78/92

Case No 402/91
N v H

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

JOSEPH CHIDI — Appellant

and

THE MINISTER OF JUSTICE — Respondent

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and

THE MINISTER OF JUSTICE Respondent

CORAM: CORBETT, CJ, SMALBERGER, KUMLEBEN, VAN DEN HEEVER, JJA, et VAN COLLER, AJA

HEARD: 4 MAY 1992

DELIVERED: 22 MAY 1992

J U D G M E N T

SMALBERGER, JA:

This appeal involves the proper interpretation of s 323 of Act 51 of 1977 ("the Act") as substituted by s 14 of Act 107 of 1990 ("the amending Act"). For convenience I shall refer to s 323, as substituted, as "the amended s 323". The circumstances giving rise to

the appeal are the following. On 16 September 1987 the appellant was convicted of murder in the Witwatersrand Local Division by LE GRANGE J and two assessors. No extenuating circumstances were found and he was accordingly sentenced to death. The appellant was refused leave to appeal against his conviction and sentence by the trial Judge, but was subsequently granted such leave by this Court.

Shortly before the hearing of the appeal the only witness who had directly implicated the appellant in the commission of the offence, one Chabedi, deposed to an affidavit in which he sought to retract his previous testimony. This gave rise, at the hearing of the appeal, to an application for an order setting aside the appellant's conviction and sentence and remitting the matter to the trial Court for further evidence. The application was granted. At the resumed hearing the trial Court, having heard further evidence, again

convicted the appellant of murder. In the absence of extenuating circumstances he was once again sentenced to death. The appellant was refused leave to appeal against his conviction and sentence by the trial Judge and on 18 October 1989 his petition to this Court seeking such leave was dismissed. On 12 December 1989 the appellant petitioned the State President for mercy in terms of the relevant provisions of the Act. His plea for clemency was granted on 24 April 1990 and his sentence was commuted to one of 20 years' imprisonment.

The amending Act came into operation on 27 July 1990. The provisions of the amended s 323 (to which I shall refer in detail later) caused the appellant, through his attorney, to write to the respondent ("the Minister") on 24 August 1990. In his letter the appellant sought to prevail upon the Minister to refer the question of the correctness of his conviction to this Court for its consideration. His

request was founded on the premise that the Minister ought to entertain a doubt as to the correctness of his conviction (for the reasons stated in his letter), as well as on the assumption that the amended s 323 empowered the Minister to act as requested. The Minister's response (acting through the Director-General: Justice) was that the amended s 323 was not applicable to the appellant as he was not "a person ..... sentenced to death" as envisaged in the section. This led to an application by the appellant in the Witwatersrand Local Division, in terms of Rule 53 of the Uniform Rules of Court, to bring the Minister's refusal to invoke the provisions of the amended s 323 under review.

The matter came before ZULMAN J. After hearing argument the learned Judge a quo dismissed the application with costs. He held that the appellant "was not a person who qualified, as a matter of law, to

require the respondent to exercise the powers given to the respondent in terms of the new section 323". The basis for his conclusion was that the amended s 323 is only applicable in the case of a person under an existing death sentence and does not apply to someone whose death sentence has been commuted. The matter now comes before us in consequence of leave granted by the Judge a quo.

The appellant failed to lodge his notice of appeal timeously. He now applies for condonation of his failure in this regard. The respondent does not oppose the application. However, it does not follow as a matter of course that condonation should be granted. The necessary prerequisites for condonation must still be established. The appellant's attorney was at fault in failing to lodge the notice of appeal timeously. The reasons for such failure appear from his affidavit in the condonation application. He was not seriously

at fault, and his conduct would be no bar to the granting of condonation provided there are reasonable prospects of success on appeal. If there are no such prospects of success there would be no point in granting condonation (Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A) at 532 D; Louw v W P Koöperasie Bpk 1991(3) SA 593 (A) at 597 C).

The central issue in the present appeal is whether the amended s 323 is capable of being invoked by the Minister in the particular circumstances of this matter. If not, cadit quaestio. The determination of this issue depends upon the correct interpretation of the amended s 323 within its proper contextual framework.

