VAN HEERDEN v CRONWRIGHT AND OTHERS 1985 (2) SA 342 (T)

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Citation	1985 (2) SA 342 (T)
Court	Transvaal Provincial Division
Judge	Eloff J
Heard	December 13, 1984
Judgment	December 13, 1984
Annotations	Link to Case Annotations

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Flynote : Sleutelwoorde

Appeal - Leave to appeal - Proposition rejected that such, in view of s 20 (4) of Act 59 of 1959, should be granted in all but hopeless cases - Criterion remains reasonable prospect of success - Section 20 (5) *(a)* permits grant of leave to appeal against part of a judgment in proper cases.
C

Headnote : Kopnota

The proposition that "... the Court *a quo* that sits on an application for leave to appeal should be very careful not to refuse leave to appeal unless it is satisfied that it is... a hopeless case" must be rejected as being clearly wrong. This proposition appears to be based on the view that s 20 (4) of the Supreme Court Act 59 of 1959 in its present form "cuts D down" the right which litigants enjoyed previously of appealing without any leave whatsoever in a large number of cases. Inasmuch as the Legislature clearly intended to limit the number of cases which might be taken on appeal and would achieve very little in that direction if leave were to be granted in all but hopeless cases, the criterion to be adopted, apart from other considerations, is whether there is a reasonable prospect of success on appeal.

The wording of s 20 (5) *(a)* of the Act permits the grant of E leave in a proper case to appeal against part of a judgment.

Case Information

Application for leave to appeal. The facts appear from the reasons for judgment.

W H Trengove for the applicant.

F *H Z Slomowitz SC* (with him *J R Gautschi* and *S F Burger*) for the respondents.

Judgment

ELOFF J: The plaintiff applies for leave to appeal against the judgment and orders delivered and given by me on 28 September G 1984. While the wording of the plaintiff's notice of motion indicates that he wishes to appeal against the whole of the judgment and order, it seems that the plaintiff does not intend to appeal against para 6 of the order; in terms thereof he succeeded in part on the fourth claim against the first defendant. I am accordingly only concerned with paras A and B of the order. The plaintiff wishes to appeal against all the H adverse findings made by me.

It will be recalled that on the third claim I found for the plaintiff to a limited extent, ie, while I concluded that the plaintiff had not proved that he was physically tortured in the manner alleged, I held that he was the victim of an *injuria* in I that he was subjected to extreme and prolonged interrogation. The plaintiff is not content with this result and desires the opportunity to persuade a higher tribunal that I should have found that he had proved on the balance of probabilities that he was physically manhandled as alleged.

The first question that falls to be considered is that of the criterion to be adopted in an application such as the present. J Plaintiff's counsel urged that I should follow a recent *dictum* of COETZEE J:

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> "... the Court *a quo* that sits on an application for leave to A appeal should be very careful not to refuse leave to appeal unless it is satisfied that it is, what one might call, a hopeless case."

(See *Magnum National Life Assurance Co Ltd v South African Bank of Athens Ltd* delivered in June 1984: WLD No 90/83.) The reason for this view appears to be that s 20 (4) of the Supreme Court Act 59 of 1959 in its present form "cuts down" the right which B litigants enjoyed previously of appealing without any leave whatsoever in a large number of cases. It has now also to hear mainly appeals on fact which previously would have been heard by the Appellate Division.

With respect, that does not seem to me to present any justification for limiting the operation of the new subsection C in the manner found by COETZEE J.

Over many years one of the requirements for leave to appeal has been held to be a reasonable prospect of success (cf *R v Baloi* 1949 (1) SA 523 (A) at 524; *R v Nxumalo* 1939 AD 580 at 581; *R v Ngubane and Others* 1945 AD 185 at 187; *Capital Building Society v De Jager and Others; De Jager and Another v Capital Building* D *Society* 1964 (1) SA 247 (A); *Afrikaanse Pers Bpk v Olivier* 1949 (2) SA 890 (O) at 892 - 893 and *S v Sikosana* 1980 (4) SA 559 (A) at 562).

