CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 29/03

ARTHUR GCALI	Applicant
versus	
THE MEC FOR HOUSING AND LOCAL GOVERNMENT IN THE EASTERN CAPE	First Respondent
MAXWELL MUTILE MAMASE	Second Respondent
THE BUTTERWORTH TRANSITIONAL LOCAL COUNCIL	Third Respondent
ANTHONY MNONELELI BAM	Fourth Respondent
THE DAILY DISPATCH MEDIA (PTY) LIMITED	Fifth Respondent
MNQUMA LOCAL MUNICIPALITY	Sixth Respondent

Decided on : 6 October 2003

JUDGMENT

THE COURT:

[1] This is an application for direct access under the provisions of section 167(6)(a)[1] of the Constitution and rule 17[2] of the Constitutional Court Rules. The

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[1] Section 167(6)(a) provides:

applicant brings these proceedings in person but states that he has been assisted in drafting the application by his erstwhile attorney Mr Gcobani Bam.

[2] The applicant, Mr Arthur Gcali, resides in Engcobo in the Eastern Cape Province and was previously Town Clerk of the Municipality of Butterworth. First respondent is the MEC for Housing and Local Government in the Eastern Cape; the second respondent is Mr Maxwell Mamase, cited as a former member of the Executive Council for Housing and Local Government in the Eastern Cape; as third respondent the applicant cites the Butterworth Transitional Local Council; the fourth respondent is Mr Anthony Bam, a former mayor of third respondent; the fifth respondent is the Daily Dispatch Media (Pty) Ltd; and as sixth respondent the applicant cites the Mnquma Local Municipality.

"(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 –
(a) to bring a matter directly to the Constitutional Court."

[2] Rule 17(1) and (2) of this Court provide:

"Direct access in the interests of justice
(1) An application for direct access as contemplated in section 167 (6)(a) of the Constitution shall be brought on notice of motion which shall be supported by an affidavit which shall set forth the facts upon which the applicant relies for relief.
(2) An application in terms of subrule (1) shall be lodged with the registrar and served on all parties with a direct or substantial interest in the relief claimed and shall set out—
(a) the grounds on which it is contended that it is in the interests of justice that an order for direct access be granted;
(b) the nature of the relief sought and the grounds upon which such relief is based;
(c) whether the matter can be dealt with by the Court without the hearing of oral evidence and, if it cannot,
(d) how such evidence should be adduced and conflicts of fact resolved."

[3] The application is prolix, repetitive and lacking in clarity, while the relief sought extensive and varied. Suffice it to say that there are two main recurring themes in the founding papers and the relief sought. The first concerns the applicant's insistence that the third respondent, whom the applicant cites in his papers in this Court as "The Butterworth Transitional Local Council," is a fiction and has never existed in law, that the Butterworth Municipality does not exist, and that the Mnquma Local Municipality, whom the applicant cites as the sixth respondent, is the only legitimate organ of state in local government in Butterworth, Centane and Nqamakwe.

[4] The second theme concerns the applicant's complaints about the way he has been treated, on a number of occasions, by the Transkei High Court (the "High Court"). This treatment, he contends, has amounted to an infringement of his right under section 34 of the Constitution –

> ". . . 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 applicant alleges in this regard that he has not had the benefit of a fair hearing before the High Court on a number of occasions and that, ultimately, his access to the High Court has been completely excluded. He consequently seeks, amongst other prayers, the setting aside of a number of judgments and orders, both specified and unspecified, of the High Court. Pursuant thereto, the applicant moreover seeks various judgments and orders from this Court on his various claims against the respondents, as though this Court was one of first instance.

[5] The applicant's contentions will be better understood against a brief survey of the relevant litigation in which he has been involved.