Prior to the amending Act coming into operation the imposition of the death sentence was mandatory where a person over the age of 18 years was convicted of murder without extenuating circumstances

(s 277(1)(a) read with s 277(2) of the Act). A person so convicted had no automatic right of appeal. He could only appeal to this Court with leave of the trial Judge (or any other Judge of the provincial or local division concerned if the trial Judge was not available) or, if such leave was refused, with leave of this Court on petition to the Chief Justice (s 316(1) and (6) of the Act). A refusal by this Court to grant leave to appeal was final (s 316(9)(a)). Save perhaps in cases where leave to appeal was sought solely in respect of sentence (including a finding of absence of extenuating circumstances), a refusal of leave to appeal by this Court would necessarily have involved a consideration of the merits of the petitioner's conviction. In cases where the convicted person did not seek leave to appeal, or having sought and obtained such leave did not prosecute the appeal, there was no procedure (apart from that provided for in s 323 of the Act) whereby the

correctness of his conviction could be considered and pronounced upon by this Court before the sentence of death was carried out.

Prior to its amendment s 323(1) of the Act provided as follows:

> "If the Minister, in any case in which a person has been sentenced to death, has any doubt as to the correctness of the conviction in question, and such person has not in terms of section 316(1) applied for leave to appeal against the conviction or has not prosecuted an appeal after leave to appeal against the conviction has been granted or has not submitted an application to the Chief Justice in terms of section 316(6) for condonation or for leave to appeal against the conviction, the Minister may, on behalf and without the consent of such convicted person, refer the relevant record, together with a statement of the ground for his doubt, to the Appellate Division, whereupon that court shall consider the correctness of the conviction in the same manner as if it were considering an appeal by the convicted person against the conviction."

The effect of the section was that where the correctness of the conviction of a person sentenced to death had not received the attention of this Court either on appeal or

by way of petition the Minister was authorised, if he had any doubt about the correctness of such conviction, to initiate an appeal to this Court. The power so conferred was a salutary one conducive to the proper administration of justice insofar as it provided a safeguard against the danger of a wrong conviction. The manifest purpose of the section was "to ensure that in appropriate cases an appeal is prosecuted to reduce the risk of a serious miscarriage of justice" (S v Malinga 1987(3) SA 490 (A) at 494 C - D). However, the Minister had no authority, where the correctness of the conviction had already been considered and pronounced upon by this Court (either on appeal or in response to a petition) to refer the matter to this Court for its reconsideration. The Legislature was presumably satisfied that once this Court had pronounced upon the merits of a conviction, such pronouncement should be accepted as correct and taken to

be final.

As far as the appellant is concerned, he had, prior to the amending Act coming into operation, exhausted all legal procedures open to him to challenge the correctness of his conviction. His case would not have qualified for referral under the then s 323 as he had already sought and been refused leave by this Court to appeal against his later conviction. The conditions precedent for the exercise by the Minister of his power under that section were not satisfied, and he could therefore not have been required by the appellant to invoke such power. The appellant's case had effectively and finally been concluded (leaving aside the question of any further evidence which might have justified its re-opening - see s 327 of the Act, as amended).

The amending Act brought about two fundamental changes in the law relating to death sentence matters.

Firstly, in terms of s 4 (which amended s 277 of the Act), it did away with the mandatory death sentence and substituted a discretionary death sentence which may be imposed provided certain prerequisites are satisfied. Secondly, in terms of s 11 (which inserted a new section, s 316A, into the Act), it granted an automatic right of appeal against conviction or sentence to an accused sentenced to death (s 316A(1)). It further made provision for the Chief Justice to initiate "review proceedings" designed to ensure that in a death sentence case the correctness of the conviction and the propriety of the sentence would be considered by this Court, or at least two of its Judges, in the event of the convicted person failing to avail himself of his right of appeal (s 316A(4), (5) and (6)). The amending Act furthermore contained certain transitional provisions (1) dealing with cases commenced but not yet finalized (s 20) and (2) providing for the recon=

sideration of the sentences of certain persons under sentence of death (s 19).

Against this background I turn to consider the meaning of the amended s 323, and whether it would have been competent for the Minister to invoke its provisions in the present instance. If he did not have the authority to do so the appellant would clearly not be entitled to the relief sought in the Court a quo. There are in my view a number of grounds (on which I shall elaborate in due course) for holding that the amended s 323 has no application to the facts of the present matter.

The amended s 323 reads as follows:

> "If the Minister, in any case in which a person has been sentenced to death, has any doubt as to the correctness of the conviction in question or the propriety of the sentence of death, the Minister may, on behalf and without the consent of the convicted person, refer a statement of the ground for his doubt to the Appellate Division, and that court shall consider that statement at the appeal

or review proceedings contemplated in section 316A."