That was also the approach in regard to the subsection repealed by ss (4) of s 20 (see *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 714). The effect of the E replacement of the old subsection was simply to extend the requirement of leave to appeal to all cases. I think that when the Legislature created ss (4) of s 20 it intended that the criteria which over many years had been adopted in regard to such provisions, including its predecessor, should be maintained. I also think that, since the Legislature clearly F intended to limit the number of cases which might be taken on appeal, it would have achieved very little in that direction if in all but hopeless cases leave to appeal is to be granted. I conclude that the judgment of COETZEE J is clearly wrong and should not be followed. In my view the criterion which should be adopted is, apart from other considerations, whether there G is a reasonable prospect of success on appeal.

The application was opposed on behalf of the defendants, whose counsel contended that there is no reasonable likelihood that another tribunal will differ from me on the factual conclusions reached.

[The learned Judge analysed the merits of the appeal, H continuing as follows.]

I have carefully considered all the contentions urged in support of the contention that another tribunal might take a different view. I do not think that I am called upon to discuss all the points raised. Suffice it to say that I consider that there is not a sufficient prospect of success on appeal on the I factual issues relative to the claims under discussion. The application in regard to paras A.1, A.3 and A.4 of my judgment should accordingly fail.

I then turn to para A.2 of the judgment. I do think that there is a reasonable prospect that another Court will hold that I erred in concluding that the claims against the first, second,

third, fourth, fifth and seventh defendants became time barred. More specifically, a higher tribunal might hold that the J defendants concerned failed to prove that

ELOFF J

A their acts, found by me to constitute *injuriae*, were "in respect of anything done" in pursuance of the Police Act 7 of 1958; or it might conclude that it was in fact objectively impossible for the plaintiff to have instituted action within the time permitted by the Act. I have given thought to the propriety and implications of granting partial leave to appeal. In my view the wording of s 20 (5) *(a)* of the Supreme Court Act B permits of the grant of leave in a proper case to appeal against part of a judgment. The section provides:

> "Any leave required in terms of ss (4) for an appeal against a judgment or order of a Court given on appeal to it may be granted subject to such conditions as the Court concerned, or the Appellate Division, according to whether leave is granted by that Court or the Appellate Division, may determine, and C such conditions may include a condition that the applicant shall pay the costs of the appeal."

As to whether this is a proper case for the compartmentalisation of the appeal in the manner indicated, I believe that there should be no difficulty in separating relevant from irrelevant material. The starting point will of course be my finding that the defendants concerned committed an D injuria in the manner and at the time and place indicated in my judgment. The factual issues will centre around the question of the *bona fides* or lack thereof of the defendants concerned and on the question whether it was possible for the plaintiff to have sued in time. Only part of the record need be studied E by the Court of appeal. Only a small part of the voluminous exhibits need become part of the appeal record. The parties should be able to agree on what need be included in the appeal record and what could be excluded. The issues are in my view fairly crisp and there should be no difficulty in identifying that much of the record which becomes necessary for the consideration of the appeal.

That brings me to the matter of costs.

F [The learned Judge dealt with this aspect, concluding as follows.]

I make the following order:

1. I grant leave to appeal against para A.2 of my order.
2. I do not, in terms of s 20 (2) *(a)* of Act 59 of 1959, direct that the appeal should be heard by the Full Bench of this Division.

G 3. I direct that the applicant (plaintiff) is to provide security for the costs of the appeal to the Appellate Division in an amount laid down by the Registrar of the Appellate Division.

4. Save as set out above the application for leave to appeal is refused.
5. As regards the seventh, eighth, ninth and tenth defendants, the applicant is to pay their costs of H opposition. As regards the remaining defendants, the costs of this application shall be costs in the appeal. For purposes of taxation it must be assumed that it was reasonable to have retained two counsel only.

Applicant's Attorneys: *Webber, Wentzel & Co*. Respondents' I Attorney: *State Attorney*.

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