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

In the matter between: **Case No.: 2018/76755**

JOAO RODRIGUES **APPLICANT**

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **1ST RESPONDENT**

MINISTER OF JUSTICE **2ND RESPONDENT**

MINISTER OF POLICE **3RD RESPONDENT**

IMITIAZ AHMED CAJEE **4TH RESPONDENT**

FIRST AND THIRD RESPONDENTS' HEADS OF ARGUMENT: LEAVE TO APPEAL

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1 INTRODUCTION

1.1 The applicant seeks leave to appeal against the dismissal of his application for a permanent stay of his prosecution.

1.2 The absence of merit in the grounds of application for leave to appeal is evidenced by the approach adopted by the applicant in his notice of

application for leave to appeal of attacking every finding (or lack of finding). According to the applicant, the Court "*misdirected itself*" in every finding. This is wrong.

1.3 The application for leave to appeal is opposed on the grounds set out below.

2 THE BASIS OF OPPOSITION

2.1 This application is an attempt by a person who protests his innocence to avoid a public opportunity to finally clear his name.

2.2 It does not assist the applicant to delay the commencement of his criminal trial by embarking on an application such as the present because on his version, he did not do it and the sooner the trial starts, the sooner he would be able to prove that he did not do it.

2.3 The applicant's notice of application for leave to appeal does not properly inform the respondents and the Court of the factual findings or issues of law in the judgment appealed against or which the Court got wrong.

2.4 The applicant has simply adopted the easy approach of saying that the Court misdirected itself. This is prejudicial in that the first and third respondents do not know, by reading the notice of application for leave to appeal, as to exactly in what particular respect, with reference to the judgment, the Court misdirected itself.

2.5 The suggestion that the Court "*misdirected itself*" in every respect without stating how and why that is so is not sufficient to constitute a proper notice of application for leave to appeal. The fact that the Court did not find in favour of the applicant does not mean that the Court "*misdirected itself*" or that there is a reasonable prospect of success and that an appeal would succeed.

2.6 Ordinarily, the first and third respondents would contend that the application be dismissed simply on the basis that the notice of appeal does not properly identify the issues of fact or law in respect of which the Court erred and against which the appeal is directed. The nature of this matter is such that it ought not to be dismissed on that type of a low level technical point.

The section 35(3) of the Constitution complaint

2.7 The applicant complaints that the Court misdirected itself by not finding that his criminal proceedings constitute an unfair trial.

2.8 In order to constitute a basis for an appeal, the applicant's notice of application for leave to appeal ought to have stated the basis on which it is sought to be contended that the Court misdirected itself by not finding in favour of the applicant on his reliance upn section 35(3) of the Constitution.

2.9 In its judgment, the Court correctly identified the factors which must be taken into account in considering whether a prosecution would violate section 35(3) of the Constitution to justify a permanent stay. The applicant does not take issue with the Court's identification of those factors and does not go on to take issue with the manner in which the Court applied those factors in this case.

2.10 For the applicant to succeed on the section 35(3) point, the applicant ought to say: The Court erred in dealing with the following issues:

2.10.1 the length of the delay and its impact;

2.10.2 the reasons advanced by the government respondents for the delay;

2.10.3 the assertion of the applicant's right to a speedy trial;

2.10.4 prejudice to the applicant;

2.10.5 the nature of the offence and the policy considerations attached to it; and

2.10.6 the interests of the Timol family.

2.11 The applicant does not in his notice of application for leave to appeal say that the Court's consideration or application of these factors is wrong in law or in fact. Without the applicant taking issue with the factors which the

Court took into account and the manner in which the Court applied those factors to the facts of this case, this Court cannot find that "*the appeal would have a reasonable prospect of success*" because there is no basis to make that finding.

Not granting a permanent stay for the charge of murder

2.12 The applicant contends that the Court "*misdirected itself*" by not granting a permanent stay relating to the charge of murder.

2.13 The whole of the applicant's case is about being granted a permanent stay of prosecution. It does not help for the applicant to simply say that the Court "*misdirected itself*" by not granting him a permanent stay.

2.14 Without the applicant attacking any of the factual findings and the law issues on the basis of which the Court did not grant him the permanent stay of prosecution, there is no basis to grant leave to appeal.

Political interference

2.15 The applicant's reliance on political interference is opportunistic because the applicant did not rely on this point in his founding affidavit.

2.16 The Court properly dealt with political interference from paragraph 57 of its judgment. Therein, the Court correctly concluded that the NDPP could not hide behind political interference because it could have taken steps to

prosecute despite such interference. On this basis alone, the Court cannot be said to have misdirected itself on this point.

2.17 In any event, the issue of political interference was not raised as an issue to justify the relief sought by the applicant. The Court would have been wrong to have granted permanent stay of prosecution because of political interference because that was not the case made by the applicant.

2.18 Political interference was raised to demonstrate how the government has betrayed the victims of crimes committed by the previous government not to justify the permanent stay of prosecution. Quite the opposite.