[6] On 26 February 1999 the applicant instituted an action in the High Court under case number 425/99 for damages against the first two respondents (as first and second defendants respectively), the Butterworth Transitional Local Council as third defendant, and the fourth and fifth respondents (as fourth and fifth defendants respectively). In this action one claim was based on his wrongful dismissal as Town Clerk of the then Butterworth Municipality. The applicant also claimed damages against the first, second, fourth and fifth respondents based on various alleged defamatory statements. At a hearing held on 5 September 2002 – to which fuller reference will be made in paragraphs 14 to16 below – the High Court substituted the Butterworth Municipality for the Butterworth Transitional Local Council as the third defendant in the action. The applicant contends that this is wrong in law, and that the Mnquma Local Municipality (cited as sixth respondent in the present proceedings) should in fact have been so substituted.

[7] Exception was taken by certain of the respondents to the applicant's particulars of claim, which was upheld by Ponnan AJ in the High Court on 21 December 2000, but leave was granted to the applicant to amend his particulars of claim. This the applicant did, but the amended particulars of claim was challenged by another exception. Then followed three High Court hearings which form the main thrust of the applicant's constitutional challenge.

[8] When the exception was argued on 25 September 2001 (the "first hearing") before Dotwana AJ, counsel for the respondents contended that the applicant had, in affidavits before the High Court, made offensive remarks about the competence of the judges of the High Court that bordered on contempt of court. The content of these remarks does not appear from the papers. They were, however, characterised as being of a serious nature by the High Court at a later stage.

[9] At the first hearing, the High Court responded to these remarks and the submissions advanced by the respondents thereon by making the following order:

> "1. The case is postponed to 8 November 2001.
> 2. The respondent, Mr Gcali, is ordered to file an affidavit with the Registrar not later than 10 October 2001 wherein he apologises unreservedly for the remarks he has made in his affidavits about the competence of Judges of this Division, which remarks border on contempt of Court.
> 3. The respondent is ordered to pay today's wasted costs including the costs of two Counsel."

[10] On 8 November 2001 the matter was heard by Jafta AJP (the "second hearing"). As at this date, the applicant had not filed the affidavit of apology in compliance with paragraph 2 of the order made at the first hearing. Instead, he filed a notice questioning the authority of the High Court to issue the order of 25 September and indicating his unwillingness to comply therewith.

[11] Jafta AJP in a full written judgment, delivered on 15 November 2001,[3] regarded the applicant's conduct as being contemptuous of the High Court and held that the applicant

> ". . . should be barred from taking any further step in the matter or being heard until he has purged his contempt."

He accordingly made the following order:

> "1. The matter is postponed **sine die**.
> 2. The respondent shall not set the matter down, be heard or take any further step therein until he has complied with the order of 25 September 2001.
> 3. The respondent is ordered to pay costs occasioned by the hearing on 8 November 2001 on the scale of attorney and client, which costs shall include the costs consequent upon the employment of two counsel.
> 4. The Registrar is directed to send a copy of this judgment to the office of the Director of Public Prosecutions."

[12] In concluding his judgment, Jafta AJP advised the applicant as follows:

> ". . . I wish to repeat the advice given to the respondent during the hearing of this matter, namely, that he must obtain legal representation. The matter is extremely complex for a person who is not legally trained. The original particulars of claim were drawn by counsel and were later found excipiable by this Court. The respondent was granted leave to amend them and it is his amendment which has prompted the applicants to file an application to have the amended particulars set aside. Should the Court grant the application, the whole exercise would prove to be highly costly to the respondent."

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[3] Unreported.

[13] On 5 September 2002 certain of the respondents applied in the High Court under rule 30 of the Uniform Rules of Court to have the applicant's particulars of claim set aside (the "third hearing"). At the time of this hearing the applicant had filed an affidavit of apology as required by the order made at the first hearing but had not yet paid the wasted costs of the first hearing. Such costs had not yet been taxed by the respondents. It is for purposes of this case unnecessary to decide whether the absence of such taxation had any impact on the barring order; or whether the applicant could in law have called on the respondents to present him with a bill of costs and, on failure to do so, place them in *mora*.

[14] At this third hearing the applicant was represented by his legal representative, Mr Gcobani Bam. On this occasion the High Court refused to grant either Mr Bam or the applicant the right to audience. Mr Bam then left the Court. The applicant says that the judge on this occasion indicated that he (the applicant) had to make an application for the upliftment of the bar before he could be heard. The applicant remained in court throughout the hearing of the application, in his own words, "recording the proceedings".

