CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 50/10
[2011] ZACC 18

In the matter of:

MSOBOMVU QHINGA	First Applicant
LUNGILE JAMISO	Second Applicant
CAMAGU ZIMELA	Third Applicant
LUVUYO MCAPHUKISI	Fourth Applicant
LIZO LUMBE	Fifth Applicant
LINDILE MAGI	Sixth Applicant
versus	
THE STATE	Respondent

Heard on : 17 February 2011

Decided on : 25 May 2011

JUDGMENT

MTHIYANE AJ:

Introduction

[1] This is an application for leave to appeal against an order of the Supreme Court of Appeal,[1] in which that Court dismissed the applicants' petition for leave to appeal against convictions and sentences imposed on them by the Eastern Cape High Court, Bhisho (High Court).[2] The applicants seek the setting aside of the Supreme Court of Appeal's order, and either:

(a) Its replacement with an order by this Court granting the applicants leave to appeal against their convictions and sentences to a full court of the High Court; or

(b) The remittal of the matter to the Supreme Court of Appeal for reconsideration of the applicants' petition.

[2] The relief requires this Court to consider the fairness or otherwise of the procedure followed by the Supreme Court of Appeal when it refused the applicants' petition for leave to appeal. The essence of the applicants' complaint in this respect is that the judges concerned were obliged to but did not have regard to the relevant portions of the record of the proceedings in the High Court when they considered the petition. Therefore they could not have conducted an adequate reappraisal of the case in accordance with the applicants' constitutional right "of appeal to, or review by, a higher court" under section 35(3)(o) of the Constitution.

[1] *Qhinga and Others v The State*, Case No. 304/09, Supreme Court of Appeal, 16 July 2009, unreported.

[2] *The State v Qhinga and Others*, Case No. CC35/2007, Eastern Cape High Court, Bhisho, 31 March 2009, unreported.

[3] The applicants are Mr Msobomvu Qhinga, Mr Lungile Jamiso, Mr Camagu Zimela, Mr Luvuyo Mcaphukisi, Mr Lizo Lumbe and Mr Lindile Magi. They were each convicted in the High Court on two counts of attempted murder and four counts of robbery with aggravating circumstances, and were sentenced to long terms of imprisonment.

[4] The respondent is the State. It initially opposed the application, then withdrew its opposition, but subsequently renewed it in written argument. This apparent uncertainty of what stance to adopt was finally cleared up during oral argument, when the respondent's counsel conceded that this application raised a constitutional matter and that a remittal of the matter to the Supreme Court of Appeal for reconsideration of the applicants' petition would be the appropriate remedy.

[5] Before turning to the issues, a brief history of the matter is apposite.

Proceedings in the High Court

[6] In March 2009, the applicants were convicted in the High Court, per Dhlodhlo ADJP sitting with an assessor. The applicants were implicated in the commission of the crimes solely by statements and pointings-out they had made to the police or to a magistrate. The judgment of the High Court disposed of their admissibility as follows:

> "The Court has to consider the evidence adduced. The assailants who robbed and committed other offences at Newlands were not identified. The State relies on statements and some pointings-out the accused made in which they implicated themselves. Trials-within-a-trial in respect of the seven accused were held. Rulings were that the statements and the pointings-out were admissible in evidence. The rulings form part of this record. The Court rules finally that the statements and pointings-out in respect of the accused are admissible in evidence."[3]

What is to be noted about this aspect of the judgment is that the trial court did not describe or discuss its reasons for admitting the statements and pointings-out, but merely referred to reasons set out earlier in the record.

[7] The first to fourth applicants and the sixth applicant were each sentenced to an effective 28 years' imprisonment and the fifth applicant to an effective 22 years' imprisonment. The applicants are currently serving their sentences.

[8] In April 2009, the applicants applied to the trial court for leave to appeal to a full court of the High Court against their convictions and sentences. The basis of their appeal was that the statements and pointings-out in which they had incriminated themselves were wrongly admitted as evidence. The applicants variously argued that, at the time of making the statements and pointings-out, they had not been apprised of their right to legal representation, and that they had been threatened, assaulted and tortured by the police.

