CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 47/05

PHINEAS LEKOLWANE First Applicant

ELIZABETH LEKOLWANE Second Applicant

versus

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Respondent

Heard on : 22 August 2006

Decided on : 22 August 2006

Reasons furnished on : 23 November 2006

JUDGMENT

THE COURT:

[1] Two applications were lodged in this Court by the same applicants: one for leave to appeal (CCT 47/05); and later, another for direct access (CCT 16/06). The application for direct access was dismissed on 5 April 2006 on the basis that it was not in the interests of justice for the issues raised to be determined by this Court as the court of first and last instance.[1] When the application for leave to appeal was heard on

[1] The Court's order was faxed to the applicants on the same day and read:

> "The Constitutional Court has considered the application for direct access to this Court. The Court has decided that it is not in the interests of justice to grant the application.

22 August 2006, an application for condonation and postponement by the applicants was refused and the application was struck off the roll. This judgment provides reasons for the Court's decision to remove the matter from the roll.

Factual background

[2] On 15 August 1998 the first and second applicants and their three children were placed under protective custody in terms of the National Witness Protection Programme (NWPP).[2] A disagreement had occurred within the community where they resided, during the course of which the first applicant allegedly insulted the Chief. As a result, tensions in the community spiralled out of control and the applicants' home, business and belongings were destroyed. The applicants and their children were forced to flee their home and seek refuge under the NWPP, after laying a charge of public violence against certain members of the community.

[3] Regulation 22(1)[3] of the Witness Protection Act 112 of 1998 (the WPA) provides for the payment of a daily allowance to a person placed under protective custody. The first applicant was a beneficiary of this allowance, but his wife (the second applicant) and children were not. On 21 November 2002 the applicants filed an application in the Pretoria High Court. An order was sought that the respondent

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Order:

The application for direct access to this Court is dismissed."

[2] In terms of section 185A(2)(a)(ii) of the Criminal Procedure Act 51 of 1977. Section 185A of the Criminal Procedure Act was subsequently repealed by the Witness Protection Act 112 of 1998.

[3] Regulation 22(1) provides:

> "A protected person shall, for the period during which he is placed under protective custody, be entitled to an allowance of R10 per day minus any amount which he may receive as witness fees, if he does not receive any income as a result of the fact that he is in protective custody."

pay to the second applicant and the children (1) a daily allowance in terms of the WPA and (2) arrears for payments not made to them from 15 August 1998 to date.[4]

[4] On 27 May 2003 the application was dismissed by the High Court.[5] The applicants then appealed the decision to the full bench of the High Court. The appeal was dismissed on 8 November 2004.[6]

[5] On or about 29 April 2005 the applicants lodged the application for leave to appeal to this Court against the decision of the full bench of the High Court and to declare regulation 22(1) unconstitutional.[7] Rule 19(3) of this Court provides that in order to obtain directions from the Court in application proceedings, the application must comprise (a) the decision against which the appeal is brought and the grounds upon which such decision is disputed, (b) a statement setting out clearly and succinctly the constitutional matter raised in the decision, (c) such supplementary information or argument as the applicant considers necessary and (d) a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court. The applicants' papers did not comply with this rule.

[4] The applicants also had a fourth claim to increase the applicants' food allowance of R35 per day in line with inflation from 1998. This claim was, however, subsequently abandoned by the applicants as the food allowance programme undertook to pay compensation to the applicants for the difference.

[5] By Bosielo J under case number 32659/2002.

[6] By Daniels J, with whom Botha J and Ranchod AJ concurred, under case number A1512/2003.

[7] The applicants claimed *inter alia* that the regulation constituted: unfair discrimination between persons placed under protective custody who, at the time that they were placed in protective custody, had an income, and persons who at that time had no income; an infringement of the rights of the applicants' minor children to proper family and parental care by depriving their parents of sufficient funds to ensure such proper care; and an infringement of the rights to dignity and to food and social security of the applicants and their minor children.

[6] On 29 November 2005, after an enquiry by the applicants, the Chief Justice directed that the matter be enrolled for hearing on 9 March 2006, despite its non-compliance with the rules of Court. The direction also requested that the Chairperson of the Society of Advocates, Pretoria, appoint counsel to act pro bono on behalf of the applicants. Two senior counsel (one of whom had argued the applicants' case before the High Court) and one junior, as well as an attorney were appointed.

[7] The record from the High Court, together with the parties' written arguments, was subsequently filed. The day before the hearing, the Court received a letter from the first applicant stating that his legal representatives had not informed him of the upcoming hearing and that he had only come to know of it through reading a newspaper report.[8] He further claimed that he had not at any stage been consulted by the legal representatives who had been appointed to the case.

[8] On the day of the hearing, 9 March 2006, the first applicant was permitted to address this Court in person, even though counsel was appearing on his behalf.[9] He submitted that he had not been consulted by his appointed legal representatives and was unhappy with the contents of the argument which had been filed by them. The Chief Justice ordered a brief adjournment, so that the first applicant and his legal

[8] At the hearing on 9 March 2006 it emerged that the reason the applicants had not heard that the matter had been placed on the roll was because the address given by the applicants for the service of documents was not a reliable permanent residential/business address of the applicants, but a garage situated near to the applicants' home.

[9] Representation of parties is generally limited by the rules of this Court. In terms of Rule 6 only a person entitled to appear in the High Courts may appear on behalf of any party in proceedings before this Court unless the Court or the Chief Justice directs otherwise.

representatives could consult and the argument advanced on his behalf could be explained to him. The first applicant was not satisfied. The case was postponed by this Court at the instance of the first applicant until 22 August 2006. The Chief Justice explained carefully and clearly to the first applicant that it was most unusual for this Court to grant a postponement and that the request had only been granted on the clear understanding that it would be a final postponement. The Chief Justice furthermore ensured that the first applicant understood the nature of the proceedings and the consequences of a final postponement.

