CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 61/05

MALIBONGWE MTOTYWA	First Applicant
ANDILE MJAYEZI	Second Applicant
KOCKET ZELE	Third Applicant
LANDELA SIQONDIFATYI	Fourth Applicant
GCINIBANDLA GXIVA	Fifth Applicant

versus

THE DIRECTOR OF PUBLIC PROSECUTIONS: (MTHATHA)	First Respondent
ATTORNEY (ATKIN. F. NOXAKA)	

Decided on : 14 December 2005

JUDGMENT

THE COURT:

[1] In this matter, applicants have applied for direct access under Rule 18 of the Rules and contemplated in section 167(6)(a) of the Constitution. The applicants are all inmates at the Mthatha Maximum Prison, Mthatha.

[2] In July 2001 the applicants were convicted of two counts of murder, four of attempted murder, four of arson and one count of assault with intent to do grievous bodily harm. On 31 July 2001 they were each sentenced to two terms of life imprisonment on the charges of murder and a collective 71 years imprisonment in respect of the rest of the charges. All the sentences run concurrently.

[3] Applicants appealed against their convictions and the sentences imposed by the single judge in the Mthatha High Court (High Court) to the full bench, presumably with the necessary leave, which in turn dismissed the appeal. They applied for leave to appeal to the Supreme Court of Appeal (SCA), which dismissed the application in July 2004.

[4] After this application was dismissed, applicants appointed new attorneys. After studying the cases and the record in the High Court new counsel advised applicants that they had been provided with incompetent and ineffective legal representation and on that basis they had been denied a fair trial.

[5] The applicants returned to the High Court on 25 July 2005, applying for a special entry on the record under section 317 of the Criminal Procedure Act (CPA). They argued that the incompetence of their legal representative gave rise to irregularity in their trial, making the trial unfair. The High Court dismissed the application.

[6] Basing its reasoning on *Sefatsa and Others v Attorney-General, Transvaal, and Another* 1989 (1) SA 821 (A) and *Mabunjana v The Magistrate of Lusikisiki and Another* 1995 (2) SACR 368 (T), the court held that it was not permissible to apply for a special entry at a time when the appeal procedure had been exhausted. Once an application for leave to appeal against a decision of the trial court is granted, the court becomes *functus officio* and would have no jurisdiction to make the entry.

[7] The applicants now approach this Court directly from the High Court, claiming entitlement to a special entry, without which their trial would not have been fair, contrary to section 35(3) of the Constitution. Whether this is properly an application for direct access under Rule 18 or one for leave to appeal under Rule 19, we need not decide. In either instance, this Court is asked to be the first to consider the constitutional issue at stake without the benefit of an SCA judgment on the matter.

[8] Although the applicants are of the view that the question of the special entry under section 317 of the CPA in the context of the right to a fair trial raises a constitutional matter falling within the jurisdiction of this Court, it is not in the interests of justice to grant the application for direct access: the applicants do not show any exceptional circumstances which exist, justifying why this matter should come to this Court directly. We could not find any. It is therefore not clear why this Court is better placed than any other court in the normal course of the appeals procedure to hear the matter.

[9] In the result, the application for direct access to this Court is dismissed.

THE COURT: Langa CJ, Moseneke DCJ, Mokgoro J, Ngcobo J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.