

**HIGH COURT
(BISHO)**

CASE NO. 17/97

**LITHA MLWANDLE
MONGEZI SAMBU
LIZO SKENJANE
LIBELE SOYAMBA
MZOLI MASWANA
MALUSI SAMUELS SAMBU
ALLAN DAVIES
THEMBINKOSI ALLAN MCOPELE**

Applicant Number 1
Applicant Number 2
Applicant Number 3
Applicant Number 4
Applicant Number 5
Applicant Number 6
Applicant Number 7
Applicant Number 8

versus

THE STATE

J U D G M E N T

EBRAHIM J: There are two applications before the Court in respect of the convictions of Applicants nos. 1 to 7 on two counts of murder, nine counts of attempted murder and one count of robbery with aggravating circumstances. The Applicants seek leave to appeal against their convictions and also apply for a special entry to be made on the record in terms of s 317 of the Criminal Procedure Act 51 of 1977. These applications are opposed by the State.

In the headings of both applications Thembonkosi Allan Mcopele is cited as Applicant number 8. This is clearly incorrect as an order has been granted separating his trial from that of the other Applicants due to him having absconded during the course of the trial. Accordingly, since he was not convicted on any of the aforementioned counts these applications do not concern him and are confined to Applicants nos. 1 to 7.

APPLICATION FOR LEAVE TO APPEAL

The grounds upon which the Applicants rely for leave to appeal are set out under two general headings in their application. These grounds, save for those directed at the conclusions reached by the Court, do not raise any issues which were not fully argued by defence counsel at the trial. For the sake of convenience I shall deal with these grounds under the same headings and utilise the same numbering in respect of each paragraph as set out in the application.

AD THE LAW

Ad 1: This ground relates to the admissibility of evidence which, counsel contends, *'fell outside the ambit of the Further Particulars'*. The extent to which the Court has relied on such evidence is self evident from the judgment and I do not propose to comment further in regard thereto.

Ad 2: This ground is directed at the authenticity and admissibility of the documents recovered by Constable Lensley from the business concerned, Super Quick Pongola. The evidence of Constable Lensley that the search for, and the finding of, documents took place in his presence and form part of the business records of this concern, was not challenged. In my view his evidence establishes beyond the reasonable doubt that these are the original documents and that they are authentic.

Ad 3: The Court's approach to, and its evaluation of, the evidence of the accomplices and its application of the relevant legal principles appear from

the judgment. As indicated therein the cross-examination of both accomplices was exceptionally thorough and covered every detail surrounding the robbery as well as a number of other issues. It extended over a number of days and provided the Court with ample opportunity to observe the demeanour of the accomplices and to assess whether they were being truthful both in the testimony they gave and their replies during cross-examination. The Court was satisfied that there was no reasonable doubt that each accomplice had testified frankly and honestly and was not implicating the Applicants falsely in the commission of these crimes.

The Court was also satisfied that they had not colluded with each other, nor with anyone else, in respect of the statements which they had furnished to the police and the evidence given by them in Court. Both accomplices, in particular the witness Dumela, created a favourable impression with the Court.

It is also apparent from the judgment which further evidence the Court relied upon in reaching its finding that the Applicants were the perpetrators of the crimes. I do not consider any further comment necessary in this regard.

Ad 4: The reasons for the Court's refusal of the application brought by Applicant no. 7 to interdict and restrain the State from further investigations are set out in the judgment. I do not consider any further comment necessary in regard thereto.

AD THE MERITS

Ad 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20: The issues raised in these grounds have been addressed in the judgment and I do not consider any further comment necessary in respect thereof.

Ad 21: This ground is set out as paragraph 1 of the application for a special entry of an irregularity in terms of s 317 of Act 51 of 1977. At the hearing of both applications an amendment was sought in terms whereof this ground was withdrawn from the application for a special entry and leave sought to include it as a further ground for leave to appeal. This amendment was granted.

In my view the allegation that the Court, during its questioning of the State witnesses and the Applicants, displayed bias in favour of the State is not borne out by an examination of the questions which were asked in each instance. The questions were of a neutral nature and directed at obtaining clarification in respect of various issues.

It is correct that the replies of the Applicants reflected adversely on their credibility and lent support to the State's case. But the reason for this is entirely due to the nature of the replies which they gave and not because of any perceived bias in respect of questions posed by the Court.

CONCLUSION IN REGARD TO GROUNDS FOR LEAVE TO APPEAL

I have considered the merits of each of the grounds for leave to appeal in order to determine whether there is a reasonable prospect that another court may arrive at conclusions different to those of the trial court. In my view there is no such prospect of success and it follows the application must fail.

THE APPLICATION FOR SPECIAL ENTRY OF AN IRREGULARITY into S 317 OF ACT 51 OF 1977

The Court, when handing down its decision in respect of the application which Applicant no. 7 brought on 25 November 1997 to interdict the State from conducting further investigations, stated that the reasons for its decision would follow in due course.

It is the contention of defence counsel that the judgment of the Court was a final order and therefore appealable. And, in not furnishing these reasons earlier but only during the course of its main judgment in the trial the Court committed an irregularity.

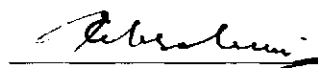
This contention, in my view, is untenable. The application for an interdict concerned an issue relating to the conduct of the trial and the admission of certain evidence. Since the judgment determined that particular issue only it did not, nor could it, have the effect of a final judgment in respect of the main trial itself. Even if the application had succeeded and an interdict had been granted against the State restraining it from any further investigations it would not have brought the trial to an end.

It is obvious that in determining the merits of the application that the Court was not called upon to address the issue of the guilt or innocence of Applicant no. 7 nor that of the other Applicants. Consequently, an appeal against the Court's decision could only be initiated after the Court's judgment in the main trial had been handed down. It follows further that the non-availability of the Court's reasons could not have '*a bearing on the right of Applicant number 7 to a fair trial*' and indeed did not have such effect. The contention that Applicant no. 7 was '*prevented from seeking relief in a higher court of law*' as a result of the reasons being furnished only in the main judgment is consequently without substance.

In my view, therefore, the application for a special entry is frivolous if not absurd and must fail.

DECISION ON THE APPLICATIONS

After considering each of the grounds of appeal I have concluded that there is no reasonable prospect of success on appeal in respect of any of the grounds. In the result the application for leave to appeal is dismissed. Similarly, for the reasons already stated by me, the application for a special entry of an irregularity in terms of s 317 of Act 51 of 1977 is without merit and accordingly refused.



Y EBRAHIM
JUDGE OF THE HIGH COURT (BISHO)

Date: 24 March 1999