

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

CASE NUMBER: 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

**APPLICANT'S WRITTEN SUBMISSIONS: APPLICATION FOR LEAVE
TO APPEAL**

A. INTRODUCTION:

1.

Applicant approached this Honourable Court on the 28th of March 2019 for an order prohibiting the First and/or Second Respondents to proceed with

the criminal prosecution against Applicant on a charge of murder as set out in the indictment relating to the death of the late A E Timol (“the deceased”).

2.

This Court dismissed the application on the 3rd of June 2019.

3.

On the 21st of June 2019 an application for leave to appeal was filed on behalf of the Applicant applying for leave to appeal to the Supreme Court of Appeal as is provided for in section 17(1) of the Superior Courts Act, Act 10 of 2013 (“the Act”)

4.

In the application for leave to appeal the following grounds were relied upon as is envisaged in section 17(1)(a)(i) of the Act:

- 4.1. The Honourable Court, with respect, misdirected itself in not finding 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 of the Republic of South Africa, Act 108 of 1996 ("the Constitution"); and/or

- 4.2. That the Honourable Court, with respect, misdirected itself by refusing to grant a declaratory order that the criminal proceeding instituted against the Applicant will constitute an infringement of his fundamental rights to a fair trial as is provided for in section 35(3) of the Constitution; and/or
- 4.3. That the Honourable Court, with respect, misdirected itself by not granting a permanent stay of the criminal proceedings relating to the charge of murder against the Applicant relating to the death of the late Ahmed Essop Timol on or about the 27th of October 1971; and/or
- 4.4. That the Honourable Court, with respect, misdirected itself by not finding that the institution of criminal proceedings against the Applicant after approximately 47 years after the relevant incident infringes the Applicant's right to a fair trial that should begin and be

concluded without unreasonable delay as is provided for in section 35(3)(d) of the Constitution; and/or

- 4.5. The Honourable Court, with respect, misdirected itself 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; and/or
- 4.6. The Honourable Court, with respect, misdirected itself by not finding that the deliberate decision by the National Prosecuting Authority to adhere to the political interference in the criminal justice system that caused a substantial delay of the prosecution of the Applicant did not infringe the fundamental right of the Applicant to a fair trial. The conduct of the First Respondent by deliberately withholding material facts from the Court in their initial answering affidavits is also relevant in this regard; and/or
- 4.7. The Honourable Court, with respect, misdirected itself by failing to give the necessary weight *alternatively* sufficient weight to the Second Respondent's (Minister of Justice) failure to disclose the

relevant and material facts relating to the political interference that caused the substantial delay in the proceedings to Court. This conduct must be evaluated under circumstances where the Second Respondent had a legal duty to disclose all relevant facts to the Court; and/or

4.8. The Honourable Court, with respect, misdirected itself by not ordering the Second Respondent to disclose all the relevant facts to the Court by way of affidavit *alternatively* to refer the application for oral evidence in order to compel the Second Respondent to provide the relevant facts; and/or

4.9. The Honourable Court, with respect, misdirected itself by failing to consider or adequately consider the prejudice suffered by the Applicant by the lengthy delay and political interference to be of such nature that it will seriously prejudice his right to a fair trial; and/or

4.10. The Honourable Court, with respect, misdirected itself by failing to consider or adequately consider the failure by the First Respondent to disclose 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; and/or

4.11. The Honourable Court, with respect, misdirected itself 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.

5.

A supplementary application for leave to appeal was subsequently filed on behalf of the Applicant on the 30th of August 2019. The purpose of the supplementary application for leave to appeal was to clearly inform this Honourable Court as well as the Respondents that the Applicant will also rely on section 17(1)(a)(ii) of the Act, i.e. that there are other compelling reasons why the appeal should be heard. The compelling reasons referred to in the application is the fact 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 issues referred to in the above regard are the following:

- 5.1. It is common cause that this case deals with alleged offences that occurred in the apartheid era allegedly committed by members of the South African Police in order to uphold the then Government.
- 5.2. There are still a substantial number of these alleged crimes that occurred in that era for the mentioned purpose by members of the then South African Police and/or other State agencies that are presently being investigated and where prosecutions are envisaged.
- 5.3. Very material is also the fact that it deals with alleged perpetrators who did not apply to the Amnesty Committee of the Truth and Reconciliation Commission for amnesty for offences and/or who applied unsuccessfully for amnesty to the TRC during the late 1990's.
- 5.4. All these alleged offences were committed a substantial time ago, mostly in the 1970's and 1980's.

