CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 14/97

J D PENNINGTON — First Appellant
M E SUMMERLEY — Second Appellant

versus

THE STATE — Respondent

Heard on: 21 August 1997

Decided on: 18 September 1997

JUDGMENT

CHASKALSON P:

[1] The two appellants were convicted in the Witwatersrand Local Division of the Supreme Court on 172 counts of fraud in January 1992. The first appellant was sentenced effectively to six years imprisonment, half of which was conditionally suspended, and the second appellant effectively to seven years imprisonment. The appellants appealed unsuccessfully to the Supreme Court of Appeal[1] against their convictions and sentences. The judgment dismissing the appeals was delivered on 16 May 1997.[2]

[2] On 26 May 1997 the appellants lodged a notice with the Registrar of this Court

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1 The appeal was noted to the Appellate Division which has since become the Supreme Court of Appeal.

2 *Pennington and Summerley v The State* case 271/94, unreported.

purporting to appeal to this Court against the decision of the Supreme Court of Appeal. The grounds of appeal set out in the notice are to the effect that the appellants' rights to "human dignity" and to "a fair trial" in terms of sections 10 and 35(3) of the Constitution of the Republic of South Africa, 1996 Act 108 of 1996 had been infringed, and the Supreme Court of Appeal had erred in holding that these provisions were not applicable to their appeal. The detailed grounds of appeal set out in the notice relate to delays in prosecuting the appellants, the absence of legal representation at "crucial times" during the trial, the failure by the trial judge to explain to the appellants the rights that they had, and the admission of certain evidence at the trial, all of which were said to have resulted in the trial being unfair and to have impaired the appellants' dignity. The notice of appeal omitted a ground of appeal relating to the admission of evidence on which the appellants wished to rely in support of their contentions and an application to amend the grounds of appeal was lodged with the Registrar of the Court. I will deal with the matter on the assumption that if there is an appeal, the amendment will be granted.

[3] The notice lodged with the Registrar purports to note the appeal in terms of section 167 of the 1996 Constitution. Section 167(3), (6) and (7) provide that:

> "(3) The Constitutional Court –
>
> (a) is the highest court in all constitutional matters;
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> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
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> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.

(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–

. . .

(b) to appeal directly to the Constitutional Court from any other court.

(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

The legislation referred to in section 167(6) has not yet been enacted; nor has a rule of Court been made to regulate the right of appeal referred to in section 167(6).

[4] Section 100(1) of the interim Constitution made provision for the rules of the Constitutional Court to be prescribed by the President of the Constitutional Court in consultation with the Chief Justice. This was done and the rules were promulgated in *Regulation Gazette* 5450 of 6 January 1995. At that time the Appellate Division had no jurisdiction to decide constitutional issues and the rules made no provision for appeals from the Appellate Division to the Constitutional Court. Section 100(1) of the interim Constitution has been repealed.[3] The making of rules for the Constitutional Court is now dealt with by section 171 of the 1996 Constitution which provides that

> "All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation."

[3] Schedule 7 of the 1996 Constitution.

Neither the Constitutional Court Complementary Act 13 of 1995 nor the Rules Board for Courts of Law Act 107 of 1985 make provision for the making of rules for the Constitutional Court and there is, as yet, no national legislation prescribing how such rules are to be made.[4] Until that legislation is passed the existing rules cannot be supplemented to deal with the changes in the functioning of the courts effected by the 1996 Constitution.

[5] In correspondence that was exchanged between the attorney for the appellants and the Director of this Court it was contended on behalf of the appellants that the constitutional issues raised by them fell to be dealt with under the 1996 Constitution and in the absence of any provisions in such Constitution, or in legislation or rules regulating appeals from the Supreme Court of Appeal to this Court, the appellants were entitled as of right to appeal. If an appeal was noted, so it was contended, this Court was obliged to hear it.

[6] The appellants, through counsel, submitted written argument in support of their contentions. The matter was then set down for hearing to enable the Court to deal with the matters that had been raised. Counsel for the appellants and counsel for the state were requested to address argument to the Court on these and other issues, the nature of which appears from this judgment.

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[4] Draft legislation has been prepared by the Department of Justice and has been circulated for comment. Hopefully, the legislation will soon be enacted and the void will be filled.

