

SOUTH AFRICA / JUDGMENT

Skosana and Others v Legal Aid Board (Mafikeng) and Another (2282/2007) [2008] ZANWHC 22 (31 July 2008) [2008] ZANWHC 22

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

2282/2007

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CASE NO: 2282/2007

In the matter between:

MR MANDLA SKOSANA 1 st Applicant

and

THE LEGAL AID BOARD (MAFIKENG) 1 st Respondent

CIVIL MATTER

DATE OF HEARING : 19 JUNE 2008

COUNSEL FOR THE APPLICANTS : ADV HITGE (amicus curiae)

[A]

Introduction

:-

[1] The six applicants apply to this court for an order, in the following terms:-

“ 1. That an amicus curiae (sic) be appointed for all (6) Applicants.

2. That the Respondents uphold the rights of all Applicants to appeal to the highest court.

3. That the 1 st Respondent speedily uphold the promises made on court order of notice of motion dated 23/06/05 case number 30/05.

4. That the 1 st Respondent uphold the constitutional right to appeal and section 237 of the Constitution
5. That the 1 st and 2 nd Respondents provide all (6) Applicants with legal assistance at the State's expense, within 21 days of this order.
6. That 1 st and 2 nd Respondents provide the Applicants with court records within 21 days of this order.
7. All Respondents pay the costs of these proceedings.
8. Granting of further and/or alternative relief.”
- [2] As far as the first prayer is concerned, Adv M.G. Hitge was appointed as amicus curiae for all six applicants and the court is indeed grateful for his assistance in this regard.
- [3] All the a p plicants are currently serving long terms of imprisonment at Baviaanspoort Maximum Correctional Centre for various crimes they have committed.
- [4] They are all desirous to appeal against their convictions and/or sentences. The relief they are seeking are in essence twofold namely:-

that the First Respondent provide all of them with legal assistance at the State's expense within 21 days of the order

that the First and/or Second Respondent provide the m with court records of their cases within 21 days of the order.

The reli ef is claimed in order for the applicants to file applications for leave to appeal.

- [5] The First Applicant deposed to the Founding Affidavit on behalf of himself and all the other applicants whilst the other applicants deposed to confirmatory affidavits. The same applies to the “Replying Affidavit” though each applicant provided more detail in their confirmatory “affidavits”. These “affidavits” does not conform with the requirements and are strictly speaking not affidavits. They were inter alia not attested to under oath. Despite their shortcomings, the court will in favour of the applicants take its contents into consideration.

[B]

Background

:-

The First Applicant

- [7] The First Applicant was convicted of murder on the 4th of March 2003 and was sentenced to 25 years imprisonment. On the 1st December 2004 the Second Respondent stated in a letter addressed to the First Applicant, that she (as the Registrar) was not responsible for the requisition of court records on behalf of inmate appellants (such as the applicants). The First Applicant was accordingly referred to the First Respondent for legal assistance by the Second Respondent.
- [8] The First Respondent responded to this letter of the Second Respondent (which was addressed to the First Applicant) by reminding the Second Respondent of the provisions of Rule 49 A (1). The First Respondent continued to request a quotation from the transcribers. The First Respondent delivered, upon receipt, the quotation to the Second Respondent on the 5th of July 2006.
- [9] The trial record of the First Applicant has not yet been received.

The First Applicant was however visited by an officer of the First Respondent on 27 November 2007 whereupon he properly completed and signed an application for legal aid and also provided a Power of Attorney. Accordingly, the First Respondent tenders to consider the request for legal assistance once the trial record is received.

The Second Applicant

- [10] The Second Applicant was convicted of rape on 30 May 2000 by the Regional Court and was thereafter sentenced to life imprisonment by the High Court. The Second Applicant wishes to appeal against the sentence only. The Second Applicant approached the First Respondent for legal assistance four (4) years after the sentence was imposed on him. An application for legal aid and a Power of Attorney were signed after 2005.
- [11] The record of the trial in the Regional Court was received by the First Respondent from the Registrar on the 1st of November 2007, but the record of the sentence proceedings in the High Court has not yet been received. The First Respondent undertakes to further deal with the matter upon receipt of the record of the sentence proceedings.

The Third Applicant

- [12] The Third Applicant was convicted of one count of murder, four counts of attempted murder and three counts of armed robbery on 4 September
2003. He was inter alia sentenced to life imprisonment. The Third Applicant wishes to appeal all his convictions and the sentences imposed on him. The Third Applicant applied for legal aid on 26 November 2003, which was according to the First Respondent within a reasonable time.

