




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case number: CC11/2021

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| (1) | REPORTABLE: YES/NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED: YES/NO |
|  | |
| SIGNATURE | DATE |
| | 23/03/2022 |

In the matter between:

DANIEL MAMPHE MSIZA

Applicant

v

THE STATE

Respondent

JUDGMENT

MOSOPA, J

1. An application for separation of trials in terms of section 157(2) of the Criminal Procedure Act 51 of 1977 ("CPA") was refused by this court, and as a sequel to such refusal, the applicant brought an application for leave to appeal against the whole judgment delivered on 1 December 2021.

2. The applicant seeks leave to appeal to the Supreme Court of Appeal, alternatively to the Full Court of this division.

APPEALABILITY OF THE ORDER REFUSING A SEPARATION OF TRIALS IN
TERMS OF SECTION 157(2) OF THE CPA

3. At the commencement of the proceedings, I invited the parties' submissions as to whether the order refusing the separation of trials sought by the applicant, from the trial of the rest of the co-accused in the main trial, is in fact appealable.
4. Adv Cilliers SC, on behalf of the applicant, contended that the order is appealable, as it is final in effect and disposes of the issue of separation of trials the applicant intended. Further, that the current application is brought in terms of sections 16 and 17 of the Superior Courts Act 10 of 2013 ("SC Act").
5. Adv van der Merwe, on behalf of the respondent, contended that the order is not appealable as it is an interlocutory order in a criminal trial without a final effect. Further, that the application is brought under the provision of section 157(2) of the CPA and as such, leave to appeal ought to be brought in terms of the provisions of section 316 of the CPA, which remedy is available to the applicant only after his conviction and sentence.
6. Section 1 of the SC Act defines appeals under this Act as follows;

"appeal – in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law..."

Chapter 5 of the SC Act consists of section 15 to 20.

7. It must be accepted that the purpose of the definitions in the SC Act is not only to harmonise the provisions of the CPA and the SC Act, but also to supplement the provisions of the CPA in events where it does not set out the

procedure to be followed for leave to appeal (see ***S v Liesching and Others 2017 (2) SACR 193 (CC)***). Section 157 of the CPA does not set out the procedure to be followed in the event that the application for separation of trials is refused.

8. The CPA dictates the procedure to be followed for a decision of a single judge to be submitted to the Supreme Court of Appeal (“SCA”) for determination in four ways;

- i) as an appeal against conviction or sentence with leave of the trial court (section 316 of the CPA);
- ii) as a special entry of an irregularity or illegality (section 317 of the CPA);
- iii) where a question of law has been reserved (section 319 of the CPA); and
- iv) instances in section 323 of the CPA (which is currently repealed *in toto*).

(see sections 315 to 324 of the CPA (Chapter 31))

9. It is trite that an order refusing an application for separation of trials is interlocutory (see ***S v Libaya en ‘n Ander 1965 (4) SA 249 (O)***). Dealing with appeal matters in a piecemeal manner is discouraged as it leads to prolonged litigation and in some instances, to wasteful use of judicial resources and costs. However, there is a competing interest available to the accused, namely that he is entitled to a fair trial; however, it is the duty of the trial court to ensure the fairness of the accused’s trial. In the matter of ***Cloete and Another v S, Sekgala v Nedbank Limited 2019 (4) SA 268 (CC)***, Theron J, writing for the majority, held at para 57;

“[57] In any event, this Court has held that in considering whether to grant leave to appeal, it is necessary to consider whether “allowing the appeal would lead to piecemeal adjudication and prolong the litigation or lead to the wasteful use of judicial resources or costs”. Similarly,

in TAC I, this Court stated that “it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance”. This is one of the main reasons why interlocutory orders are generally not appealable while final orders are.”

10. Section 16(1) of the SC Act provides;

*“(1) Subject to subsection 15(1), the Constitution and any other law –
(a) an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted –
(i) if the court consisted of a single judge, either to the Supreme Court of Appeal or to a full court of that Division, depending on the direction issued in terms of section 17(6), or...”*

11. It is against this backdrop that Adv Cilliers SC contended that the order I made is appealable. As already indicated, this only became applicable in exclusion of appeals in terms of the CPA, as two statutes cannot regulate the same subject matter. In the matter of **S v Liesching and Others** (*supra*) at para 36, Muni AJ held;

“[36] The reason for the exclusion of appeals regulated in terms of the CPA or any other criminal procedural law from the purview of Chapter 5 is to avoid duplication. It would be senseless to have two statutes regulate the same subject matter. The Legislature recognised that, although the CPA deals comprehensively with appeals in criminal matters, it does not do so exhaustively. Chapter 5 of the SC Act, in so far as it deals with appeals, complements and supplements the CPA. The purpose of the definition is therefore not only to harmonise the provisions of the CPA and the SC Act but also to supplement the provisions of the CPA.

[37] “Appeal” for purposes of Chapter 5 does not include an appeal in a matter regulated in terms of the CPA or any other criminal procedural

law. The converse is also true; if it is not a matter regulated by the CPA or any other criminal procedural law it would be an appeal for the purposes of Chapter 5.

[38] The CPA regulates appeals in criminal proceedings, in respect of Superior Courts, in sections 315 to 324. These provisions regulate various matters including applications for leave to appeal, petitions, applications to adduce further evidence and special entries. The CPA regulates applications to adduce further evidence, after conviction in the High Court, in two instances. First, in section 316(5) and second, in sections 316(13)(d) and (e)."