The proceedings in the Supreme Court of Appeal

[7] The trial of the two appellants was completed before the interim Constitution of 1993 came into force. They appealed to the Appellate Division against their convictions and sentences. During the period between the noting of the appeal and the hearing before the Supreme Court of Appeal the interim Constitution came into force and was superseded by the 1996 Constitution.

[8] Under the interim Constitution the Appellate Division had no constitutional jurisdiction. This was changed by the 1996 Constitution which gave the Supreme Court of Appeal jurisdiction to decide appeals in respect of any matter.[5] At the hearing before the Supreme Court of Appeal the appellants contended that the trial court had erred in convicting them. They also contended that they had not received a fair trial. In support of this contention they sought to rely on the provisions of the 1996 Constitution and the jurisdiction conferred on the Supreme Court of Appeal by that Constitution to decide constitutional issues. The Supreme Court of Appeal dismissed the appeals. On the merits of the appeals the majority of the Court held that the appellants had not shown that the judgment of the trial judge was wrong or that the sentences were excessive. On the issue as to whether the appellants had received a fair trial the Court held unanimously that this

5 Section 168(3).

had to be determined according to the law in force at the time the trial was conducted and that the appellants had failed to establish that they had not received a fair trial in accordance with such law.

The jurisdiction of the Constitutional Court to hear appeals from the Supreme Court of Appeal

[9] The appellants contend that they are entitled to have the question as to whether or not they had been given a fair trial, and their complaint that their dignity was infringed by the way the trial was conducted, determined in accordance with the provisions of the 1996 Constitution,[6] and that they are entitled to appeal as of right to this Court, as the highest court in all constitutional matters, to set aside the decision of the Supreme Court of Appeal holding that the Constitution was not applicable to their appeal.

[10] On a proper construction of the 1996 Constitution there can be no doubt that this Court has appellate jurisdiction, including jurisdiction to hear appeals from decisions of the Supreme Court of Appeal on constitutional matters. Section 167(3)(a) of the 1996 Constitution provides that the Constitutional Court "is the highest court in all constitutional matters".

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6 Section 35(3) makes provision for the right to a fair trial and includes detailed provisions of the standards that have to be adhered to.

Section 168(3) provides that the Supreme Court of Appeal

> "may decide appeals in any matter. It is the highest court of appeal except in constitutional matters . . . ."

The "highest" court of appeal in respect of constitutional matters is therefore the Constitutional Court. This is made explicit by section 167(6) of the 1996 Constitution which provides

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court –
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> (a) to bring a matter directly to the Constitutional Court; or
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> (b) to appeal directly to the Constitutional Court from any other court."

The words "any other court" would include the Supreme Court of Appeal.

[11] Section 167(6) makes clear that the Constitutional Court is to have both original and appellate jurisdiction, and the power to control access to it by granting "leave" only in cases where it is in the interests of justice to do so. In other words, litigants will not ordinarily have the right to insist upon a matter being heard by the Constitutional Court. What has to be decided in the present matter is whether in the period between the coming into force of the 1996 Constitution and the enactment of the legislation or rules required by section 167(6), the Court can hear appeals from the Supreme Court of Appeal, and if so, whether it can regulate the procedure to be followed in such appeals.

[12] Counsel for the appellants contended that:

(a) Section 167(3) read with section 168(3) vests appellate jurisdiction in this Court to hear appeals from decisions of the Supreme Court of Appeal.

(b) A court has no power at common law to decline to entertain a matter properly within its jurisdiction by refusing leave to appeal and that this Court has been vested with no power under the 1996 Constitution to impose such a requirement; alternatively,

(c) Section 167(6) read with sections 171 and 34 of the 1996 Constitution places the decision in regard to whether, and to what extent, this Court should be entitled to refuse leave to appeal in the hands of the legislature and/or the rules board and the Court accordingly has no power to require the appellants to secure the leave of the Court before noting an appeal.

[13] Counsel also contended that the procedure to be followed is prescribed by rule 20 or rule 21 of the existing rules of the Constitutional Court, which should be read as applying *mutatis mutandis* to the present matter. These rules make provision for certain appeals to be brought to this Court without leave having to be obtained.

The procedure to be followed in bringing matters before the Constitutional Court

[14] Until the legislation required by sections 167(6) and 171 of the 1996 Constitution has been passed the procedures for bringing matters before this Court must be regulated by its existing rules, which remain in force in terms of item 16(1) of schedule 6 of the 1996 Constitution,[7] and by section 173 of the 1996 Constitution, which provides:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

I deal first with the existing rules and then with the Court's "inherent power".

