CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 23/98

VINCENT MAREDI MPHAHLELE Applicant

versus

THE FIRST NATIONAL BANK OF SOUTH AFRICA LIMITED Respondent

Decided on : 1 March 1999

JUDGMENT

GOLDSTONE J:

[1] The applicant is an attorney and the respondent is his banker. In December 1997, the applicant applied to the Transvaal High Court for an order relating to the applicant's trust account with the respondent. On 11 December 1997, Southwood J dismissed the application with costs. Some time later, the applicant sought condonation for the late noting of an application for leave to appeal to the full bench of the High Court or to the Supreme Court of Appeal. During June 1998 that application was also dismissed with costs. The applicant then petitioned the Chief Justice for leave to appeal. In terms of section 21(3)(b) of the Supreme Court Act 1959[1] (the Supreme Court Act) the petition was considered by two judges of the Supreme Court of Appeal. They refused the petition without argument and without referring it to the Court, a procedure they were entitled to

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1 Act 59 of 1959.

adopt.[2]

[2] By letter, the applicant approached the Registrar of the Supreme Court of Appeal for reasons for the refusal of his petition. He was informed by the Registrar that the long-standing practice of the Court is that reasons are not furnished in such matters. The applicant then addressed a letter to the Chief Justice in which he submitted that "the long-standing practice of the Court" refers to "apartheid practice which was oppressive and destined to intimidate the poor masses".

[3] The Legal Administrative Officer in the Chambers of the Chief Justice replied to the applicant, saying, inter alia:

> "Usually implied in the order refusing an application for leave to appeal to the Supreme Court of Appeal, is the conclusion that the order of the court *a quo* is correct and the appeal would not have any reasonable prospects of success. It is for this reason that the practice has been not to give any formal reasons for an order refusing leave to appeal. It also applies in the instant case."

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2 *Buchanan v Marais NO and Others* 1991 (2) SA 679 (A) at 684 F - G.

[4] By notice of motion filed in this Court, the applicant seeks orders directing the two judges of the Supreme Court of Appeal, who considered the petition, to furnish reasons for dismissing it and directing them to grant leave to appeal. The main ground on which the order is sought is that the Constitution binds the judiciary[3] and obliges it to furnish reasons for orders it issues.

[5] The President of this Court issued directions requiring the applicant to lodge written argument in support of his application, whereafter consideration would be given to the manner in which the application should be dealt with. Pending such decision, and any further directions, the respondent was not required to respond to the applicant's written argument. The applicant's argument was duly filed.

[6] I have given careful consideration to the application, the reasons of the applicant in support thereof and the written argument of his counsel. In my opinion the application should be dismissed at this stage without calling for a response from the respondent. The following are the reasons for that conclusion.

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[3] Section 8(1) of the Constitution provides that:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[7] The applicant does not suggest that the original application before Southwood J or the subsequent applications for condonation and for leave to appeal in themselves raised any constitutional issue. It is thus not necessary for this Court to consider the nature or detail of those applications. Suffice it to say that the matter is one of substantial importance to the applicant: on the strength of the judgment of Southwood J, the Law Society of the Transvaal is seeking to strike the applicant's name from the roll of attorneys. What is said to be a constitutional issue is the dismissal by the Supreme Court of Appeal of the petition without furnishing any reasons. That, however, on the face of it, is a matter of procedural practice and whether it raises a constitutional question is open to doubt. However, I shall approach the matter as if there is a constitutional issue involved.

[8] In their written argument, counsel for the applicant refer in some detail to the transformation of our society brought about by the Constitution and especially the Bill of Rights. They submit that the furnishing of reasons for all decisions will make the accountability of judges more apparent, and help restore the legitimacy of, and maintain public confidence in, the judiciary. In their submission this is necessary in the light of the perception of the vast majority of black South Africans that the judiciary traditionally served the interests only of the apartheid state and that the laws enforced by it were illegitimate as black South Africans had no say or representation in making those laws.

