

SOUTH AFRICA / JUDGMENT

Sibiya and Another v Magistrate for the Regional Division of Northern Cape, Mr Viewe NO and Another (301/2019) [2020] ZANCHC 60 (7 August 2020)

[2020] ZANCHC 60**COURT**

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Chwaro

CASE / FILE NUMBER

301/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTHERN****CAPE DIVISION, KIMBERLEY****Case**

No:	301/2019 Date
delivered:	07/08/2020 In
the matter between:	MICHAEL JOEL SIBIYA First Applicant TEBOHO RONY NOE Second Applicant and MAGISTRATE FOR THE REGIONAL DIVISION OF NORTHERN CAPE, MR M VIEWE N.O. First Respondent NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Second Respondent

CORAM:MAMOSEBO J et CHWARO AJ

JUDGMENT**ON APPLICATION FOR LEAVE TO APPEAL**

CHWARO AJ:

INTRODUCTION

[1]

This is an application for leave to appeal to the Supreme Court of Appeal against the whole judgment and order handed down on 28 February 2020 in terms of which this Court dismissed, with costs, an application to review and set aside the on-going criminal proceedings instituted by the State against the applicants herein at the Upton Regional Court under case number RC75/2015.

[2]

The application for leave to appeal is premised on various principal grounds on the merits and the costs order. The applicants contend

that their application ought to be considered in terms of the provisions of section 17(1)(a)(i) and (ii) of the Superior Courts

Act[1], ("the Act") as they believe that the appeal would have a reasonable prospect of success and there is some compelling reason why the appeal should be heard. The application is opposed.

APPLICABLE PRINCIPLES ON APPLICATION FOR LEAVE TO APPEAL

[3]

On a proper reading and analysis of the provisions of section 17(1)(a) of the Act reveals that leave to appeal may only be granted on either of the two situations, firstly under circumstances where the appeal would have a reasonable prospect of success or secondly where there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[4]

It is now settled law that since the enactment of section 17(1)(a) of the Act, the threshold for determining whether to grant leave to appeal on the basis that the appeal would have a reasonable prospect of success is higher and stringent[2]. Our courts have interpreted the phrase "would" as indicative of some form of certainty or realistic chance of success.

[5]

In *The Mont Chevaux Trust v Tina Goosen & 18 Others*[3] the court, pronounced itself on the new stringent test and the meaning of the phrase "would" in the following terms:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cornwright & Others* 1985 (2) SA 342 (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

[6]

In the matter of *MEC for Health, Eastern Cape v Mkhitha and Another*[4] the Supreme Court of Appeal explained the higher and stringent threshold on an application for leave to appeal based on section 17(1)(a) in the following terms:

"Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success: or there is some other compelling reason why it should be heard.

An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal."

[7]

In considering an application of this nature, one should also be mindful of the dictum in *S v Mabena and Another*[5], where the court stated the following:

"It is the right of every litigant against whom an appealable order has been made to seek leave to appeal against the order. Such an application should not be approached as if it is an impertinent challenge to the Judge concerned to justify his or her decision. A court from which leave to appeal is sought is called upon merely to reflect dispassionately upon its decision, after hearing argument and decide whether there is a reasonable prospect that a higher court may disagree."

GROUND OF APPEAL

[8]

A summation of the grounds of appeal advanced by the applicants under section 17(1) (a)(i) of the Act are that this Court erred :

- 8.1. In failing to appreciate that the gist of the information contained in the standing order was communicated to Mr Bakamela on 7 April 2016 alternatively on 8 April 2016 during negotiations in respect of the section 220 admissions;
- 8.2. In finding that reliance was placed on conjecture and assumption about Mr Bakamela's knowledge of the gist of the information contained in the standing order;
- 8.3. In failing to refer the factual dispute about whether Mr Bakamela sought admissions from Mr Mjila to oral evidence;
- 8.4. In finding that the suggestion by the applicants that the Presiding Magistrate indeed confirmed that the State conducted the trial by ambush was not borne out by the record; and
- 8.5. In finding that the applicants did not advance any exceptional circumstances to warrant interference in an incomplete criminal trial.

[9]

The applicants further contend that leave to appeal ought to be granted on the basis of the provisions of section 17(1)(a)(ii) as they submit that the matter involves an accused's right to fair trial as guaranteed in section 35(3) of the Constitution and that it relates to the conduct and credibility of the prosecutor during the course of a criminal trial thus bringing into sharp focus the concern about the administration of justice.

- [10] In as far as the costs order is concerned, the applicants contend that this Court misapplied the Biowatch principle and should have not ordered them to pay the costs as they were enforcing their constitutional rights against a state organ in a manner that cannot be described as vexatious or untoward.

