniences were in any case strongly denied by Adv Susanna Venter, specialist prosecutor in the office of the Director of Public Prosecutions, Mbombela, and Dr Xolani Nicholas Funda of SANParks in their affidavits. Their affidavits, dealt with in our judgment, were filed to contest the RCP's response to questions that had been directed to her by Judge President Legodi when he referred the matter for review. In any event, an accused person does not have the luxury to choose at which court building they should be tried. As long as the crime was committed within the relevant magisterial district of the court, it remains the prerogative of the State to choose which court building; whether or not the court building has an effective air-conditioning system, or whether the road to that court is dirt or bumpy in relation to the court building they prefer. It is our view that the accused have no locus standi. The outcome of the appeal would have no meaning to them.

Alleged irregularities:

[5] The issue is not whether the matter was reviewable or not; at any rate we explained fully why it was. What is now being raised in the RCP's Notice of Appeal is that both the RCP and the JP should have been joined, although it is not clear by whom. It turned out that in truth, the argument is that a wrong procedure was followed in subjecting the RCP's judgment to review. Mr Mokhari SC said the proceedings should have been by way of Rule 53, and the RCP joined as a respondent. He therefore raised the issue of non-joinder. Mr Shakoane SC also argued likewise. In this respect we were referred to a judgment of the Full Bench of the High Court, Limpopo Division: *Old Mutual Finance (Pty) LTD v Makalapetlo* 2018 (3) SA 258 (LP). This was a civil case in which the magistrate had submitted a default judgment, entered by the clerk of the court, for review

behind the back of both the judgment creditor and the judgment debtor. The court noted that it was not stated in sections 21 or 22 of the Superior Courts Act 2013 as to what procedure should be followed in bringing a review under the sections; it held, however, that it should be by way of Rules 6 or 53. Of course, that was a civil case. A lot might turn on the fact that the proceedings to be reviewed before us are criminal proceedings. Pragmatically speaking, invoking either Rule 53 requires the involvement of an attorney and counsel; therefore, access to justice in criminal matters might be an issue; particularly where indigent people are involved. There are at any rate two related reasons why, in the present case, leave to appeal cannot be granted:

5.1 At the hearing of the review proceedings, neither the accused nor the RCP raised the alleged non-joinder. The RCP therefore wants a point which was never raised before us and on which we have not made any ruling, to be adjudicated for the first time at the level of the Supreme Court of Appeal; it is trite law that this may not be done. The accused were represented by Mr Shai, instructed by the current attorneys. He also informed us then that he was arguing for the RCP; we allowed him to do so in the interest of full ventilation of issues for the benefit of the Court. If Mr Shai was arguing for the RCP on his own frolic, which was not clear to us, the RCP nonetheless knew about the proceedings anyway and needed no invitation to appear if so advised, either in person or otherwise. Nothing was said or indicated

that the RCP had anything more to say or add to the extensive response she had already filed of record. The Orders made fell within

the perimeters of the referral and the issues raised and canvassed. They should therefore have been anticipated right from the beginning as a possibility, depending on the findings especially of law.

5.2 The reason the issue of the non-joinder of the RCP was not raised is obvious: she was not only informed of the proposed review, but was, importantly, given the opportunity to respond. Anyway, as far as the facts of this particular case are concerned, and bearing in mind that sections 21 and 22 of the Superior Courts Act do not prescribe any procedure, the argument that the review proceedings are vitiated by failure to invoke Rule 53, amounts to elevating form above substance. We say so for this reason: A complete record of the criminal proceedings in question was filed of record. It included specific issues formulated by the Judge President directed to the

RCP, pertinent to the correctness or otherwise of the basis of the RCP's judgment, namely, the interpretation of the law and the facts surrounding their disagreement. In so doing, the JP was giving the RCP the opportunity to respond as it is normally done, an opportunity the RCP seized. In fact, whereas the record of proceedings before the RCP, including her judgment, the JP's referral as well as questions to the RCP, comprised 70 pages, the RCP's response was twice as much. It comprised 136 pages, compiled as meticulously as could be expected of a judicial officer of her standing. Importantly, the response was in the form of an affidavit. In it, she dealt with every single question raised by the JP, submitting supporting annexures. Those were the questions, and the responses thereto, on which the review and the review judgment turned. The RCP therefore made full use of the opportunity to, as it were, put her case. It is important to note that nowhere in our judgment did we question the RCP's credibility; we set aside her judgment solely on points of law. We treated the material facts as being common cause. We treated the RCP's response as being part of the record and dealt with it fully. Once more, we refer to our judgment.

It might well be that an appropriate opportunity will arise for sending a matter to the Supreme Court of Appeal to adjudicate whether or not Rule 53 should be invoked all the time including in criminal matters as the RCP argues; but, given paragraphs 5.1 and 5.2, the present is

not such a case. We may not compromise important principles governing the adjudication of applications for leave to appeal solely for the purpose of creating such an opportunity. Serious doubt also exists as to whether a Judicial Officer whose judgment has been overturned - be it on review or appeal - would have the right to appeal to the next Court, in his/her judicial capacity for that matter, in order to defend his/her judgment. It is unheard of.

[6] For all the reasons given above, the following Order is made: The application is dismissed.

B M NGOEPE

JUDGE C PRETORIUS

ACTING JUDGE MANGKE

For the accused (applicants 1 - 4):

Adv Shakoane SC

Adv Shai

Instructed by: Mpho Mashiloane Attorneys, Mbombela

For Regional Court President Engelbrecht

Adv Mokhari SC

Adv Lithole

Instructed by Yethu Lushaba Attorneys, Mbombela

For the State

Director of Public Prosecutions

Adv F van der Merwe, Mbombela

For the Minister of Justice

Adv Tsietsi Ramatsekisa

Instructed by the State Attorney, Pretoria

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