IN THE SUPREME COURT OF APPEAL

[BLOEMFONTEIN]

APPEAL COURT CASE NO: _____

GAUTENG HIGH COURT CASE NO: 76755/2018

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
THE MINISTER OF POLICE	Third Respondent
IMITIAZ AHMED CAJEE	Fourth Respondent

FILING SHEET: JUDGMENT OF THE COURT *A QUO* REFUSING APPLICATION FOR LEAVE TO APPEAL

HEREWITH FILED:

A copy of the judgment of the court *a quo* per Kollapen J dated 18 September 2019 refusing the application for leave to appeal.

SIGNED at **BLOEMFONTEIN** on this the **3RD** day of **DECEMBER 2019.**

BEN MINNAAR ATTORNEYS
ATTORNEYS FOR THE APPLICANT
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WONDERBOOM AH X 1
WONDERBOOM
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C/O
HILL McHARDY & HERBST INC
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ARBORETUM
BLOEMFONTEIN
REF: SCHUURMAN/rs/G26184
TEL: 051 447 2171
E-MAIL: pieter@hillmchardy.co.za

TO: **THE REGISTRAR**
SUPREME COURT OF APPEAL
BLOEMFONTEIN

AND TO: **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS**
FIRST RESPONDENT
C/O STATE ATTORNEY: PRETORIA
316 THABO SEHUME STREET
SALU BUILDING
PRETORIA
REF: PETER SELEKA

SERVED BY E-MAIL AS AGREED TO:
Pseleka@justice.gov.za

AND TO: **THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES**
SECOND RESPONDENT
C/O STATE ATTORNEY: PRETORIA
316 THABO SEHUME STREET
SALU BUILDING
PRETORIA
REF: PETER SELEKA

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Pseleka@justice.gov.za

AND TO: THE MINISTER OF POLICE
THIRD RESPONDENT
C/O STATE ATTORNEY: PRETORIA
316 THABO SEHUME STREET
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REF: PETER SELEKA

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AND TO: IMTIAZ AHMED CAJEE
FOURTH RESPONDENT
C/O LEGAL RESOURCES CENTRE
BRAAM FISHER TOWERS
15th AND 16th FLOOR
20 ALBERT STREET
MARSHALLTOWN
JOHANNESBURG
REF: LUCIEN LIMACHER

SERVED BY E-MAIL AS AGREED TO:

E-MAIL: Lucien@lrc.org.za

C/O WEBBER WENTZEL

JOINT ATTORNEYS FOR FOURTH RESPONDENT

10 FRICKER ROAD

ILLOVO BOULEVARD

JOHANNESBURG

2196

REF: MORAY HATHORN 3005789

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E-MAIL: moray.hathorn@webberwentzel.com

Rochelle Streso

From: Ben Minnaar <benjaminnaar@gmail.com>
Sent: 03 December 2019 14:21
To: Rochelle Streso
Subject: Fwd: LEAVE TO APPEAL J A RODRIGUES

Begin forwarded message:

From: Lucien Limacher <lucien@lrc.org.za>
Date: 03 December 2019 at 11:29:43 SAST
To: benjaminnaar@gmail.com
Subject: Re: LEAVE TO APPEAL J A RODRIGUES

Dear Sir

I acknowledge receipt.

Kind regards

Lucien

On 02 Dec 2019, at 12:49, benjaminnaar@gmail.com wrote:

Dear Sir, Madam

Herewith please find the judgment in the application for leave to appeal of Kollapen J dated 18 September 2019.
The judgment was not available at signing of the founding affidavit.

Kindly acknowledge receipt hereof as it is needed for filing with the SCA.

Kind regards

Ben Minnaar

<Judgment leave to appeal J Rodrigues.PDF>

Rochelle Streso

From: benjaminnaar@gmail.com
Sent: 02 December 2019 20:41
To: klerk7@hmhi.co.za
Subject: FW: LEAVE TO APPEAL J A RODRIGUES

Herewith acknowledgement of receipt of Webber Wentzel.

From: Moray Hathorn <moray.hathorn@webberwentzel.com>
Sent: Monday, 02 December 2019 14:12
To: benjaminnaar@gmail.com; 'Lucien Limacher' <lucien@lrc.org.za>; 'Seleka Peter (DoJ&CD Contact)' <PSeleka@justice.gov.za>
Subject: RE: LEAVE TO APPEAL J A RODRIGUES

Dear Sir

I acknowledge receipt of the judgment.

Sincerely
Moray Hathorn | Partner
T: +27115305539 | **M:** +27630030640 | moray.hathorn@webberwentzel.com | **www.webberwentzel.com**

WEBBER WENTZEL
in alliance with > Linklaters

African Law Firm of the Year (African Legal Awards, 2019)

From: benjaminnaar@gmail.com [mailto:benjaminnaar@gmail.com]
Sent: 02 December 2019 12:50
To: 'Lucien Limacher'; Moray Hathorn; 'Seleka Peter (DoJ&CD Contact)'
Subject: LEAVE TO APPEAL J A RODRIGUES

Dear Sir, Madam

Herewith please find the judgment in the application for leave to appeal of Kollapen J dated 18 September 2019. The judgment was not available at signing of the founding affidavit.

