IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 76755/18

In the matter between:

JOAO RODRIGUES	Applicant
and	
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS OF SOUTH AFRICA	First Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Second Respondent
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

FOURTH RESPONDENT'S HEADS OF ARGUMENT

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OVERVIEW

1 On 3 June 2019, the Full Court of this Court handed down its decision in which it rejected the Applicant's bid for a permanent stay of prosecution. It did so after a careful and thorough consideration of various factors including the delay period and the asserted prejudice to the Applicant. It further gave regard to the interests of the Timol family as victims of the Applicant's conduct.

2 The Full Court also gave due and careful consideration to the evidence of political interference perpetrated by the First to Third Respondents and others to supress the investigation and prosecution of so-called apartheid era crimes. The Full Court correctly dismissed the Applicant's point *in limine* that the political interference had to be investigated further before the Full Court could determine the Applicant's stay of prosecution application.

3 The Full Court rebuked the First to Third Respondents and their officials for enabling the political interference. It held that the Applicant should not be permitted to gain further from such interference through a permanent stay of prosecution. The Full Court called upon the relevant State actors to take further steps, including requiring the National Director of Public Prosecutions (NDPP) to consider whether action in terms of section 41(1) of the National Prosecuting Authority Act, 32 of 1998 was warranted.

4 The Applicant now seeks leave to appeal the decision of the Full Court. The Applicant relies both on section 17(1)(a)(i) as well as section 17(1)(a)(ii) of the

Superior Courts Act 10 of 2013 ("**the Act**"). Under section 17(1)(a) of the Act, leave to appeal "*may only be given*" where one of these two requirements are satisfied.[1] Leave to appeal may "*only*" be given either where—

4.1 First, "*the appeal would have a reasonable prospect of success*";[2] or

4.2 Secondly, "*there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration*".[3]

5 For the reasons that follow, we submit that the Applicant has failed to meet the requirements for leave to appeal to be granted under s 17(1)(a) of the Act. The application for leave to appeal should be dismissed.

APPEAL WOULD NOT HAVE A REASONABLE PROSPECT OF SUCCESS

6 The Applicant first claims that the appeal would have a reasonable prospect of success in terms of section 17(1)(a)(i) of the Act on the basis that the Court failed to grant the various forms of relief sought by the Applicant.[4]

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1 The additional requirement in section 17(1)(c) of the Act are not relevant to this application.

2 Section 17(1)(a)(i) of the Act.

3 Section 17(1)(a)(ii) of the Act.

4 That the criminal proceedings instituted against the Applicant constitutes *inter alia* an unfair trial against the Applicant, an infringement of his fundamental rights to a fair trial.

7 Importantly, the Applicant accepts that the standard the Applicant is required to meet in terms of section 17(1)(a)(i) is that "*another Court <u>would</u> come to another decision*".[5]

8 However, the Applicant fails to state with any degree of clarity, or at all, <u>why</u> the Court erred in not granting this relief. It appears that the only grounds advanced by the Applicant in this regard are that:

8.1 the criminal proceedings were instituted approximately 47 years after the relevant incident; and

8.2 the Court failed to find that the political interference infringed the fundamental right of a fair trial of the Applicant, including the conduct by the National Prosecuting Authority (NPA) and the Second Respondent (Minister of Justice) in not disclosing facts before this Court.

9 In our submission, the mere listing or describing of the findings sought to be impugned and alleging that the Court erred in making such findings is insufficient. In this regard, our Courts have held that:

> *"I am not aware of any judgment dealing specifically with grounds of appeal as envisaged by Rule 49(1)(b); however, Rule 49(3) is couched in similar terms and also requires the filing of a notice of appeal which shall specify 'the grounds upon which the appeal is founded'. In regard to that subrule it is now well established that the provisions thereof are peremptory and that the grounds of appeal are required, inter alia, to give the respondent an opportunity of abandoning the judgment, to inform the respondent of the case he has to meet and to notify the Court of the points to be raised. Accordingly, insofar as Rule 49 (3) is concerned,* ***it has been held that grounds of appeal are bad if they are so widely expressed that it leaves the appellant free to canvass every finding of fact and every***

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5 Applicant's HOA p 11 para 10.