DISCUSSION

- [11] The main judgment dealt fully with the reasons for rejecting the version of the applicants relating to the alleged knowledge of Mr Bakamela, during or about 7 and 8 April 2016, about the gist of the information contained in the standing order. On this ground, the applicants rely on a supposition which is alleged as if it is a fact.
- [12] The supposition is that "it is highly improbable that Mr Bakamela, a Prosecutor at a specialised unit within the NPA, would not have been told at the consultation what the gist of the content of the standing order is". The main judgment held that this supposition is based on bald allegations where the applicants have not pleaded any facts to substantiate their allegations. These allegations were simply not proved by the applicants on the papers and this Court cannot equate same to

facts.

[13] In the absence of substantiating facts independent from the assumption or likelihood alleged by the applicants, the factual dispute around that aspect was correctly determined by invoking a robust approach in favour of the respondent in accordance with the Plascon-Evans test. There was no need to refer any aspect of the parties' respective versions to oral evidence.

[14] The issue around the suggestion made by the presiding magistrate in relation to a trial by ambush was also addressed in full in the main judgment. It is significant to note that the presiding magistrate has not given his reasons in refusing the applications made on behalf of the applicants in relation to the evidence of Andrews and the withdrawal of the admissions made.

[15] This Court will be second guessing the presiding magistrate if it were to make any pronouncement on that issue, which may be a subject of an appeal in due course. Resultantly, I reiterate that the applicants have not established exceptional circumstances warranting an intervention by this Court or the appeal court with an incomplete criminal trial.

[16] In the premises and after careful consideration of the totality of the grounds of appeal presented by the applicants, I find that the applicants have not met the threshold for consideration for leave to appeal in terms of section 17(1)(a)(i) of the Act.

[17]

Reliance on the provisions of section 17(1)(a)(ii) by the applicants on the basis of a right to fair trial and conduct of a prosecutor is misplaced. The application is not directed against any statutory or policy provisions which infringe the applicant's fair trial rights.

[18] The application is fundamentally premised on the alleged conduct of the public prosecutor in relation to his conduct of the trial which led to the applicants making section 220 admissions without having had the benefit of the standing order.

[19] In my view, this does not constitute a compelling reason to grant leave to appeal as the applicants may still contest the reasons of the presiding magistrate to refuse them to withdraw such admissions and still appeal any conviction, if any, premised on the said admissions.

[20]

On the question of costs, I need not restate the trite principle of our law that a costs order is a matter of judicial discretion exercised by a court hearing a matter. The applicants have not demonstrated the basis upon which they contend that this Court failed to exercise its judicial discretion properly or at all.

[21]

Though it is correct that private parties who are unsuccessful in their litigation against state organs to assert their constitutional rights must not be mulcted with costs, such a general statement is subject to exceptions. In Biowatch[6] the court put one of the exceptions in the following terms:

"Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication."

[22]

In the present application, the applicants are not attacking any provision of a statute or policy which they allege to be infringing on their right to fair trial. The applicants contend that the conduct of a prosecutor, in allegedly failing to inform them about the gist of the information contained in the standing order, infringes their right to fair trial.

[23] The trial court has already admitted the section 220 admissions made by the applicants and still has to provide reasons for such admissions and refusal to withdraw same. It is my considered view that this case is one of those exceptions, especially given the fact that the applicants had the benefit of legal representation at the relevant time and that they can still challenge the decision of the trial court to admit the admissions through a normal appeal process in due course.

[24] In my view, the launching of the review proceedings was simply an attempt at seeking matter. The costs order in the Gounden case referred to in the main judgment and above must apply with equal force herein.

ORDER

[25] In the premises, I make the following order:

. The application for leave to appeal is dismissed with costs.

OK CHWARO

ACTING JUDGE OF THE HIGH COURT

I agree

MC MAMOSEBO

JUDGE OF THE HIGH COURT

DATE OF HEARING:

The application for leave to appeal was determined on papers. The heads of argument on behalf of the applicants were filed on 30 June 2020 and those of the second respondent on 30 July 2020.

DATE OF JUDGMENT: 07 August 2020

REPRESENTATIONS:

Counsel for the Applicants: Adv. F. Petersen

Instructed by:

Mjila & Partners Kimberley

Attorney for the Second Respondent: Ms M.P.Olivier

Instructed by:

The State Attorney Kimberley

[1] No. 10 of 2013

[2] See Notshokovu v S [2016] ZASCA 112 (7 September 2016) at para 2

[3] 2014 JDR 2325 (LCC) at para 6

[4]

[2016] ZASCA 176 (25 November 2016) at paras 16-17

[5] 2017 (1) SACR 482 (SCA) at para 22

[6] Biowatch Trust v Registrar, Genetic Resources and Other 2009 (10) BCLR 1014 (CC) at para 25.
See also Thint Holdings (

Southern Africa) (Pty) Ltd and Another v National Director of Public Prosecutions [2008] ZACC 14;
2009 (1) SA 141 (CC) at para 62 and Gounden and Another v Noncebu N.O and Others 2018(2) SACR
186 (KZP)

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