



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)**

CASE NO: **2339/2016**
DATE HEARD: **20 JUNE 2017**
DATE DELIVERED: **23 JUNE 2017**

In the matter between:

BUYS, CHARLES	1st Applicant
BUYS, ANDRIES	2nd Applicant
BUYS, CONRAD	3rd Applicant
BUYS, GORDON	4th Applicant
MOSSEL, LOUIS	5th Applicant

and

THE MINISTER OF POLICE	1st Respondent
HEAD OF HAWKS, SA POLICE SERVICE	2nd Respondent

Coram: Snyders AJ

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

Snyders AJ:

[1.] The applicants seek leave to appeal to the Full Court of the Northern Cape Division, alternatively to the Supreme Court of Appeal against the whole of my judgment and order granted on 21 April 2017, in which the following order was made:

1.1 The application is dismissed.

1.2 Each party is to pay their own costs.

- [2.] The grounds of appeal upon which the applicants relied were couched as a notice of motion with supporting and confirmatory affidavits which comprised of 10 pages. The applicants also listed eleven findings I made, in which they alleged I erred and consequently argued that there were reasonable prospects of success. Listing and dealing with all of them will render this judgment unnecessarily prolix¹.
- [3.] The first three grounds boils down to my finding that the respondent had discharged the onus in providing objective facts that there was a reasonable belief for the seizure of the items. Grounds 5, 6 and 7 related to my finding that the applicants had failed to make out a case in terms of section 31 of the **CRIMINAL PROCEDURE ACT, 51 of 1977 ("CPA")**. Ground 4 was my alleged finding that the failure by the Asset Forfeiture Unit to bring a forfeiture application counted against the applicants. Ground 9 related to my alleged finding that the 2nd respondent did not exist. Grounds 8, 10 and 11 related to my findings regarding the cost order.
- [4.] Grounds 6 and 7 are what they applicants sought to emphasise and argued that leave to appeal should be granted on this ground alone. The applicants relied on the finding of **NDPP v Freedom under the Law**². Therein, the Court referred to a withdrawal under section 6(a) of the CPA, i.e. withdrawing the charge before the accused has pleaded. In such an instance the State may later re-institute proceedings. However, the Court held that such withdrawal will nevertheless be final and should not be labelled as "*provisional*". The applicants argued that their referral to the withdrawal of the matter was to strengthen their case set out in

¹ Compare **Songono v Minister of Law and Order**, 1996 (4) SA 384 (E), at 385C - E

² 2014 (4) All SA 147 (SCA), at 158 - 160

the founding papers and not to set out a case based on s 31 of the CPA. They further argued that they had no onus to do so.

[5.] In terms of the provisions of section 17(1) of the **SUPERIOR COURTS ACT** ("ACT"), 10 of 2013, leave to appeal may only be granted if the Judge concerned is of the opinion that:

- 5.1 The appeal would have a reasonable prospect of success or if there is some compelling reason why leave should be granted;
- 5.2 The decision sought on appeal does not fall within the ambit of section 16(2)(a) of the Act;
- 5.3 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.

[6.] In **S v Smith**³, Plasket JAJA stressed that:

'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

³ 2012 (1) SACR 567 (SCA), at para 7

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.'

- [7.] Having had regard to the above and having dispassionately considered the application, I am satisfied that the applicants have a reasonable prospect of success on appeal on grounds 1, 2, 3, 5, 6 and 7. In my view, a Court of Appeal could not reasonably arrive at a different conclusion to that of the trial Court on grounds 4, 8, 9 and 10 and 11 for the reasons below.
- [8.] As stated above, this application came before in the form of an affidavit. Mr Schreuder for the applicants conceded that grounds 4 and 9 were subjective feelings experienced by the applicants and did not form part of my judgment. No more consideration thus needs to be given to these aspects.
- [9.] Ground number 9 consisted of my supposed finding that no such unit as The Head of the Hawks existed. This was however not what I had found and the applicant had misconstrued this portion of the judgment. This was merely to record the reason why the applicant abandoned any relief against the 2nd respondent (the Head of The Hawks).
- [10.] During argument, Mr Schreuder conceded that the applicants were not prejudiced with a cost order. The cost order related to grounds 8, 10 and 11. In my view, the Appeal Court may in any event make an appropriate order as to costs in the hearing of the appeal. The applicants further conceded that the matter could be referred to a Full Court of this Division.

[11.] In the result, the following order is made:

1. **APPLICANTS ARE GRANTED LEAVE TO APPEAL ON THE GROUNDS SET OUT AS 9.1, 9.2, 9.3, 9.5, 9.6 AND 9.7 IN THE AFFIDAVIT OF CHARLES BUYS DEPOSED TO ON 6 MAY 2017.**
2. **THE APPLICATION FOR LEAVE TO APPEAL ON THE GROUNDS SET OUT AS 9.4, 9.8 AND 9.9 IN THE AFFIDAVIT OF CHARLES BUYS DEPOSED TO ON 6 MAY 2017 IS DISMISSED.**
3. **THE COSTS OF THE APPLICATION FOR LEAVE TO APPEAL ARE COSTS IN THE APPEAL.**



**SNYDERS AJ
ACTING JUDGE
NORTHERN CAPE DIVISION**

For the Applicants:

**ADV. J J SCHREUDER
(RICK ISHMAIL ATTORNEYS)**

For the Respondent:

**MS. M N PHAKAMA
(OFFICE OF THE STATE ATTORNEY)**