[3] Id at para 50.

These statements and pointings-out had therefore not been made freely, voluntarily and without undue influence.

[9] The trial court rejected these contentions and refused their applications for leave to appeal on the ground that there were no reasonable prospects of success on appeal. In refusing leave to appeal, the trial court again did not describe or discuss the reasons for its rulings in the trials-within-the-trial by which it admitted the contested statements and pointings-out as evidence.

Proceedings in the Supreme Court of Appeal

[10] In May 2009, the applicants petitioned the President of the Supreme Court of Appeal for leave to appeal against the judgment, to a full court of the High Court. In their petition, the applicants again argued that their statements and pointings-out were wrongly admitted as evidence, reiterating the grounds advanced in their application to the High Court.

[11] A petition for leave to appeal to the Supreme Court of Appeal must be considered by two judges,[4] whose decision becomes the decision of the Court. This Court has also held that the Supreme Court of Appeal is entitled, in circumstances where no constitutional issues are raised, to refuse leave to appeal without that Court hearing oral

[4] Section 21(3)(b) of the Supreme Court Act 59 of 1959.

argument or providing reasons.[5] On 16 July 2009, the applicants' petition was summarily dismissed.

Proceedings in this Court

[12] In May 2010 the applicants approached this Court for leave to appeal against the order of the Supreme Court of Appeal. They also seek condonation of the late filing of their application.

[13] The applicants contend that their right to a fair trial, which includes the right of "appeal to, or review by, a higher court" under section 35(3)(o) of the Constitution, was infringed. They argue that the Supreme Court of Appeal did not have regard to those portions of the record in which the rulings in the trials-within-the-trial and the reasons for those rulings were located. The applicants conclude that the Court could not have given proper consideration to their submissions, which were concerned solely with the rulings in the trials-within-the-trial, and therefore that the petition procedure followed was unfair.

[14] The Supreme Court of Appeal did not provide reasons for its order. We therefore did not know whether the Supreme Court of Appeal had regard to the relevant portions of the record when it considered the applicants' petition. The Chief Justice addressed a letter to the President of the Supreme Court of Appeal to enquire whether the petition

[5] See *Greenfields Drilling CC and Others v Registrar of the Supreme Court of Appeal and Others* [2010] ZACC 15; 2010 (11) BCLR 1113 (CC) and *Mphahlele v First National Bank of SA Ltd* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

judges had regard to the relevant portions of the record. In reply, the President of the Supreme Court of Appeal stated as follows:

> "The above applicants' petition to this Court (SCA) for leave to appeal was dealt with in accordance with the provisions of section 20(2)(c), read with section 21(3), of Act 59 of 1959. The applicants were legally represented and the petition was presented in accordance with the provisions of Rule 6 of the Rules of the SCA.
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> Rule 6(5) provides that:
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> 'Every application, answer and reply—
> (a) shall—
> (i) be clear and succinct and to the point;
> (ii) furnish fairly all such information as may be necessary to enable the Court to decide the application;
> (iii) deal with the merits of the case only insofar as is necessary for the purpose of explaining and supporting the particular grounds upon which leave to appeal is sought or opposed;
> (iv) . . .; and
> (b) shall not—
> (i) be accompanied by the record, or
> (ii) traverse extraneous matters.'
>
> The judges considering the application may, in terms of Rule 6(6), call for further submissions, affidavits or the record or portion of it.
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> In this case, although the petitioners' legal representatives were in possession of the full record of the trial, they did not seek to place any portion of the record before the judges considering the application (Justices Navsa and Wallis (acting)), nor did they submit that it was necessary for the purposes of determining the petition that the judges should read all or an identified part of the record. Petitioners have, on numerous occasions, sometimes unnecessarily, attached specific pages or portions of the record to their

> petition. This was not done in this case. And the two judges who considered the petition did not call for the record or any portion of it, as they considered that to be unnecessary."

