

**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

Case no. 2280/2022

In the matter between:

MARC VAN VEEN

Applicant

and

**DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**

First Respondent

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

Second Respondent

THE FINANCIAL SECTOR CONDUCT AUTHORITY

Third Respondent

**JUDGMENT delivered on 31 AUGUST 2023
Application for leave to appeal
(Delivered by email and listing on SAFLII)**

BINNS-WARD J:

[1] The applicant, who applied to this court, unsuccessfully, for a permanent stay of prosecution, now applies for leave to appeal from the judgment dismissing his application in the principal case. The judgment in the principal case has been listed on SAFLII *sub nom. Van Veen v Director of Public Prosecutions, Western Cape and Others* [2023] ZAWCHC 174 (31 July 2023).

[2] The judgment in the principal case identified that the applicant had sought a permanent stay of prosecution on three grounds, *viz.* (i) unreasonable delay, (ii) mental or intellectual incapacitation due to the effects of a brain tumour and (iii) that the prosecution's case is reliant on unlawfully obtained self-incriminatory evidence. See para 7 of the judgment. The

application for leave to appeal does not attack the correctness of the court's summary of the grounds on which the application was made.

[3] As to the first ground, the judgment held that there had been an unreasonable delay by the state in instituting the criminal proceedings, but that the applicant had failed to establish that the delay had caused him material trial-related prejudice. It is well established by the SCA and Constitutional Court authorities cited in the principal judgment that to obtain a permanent stay it was incumbent on the applicant to show such prejudicial effect of the delay; see para 16-24 of the principal judgment and the further authorities cited in footnotes 6 and 14.

[4] The judgment noted that the third ground was not pressed in argument and held that it was in any event without merit; see para 8-12 of the principal judgment.

[5] I am unable to form the requisite opinion that there is a reasonable prospect that another court might find on appeal that this court erred in its findings that the applicant had not established an entitlement to the relief he sought on the aforementioned first and third grounds of his application, nor do I consider that there is any other compelling reason for an appeal against them to be entertained.

[6] As to the second ground, the applicant's case was that the sequelae to the pituitary adenoma for which he had received medical treatment prevented him from being able to adequately instruct his legal representatives in the criminal proceedings and meant that he was intellectually incapacitated from properly defending himself at a criminal trial. The medical opinion evidence that the applicant adduced in support of the second ground was uncontroverted because the prosecution chose not to engage with it, contending that the issue fell to be addressed in terms of ss 77 and 79 of the Criminal Procedure Act 51 of 1977.

[7] The applicant contended that the medical evidence established that his fair trial rights under s 35(3) of the Constitution would be infringed were the criminal case to go to trial. This court held, however, that the applicant's intellectual incapacity made out by the evidence was of the sort of disability contemplated by, and provided for, in s 77 and 79 of the Criminal Procedure Act. Applying the principle of subsidiarity, this court held that a civil application for a stay of prosecution on the second ground relied on by the applicant was precluded because the pertinent provisions of the Criminal Procedure Act covered the question procedurally and substantively. See para 28-39 of the principal judgment. This court also held that in any event the relief sought by the applicant was of a final interdictory character and that, because of the redress he could obtain under the Criminal Procedure Act, he had not satisfied the requirement

of showing the absence of an adequate alternative remedy. See para 40 of the principal judgment.

[8] Whilst I am doubting about the likelihood of this court's findings on the second ground of the principal application being reversed on appeal, the questions raised in the applicant's second ground are nevertheless novel, not altogether free of complexity, and deserving of clarification in a nationally binding judgment. I could foresee that had the application been granted on the second ground, it would provide the foundation for similar such applications by other accused persons in future to pre-empt the statutory criminal procedural process. That is why I consider it desirable for clarity on the subject to be obtained from a higher court. These factors have led me to form the opinion that there is sufficient reason, under the ambit of s 17(1)(a)(ii) of the Superior Courts Act 10 of 2013, to grant leave to the applicant to appeal to the Supreme Court of Appeal on the limited questions whether this court was correct in dismissing the principal application on the bases of the application of the principle of subsidiarity and the applicant's failure to comply with the requirements for a final interdict.

[9] The applicant's counsel, having been apprised of my prima facie view that leave to appeal should be on limited issues, argued against the proposition. In a written submission, he argued that '*[t]he Court's conclusions in relation to the question of trial prejudice cannot be separated from the reliance on the principle of subsidiarity*' and further that the effect of the holding by this court at para 38 read with para 30 of the principal judgment was that the '*trial-related prejudice to the applicant must be addressed in the criminal proceedings*'.

[10] These arguments misconceive the effect of the limitation of issues that I propose to direct. The whole case was about the applicant's alleged trial-related prejudice on the three grounds mentioned in paragraph 2 above. As discussed earlier, the only one of those grounds with any substance was the second one, ie the applicant's trial-related prejudice by virtue of intellectual incapacity. The application on that ground was dismissed by virtue of the principle of subsidiarity, alternatively because the applicant had failed to show that he lacked an alternative adequate remedy. It is appropriate therefore that those be the issues separated for consideration on appeal. It would in fact be misdirected, considering my remarks at paragraphs 3 to 5 above, for this court to grant leave to appeal on an unrestricted basis.

[11] I am, however, concerned about the further delay in the criminal proceedings that any appeal will occasion. This matter has already been dragging on for about 15 years and it is manifestly desirable that any further delay be kept as short as practically possible. I therefore

intend, as permitted by s 17(5) of the Superior Courts Act, to attach as a condition that the applicant apply to the President of the Supreme Court of Appeal within 20 days of the granting of the order for an expedited enrolment of the appeal for hearing.

[12] An order will issue in the following terms:

1. Leave to appeal from the judgment of this court delivered on 31 July 2023 is granted limited to the following issues only: whether the court was right to dismiss the application on the application of the principle of subsidiarity, or because the applicant failed to satisfy all the requirements for final interdictory relief.
2. The appeal shall lie to the Supreme Court of Appeal.
3. The relief granted in terms of paragraph 1 of this order is granted conditionally upon the applicant making written application to the President of the Supreme Court of Appeal within 20 days of the granting of this order, supported by a copy of this judgment, for an expedited enrolment of the appeal for hearing.
4. The costs of the application for leave to appeal shall be costs in the appeal.

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A.G. BINNS-WARD

Judge of the High Court