



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

NOT REPORTABLE

Case no: **83/2023**

In the matter between:

THABO BESTER

Applicant

and

THE STATE

Respondent

Coram: JP DAFFUE J

Heard: 23 APRIL 2025

Delivered: 29 APRIL 2025

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 15H00 on 29 APRIL 2025.

Summary: Application for leave to appeal. The court ruled that the applicant, accused 7 in a criminal trial which has yet to commence, shall respond to the State's notice in terms of s 212B of the Criminal Procedure Act 51 of 1977. The purpose of the section was considered, *ie* to establish the undisputed facts in criminal proceedings in an attempt to streamline proceedings. The court held that the ruling was not appealable, did not cause any unfairness and did not disregard any of the applicant's constitutional rights. Also, an appeal in the uncompleted criminal proceedings should not be allowed. The court dismissed the application for leave to appeal.

ORDER

1. The application for leave to appeal is dismissed.
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JUDGMENT

Daffue J:

Introduction

[1] The applicant, Mr Thabo Bester, cited as the seventh accused in criminal case number 83/2023, applies for leave to appeal to the Supreme Court of Appeal, alternatively the full bench of this division. His case is that the ruling on 13 January 2025, directing him to reply to the State's notice in terms of s 212B of the Criminal Procedure Act 51 of 1977 (the CPA) on/or before 28 February 2025, should be set aside on appeal for various reasons to be dealt with briefly. The application is opposed by the State.

Grounds of appeal

[2] In submitting that there are reasonable prospects of success on appeal, or compelling reasons why the matter should be referred to a court of appeal, the applicant relies on the following grounds of appeal:

- a. I violated the *audi alteram partem* principle with reference to ss 34 and 35 of the Constitution;
- b. I disregarded his right to remain silent, to be presumed innocent and not to testify;
- c. the proceedings on 13 January 2025 are equivalent to litigation by ambush;
- d. I usurped the powers of the court hearing his 'pending fair trial rights application'; and
- e. I erred in compelling the applicant to reply to the s 212B notice before he could properly consult with his legal team; furthermore, I should have instituted an investigation in terms of s 212B(5) at the very least, which I failed to do.

The test in applications for leave to appeal

[3] In *S v Smith*¹ the Supreme Court of Appeal (the SCA) stated:

‘... 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 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.’

[4] Later on in *MEC for Health Eastern Cape v Mkhita and Another*² the SCA repeated the principle in the following words:

‘[16] 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.

[17] 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.’

[5] More recently the same court commented as follows in *Ramakatsa and Others v African National Congress and Another*³:

‘... The test of reasonable prospects of success postulates 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 other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist.’

The history of the litigation

[6] As can be gleaned from the heading, the case number is 83/2023. We are now in 2025, two years after the criminal proceedings have been instituted. I have not been involved in any of the several pre-trials and/or applications launched by Dr

¹ 2012 (1) SACR 567 (SCA) para 7.

² [2016] ZASCA 176, a judgment delivered on 25 November 2016 at paras 16 & 17.

³ [2021] ZASCA 31, a judgment delivered on 31 March 2021.

Magudumana, the first accused and the applicant, Mr Bester, relating to the criminal case. Bearing in mind the huge attention that this matter has been given by the media, I have taken note of the events. I am not a stranger in Jerusalem. This matter has been delayed, but the criminal trial was eventually set down to start on 10 February 2025.

[7] Dr Magudumana applied for several orders, inter alia that her alleged arrest in Tanzania and subsequent transportation to South Africa as well as her further detention be declared wrongful and unlawful. On 5 June 2023 her application was dismissed by Loubser J⁴. She was not satisfied with the outcome and appealed to the SCA. I was informed by Mbhele DJP that she had been informed that the SCA judgment would be handed down not later than 10 February 2025. At the hearing of this application for leave to appeal this judgment was still outstanding.