> ***ruling of the law made by the court a quo, or if they specify the findings of fact or rulings of law appealed against so vaguely as to be of no value either to the Court or to the respondent, or if they, in general, fail to specify clearly and in unambiguous terms exactly what case the respondent must be prepared to meet*** *- see, for example, Harvey v Brown 1964 (3) SA 381 (E) at 383; Kilian v Geregsbode, Uitenhage 1980 (1) SA 808 (A) at 815 and Erasmus Superior Court Practice B1-356-357 and the various authorities there cited.*
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> *It seems to me that, by a parity of reasoning,* ***the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal****. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory.*"[6]

10 The Applicant ought to have stipulated in his grounds of appeal why the Court erred in making the findings in question. This is especially so since the Act imposes a heavy onus on the Applicant to establish that another Court would come to another decision.

11 At the minimum the Applicant ought to have set out the case that the respondents must meet on appeal.[7] Since the grounds of appeal do not explain why or how the Court erred in respect of the impugned findings, they are defective.

12 Ultimately, the Applicant merely complains that the Court failed to make the findings he sought and declined to grant the relief he wanted. No attempt is made to explain how or why the Court erred in reaching these conclusions. An example is the very first ground which claims that the Court misdirected itself "*in not finding*

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6 *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) 385E to 385B.

7 *Smit v Greylingstad Village Council* 1951 (4) SA 608 (T) at 613A – C

that the criminal proceedings instituted against the Applicant constitutes an unfair trial against the Applicant as is envisaged in section 35(3) of the Constitution".[8]

13 The Applicant does not explain how the Court misdirected itself in reaching such a conclusion. He does not contend that the Court erred in applying or interpreting the law or failed to apply the law to the facts; and/ or failed to apply its mind in relying on certain facts or evidence. Accordingly, the respondents are left to guess on what basis the Court might have erred.

14 Indeed, it is apparent from a conspectus of the Applicant's heads of argument that the Applicant simply attempts to re-argue his case in a vacuum rather than demonstrate, with reference to the judgment of the Court, why there is a reasonable prospect that another court would come to a different decision.

15 A prime example of the Applicant's failure is his lament that "*there was an enormous delay by the First Respondent to proceed with the prosecution against the Applicant – more than 47 years*". The Applicant refers to this 47-year period at five different places in his heads of argument.[9] However, despite the significance that the Applicant seemingly attributes to the 47-year period, he does not explain why the detailed analysis in the judgment of the Court of this period is incorrect.[10]

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8 Ground 1.1.

9 HOA paras 4.4, 7.1, 11.3, 13 and 23.5.1.

10 Judgment paras 41-89. Indeed, the period between the closure of the TRC and the 2017 Inquest, during which the political interference occurred, is a comparatively short period compared to the preceding years going back to 1971.

16 The Applicant's central assertion appears to be that the political interference, which suppressed the Apartheid-era cases post the closure of the TRC, warranted the granting of a permanent stay of prosecution.

16.1 The only discernible legal basis advanced for this claim appears to be the Applicant's suggestion that he must have benefitted from an amnesty or pardon granted following the winding up of the TRC – and that presumably this Court ought to have respected or complied with such amnesty or pardon.[11]

16.2 The Applicant's heads suggest such an amnesty or pardon existed because there were no prosecutions post the TRC,[12] the Ministers of Justice and Police remained silent on this issue; and the NPA admitted that political interference stopped the cases. [13]

16.3 As a matter of law and logic, a decision not to prosecute does not amount to an amnesty or pardon. It hardly needs stating that the silence of the executive, as reprehensible as it is, does not amount to an amnesty or pardon. Similarly, the concession of the NPA that unlawful political interference stopped the prosecutions of the TRC cases, does not amount or equate to the granting of amnesty or pardons.

16.4 The Applicant's claim is made even though no evidence of an amnesty or pardon was offered, and no law was identified authorising amnesty.

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11 Applicant's HOA, para 23.5.

12 While less than a handful of prosecutions took place Ackermann SC points to 4 proceedings that were initiated – in respect of cases that had already been investigated. See Ackermann Supporting affidavit at paras16 -17 at p 618 – 621.

13 Applicant's HOA, paras 23.5.1 - 23.5.3

Rodrigues never applied for a pardon and points to nothing in writing[14] nor to any communication of any such decision upon which he could have placed reliance.[15] Moreover, the Amnesty Task Team (ATT) report indicated that the ATT decided not to recommend a further amnesty.[16]

17 We submit that such defects are fatal to the Applicant's application for leave to appeal. The Applicant has simply failed to demonstrate that "*the appeal would have a reasonable prospect of success*" as required by section 17(1)(a)(i) of the Act.

