

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 27/02

GABRIEL NTLELI SWARTBOOI
AND SEVENTEEN OTHERS

Appellants

versus

LILIAN RAY BRINK

First Respondent

GERRIT NIEWOUDT

Second Respondent

Heard on : 12 November 2002

Order made on : 21 November 2002

Reasons delivered on : 3 April 2003

JUDGMENT

YACOOB J:

[1] The appellants, all members of the council of Nala Local Municipality (the council) were granted leave to appeal by this Court¹ against part of a judgment and order of the Free State High Court (the High Court).² The short judgment granting

¹ *Swartbooi and Others v Brink and Another* 2003 (1) BCLR 21 (CC) delivered on 21/11/2002.

² *L R Brink and G Niewoudt v The Speaker of the Nala Municipality and Another* OPD 2125/2001 10 December 2001, unreported.

leave to appeal said that full reasons for that decision would be furnished when judgment on the appeal was given.³ That judgment is being delivered simultaneously with these reasons and contains all the relevant facts.

[2] A procedural question must be answered before the reasons for granting leave to appeal are set out. The appellants sought leave to appeal to this Court after an application for leave to appeal was refused by the Supreme Court of Appeal (SCA). They based their application on rule 20 of the Constitutional Court rules on the understanding that they were seeking leave to appeal against the order of the SCA.⁴ The procedural question that arises is whether the appellants were correct in their use of rule 20 or whether rule 18 is the appropriate rule. Rule 18 is headed “Appeals from courts other than the Supreme Court of Appeal” and subrule (1) of that rule provides:

“The procedure set out in this rule shall be followed in an application for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court other than the Supreme Court of Appeal *irrespective of whether the Chief Justice⁵ has refused leave or special leave to appeal.*” (my emphasis)

³ These reasons are being given separately from the main judgment because the court that heard the application for leave to appeal was constituted differently from that which heard the appeal.

⁴ Made on 5/7/2002.

⁵ The rules of the Constitutional Court pre-date the amendments to the Constitution effected on 21 November 2001 and at a time when section 168(1) of the Constitution provided for a Chief Justice to head the SCA and section 167(1) for the President of the Constitutional Court to lead this Court. Now, section 167 of the Constitution locates the Chief Justice within this Court and section 168(1) provides for the President of the SCA to head up that Court.

Rule 20 is titled “Appeal against a decision of the Supreme Court of Appeal” and its first subrule says:

“An appeal to the Court on a constitutional matter against a judgment or order of the Supreme Court of Appeal shall be granted only with the special leave of the Court on application made to it.”

[3] Rules 18 and 20 are both concerned with the procedure by which leave to appeal to this Court may be sought against decisions by other courts on constitutional matters.⁶ Rule 20 sets out the procedure for leave to appeal against an SCA decision while rule 18 prescribes the steps in an application for leave to appeal directly to the Constitutional Court from a court other than the SCA. The appellants’ decision to approach this Court through rule 20 can be correct only if rule 20 covers applications for leave to appeal to this Court in a case in which the President of the SCA has refused leave to appeal.

[4] Rule 20 covers applications for leave to appeal against decisions of the SCA that are appealable. This Court held in *Mphahlele’s* case⁷ that the refusal of a petition for leave to appeal to the SCA is not appealable. When the SCA refuses to grant leave to appeal in a case, the appeal to this Court is not an appeal against the SCA’s refusal of leave to appeal to it but an appeal against the High Court decision itself. Rule 18 governs appeals against such decisions. This is made clear in rule 18 itself. Subrule (1) of rule 18 expressly states that it applies to appeals against decisions of courts

⁶ Although rule 20(1) as distinct from rule 18(1) refers to an appeal “against a judgment or order of the Supreme Court of Appeal” subrule (2) refers to a “decision of the Supreme Court of Appeal on a constitutional matter”.

⁷ *Mphahlele v First National Bank of South Africa Ltd* 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC) at para 14.

other than the SCA “irrespective of whether . . . the SCA has refused leave . . . to appeal.”

[5] The appellants’ counsel submitted during argument that if the procedure they followed were incorrect this Court should condone their non-compliance with rule 18. Condonation is usually granted if it is in the interests of justice to do so.⁸ The application for condonation in this case is intertwined with the application for leave to appeal where the question of the interests of justice also arises.

[6] An application for leave to appeal will be granted if the issue to be determined in the proposed appeal involves a constitutional matter and if it is in the interests of justice for leave to be granted.⁹ The part of the judgment and order of the High Court in issue in this case is the order that required the appellants to pay out of their own pockets the costs of the proceedings in which two decisions of the council were set aside. Broadly speaking, the court decided that the appellants, though not initially parties to the litigation, should pay the costs of the proceedings on the basis that they supported and voted for both impugned decisions. The substance of the reasoning was that the decisions that had been set aside could not reasonably have been made and were characterised by undertones of racism and *mala fides*.¹⁰

⁸ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

⁹ *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) at para 7; *NUMSA and Others v Bader Bop (Pty) Ltd and Another* 2003 (2) BCLR 182 (CC) at para 15.

¹⁰ High Court judgment at 15.

[7] The High Court based its decision on the conduct of the appellants during deliberations at a full council meeting, deliberations which culminated in the decisions that had been taken and that fell to be set aside. In these circumstances, the appellants claim the protection accorded by section 161 of the Constitution¹¹ to which section 28 of the Local Government: Municipal Structures Act No. 117 of 1998 gives effect. Subsection (2) of section 28 provides:

“(2) Until provincial legislation contemplated in subsection (1) has been enacted the privileges referred to in paragraphs (a) and (b) of subsection (1) will apply to all municipal councils in the province concerned.”

[8] Members of a municipal council are elected and hold office pursuant to the Constitution¹² and must perform their functions within the terms of the Constitution.¹³ The protection accorded by section 28(2) has its roots in the Constitution.¹⁴ In addition, an order by a court that democratically elected members of a municipal council should pay the costs arising out of their conduct in the council raises important constitutional issues. These issues concern the freedom of speech of members of elected deliberative bodies and the separation of powers between the judiciary on the one hand and the executive and legislative branches of government on the other. The

¹¹ Section 161 of the Constitution provides:

“Provincial legislation within the framework of national legislation may provide for privileges and immunities of Municipal Councils and their members.”

¹² Sections 157 and 158 of the Constitution.

¹³ Chapter 7 of the Constitution.

¹⁴ Note 11 above.

question of the circumstances in which elected public representatives should incur personal liability for their conduct at meetings of the council is a constitutional matter.

[9] The issues in the appeal are of importance to the functioning and growth of a constitutional democracy and to a material aspect of the relationship between the judiciary and the legislative and executive arms of government within this democracy. The decision on the appeal will have relevance not only to the case at hand but also to the functioning of every municipal council and to the conduct of every municipal council member. These issues have not been decided before. In the circumstances, we concluded that it is in the interests of justice for this Court to hear the appeal and for the non-compliance with rule 18 to be condoned.

[10] The application for leave to appeal was accordingly granted on 21 November 2002.

Chaskalson CJ, Langa DCJ, Goldstone J, Kriegler J, Mokgoro J, Ngcobo J, O'Regan J and Sachs J concur in the judgment of Yacoob J.

For the applicants:

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For the respondents:

S.J. Reinders instructed by G.P. Niewoudt &
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