[8] The applicant, Mr Bester, brought an application issued under case number 4096/2024, inter alia claiming that it was impossible for him to consult with his legal team, bearing in mind the detention conditions. He inter alia averred that no meaningful consultations could be held with his legal team. He also sought an order that he be allowed to use a laptop or any suitable gadget in preparation of his criminal trial. The application was heard by Mbhele DJP who informed me the night before the events on 13 January 2025 that her judgment was still outstanding, but would be delivered soon. I have now been informed by Adv Moela, acting for the applicant, that judgment had indeed been delivered, but that they had applied directly to the Constitutional Court for leave to appeal to that court. Those proceedings are pending. In the mean time I obtained a copy of Mbhele DJP's judgment. Applicant's counsel argued that the criminal court before which he is arraigned is cloaked with jurisdiction and not the civil court. His objection to the civil court's jurisdiction was dismissed with costs.

[9] I now return to the events of 13 January 2025. Adv Bester on behalf of the State arranged with the parties involved in the criminal trial to appear before me on that day, I being the only judge on duty at the time during the recess. The purpose, and my understanding of the meeting, was to come to an agreement pertaining to the

⁴ *Magudumana v DPP Free State and Another* (2484/2023) [2023] ZAFSHC 223 (5 June 2023).

postponement of the criminal case, set down for hearing as mentioned above, to new dates. It was apparent to the State that the defence would not be ready to proceed on trial in February 2025. The parties did in fact agree on postponement of the criminal trial to the third term of 2025, as well as certain dates in the fourth term of 2025. They also provisionally agreed that, if required, dates in the first term 2026 should be allocated to the case. Such order was made.

[10] When the parties met me in chambers before going to court, Adv Bester indicated that I should make further orders. The only relevant order required and the issue now before the court is the ruling that the applicant shall respond to the State's notice in terms of s 212B which had been provided to him several months ago. Mr Moela indicated in chambers that his client was ambushed. As a result, I gave him a short while to consult with his client before the start of proceedings in court. After hearing some argument, I made my ruling without giving reasons and without allowing further submissions as indicated in the transcription obtained by the applicant's attorney.

Norms and Standards and the finalisation of criminal cases

[11] On 14 February 2014, Chief Justice Mogoeng Mogoeng at the time issued Norms and Standards in terms of s 8 of the Superior Courts Act 10 of 2013, read with s 165(6) of the Constitution. In paragraph 5.2.4 thereof judicial case flow management is dealt with. Judicial Officers shall take 'active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay'. Pre-trial conferences became obligatory and it is stated that these shall be held 'as early and as regularly as may be required to achieve the expeditious finalisation of cases'. It is clearly stipulated in paragraph 5.2.5 that 'every effort shall be made to bring the accused to trial as soon as possible after the accused's arrest and first appearance in court'. (emphasis added)

Section 212B of the Criminal Procedure Act 51 of 1977

[12] Section 212B(1) provides an opportunity to the State at any stage during the proceedings to hand a notice to the accused or their legal advisor, setting out the facts that shall be deemed to be proved at the proceedings, unless notice is given that those facts (or some of them) will be placed in issue. In terms of subsec (3) the accused or their legal representative shall deliver a notice in writing indicating the facts in issue. If

a fact or facts are not placed in issue as contemplated in subsec (3), the court may in terms of subsec (4) deem such fact or facts to have been sufficiently proved, subject to the provisions of subsecs (5) and (6). Once the State's s 212B notice and the reply thereto are brought to the notice of the court, it shall at the commencement of the criminal proceedings institute an investigation into such of the facts which are not disputed and enquire from the accused whether they confirm the information given by the prosecutor, whether they understand their rights and the implications of the procedure and whether they confirm their reply or not.

[13] Mr Moela conceded that the purpose of s 212B was to establish the undisputed facts in criminal proceedings in an attempt to streamline proceedings. Yet, he submitted that I had no power to compel his client to reply. Adv Bester for the State submitted that instead of accepting that the failure to reply should be deemed to be an admission of the facts set out in the State's s 212B notice, she was lenient and requested a further opportunity for the applicant to reply.

Discussion

[14] I shall focus in my discussion under several sub-headings. I deal first with the non-appealability of the ruling. Then I shall deal with aspects relating to the merits of the application and the grounds of appeal.

