CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 08/07

UNIVERSITY OF WITWATERSRAND LAW CLINIC	Applicant
versus	
THE MINISTER OF HOME AFFAIRS	First Respondent
MICHAEL SIRELA	Second Respondent
and	
ISMAIL EBRAHIM JEEBHAI	Applicant for Joinder

Decided on : 11 April 2007

Revised on : 7 June 2007[1]

JUDGMENT

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[1] Unusually for this Court, this judgment was revised after the Court became aware that a patent error existed in paragraph 8 of the judgment originally handed down. In terms of Rule 29 of the Rules of this Court, Rule 42(1)(b) of the Uniform Rules of Court also applies in this Court. That Rule provides that –

> "The Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary:
>
> (a) . . .
>
> (b) an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission".

This Court has approved the dictum in *Firestone South Africa (Pty) Ltd v Genticuro A.G.* 1977 (4) SA 298 (A) at 306H-307H in which four circumstances were identified when a court may vary its judgment or order. See *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC); 1997 (6) BCLR 677 (CC) at paras 22-24; and *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) at para 4. One of those circumstances is where the judgment contains a patent error which may be deleted without altering the intended sense or substance of the judgment. The patent error in this case suggested that the applicant had made a submission which it had not that reflected negatively on its professional competence. It can be deleted without affecting the sense or substance of the judgment. The Court gave notice to the parties that it intended to delete paragraph 8 from its judgment, and having received no objection, duly issues a revised judgment from which the original paragraph 8 has been deleted.

THE COURT:

[1] This is an application by the University of Witwatersrand Law Clinic (the Clinic), purportedly in terms of Constitutional Court Rule 19(2),[2] for direct appeal to this Court. The Clinic was an amicus curiae in proceedings in the Pretoria High Court. In those proceedings, Mr Jeebhai, who was the applicant, had sought declaratory relief concerning the arrest, removal, detention and subsequent disappearance of Mr Khalid Mahmood Rashid. On 16 February 2007, the full bench in the Pretoria High Court dismissed the application. The present application by the Clinic is directed against that decision.

[2] On 2 March 2007, Mr Jeebhai lodged with the Pretoria High Court an application for leave to appeal to the Supreme Court of Appeal. That application has yet to be determined.

[3] On 22 March 2007, Mr Jeebhai, through his attorneys, lodged with this Court an application in which he sought (a) "leave to join" the Clinic's application to this Court; and (b) leave to appeal directly to this Court. This application, however, makes no mention of the application for leave to appeal that was lodged with the

[2] Rule 19(2) provides as follows:

> "A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave."

Pretoria High Court on 2 March 2007. The Clinic has however subsequently filed a further affidavit purporting to comply with Rule 19 by drawing attention to the application for leave to appeal in the High Court.

[4] The sole question for decision at present is whether it is in the interests of justice to grant these applications at this stage while an application for leave to appeal is pending in the High Court.

[5] Mr Jeebhai has elected to pursue an appeal first in the Supreme Court of Appeal. He was entitled to do so and his choice must be respected. The Clinic, as an amicus, cannot take over the litigation and determine an appellate forum for Mr Jeebhai. The decision of this Court in *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another*,[3] relied upon by the Clinic, is clearly distinguishable from the present case. That case did not, as the present case does, involve a direct appeal to this Court while an application for leave to appeal is pending in the High Court.

[6] The application filed by Mr Jeebhai is defective in two material aspects. In the first place, it purports to be an application to join the amicus in an application for direct appeal to this Court. This is impermissible. As he is dominus litis, he must lodge his own application and not seek to join an application lodged by an amicus.

[3] 2006 (6) SA 103 (CC); 2006 (6) BCLR 669 (CC).

This Court made it clear in *Campus Law Clinic*[4] that an amicus curiae would ordinarily be permitted to appeal against an order of another court only where the actual parties to that litigation were not seeking to pursue an appeal and there was a clear public interest requiring it to be permitted to lodge the appeal. Where a party to the litigation seeks leave to appeal, that party must launch its own application for leave to appeal in terms of the rules and set out all the considerations relevant to its application. To permit a party to join an application for leave to appeal made by an amicus would be to subvert the clear understanding in *Campus Law Clinic* that parties to litigation are those who in the first place must seek to prosecute the litigation.

[7] In the second place, the application, contrary to Constitutional Court Rule 19(3)(d),[5] does not indicate that an application is pending in the High Court and the status of that application. The purpose of this rule is to avoid the duplication of proceedings and more importantly to enable this Court to determine whether it is in the interests of justice to consider the matter while an application for appeal is pending in another court. It is not in the interests of justice to have two courts

[4] Id at para 21.

[5] Rule 19(3)(d) provides:

> "An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain-
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> . . .
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> (d) a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so-
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> (i) which court;
>
> (ii) whether such application is conditional upon the application to the Court being refused; and
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> (iii) the outcome of such application, if known at the time of the application to the Court."

consider applications for leave to appeal at the same time without each knowing that another court is considering an application for leave to appeal in the same matter.

[8] We accept that the matter is one which evokes public interest. The disappearance of a human being following an arrest is a matter of grave concern. It is therefore a matter that must be accorded the attention that it deserves. This in itself does, however, not justify a departure from the rules relating to applications for leave to appeal. An application for leave to appeal is presently pending in the Pretoria High Court. There is no suggestion that there has been an unreasonable delay in dealing with the application for leave to appeal.[6]

[9] In all the circumstances it is not in the interests of justice to grant the application for leave to appeal at this stage. Both applications must therefore be dismissed. This is not a case in which an order for costs ought to be made.

[10] In the event the following order is made:

The applications are dismissed.

Moseneke DCJ, Madala J, Mokgoro J, Navsa AJ, Ngcobo J, Nkabinde J, O'Regan J, Sachs J, Skweyiya J and Van der Westhuizen J.

[6] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 68-73.