IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: CC11/2021

DATE: 27-06-2024

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
DATE 2024.09.30
SIGNATURE [redacted]

10 In the matter between

KABELO JOHN MATSEPE — Applicant 10

MAMPHE DANIEL MSIZA — Applicant 11

and

THE STATE — Respondent

J U D G M E N T

LEAVE TO APPEAL

MABUSE, J:

20 [1.] This is an application by the accused 10 and accused 11 for leave to appeal against the whole of the judgment

and orders that this Court made in its written judgment handed down on 26 April 2024.

The applicants plan to appeal either to the Supreme Court of Appeal or the full court of this division. In the course of this judgment accused 10 and accused 11 will be referred simply as accused 10 and accused 11 or as the applicants.

[2.] In that judgment that the Court handed down on 26 April 2023 this Court dismissed the applications of the applicants to compel the State to furnish them with full and better particulars to their request therefore.

In the said judgment, the Court furnished full reason why it found that the State had complied with their requests. I therefore have no intention to regurgitate those reasons in this judgment.

[3.] On grounds which have been fully set out in the application for leave to appeal the two applicants contemplate challenging the said judgment. In view of the fact that the application for leave to appeal constitutes part of these appeal papers I will not repeat such grounds in this judgment.

[4.] In order to succeed with their applications, the applicants must satisfy the requirements of section

17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013 "the Act".

This section provides as follows:

> "Leave to appeal may only be given where the Judge or Judges concerned are of the opinion that the appeal would have reasonable prospect of success or (2), there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

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In terms of S17 of the Act although there are other requirements, the requirements set out above are the only requirements that the applicants must satisfy in order to succeed with their applications for leave to appeal.

[5.] In paragraph 4 of the *Pretoria Society of Advocates and Others v Nthai*, case number 6271/18 it was stated that:

> "The enquiry as to whether leave should be granted is twofold. The first step that a Court seized with such an application should do is to investigate whether there are any reasonable prospects that another Court seized with the same set of facts would reach a different conclusion. If the answer is positive the Court should grant

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leave to appeal, but if the answer is in the negative the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard."

[6.] S17(1) of the Act sets out an inflexible threshold to grant leave to appeal. Therefore, the applicants must of necessity meet this stringent threshold set out in S17 of the Act. In order to succeed with their respective applications for leave to appeal they must jump this hurdle.

10 That threshold under S17(1) of the Act is now even more stringent than when the now repealed Supreme Court Act 59 of 1959 was still applicable, is aptly demonstrated in some authorities.

[7.] Fortunately, is not the appellants' case that there is some compelling reason why this appeal, should be heard and that such compelling reason includes conflicting judgments on the same matter under consideration. Consequently, in its determination of the matter this Court

20 will be confined to one ground only and that ground is that the appeal would have a reasonable prospect of success.

[8.] Advocate Mukhari SC, correctly pointed out that the purpose of the application for leave to appeal was not so much to reargue the judgment of the Court as it was to point

out the respects in which, in the appellants' view, the Court erred in the judgment and based on such respects to demonstrate to the Court that there is reasonable ground of success if leave to appeal is granted.

[9.] In enlarging his argument Mr Mukhari contended that in its judgment the Court erred both in law and in fact. According to him accused 10 and accused 11 or the first and second applicants made applications for further and better particulars.

The running thread in the judgment is, as far as he is concerned, that the applicants do not need the further details in order to plead. The Court missed the other reason why further and better particulars were requested. That reason was that the further and better particulars were required to enable the applicants to prepare for trial. On that basis, so argued Mr Mukhari, the Court of Appeal would find that it was necessary for the State to provide the applicants with further and better particulars in order to enable them to prepare for trial. I find no merits in this argument.

[10.] Furthermore, he dealt with an affidavit that was submitted by an officer of the DPP's office and argued that it served no purpose. This affidavit did not provide any

defence as far as he is concerned.

It will be recalled that there was an objection raised by Ms Manaka about the heads of argument submitted by the State in opposing the applicants' application to compel.

The application was based on the fact that the heads of argument submitted could not constitute part of the indictment. In terms of the law the State's response to the accused application for further particulars would form part of the indictment. Therefore, the heads of argument
10 submitted at that stage could not constitute part of the indictment.

[11.] The Court then asked Mr Van der Merwe, who appeared for the State, whether it was possible for the State to submit an affidavit in the place of the heads of argument. Mr Van der Merwe then undertook to submit the affidavit, which is what he did.

[12.] What the State did in this regard was to convert the
20 heads of argument into an affidavit. In the heads of argument the State had clearly indicated its intention to oppose the applications, the applicants' application to compel.

The opposition was at that stage set out in a wrong document. It will therefore be naïve for the applicants to

think that the applications were unopposed. Even after the affidavit was filed there was very little difference between the contents of the heads of arguments and the relevant affidavit.

I do not see how that prejudiced the applicants. At any rate, no argument has been placed before Court that the applicants were prejudiced by the filing or the late filing of the affidavit. No argument was placed before Court that there were material differences between the heads of
10 argument and the affidavit.

In the absence of any prejudice suffered by the applicants I see no reason why it is alleged that the affidavit served no purpose. The applicants did not question the affidavit before this application for leave to appeal.