Non-appealability of the ruling

[15] My ruling is not definitive of the rights of either the applicant, or the State. Clearly, it is not dispositive of a substantial portion of any relief to be claimed in the criminal proceedings still to commence. I did not finally determine any of the parties' rights. Clearly, the trial judge may again consider the issue when the applicant and his co-accused eventually go on trial. The trial judge may decide to grant more time to the applicant to respond.

No practical effect

[16] Section 16(2)(a)(i) of the Superior Courts Act 10 of 2013 states that when it appears at the hearing of an appeal 'that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.' Courts shall not decide issues purely for academic interest and leave to appeal should not be granted where the decision sought on appeal will have no practical effect or result as stated in

*Centre for Child Law v The Governing Body of Hoërskool Fochville*⁵. The doctrine of mootness is also relevant to the application. Clearly, the matter has become moot. The date provided for the reply to be filed has come and gone. Even if it may be assumed that the applicant's failure to respond – which is seriously doubted in the circumstances - resulted in admissions, the trial court will be duty-bound to enquire from him as set out in subsec 212B(5). Mr Moela's submission that I should have undertaken such enquiry already on 13 January 2025 is without substance as I granted more time to respond at the request of the State.

[17] Mr Moela conceded that my ruling cannot have any conceivable effect on the applicant's rights to fair hearing. What I did was to grant the applicant more than sufficient time to respond to the State's notice in terms of s 212B. He failed to file a response by 28 February 2025. Mr Moela conceded that the decision to be sought on appeal will have no practical effect, but submitted that the consequences are of such a serious nature that a court of appeal should rule that I was wrong, because if this is not done, the ruling will have an unfair and negative effect on other accused persons who may be subjected to similar rulings. I accept that the SCA may in its discretion hear moot matters where an appeal raises issues of public importance that may influence future matters, but am not prepared to accept that this is such a case and that another court may reasonably come to such a conclusion.

Unfairness and violation of the applicant's constitutional rights

[18] The *audi alteram partem* principle, applicant's rights in terms of ss 34 and 35 of the Constitution and his right to remain silent must be considered. Although I cut Mr Moela short during his argument on 13 January 2025 due to time constraints and my work load, being the only judge on duty during the recess, the ruling does not affect the applicant's constitutional rights as set out in ss 34 and 35. Section 34 provides that everyone has the right to have any dispute that can be resolved by application of the law decided in a fair public hearing. The legislature has deemed it necessary to enact s 212B. The applicant has not attacked the constitutionality of the section. An accused is obliged to respond to the State's notice. The rights afforded to the applicant in s 35 have not been affected. He was not ordered to make admissions or to speak when he had the right to remain silent. The ruling has no effect on his right to a fair criminal trial.

⁵ 2016 (2) SA 121 (SCA) para 10.

Like all accused persons during plea procedure and those required to respond to notices in terms of s 212B, he could just dispute all allegations. In such a case the State would still have to prove each and every allegation relied upon, even those which it might have thought would be undisputed.

[19] I confirm that the purpose of the appearances on 13 January 2025 was to agree on new trial dates. But I do not agree with Mr Moela that his client was ambushed. Litigation by ambush refers to a practice of deliberately concealing information or evidence during pre-trial discovery and then to use it to surprise or disadvantage the opposing party during the trial. Such tactic undermines the principle of fairness as the other party should have a fair opportunity to prepare a defence or argue their case based on a complete understanding of the case to meet. I reiterate that nothing prevented the applicant to reply to the s 212B notice, even if he had to deny all issues raised therein because of the alleged difficulty to consult properly with his counsel.

Reviews or appeals in respect of uncompleted proceedings

[20] Section 309 of the CPA deals with appeals from the lower courts by convicted persons. Section 315 deals with appeals in respect of High Court judgments. If a special entry is made on the record in terms of s 317 of the CPA, the convicted person may in terms of s 318 appeal against the conviction on the ground of the irregularity or illegality stated in the special entry. Clearly, there is no room for an appeal procedure in respect of rulings made mid-stream.