Kindly acknowledge receipt hereof as it is needed for filing with the SCA.

Kind regards

Ben Minnaar

Rochelle Streso

From: benjaminnaar@gmail.com
Sent: 02 December 2019 20:40
To: klerk7@hmhi.co.za
Subject: FW: LEAVE TO APPEAL J A RODRIGUES

Herewith State Attorney acknowledgement of receipt

From: Seleka Peter <PSeleka@justice.gov.za>
Sent: Monday, 02 December 2019 13:50
To: benjaminnaar@gmail.com; 'Lucien Limacher' <lucien@lrc.org.za>; 'Moray Hathorn' <moray.hathorn@webberwentzel.com>
Subject: RE: LEAVE TO APPEAL J A RODRIGUES

Dear Mr Minnaar
I acknowledge receipt of the Judgment.

Regards
GP SELEKA

From: benjaminnaar@gmail.com [mailto:benjaminnaar@gmail.com]
Sent: Monday, December 2, 2019 12:50 PM
To: 'Lucien Limacher' <lucien@lrc.org.za>; 'Moray Hathorn' <moray.hathorn@webberwentzel.com>; Seleka Peter <PSeleka@justice.gov.za>
Subject: LEAVE TO APPEAL J A RODRIGUES

Dear Sir, Madam

Herewith please find the judgment in the application for leave to appeal of Kollapen J dated 18 September 2019. The judgment was not available at signing of the founding affidavit.

Kindly acknowledge receipt hereof as it is needed for filing with the SCA.

Kind regards

Ben Minnaar

(Iniexso Innovative Legal Services) pc

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 76755/2018

DATE: 2019-09-18

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

DATE: 26/11/2019 SIGNATURE

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In the matter between

SUPREME COURT OF APPEAL
2019-12-03
REGISTRAR'S CLERK

JOAO RODRIGUES — Applicant

and

NDPP — 1st Respondent

MINISTER OF JUSTICE — 2nd Respondent

MINISTER OF CORRECTIONAL SERVICES — 3rd Respondent

MINISTER OF POLICE — 4th Respondent

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J U D G M E N T

KOLLAPEN, J: This is judgment in an application for leave to appeal against the whole of the order and judgment of this court of 3 June 2019 when it dismissed the applicant's attempt

to seek a permanent stay of criminal prosecution on a charge of murder which arose out of the killing of the late Mr Ahmed Thimal which occurred on 27 October 1971. The first to the fourth respondents oppose the application.

The grounds upon which the application is advanced, are set out in the notice of application for leave to appeal dated 21 June 2019 as supplemented by the supplementary application for leave to appeal dated 27 August 2019.

It is common cause that the supplementary application for leave to appeal was served and filed out of time and it was accompanied by an application for condonation in which the applicant deposed to an affidavit essentially arguing that the interests of justice would serve to require that condonation be granted. There was no opposition to the application for condonation and this court, during the hearing of the application for leave to appeal, granted condonation.

The grounds upon which the application for leave to appeal are advanced can be categorised into two broad categories. Firstly the applicant comes to court in terms of section 17(1)(a)(i) of the Superior Courts Act contending that the appeal would have a reasonable prospect of success. In addition and as envisaged in the supplementary application for leave to appeal, the applicant also relies on section 17(1)(a)(ii), namely that there is some other compelling reason why the appeal should be heard including conflicting

judgments on the matter under consideration.

In respect of the first category under which the application is brought, the applicant advances some 11 grounds in support of the application for leave to appeal and in the main all of those grounds proceed on the basis that this court misdirected itself in not granting the relief that was sought in not finding that the applicant would not have a fair trial in not granting a permanent stay of prosecution and in not finding that there was deliberate political interference which infringed on the fundamental right of a fair trial.

In opposition to this ground of appeal, the first and third respondent, as well as the fourth respondent in particular, took the view that the applicant resorted to what they called a "shot gun approach". In this regard they contend that apart from a board assertion of misdirection, the applicant did not take issue with any of the factual findings made by this court, as evidenced in its judgment, except possibly on the question of whether there was an amnesty but even in this regard, took the view that the grounds or otherwise on amnesty, was not advanced as a ground of appeal in the notice of application for leave to appeal. Their view was that such an approach was not in compliance with the provisions of the rule and that the court, if it so wished, could dismiss the application for leave to appeal purely on this basis. However, they did not persist with that what may be called a "technical" approach and

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nevertheless urged the court to engage with the application for leave to appeal.

When one considers the judgment of this court, then what is evident and what emerges quite clearly, is this court considered what it described as:

"The six factors to be considered including the delay, the reasons for the delay advanced by the Government, the applicant's assertion to a speedy trial, the question of prejudice, the interests of the victims, and the nature of the crime."