[15] It is apparent from the letter that the Supreme Court of Appeal did not call for the relevant portions of the record. Whether or not there was a full record when the Supreme Court of Appeal considered the petition is uncertain. It is apparent, though, that a record of some sort was in existence, since the first applicant's founding affidavit before that Court makes reference to "page 634 of the record". However, in an affidavit in this Court deposed to by Mr Adriaan Erasmus, the prosecutor at the applicants' trial, it is stated that, as at 15 September 2010, "[r]elevant parts of the record were not transcribed". This was because of a malfunctioning of the microphone recording system in the courtroom, which prevented the transcription of twelve days of proceedings. The respondent submitted that it only received the record on 15 September 2010. Consequently, even the record available before this Court is incomplete.

[16] It is worth noting that the rules referred to in the letter from the President of the Supreme Court of Appeal impose no obligation on a petitioner to provide the Court with the record. Rather, the quoted rule 6(5)(b)(i) seems indeed to indicate the opposite. This provides that the petition "shall not be accompanied by the record", although rule 6(6) empowers the judges considering the petition to call for the record or parts of it. For their part, the applicants assert that they were unaware that they could request that the record be placed before the judges of the Supreme Court of Appeal.

Applicable statutory provisions

[17] At this juncture, it is necessary to note that section 316(10)(c) of the Criminal Procedure Act[6] (Act), as it read at the time of the petition, generally required the registrar of the High Court to forward a copy of the trial record to the registrar of the Supreme Court of Appeal. However, section 316(10)(c)(i) provided that, if the accused were legally represented at the trial (as the applicants were), "a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (12)(a), suffice for the purposes of the petition."[7] Section 316(12)(a), as it read at the time of the petition, provided that the judges considering a petition "may call for any further information, including a copy of the record of the proceedings that was not submitted in terms of the proviso to subsection (10)(c)".[8] This position is mirrored in Supreme Court of Appeal rule 6(6).

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[6] 51 of 1977.

[7] Section 316(10) of the Act, prior to 10 September 2010, read as follows:

> "When receiving notice of a petition as contemplated in subsection (9), the registrar shall forward to the registrar of the Supreme Court of Appeal copies of the—
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> (a) application or applications that were refused;
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> (b) the reasons for refusing such application or applications; and
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> (c) the record of the proceedings in the High Court in respect of which the application was refused: Provided that—
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> (i) if the accused was legally represented at the trial; or
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> (ii) if the accused and the prosecuting authority agree thereto; or
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> (iii) if the prospective appeal is against the sentence only; or
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> (iv) if the petition relates solely to an application for condonation,
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> a copy of the judgment, which includes the reasons for conviction and sentence, shall, subject to subsection (12)(a), suffice for the purposes of the petition."

[8] Section 316(12) of the Act, prior to 10 September 2010, read as follows:

[18] The corresponding provisions in respect of petitions for leave to appeal from the Magistrates' Courts to the High Courts had already been declared unconstitutional by this Court in *Shinga*,[9] but similar petitions from the High Courts to the Supreme Court of Appeal were not directly affected by that declaration of unconstitutionality. Therefore, the applicants also sought an order from this Court declaring subparagraphs (i) to (iv) of section 316(10)(c) of the Act unconstitutional and invalid. In response to this Court's judgment in *Shinga*, however, the Legislature has already enacted an amendment to the Act, to the effect that subparagraphs (i) to (iv) of section 316(10)(c) have been deleted by section 16 of the Judicial Matters Amendment Act,[10] which came into force on 10 September 2010. Consequently, the applicants have abandoned their constitutional challenge to section 316(10)(c) of the Act, and therefore this Court will not need to pronounce on it.

Issues for determination by this Court

[19] The main issues requiring determination by this Court are the following:

"The judges considering a petition may—

(a) call for any further information, including a copy of the record of the proceedings that was not submitted in terms of the proviso to subsection (10)(c), from the judge who refused the application in question, or from the judge who presided at the trial to which any such application relates, as the case may be; or

(b) in exceptional circumstances, order that the application or applications in question or any of them be argued before them at a time and place determined by them."