12. An application in terms of section 157(2) is a matter which is regulated by the CPA and the appeal against the decision made in the determination of such application, is matter regulated in terms of the CPA.
13. The conclusion that I arrive at, is that the appeal against the decision I made can only be appealed in terms of section 316(1)(a) of the CPA and not in terms of section 16(1)(a)(i) of the SC Act, as that only applies after the conviction and sentence of the applicant in the criminal trial. The interlocutory order I made does not dispose of the criminal trial of the applicant.
14. Normally, when a court comes to this sort of conclusion, it means that the court cannot entertain the merits of the application for leave to appeal. I am of the view that I should take a different approach and consider the merits of the application for leave to appeal, as I allowed both parties to address the court on such merits.

ANALYSIS

15. Adv Cilliers SC also brings this current application in terms of section 17(1) of the SC Act. I received a notice for application for leave to appeal in this matter, which listed various grounds under which the application resorts, but Adv Cilliers SC, in argument, adopted a different angle and only raised one issue as a ground for the application, which is the applicant's right to be

represented by a legal representative of his choice. This ground was not listed in the notice I received, however, it was contended on behalf of the applicant that, despite the fact that this ground was not raised in argument, it is contained in his founding affidavit in support of the section 157(2) application.

16. Paragraphs 23 and 24 of the applicant's founding affidavit partly reads;

"[23] ...the legal costs resulting from this for the applicant in this regard, will be substantial and the applicant would be severely prejudiced financially should he instruct his senior counsel to be present at court for the entire period of the criminal trial, while most probably the evidence led by one witness only which oral evidence may also entail perhaps one or two days at the very best, may implicate the applicant in any wrongdoing. The applicant has already incurred substantial legal costs in respect of his attorneys and senior counsel as already demonstrated above.

[24] The financial burden alone placed on the applicant is undisputedly totally irrational, which should not be countenanced by any court and would result in the applicant not having a fair trial in the context as set out above."

17. From the above, it is clear that if the accused is subjected to a joint trial, he will suffer financial prejudice and he wishes to retain his current lawyers of his choice. This is not a new factor, as was argued by Mr van der Merwe on behalf of the respondent. However, the applicant does not contend that there is a possibility, if he has to sit in a joint trial, he will end up losing his lawyers of choice, but his emphasis is on financial prejudice he stands to suffer. This argument only arose in submissions in this court, when it was contended, on behalf of the applicant, that in determining the competing interests of the State and the applicant in ordering a separation of trials, the applicant will suffer infringement of his constitutional right to have a lawyer of his choice during his trial.

18. Section 17(1)(a)-(c) of the SC Act provides;

“17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

- (a) (i) the appeal would have reasonable prospects of success; or*
(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and*
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.”*

19. Adv Cilliers SC did not clearly state under which ground stated in section 17 the applicant is bringing this current application, but I gather based on the submissions that it is under the provisions of section 17(1)(a)(ii), in that the SCA has never dealt with the issue of the legal representative of choice as an infringement of one's constitutional right.

20. To better understand this contention by the applicant, it is important for one refer to the Constitution and section 35(3)(g) provides;

“Every accused person has a right to a fair trial, which included the right –

to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”

21. This is not an absolute right, and Legal Aid, South Africa, which funds legal representation at state expense, has the right to refuse funding to a person who undisputedly can afford to pay for his legal representation. The contrary is also true, if a person is indigent, Legal Aid will fund his legal representation. If the applicant's funds happen to be exhausted in the process of a criminal

trial he is subject to, he may be afforded legal representation on application to Legal Aid.

22. Now the question which this court must determine is whether if such funding is afforded to the applicant, does he have the right to retain his lawyer of choice. Legal Aid, South Africa has a list of lawyers on their panel who are instructed to represent accused persons in their criminal cases. Normally, accused persons are not afforded the opportunity to choose the lawyers of their choice.
23. This court in the matter of ***Magidiwana and Others v President of the Republic of South Africa and Others 2013 (11) BCLR 1251 (CC)***, when dealing with the funding of miners in the Marikana Commission at state expense, that is to say through Legal Aid, South Africa, the court remarked in the minority judgment when dealing with the High Court's order of legal representation of choice, that;

“...it would be commendable for the miners' current legal teams to be retained for the purposes of legal representation.”

The miners in this matter had private funding which dried up and Legal Aid refused to fund them, but the court ruled in favour of the miners and that they continue to be represented by their current lawyers.

24. Based on the above, it is my considered view that in the event that the applicant cannot afford his current legal representation in the course of his joint trial, he can always apply to Legal Aid for funding and more especially, retain his current legal representatives. In this regard, the applicant will suffer no infringement of his right to be afforded his lawyer of choice.
25. The contention by Adv Cilliers SC that the issue of infringement of the right to have a lawyer has not been dealt with by the Supreme Court of Appeal in the past and that this appeal should be directed to the Supreme Court of Appeal is not supported. The matter of ***Magidiwana (supra)*** served before both the

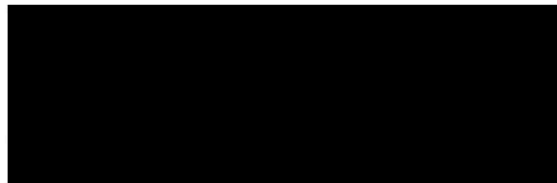
Supreme Court of Appeal and Constitutional Court wherein leave to appeal by Legal Aid was refused. This application stands to fail for two reasons;

- 25.1. The order refusing the separation of trials is not at this stage appealable; and
- 25.2. There are no prospects of success and the applicant failed to demonstrate that another court will come to a different conclusion than this court. There are also no other compelling reasons why the appeal should be heard; it is not of substantial importance to both the parties.

ORDER

26. Consequently, the following order is made;

- (1) Application for leave to appeal refusal of separation of trials is hereby refused.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant: Adv J Cilliers SC

Instructed by: Maluks Attorneys

For the respondent: Adv H van der Merwe

Instructed by: The DPP

Date of hearing: 28 February 2022

Date of judgment: Electronically delivered