[15] At the conclusion of the third hearing the High Court made the following order:

> "1. The delay by the First to Fourth Defendants (excipients) to institute these proceedings be and is hereby condoned.
> 2. The Butterworth Municipality be and is hereby substituted as Third Defendant in case number 425/99 and all proceedings incidental thereto;

3. The amended Particulars of Claim dated 31 January 2001 be and are hereby declared irregular in terms of the provisions of rule 30 of the Rules of the High Court and are set aside.
4. The plaintiff be and is hereby granted leave to amend his Particulars of Claim within thirty (30) days of this Court granting an Order confirming the Plaintiff's compliance with this Court's Orders dated 25 September 2001 and 15 November 2001.
5. The Plaintiff pay the costs of the application on a scale as between Attorney and its own client, which costs shall include the costs consequent upon the employment of two Counsel.
6. Directing that a copy of this Order be served on the Plaintiff personally, and
7. It is recorded that the Plaintiff was present in Court throughout the hearing of this application."

The applicant made no effort to appeal against any of the orders made at the conclusion of the first, second or third hearing.

[16] On the basis of these facts the applicant contends in his present application that his constitutional rights have been infringed –

(a) because the Butterworth Transitional Local Council, the Butterworth Municipality and the fourth respondent are bogus or fictitious parties; and
(b) because he has been barred to this day from being heard by the High Court.

[17] He argues that he has no other remedy except to seek review from this Court of the judgments and orders consequent upon the three hearings in the High Court because –

> "(i) before I can appeal to a full bench of the Transkei Division of the High Court I must first be granted leave to appeal by the court of the first instance that made the decision to bar me which will refuse to hear my application for leave.
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> (ii) Also before I can appeal to the Appellate Division of the High Court of Transkei I need to be granted leave to appeal by the same court of the first instance that made the decision to bar me."

Therefore, so the applicant submits, he has no option but to apply to this Court for direct access.

[18] In form the application is one for direct access. In substance it is a disguised application for leave to appeal[4] against the three judgments referred to. In an application for direct access under section 167(6)(a) of the Constitution read with rule 17 of the Constitutional Court Rules, the applicant must show, in order to succeed, that it is in the interests of justice and that exceptional circumstances exist that warrant the granting of direct access.[5] In assessing whether exceptional circumstances have been established by the applicant, the Court will *inter alia* take the following factors into consideration:

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[4] As to which see *Shongwe v S* 2003 (8) BCLR 858 (CC) para 4 where this Court stated that:

> "Rule 17 is a procedure for gaining access to this Court directly . . . It is not an appeal procedure, nor may it be used for disguised appeals."

[5] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (4) BCLR 415 (CC); 1998 (2) SA 1143 (CC) para 9; *Christian Education South Africa v Minister of Education* 1998 (12) BCLR 1449 (CC); 1999 (2) SA 83 (CC) para 4; *Dormehl v Minister of Justice and Others* 2000 (5) BCLR 471 (CC); 2000 (2) SA 987 (CC) para 5; *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) BCLR 156 (CC); 2002 (2) SA 715 (CC) para 29; *Van der Spuy v General Council of the Bar of South Africa and Others* 2002 (10) BCLR 1092 (CC); 2002 (5) SA 392 (CC) para 6-7; *Satchwell v President of the Republic of South Africa and Another* 2003 (4) SA 266 (CC) para 6 and *Ex parte: Ahmed Raffik Omar* (as yet unreported, delivered on 11 September 2003) Case CCT 32/03 para 4.