[21] Hancke and Pickering JJ considered the applicable principles pertaining to reviews of uncompleted criminal proceedings in *Motata v Nair NO*⁶ and for the sake of convenience I quote extracts from paragraphs [9] – [12]:

‘[9] It is trite that, as a general rule, a High Court will not, by way of entertaining an application for review, interfere with uncompleted proceedings in a lower court. As stated in *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point decided against the accused by a magistrate is fundamental to the accused's guilt. At 119H - 120A Ogilvie Thompson JA (as he then was) stated as follows:

⁶ 2009 (2) SA 575 (TPD)

"It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief - by way of review, interdict, or *mandamus* - against the decision of a magistrate's court given before conviction.... This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of *Gardiner and Lansdown* (6th ed., vol. I p. 750) state: "While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by *mandamus* or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained . . . In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available."

In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts.

At 120D, the learned judge continued: "(T)he prejudice, inherent in an accused's being obliged to proceed to trial, and possible conviction, in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision overruling a preliminary, and perhaps a fundamental, contention raised by the accused, does not *per se* necessarily justify the Supreme Court in granting relief before conviction... As indicated earlier, each case falls to be decided on its own facts and with due regard to the salutary general rule that appeals are not entertained piecemeal."

[10] In *Ismail and Others v Additional Magistrate, Wynberg and Another* 1963 (1) SA 1 (A), the following was stated at 5H - 6A:

"I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before conviction. As was pointed out in *Wahlhaus and Others v. Additional Magistrate, Johannesburg and Another*, 1959 (3) S.A. 113 (A.D.) at p. 119, where the error relied upon is no more than a wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrate's decision under appeal at a stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in unterminated proceedings in the court below, and should, generally speaking, confine the exercise of its powers to 'rare cases where grave injustice might otherwise result or where justice might not by other means be attained' (*Wahlhaus's case, supra* at p. 120)."

[11] These principles have been applied in a number of later cases ...; *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) (2005 (1) SACR 441) in para 20.

[12] It has been stressed that underlying the reluctance of the courts to interfere in unterminated proceedings in a lower court is the undesirability of hearing appeals or reviews

piecemeal. See ... and *S v Western Areas Ltd and Others* (supra) where, in para 25, Howie P stated:

“Long experience has taught that in general it is in the interests of justice that an appeal await the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary course.”

[22] The learned judges dealt with reviews and appeals to the High Court and not with a ruling granted by a High Court judge. In any event, there are no exceptional circumstances why the ruling should be overturned on appeal. In any event, there is no reasonable possibility that a court of appeal will interfere with a ruling made mid-stream through pre-trial proceedings prior to the commencement of the criminal trial and which has no effect at all on the person's right to a fair trial.

[23] I accept that constitutional approaches to rights determination must generally enjoy primacy as explained by Cameron J in *Jordaan & Others v Tswane Metropolitan Municipality & Others*,⁷ but as the SCA held in *Moyo & Another v Minister of Justice and Constitutional Development & Others*,⁸ preliminary litigation that serves no purpose other than to circumvent the application of s 35(5) of the Constitution must be discouraged.

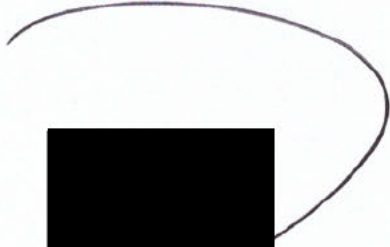
Conclusion

[24] I conclude that the ruling is not appealable, but even if it was, I am satisfied that there is no reasonable possibility that another court would come to a different conclusion and furthermore, there are no compelling reasons why another court should deal with this on appeal.

Order

[25] The following order is made:

1. The application for leave to appeal is dismissed.



JP DAFFUE J

⁷ 2017(6) SA287 (CC) at para 8.

⁸ 2018(2) SACR 313 (SCA) at para 161; the court relying on *Thint (Pty) Ltd v NDPP & Others*; *Zuma v NDPP & Others* 2009 (1) SA 1 (CC) at para 65.

Appearances

For applicant:	Adv L Moela
Instructed by:	Dinana Reid Inc Bloemfontein
For the State:	Adv A Bester
Instructed by:	DPP Bloemfontein