

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE LOCAL DIVISION: MTHATHA]**

CASE NO. 884/2014

In the matter between

ZOLEKA SUSAN PONOANE

APPLICANT

AND

MINISTER OF POLICE

RESPONDENT

IN RE:

MINISTER OF POLICE

APPLICANT

AND

LINDA BLESSING VOWANA

1ST RESPONDENT

ZOLEKA SUSAN PONOANE

2ND RESPONDENT

JUDGMENT

JOLWANA J

[1] On 14 February 2019 this court delivered a judgment in respect of a review application (the main application) instituted by the respondent and granted orders in which it directed that the proceedings and the judgment of the magistrate's court for the district of Herschel were reviewed and set aside. It was further ordered, *inter alia*, that

the case in those proceedings must be heard *de novo* before another magistrate from outside the magisterial district of Herschel.

[2] On 5 March 2019 the applicant filed an application for leave to appeal to the full bench of this division the whole judgment and orders delivered on 14 February 2019. On 10 July 2019 the following directive was issued inviting the parties to make written submission on or before the 16 July 2019 on the following issues:

- “1. The appropriateness of the applicant’s application for leave to appeal to the full bench of this division.
2. The appropriateness of the leave to appeal being sought to be heard by the two judges of this division sitting as a full bench.
3. Whether it is procedurally appropriate for the applicant to raise alleged bias and/or conflict of interest on the part of the presiding judges who heard the main application only after judgment was delivered and not prior to the matter being heard.
4. The identity of the author of the applicant’s notice of application for leave to appeal.”

[3] The issues referred to above are largely procedural issues on which we sought to be addressed by counsel for a proper determination of the application for leave to appeal. No submissions have been filed to date by the applicant. Instead a notice to amend the application for leave to appeal was filed on 15 July 2019 to which a notice of objection was filed by the respondent. On 10 February 2020 the applicant filed a notice of withdrawal of the application for leave to amend.

[4] When the application was heard the applicant had still not filed the submissions nor had any explanation for not complying with the court directive been given. Mr Matyumza who appeared for the applicant sought refuge, with respect incoherently, in the withdrawn amendment of the application for leave to appeal. However, even if the

amendment had not been withdrawn it would not have availed counsel and the applicant both of whom are legal practitioners in this division who should know better as officers of this court than not comply with court directives. It is even more surprising that this justification was sought to be made long after the said amendment had been withdrawn by the applicant herself. This begs the question, firstly, once the amendment was withdrawn why was the directive not complied with. Secondly and even if the intended amendment had not been withdrawn what about the other directives which had nothing to do with what the amendment sought to address.

[5] What the parties were required to make submissions on through the directive, at least in respect of paragraphs 1 and 2 thereof, can be put to rest with reference to *De Villiers v The State and Another* (20732/14) [2016] ZASCA 38 (24 March 2016) para 3 in which Madjiet JA clarified the legal position as follows:

“It is plain that a division of the high court which sits on review with two judges presiding is a court of first instance as contemplated in s 16(1)(a) of the Superior Courts Act (the Act) and that leave has therefore been properly granted in this instance in terms of section 16(1)(a)(ii). The relevant part of that section reads as follows:

‘16 Appeals generally

(1) Subject to section 15(1), the Constitution and any other law-

(a) An appeal against any decision of a Division as a court of first instance lies, upon leave having been granted –

(i) ...

(ii) If the court consisted of more than one judge to the Supreme Court of Appeal.’

The review before us is regulated by Uniform rule 53. It is not regulated by the Criminal Procedure Act 51 of 1977 (the CPA) or by any other criminal procedural law as envisaged in s 1 of the Act, and sections 16 and 17 of the Act therefore apply in this

case. In the premises the matter is properly before us on appeal. The petition was therefore unnecessary and should be regarded as superfluous. I discuss the merits next.”

[6] It is therefore axiomatic that leave to appeal can be sought from this court and if granted it can only be to the Supreme Court of Appeal and not to the full bench of this division as the notice of application for leave to appeal seeks to do. Where two judges sat as a court of first instance as was the case in this matter leave to appeal from it can be sought only to the Supreme Court of Appeal and not to a full court of a division. Therefore, the application for leave to appeal will be dealt with and determined on the basis that it is sought from this Court to the Supreme Court of Appeal and not to the full bench of this division which is simply impermissible. It was incorrect for the applicant to apply for leave to appeal to the full court of this division in any event.