- 5.5. It is clear 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.
- 5.6. These prosecutions will probably take place in different Provinces and the accused in those cases will undoubtedly also raise the issue of a fair trial following the substantial time delay. There is therefore the real possibility if not probability that the various High Courts in the different Provinces may come to different rulings and deliver conflicting judgments on the matter presently under consideration in this Honourable Court.
- 5.7. 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.

B. FACTUAL BACKGROUND:

6.

The factual background relevant to this application appears in great deal from the application papers and has been dealt with in detail during argument of the application. We do not wish to burden these submissions with a repetition of all the relevant facts but refer to our heads filed previously in the main application.

7.

We wish to, however, emphasise the following relevant facts:

- 7.1. The death of the deceased and therefore the alleged offence relevant to this prosecution occurred approximately 47 years ago.
- 7.2. The identity of the Applicant and his alleged involvement in the death of the deceased was at all times since the incident known to the authorities as well as his whereabouts. There is therefore no suggestion that the Applicant at any time took any steps to evade prosecution.

- 7.3. Any investigation relating to the relevant incident indeed formed part of the investigations of the TRC during approximately 1996. The Applicant was indeed interviewed by an official of the TRC.
- 7.4. The decision, at least from 1994 *alternatively* 1999 was a deliberate decision by the relevant authorities including the NPA and SAPS.
- 7.5. Politicians at the highest level, including the then State President and Minister of Justice, were clearly involved in this deliberate decision not to proceed with prosecutions against alleged perpetrators, including the Applicant during that time.
- 7.6. The First Respondent clearly accepted the above interference, if it was unlawful, contrary to its clear obligations in terms of the Constitution.
- 7.7. Basically, all the persons involved in the incident that led to the death of the deceased passed away in the meantime, apart from the Applicant.

7.8. A formal inquest into the death of the deceased was re-opened during 2017 presided by a Judge of this Honourable Court. The findings of the Court were to the effect that the Applicant was not involved in the death of the deceased and that his involvement relates more to the cover-up of the true facts that led to the death of the deceased.

C. RELEVANT LEGAL PRINCIPLES:

8.

As mentioned this is an application in terms of section 17(1)(a) of the Act. For the convenience of the Court we quote the relevant portion of section 17 of the Act:

“Leave to appeal

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

- (a) (i) the appeal would have a reasonable prospect of success; or*
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*

(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”

9.

We submit that section 17(1)(b) and (c) are not applicable and that the question whether leave should be granted by this Honourable Court should be determined in terms of section 17(1)(a)(i) and/or (ii).

10.

We are aware of the approach by our Courts that leave to appeal should only be granted in terms of section 17(1)(a)(i) if a Court is persuaded that another Court would come to another decision.¹

11.

In the above regard we refer the Honourable Court to the submissions made during argument of the main application and only briefly refer to the following:

¹ See: ..

- 11.1. Section 35(3)(d) of the Constitution entrenches an accused person's right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay.
- 11.2. The further fundamental requirement for a fair trial provided for in section 35(3)(i) of the Constitution is the right to adduce and challenge evidence. This presupposes that a trial should be instituted and concluded at a time that will enable an accused person to properly and effectively adduce and challenge evidence.
- 11.3. The objective facts in this case are of course that Applicant has only been charged more than 47 years after the death of the deceased.
- 11.4. At all relevant times Applicant co-operated with the First Respondent and/or the investigating team in this matter. Applicant still lives at the same address for the past 54 years and tracing Applicant could never have been any problem for the First Respondent or the investigating team. The TRC had no difficulty in approaching Applicant in 1996 relating to this incident.

12.

Apart from denying any involvement in the causing of the death of the deceased at all relevant stages Applicant never did anything to evade justice and/or caused a delay to the proceedings. He agreed to testify at the re-opened inquest proceedings when requested to do so and also handed himself over to the investigating team when he was informed that the First Respondent decided to arrest and charge him.

13.

The objective facts are of course that there was an enormous delay by the First Respondent to proceed with the prosecution against the Applicant – more than 47 years.

14.

The above failure must be seen against the continuous requests and pressure by the family of Timol to proceed in the matter.

15.

It must further be evaluated against the assurances given by the family of Timol to the effect that sufficient evidence was uncovered and available to indicate that Timol did not commit suicide as was previously found.

16.

At that stage the perpetrators, according to the findings of Mothle J in the re-opened inquest proceedings, were still alive and could be prosecuted.

17.

Although we do not have access to all the relevant and material facts and documentation at this stage to fully evaluate the cause of the delay, we do establish some information from the Fourth Respondent's answering affidavit followed by the supplementary affidavit filed on behalf of the First Respondent.