The existing rules

[15] Rules 20 and 21 which are relied upon by the appellants do not apply to the present case. Rule 20 deals with an appeal from the decision of a provincial or local division in circumstances in which "no other court has jurisdiction to hear and determine such

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[7] Item 16(1) provides:

> "Every court, including courts of traditional leaders, existing when the new Constitution took effect, continues to function and to exercise jurisdiction in terms of the legislation applicable to it . . . subject to –
> (a) any amendment or repeal of that legislation; and
> (b) consistency with the new Constitution."

appeal". In the present case the appeal is from the Supreme Court of Appeal and not from a "provincial or local division". The appellants have already exercised their right to appeal from a local division to the Supreme Court of Appeal, which had jurisdiction to determine the issue raised on appeal, and did so.

[16] The purpose of the rule was to allow appellants to exercise the constitutional right which formed part of the fair trial provisions of section 25(3) of the interim Constitution:

> "to have recourse by way of appeal or review to a higher court than the court of first instance."[8]

The appellants have already exercised this right by appealing to the Supreme Court of Appeal. A condition requiring leave to appeal to the "highest court" is not inconsistent with this principle, even when the appeal is to the Supreme Court of Appeal;[9] *a fortiori* when the appeal is from a decision of the Supreme Court of Appeal.

[17] Rule 21 deals with appeals in which the appellant wishes to raise a constitutional issue within the exclusive jurisdiction of the Constitutional Court, which is not the case in the present matter.

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8 Section 25(3)(h).

9 *S v Rens* 1996 (1) SA 1218 (CC); 1996 (2) BCLR 155 (CC) at para 25.

The common law

[18] Counsel for the appellants rely on *Goldberg v Goldberg*[10] and *Standard Credit Corporation Ltd v Bester & Others*[11] to support their contention that "a court at common law has no inherent jurisdiction to decline to entertain a matter within its jurisdiction", and that absent a statutory provision authorising it to do so, a court cannot attach conditions to the right of a litigant who wishes to bring a matter before it.

[19] Neither of these cases was concerned with appeals. In both cases the Court had been approached at first instance to deal with an issue within its jurisdiction, which was also within the jurisdiction of the Magistrates' Court. It was in this context that it was said by Schreiner J:[12]

> "On principle it seems to me that in general a Court is bound to entertain proceedings that fall within its jurisdiction."

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10 1938 WLD 83.

11 1987 (1) SA 812 (W).

12 *Goldberg v Goldberg* above n 10 at 85.

[20] At common law a court has no jurisdiction to hear an appeal against a decision of another court. It can only do so if that authority is conferred on it by the statute under which it is constituted, and then it must function in terms of that statute.[13] This Court was established under the interim Constitution,[14] and its authority as a court was recognised and reaffirmed by the 1996 Constitution.[15] The question is whether on a proper construction of the Constitution it has the power in the circumstances of the present case to regulate its procedure so as to require the appellants to secure its leave to the noting and prosecuting of their appeals to it.

The Court's power to regulate its own procedure

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13 *Myers v Benoni Municipality* 1913 TPD 632 at 633–4; *The Minister of Labour v Building Workers' Industrial Union* 1939 AD 328 at 330.

14 Section 98 of the interim Constitution.

15 Item 16 of Schedule 6 to the 1996 Constitution.

[21] In terms of the interim Constitution the Court was given jurisdiction to deal with constitutional issues referred to it by a provincial or local division of the Supreme Court,[16] or the Appellate Division,[17] and appellate jurisdiction to hear appeals from decisions of provincial or local divisions on constitutional issues.[18] It also had an original jurisdiction to deal with matters by way of direct access,[19] and with the constitutionality of bills before Parliament or a provincial legislature.[20] As the Appellate Division then had no jurisdiction in respect of constitutional matters, neither the interim Constitution nor the rules of Court made provision for appeals from its decisions to this Court.

[22] A person who wishes to approach this Court to uphold or protect his or her constitutional rights should not be prevented from doing so solely because the legislation or rules contemplated by sections 167(6) and 171 have not been passed. Section 173 of the 1996 Constitution gives this Court an "inherent power" to "protect" and "regulate" its process. It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the "inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice"[21] which

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16 Section 102(1), 102(13) and 103(4) of the interim Constitution.

