



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: CCD30/2018

In the matter between:

**THALES SA (PTY) LTD (as represented by PIERRE-MARIE Du RAND)
JACOB GEDLEYIHLEKISA ZUMA**

and

THE STATE

ORDER

The application for leave to appeal by both Mr Zuma and Thales is dismissed.

JUDGMENT

Chili J:

[1] This is an application for leave to appeal the judgment and order of this court, dismissing an application brought by Thales, and supported by Mr Zuma, in which they

sought an order directing the State to quash their prosecutions in terms of s 6 of the Criminal Procedure Act 51 of 1977 ('the Act'), and acquitting them on all charges.

[2] To succeed, the applicant in an application for leave to appeal must satisfy the court that there are reasonable prospects of success on appeal or that there are compelling reasons to grant the appeal.

[3] It is now settled that the bar in an application for leave to appeal has since been raised. In *Mont Chevaux v Goosen and others*¹ the court held that the 'use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against'. Regarding reasonable prospects of success, the Supreme Court of Appeal in *S v Smith*² stated: '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.³ 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] The Supreme Court of Appeal again asserted the significance of leave to appeal being granted only when there are reasonable prospects of success in *MEC for Health, Eastern Cape v Mkhitha and another*, where the court held:⁴

¹ *Mont Chevaux Trust v Goosen* [2014] ZALCC 20, 2014 JDR 2325 (LCC) para 6.

² *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 7.

³ *S v Mabena and Another* [2006] ZASCA 178; 2007 (1) SACR 482 (SCA) para 22.

⁴ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 para 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.'

[5] I begin with Thales's grounds of appeal. First, it was argued on behalf of Thales, that another court would find that due to the deaths of Messrs Maynot and Thétard, Thales has suffered irredeemable or insurmountable trial prejudice which will only be exacerbated by the trial. There is no merit in this ground. In my judgment I found, that the court best suited to decide whether the deaths of Messrs Maynot and Thétard has caused Mr Zuma and Thales irredeemable or insurmountable trial prejudice is the trial court (the court deciding the merits), whose duty it is to consider the impact of the non-availability of Messrs Maynot and Thétard in the light of all the evidence presented to court.⁵ A holistic approach in determining Mr Zuma's and Thales's constitutional right to a fair trial is, in my view, justified and I am not persuaded that another court would find differently.

[6] The second ground of appeal is that this court erred in finding that Thales had failed to place sufficient material evidence before court to decide that Thales will not receive a fair trial due to deaths of Messrs Maynot and Thétard. This contention is misdirected. No such finding was made by this court. When considering a declaratory relief sought under s 172(1)(b) of the Constitution, the court initially acknowledged the roles played by both Messrs Maynot and Thétard in Thales, and following on a discussion on *Bothma v Els and Others*,⁶ the court made a finding, in the main, that 'it can shut the door to the continued prosecution *only* if it is satisfied that the continued prosecution will cause both Mr Zuma and Thales irreparable or insurmountable trial prejudice'.

⁵ *Key v Attorney-General, Cape Provincial Division, and Another* [1996] ZACC 25; 1996 (4) SA 187 (CC) para 14.

⁶ *Bothma v Els and Others* [2009] ZACC 27; 2010 (2) SA 622 (CC) (*Bothma*).

[7] Regarding the third ground, Thales argued that this court erred in finding that the evidence of Mr Driman and Ms Guerrier can sufficiently substitute the evidence of Messrs Maynot and Thétard. Again, no such finding was made by this court. The issue between the state and the defence regarding Mr Driman and Ms Guerrier is whether they should be called as witnesses in the defence case. In this regard, the parties expressed contrasting views which at this stage of the proceedings could only be decided on the papers. That being the case, the court, relying on *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁷, chose to prefer a contention made by the State, that a decision whether to call Mr Driman and or Ms Guerrier, rests entirely on Thales.

[8] The fourth ground related to the court's finding regarding the probative value of the evidence of Mr Driman and Ms Guerrier. By implication it was suggested that this court could and should have pronounced that the evidence of these witnesses could never have any probative value. The view held by the court was that the value to be attached to the evidence sought to be adduced by Thales will only be known once evidence has been presented. It would therefore be speculative at this stage of the proceedings, so the court held, to pronounce on the probative value of the evidence of Mr Driman and Ms Guerrier. I am not persuaded that another court would find differently.

[9] The fifth ground of appeal related to the court's finding that Thales failed to show that Mr Thétard would have assisted it had he been alive. In my judgment, I contrast what Thales now says (in the present application) with what it said in 2018 in support of its application for the permanent stay of prosecution. The case now being made by Thales, namely, that Mr Thétard would have testified had he been alive, is contrary to the case it made in 2018, namely, that Mr Thétard is not willing to testify, 'in any forum, under any circumstances, should a trial take place'.