> "[W]hether any dispute of fact may arise in the case, whether the issues have been properly traversed by other courts, the attitude of the other parties to the litigation, the possibility of the applicant obtaining relief in another court, the importance of the legal issues raised and the desirability of an immediate decision thereupon. Perhaps the most important factor is the recognised undesirability of this Court being the court of both first and final instance in a matter."[6]

[19] The applicant took no steps to appeal any of the orders granted in consequence of the three hearings referred to. His excuse that he could not do so because he had been barred from appearing is legally unsound. It is incorrect to contend that he was not able to apply to the High Court or the Supreme Court of Appeal for leave to appeal against any of these orders because of his barring. If in any application for leave to appeal, either in the High Court or in the Supreme Court of Appeal, it had been contended that a barring order had been wrongly granted, whether on fact or law, the court hearing the application would be bound to consider the merits of such contention in order to determine the application. These conclusions apply with equal force to the applicant's complaints against the status of the parties in his High Court action. He could have appealed the substitution order made at the third hearing, at the same time as appealing the other orders granted at the three hearings.

[20] The truth of the matter is that the applicant, unfortunately for himself, does not comply with court orders and does not appeal them either. The nature of all the applicant's complaints is such that they should have been pursued by way of appeal in the ordinary course. The complaints all relate, in one form or another, either to

[6] *Satchwell's* case above n 5 at para 6, footnotes omitted.

procedural matters in litigation, the basis upon which exceptions should be granted, or the circumstances under which parties, who ignore court orders, can be barred from further appearance. Even to the extent that such issues raise, or may raise, constitutional issues, they are the very procedural and litigation issues that should be dealt with exhaustively by the High Courts, whether on appeal or otherwise, and by the Supreme Court of Appeal, before this Court is approached for relief.[7] It is far removed from the interests of justice to allow an applicant, under these circumstances, to apply for direct access to this Court.

[21] There is a further consideration that strongly militates against the granting of direct access. Several of the claims pursued by the applicant in this application will undoubtedly give rise to disputes of fact. It is not in the interests of justice that this Court should resolve such disputes.

[22] This is not a case where the Court should, as an indulgence to the applicant as a lay litigant,[8] treat his application as one for leave to appeal against the various High Court orders. In substance, the issues raised by the applicant are ones that involve the application of the common law and procedure and which should, as a matter of course, be heard by the Supreme Court of Appeal. It is not a matter in which it would be

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[7] *De Freitas and Another v Society of Advocates of Natal* (Natal Law Society intervening) 1998 (11) BCLR 1345 (CC) paras 21-3; *Van der Spuy v The General Council of the Bar and Others* above n 5 para 13.

[8] As to which see, *Dormehl v Minister of Justice and Others* above n 5 para 1; *Xinwa and Others v Volkswagen SA (Pty) Ltd* 2003 (6) BCLR 575 (CC) para 13 and the authorities referred to therein.

appropriate to permit an appeal directly to this Court, even if the proper procedures had been followed.

[23] One last matter needs to be dealt with. Although there is no substantive prayer for such relief, one finds – tucked away in the papers – a request that this Court should have a legal representative appointed to argue the application on the applicant's behalf. This request will be treated as though it were embodied in an appropriate prayer. There is no express constitutional right to have free legal representation in civil matters. This Court has, on occasion, and at its own instance, arranged for such representation, where it has considered it necessary and in the interests of justice to do so. The present case does not call for this. Such complexities as do exist, are of the applicant's own making and arise in part because of his unfortunate inclination to follow his own head and to ignore or seek to circumvent court orders. There is no merit in this request.

[24] For all the reasons set forth above, it is not in the interests of justice to grant the applicant direct access to this Court.

[25] In coming to this conclusion, we have had regard to the applicant's notice and supporting document, filed on 16 September 2003, objecting to the fifth respondent's opposition to the application. We have dealt summarily with the application in terms

of rules 17(5) and 18(10)(b)[9] of our Rules. In so doing, we have come to our above conclusion solely on the basis of the applicant's own papers.

[26] The applications are therefore all dismissed.

By the Court: Chaskalson CJ, Langa DCJ, Ackermann J, Goldstone J, Madala J, Mokgoro J, Moseneke J, O'Regan J, Sachs J and Yacoob J.

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[9] The relevant part of Rule 17(5) provides that –

> "[a]pplications for direct access may be dealt with summarily, without hearing oral or written argument other than that contained in the application itself . . . "

Compare Rule 18(10)(b), which makes identical provision in regard to an application for leave to appeal.