18.

It is common cause that the reason for the delay in the prosecution of the Applicant was a deliberate decision by the First Respondent not to prosecute *inter alia* the Applicant as a result of decisions and interference

by Government including the State President and the Minister of Justice (Second Respondent). In order to assist the Honourable Court we refer to the following evidential material supporting the above submission:

18.1. In the supplementary affidavit on behalf of the First Respondent it was now emphatically admitted that the cause for the delay of the prosecution was based on a decision in this regard:

*"I do not deny that the National Prosecuting Authority was subjected to political interference and political pressure not to immediately prosecute cases such as the present. Incidentally, this also happened during the time that Pikoli was the National Director of Public Prosecutions."*²

18.2. We refer the Honourable Court again to paragraph 12 above together with the quotation from the supplementary affidavit on behalf of the First Respondent. As mentioned it was stated under oath that the delay was caused by the political interference and the severe political constraints to which the First Respondent was subjected.³

² See: First Respondent's Supplementary Affidavit: P. 791, par 5.4

³ See: First Respondent's Supplementary Affidavit: P. 748, par 2.12

18.3. We also again refer the Honourable Court to the admission formulated by the deponent in the supplementary affidavit on behalf of the First Respondent where he agreed that the reason for the delay was the manipulation of the criminal justice system to protect individuals from criminal prosecution.⁴

18.4. In an affidavit the former Special Director of Public Prosecutions in the office of the First Respondent, Advocate Ackermann SC, set out in detail how he was stopped from pursuing the investigation and prosecution of these type of cases.⁵

18.5. In a secret memorandum by Advocate Pikoli, a former National Director of Public Prosecutions, concluded that there had been interference in relation to TRC cases and that he was obstructed to proceed with the prosecution of these cases.⁶

18.6. Advocate Pikoli of course also stated under oath in an affidavit annexed to the Fourth Respondent's answering affidavit that:

⁴ See: First Respondent's Supplementary Affidavit: P. 768, par 2.30

⁵ See: Annexure "IC7": P. 622

⁶ See: Annexure "IC10": P. 644

*"I also have reason to believe that my decision to pursue prosecutions of apartheid-era perpetrators who had not applied for amnesty or had been denied amnesty by the Truth and Reconciliation Commission ... contributed to the decision of President Mbeki to suspend me ..."*⁷

And

*"In particular, I confirm the contents of the Applicant's affidavit under the heading 'political constraints'. I confirm that there was political interference that effectively barred ... possible prosecution of the cases recommended for prosecution by the TRC ..."*⁸

And

*"I have little doubt that my approach to the TRC cases contributed significantly to the decision to suspend me. It is no coincidence that there has not been a single prosecution of any TRC matters since my suspension and the removal of the TRC cases from Advocate Ackerman."*⁹

18.7. Advocate Pikoli further stated in a secret internal memo dated 15 February 2007 to the Minister of Justice (Second Respondent):

"5.4 Based on the above, I cannot proceed further with these TRC matters in accordance with the 'normal legal processes'

⁷ See: Annexure "IC6": P. 575, par 8

⁸ See: Annexure "IC6": P. 579, par 14

⁹ See: Annexure "IC6": P. 602, par 75

*and 'prosecuting mandates' of the NPA, as originally envisaged by Government. Therefore, and in view of the fact that the NPA prosecutes on behalf of the State, I am awaiting Government's direction on this matter."*¹⁰

19.

It must of course be pointed out that the political interference and political pressure referred to in the supplementary affidavit on behalf of the First Respondent apparently occurred after the conclusion of the TRC proceedings. These proceedings were finalised during the late 1990's. Thereafter the First Respondent waited approximately 18 years before the request was submitted for the re-opening of the inquest in the Timol matter.

20.

It is of course necessary to emphasise the fact that in the event that it is found that the authorities (including the State President and the Minister of Justice) acted unlawful in their decision not to prosecute *inter alia* the Applicant that the infringement caused on the Applicant's fundamental

¹⁰ See: Annexure "RCM17": P. 869

rights was not only deliberate but also with knowledge of the fact that it would cause an infringement on fundamental rights.

D. LEGAL PRINCIPLES RELATING TO THE ISSUE OF AN UNFAIR TRIAL:

21.

There were various issues that were relevant and required evaluation and adjudication by this Honourable Court:

21.1. The question whether an amnesty had been granted to a group of politically motivated perpetrators for conduct prior to 1994.

21.2. The factual issue relating to the precise nature and terms of the agreement/arrangement between Government and interested parties with reference to the prosecution of certain politically motivated offences (which includes the incident relating to this application).

