

SOUTH AFRICA / JUDGMENT

Van Vuuren v S (Leave to Appeal) (K/S3/2021) [2024] ZANCHC 72 (3 May 2024) [2024] ZANCHC 72

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

K/S3/2021

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: K/S3/2021

Heard on: 23/04/2024

Delivered on: 03/05/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

JACQUES VAN VUUREN

APPLICANT

and

THE STATE

RESPONDENT

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

MAMOSEBO J

- [1] On 25 March 2021 the applicant, represented by Adv J Henzen-Du Toit, and the respondent represented by Adv JJ Cloete, entered into a Plea and Sentence Agreement (the agreement) in terms of s 105A of the Criminal Procedure Act[1] (CPA). The agreement was signed by the applicant, his counsel and the respondent's counsel.
- [2] The applicant was arraigned on three counts: Count 1: Murder read with the provisions of s 51(1) of the Criminal Law Amendment Act, 105 of 1997 (CLAA); Count 2: Robbery with Aggravating Circumstances as described in s 1 of the Criminal Procedure Act, 51 of 1977 and read with the provisions of s 51(2) of the CLAA; Count 3: a contravention of s 3(1) read with sections 1, 120(1) and 121 and also read with columns 1 and 2 of Schedule 4 of the Firearms Control Act, 60 of 2000 Unlawful Possession of Firearms.
- [3] Having considered the Plea and Sentence Agreement and having ascertained from the applicant and having satisfied myself that all the prescribed requirements of s 105A were met and that the applicant had entered into the agreement freely and voluntarily without being coerced or promised anything in return, and having considered the substantial and compelling circumstances, he was subsequently found guilty on all the three counts. On count 1 he was sentenced to Twenty-Five (25) years' imprisonment of which Five (5) years were suspended for a period of Five (5) years on specified conditions. On count 2 he was sentenced to fifteen (15) years' imprisonment while on count 3, a sentence of Three (3) years was imposed. Counts 2 and 3 were ordered to run concurrently with the sentence in count 1. The applicant is serving an effective imprisonment term of Twenty (20) years.
- [4] The court file contained the original Notice of Motion dated 15 November 2022 together with the applicant's Founding Affidavit. On 26 September 2023 an email under signature of Peyper & Botha Attorneys Inc. was addressed to the Judge's clerk accompanied by an Amended Notice of Motion marked "J1", without an affidavit. The relief sought in the Amended Notice of Motion is condonation for the late serving and filing of this application and to be granted leave to appeal against his conviction and sentence and leave to lead further evidence to the Supreme Court of Appeal alternatively, to the Full Bench of the Northern Cape Division.
- [5] The amended Notice of Motion changed the parties' initial approach to have the matter determined on the papers in respect of sentence only. The respondent opposed the application requesting that the matter be referred for oral argument contending that there are no reasonable prospects of success. The respondent did not oppose the application for condonation to be granted to the applicant for the late filing of the application. There is no need to deal further with the aspect of condonation as it is unopposed.
- [6] These are the listed grounds upon which the applicant relied, as found in his Founding Affidavit alleging that the Court had erred in:

6.1 Overemphasizing the seriousness of the offence and the interests of society, thereby attaching insufficient weight to his personal circumstances and his chances of rehabilitation;

6.2 Failing to look at precedent when sentencing the applicant;

6.3 Failing to take into consideration that the applicant was a first offender;

6.4 Failing to take other forms of punishment into consideration.

[7] It is significant, before considering the merits of this matter, to highlight that Rule 6(1) of the Uniform Rules of Court stipulates:

“Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.”

As stated earlier, the applicant failed to file an accompanying affidavit to the Amended Notice of Motion (Annexure “J1”).

[8] The argument for the basis of the amendment is in the applicant’s Heads of Argument. The purpose of the Heads of Argument is settled and that is to afford a party’s opponent/s and the court an opportunity to familiarize themselves with the arguments that will be presented at the hearing. Of significance, is that the Heads themselves do not constitute pleadings but are based on the pleadings filed. The information as argued in the Heads of Argument prepared by the applicant’s legal representative does not appear anywhere in his founding affidavit. A case cannot and should not be made out in the heads of argument. I have, nevertheless, allowed the parties to continue with their submissions.

[9] The test to be applied in determining whether an application for leave to appeal should be granted or not is governed by s 17[2] which stipulates:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a)

(i) the appeal would have reasonable prospects of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of s 16(2)(a); and

(c) Where the decision sought to be appealed does not dispose of all issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[10] In *S v Smith*[3] Plasket AJA stressed:

“[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

As reiterated by Leach JA in *S v Kruger*[4] the Courts should follow the aforementioned test scrupulously in the interests of justice.

