

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case No: CC 9/2017

Date heard: 3 June 2020

Date delivered: 9 June 2020

In the matter between:

DEWI DELGADO WALTON

Applicant

AND

THE STATE

Respondent

JUDGMENT

Goosen J

[1] The applicant seeks leave to appeal against his convictions. The applicant was convicted of murder; attempted murder, unlawful possession of a firearm and unlawful possession of ammunition. Judgment on conviction was delivered on 5 July 2017. On 12 July 2017, the applicant was sentenced to life imprisonment on the murder charge; 8 years imprisonment for the attempted murder; 15 years imprisonment for the unlawful possession of a semi-automatic firearm and 18 months imprisonment for the possession of ammunition.

[2] At the trial, the applicant was represented by Mr Saziwa.

[3] On 24 July 2017 a notice of application for leave the appeal was filed on behalf of the applicant. It appears from the notice that Mr Daubermann, who now appears for the applicant, was instructed to prosecute the application for leave. It is to be noted that Mr Daubermann who filed an application for leave to appeal on behalf of Mr Trenton Ambraal, who was the applicant and co-accused at trial. The application, however, is only proceeding in respect of the applicant.

[4] I should indicate that the fact that a notice of application for leave to appeal was filed was not drawn to my attention. This is despite the clear provisions of Eastern Cape Rule 10.

[5] Rule 10 deals with applications for leave to appeal and provides as follows:

- (a) *Applications for leave to appeal shall be heard in dates to be arranged by the legal representatives of the parties in consultation with the judge who is to hear the application.*
- (b) *Within 10 court days of the application for leave to appeal being filed, the legal representatives of the parties are to approach the judge who is to hear the application in order to attempt to arrange a mutually convenient date for the matter to be heard.*
- (c) *In the event of the judge concerned not being approached within the aforementioned period of 10 days or such longer period to which the judge may agree, or in the event of it not being possible within such period as the judge may deem to be reasonable, the judge will*

determine a date and give the parties at least 10 court days' notice thereof.

- (d) *Once the date for hearing of the application for leave to appeal has been determined, the registrar will issue a notice of set down stipulating the date and time of the hearing and deliver a copy thereof to each party.*

[6] The Rule serves several important purposes. The first and most important is that it requires that application for leave to appeal be prosecuted to finality promptly. There are important reasons for such requirement. It seeks to ensure that the appeal process itself is commenced with expedition and it enables the first stage of the process, namely the application for leave, to occur when the trial or application proceedings are still fresh in the minds of the parties and the judge.

[7] The second purpose is to facilitate the hearing of the application in circumstances when the judge is usually engaged in other judicial functions. It is for this reason that the Rule casts an obligation on the legal representatives to approach the judge to make such an arrangement.

[8] In order for the Rule to achieve its purpose it is essential that the Registrar and the legal representatives comply therewith. In every instance the Registrar must, upon receipt of a notice of application for leave, draw same to the attention of the judge. The primary obligation however, is that of the legal representatives and, since the applicant is *dominus litus*, it is the applicant's legal representative who must take the lead in arranging to see the judge concerned.

[9] In this case the Rule was ignored. The result is the passage of almost 3 years since judgment was delivered. When I was approached during the course of last week I enquired of Mr Dauberman why no application for condonation had been filed. I was told that none was required since the application had in fact been commenced timeously. I indicated that I required an explanation.

[10] A supplementary affidavit has now been filed by the applicant explaining the delay. The applicant states that he was dissatisfied with his erstwhile attorney and accordingly instructed Mr Dauberman to apply for leave to appeal. Mr Dauberman was paid an amount of R10 000, 00 as a deposit. He indicated, however, that he would not proceed with the application until his fees had been paid in full. He also indicated that a full transcript of the evidence would be required.

[11] The R10 000, 00 was repaid to the depositor in October 2017. The applicant was only able to raise money paid by his mother in monthly instalments from December 2018. Those instalments were paid into Mr Daubermann's trust account. In March this year the transcript was acquired and Mr Daubermann accordingly thereafter proceeded to prepare the amended application for leave to appeal.