NO OTHER COMPELLING REASON WHY THE APPEAL SHOULD BE HEARD

18 The Applicant also relies on section 17(1)(a)(ii) of the Act. The Applicant claims that there are other compelling reasons why leave should be granted; namely, that "*this case is of material importance and that it is in the interest of justice that the legal approach to cases of this nature be determined*". The Applicant's submissions on this score are as follows:

18.1 A number of further prosecutions for so-called apartheid era crimes will be instituted with the same issues relating to the fairness of these prosecutions that form the subject matter of the Applicant's application being raised during the trial.

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14 Section 101 of the Constitution requires that decisions of the President be in writing if it has legal consequences – which if made could have been accessed.

15 See: *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) paras 64, 66 and 105

16 Record p 554 para 2.1(a); p 555 para 2.1(c); p 557 para 3.1(b); and pp 562-563 paras 3.3-3.4

18.2 Because these prosecutions will be instituted in separate provinces there is a "*real possibility if not probability that the various High Courts in the difference Provinces may come to different rulings and deliver conflicting judgments on the matter*".

18.3 It will therefore be of the utmost importance to get clarity and finality on the approach that Courts should follow in this prosecution as well as future prosecutions based on the same principles.

19 The Fourth Respondent opposes the Applicant's ground of appeal on this score on two bases:

19.1 First, the Applicant has perempted his right to prosecute an appeal on the grounds he relies upon in terms of section 17(1)(a)(ii) of the Act.

19.2 Second, the grounds relied upon by the Applicant are pure speculation that contradict his own statements set out on oath and thus fail to meet the requirement in section 17(1)(b) of the Act.

Peremption

20 The Applicant's belated reliance on section 17(1)(a)(ii) of the Act directly contradicts the representations made by the Applicant to this Court in his attorneys' letter of 6 December 2018. It is on the very basis of the contents of this letter that the Judge President determined that a Full Court should be convened to provide the "*clarity"* and *"finality*" that the Applicant now contends a further appeal court must provide. In our submission, the Applicant has waived

his right to rely on the need for finality as a ground of appeal and this Court should hold that the doctrine of peremption bars the Applicant from doing so.

21 In this regard, the Applicant wrote to the Judge President of this Court on 6 December 2018 stating, in relevant part, that:

> *"The purpose of this letter is to approach you to consider the request to convene a Full Court for hearing the abovementioned application. The reasons for the request are set out in more detail hereunder.*
>
> *…*
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> *7. During discussions between the parties and Monama J on the 4th of December 2018 the convening of a Full Court to hear the application was inter alia discussed. All the parties as well as Monama J agreed with Applicant's view that it would be prudent to approach you to request that a Full Court be convened to hear the application. The reasons for the approach were inter alia the following:*
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> *7.1 It is a very important application with far reaching implications, not only for this case but also for future similar cases. In this regard it can be indicated that it is apparently the view of the Prosecution Authorities that the re-opening of a number of inquests that dealt with the deaths of people under detention of the Police are envisaged at this stage.*
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> *7.2 As is evident from the present case the death of the late Timol occurred almost 48 years ago.* ***This will probably also be the factual reality of other inquests to be re-opened and which may also lead to prosecutions. It is therefore important that finality be reached relating to inter alia the effect of the material time delay of cases of this nature and the right of the Prosecution Authorities to proceed with prosecutions under these circumstances.***
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> *7.3* ***It is clearly in the interest of justice that this matter be finalised expeditiously. We are of the view that the hearing of the application by a Full Court will expedite proceedings and will probably curtail the possibility of prolonged appeal procedures following a decision in the application.***
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> *7.4 As to the pleadings all respondents have answered to the founding affidavit of the applicant. The applicant filed his reply to the answer of the second respondent and has to file his reply to the first respondent by 14 December 2018. There are parties who filed applications to intervene and*

> *Monama J indicated that he will hear those application on 19 December 2018.*" (Our emphasis)

22 The contents of the Applicant's attorneys' letter reflect that it was always the understanding of the parties that constituting a Full Court would provide the necessary "*clarity"* and *"finality*" that the Applicant now contends a further appeal court must provide. There was to be no appeal procedure or else the matter should have been heard by the Honourable Justice Monama as the assigned trial judge and the judge that presided over the interlocutory applications.