Logically the first enquiry should be whether the amended s 323 was intended to apply to a matter concluded before the amending Act came into effect and in respect of which the person sentenced to death has exhausted all his legal remedies. It is a well-known rule of interpretation that a statute, unless a contrary intention appears, is prospective in its operation - it regulates future conduct and does not apply to past events (Jockey Club of SA v Transvaal Racing Club 1959(1) SA 441 (A) at 451 F - G). The rule is subject to certain exceptions, none of which is relevant in the present instance. There is nothing in the wording of the amended s 323, or in any of the other provisions of the amending Act, to suggest that the legislature intended the amended s 323 to be of application to matters which had been disposed of finally before the

amending Act took effect. On the contrary, there are strong indications that the amended s 323 was only intended to apply to cases in which a person was sentenced to death on or after the date on which the amending Act came into operation.

Cases which had not been finalized when the amending Act came into operation are specifically dealt with in s 20(1). It provides:

> "Any criminal case which commenced before the date of commencement of this section, and any appeal, application or proceedings in or in connection with such a case -
>
> (a) shall be continued and concluded as if sections 4 and 13(b) had at all relevant times been in operation;
>
> (b) shall, if sentence in the case concerned is passed on or after that date, be continued and concluded as if section 11 had also been so in operation."

It follows from the wording of s 20(1) that certain provisions of the amending Act apply to cases not concluded before its commencement or where sentence

is passed on or after its commencement. By contrast there is nothing in the amending Act which makes any of its provisions applicable to concluded matters, save those which fall to be dealt with under s 19 (which relate solely to the question of sentence - see Mamkeli v The State, an unreported judgment of this Court delivered on 20 March 1992). This strongly suggests that it was intended to exclude completed matters such as the present from the ambit of the amending Act. Furthermore, s 11 (which is referred to in s 20(1)(b)) is the section which inserted s 316A in the Act. For reasons which appear more fully below, the amended s 323 is concerned only with the correctness of a conviction subject to appeal or review proceedings contemplated in s 316A. Such appeal or review proceedings only lie at the instance of a person sentenced to death on or after the date on which the amending Act came into operation. It follows that the amended s 323 does not contemplate a

matter where sentence of death was passed before such date. It accordingly does not cover the appellant's case. On this ground alone, therefore, the appeal should fail.

There are further obstacles in the way of the appellant. The Minister's powers under the amended s 323 are in respect of "any case in which a person has been sentenced to death". It was contended by Mr Unterhalter, for the appellant, that this wording did not exclude from the ambit of the section a person whose sentence of death had later been commuted. While the section does not specifically provide that the death sentence should be extant, this is implicit in the words used seen in their proper context. In this respect it is permissible to have regard to the heading of the section (which has been expressly incorporated into the amending Act) in order to elucidate the meaning of the section (Turffontein Estates Ltd v Mining Commissioner,

Johannesburg 1917 A D 419 at 431). The heading reads: "Submission by Minister to Appellate Division on behalf of person sentenced to death". This presupposes that the person concerned should be under sentence of death when the submission is made. And the fact that such submission requires to be considered at appeal or review proceedings "contemplated in s 316A" (which deals specifically with death sentence cases) reinforces the conclusion that the section only applies to a person still under a death sentence and not to someone, such as the appellant, whose death sentence has been commuted. On this ground too (which, as previously mentioned, was the basis on which the Judge a quo dismissed the appellant's application) the appeal must fail.

Even if one assumes in the appellant's favour that he is "a person [who] has been sentenced to death" within the meaning of that phrase, the concluding words

of the amended s 323 place the appellant's case beyond the reach of the section. They provide for any referral by the Minister, where he has a doubt as to the correctness of the conviction in question, to be considered by this Court "at the appeal or review proceedings contemplated in section 316A". In order to ascertain the intention of the legislature those words must be given their ordinary, grammatical meaning (S v Toms; S v Bruce 1990(2) SA 802 (A) at 807 H - J). The words are unambiguous and their meaning is clear. What is envisaged is that this Court must consider any statement by the Minister at the actual hearing of the appeal against the conviction in question (consequent upon the provisions of s 316A (1), (2) and (3)) or at the relevant stage of the actual review proceedings initiated by the Chief Justice (as provided for in s 316A(4), (5) and (6)). In the case of the appellant there cannot be any such appeal or review proceedings

either now or in the future bearing in mind that s 316A only has application to a person sentenced to death on or after the date on which the amending Act came into force. It is therefore impossible for the Minister to act in accordance with the clear meaning of the amended s 323.