17 Section 102(6) of the interim Constitution.

18 Section 102(12), (16) and (17) of the interim Constitution.

19 Section 100(2) of the interim Constitution.

20 Section 98(2)(d) of the interim Constitution.

21 Per Corbett JA in *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) at 754G

vested in the Appellate Division prior to the passing of the 1996 Constitution.[22] Even if it is subject to such constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power.

[22] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7E–F.

[23] The power is to "protect and regulate" the process of this Court taking into account "the interests of justice". When this power is exercised it should be done in a way which accords with the requirements of the Constitution and as far as possible with the procedure ordinarily followed by this Court in similar cases.[23] Section 167(6) of the 1996 Constitution indicates the procedure that is contemplated by the Constitution. It is to

> ". . . allow a person, when it is in the interests of justice and with leave of the Constitutional Court . . . to appeal directly to the Constitutional Court from any other court."

This is the procedure that will be required when the vacuum is filled. The procedure of securing leave to appeal is also prescribed by rule 18 of the rules of this Court, which deals with "any proceedings other than those referred to in rules 20 and 21".

[24] The Supreme Court of Appeal is a court of the highest standing. The appellants have had the benefit of a decision from that Court, and now claim that irrespective of the merits of their appeal, they should be allowed, as of right, to reargue the issue before this Court. That is not required by any provision of the Constitution and would be contrary to the procedure prescribed for appeals from the High Court to the Supreme Court of Appeal and from the High Court to this Court.

[25] Section 167(6) of the 1996 Constitution is the only provision of the Constitution which addresses the procedure to be followed in engaging the Constitutional Court. It

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[23] *Krygkor Pensioenfonds v Smith* 1993 (3) SA 459 (A) at 469H–I.

prescribes that legislation must be enacted to allow appeals to be brought to this Court from decisions of another court when it is in the "interests of justice" to do so and "with leave of the Constitutional Court".

[26] The appellants purport to note their appeal in terms of section 167. Leave of this Court is a requirement prescribed by section 167(6). Section 173 of the Constitution allows this Court to "protect and regulate [its] own process". "Leave to appeal" is also a requirement needed to "protect" the process of this Court against abuse by appeals which have no merit, and it is in the "interests of justice" that this requirement be imposed, for if appeals without merit were allowed against decisions of the Supreme Court of Appeal, justice would be delayed.[24]

[27] I would therefore hold that in regulating its process to fill the vacuum caused by the absence of the necessary legislation and rules, this Court should adopt the procedure contemplated by section 167(6) of the Constitution and require leave of this Court to be obtained for the noting of appeals to it against decisions of the Supreme Court of Appeal on constitutional matters – a procedure that is consistent with the rules regulating appeals from the High Court to this Court. This procedure requires a consideration of the merits of the appeal and is an exercise of the appellate jurisdiction vested in the Court. It will be necessary to lay down the details of the procedure to be followed in such matters and this will be done in the order that is made later in this judgment.

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[24] *S v Rens* above n 9 at para 25.

[28] I am willing to treat the notice of appeal lodged by the appellants as an application for leave to appeal, and I proceed now to deal with that application in the light of the argument on the merits of the appeal submitted to this Court on behalf of the appellants.

Can the appellants rely on the Bill of Rights in the 1996 Constitution?

[29] The appellants contend that the Supreme Court of Appeal erred in holding that their right to a fair trial had to be determined according to the law in force at the time the trial was conducted, and that it ought to have held that this issue fell to be determined in accordance with the provisions of the Bill of Rights in the 1996 Constitution. They rely in particular on schedule 6 of the 1996 Constitution which makes provision for transitional arrangements. According to item 17 of schedule 6:

> "All proceedings which were pending before a court when the new Constitution took effect, must be disposed of as if the new Constitution had not been enacted, unless the interests of justice require otherwise."

The wording of this provision is different to that of the comparable transitional provision of the interim Constitution[25] considered by this Court in *S v Mhlungu and Others*.[26] It was correctly accepted by both counsel that in terms of item 17 of schedule 6 the 1996

[25] Section 241(8).

Constitution would not be applicable to pending proceedings unless it is "in the interests of justice" that its provisions should be applied.