21.3. The effect of the very substantial time delay in the prosecution of the Applicant caused by the deliberate decision not to prosecute.

21.4. The question relating to the fairness of the charge of premeditated murder against the Applicant under circumstances where this Court found in the re-opened inquest proceedings that the Applicant's only involvement related to the providing of an alibi to the perpetrators after the incident.

22.

We have dealt with all these issues in detail in our heads filed prior to the hearing on the main application. We refer the Honourable Court to the submissions in those heads of argument as well as argument raised during the hearing of the main application. In order not to burden these heads we do not repeat these submissions here.

23.

We submit that the following findings that this Honourable Court made in the judgment relating to the main application is not only relevant but important for purposes of this application:

23.1. All investigations of this nature, including the investigation of the Applicant's case, relating to cases of alleged crimes of the past were

stopped as a result of an executive decision taken at the highest level that purported to interfere with the National Prosecuting Authority's prosecutorial decision making.¹¹

23.2. The high level of executive interference on investigations of the abovementioned matters included the involvement of the Minister of Justice and State President.¹²

23.3. The above issue of political interference is a matter of great seriousness. This included the manner in which the evidence about the interference was revealed.¹³

23.4. The fact that the detail of the interference and the basis therefore was deliberately withheld from this Court.¹⁴

23.5. There is a possibility of amnesty or pardon being granted to these persons accused of crimes in the past.¹⁵ The finding by the Court that it is unlikely that there was an amnesty or a pardoned and that

¹¹ See: Judgment: Par [21], p. 10

¹² See: Judgment: Par [23], p. 11

¹³ See: Judgment: Par [31], p. 13

¹⁴ See: Judgment: Par [66] to [68], p. 26 to 27

¹⁵ See: Judgment: Par [33], p. 14

the legal basis and legal validity would be highly questionable because there is nothing more than speculation as there is nothing on the papers to suggest that either an amnesty or pardon was granted to the Applicant¹⁶ is clearly debatable. We refer to the following:

23.5.1. The objective facts are that there was no prosecution for 47 years. This included the period between 2003 to 2017.

23.5.2. There is no explanation by the Minister of Justice and/or State President why they conducted themselves in this manner.

23.5.3. The fact that the NPA just accepted this interference despite their constitutional obligation to the contrary is not properly explained.

Clearly there is, with respect, a basis for the assertion that there was an amnesty and/or pardon and/or agreement not to prosecute.

¹⁶ See: Judgment: Par [33], p. 14 and [71], p 28

23.6. The delay would have resulted in some prejudice to the Applicant – the trial he is now required to face could have occurred much earlier.¹⁷

23.7. It was found in conclusion that the delay has caused some measure of prejudice.¹⁸

24.

We submit that it is also material to refer to section 17(1)(a)(ii) for purposes of this application. We submit that there are indeed compelling reasons why the appeal should be heard in this particular case. We refer to the following:

24.1. It is common cause that this case deals with alleged offences that occurred in the apartheid era allegedly committed by members of the South African Police in order to uphold the then Government.

¹⁷ See: Judgment: Par [77], p. 30

¹⁸ See: Judgment: Par. [89], p. 34

24.2. There are still a substantial number of these alleged crimes occurring in that era for the mentioned purpose by members of the then South African Police and/or other State agencies.

24.3. Material is also the fact that it deals with alleged perpetrators who did not apply to the Amnesty Committee of the Truth and Reconciliation Commission for amnesty for offences and/or who applied unsuccessfully for amnesty to the TRC during the late 1990's.

24.4. All these alleged offences were committed a substantial time ago, mostly in the 1970's and 1980's. These offences were committed in various Provinces in South Africa and will fall under the jurisdiction of different Courts. There is therefore a probability *alternatively* a real possibility that different Courts may deliver conflicting judgments on this issue.

24.5. It appears to be clear 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.

24.6. 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.

25.

We submit that the judgment in this case is of particular importance to a variety of cases that will probably follow this case and in which cases the particular issues of this case would also be relevant and of the utmost importance.

26.

We therefore submit that it is of extreme importance that finality be reached and that the correct approach that a Court should follow in cases of this nature be finally determined by our Courts.

E. CONCLUSION:

27.

We submit that a proper case has been made out for leave to appeal be granted and request the Honourable Court for an order accordingly. We submit that there are indeed reasonable prospects that another Court could come to a different conclusion in this regard.

DATED at PRETORIA on this 2nd day of SEPTEMBER 2019

J G CILLIERS SC

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