2.19 In his affidavit, the fourth respondent correctly said that granting a permanent stay because of political interference would serve to validate and reward the political interference complained of and that[1]:

> "*92 Families and victims would be punished for the political interference and inaction by the authorities, when they took no part in such obstructions and were entirely oblivious of such machinations. This would be iniquitous and unjust, particularly in circumstances where families, such as mine, have been persistently and diligently campaigning for justice for decades.*

[1] Page 509.

93 *I submit that staying the prosecution in such circumstances would play into the hands of unscrupulous elements who have engineered near total impunity for apartheid era crimes. This is precisely the perverse outcome that they have sought. It would stand as a deep betrayal of the sacrifices made by victims such as Timol, Biko, Simelane and others. It would also be deeply offensive to our constitutional order.*"

2.20 Having admitted that it was politically interfered with, the first respondent also contended that the political interference was not a basis to grant a permanent stay. It said[2]:

"*2.55 The above being the case, this court cannot perpetuate the injustice to which Mr Timol was subjected by granting an order in terms of which the applicant's prosecution is stayed permanently. Mr. Timol was subjected to injustice by the apartheid government and its security agents and cannot again be subjected to injustice by this government, for which he died.*"

2.21 The Court clearly accepted what is quoted above. It is not the applicant's case in his notice of application for leave to appeal that the Court erred in accepting what is quoted above. There is also no suggestion that what is quoted above is not correct.

2.22 The applicant cannot therefore seek to rely on political interference to justify leave to appeal because. There was no basis for the Court to rely on political interference to grant the permanent stay of prosecution. The suggestion that the first respondent's "*decision ... to adhere to political interference*" ought to have moved the Court to grant a permanent stay is wrong. The applicant did not make such a case in his founding affidavit.

Failure to disclose material facts by the Minister of Justice

2.23 There is no merit in the suggestion that the Court ought to have given some weight to the Minister of Justice's alleged failure to disclose "*the relevant and material facts relating to the political interference that caused the substantial delay.*"

2.24 The applicant misses the point. It was the applicant's function to place all the necessary facts to justify the relief sought by him. The first respondent and the Minister of Justice did not rely on political interference to oppose the application. For this reason, there was no basis for them to produce information which they did not need to justify the opposition. Insofar as the applicant wanted more information to justify the relief which he wanted, the applicant cannot blame the respondents for not relying on that information in opposing his application.

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[2] Page 781.

2.25 This was not a review application where the author of a decision sought to be reviewed and set aside is in law required to file a full record of the decision sought to be reviewed and set aside. For this reason, the criticism levelled against the Minister of Justice is misplaced and there was no basis for the Court to grant any order against the Minister of Justice.

2.26 The applicant failed to invoke the correct remedies available to him to obtain whatever information he wanted in the Minister of Justice's possession.

2.27 The applicant did not bring an application to compel the Minister of Justice to produce any records. For this reason, the Court could not have ordered the Minister of Justice to produce unidentified records or documents.

Prejudice

2.28 It is wrong for the applicant to suggest that the Court did not consider the prejudice suffered by the applicant.

2.29 After having considered all the issues on the basis of which the applicant claimed prejudice, the Court correctly concluded that[3]:

"*[89]* *In conclusion, while the delay has caused some measure of prejudice, it cannot be said that it will taint the fairness of the*

[3] Paragraph 89 of the judgment

proposed trial or that such a trial, if it proceeds, will not of necessity incorporate the safeguards of fairness that the Applicant is entitled to. In any event, the right to a fair trial is subject to the limitations envisaged in section 36(1) of the Constitution." (Own emphasis).

2.30 Without the applicant seeking to challenge the above quoted conclusion, which is correct, the reliance on prejudice is ill-conceived and ought to be rejected.

Compelling reasons

2.31 There are no compelling reasons to grant leave to appeal.

2.32 The Constitutional Court has pronounced itself on the law relating to granting an order for a permanent stay of prosecution. This Court relied on its judgments. The Supreme Court of Appeal itself has also pronounced itself on the topic. There is therefore more than enough case law, from the highest Court in the land, to provide guidance to the various divisions of the High Court in dealing with cases such as the present. For this reason, there is no basis to send this matter to the Supreme Court of Appeal to restate the law.

2.33 Whilst there is always room to develop the law, the applicant's case is not one which justifies leave to appeal for that purpose. The applicant has not

in his notice of application for leave to appeal even attempted to make out a case as to in what respect the law on this topic requires development by a superior court.

The delay

2.34 The Court correctly divided the relevant times to be considered as far as the time delay is concerned. Having done this, the Court correctly found that there was a lengthy delay after the end of the TRC process. The applicant accepts this because he does not challenge it in his notice of application for leave to appeal.

2.35 Having arrived at the aforesaid conclusion, the Court concluded that[4] "*this cannot be the end of the enquiry*." After taking the enquiry further, the Court concluded that the delay is not of such a nature that it would irremediably taint the overall substantive fairness of the trial if it were to commence. This conclusion is not directly attacked in the notice of application of for leave to appeal. Even if it were attacked, it would lack merit because the Court's conclusion is supported by the facts and the correct legal position as restated in *Bothma*.

2.36 In the premises, the application for leave to appeal ought to be dismissed.

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[4] Paragraph 75 of the judgment.

Dated at Sandton on this 9th day of September 2019.

Kennedy Tsatsawane SC

Tiny Seboko