

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

IREEN MAY BUCHANAN

Appellant

and

B DU TOIT MARAIS N.O.

First Respondent

C J VAN SCHALKWYK N.O.

Second Respondent

ALFOS MKHIZE

Third Respondent

GORDON FRANCIS MOREY

Fourth Respondent

THE ATTORNEY-GENERAL OF NATAL

Fifth Respondent

CORAM : HEFER, MILNE JJA et KRIEGLER AJA.

HEARD : 28 FEBRUARY 1991.

DELIVERED : 21 MARCH 1991.

J U D G M E N T

HEFER J A.

HEFER J A:

Appellant's son was killed on 16 August 1983 when his motorcycle collided on the road between Riverside and Creighton with a truck belonging to the Natal Provincial Administration and driven at the time by one Alfos Mkize (the present third respondent). As a result of the collision third respondent appeared in the Magistrate's Court at Ixopo on charges of culpable homicide, alternatively contravening sec 138(1) or 139 of Ord 21 of 1966 (N). First respondent was the presiding magistrate and second respondent, a State advocate attached to the attorney-general's office in Pietermaritzburg, the prosecutor. Fourth respondent, a warrant officer in the police, was the investigating officer in the matter. Third respondent was represented by an attorney on the staff of the State attorney. The trial resulted in an acquittal since first respondent found that negligence on third respondent's part had not been estab-

lished.

The appellant was not satisfied with third respondent's acquittal. She prevailed upon the attorney-general (fifth respondent) to investigate second respondent's conduct at the trial and appealed to him to have the matter reopened in order to present further evidence and to re-examine the State witnesses. She was firmly of the view that the case had not been properly investigated by fourth respondent nor properly presented by second respondent nor properly considered by first respondent. Upon being informed by fifth respondent that there was no way in which the trial could be reopened she filed an application in the Natal Provincial Division for an order in the following terms:

"

ORDER PRAYED

1. That the judgment of the Magistrate, First Respondent delivered in the Magistrate's Criminal Court, Ixopo, on 31.7.84 (Case No. 632/1984) case against ALFOS MKHIZE be and the same is hereby set aside and the Second Respondent is

directed to re-open the case for hearing.

2. The Fourth Respondent is to be recalled for the purpose of amplifying his evidence as outlined in the Applicant's Founding Affidavit.
3. That the Attorney General for the Province of Natal is directed to appoint another Prosecutor other than the Second Respondent for the further handling of the trial.
4. That the new Prosecutor so appointed give due and proper attention to any prospective witnesses and their statements submitted to him by the Applicant, with a view to calling them as state witnesses if deemed necessary, and to calling any other witnesses deemed necessary.
5. That the Registrar of this Honourable Court is directed to arrange for payment to Applicant or her duly authorised Agent or Attorney any expenses incurred by her in preparing, and serving any process necessary for this Application. -

6. Further, other or alternative relief. "

Her founding affidavit was a reiteration of her earlier complaints to fifth respondent. Against the latter she alleged inter alia that he had overlooked

".....the fact that the judicial set-up of the court

was wholly constituted of interested parties orientated to the same employer as the accused, with a common disinterest in conviction being a possibility."

Elsewhere in the affidavit she alleged:

" The sum total of all the foregoing omissions, failures, evasions and neglects on part of counsel for prosecution, if not due to utter incompetence and inability to function in the capacity of his appointment, could then only be construed to be directed towards the main aim of inviting, by default, the acquittal of the accused Mkize, and thereby perverting the course of justice."

All the respondents filed opposing affidavits in which they denied appellant's charges. The matter came before SHEARER and BOOYSEN JJ during December 1986. The appellant appeared in person. Counsel for first, second, fourth and fifth respondents (third respondent was not represented) argued in limine that the court had no jurisdiction to review the acquittal and that the appellant in any event had no locus standi. After addressing the court on the preliminary points and on the merits of the application they moved for its dismissal.

Judgment was reserved and on 5 March 1986 a written judgment prepared by BOOYSEN J in which SHEARER J concurred was handed down. In terms thereof the court overruled the preliminary points but dismissed the application on its merits and directed the appellant to pay one third of each respondent's costs since they had "been successful in this matter overall but not on the points in limine." (It is not necessary to consider the correctness or otherwise of the court's decision to overrule the preliminary points, and I accordingly do not comment thereon.)