[30] If the 1996 Constitution had not been enacted the interim Constitution would still have been in force. In *S v Mhlungu and Others*,[27] Mahomed DP held, in a judgment concurred in by four members of this Court, that section 241(8) of the interim Constitution did not preclude an accused person from relying on any of the applicable provisions of the Bill of Rights in a criminal trial which was pending before a court immediately before the commencement of that Constitution. In the course of his judgment Mahomed DP found it necessary to consider whether, as a result of the law being changed during the course of the case, this interpretation of section 241(8) would result in disruptions and dislocations of pending proceedings. In dealing with the impact of the decision on appeals he said:[28]

> "In respect of appeals arising from proceedings which had commenced before the Constitution came into operation but were only concluded thereafter, there should again be no 'dislocation'. If the particular fundamental right relied on by the appellant was of operation at the relevant time of the trial, the appellant was entitled to rely on it and if it had been wrongly denied to him he would be entitled to suitable relief on appeal.

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26 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC).

27 Id.

28 Id at para 41.

(*Regina v Antoine* 4 CRR 126). If it did not exist at the relevant time, the appellant would have no legitimate cause for complaint. The remaining category concerns appeals arising from trials which had commenced and were completed before the Constitution came into operation. In my view, such appeals must be disposed of without applying chapter 3 of the Constitution, because an appeal inherently contains the complaint that the Court *a quo* had erred in terms of the law which was then of application to it and not in terms of a law which subsequently came into operation. There should therefore also be no 'dislocation' arising from this category of appeals. There is nothing in the wording of s 241(8) which, on my interpretation, would entitle an appellant on appeal to rely on chapter 3 if the proceedings against him had been concluded before the commencement of the Constitution."

[31] Kriegler J and Sachs J who concurred in the decision reached by Mahomed DP did not find it necessary to consider the question of appeals, but nothing in their judgments is inconsistent with the views expressed by Mahomed DP.

[32] In *Du Plessis and Others v De Klerk and Another*[29] this Court held that a change in law resulting from the adoption of the interim Constitution is not retroactive. Kentridge AJ who delivered a judgment in which the majority of the members of the Court concurred described retroactivity as follows:[30]

"A statute is said to be retroactive if it enacts that 'as at a past date the law shall be taken to have been that which it was not', so as to invalidate what was previously valid, or *vice versa*."

Mahomed DP, in a concurring judgment, referred to his judgment in the *Mhlungu* case

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[29] 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC).

saying that in that case:

[30] Id at para 13.

> ". . . I held expressly that an accused person could not rely on any of the provisions of s 25(3) of the Constitution in an appeal heard after the commencement of the Constitution in which it was being asserted that a right protected by s 25(3) had not been accorded to the accused at the trial at a time when the Constitution was not yet in operation. The lawfulness or unlawfulness of any conduct at the time it took place is determined by the applicable law at that time."[31] (Footnote omitted)

Section 25(3) of the interim Constitution dealt with an accused person's right to a fair trial.

[33] Although counsel for the appellants suggested that the passage dealing with appeals in the judgment of Mahomed DP in *Mhlungu*'s case was obiter, he did not dispute its correctness, and accepted that if the interim Constitution were to be applicable, there would be no basis for an appeal to this Court. This is clearly correct. The passage from the judgment constituted an important part of the reasoning of Mahomed DP, and any contrary view would be inconsistent with the judgment of this Court in *Du Plessis v De Klerk.*

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31 Id at para 68.

[34] In an attempt to avoid this obstacle counsel contended that in the present case it was not in the interests of justice to apply the interim Constitution which requires the fairness of a completed trial to be judged according to the law in force prior to the establishment of the new constitutional order. That law did not require trials to be conducted in accordance with basic notions of fairness and justice,[32] and that being so, justice now required that the appellants be allowed to have the fairness of their trial determined according to the more generous standards set by the 1996 Constitution.

[35] The fallacy in this argument is that even if the appeals were to be disposed of under the 1996 Constitution there would be no reason why the decisions in *Mhlungu* and *Du Plessis v De Klerk* should not be followed. The appellants were tried and convicted at a time when there was no Bill of Rights. According to the Supreme Court of Appeal they were fairly tried in accordance with the law then in force and they were correctly convicted in accordance with that law. The subsequent introduction of a Bill of Rights in the interim Constitution and the 1996 Constitution did not convert what were regular proceedings at the time of their trial, into irregular proceedings; nor could it give rise to a right to claim that the conduct of the trial at a time when the new constitutional order was not in force impaired the appellants' constitutional right to dignity.

