



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: SS 40/2006

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED. |

23 February 2024

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SIGNATURE

In the matter between:

THE STATE

and

GARY PATRICK PORRITT

Accused No.1

SUSAN HILARY BENNETT

Accused No.2

REASONS FOR ORDER OF 23 FEBRUARY 2024

RE NOTICE OF APPLICATION FOR LEAVE TO APPEAL

Spilg J

23 February 2024

INTRODUCTION

1. On 23 November 2023 this court heard argument with regard to whether or not Mr. Porritt, who is accused 1, should be transferred to the Kgosi Mampuru Correctional Facility in Pretoria and that the trial proceeds at the Pretoria High Court.

2. The following order was then made on 24 November 2023.:

1. *The trial will continue on 29 January 2024 at the High Court in Pretoria*
2. *Accused no 1, Mr Porritt is to be transferred by 29 January 2024 from the Johannesburg Central Correctional Facility ("Jhb Central") to a single cell at the Kgosi Mampuru Correctional Service Facility in Pretoria ("Kgosi Mampuru")*
3. *Correctional Services is requested to facilitate that Accused no 1 will be the sole occupier of the said cell*
4. *All Accused no 1's files and documents which are currently with him are to be taken to Kgosi Mampuru at the time he is transferred there and to be located within a reasonable distance from his cell to enable him to work on them with the request that it be preferably at a table with the use of a chair*
5. *Mr Porritt is to be allowed the use of a Dictaphone subject to such reasonable restrictions as will not impede its use by him when he requires to work on this criminal trial*
6. *Mr Porritt shall be transported to and from the Pretoria High Court in a manner that will not compromise his neck or back*
7. *Dr Tsitsi of Chris Hani Baragwanath Hospital ("Chris Hani") is to remain Mr Porritt's managing physician*
8. *Dr Tsitsi shall decide what treatment, care, consultations, surgical procedures and the like in respect of Mr Porritt should continue to be carried out at Chris Hani*
9. *The Prosecution shall cause this order to be delivered to the responsible person at;*

- a. *The Correctional Service facility where Mr Porritt is presently detained*
- b. *The Kgosi Mampuru Correctional Service facility at Pretoria*
- c. *The South African Police Services responsible for transporting Mr Porritt and his files, documents and belongings from Jhb Central to Kgosi Mampuru*

in order that they execute this order

10. The Prosecution shall cause this order to be delivered to;

- a. *the Office of the Judicial Inspectorate for Correctional Services concerned with the detention of those in custody awaiting the conclusion of their trial*

- b. *Dr Tsitsi*

3. Reasons for the order were handed down when the case resumed on 29 January 2024

4. In the interim the accused had attached to an urgent application to stay the execution of the 24 November order a notice of intention to apply for leave to appeal. That application was not allocated a judge. This application never saw the light of day and the notice was only received by me when court resumed on 29 January.

5. The notice of 18 December is headed:

"Notice of intention to apply for leave to appeal in terms of section 16(10(a) of the Superior Court Act no 10 of 2013 against the order of 24 November 2023"

6. Another notice of which the court was also unaware had been attached to another application brought by the accused. This application was also awaiting allocation and

had not been given a case number. This notice which was served on the national prosecuting authority on 18 January 2024 is headed:

“Amendment to Notice of Intention to Apply for Leave to Appeal dated 18 December 2023”

7. The first notice of 18 December 2023 stated that the accused intended to apply for leave to appeal to the full court against the whole order of 24 November and that they will file their grounds of appeal after receipt of the written judgment.

The amended notice of 18 January 2024 corrected the reference to the section of the Superior Courts Act mentioned in the first notice to ss 18(1) and (5).

