

**IN THE SUPREME COURT OF APPEAL
(BLOEMFONTEIN)**

**APPEAL CASE NO: 1186/2019
GAUTENG HIGH COURT CASE NO: 76755/18**

In the matter between:

JOAO RODRIGUES

Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS OF SOUTH AFRICA**

First Respondent

**MINISTER OF JUSTICE AND CORRECTIONAL
SERVICES**

Second Respondent

MINISTER OF POLICE

Third Respondent

IMITIAZ AHMED CAJEE

Fourth Respondent

SECOND RESPONDENT'S WRITTEN SUBMISSIONS

INTRODUCTION

1.

Applicant seeks leave to appeal against the judgment of the Full Court, sitting as a court of first instance. A unanimous judgment was handed down on 12

October 2018. An application for leave to appeal was dismissed on 18 September 2018.

2.

This Honourable Court referred an application for leave to appeal to oral argument in terms of section 17(2) (d) of the Superior Court Act 10 of 2013. The parties were informed that they must be prepared, if called upon to do so, to address the court on the merits.

3.

Second Respondent opposes both the application for leave to appeal and the granting of an order setting aside the judgment and order of the full court.

LEAVE TO APPEAL

4.

Applicant relies on section 17 (1) (a) (i) and (ii) of the Superior Courts Act, as the basis for the application, which reads:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) *the appeal would have a reasonable prospect of success;*

(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.”*

APPLICANT’S GROUNDS OF APPEAL

5.

The grounds of appeal, as they refer particularly to Second , are that the Honourable Court misdirected itself:

5.1 by not finding that the deliberate political interference at the highest political level in the criminal justice system did not infringe the fundamental right of a fair trial of the Applicant;

5.2 by failing to give the necessary weight, alternatively sufficient weight to the Second Respondent’s failure to disclose the relevant and material facts relating to the political interference that caused the substantial delay in the proceedings to Court in circumstances where

the Second Respondent had a legal duty to disclose all relevant facts to the Court;

5.3 by not ordering the Second Respondent to disclose all the relevant facts to the Court by way of affidavit alternatively to refer the matter for oral evidence in order to compel the Second Respondent to provide the relevant facts;

5.4 by failing to consider or adequately consider the failure by the Second Respondent to disclose or explain the political interference in their Answering Affidavit as a continuation of the political interference and confirmation of the unfairness of the prosecution of the Applicant.”

COMPELLING REASON WHY LEAVE SHOULD BE GRANTED

6.

Applicant submits in addition, that this case deals with alleged offences that occurred in the so-called apartheid era, allegedly committed by members of the South African Police in order to uphold the regime that existed at that stage. The alleged perpetrators did not apply to the Amnesty Committee of the Truth and Reconciliation Commission for amnesty for offences. A substantial number of further prosecutions will be instituted in the future and the same issues relating to fairness of such prosecutions that formed the subject matter of this application will be raised during such trials. It is submitted by Applicant

that it is of 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

7.

Applicant submits that there will be prosecutions in the future relating to apartheid era crimes. The abovementioned section does not refer to conflicting judgments in the future, and the Applicant does not submit that there are existing conflicting judgments on any of the points raised.

8.

Applicant seeks to have this Honourable Court provide clarity on matters that might arise in future. The submission is without merit, as each matter has a particular factual matrix, and each matter will fall to be decided on a case by case basis.

9.

This application raises no discrete legal point or discrete issue of public importance that will have an effect on future matters.¹ With respect, Applicant does not make out such a case.

AD GROUNDS OF APPEAL

Re: Prejudice/Delay

10.

10.1 The Court *a quo* found that the delay during the period 2003 to 2017 constituted a substantial period and that the political interference advanced as a reason for that delay did not serve to justify the delay;²

10.2 It also found, that even though the delay would have resulted in some prejudice to Applicant, the Court is required to consider more than prejudice in isolation, but rather “*whether the delay would inevitably and irremediably taint the overall substantive fairness of the trial if it were to commence*”.³

¹ President of the Republic of South Africa v Democratic Alliance and Others 2020 (1) SA 429 (CC)

² Judgment para 74

³ Judgment paras 75 and 77

11.

It is submitted, that the delay must also be looked at in the context of the evidence implicating Applicant becoming available. The details with regard to Applicant's actions, which form the basis of the criminal charge, only emanated fully during the Inquest that was reopened in 2017. The Inquest findings were delivered on 12 October 2017. Applicant was arrested on 30 July 2018.