[36] There is nothing in the 1996 Constitution which suggests that the decision as to

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32 *S v Zuma and Others* 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 16.

retroactivity in *Du Plessis v De Klerk* is no longer applicable, or that it was intended that the 1996 Constitution should have retroactive application. It should perhaps be added that even if the phrase "unless the interests of justice require otherwise" was wide enough not only to make the provisions of the 1996 Constitution applicable to pending proceedings in appropriate cases, but also to make them applicable retroactively, it could hardly be said to be in the "interests of justice" to allow completed trials to be re-opened and to be dealt with in accordance with laws of procedure and evidence which were not in force at the time of the trial.

Delay in the hearing of the appeal

[37] During argument counsel for the appellants raised the issue of the delay in the hearing of the appeal to the Supreme Court of Appeal. More than five years elapsed between the conclusion of the criminal trial at which the appellants were convicted and sentenced and the hearing of the appeal. Of this, approximately 35 months occurred after the interim Constitution came into force. According to the decision in *Mhlungu*'s case regard could be had to this delay if it infringed a right to which the appellants were entitled under the interim Constitution.

[38] The cause of the delay was not addressed by the appellants in their written arguments, nor is it referred to in the judgment of the Supreme Court of Appeal. The

appellate delay was referred to by counsel almost as an afterthought during argument, the focus of which was on the delays and other matters connected with the conduct of the trial.

[39] Both the interim Constitution and the 1996 Constitution deal with the rights of accused persons to a fair trial. Section 25(3)(a) of the interim Constitution includes within this right the right to a trial "within a reasonable time after having been charged", and section 35(3)(d) of the 1996 Constitution to the right "to have their trial begin and conclude without unreasonable delay". Although delays in the hearing of an appeal might extend the period of anxiety which the appellants undergo before finality is reached, appellate delays are materially different to trial delays. To begin with there can be no question of prejudice, for the appeal is decided on the trial record, and the outcome of the appeal cannot be affected in any way by the delay. Moreover, where the appeal fails, as it did in the present case, the appellant's guilt, established at the trial, has been confirmed.

[40] The Supreme Court of Canada decided by a majority[33] that delays in the appeal process do not infringe the Charter right to be tried within a reasonable time.[34] The majority decision was based on a construction of the relevant provision which, in its context, was held not to include appeals. The minority, who took a different view, held that appellate delay was relevant, but that it was of a different character to trial delay.

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33 *R v Potvin* (1993) 16 CRR (2d) 260.

34 Section 11(1)(b) of the Charter.

The remedy for such delay was not a stay of proceedings or a reversal of the conviction. A stay would leave the conviction standing, and a reversal would be disproportionate to the interest that had been harmed by the infringement. It might, so they held, possibly give rise to a right of action for damages, or depending on the circumstances, to some other relief.

[41] Undue delay in the hearing of criminal appeals is obviously undesirable, particularly when the appellants are in custody. It does not follow, however, that such delay constitutes an infringement of the constitutional right to a fair trial. That question can be left open, for even if it were to be regarded as an infringement of that or some other constitutional right, I am satisfied that it would not entitle the appellants to have their convictions set aside or their sentences reduced on appeal.

[42] Section 7 of the interim Constitution provides that the remedy for an infringement of a right entrenched in the bill of rights is "appropriate relief". It is in the public interest that persons who are guilty of crimes should be convicted and sentenced. The reversal of the conviction or the reduction of the sentence properly imposed on the appellants by the trial court could not be regarded as "appropriate relief" for the delay in the hearing of what proved to be unsuccessful appeals. The cause of the delay was not referred to in the argument, or in the analysis of the alleged irregularities relied upon by counsel for the appellant. Even if the delay occurred without fault on the part of the appellants, it could not be said to have had any bearing on the convictions and sentences imposed on them.

To grant them the relief they seek would be contrary to the public interest and would bring the administration of justice into disrepute.

[43] To say that guilty persons are excused from serving the sentences imposed on them because of delays associated with unsuccessful appeals, would be consistent neither with fairness nor justice. In the present case three persons were convicted at the trial. They were all given leave to appeal. One of them abandoned his appeal and presumably has been serving his sentence since then. There is no reason why the two appellants, as a result of an unsuccessful appeal, should escape the punishment imposed on them.

[44] It follows that there are no prospects that the appeal will succeed and the application for leave to appeal must therefore be dismissed.