8. When the court resumed after the recess on 29 January 2024 and pursuant to issues raised concerning the legal validity of the notice and whether it could stay execution, the following order was made:

This court’s order of 24 November 2024 which concerns the transfer of Mr. Porritt, accused no 1, to Kgosi Mampuru Correctional Services facility in Pretoria and the sitting of this court in Pretoria as from 29 January 2024 shall remain effective until the court makes a determination on whether the accused’s notice of intention to apply for leave to appeal to appeal that order in terms of section 16(1)(a) or the subsequent amendment to it of 18 January 2024 can lawfully support a stay of execution

9. The court subsequently heard argument. One of the principle arguments advanced by Mr. Coetzee on behalf of the State was that section 18 of the Superior Courts Act only applies to civil proceedings. This is because the s. 1 definition expressly provides that the term “*appeal*” in Chapter 5 “*does not include an appeal in a matter regulated*

in terms of the Criminal Procedure Act, 1977... or in terms of any other criminal procedural law.”

10. This prompted the accused to submit in the alternative that the provisions of the Superior Courts Act 10 of 2013, which came into effect only in August 2013, did not apply because their criminal proceedings commenced as far back as 2006, if not earlier, and in terms of section 52:

“ (1) proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed.

(2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed.

11. On 1 February the accused then introduced a further amendment to their notice of 18 December. The prosecution did not oppose its introduction and the amendment was granted.

The amendment reads:

“The statute under which the application for leave to appeal is unclear as the criminal procedure act only appears to allow appeals the gaze convictions in section 309B. It appears that the uniform rules of court apply insofar as any appeal is concerned. The Supreme Court act refers to appeals in terms of section 22 and again the uniform rules of court apply.

The notice of appeal is therefore amended to read that the Supreme Court act #59 of 1959 shall apply read with section 49 of the uniform rules of court, alternatively the criminal procedure act No 51 of 1977 as amended, if applicable.

The balance of the notice dated 18 December 2023 and the amended notice of 18 January 2024 remain unchanged.”

THE SUPERIOR COURTS ACT

12. The State persisted with its point that under the Superior Courts Act, those provisions dealing with applications for leave to appeal are confined to civil proceedings and therefore section 18 (1), which suspends the operation and execution of a decision, is of no application in criminal matters.

Moreover the accused's invocation of “*section*” 49, which can only mean rule 49 of the Uniform Rules, clearly identifies itself as applicable only to civil appeals. The rule in fact is headed “*Civil Appeals from the High Court*”

The accused's reliance on section 18(1) of this Act and Rule 49 of the Uniform Rules is misconceived. The rule only applies to civil proceedings and s 18(1) ,which falls under chapter 5, similarly only stays execution in civil proceedings.

THE SUPREME COURT ACT

13. The use of terms such as “*summons*” and “*judgment*” rather than “*judgment or sentence*” in the savings provisions of s 52 of the Superior Court Act suggests that only civil proceedings were envisaged, criminal proceedings generally being governed, insofar as the High Court was concerned, by the Criminal Procedure Act 51 of 1977 at least since the introduction of that Act.
14. It is however unnecessary to go through the wording of the Supreme Court Act or for that matter of the Criminal Procedure Act immediately prior to the enactment of the Superior Courts Act to discern the prevailing regime at the time because the further point taken by Mr Coetzee regarding the interlocutory nature in form and effect of the

orders made is dispositive of whether the order made by this court on 24 November is subject to appeal.

INTERLOCUTORY ORDER IN FORM AND EFFECT

15. The orders to transfer Porritt from one correctional service facility in Gauteng to another and to transfer the hearing from one seat of the court in Gauteng to another within the same jurisdiction is interlocutory by nature and in effect. It does not finally dispose of an issue in the trial and can be revisited.
16. The accused submitted that even if it was an interlocutory order, it was of final effect as it impacted on their fair trial rights.
17. During one of the adjournments I located the 1997 publication of Herbstein and van Winsen *The Civil Practice of the Supreme Court of South Africa*. This is the Fourth Edition of the work.

The authors in distinguishing between interlocutory orders which are appealable and those which are not drew up lists of each. Under orders which were held to be interlocutory in effect as well as in form is included an order made on an application for the removal of a case to a different court for trial under s 9(1) of the Supreme Court Act or s 35 of the Magistrates Courts Act. The case relied on was *United Motor Services Limited v Globe Manufacturing Company of Chicago* 1937 CPD 284.