[11] Counsel for the applicant, Adv A Simpson, abandoned all the grounds listed in the original Notice of Motion. Counsel contended that there is a grey area with regard to whether or not aspects of s 105A are appealable and that, on that basis, it becomes one of the compelling reasons for leave to be granted. Counsel further focused his submissions on s 204 of the CPA[5] contending that absent any explanation of the provisions of s 204 to the applicant by his erstwhile counsel, and the respondent's

counsel and even the Court itself before the applicant had concluded the plea and sentence agreement, it is unclear whether he would have proceeded with the agreement and that, so the argument went, may be another basis for leave to be granted. In my view, the contention pertaining to s 204 and the absence of an explanation, is without merit. At the time when the applicant appeared before court he was already indicted as an accused on the three counts as specified. Section 204 does not find application in this instance because he was not a witness expected to furnish incriminating evidence where the court would then consider if his answers were provided frankly and honestly in order to be discharged from prosecution and remain as a witness for the state. The reliance by the applicant on s 204 is misplaced.

[12] It is significant that the applicant does not allege or challenge any non-compliance with the provisions of s 105A of the CPA. It is further significant that he does not allege that he was misled by his erstwhile legal representative in terms of the advice provided and services rendered. He also does not put into question that he did not act freely and voluntarily, was not in his sound and sober senses or was unduly influenced to conclude the plea and sentence agreement. In actual fact, his erstwhile counsel went on record after the accused answered the court pertinently on his state of mind

before entering into the agreement to say there was comprehensive consultations and everything was explained in full.

[13] The applicant cannot now approach court with a request to be granted leave to appeal where new evidence would be led. I incline to agree with the Court in *S v De Koker* 2010 (2) SACR 196 (WCC) at 204i – 205a making the following remarks:

"I cannot think of a clearer case of peremption than one where an accused duly concludes a plea and sentence agreement with the State

in terms of s 105A of the CPA, confirms the agreement to the court before which he is arraigned, asks the court to convict and sentence him in accordance with the agreement, and is thereupon duly convicted and sentenced in accordance with the agreement. By following the process created by s 105A, the appellant settled the lis between the State and him once and for all."

Since the terms of the agreement were clear and were confirmed by the applicant before the matter was finalised, that in my view, leaves no room for new evidence, especially if it pertains to s 204. I was satisfied in terms of s 170A(8) that the sentence agreement was just before convicting and sentencing the accused.

[14] Regard being had to the submissions made pertaining to this application for leave to appeal in order to determine whether there are reasonable prospects that another court would come to a different finding than this court had reached, I have not found any. I am not persuaded of any cognisable prospects of success nor compelling reasons that warrant the attention of the SCA or the Full Court of this Division, nor are there any compelling reasons to entertain this appeal. I am therefore, satisfied that there are no reasonable prospects of a successful appeal. In the result the application for leave to appeal to the Supreme Court of Appeal alternatively, to the Full Bench of this Division, must fail.

[15] In the result the following order is made:

The application for leave to appeal is dismissed.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

For the applicant: Adv. A Simpson Instructed by: Peyper & Botha Attorneys Inc. For the respondent: Adv. JJ Cloete Office of the Director of Public Prosecutions

[1] 51 of 1977

[2] Of the Superior Courts Act, 10 of 2013

[3] 2012

(1) SACR 567 (SCA) para 7

[4] 2014

(1) SACR 647 (SCA) at 649d (para 3)

[5] Section 204 Incriminating evidence by witness for prosecution

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor- (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness- (i) that he is obliged to give evidence at the proceedings in question; (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor; (iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court,

notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; (iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and (b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified. (2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-

- (a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
- (b) the court shall cause such discharge to be entered on the record of the proceedings in question. (3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court. (4)
- (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence. (b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955). [Para. (b) amended by s. 1 of Act 49 of 1996 (wef 4 October 1996).]

[5] Section 204 Incriminating evidence by witness for prosecution

- (1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor-
- (a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness-
- (i) that he is obliged to give evidence at the proceedings in question;

- (ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;
 - (iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;
 - (iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
- (b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.
- (2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him-
 - (a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and
 - (b) the court shall cause such discharge to be entered on the record of the proceedings in question.
 - (3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.
 - (4)
 - (a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.
 - (b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319 (3) of the Criminal Procedure Act, 1955 (Act 56 of 1955).

[Para. (b) amended by s. 1 of Act 49 of 1996 (wef 4 October 1996).]

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