- [13] His application could not be considered as the trial record was not available at the time. The First Respondent states that the record has been requested, but does not mention the date when such request was made. However, the First Respondent undertakes to properly deal with the matter upon receipt of the record.

The Fourth Applicant

- [14] The Fourth Applicant was convicted on charges of murder, rape and the unlawful possession of a firearm and ammunition on the 7th of February 2002. He has not applied for legal aid shortly after his conviction and sentence.
- [15] According to the First Respondent, the Fourth Applicant appointed a private legal practitioner to deal with his appeal. The private legal practitioner filed a “Record of Reconstructed Evidence” with the Second Respondent on the 8th of January 2008 under Case no. CC68/2001. The First Respondent therefore avers that the Fourth Applicant’s application for the relief sought is without merit.

The Fifth Applicant

- [16] The Fifth Applicant was convicted on charges of murder and robbery on 29 February 2001. He was sentenced to life imprisonment on the murder charge and fifteen years for the robbery. The Fifth Applicant applied for legal aid for the first time on the 23rd of October 2007.
- [17] The Fifth Applicant was visited by the First Respondent and a Power of Attorney and an application for legal aid was obtained.

He, however, has provided no cogent reason why his application should be considered after six (6) years . Consequently, it is submitted by the First Respondent that the Fifth Applicant is not entitled to the relief he seeks.

The Sixth Applicant

- [18] The Sixth Applicant was charged with various counts of attempted murder, robbery, kidnapping and housebreaking. He was convicted and sentenced to terms of imprisonment totalling 99 years. The Sixth Applicant wishes to appeal the convictions and sentences.
- [19] The Sixth Applicant’s record was received from the then contracted transcribers, Sneller Verbatim. The record was evaluated by the First Respondent and his application for legal aid was declined. He was advised of this fact on the 3rd of August 2006 and his attention was drawn to his right of internal appeal. This right was to date not exercised. On behalf of the First Respondent, it is submitted that the Sixth Applicant’s application is not only without merit but also premature.

[C] The First Respondent’s reply :-

- [21] The First Respondent further states that in terms of Rule 49A of the Uniform Rules of Court, Registrars of the High Courts are required to provide in certain circumstances prospective appellants, like the applicants, with copies of their trial records. The First Respondent alleges that it does not have a budget for the transcribing and providing of trial records.
- [22] The First Respondent, however, recognises the fact that every person is entitled to equality before the law and alleges that it attempts to make legal aid available as widely as possible within its financial means.
- [23] The First Respondent states further that as a result of financial restrictions, it has no alternative but to limit the aid it provides and it is for this reason that it has implemented certain criteria, that all persons have to comply with before it will provide and fund legal assistance.
- [24] According to the First Respondent these criteria include guidelines concerning the delay between conviction and when an applicant makes an application for legal aid and also the prospects of success in respect of an application for condonation for an appeal brought outside the prescribed time limits.

[D] The Second Respondent's reply :-

- [26] Rule 49 A (1)(b) of the Uniform Rules of Court provides that if an accused is too poor to pay the prescribed fee for the record, the Second Respondent may furnish such record free of charge.
- [27] This rule is silent on the issue whether an indigent person must apply directly to the Second Respondent for the record or first lodge an application with the First Respondent for legal assistance.
- [28] Rule 49 A (1)(b)(7) of the Uniform Rules of Court provides that “ the ultimate responsibility for ensuring that all copies of the record on appeal and all the necessary exhibits are in all respects properly before the Court, shall rest on the appellant or his attorney ” . The Second Respondent alleges that one would assume that the legal aid officer who is appointed to represent the indigent inmate has to take responsibility for securing the record of his client at the First Respondent's costs.
- [29] Apparently the Department of Justice agreed to assist the First Respondent by paying for the transcription of these records on behalf of the Second Respondent.
- [30] The Second Respondent's concern is that after the records have been transcribed, the First Respondent may still pronounce negatively on the prospects of success and decide not to provide legal assistance to the inmate, with the result that the transcribing of the records would have been a fruitless expense. It was decided that the First Respondent will only request records once it has applied its mind to the facts contained in the court file, which would in the Second Respondent's view prevent the unnecessary transcription of records at great costs.