[13.] It was furthermore argued by Mr Mukhari that the Court order infringed upon the applicants' rights to a fair trial and that this is a constitutional right.

20 [14.] On the facts of the case Mr Mukhari argued that, in certain instances, the Court did not make any findings. He contended that the Court failed to capture the facts. Based on that point, the Court should grant leave to appeal.

The argument that in certain instances the Court made no findings seems, in my view, to be a sweeping statement. No

specific reference to any paragraph of the judgment was made despite the fact that before us we all had copies of the judgment. The Court found it difficult to deal with such a sweeping complaint.

[15.] In response Mr Van der Merwe, in opposing the applications for leave to appeal, referred to and relied on two grounds. He argued that the application for leave to appeal is premature. He argued furthermore that this is an interlocutory application in the matter and that if the applicants want the appeal they must wait until the conclusion of the trial.

[16.] An interlocutory application is an urgent request to the Court to compel compliance with the procedure and time periods in order to secure some end and purpose necessary and essential to the progress of a case. A party in a case can apply to Court for an interlocutory order to help with the procedure and preparation for their case.

[17.] Mr Van der Merwe relied on paragraph [57] of the Constitutional Court judgment of *Cloete and Another v S, Sekgala v Nedbank Limited* [2018] ZACC6 in which the Court had the following to say:

> "In any event this Court has held that in

considering whether to grant leave to appeal it is necessary to consider whether allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs. Similarly, in *TAC 1* this Court stated that:

> "It is undesirable to fragment a case by bringing appeals on individual aspects of a case prior to the proper resolution of the matter in the court of first instance. This is one of the main reason why interlocutory orders are generally not appealable while final orders are.""

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The above paragraph sets out the factors that I must take into account in determining the issue whether the applicants' application for leave to appeal should be granted.

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[18.] These are the factors which, inter alia, have a bearing on whether the Court should favourably decide for the applicants. If one bears in mind the long delays occasioned by the applicants since the days of the case

management by the Deputy Judge President when the second appellant's counsel declared at that stage of the case management meeting to be ready to proceed to trial with the matter; when one considers the number of times this matter was set down for hearing and the reasons why the matter could not proceed and one takes into account the fact that, save for the applicants, the other accused in the matter were ready or they declared to be ready and in fact have been ready to proceed with the trial since the days of
10 the case management; when one considers the inconvenience caused to the other accused who have always come to court only to have their cases postponed because the appellants are not ready, when one considers the costs involved in respect of each of the accused who was ready or is ready to proceed with the matter to trial but his case is repeatedly postponed and when the Court takes into account that applicants have alternative remedy in terms of Section 86 of the Criminal Procedure Act 71 of 1977 the Court is of the view that it is not in the interest of
20 justice to grant the application.

[17.] Ms Manaka responded to Mr Van der Merwe's argument. In her view the *Cloete* case did not apply in this case because in that case the Court was dealing with the provisions of Section 17(2)(c) of the Superior Courts Act 10

of 2013. I do not deem it necessary in this judgment to cite the provisions of the said section. For the following reasons there seems to be no merit in Ms Manaka's argument. It is not what the Court was dealing with that is of paramount importance.

It must always be remembered that no two cases are ever the same. It is the principle that is founded in a case that is of crucial importance. That principle may then be applied to all the facts, quite different from the facts of the case in
10 which the principle initially was set out.

[20.] We all know that we apply the law to the facts and not the facts to the law. The facts do not have to be the same, in other words, to apply this principle the Court does not always have to deal with the provisions of S17(2)(c) of the Superior Courts Act.

[21.] Consequently, in my view, the principle set out in the Constitutional Court in paragraph [57] of the *Cloete*
20 judgment and the cases cited in that paragraph are applicable in this case. I would venture to say that the judgments quoted in paragraph [58] of the *Cloete* judgment is also applicable in this case.

In paragraph 10 to 19 of the judgment under attack I set out the law with the support of some authorities that relates to

what must be observed when you request for further particulars. There was no argument against that law.

[22.] May I hasten to state that the factors that are referred to in paragraph [18] were not the only factors that a Court must have regard to when deciding on the issue of whether an application for leave to appeal may be granted.

I have stated in paragraph [6] above the stringent threshold that an applicant for leave to appeal should satisfy in order
10 to succeed with the application for leave to appeal.

What does the test of reasonable prospect postulate. In this regard see *S v Smith* 2012 (2) SACR 567 at 570, paragraph 7, a judgment by Plasket AJA as he then was.

> "What the test of reasonable prospect of success postulates is dispassionate decision based on the fact and the law that the Court of Appeal could reasonably arrive at a conclusion different to that of the trial Court. In order to succeed therefore the
> 20 applicant must convince the 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 there is a

mere possibility of success, that the case is arguable on appeal or that the case cannot be characterised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[23.] For two reasons the application for leave to appeal cannot succeed. Firstly, it is not in the interest of justice that leave to appeal be granted and I have stated why. Secondly, this Court has not been persuaded that there is any reasonable prospect of success if leave to appeal is granted.

Accordingly, the applications for leave to appeal are hereby refused.

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MABUSE, J

JUDGE OF THE HIGH COURT

DATE: 2024.09.30