23 In *SARS v CCMA*, the Constitutional Court set out the legal principles relating to peremption and held that:

> *"The onus to establish peremption would be discharged only when the conduct or communication relied on does '**point indubitably and necessarily to the conclusion' that there has been an abandonment of the right to appeal** and a resignation to the unfavourable judgment or order."*[17]

24 We submit that the Applicant, by seeking to convene a Full Court on the basis of the need that "*finality be reached relating to inter alia the effect of the material time delay*" and in order "*that this matter be finalised expeditiously*", perempted his right to appeal the Full Court's decision. On this basis we submit that the Applicant's belated reliance on section 17(1)(a)(ii) of the Act should be rejected.

25 That the Applicant now seeks to appeal the Full Court's decision suggests that the Applicant's initial request to convene a Full Court was made for a purpose other than the stated purpose in the Applicant's attorneys' letter.

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17 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 (1) SA 549 (CC) para 26.

No Practical Result

26 The Applicant attempts to bring his case within the wording of section 17(1)(a)(ii), which cites a specific instance where leave will be granted for "*some other compelling reason*" being where there are conflicting judgments on the matter under consideration. In such an instance the competing need to resolve ongoing legal uncertainty warrants the intervention of an appellate court and renders the dispute justiciable.

27 In this regard, the Applicant claims that there is a "*real possibility if not probability that the various High Courts in the difference Provinces may come to different rulings and deliver conflicting judgments on the matter*". And, that "*a substantial number of further prosecutions will be instituted in the above regard and surely the same issues relating to fairness of such prosecutions that formed the subject matter of this application will be raised during such trial*".

28 However, the Applicant's submissions must be rejected. Section 17(1)(a)(ii) must be read with section 17(1)(b), which requires that an applicant seeking leave must also show that "*the decision sought on appeal does not fall within the ambit of section 16(2)(a) [of the Act]*". Section 16(2)(a) of the Act provides that:

> *"When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*"

29 The section accords with the well-established principle that our Courts will not exercise their discretion to decide points that are merely abstract, academic or hypothetical. The Constitutional Court has confirmed this principle as follows:

> *"[B]ecause a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer.* ***A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.***"[18] (Our emphasis).

30 The Applicant's contentions that there is a "*real possibility*" of "*different rulings and… conflicting judgments*" and that "*surely the same issues relating to fairness… will be raised during*" subsequent criminal trials is pure speculation. The Applicant does not refer to any conflicting judgments or pending cases. Indeed, it is apparent from the uncontested facts put up in the Fourth Respondent's answering affidavit that virtually all the TRC cases were suppressed with little likelihood of their resuscitation at this late stage.[19] In any event, there is no reason to believe why co-accused and other Courts will not view this Full Court's judgment as authoritative and adhere to the principles it has established.

31 Indeed, when the First Respondent stated in paragraph 2.22 of its answering affidavit that "*if this application succeeds on the grounds relied upon by the applicant, which grounds would potentially be available to other perpetrators in his position, no purpose would be served by the re-opening of other similar inquests and there are 'many more families' affected by deaths in detention*" the Applicant stated in paragraph 7.4 of his replying affidavit that:

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18 *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) para 14.

19 Paras 64 – 65.5 and 84 – 94.4, Fourth Respondent's answering affidavit. See in particular para 93.3.

> *"I further deny the allegation that there would be no purpose of assisting families affected by the death of their relatives if the relief is granted that I seek in the notice of motion.* ***Every case should clearly be assessed on its own merits.***" (Our emphasis)

32 It is clear that the Applicant accepts that despite potential commonality, each case must be decided on its own merits having regard to the relevant legal principles which would include those articulated by the Full Court. There is simply no reason to speculate that conflicting judgments will arise at some future unknown date which this Court must now anticipate, while the Applicant's criminal trial is further delayed. This, we submit, is a classic example of the Applicant asking this Court to grant leave to decide points "*that are merely abstract, academic or hypothetical ones*".

33 In our submission the Applicant has failed to demonstrate that the grounds of appeal relied upon in terms of section 17(1)(b)(ii) of the Act meet the requirement in section 17(1)(b) read with section 16(2)(a) of the Act. Accordingly, this ground of appeal must also be rejected.

CONCLUSION

34 For the reasons set out above, the Fourth Respondent prays that the Applicant's application for leave to appeal be dismissed.

H VARNEY

T SCOTT

Counsel for the Fourth Respondent

Chambers, Sandton
9 September 2019