On resuming court, this was made available to the accused and they were subsequently given an opportunity to deal with it. They persisted that Porritt's transfer to Kgosi Mampuru and the transfer of the case to Pretoria were final in effect, were not in the interests of justice and irreparably prejudiced their fair trial right. It was also contended that there did not exist any means of appealing a decision made during a criminal trial outside an appeal against conviction in terms of section 309B

18. In *United Motor Services Limited* the magistrate had transferred an action from a magistrates' court in Gqeberha to one in Johannesburg. On appeal to the full bench, the respondent took the point that the order was not appealable.

The court accepted that an interlocutory order may well be final and definitive in form or effect, but in upholding the objection the court considered that the order was incidentally given during the progress of litigation which in no way disposed of a definitive portion of the suit, did not irreparably anticipate or preclude in whole or in part the relief sought and did not dispose of any issue or any portion of the issue in the main suit.

The full bench concluded that by ordering the transfer as a means of avoiding expense and inconvenience of the trial from one Magistrates Court to another, the magistrate did not dispose of any definite portion of the issue in the main suit so as to cause irreparable prejudice to the respondent when the final judgment came to be given and even “... if the effect of the order is to cause the respondent inconvenience or even expense it has no effect upon the issue or issues in the suit.”¹

19. The court went further and found that even if it was unlawful for the magistrate to transfer the action to another Magistrates Court, that will not amount to irreparable prejudice because the party could either submit to the jurisdiction or have it set aside as being beyond the magistrate's powers². This is a complete answer to the accused's contention that neither Correctional Services nor the South African Police Service was a party to the hearing. The fact of the matter is that there has been a transfer of the accused carried out by both and neither of them has objected.

¹ At p 287

² At p 288

GENERAL

20. Whether the decision as to where a High Court sits within the jurisdiction of its Division is a purely discretionary matter falling within its inherent jurisdiction to regulate its proceedings efficiently and conveniently and whether the parties need only be consulted on as opposed to argument being heard was not argued before me and need not be dealt with at this stage.

21. The alacrity with which rulings are sought to be made the subject of a leave to appeal application is however one of concern.

The accused have brought a further application for leave to appeal regarding another ruling. Whether procedures enabling appeals during the course of proceedings in civil matters are there for the taking under criminal procedure is a matter that will have to be considered on the next occasion insofar as they create delay, whether unintended or otherwise, and are disruptive of the orderly conducting of a criminal trial in an efficient yet fair manner.

This judgment puts the accused on notice that if they wish to persist with applications for leave to appeal in respect of procedural rulings whether it is the nature of the transport used to bring the accused to court or the length of time that the court should sit, then they must be prepared, if unsuccessful, to argue whether this court has the competence to impose an order for costs, punitive or otherwise.

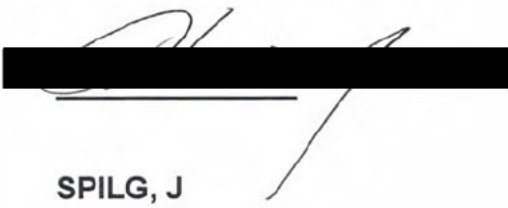
ORDER

22. The following order is made:

The Notice of Intention to Apply for Leave to Appeal dated 18 December 2023, the amendment to that notice dated 17 January 2024 (and served on 18 January 2024) and the further handwritten amendment to the Notice dated 18 December 2023 which was granted on 1 February 2024;

a. are set aside and declared as null and void and of no legal force or effect;

b. are declared incapable of lawfully supporting a stay of execution.



SPILG, J

DATE OF HEARING: 31 January and 1 February 2024

DATE OF JUDGMENT: 23 February 2024

LEGAL REPRESENTATIVES:

FOR THE STATE: Adv EM Coetzee SC
Adv JM Ferreira

FOR ACCUSED: Each accused argued in person