[7] The rather lengthy notice of application for leave to appeal which runs into twelve pages may be correctly characterized, to borrow the words of Leach J, as vitriolic diatribe. In our view it does not raise any new matter or different contentions to the ones made in the main application save for one or two issues which will be dealt with later herein. The contentions are, in the main, that in the decision and the reasons therefore contained in the judgment in which we dealt with all the arguments that were made, we erred. The grounds for the leave to appeal are stated in the notice of application for leave to appeal and need not be repeated in this judgment. Suffice to state the applicant’s contentions are essentially that a proper case has been made and that the applicant has satisfied the requirements set out in section 17 of the Superior Courts Act No. 10 of 2013 for the granting of an application for leave to appeal.

[8] One of the new contentions raised for the first time in the notice of application for leave to appeal is also foreshadowed in the directive that was issued on the 10 July 2019. That is the issue of our alleged bias. For reasons that are not altogether clear that directive has not been complied with even as it relates to the new issue of our alleged bias and our alleged failure to recuse ourselves. In essence we are alleged to have had prior knowledge of this matter long before the review application was instituted. As far as we understand this ground of appeal we are alleged to have dealt with the matter motivated by bias and we ought to have recused ourselves from hearing the main application.

[9] These allegations of bias on our part are cast in wild terms, bereft of any factual material and are more of an attack on our integrity as judicial officers without any factual basis for the alleged bias, actual or potential. Quintessentially the allegations, at least as stated in the notice of application for leave to appeal, are that Justice Jolwana was at some stage before he was appointed to the bench, a councilor of the then Cape Law Society and later its president. During this time it is alleged that he would have become aware of or did become aware of this matter through a report allegedly made to the Cape Law Society by a colonel Magadlela. On this basis, so goes the contention, when he co-presided over the main application he dealt with this matter already vested with inside knowledge attained in the manner aforesaid. He, nevertheless, despite his foreknowledge of the matter, allowed himself to preside over it instead of recusing himself.

[10] On the other hand the allegations of bias against Justice Malusi is that his wife was also a councilor of the then Cape Law Society. Therefore Mrs Malusi, would have, just

like Justice Jolwana, become aware of this matter through the same report allegedly made by colonel Magadlela to the Cape Law Society. On this basis, so goes the submission, *“it is most likely that Justice Malusi could have had a preview of the matter through his wife even when pillow talking”*. Therefore, Justice Malusi should have recused himself from presiding over this matter, so contends the applicant. Based on these allegations we are said to have committed a gross irregularity in failing to recuse ourselves.

[11] It is not clear when the applicant gained insight into this information in relation to the date on which the main application was heard. The significance of this is that no application for our recusal was made before or during the hearing of the main application. We do not consider it necessary to respond to these wild allegations nor have we been enabled to do so which are at best, speculative and are made without any attempt to provide a simple factual basis. They are, in any event, factually incorrect.

[12] It would have made more sense for Mr Matyumza and the applicant to establish as a matter of fact from the Legal Practice Council the dates of Justice Jolwana and Mrs Malusi's councillorship and president of the Cape Law Society in relation to when Mr Magadlela reported the matter to the Cape Law Society. Secondly the applicant could have ascertained if, in any event, such a complaint was ever tabled in any meeting Justice Jolwana and Mrs Malusi had attended in those capacities. That is not to say that if they had attended meetings in which the matter served a case of bias, actual or perceived would have necessarily been made without more. It would at least have

given some form of factual context to the allegations and would have made it somewhat possible to respond thereto.

[13] This style of litigation is more indicative of the applicant, who herself is an attorney, having been ill advised by her attorneys and counsel, who had no difficulty in lending their name to a direct attack on our integrity as judicial officers and are happy to have us slighted without any factual basis. This conduct should be a matter of grave concern to the judiciary at large because it is an attack on the integrity of judicial officers who are maligned based on what is seemingly nothing more than unhappiness with the outcome. It is even difficult to resist the feeling that had this Court found in favour of the applicant none of these very reckless allegations would have been made hence the inexplicable failure to apply for our recusal at the hearing of the main application. During the hearing of the application for leave to appeal Mr Matyumza withdrew this ground of appeal which was, in any event ill informed, ill-advised and based on conjecture.

