IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A381/2009

DATE: 3 DECEMBER 2009

In the matter between:

ADRIAAN WILDSCHUTT Applicant

and

THE STATE Respondent

J U D G M E N T

Application for Leave to Appeal

THRING, J:

I shall refer to the parties in this application as they were in the review proceedings which came before us on the 14th August, 2009. This is an application in terms of section 20(4)(b) of the Supreme Court Act, No. 59 of 1959 by the second respondent, the Director of Public Prosecutions, Western Cape, against the whole of the judgment and order delivered by this Court on that date. The relevant facts up to that date are set out in my earlier judgment and I need not

repeat them.

We have been informed, and it seems to be common cause, that since the 14th August, 2009, the first applicant, Mr Wildschutt, together with his 14 co-accused, has been charged and tried in a regional court on various charges, including kidnapping and assault. That trial has been concluded. The first applicant was found guilty apparently of common assault and fined. There is no appeal pending, so that in the event of another Court setting aside the order which we made, there would be no question of the first applicant being rearrested on these charges: they are no longer pending against him and they have, in fact, been finally disposed of. Nor, of course, would there be any need for the first applicant to bring a fresh application for bail, as was envisaged in paragraph 1(ii) of our order, his trial now being a thing of the past.

The second respondent, however, seeks leave to appeal, as we understand the position, essentially because he finds unpalatable our declaratory order that the first applicant may, in a fresh application for bail, call certain witnesses notwithstanding that they may possibly be called later for the prosecution at the first applicant's trial. The second respondent fears the creation of a precedent in that respect. However, that issue is, in our view, now of academic interest only in view of what has happened since we decided the

review. The second respondent does not require to have our order set aside on appeal in order to prevent the first applicant from calling these witnesses. It will never happen anyway.

In an application such as this for leave to appeal, the Court will, generally speaking, in my view, be entitled to have regard to facts which have arisen or events which have taken place since it made its order against which leave is being sought to appeal. In Attorney-General Free State v Ramakhosi 1999(3) SA 588 (SCA), Melunsky, AJA, as he then was, said the following at 594C-D:

> "For the reasons given I am of the view that this Court may, in the circumstances of the present case, consider the facts that have arisen since the release of the respondent on bail for the purpose of deciding whether the appeal will have any practical effect or result. Furthermore, it is proper to conclude, particularly in view of the appellant's own concessions in this regard, that the appeal will not have such a result."

In that matter the respondent had unsuccessfully applied for bail in a regional court. He appealed to the Free State Provincial Division against the magistrate's refusal to grant

him bail. His appeal was successful and he was ordered by the Provincial Division to be released on bail. His trial then proceeded in the regional court. In the meantime the Attorney-General appealed to the Supreme Court of Appeal against the respondent's release on bail. In the Supreme Court of Appeal it was conceded by the appellant, the Attorney-General, that even if the appeal were to succeed, the respondent would, as a matter of strong probability, be released on bail again pursuant to a fresh application for bail because of his observance of all of the conditions of his bail hitherto. The decision of the Supreme Court of Appeal turned on whether or not, if the appellant were to be successful, the judgment of the Supreme Court of Appeal would have any practical result or effect. It was held that it would not and the appeal was dismissed for that reason. At 593F-G the Court said:

> "This Court has held that it is not obliged to give decisions on academic questions that have no real bearing on the conviction or acquittal of an accused (see Attorney-General Transvaal v Flats Milling Company (Pty) Ltd & Others 1958(3) SA 360 (A) at 370H-372D). There is no reason why the same principle should not be extended to cover an appeal relating to bail."

The matter of the creation of a precedent was raised in that case by the Attorney-General, as it is before us. In that connection Melunsky, AJA said this at 593I-594A:

> "Counsel for the Attorney-General was in fact constrained to concede that no practical benefit would accrue to the appellant if the merits of the appeal were argued. He submitted only that a decision on the merits may be used as a precedent in other bail applications. This submission merely reinforces the view that the outcome of the appeal will not affect the rights of the parties in a practical manner."

So, too, also in the present matter. In my opinion, even if another Court should uphold the proposed appeal and set aside our judgment and order, no practical benefit would accrue to the second respondent. The outcome of the appeal would not affect the rights of the parties in a practical manner and the appeal would have no practical effect or result. It would, in other words, deal only with a question which has become academic because of the supervening facts. In our opinion, in the circumstances, and particularly on the strength of the decision in the Ramakhosi case, supra, another Court

would almost certainly decline to entertain such an appeal.

For these reasons the proposed appeal does not, in my view, enjoy reasonable prospects of success, and leave to appeal must accordingly be refused.

This application was opposed by the first applicant, Mr Wildschutt, the erstwhile applicant. Why, I do not know, since he has no longer been in jeopardy of being rearrested or recharged since the conclusion of his trial. In my view his opposition was consequently unnecessary, and served no useful purpose as far as he was concerned. In the circumstances, although Mr Mihalik, who appears again for the first applicant, has asked for an order for costs, it would be inappropriate to award such costs. Consequently the application will be refused.

THRING, J

I agree.

BAARTMAN, J

/bw