[12] An inability to pay for legal services ought not to prejudice a party who genuinely and *bona fide* wishes to prosecute a particular matter. In this instance the applicant had apparently lost confidence in his erstwhile representative and the Legal Aid Board who instructed him. He, therefore, had no option but to seek to instruct a private attorney and pay his reasonable fee. I accept that the applicant had clearly evidenced an intention from the outset to seek leave to appeal.

[13] However, Mr Dauberman's conduct of the application cannot be ignored. It appears that as early as 11 July 2017 he held an instruction to seek leave to appeal. He held R10 000, 00 in trust for this purpose. He acted upon that instruction and filed a Notice of Application for Leave. When this notice was filed he had already indicated to his client that he would not take any steps until his fees were paid and he had been furnished with a transcript.

[14] Despite the fact that he was on record he did not comply with Rule 10, nor did he seek an extension of time as is provided for in Rule 10.

[15] In October 2017 the R10 000, 00 deposit was repaid and it was not until December 2018 that he started receiving payment. In my view, such flagrant disregard of the Rules is not acceptable. The fact that no condonation for late prosecution of an application for leave is not technically required is no excuse. An explanation for non-compliance with Rule 10 was required and such explanation ought to have been incorporated in the affidavit.

[16] Legal practitioners do not only have a duty to their clients. They also have a duty to the court. That duty requires them to act with absolute fidelity; to comply with the procedural rules and to facilitate the proper administration of justice. In the case of applications such as this that requires that the application be prosecuted expeditiously and where that is not possible, to provide an adequate explanation for the delay as soon as it is apparent that such delay will occur.

[17] I now turn to the merits of the application. In the light of the conclusion to which I have come it is unnecessary to deal with each of the grounds of appeal advanced by the applicant. It suffices to state that the grounds centre upon the trial court's acceptance of the evidence of the state witness Pregnathon Booth as credible and reliable. Booth had identified the applicant and his co-accused as the persons who had pursued him and the deceased and fired multiple shots at them. Booth was able to make his escape. The challenge to the acceptance of Booth's evidence is premised on the admission of evidence relating to a previous inconsistent statement made by Booth. It is submitted that the court erred in allowing the state to lead evidence relating to this statement in which Booth contradicted his early statement to the police regarding the involvement of the perpetrators. The state had presented the evidence to explain the circumstances in which Booth came to make what was referred to as a 'withdrawal statement' deposed to before an attorney apparently in exchange for payment of money promised by the perpetrators or persons associated with them.

[18] Although I am not persuaded that the grounds of appeal establish a reasonable prospect of success on appeal, further evidence has come to light which may induce a court of appeal to interfere. Mr Daubermann submitted an affidavit explaining that Booth had pleaded guilty to a charge of perjury a few days before he had testified at the trial. The charge of perjury concerned a similar instance in which he had made a statement to police identifying persons who had fired shots at him and then subsequently made a further statement 'withdrawing' said allegations. He was then charged with perjury.

[19] The new evidence was presented to explain that the applicant proposed to apply for leave to the appeal court to receive the evidence on the basis that it relevant to that which was before the trial court and may bear upon the findings made by the trial court.

[20] Mr Baartman, on behalf of the state, indicated that no dispute was being raised regarding the fact that Booth had been charged with and pleaded guilty to perjury. He nevertheless submitted that leave to appeal should be refused.

[21] In my view this latter submission would require that this court would in effect rule upon the admission of the new evidence. That it cannot do. The only question that is to be answered is whether there is a prospect that the new evidence may be received on appeal and whether if so received it may bear upon the findings made by this court at trial. It seems self-evident that the evidence is relevant and that there is a reasonable prospect that it would be received. On this basis, it seems to me, leave to prosecute an appeal on the grounds advanced ought to be granted.

[22] In the result I make the following order:

The applicant is granted leave to appeal to the Full Court of this Division against the convictions entered against him on 5 July 2017.

G.G. Goosen

JUDGE OF THE HIGH COURT

Obo the Applicant:

Mr P. Daubermann

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Obo the Respondent:

Advocate G. Baartman

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