

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 45/02

SIPHO SHONGWE

Applicant

versus

THE STATE

Respondent

Decided on : 30 May 2003

JUDGMENT

THE COURT:

[1] This is an application for direct access to the Court in terms of rule 17 lodged by the applicant's attorney on his behalf.¹ The applicant was convicted in the Pretoria High Court of a number of serious charges, including murder, attempted murder and robbery, arising from a cash-in-transit robbery that took place on 31 July 1997. On 1 March 2001, he was sentenced to two terms of life imprisonment as well as several further periods of imprisonment which he is currently serving. His application for

¹ Rule 17(1) provides as follows:

“An application for direct access as contemplated in s 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.”

leave to appeal against his conviction was refused both by the High Court and the Supreme Court of Appeal.

[2] In convicting the accused, the High Court relied upon the evidence of a state witness regarding the applicant's involvement in the planning of the robbery as corroborated by certain admissions and a pointing out made by the applicant to a police officer during the night of 19 and 20 March 1998. The High Court did not consider the state witness's evidence to be wholly satisfactory and relied on it only to the extent that it was corroborated by other evidence.

[3] The applicant argues, amongst other things, that in admitting the evidence of the pointing out and the admissions made on the night in question, his fundamental right to a fair trial was impeached. This assertion is made on the basis that prior to the applicant's being arrested on 19 March 1998, the police had given an undertaking to his attorney that should they wish to question the applicant, they would first contact his attorney. The police breached this undertaking on 19 March 1998 which the applicant asserts constitutes a breach of his right to a fair trial.

[4] The state has not filed any opposition to the applicant's case. From a reading of his affidavit alone, it may well be that the applicant raises a substantive constitutional point that may or may not affect the correctness of his conviction. However, it is quite clear that the procedure adopted by the applicant is quite wrong. In essence, the applicant seeks direct access to this Court to appeal against his conviction by the High

Court. It is impermissible to use the rule 17 procedure for appeals. Rule 17 is a procedure for gaining access to this Court directly, ordinarily in circumstances where the issue raised has not been considered by another court.² It may be employed in exceptional circumstances only.³ It is not an appeal procedure, nor may it be used for disguised appeals.

[5] In this case as the applicant wishes to appeal his conviction, the only course open to him is to approach the Court in terms of rule 18.⁴ Given that the applicant is represented by an attorney,⁵ there is no reason for this Court to treat his rule 17 application as a rule 18 application in particular because such an application would have to be accompanied by an appropriate application for condonation. This Court has not yet considered the circumstances in which it would be proper to grant condonation in cases where a substantive constitutional issue is raised in a criminal matter where the time for an appeal has long since expired. In considering such a

² See *Van der Spuy v General Council of the Bar of South Africa (Minister of Justice and Constitutional Development, Advocates for Transformation and Law Society of South Africa Intervening)* 2002 (5) SA 392 (CC); 2002 (10) BCLR 1092 (CC) at paras 7 – 9.

³ See *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) at para 4.

⁴ Rule 18(1) provides as follows:

“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 Justice has refused leave or special leave to appeal.”

⁵ In *Wallach v High Court of South Africa and Others* CCT 2/03 as yet unreported decision of this case dated 4th April 2003, the applicant was unrepresented. That application too concerned what was, in effect, an attempt by an applicant to appeal a decision of the High Court under rule 17. It was dismissed by the Court for that reason. The court also held that even if the defective application were to be construed as a rule 18 application it was not proper for a direct appeal to be brought to this Court and would fail on that basis too.

matter, the Court would be alert both to the need to provide protection for constitutional rights, on the one hand, and to the desirability of finality in litigation, on the other. The Court could only decide this issue in a proper case where an application for condonation is lodged and where the state has had an opportunity to respond. An applicant would also need to show some legitimate reason for his or her failure to launch the application for leave to appeal to this Court timeously. Be that as it may, the question does not arise for determination here as the procedure adopted by the applicant is quite inappropriate.

[6] The application is therefore dismissed.

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

For the applicant: LS Francis Attorneys