[10] In argument, Thales again shifted the goal post. While conceding that Mr Thétard had expressed his unwillingness to testify, Mr Roux SC contended that 'it matters not that he was unwilling to testify...what matters is that we would have been

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

subpoenaed because he is a compellable witness'. The issue pertaining to Mr Thetard's willingness to testify was pertinently dealt with by the State in its answering affidavit when it called on Thales to explain when, between November 2018 and his death on 5 September 2022, did Mr Thétard decide to change his mind⁸ to which Thales proffered no reply.

[11] From the above it is clear, that Thales's contention regarding its inability to lead Mr Thétard's testimony is opportunistic. I am therefore not persuaded that prospects of overturning this court's finding that Thales failed to show that Mr Thétard would have assisted it, exist.

[12] Both Mr Zuma and Thales conceded, that this court was correct in concluding that the relief sought, directing the state to stop the prosecution in terms of s 6(b) of the Act was incompetent. It is therefore not necessary to belabour that aspect.

[13] At the inception of his argument, Mr *Mpofu* SC again reiterated comments made at the hearing of the application, that the application before court 'is not Mr Zuma's, but that it is Thales'. In his words, they were 'merely passengers in the motor vehicle driven by Thales'. Those comments re-enforce a finding made by this court in its judgment, that if Thales's case fails, then Mr Zuma's should also fail.

[14] Mr *Mpofu* contended that Mr Zuma's application for leave to appeal should succeed for two reasons, first, on the basis that there are prospects of success on appeal and, second, because there are compelling reasons to grant the appeal.

[15] Mr *Mpofu*'s main ground of appeal is anchored on the proposition that this court mischaracterised the case it adjudicated upon. The case before court, so he argued, was an application under s 35(3)(i) not s 35(3)(d) of the Constitution⁹ as characterised by the court. He thus contended, that there are reasonable prospects of another court finding that what this court decided, was not what Thales's case was about. Subsections 35(3)(d) and (i) provide that:

⁸ See para 136.1 of the State's answering affidavit, page 119 of the record.

⁹ Constitution of the Republic of South Africa, 1996.

'Every accused person has a right to a fair trial, which includes the right-

...

(d) to have their trial begin and conclude without unreasonable delay;

...

(i) to adduce and challenge evidence'.

[16] Mr *Mpofu* contended that what the court decided was trial prejudice based on a delay in the prosecution of Mr Zuma and Thales (i.e. in terms of s 35(3)(d)) and not trial prejudice based on Mr Zuma's and Thales's right to adduce and challenge evidence (i.e. in terms of s 35(3)(i)). There is no merit in that contention. It is clear from the judgment that the court was alive to the fact that the case before it was not about delay induced trial prejudice, but trial prejudice associated with Mr Zuma's and Thales's constitutional right to adduce and challenge evidence. Although an issue was made in the papers on undue delay, both by the State and Thales, the court made it patently clear in its judgment that Thales's case was not decided on delayed prosecution. Whilst acknowledging the presence of a delay, the court pointedly decided not to attribute blame for the delayed prosecution to any party but instead, focussed its attention on the question whether, on the facts, Mr Zuma and Thales succeeded in establishing trial prejudice emanating from the non-availability of Messrs Maynot and Thétard.

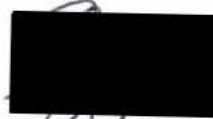
[17] Mr *Mpofu*'s criticism of the court's reliance on *Bothma* is misplaced. It is worth mentioning that both the State and Thales also relied on *Bothma* in support of their respective cases. I am not persuaded that they were wrong. Their reliance on *Bothma* was well made. Their argument focussed squarely on the test for establishing irreparable or insurmountable trial prejudice. It is correct, as Mr *Mpofu* contended, that unlike in the present application, the court of first instance (the high court) in *Bothma*, had been called upon to decide a permanent stay of a prosecution brought under s 342A of the Act. But that is neither here nor there. It is not the delay test, as contended, that this court relied upon in determining Thales's and Mr Zuma's trial prejudice rights. In fact, this court's brief discussion on *Bothma* begins with the Constitutional Court's criticism of the high court's reliance only on the length of the delay, the reasons for the delay and the trial prejudice caused to Mr Else by the delay in prosecuting that matter.

[18] The criticism of this court's reliance on *Sanderson v Attorney General, Eastern Cape*¹⁰ was also misplaced. Reliance on *Sanderson* was directed squarely at two issues: (a) the test applicable in barring the prosecution before the trial begins (eloquently described by the court as 'far-reaching') and (b) reliance on hypothecated evidence in a permanent stay application. I am not persuaded that another court would find that this court's reliance on *Sanderson* was misdirected.

[19] Having considered all ground of appeal relied upon by both Mr Zuma and Thales, I am not persuaded that there are prospects of success on appeal. Neither am I persuaded, that there are compelling reasons to grant leave to appeal.

[20] In the circumstances I make the following order.

The application for leave to appeal by both Mr Zuma and Thales is dismissed.


Chili J

¹⁰ *Sanderson v Attorney-General, Eastern Cape* [1997] ZACC 18; 1998 (2) SA 38 (CC) (*Sanderson*) para 38.