

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO:

A500/2006

DATE:

6 JUNE 2008

5 In the matter between:

BURTON FORTUIN

Applicant

ANDTHE STATE

Respondent

10

## JUDGMENT

(Application for Leave to Appeal)

MOOSA, J:

15 This is an application for leave to appeal to the Supreme Court of  
Appeal against a decision of this Court to dismiss the appeal  
against the conviction of applicant in the Regional Court.

20 The applicant was convicted in the Regional Court on a charge of  
rape and sentenced to nine years imprisonment. The applicant  
denied any wrong doing; the application for leave to appeal is  
opposed by the respondent namely, the State.

The grounds of appeal are set out in the notice of application for leave to appeal dated 21 May 2007.

Although there are five grounds of appeal, as set out in the notice of application for leave to appeal, Advocate Maraais, who appeared for the applicant, informed the Court that he is essentially concentrating on two grounds; they are the first ground namely, that the Honourable Court of Appeal misdirected itself by not finding that the learned magistrate erred in dismissing the application by the applicant's attorney for the recall of the applicant; and the fifth ground, namely, that the Honourable Court of Appeal erred in not sufficiently taking into account that according to Dr Trope some of the injuries that the complainant professed to have sustained could have been faked, and that some of the injuries the complainant testified about were not seen and noted by Trope.

Now it is settled law for the applicant to succeed with his leave to appeal he must satisfy this Court that he has reasonable prospects of success on appeal. In this regard see R v Ngubane and Others 1948 AD 185 at 186/7 and S v Ackermann en 'n Ander 1973(1) SA 765(A) 767 g-h. This consideration applies to both

the question of law and fact. In this regard see R v Koswayo  
1949(3) SA 761(A).

This Court has dealt fully, in its judgment, with all the issues  
5 which have been raised in the grounds of appeal and also more  
particularly, with the grounds as contained in 1 and 5 on which the  
applicant is concentrating. There is, therefore, no reason for me  
to repeat the rationale of this Court in coming to its conclusion in  
respect of those grounds. We have also heard the submissions by  
10 both applicant's and respondent's counsel in connection with this  
application.

After careful consideration, I have not been persuaded that there  
are reasonable prospects of success on appeal to the Supreme  
15 Court of Appeal, either on the question of law or fact. In the  
premises I am of the view that the APPLICATION FOR LEAVE TO  
APPEAL TO THE SUPREME COURT OF APPEAL SHOULD BE  
DISMISSED, and it is so ordered.

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MOOSA, J

I agree,

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MLONZI, AJ

DS