ORAL ARGUMENTS ON LEAVE TO APPEAL

1. I will endeavour not to unduly repeat the submissions made by my learned colleagues for the 1st to 3rd Respondents.

DEFECTIVE GROUNDS / NO REASONABLE PROSPECT ON APPEAL

2. The 12 odd grounds of appeal in the application for leave to appeal reflect something of a **shotgun approach**. Essentially the applicant claims that the Court misdirected itself in not granting the findings he sought by way of a declaratory order and it misdirected itself in not granting the relief he sought.

3. In this regard we endorse the submissions of our learned friends for the NDPP at paras 2.3 – 2.6 and elsewhere in their written arguments.

4. Rather than specifically impugning the judgment of this Court and explaining how the Court erred, my learned friends for the applicant simply seek to **re-argue their case**. This is, with respect, not permissible in proceedings for leave to appeal. A perusal of the applicant's heads confirms this. The heads comprise the following:

    a. Restating the grounds of appeal (paras 4 – 5.7);
    b. Factual background (paras 6 – 7.8)
    c. Relevant legal principles (paras 8 – 20)
    d. Legal principles relating to unfair trials (paras 21 – 26)

5. The applicant's heads amount to a synthesis of their arguments advanced in the main application. The heads in these proceedings amount to little more then a rearguing of the applicant's case.

    a. Reference is made to the contents to various affidavits and annexes to demonstrate the political interference in the work of the NPA (paras 18 – 19).

    b. The only references to the judgment itself are made at para 23 and its sub-paras. Surprisingly the references do set out where and how the court erred but are rather highlighted because they are "**not only relevant but important**" for the applicant's application.

    c. These references deal essentially with the Court's findings on the political interference of the executive with the NPA's prosecutorial decision making and how serious such interference was; and that the political interference delayed the trial of Rodrigues and caused him some prejudice (paras 23.1 – 7).

d. With the exception of the reference to the Court's conclusion on amnesty (at para 23.5) which I will deal with shortly, the references to the judgment are made because in the view of my learned friends such references **support the cause** of the applicant, **not** because the Court erred in making such findings.

e. In other words, with the exception to the faint-hearted objections on the Court's finding on amnesty, the heads are **entirely devoid of any attempt by the applicant to identify where and how the court erred** on any question of law and fact; which, in any event, ought to have been set out in his grounds of appeal. On this score its worth noting that there is no whisper of the Court erring on its finding on amnesty in the applicant's grounds of appeal.

6. The respondents are **not entirely sure of the case they are required to meet** since potentially the applicant is seeking to canvass every finding of fact and every ruling of law made by this Honourable Court.

   a. In this regard we rely on the passage quoted at para 9 of our heads from ***Songono v Minister of Law and Order*** 1996 (4) SA 384 (E) 385E- B – which we will not repeat here.

   b. The applicant ought to have set out in his grounds, not just a shopping a list of alleged misdirections but "**why and in what respect**" the Court erred. This means stipulating how the Court erred in applying the law and/ or the facts.

   c. In this regard we refer this Honourable Court to a judgment cited in footnote 7 of our heads: ***Smit v Greylingstad Village Council*** 1951 (4) SA 608 (T) at 612C - 613C. (Interestingly the Court in Smit noted that an applicant is not required to set out heads of argument in his grounds of appeal, but he must at least set out the case that respondents must meet on appeal).

7. At para 15 of our written heads we note the emphasis our learned friends place on the **47 years** that have elapsed since the incident (at 5 different places in his heads) but express our amazement that no attempt was made to impugn any aspect of the Court's very detailed analysis of this time period.

8. As mentioned previously the only specific aspect of the Court's judgment impugned by the applicant is the Court's finding that Rodrigues was not awarded any **amnesty or pardon** – at para 23.5 of the Applicant's heads. We deal with this question at para 16 of our heads. Essentially our learned friends argue that there was such an amnesty or pardon because

   a. there were no prosecutions post the TRC,

b. the Ministers of Justice and Police remained silent on this issue; and
c. the NPA admitted that political interference stopped the cases (paras 23.5.1 - 23.5.3)

9. We have dealt with this aspect at paras 16.3 – 4 of our heads and I won't repeat these submissions beyond stating that it is barely worth repeating that **no legal or factual basis** was provided for the claim of the award of amnesty. None of those facts gives rise to an inference of amnesty, let alone any evidence of one.

10. Accordingly, we submit that the applicant's grounds of appeal are **fatally defective** and have not been cured by his heads of argument or any statement from the bar, which would in any event be impermissible.

11. To the extent that this Court finds that the applicant's grounds are not defective we submit that the applicant has **failed to demonstrate any prospect of success** on appeal.

NO OTHER COMPELLING REASON WHY THE APPEAL SHOULD BE HEARD

12. I turn to the applicant's additional grounds set out in the applicant's Supplementary Application for Leave to Appeal dealing with the claimed **necessity to seek certainty** for possible other apartheid-era prosecutions.

13. At the outset we express our **surprise** that the applicant has sought to take the full court's judgment on appeal when his representatives specifically sought a full bench court in order:

    a. "**that finality be reached**" on the question of delay and the right of the NPA to proceed with prosecutions under these circumstances;

    b. and to **curtail any appeal procedure** (paras 7.2 - 3 of the Applicant's attorney letter to the JP dated 6 Dec 2018 quoted at para 21 of our heads).

14. We believe there is a strong argument to suggest that in seeking a full court hearing for these reasons the applicant has **abandoned or perempted** his right to appeal – and we deal with these aspects at paras 18 – 25 of our written heads.

15. We do not make a meal of this assertion for the simple reason that there is **not the slightest basis in law or fact** for the supplementary grounds which are nothing more than speculation and conjecture on the part of the applicant.

    a. As my learned friend for the 2nd respondent points out, the applicant points to **no conflicting judgments let alone any actual live cases**.

b. As we assert at para 30 of our heads the political interference has largely guaranteed that **few if any** apartheid cases will ever see the light of day.

16. Accordingly, the applicant is urging this court to grant leave on the speculation that there may be conflicting judgments arising at future unknown dates.

    a. In the first place we submit that each application for a permanent stay of prosecution must be **assessed on its own merits** (something the applicant accepted at para 7.4 of his replying affidavit);

    b. Since the possibility of future conflicting judgments rests only on speculation this amounts to the applicant asking this court to grant leave in order have points decided that are **academic or hypothetical** (dealt with at paras 26 – 33 of our written heads).

17. In the circumstances we submit that there are **no other compelling reasons** why this appeal should be heard. We accordingly ask that the applicant's application for leave to appeal be **dismissed**.

H VARNEY

T SCOTT

17 Sep. 19