[9] Counsel go on to submit that the Constitution "creates an ethos of accountability" in the context of which the right of access to courts, guaranteed by section 34 of the Constitution,[4] must be made effective. Without furnishing reasons for all judicial decisions, they submit, this right is violated. They rely further on the right to information which is granted by section 32 of the Constitution.[5] They submit that the applicant is entitled to the reasons for the decision of the Supreme Court of Appeal, which is information in its possession and that there is a fundamental connection between the right to information and the creation of a constitutional democracy based on the principle of openness.

[10] Counsel rely, finally, on the right to equality enshrined in sections 9(1) and (2) of the Constitution[6] and submit that there is no reason for treating parties to civil litigation

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4 Section 34 provides that:

> "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."

5 Section 32(1) of the Constitution provides that :

> "Everyone has the right of access to -
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> (a) any information held by the state; and
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> (b) any information that is held by another person and that is required for the exercise or protection of any rights."

In terms of section 32(2) national legislation must be enacted to give effect to this right. In terms of the Sixth Schedule to the Constitution, until national legislation is enacted section 32(1) must be regarded to read as follows:

> "(1) Every person has the right of access to all information held by the state or any of its organs in any sphere of government in so far as that information is required for the exercise or protection of any of their rights."

6 Section 9(1) and (2) provide that:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
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> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To

differently from parties to criminal litigation. The foregoing is a brief and truncated summary of the submissions contained in counsel's written argument. I will deal with each of the submissions in turn.

[11] I agree with applicant's counsel that the judiciary has a responsibility to ensure that practices which grew up in our courts in the pre-constitutional era should be scrutinised carefully in order to ensure that they are compatible with the provisions and precepts which govern our still young constitutional democracy. However, simply because a practice was established during the apartheid era does not, without more, render it bad or unconstitutional. Indeed, the continuity of the judicial system was expressly provided for in both the interim and 1996 constitutions. It is necessary to examine the procedure now under attack and to determine whether in a case such as the present it is objectionable for any reason founded on the Constitution.

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promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken."

[12] There is no express constitutional provision which requires judges to furnish reasons for their decisions. Nonetheless, in terms of section 1 of the Constitution, the rule of law is one of the founding values of our democratic state,[7] and the judiciary is bound by it. The rule of law undoubtedly requires judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions. Then, too, it is essential for the appeal process, enabling the losing party to take an informed decision as to whether or not to appeal or, where necessary, seek leave to appeal. It assists the appeal court to decide whether or not the order of the lower court is correct. And finally, it provides guidance to the public in respect of similar matters. It may well be, too, that where a decision is subject to appeal it would be a violation of the constitutional right of access to courts if reasons for such a decision were to be withheld by a judicial officer.

[13] The mere fact that there is no appeal against a decision is not in itself a justification for not furnishing reasons. Courts of last instance in this and most democratic countries do furnish reasons. However, in applications for leave to appeal to a court of last

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[7] Section 1(c) states that:

> " The Republic of South Africa is one, sovereign, democratic state founded on the following values:
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> . . .
>
> (c) Supremacy of the constitution and the rule of law."

instance, other compelling practical considerations apply. In particular, it is not in the public interest to clog the rolls of such courts by allowing "unmeritorious and vexatious issues of procedure, law or fact" to be placed before them.[8] The purpose of the procedure requiring leave to appeal is to avoid the waste of judicial time.

[8] See *S v Rens* 1996 (2) BCLR 155 (CC) at paras 24 and 25.

[14] The refusal of leave to appeal by the Supreme Court of Appeal is not appealable to any other court.[9] The failure to furnish reasons for a decision made under section 21 of the Supreme Court Act cannot prejudice the unsuccessful litigant in taking the matter further. Except in constitutional matters, the end of the litigation road has been reached. Moreover, a litigant who is refused leave to appeal will already have been informed by the court of first instance, and in some cases also by a court of appeal, of the reasons for the adverse order. To ensure that adequate attention is given to an application for leave to appeal by the Supreme Court of Appeal, section 21 of the Supreme Court Act provides that at least two judges of that Court must consider the reasons of the lower court. The litigant will, expressly or by clear implication, be informed by their decision that there is no prospect of successfully challenging that order on appeal.