[9] *Shinga v The State and Another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connell and Others v The State* [2007] ZACC 3; 2007 (4) SA 611 (CC); 2007 (5) BCLR 474 (CC).

[10] 66 of 2008.

(a) What is the constitutional standard of a fair procedure for petitions?

(b) Was the petition properly considered without the reasons for the rulings?

(c) What is the appropriate relief?

[20] However, this being an application for leave to appeal, a preliminary issue to be decided is whether leave to appeal should be granted. Moreover, the application was lodged late and therefore the first preliminary issue to consider is whether condonation should be granted.

Condonation

[21] This application was filed in May 2010, more than 10 months after the Supreme Court of Appeal dismissed the applicants' petition. An application for leave to appeal against an order of the Supreme Court of Appeal is required to be filed within 15 days of the order.[11] Accordingly, the applicants have sought condonation of the late filing of their application for leave to appeal.

[22] It is well established that this Court will only grant condonation if it is in the interests of justice to do so.[12] Two prominent factors in determining the interests of

[11] Rule 19(2).

[12] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20 and *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

justice are: (i) the importance of the constitutional issue raised; and (ii) the prospects of success.

[23] The constitutional issue arising in this matter is the right of appeal or review in terms of section 35(3)(o) of the Constitution. This is an important constitutional issue indeed, as it concerns the fairness of the procedure of the Supreme Court of Appeal in granting or refusing petitions for leave to appeal. In particular, this case concerns the obligation, if any, of the Supreme Court of Appeal, when considering petitions, to have regard to relevant portions of the record in order to conduct a fair reappraisal. In the light of the rest of this judgment it is clear that the application in this Court bears prospects of success. Accordingly, it is in the interests of justice to grant condonation.

Leave to appeal

[24] For the same reasons as set out in considering condonation, this application raises an important constitutional issue and also bears prospects of success. Accordingly, it is in the interests of justice that leave to appeal be granted. It is now necessary to determine whether the appeal should be upheld, and I now turn to the main issues requiring determination by this Court.

What is the constitutional standard of a fair procedure for petitions?

[25] In *S v Ntuli*,[13] this Court held that the right of appeal or review envisages, as a minimum, "the opportunity for an adequate reappraisal of every case and an informed decision on it." This position was reiterated in *S v Steyn*,[14] in which this Court also held:

> "A leave to appeal procedure which does not enable an appeal Court to make an informed decision on the application, and which does not adequately protect against the possibility of wrong convictions and inappropriate sentences constitutes a serious limitation of the right to appeal."[15]

[26] A significant safeguard of adequate reappraisals of petitions for leave to appeal is the guarantee that petitions must be considered by two judges.[16] Moreover, it is required that those judges must make an informed decision and must therefore have sufficient information before them in order to conduct an adequate reappraisal of the correctness of the convictions and sentences being appealed against. As a minimum, this implies that they must have before them the challenged rulings and the reasons for those rulings, in order to determine whether the rulings were justified by the reasons, and whether the reasons were justified by the evidence. As stated by this Court in *Steyn*, "a trial court's reasons for its factual findings and conclusions of law are vital to the proper functioning of an appeal process."[17]

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[13] [1995] ZACC 14; 1996 (1) SA 1207 (CC); 1996 (1) BCLR 141 (CC) at para 17.

[14] [2000] ZACC 24; 2001 (1) SA 1146 (CC); 2001 (1) BCLR 52 (CC) at para 6.

[15] Id at para 36.

[16] See *Shinga* above n 9 at paras 46-7.

[17] Above n 14 at para 36.