[31] There were however other problems, according to the Second Respondent, that contributed to the delays in providing the records, such as:

[a] the requests for records did not have correct or sufficient information. Inmates often did not reflect their case number or their names or the date of convictions or in which court they were convicted and sentenced;

[E] The Applicable Law :-

Statutory Provisions :-

Every accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court.

SEE: Section 35 (3) of the Constitution Act No. 108 of 1996 .

[33] Access to courts :-

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum.

SEE: Section 34 of the Constitution Act No. 108 of 1996 .

[34] Copies of the record :-

[a] an accused has been granted leave to appeal in terms of Section 316 of the Criminal Procedure Act 1977 (Act 51 of 1977); or

[ii] The accused shall be entitled, on payment of the prescribed fees, to obtain from the Registrar of the Court which tried him such number of copies of the record (as the case may be) as may be necessary for his purpose: Provided that if he is unable by reason of poverty to pay the prescribed fees he shall be entitled to obtain the same without payment of any fees.

[2] Any question arising as to the accused's inability to pay the prescribed fee shall be decided by the Registrar of the Court which tried the accused. The Registrar's decision shall be final.

SEE: Rule 52 of the Uniform Rules of Court.

[35] Application for leave to appeal :-

[b] An application referred to in paragraph [a] must be made:-

[i] within 14 days after the passing of the sentence or order following on the conviction; or

SEE: Section 316 of the Criminal Procedure Act 51 of 1977 .

[36] If an application under subsection [1], for leave to appeal is granted and the appeal is to be heard under section 315 (3) by the full court of the High Court from which the appeal is made, the registrar shall without delay prepare a certified copy of the record , including copies of the evidence, whether oral or documentary, taken or admitted at the trial, and a

statement of the grounds of appeal: Provided that, instead of the whole record, with the consent of the accused and the Director of Public Prosecutions, copies (one of which must be certified) may be prepared of such parts of the record as may be agreed by the Director of Public Prosecutions and the accused to be sufficient, in which event the judges of the full court of the High Court concerned may nevertheless call for the production of the whole record.

SEE: Section 316 (7) (b) of the Criminal Procedure Act 51 of 1977 .

[37] In the case of an appeal in terms of section 315 (3) of the Criminal Procedure Act, (Act 51 of 1977), to the full court, the registrar shall, subject to the provisions of section 316 (5) (b) of the said Act, prepare three additional copies of the case record or parts thereof, as the case may be, and shall furnish the State with the number it requires and, on payment of the prescribed fee, shall furnish the accused with the number he requires: Provided that if the registrar is of the opinion that the accused is too poor to pay the prescribed fee, such copies may be furnished without payment of any fee, in which case the registrar's decision shall be final.

SEE: Rule 49 A (1) (b) of the Uniform Rules of Court .

[38] The ultimate responsibility for ensuring that all copies of the record on appeal and all the necessary exhibits are in all respects properly before the court shall rest on the appellant or his attorney.

SEE: Rule 49 A (7) of the Uniform Rules of Court .

[F] Reliance on the Constitution :-

[40] In my view there are sufficient relevant statutory provisions that exist to deal with the applicant's application. However, in interpreting these legislative provisions, the interpretation must promote the spirit, purport and objects of the Bill of Rights. Consequently, I find that the Constitution enjoy indirect applicability in this application in accordance with the notions of basic fairness and justice.

[G] The Merits :-

[1] when an accused has been granted leave to appeal in terms of Section 316 of the Criminal Procedure Act; or

[43] I am of the view that there is currently no obligation on the Second Respondent to provide any records whatsoever to any applicant, as the conditions set out in Rule 52 are not met. If any of the applicants were to desire copies of their records, at this stage (where the applicants are currently in the process of their appeal) it would be the responsibility of such applicant (or his legal representative) to obtain the said copies from the transcribers directly at payment of the quoted fee. It is not the responsibility of the Second Respondent to do so.

First Respondent's criteria for assistance in an appeal :-

- [44] It is common cause that the First Respondent implemented certain criteria that the applicants have to comply with before the First Respondent will provide and fund legal assistance. The criteria involve a determination of the prospects of success that an applicant may have on appeal when an application for condonation for the late noting of an appeal were to be launched.
- [45] For this reason, the First Respondent now claims the transcribed records from the Second Respondent free of charge to determine the possible prospects of success for condonation, prior to filing an application for leave to appeal.