The main thrust of Mr Unterhalter's argument, as I understood it, is that the amended s 323 should be interpreted to confer a separate right of referral on the Minister irrespective of whether there are actual appeal or review proceedings pending in terms of s 316A. He contended that the Minister could exercise such right in any death sentence case in which he entertained a doubt about the correctness of the conviction or the propriety of the death sentence, and at any time, whether or not such case had previously been dealt with and disposed of by this Court on appeal or in the course of review proceedings in terms of s 316A. It would

then be for the Chief Justice to initiate proceedings along the lines indicated in s 316A (4), (5) and (6) in order to bring the matter before this Court. The argument is untenable for a number of reasons.

There is nothing ambiguous about the words used in the amended s 323. Nor does their ordinary, grammatical meaning give rise to any absurdity or illogicality which would justify seeking another meaning for them. There is accordingly no justification for reading more into the section than the actual words of the section convey. No proper basis therefore exists for the interpretation contended for by Mr Unterhalter. Apart from that his submissions, if accepted, would give rise to an extraordinary anomaly. Not only would the amended s 323 apply when there were actual appeal or review proceedings contemplated by s 316A (as Mr Unterhalter was obliged to concede), but also when (according to him) there were not. He therefore seeks

to rely upon the same language in the section to cover two essentially different situations. It is inconceivable that this could be the case. Furthermore, if Mr Unterhalter's submissions are correct, it would mean that the otherwise inappropriate language of s 316A(4) would have to be adapted and unduly strained to meet the exigencies of the case. There is no justification for following such a course. What Mr Unterhalter is seeking to do is to persuade us to interpret the amended s 323 in an artificial manner in order to vest both the Minister and this Court with powers not conferred by the section. This Court does not have an implied residual jurisdiction beyond that expressly conferred by statute (Sefatsa and Others v Attorney-General, Transvaal, and Another 1989(1) SA 821 (A) at 833 E - 834 F). If the legislature had intended to vest this Court with a special jurisdiction to hear matters falling beyond the ambit of the amended

s 323 it would have done so in express terms.

Mr Unterhalter's contention, if correct, would also mean that it would be open to the Minister to refer a matter to this Court for reconsideration despite the fact that this Court had already pronounced upon the merits of the conviction or the propriety of the death sentence. Not only would this clothe the Minister with a power he did not previously have, it would also amount to a radical departure from the principle, previously adhered to in the Act, that this Court's decisions are final. If the legislature had intended so drastic a change it would have effected such change by the use of more direct and appropriate language.

Mr Unterhalter referred to s 19 of the amending Act as providing an example of legislative approval for the reconsideration of matters on which this Court has previously given a decision. That is a

totally different situation. Section 19 only deals with sentence. The reason why the reconsideration of death sentences previously confirmed by this Court is provided for and permitted is because of the subsequent introduction of a new and more favourable sentencing regime. This necessitated, as a matter of policy and fairness, the reconsideration of all outstanding death sentence cases in the light of the new approach and the new principles applicable to death sentence matters.

Mr Unterhalter further contended that the amended s 323 would serve no useful purpose unless given the wider meaning for which he contended. He claimed that a referral by the Minister of a statement recording the grounds for his doubt to this Court for its consideration at appeal or review proceedings in terms of s 316A would not add anything to what counsel was likely to raise in argument. In a sense this is so, and the Minister's power is more circumscribed than

before. But this is because under the amending Act, unlike the position previously, every conviction in a death sentence case must inevitably came before and be adjudicated upon by this Court or at least two of its members. There is no longer any need for the wider power of referral previously given to the Minister in order to ensure as far as possible that every death sentence matter in respect of which there was a doubt would come before this Court. But even so, there is no gainsaying the fact that, in an appropriate case, the exercise by the Minister of his more limited powers under the amended s 323, in order to place his doubts pertinently before this Court, can still serve a useful purpose.

For the reasons enumerated above the appellant was clearly not entitled to the relief which he sought in the Court a quo. It also follows that he had no reasonable prospects of success on appeal.

The application for condonation consequently falls to be dismissed, with costs. Such costs will include the respondent's costs of appeal. It is ordered accordingly.

J W SMALBERGER
JUDGE OF APPEAL

CORBETT, CJ)
KUMLEBEN, JA) CONCUR
VAN DEN HEEVER, JA)
VAN COLLER, AJA)