[15] To require the Supreme Court of Appeal to listen to argument and give reasoned judgments in applications for leave to appeal which have no substance, or even to give reasoned judgments in such matters without hearing oral argument, would defeat the purpose of the requirement that "leave" be obtained. Such matters can and should be disposed of summarily.[10]

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9 Section 21(3)(d) of the Supreme Court Act, 1959 expressly provides that:
"The decision of the majority of the judges considering the application, or the decision of the appellate division [the Supreme Court of Appeal], as the case may be, to grant or refuse the application shall be final".

10 Courts of appeal in many democratic countries have a procedure for applications for leave to appeal. It is not customary for reasons to be furnished for the refusal of leave. In countries such as the United States of America and Canada, one of the reasons for requiring leave to appeal is to enable their courts of final instance to control their dockets. In those jurisdiction, therefore, leave may be refused even

where there are prospects of success on appeal. As it was put by Lamer CJ in *R v Hinse* (1996) 130 DLR (4th) 54 at 62:

> "The ability to grant or deny leave represents the sole means by which this court is able to exert discretionary control over its docket. In order to ensure that this court enjoys complete flexibility in allocating its scarce judicial resources towards cases of true public importance, as a sound rule of practice, we generally do not convene oral hearings on applications for leave, nor do we produce written reasons for our grants and denials of leave."

In the German Constitutional Court there is also no requirement for the furnishing of reasons for the refusal of an application for leave to appeal. See Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* 2 ed at 19.

For different reasons, it would be appropriate to deal with matters summarily and make orders without furnishing reasons - for instance unopposed applications where the matter is clear or applications for direct access to this Court.

[16] The provisions of the Constitution which relate to the right to information[11], as they now are deemed to read, apply only to a case where the information is required "for the exercise or protection" of a right. In this case even if the applicant were to be given the reasons he seeks, he would not be able to claim any consequent right. The refusal of his application for leave to appeal by the Supreme Court of Appeal is final.[12] The applicant's reliance on section 32(1) of the Constitution thus misplaced.

[17] The provisions relating to applications for leave to appeal apply no less to criminal matters than to civil. The applicant's reliance on the equality clause is thus also misplaced.

[18] Courts of first instance invariably furnish reasons for their decisions, whether in criminal or civil cases. As I have already suggested, if they fail to do that, they might be in violation of a constitutional duty. In the present case Southwood J furnished reasons for his decision. It was on the basis thereof that the Chief Justice was petitioned for leave

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11 Above n 5.

12 Above n 9.

to appeal. The two judges of the Supreme Court of Appeal had those reasons before them when they considered the application. As stated in the letter from the Legal Administrative Officer in the Chambers of the Chief Justice, the refusal of leave to appeal means that the judges were of the opinion that there was no reasonable prospect of an appeal succeeding. That has always been the position. It does not necessarily carry with it the implication that the judges in the appeal court agree with the reasons of the court below. It might mean no more than that, whether for the reasons in the judgment, or for other legal considerations, there is no reasonable prospect of a different order being granted on appeal. In the result, the applicant has been given reasons for the adverse decision in the court of first instance and has been informed by the highest court having jurisdiction in the matter that there are no reasonable prospects of a different order being granted on appeal. In my opinion, this procedure is not in any way inconsistent with an open and democratic society.

[19] There has accordingly been no breach of the Constitution in this case. Even if this Court were to have jurisdiction to order the Supreme Court of Appeal to grant an application for leave to appeal, which is open to serious doubt, it could not do so in a case such as the present, where there has been no breach of the Constitution.

[20] It remains to deal with the costs of this application. The issue raised by the applicant is an important one which in my opinion he was entitled to have considered by

this Court. In accordance with our usual practice in such cases I would make no order as to costs.

THE ORDER

The application is dismissed.

Chaskalson P, Langa DP, Ackermann J, Kriegler J, Madala J, Mokgoro J, O' Reagan J, Sachs J and Yacoob J concur in the judgment of Goldstone J.

GOLDSTONE J

For the Applicant :	Adv E Seima and Adv J Mguni instructed by Mpho Mofomme Attorneys.
For the Respondent :	Mr Brink of Rooth and Wessels Attorneys.