Thereafter the appellant approached the Natal Provincial Division with an application for leave to appeal. The application was opposed by the respondents and heard by PAGE J and BOOYSEN J on 22 May 1986. The result appears from the written judgment prepared by BOOYSEN J:

"I would accordingly, firstly, grant leave to appeal to the applicant against the order of court ordering her to pay one third of the costs of the respondents. Secondly, refuse leave to appeal against the order refusing the application for a review of the acquittal. thirdly, reserve the question of costs of this

application for decision by the Appellate Division and if it is not decided by the Appellate Division, grant leave to the parties to have the matter set down after the appeal has been disposed of for argument and a decision in respect of the costs of this application."

Despite the limited extent of the leave granted to appellant to appeal she filed, on 9 June 1986, a notice with the registrar of the Natal Provincial Division and with the registrar of this court which reads as follows:

"Take notice that the appellant appeals against the whole of the judgment delivered by the Hon Mr Justice Booysen and the Hon Mr Justice Shearer in the Natal Provincial Division on the 5th of March, 1986.

In so far as may be necessary, appellant will apply for leave to appeal against the issue raised in the revue of the setting aside of the acquittal of the third respondent. Appellant was given leave to appeal against the order for costs in favour of respondents on the 5th of March 1986 by the Hon Mr Justice Booysen on the 22nd May 1986." (The notice proceeds to list what are called the grounds of appeal).

On 24 July 1986 a Bloemfontein attorney filed an application for leave to appeal with the registrar of

this court. In the founding affidavit the appellant stated:

" Whereas on the 22nd May 1986 the Hon Mr Justice Booysen made an order, a copy whereof is annexed marked A, and your petitioner wishes to appeal against the whole of the judgment of the Hon Justices Booysen and Shearer in the same matter delivered by the Hon Mr Justice Booysen on the 5th of March 1986, copy whereof is annexed marked B and your petitioner has been refused leave to appeal on the merits, she hereby petitions you for an order granting leave to appeal insofar as may be necessary, relying on the grounds set out below. "

Upon receipt of the application the registrar informed the attorney that he did not regard it to be in proper form. The papers were uplifted in order to be corrected and were only received back by the registrar on 26 February 1987. In the meantime, however, first, second, fourth and fifth respondents had filed their opposing affidavits. The application was thereafter referred to three judges of this court and on 10 March 1987 leave to appeal was refused

with costs. Appellant's Bloemfontein attorney was advised accordingly.

What then happened was that the appellant's appeal against the order of costs made against her by the Natal Provincial Division on 5 March 1986 was enrolled. At the hearing of the appeal the appellant appeared in person. At the outset she applied for condonation for her failure to file the record timeously. Condonation was granted and the appellant directed to pay the costs occasioned by the application for condonation. She then proceeded to argue the correctness of the order of costs referred to earlier. This part of her argument will be discussed later. Having done so she intimated that she also wished to argue the correctness of the dismissal of the application for review by the court a quo. When her attention was drawn to the fact that her application for leave to appeal against that part of the court a quo's judgment had been refused,

she argued that she did not require leave since the matter is essentially a criminal one. It further emerged from her argument that she was under the impression that the refusal of her application for leave could be reviewed by what she called the "full court"; and that she required us to do so since the three judges who had heard the application did so "secretly" without affording her an opportunity to address them and could not honestly have formed the opinion that she had no reasonable prospects of success. In view of this argument I shall now proceed to state the reasons why the appellant could not be allowed to argue the correctness of the dismissal of the application for review.

In terms of sec 20(1) of the Supreme Court Act
59 of 1959 as amended -

"(an) appeal from a judgment or order of the court of a Provincial or Local Division in any civil proceedings or against any judgment or order of such a court given on appeal shall, subject to the provisions of sub sec (3), be heard by

the Appellate Division."

Sec 20(4) reads as follows:

" No appeal shall lie against a judgment or order of the court of a Provincial or Local Division in any civil proceedings or against any judgment or order of that court given on appeal to it except -

(a) in the case of a judgment or order given in any civil proceedings by the Full Court of such a division on appeal to it in terms of sub sec (3) with the special leave of the Appellate Division;

(b) in any other case with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the Appellate Division."

It is plain that, if the judgment of the court a quo dismissing the application for review in the present matter was given either in "civil proceedings" or "on appeal" to it, the appellant has no right of appeal and requires leave in terms of sub sec (4) (b).