[45] In the present matter oral argument on the relevant issues was heard in open court. Counsel were asked to consider and to address argument to us on the question whether section 34 of the 1996 Constitution, on which the appellants rely, applies to applications for leave to appeal in criminal cases, and if it does, whether this Court in regulating its own process has the power to lay down a practice which permits such matters to be dealt with in chambers and not in open court.

[46] Section 34 provides:

> "Everyone has the right to have any dispute that can be resolved by the application of

law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

The words "any dispute" may be wide enough to include criminal proceedings, but it is not the way such proceedings are ordinarily referred to. That section 34 has no application to criminal proceedings seems to me to follow not only from the language used but also from the fact that section 35 of the Constitution deals specifically with the manner in which criminal proceedings must be conducted.

[47] Section 35(3) sets out what is required for a fair trial in criminal proceedings. Sections 35(3)(c) and (e) provide that every accused person shall have the right

"(c) to a public trial before an ordinary court;
(e) to be present when being tried."

In contrast section 35(3)(o) which deals with appeals provides only for the right "of appeal to, or review by, a higher court".

There is no express requirement that the appeal be in open court or that the accused person be entitled to be present at the appeal.

[48] The settled practice of our courts has always been for appeals to be heard in public. Applications for leave to appeal are not ordinarily heard in open court, though a hearing may be called if the application raises issues on which it is considered desirable to hear

oral argument. In most cases, however, the applications are dealt with in chambers and are either granted or refused on the basis of the judgment of the Court *a quo* and the reasons advanced in the application in support of the submission that such judgment was wrong. There are sound practical reasons for this. If such matters had to be dealt with in open court, the court rolls would be clogged and the result would be additional expense and delays.

[49] The European Court of Human Rights has held that an application for leave to appeal is a special procedure which does not necessarily call for a public hearing under the provisions of article 6(1) of the European Convention for the Protection of Human Rights. Article 6(1) provides that

> "[i]n the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing . . . ."

That requirement is met by the holding of the criminal trial in public, and

> "[t]he limited nature of the subsequent issue of the grant or refusal of leave to appeal did not in itself call for oral argument at a public hearing or the personal appearance of the [accused] before the court of appeal."[35]

[50] Section 35(3)(c) refers to the right to a public *trial* which is narrower than the right under the European Convention to a public hearing in the *determination of a criminal*

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35 *Monnell and Morris v United Kingdom* 10 EHRR 205 at para 58.

charge – language which is wide enough to include appeals.

[51] I am accordingly of the opinion that applications for leave to appeal do not need to be heard in public. Counsel for the appellants contended that applications for leave to appeal need to be dealt with by a quorum of the Court and not by a panel. It is not necessary to say more than that it is the practice of this Court to consider applications for leave to appeal at conferences at which at least eight justices are present, and not to refuse the application unless a majority of those justices take the view that there are no reasonable prospects of success. In urgent matters the President of the Court or a justice designated by him or her in terms of rule 1(2) may grant leave to appeal. In that event, however, the appeal follows and is heard in open court. The grant of leave is purely procedural and does not lead to the determination of the matter. In my view this practice is not inconsistent with any provision of the Constitution and there is no need for it to be changed.

[52] I would make the following order in regard to the procedure to be followed in appeals from the Supreme Court of Appeal to this Court:

> Pending the enactment of legislation or rules dealing specifically therewith the following procedure must be followed where a party wishes to appeal to this Court against a decision of the Supreme Court of Appeal on a constitutional matter:

(a) Appeals in such matters may only be brought with the leave of this Court.

(b) Applications for leave to appeal must be brought in terms of rule 10 within 14 days of the decision of the Supreme Court of Appeal and shall set out sufficient information to enable this Court to determine whether or not the issue is one of substance on which a ruling by this Court is desirable and whether there is a reasonable prospect that this Court will reverse or materially alter the decision.

(c) If leave to appeal is granted the provisions of rule 19 shall be applied *mutatis mutandis* to such appeals.

(d) This procedure shall be followed for as long as there is no legislation or rule governing such appeals.

[53] The following order is made in regard to the present matter:

(a) The Notice of Appeal is treated as an Application for Leave to Appeal.

(b) The Application for Leave to Appeal is dismissed.

Langa DP, Ackermann J, Goldstone J, Madala J, Mokgoro J, O'Regan J and Sachs J all

concur in the judgment of Chaskalson P.

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For the Respondent: A J Fourie instructed by the Attorney General, Johannesburg.