12.

12.1 With regard to Applicant alleging that he is prejudiced because he suffers from memory loss due to old age, this Honourable Court found that it is a neutral fact as the same consideration applies equally to the witnesses for the State;⁴

12.2 With regard to age and infirmity, this Court found that these are factors that a trial court takes into account during sentencing, and not grounds upon which Applicant can rely on as a form of prejudice;⁵

⁴ Judgment para 86

⁵ Judgement para 88

Details of political interference

13.

Applicant submits that there is insufficient evidence as to the political interference and that it is also unclear whether the nature of the political decisions amounted to an amnesty or pardon.

14.

The Court *a quo* found that the absence of detail as to why and how the political interference occurred was not an obstacle to the matter being determined, in circumstances where it is plain that such interference occurred and which caused delay to the prosecution;⁶

15.

Applicant does not submit how the details of the political interference impacts on the factors pertaining to the inquiry as to whether the “*overall fairness of the trial*” is tainted. The submission of the applicant pertaining to the filing of a further detailed affidavit by Second Respondent and the referring of the matter for oral evidence, will in effect cause further and protracted delays of the

⁶ Judgment para 31 and 32

matter, in circumstances where delay is at the root of all Applicant's complaints.

16.

Applicant does not submit that there was any evidence existing prior to the reopened inquest, upon which criminal charges could be based. In the circumstances any political interference, or agreements not to prosecute, cannot have any reference to Applicant.

Re: Amnesty/Pardon

17.

17.1 With regard to the possibility of amnesty or a pardon, the Court *a quo* found that Applicant was speculating and that even if such amnesty had been granted, it would not survive a legal challenge because of the absence of participation of the victim's family;⁷

17.2 In the absence of any reliable evidence of an amnesty or pardon advanced by Applicant, it is submitted that the Court *a quo* correctly concluded that applicant was speculating.

⁷ Judgment para 33 and 71 to 73

18.

The Constitutional Court in *Bothma v Els*⁸ quoting *Sanderson*⁹ said that in determining relief for a permanent stay of prosecution, the Court was required to engage in a balancing exercise, taking the following into consideration:

18.1 The length of the delay;

18.2 The reasons the Government assign to the delay;

18.3 The accused's right to a speedy trial;

18.4 Prejudice to the accused;

18.5 the nature of the offence and the public policy considerations.

19.

The Court *a quo* added a sixth factor which required to be taken into account, viz, the interests of the family and or the victims of the crime.¹⁰

⁸ 2010(2) SA 622 (CC) at para 36

⁹ *Sanderson v Attorney General, Eastern Cape* 1998(2) SA 38 (CC)

¹⁰ Judgment para 39

20.

Applicant seeks to over emphasize the issue of political interference and have it take precedence over all other factors. This approach is contrary to the balancing exercise as enunciated by the Constitutional Court.

21.

In *S v Smith*¹¹, Plasket AJA, as he then was, said:

“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. In order to succeed, therefore, the appellant must convince the court on proper grounds that he has a prospect of success on appeal and that those prospects are not remote, but have realistic chance of succeeding. More is required to be established than there is a mere possibility of success, that there is a case arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, a rational basis for the conclusion that there are prospects of success on appeal.”

¹¹ S v Smith 2012 (1) SACR 567 (SCA) para 7.

22.

For reasonable prospects of success on appeal to exist, the lack of detail of political interference, if weighed against all the considerations apposite to a stay of prosecution, would have to, in effect, be of more importance or weight than all the other considerations. Applicant does not make out such a case.

23.

It is respectfully submitted that there is no reasonable prospect that an appeal would succeed on any of the grounds raised by Applicant. It is submitted further that there is no some other compelling reason why the appeal should be heard and that there are no conflicting judgments on the matter under consideration as envisaged in section 17 (1)(a) (ii).

24.

With regard to the merits, It is submitted that this Honourable Court considered all the relevant factors in arriving at the decision not to grant a permanent stay of prosecution and that there is accordingly, no misdirection.

Wherefore it is submitted that the Application for leave to appeal and the Appeal be dismissed.

Dated at Sandton on this 15 day of July 2020

PD Hemraj SC
082 870 8254

RJ Mbuli
076 5561 271

Counsel for Second Respondent