[9] On 15 March 2006 the first applicant requested in writing that the Court ignore the existing heads of argument and appoint a new legal team for him. Shortly thereafter, the pro bono firm of attorneys and advocates requested leave from the Chief Justice to withdraw from the case, or for alternative directions. Towards the end of March the Court received an application from the applicants' new attorneys confirming that they had appointed new advocates and requesting an extension for the filing of documents from 30 March 2006 to mid May 2006. This request was not granted. On 4 April 2006 the request by the pro bono firm of attorneys and advocates to withdraw from the matter was granted, given the first applicant's decision to appoint new counsel. This Court is indebted to them for their contribution.

[10] On 22 May 2006 the first applicant informed his newly appointed attorneys and the Court that he had appointed a third legal team and terminated the services of the second team.

[11] On 2 June 2006 the applicants' attorneys informed the Court that they intended to apply for legal aid from the Legal Aid Board, Pretoria, on behalf of the applicants. Furthermore, on 22 June 2006 they requested that the Court issue new directions granting an extension for a date of the hearing beyond 22 August 2006, as they felt that there was insufficient time within which to obtain and prepare the necessary documentation.

[12] On 31 July 2006 the Registrar of this Court sent a letter to the applicants' attorneys declining the request and informing them that the appropriate procedure to obtain a postponement would be to submit a formal application fully explaining the reasons for the postponement.

[13] On 21 August 2006 an application for condonation and postponement was filed with this Court. The applicants sought condonation for not having filed additional heads of argument by 30 March 2006 and for an extension of time in which to do so. They also sought a postponement of the hearing and condonation for the late application therefor.[10] The applicants explained that because they belatedly obtained provisional legal aid – due to the alleged inefficiencies of the Legal Aid Board and the difficulties in acquiring the papers – their legal representatives had insufficient time to submit proper heads of argument. From the application for condonation it appears

[10] In the alternative the applicants also asked for leave to appeal on the papers as they stood and to postpone the hearing of the principal case. As such, the hearing of 22 August 2006 would deal only with the application for leave to appeal and not with the actual appeal itself.

that the applicants' attorneys had been briefed towards the end of May, but had only received confirmation of the provisional grant of legal aid on 18 August 2006.

[14] On 22 August 2006 the matter was again heard by this Court. Counsel made submissions on the application for condonation and the postponement. Counsel for the applicants was asked by the Court whether he would be able to proceed in the event that the application was not granted. The Court then adjourned to consider the merits of the application.

[15] After the adjournment counsel for the applicants informed the Court that he would not be able to proceed if the application for condonation and a postponement were not granted. The Court then ordered:[11]

> "(a) The application for condonation and postponement of today's hearing is dismissed.
>
> (b) The application for leave to appeal the decision of the full bench of the High Court Pretoria made on 8 November 2004 is struck off the roll.
>
> (c) No order is made as to costs."

[16] The reasons for the order now follow.

Reasons for the refusal of condonation and a postponement

[11] This Court's order was faxed to the applicants on the same day.

[17] The postponement of a matter set down for hearing on a particular date cannot be claimed as a right.[12] An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory,[13] whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.[14]

[18] If a postponement is refused and the applicant or his or her counsel is unable to argue the matter, it follows that the matter cannot proceed and has to be struck off the roll. Naturally this does not mean that the doors are completely shut to a litigant. A party who wishes to approach the Court afresh will be required to show good cause and give a full explanation as to why their application should be enrolled in view of its history.

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[12] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 1999 (3) SA 173 (C) at 181D; 1999 (3) BCLR 280 (C) at 287E; *The National Police Service Union and Others v The Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC); 2001 (8) BCLR 775 (CC) at paras 4 – 5.

[13] *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399.

[14] *The National Police Service Union and Others v The Minister of Safety and Security and Others* above n 12 at paras 4 – 5.

[19] The applicants were given more than an ample opportunity to prepare their argument in the three month period preceding the hearing. The applicants and their legal representatives, rather carelessly, failed to treat the matter as one of urgency. Instead they adopted a lackadaisical approach to their application, despite the knowledge that the matter had already finally been postponed by this Court. Their approach resulted in the failure to draw the attention of the Legal Aid Board to the fact that the matter was urgent. This Court, mindful of the fact that it had granted a final postponement, invited the applicants' legal representatives to proceed with argument on the heads of argument produced for the first hearing – but they were insufficiently prepared to do so. This lack of preparation could have been avoided had the applicants' legal representatives simply applied timeously for condonation and postponement. If the application had been rejected at this stage they could still have elected to proceed on the previous heads of argument submitted to this Court for hearing on 9 March 2006 – which the first applicant had intimated, with hindsight, had been adequate.

[20] In light of the above, there does not appear to be any good cause shown for the application for condonation and postponement by the applicants. On the contrary, the applicants had foregone opportunities to have the matter fully ventilated and had been warned that the previous postponement granted was a final one. To grant yet another postponement would have constituted a gross abuse of the processes of this Court. As

such, it could not be considered in the interests of justice to grant the application. Therefore the Court did not grant the request for condonation and postponement.

Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, Van der Westhuizen J, Van Heerden AJ and Yacoob J.

Counsel for the applicants:	BH Pieters SC
	Instructed by *BP Angelopulo and Co.*
Counsel for the respondent:	JA Coetzee SC, HJ De Wet
	Instructed by the *State Attorney, Pretoria*.