



CONSTITUTIONAL COURT OF SOUTH AFRICA

Pieter Pietertjie Liesching and Others v The State

CCT 304/16

Date of hearing: 24 August 2017

Date of judgment: 29 August 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 29 August 2018, the Constitutional Court handed down judgment in the application for leave to appeal against a decision by the President of the Supreme Court of Appeal (the President). In terms of section 17(2)(f) of the Superior Courts Act (the Act), the President has the power, in exceptional circumstances, to order that an application already dismissed by the Supreme Court of Appeal be reconsidered.

The applicants, Mr Pieter Pietertjie Liesching, Mr Malvin Naas Swartz and Mr Xavier Malgas had been convicted of murder and unlawful possession of firearms and ammunition by the High Court of South Africa, Gauteng Local Division, Johannesburg. The applicants were convicted on the strength of the testimony of Mr Sherwin Arries. After an application for leave to appeal had been refused by the Supreme Court of Appeal, Mr Arthur Saimons was tried for the murder of the deceased in the High Court. Mr Arries testified in that trial and recanted the testimony he had given in the applicants' trial. Mr Saimons was discharged at the close of the state's case in terms of section 174 of the Criminal Procedure Act 51 of 1977. A few months later, the applicants made an application to the President in terms of section 17(2)(f) of the Superior Courts Act. The President dismissed their application on the basis that a convicted person seeking to adduce further evidence, after all the recognised appeal procedures had been exhausted, had to do so under section 327(1) of the Criminal Procedure Act and not section 17(2)(f) of the Superior Courts Act. The applicants successfully appealed against this decision to this Court. This Court found that section 17(2)(f) applied to criminal matters and remitted the matter to the President for a decision. Maya AP considered the application and dismissed it on the grounds that no exceptional circumstances existed. This application is a sequel to this Court's decision in *S v Liesching* [2016] ZACC 41. The

applicants appealed against the President's decision, arguing that exceptional circumstances did exist.

In essence, the applicants' case is that the new evidence of Mr Arries is, by definition, an exceptional circumstance. The main issues in this matter were, firstly, whether the new evidence constituted exceptional circumstances and, secondly, whether the President has a duty to provide reasons when dismissing an application made under section 17(2)(f).

In a minority judgment by Kathree-Setiloane AJ, jurisdiction was founded on the basis of *Liesching I* and also on the basis that this matter concerned the interpretation of the Superior Courts Act. Kathree-Setiloane AJ found that whether something was exceptional must be determined on the merits of each case and is a factual inquiry and that prospects of success are central but not decisive. It was reasoned that the applicants needed to demonstrate that there was a reasonable prospect that their application to adduce further evidence would succeed. Kathree-Setiloane AJ therefore held that there was a reasonable prospect of the Supreme Court of Appeal finding that the new evidence would result in a materially different outcome in the applicants' trial. Kathree-Setiloane AJ concluded that exceptional circumstances did exist and that the President committed a misdirection in law and fact by dismissing the applicants' application. Due to the delays in the matter, Kathree-Setiloane AJ held that it would not be just and equitable to refer the matter back to the President and that instead the application for leave to appeal should be referred to the Supreme Court of Appeal for reconsideration. With regard to the second question, Kathree-Setiloane AJ held that court decisions which are subject to an appeal must be accompanied by reasons and that, ideally, the Supreme Court of Appeal ought to provide reasons where deciding a matter as a court of first instance and where an appeal lies to this Court, there is a duty on the President to provide reasons.

The majority judgment by Theron J (Zondo DCJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring) held that the new evidence did not constitute exceptional circumstances and that the application for leave to appeal should be dismissed. Theron J found that as the parties had assumed that this Court had jurisdiction to entertain an appeal against the President's decision under section 17(2)(f), the matter should be decided on the basis that this Court's jurisdiction is assumed. With regard to the first question and the meaning of exceptional circumstances, Theron J found that the requirement of exceptional circumstances must be present before the President can exercise her discretion. Theron J further held that this Court should then be slow to substitute its "discretion" for that of the President unless it is satisfied that it has good grounds to do so. Theron J found that the President had not yet exercised her discretion and that the applicants had not demonstrated why it would be in the interests of justice for this Court to entertain an appeal against a section 17(2)(f) decision. However, even if it would be in the interests of justice to hear the appeal, Theron J found that there were no exceptional circumstances present in this case which warranted the President exercising her discretion. Theron J stated that while a recantation of testimony may constitute exceptional circumstances in certain circumstances, there ought to be some external, verifying indicator or circumstance showing that the original evidence was suspect, and that the subsequent recantation is more plausible. In this matter, Theron J

found that Mr Arries' testimony in the Saimons' trial was a mere repudiation of his previous testimony. For these reasons, Theron J held that there were no exceptional circumstances present and it was not in the interests of justice to grant leave to appeal. On this approach, there was no need to deal with the second question.