Second Respondents duty to provide rec ords and the interaction with Rule 51 (3) of the Uniform Rules of Court :-

- [46] It cannot be denied that the primary task of placing the records before the court for hearing of an appeal rests on an appellant. The question is who is responsible for the provision of the transcribed records at this very early stage of the appeal procedure?

‘ It is the appellant who asserts and exercises her or his right by noting and prosecuting an appeal; the duty of showing some error or unfairness in the trial proceedings resulting in her or him having been wrongly convicted, rest upon the appellant; and the Court requires an adequate record in order to consider and decide the appeal. On first principles therefore, it is the appellant who has the duty of placing an adequate record of the proceedings in the court a quo before the Court of Appeal in order to enable it to consider and decide the appeal .’

‘ However, the administrative, logistical and financial implications of placing the primary responsibility for preparing an appeal record on the appellant would probably, in the majority of cases, negate her or his constitutional right to an appeal since the State, through its officials, employees and/or subcontractors, not only records all court proceedings, but also has custody of all relevant recordings, notes, transcripts, statements and other documentary information, as also all exhibits. The provisions of Rule 67 supra which place the primary responsibility for providing a record on appeal on the State are therefore fair, practical and convenient, and, as mentioned in *S v Siwaxa* 1967 (3) SA 240 (E0 at 241 in fin -242, save an appellant unnecessary expense .’

SEE: *S v Zondi* 2003 (2) SACR (W) at page 243-244.

[47] The goal of the Constitution is that the basic needs of all in our society be effectively met and the requirements of progressive realisation means the State has to take steps to achieve this goal. This means that accessibility had to be progressively facilitated, involving the examination of legal, administrative, operational and financial hurdles which had to be lowered over time.

S EE: *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 .

[48] The State must provide to those in desperate need within its available resources otherwise one will be confronted with the harsh reality that the Constitution's promise to a fair trial will remain for many a distant dream.

Access to the Court and the responsibility for the costs of transcribing the records :-

[49] The policy of the First Respondent to prejudge an appellant's prospects of success based on prior acquirements of the transcribed record and by way of doing so, to close the doors to a Court of Appeal for an appellant, raise some concern.

[50] This policy of the First Respondent seems to be causing a fair part of the delay in the acquisition of the records. However, should First Respondent require the records prior to an application for leave to appeal having been granted, it bears the responsibility to budget and pay for such records.

[51] In my view, if the First Respondent insists on having a transcribed record prior to the stages of proceedings contemplated in Rule 52 of the Uniform Rules of Court, it would be only reasonable and fair that the First Respondent pay for the costs thereof, because there is no statutory duty on the Second Respondent to pay for the requested records at this stage before the requirements of Rule 52 have been met.

Agreement between Respondents for providing and payment of the Transcribed Records on behalf of First, Second and Third Applicants :-

[52] Although the Second Respondent undertook in it's Answering Affidavit to provide the First, Second and Third Applicants with their records when the equipment and machines are repaired, there is no statutory duty on the Second Respondent to have same transcribed. This Court is also not bound by the agreement between the Respondents in deciding this matter.

[H]

Conclusion

:-

[54] The Second Respondent cannot be compelled by either the Applicants or the First Respondent to deliver transcribed records to the First, Second and Third Applicants, as the requirements set out by Rule 52 of the Uniform Rules of Court have not been met.

[55] If the First Respondent insists on the record before the requirements of Rule 52 of the Uniform Rules of Court have been met, then it is the primary responsibility of the First Respondent to obtain and pay for such records.

[56] The First, Second and Third Applicants can compel the First Respondent indirectly to obtain the records by obtaining an order that the First Respondent must decide whether or not to grant legal assistance.

[I] Costs :-

[58] However, in view of the fact that the Applicants are at present inmates with no form of income; the long history and delay of their applications for assistance to both Respondents; the fact that uncertainty prevailed between the two Respondents as to whether or not the records should be transcribed and at who's costs, I am of the opinion that it will be just, fair and equitable that no order as to costs be made under the circumstances of this case.

[J] Order:

[i] The application by the Fourth, Fifth and Sixth Applicants against both Respondents is dismissed.

[ii] The application by the First, Second and Third Applicants as against the Second Respondent is dismissed.

[iii] First Respondent is ordered to decide and communicate its decision whether or not to provide legal representation to the First, Second and Third Applicants within thirty (30) days from the date of this order.

[iv] There will be no order as to costs.

R D HENDRICKS

ATTORNEYS FOR THE APPLICANTS : JOHN VAN ONSELEN

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