In respect of each of these factors the court undertook a detailed exercise in examining the particular factual matrix that presented itself and reached conclusions in respect of each such issue. Those factual conclusions have not been challenged and in this regard, it is important to point out that each factor cannot be viewed in isolation, and so simply by way of example, the fact that there was a delay and even if the delay was unreasonable, cannot be dispositive of the decision the court was required to make and so it goes for each and every other factor.

What the court is required to do and as enunciated by the Constitutional Court in *Bothma v Els* as well as in *Sanderson* is to undertake a balancing exercise and to exercise its discretion in how all of those factors come together. In this regard and in particular, on the question of

delay the court nevertheless concluded that while there was a delay of a lengthy period which it characterised as unreasonable it nevertheless found that that delay did not have an impact on the fair trial rights of the appellant.

In similar vein in dealing with the question of prejudice the court found that while the applicant may have experienced some prejudice his fair trial rights remained intact and a future trial court was bound to ensure that the trial was conducted in a fair manner.

And then moving on to the question of political interference upon which the applicant placed considerable reliance and in this regard, there were a number of features of the question of political interference that the court found wholly unsatisfactory, certainly from the perspectives of the State respondents, including the manner in which it expressed itself, the impact it had in delaying the trial, the unsatisfactory manner in which it emerged in these proceedings. But having said that, the court nevertheless concluded that while the question of political interference was a matter of great seriousness, and impacted on the delay in the matter, again it could not be dispositive of the determination the court was required to make in granting what the Constitutional Court described as a .... [radical] remedy.

That being the case certainly in respect of the appeal premised on the basis that there is a reasonable prospect of

success. I am not of the view that the applicant has advanced a case in convincing this court that there is a reasonable prospect that another court would come to a different conclusion.

With regard to the second leg of the application, .. Applicant says that these offences would have been committed in the 1970's and 1980's, and that there is a real possibility that High Courts will render different rulings on the matters that may come before those courts, and therefore on this basis it was important to get what it called "clarity and finality" on the approach courts should follow in this and further prosecutions.

There are a number of responses to this. Firstly there are certainly to date no conflicting judgments on the issue and certainly on that narrow score alone, one must question the need for clarity in the absence of any conflicting judgments. But the second and more fundamental objection to this reasoning, is that the Constitutional Court has in both *Bothma v Els* and *Sanderson* set out the approach and the principles to be followed in determining applications of this nature. Those principles it is trite, must be applied in individual cases and ultimately would be fact specific.

That being the case, it may well be that there will be different outcomes that may emerge depending on the particular factual matrix at play in each such case. It can

hardly be contended that that is in itself objectionable and so, the need for clarity and certainty is not clear.

If what is being suggested is that clarity and certainty is required in respect of how the State deals with apartheid era crimes, and how and whether they should be prosecuted, that is totally a different matter. If there is to be clarity on those issues, and I am not sure if there is a need for such clarity, it would in any event not be within the remit of the courts to provide such clarity. Those would be far reaching policy considerations that would be best left to the Executive and to Parliament.

So on this aspect of the matter, we have not been convinced that there is a compelling reason why the appeal should be granted, given the clear principles laid out by the Constitutional Court in matters of this nature. All that remains to be done is for other courts to apply those principles in a fact specific manner and reach the conclusions that they must reach without fear, favour or prejudice.

Finally, there is the issue raised by the fourth respondent and that namely is the issue of pre-emption. As I understand the argument, the fourth respondent contends that the applicant in the process leading up to the enrolment of this matter and in particular during the case management process, sought the allocation of a Full Bench for the hearing of this matter and it did so on the basis that it contended that a Full

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Bench would provide finality and would also obviate the need for further appeals.

Certainly from the letter submitted by the applicant, one may draw some conclusion that the applicant may have reconciled itself with the fact that the Full Bench judgment may be the last and the final word in this matter. However, the matter cannot be as simple as that because a party that has the Constitutional Right to access to court, can only be said to have a given up that right in the face of clear evidence to that effect and absent such evidence, the court should be careful in assuming that the right of appeal, which is constitutionally enshrined as well, would have been abandoned. And therefore in our view, the appeal should not be disposed of, or dealt with purely on the basis of pre-emption.

That being the case, and for the reasons given I propose that the application for leave to appeal be dismissed on the basis firstly that there is no reasonable prospect that another court would come to a different conclusion, and secondly that there is no compelling reason why the appeal should be granted.

On the question of costs, the parties made no submissions in particular but our view was that in the main application none of the parties sought costs in the event of the applicant being unsuccessful and in that matter, no order as to costs was made. My view is that a similar order should be

made.

In this matter I therefore propose the following order:

1. That the application for leave to appeal be dismissed;
2. That no order be made as to costs.

JUDGE MOSHIDI: Do you agree?

JUDGE OPPERMAN: I agree.

JUDGE MOSHIDI: I too agree. It is so ordered.

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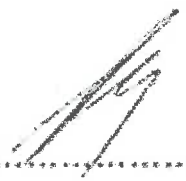

.....

KOLLAPEN, J

JUDGE OF THE HIGH COURT

DATE: 26/11/2019