[27] This Court has emphasised that a trial court's reasons are "essential for the appeal process", pointing out that reasons assist "the appeal Court to decide whether or not the order of the lower court is correct."[18]

[28] It is important to note that section 316(10)(c)(i) of the Act then provided that, if the accused were legally represented at the trial (as the applicants were), then "a copy of the judgment, *which includes the reasons for conviction and sentence*, shall, subject to subsection (12)(a), suffice for the purposes of the petition."[19] It was necessary to determine whether the reasons provided in the judgment of the trial court were indeed sufficient for a finding of guilt and thus for the purposes of the petition. On the law as it stood at the time of the applicants' petition, it was required that the appellate court was able to ascertain and adequately reappraise the reasons for the imposition of the convictions and sentences by the trial court.

Was the petition properly considered without the reasons for the rulings?

[29] We have already observed that the applicants were convicted solely on the basis of the statements and pointings-out in which they had incriminated themselves. This is apparent from the judgment of the High Court. It is also apparent that the admission of this evidence was contested by the applicants, and that trials-within-the-trial were held in

[18] *Mphahlele* above n 5 at para 12.

[19] Emphasis added.

order to determine their admissibility. In its judgment, the trial court held the evidence to be admissible, and stated that its rulings in this regard were to be found in the record. The trial court does not discuss the grounds upon which the evidence was challenged, nor does it discuss the grounds upon which it was admitted.

[30] The applicants' petition to the Supreme Court of Appeal challenged the rulings in the trials-within-the-trial. These were neither included nor discussed in the judgment of the High Court. They were to be found only in the record. It follows that the Supreme Court of Appeal would not have been able to assess whether those rulings were reasonably open to challenge on appeal.

[31] We can come to no conclusion other than that the applicants did not have the benefit of an adequate reappraisal of their case or an informed decision on it. Regrettably, the applicants were not afforded a fair procedure in terms of their right "of appeal to, or review by, a higher court", as contemplated by section 35(3)(o) of the Constitution. The Supreme Court of Appeal's order, accordingly, cannot stand.

What is the appropriate relief?

[32] One form of relief sought by the applicants is the remittal of the matter to the Supreme Court of Appeal for reconsideration of the petition. It is convenient at this stage to refer to the directions issued by this Court on 1 November 2010, in which the following questions were posed to the parties:

"(a) Does this Court have the power to set aside an order by the Supreme Court of Appeal refusing leave to appeal and refer the matter back to the Supreme Court of Appeal for reconsideration? If so,

(b) Under what circumstances will it be appropriate for these powers to be exercised by this Court?

(c) Do these circumstances exist in this case?

(d) What is the appropriate order to be made by this Court?"

[33] Section 172(1)(b) of the Constitution vests this Court with the power to make any order that is just and equitable to remedy a breach of the Constitution.[20] The applicants did not have the benefit of their right of appeal envisioned in section 35(3)(o) of the Constitution. It is, therefore, incumbent on this Court to make a just and equitable order. In the circumstances, there can be no more appropriate relief than remittal to the Supreme Court of Appeal for reconsideration of the petition having regard to the relevant portions of the record. The remaining questions in this Court's directions have been answered above.

[34] The applicants' plea that this Court grants them leave to appeal against their convictions and sentences to a full court of the High Court need therefore not be

[20] See *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at para 97, in which this Court held:

> "The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements." (Footnote omitted.)

considered.

[35] The following order is made:

(a) Condonation is granted.

(b) Leave to appeal is granted.

(c) The appeal is upheld to the extent set out in paragraphs (d) and (e).

(d) The order of the Supreme Court of Appeal in Case No. 304/09, dated 16 July 2009, dismissing the applicants' petition for leave to appeal, is set aside.

(e) The petition is remitted to the Supreme Court of Appeal for reconsideration.

Ngcobo CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Mogoeng J, Nkabinde J, Van der Westhuizen J and Yacoob J concur in the judgment of Mthiyane AJ.

For the Applicants:	Adv L Crouse instructed by Legal Aid South Africa, Port Elizabeth Justice Centre.
For the Respondent:	Adv Nelly Cassim SC instructed by the State Attorney, Pretoria.