Since the application related to a criminal matter I am prepared to accept on the authority of Sita

and Another v Olivier N O and Another 1967(2) SA 442 (A) at 449 that the proceedings were not "civil proceedings" as envisaged in sec 20(4). It is quite clear, however, that the reference in that section to a judgment given "on appeal" must be construed as denoting any application by an aggrieved party to a higher authority for relief from a decision of a lower one, so as to include not only an appeal in the strict sense of the word but an application for review as well. That this is so, appears from a long line of cases of which only Sita's case (supra) at 447 H - 448 H, R v Keeves 1926 AD 410 at 416 and R v Bhana 1954(1) SA 45 (A) at 50 A - 51 B need be mentioned. Sita's case was decided before the amendment of sec 20 during 1982 and the other decisions relate to the position before the Supreme Court Act was enacted; but the reasoning in the judgments in all these cases obviously still holds good.

It follows that the appellant indeed required

leave to appeal to this court against the dismissal by the court a quo of her application for review. Her application for leave was considered by three judges of this court in terms of sec 21(3) which, before its amendment during 1987, read as follows:

"3(a) An application to the Appellate Division under sub sec (2) shall be submitted by petition addressed to the Chief Justice.

(b) The petition shall be considered by three judges of the Appellate Division designated by the Chief Justice.

(c) The judges considering the petition may order that the application be argued before them at a time and place appointed, and may, whether or not they have so ordered -

(i) grant or refuse the application; or

(ii) refer the application to the Appellate Division for consideration, whether upon argument or otherwise,

and where an application has been so referred to the Appellate Division, that Division may thereupon grant or refuse the application.

(d) The decision of the majority of the judges

considering the application, or the decision of the Appellate Division, as the case may be, to grant or refuse the application shall be final."

The judges who considered the appellant's application refused it, as they were entitled to do, without argument and without referring the application to the court for consideration. Their decision is final and cannot be reviewed. Appellant's contention that the court may overrule it in terms of Rule 13 of the Rules of this division (which only entitles the court to excuse the parties from compliance with any of the Rules) is plainly without substance.

The only matter with which we are concerned is the appeal against the court a quo's order that she pay one third of the respondent's costs. Her contention that there should have been no order as to costs is based on what she says is a rule that costs are never awarded in criminal cases. It is true that costs are

not awarded in criminal cases stricto sensu where the prosecution is at the public instance (although even in such cases the attorney-general may be mulcted in costs in terms of sec 311 of the Criminal Prosedure Act 51 of 1977 in the event of an unsuccessful appeal brought by him). But this does not mean that every application in which relief is sought from a higher court in respect of criminal proceedings in a lower court must, for purposes of costs, be regarded as criminal in nature. The reports abound with cases in which costs were awarded in such matters. The present matter is unique in that it was neither the prosecutor nor the accused who sought relief from a higher court. The appellant rightly stressed the fact that she was not a private prosecutor and that the provisions of the Criminal Procedure Act (eg secs 16 and 311(2)) relating to costs in private prosecutions do not apply to her. If, however, as appears from these provisions, a private prosecutor runs the

risk of an adverse order of costs, so much the more does a person in the appellant's position. In Barclays Zimbabwe Nominees (Pvt) Ltd v Black 1990(4) SA 720 A at 726 1 this court mentioned that it is "the general policy of the legislature that all prosecutions are to be public prosecutions in the name and on behalf of the State the exceptions are firstly where a law expressly confers a right of private prosecution upon a particular body or person and, secondly, those persons referred to in sec 7." And, as VAN DER HEEVER AJP remarked in Bornman v Van der Merwe 1946 OPD 192 at 195,

"(e)ssentially, private prosecutions are in the nature of private litigation. The parties take their courage in both hands and institute and defend to gain their private ends. Since the State has made ample provision for the prosecution of offenders at the public instance, it seems equitable that the parties who desire to exercise their very special rights should do so at their own peril of being mulcted in costs."

This reasoning applies a fortiori to a person in appel-

lant's position. In my view she was rightly ordered to pay portion of the respondents' costs.

The appeal is accordingly dismissed with costs which include the costs occasioned by the appellant's application for condonation for the late filing of the record and of the application to the court a quo for leave to appeal.

J J F HEFER JA

MILNE JA)
KRIEGLER AJA) CONCUR.