[14] The other ground of appeal that calls for specific comment relates to the averments allegedly raised by the respondent for the first time in the replying affidavit in the main application. There was no application to strike out the impugned averments. The replying affidavit was served on applicant's attorneys on 23 July 2018. The matter was only heard on 18 October 2018. For a period of almost three months before the matter came before us the applicant was in possession of the replying affidavit, it must be assumed, having no qualms about any of its averments. The impugned averments could not have been new to the applicant as they related to a warning statement made to the police by the magistrate in which he admitted to the impropriety of his liasons with

the applicant about the judgment. That warning statement was taken by the police from the magistrate long before the proceedings in the main application were launched. Even if it could be argued that the applicant had all along not been aware of the magistrate's warning statement until the replying affidavit was filed, it was incumbent upon the applicant to make an application to strike them out which she did not do. It is very significant also that both the magistrate and the applicant were represented by the same attorney, Mr Tshaka and the same counsel, Mr Matyumza in the main application. In the circumstances ignorance about the existence of the warning statement is clearly feigned.

[15] We delivered what we considered to be a comprehensive judgment in the main application and therefore no purpose will be served by the rehashing of the detailed reasons contained therein. We therefore refrain from doing so herein save to point out that most, if not all, the relevant material facts on which our judgment was based were, on the papers, common cause. For instance there is no dispute that unbeknown to the respondent the magistrate who presided over the matter communicated with the plaintiffs' attorney about the judgment he intended to deliver in the same matter. He and the plaintiffs' attorney agreed that the plaintiffs' attorney would rewrite the said judgment in respect of which the plaintiffs' attorney represented the plaintiffs in the proceedings before the said magistrate. The judgment rewritten by the plaintiffs' attorney is the judgment which the magistrate signed as his own judgment and released to the parties. All of this was done to a completion without the knowledge or consent of the respondent's attorney who was in complete darkness about these engagements, conversations and happenings. It is even shocking that the said plaintiffs' attorneys

who now applies for leave to appeal has no compunction whatsoever in maintaining that there was nothing wrong with her conduct.

[16] During the hearing of the application Mr Matyumza initially conceded that the conduct of the magistrate and the applicant was unlawful. He later made a belated attempt to withdraw the concession and recharacterised their conduct as having been merely procedurally incorrect as against being unlawful. It is atrocious that Mr Matyumza who has been counsel in this division for about three decades at least, downplays the violation of judicial ethics, norms and standards in this manner. It is even more shocking that in all the submissions he made he completely ignored the provisions of section 165 of the Constitution which is also relied upon in the judgment as it relates to the judicial authority of the republic which vests in no one else other than judicial officers only. We simply do not understand how it could not be unlawful and unconstitutional for a legal representative of one of the litigants to secretly usurp the authority of judicial officers by contributing to the outcome of the case through a contribution in formulating the reasons for the said outcome. How Mr Matyumza downplayed that behavior to a mere procedural irregularity is unconscionable to say the least.

[17] On the issue of costs, a submission was made that costs ought not to have been awarded without the substitution of the estate of the magistrate who had died before the matter was heard. In making this submission Mr Matyumza ignored the fact that the magistrate was cited in an official capacity as a judicial officer and not in a personal capacity. His estate, even if he had not died, had nothing to do with the matter unless the court had decided to award costs against him personally which the court did not do

and in any event no case was made for such an order. The trite legal position is that costs are a matter of discretion by the court of first instance. On the facts of this matter we exercised our discretion judiciously and awarded costs on a punitive scale. We are not persuaded that we erred in doing so.

[18] Section 17(1) of the Superior Courts Act provides as follows:

“17(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 a reasonable prospect 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 to be appealed does not fall within the ambit of section 16(2)(a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

[19] In *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] JOL 36940 SCA paras 16-17 the court explained the approach to an application for leave to appeal as follows:

“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.”

[20] Having considered the peculiar facts of this case, which are largely common cause, our reasons for the judgment and orders in the main application and the grounds on which leave to appeal is sought, the threshold for the granting of an application for leave to appeal has not been met in our view. Accordingly, the applicant's application for leave to appeal falls to be dismissed.

[21] In the result the following order shall issue:

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

M S JOLWANA

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

T MALUSI

JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicant: Advocate Sishuba *instructed by*

State Attorney

EAST LONDON

o/c State Attorney

MTHATHA

Counsel for the Respondents: Advocate Matyumza *instructed by*

ZS Ponoane & Co.

c/o Mafungo Tshaka Inc

Date heard: 26 March 2021

Delivered on: 28 April 2021