IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 81368/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

[31 August 2022]

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SIGNATURE

LEGOABE WILLIE SERITI N.O.	First Applicant
HENDRIK MMOLLI THEKISO MUSI N.O.	Second Applicant

and

CORRUPTION WATCH	First Respondent
RIGHT 2 KNOW CAMPAIGN	Second Respondent
ARMS PROCUREMENT COMMISSION	Third Respondent
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Fourth Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fifth Respondent
MINISTER OF DEFENCE	Sixth Respondent
MINISTER OF TRADE AND INDUSTRY	Seventh Respondent

JUDGMENT

Leave to appeal to the Supreme Court of Appeal – Condonation - Excessive Delay – Appeal triggered by complaint before Judicial Services Commission – Section 177 of Constitution – Link between findings of court in review proceedings and JSC complaint.

Prospects of success - No prospects that another court would come to a different conclusion regarding the assessment of the flaws and failures inherent in the Commission of Inquiry report as was set out in the review judgment - Commission of Inquiry failed to exercise its investigative powers in a manner required by law - No legal point requiring decision of a higher court

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The Court

[1] This is an application for leave to appeal against the whole of the judgment and order of this Court which was delivered on 21 August 2019. The Court reviewed and set aside the findings of the Commission of Inquiry into allegations of fraud, corruption, impropriety or irregularity in the Strategic Defence Procurement package known as the Arms Deal Commission ('Commission').

[2] The first applicant was the chairperson of the Commission and the second applicant was a former member thereof. They presided over the Commission and were cited *nomine officio* in their capacity as Commissioners in the review application which was heard before this Court and in terms of which the Court set aside the findings of the Commission. The first respondent is a non-profit company whilst the second respondent is a voluntary association registered as a non-profit organisation. They are the only respondents who oppose the application, the others having elected to abide the decision of the court.

[3] At the commencement of the hearing, the court considered an application by the first and second respondents, to file an explanatory affidavit, filed by the President, the fifth respondent, in related proceedings initiated by the applicants. The application in this court was essentially unopposed and was granted.

Condonation

[4] As is apparent from the outline, judgment was delivered on 21 August 2019, following a hearing of the application to review the findings of the Commission on 11 June 2019. The applicants made a decision not to oppose the application and abided the order of the Court. They stated that they were cited *nomine officio* and thus believed that they were *functus officio* once they had handed the report of the Commission to the President. They claim further that they were not aware of any legal provision which allowed or enabled judges and/or Commissioners to defend their decisions or findings once they were taken on review. They further contend that, after the review application had been launched, the State Attorney served and filed on behalf of the third to sixth respondents a notice of intention to oppose the application on 24 November 2017.

[5] Accordingly, the applicants claim that they relied on the Presidency and Minister of Justice and Constitutional Development to defend the report. Albeit, that prior to the hearing, the decision by the President to oppose the relief was reversed. Significantly, this was a decision known to the applicants prior to the hearing before the Court. Nonetheless they chose to abide.

[6] The delay in applying for leave to appeal is clearly excessive, i.e. more than two years, and thus it behoves the applicants to provide a plausible and justifiable reason for this Court granting condonation for the excessive delay.

[7] The chronology is important. The applicants did not react to the judgment of this Court delivered on 19 August 2019. Some 21 months later, on 10 May 2021 they received a complaint of gross misconduct from the Judicial Service Commission (JSC) at which point, although they claimed that the judgment was wrongly decided, they decided to change their minds after receiving the complaint from the JSC. Four further months elapsed after receiving the complaint before they filed an application for leave to appeal.

[8] They explain the four month delay as follows: they had to consult and prepare a response to 'the voluminous complaint' which in fact comprised 52 pages and a response which comprised 149 pages. They devoted considerable time preparing for the JSC hearing of the complaint on 2 July 2021 and thus could not work on the application for leave to appeal before that hearing commenced. They also needed

time to consult with counsel and obtain advise concerning the prospects of success of the application which they then brought four months after the lodgement of the complaint to the JSC had been brought to their attention.

[9] The application for condonation must be decided in the context of applicants who made a choice not to appeal against the judgment of this Court and the further knowledge that the Court could, if the review application was successful, make an adverse finding against them.

[10] An application for condonation, in respect of the late application for leave to appeal which, in terms of Rule 49 (1) of the Uniform Rules of Court should have been filed within 15 days after the delivery of the impugned judgment, needs to be assessed in terms of clear jurisprudence which has been laid down by our courts. This jurisprudence is captured in the judgment in *Van Wyk v Unitas Hospital and Another*[1]:

> 'There is an important principle involved here. An inordinate delay induces a reasonable belief that the order had become unassailable. This is a belief that the hospital entertained and it was reasonable for it to do so. It waited for some time before it took steps to recover its costs. A litigant is entitled to have closure on litigation. The principle of finality and litigation is intended to allow parties to get on with their lives. After an inordinate delay a litigant is entitled to assume that the losing party has accepted the finality of the order and does not intend to pursue the matter any further. To grant condonation after such an inordinate delay and in the absence of a reasonable explanation would undermine the principle of finality and cannot be in the interest of justice.'

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[1] 2008 (8) SA 472 (CC) at para 31

[11] It is difficult to gainsay the argument that the respondents who had brought the application and had been successful had not been induced into a reasonable belief that this judgment had become unassailable and that the matter had reached finality. After all nothing was heard from the applicants for some two years.

[12] The central reason offered by the applicants for this delay is their averment that they were prepared to accept a 'wrongly decided' outcome until organisations called Shadow World Investigations and Open Secrets sought to employ the judgment of this Court to lodge a complaint of judicial misconduct, against the applicants. It was contended by the applicants that the complaint brought in terms of s 14 of the Judicial Service Commission Act, 9 of 1994, was unprecedented and could not possibly have been foreseen or anticipated by the applicants until such time as it was brought some two years after judgment was delivered.

[13] As it was contended that the reason why this application for leave to appeal was so belatedly lodged triggered by a complaint lodged before the JSC, it follows that, notwithstanding the submissions about being in the interests of justice to grant condonation, it is clear that this application for leave to appeal would never have been lodged had it not been for the complaint lodged before the JSC. There lies the rub. In the first place, it is not the respondents who lodged the complaint against the applicants. In the second place, for a complaint against the applicants to succeed, particularly a complaint directed to the impeachment of a judge, a different test is to be applied from that which confronted this Court in a review application. A judge can only be removed by way of impeachment in terms of s 177 of the Constitution of the

Republic of South Africa 1996, if the JSC finds that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, and the National Assembly calls for that judge to be removed by way of a resolution adopted with the supporting vote of at least two thirds of its members.

[14] The inquiry which the Constitution mandates the JSC to initiate is entirely different from the reasons for upholding the review application by this Court. It must be a relevant consideration that, in its judgement in the review application, this court made no findings of incapacity, gross incompetence and misconduct against the applicants.

[15] Even counsel for the applicants was constrained to describe the reasons for granting the review application as being that the Court had found that the Commission had failed to gather relevant material to properly consider and investigate matters so arising, to admit evidence which was highly material to the inquiry and which was in its possession, to seek and thus gain information or material evidence from key witnesses, to test the evidence of witnesses who appeared before it by putting questions to them with the required open mind and to carry out the tasks assigned to it under the Constitution and within the principles of legality.

[16] None of these findings said anything nor could they possibly have about misconduct as envisaged in s177 of the Constitution. It was not part of the review application to consider judicial misconduct nor the kind of gross incompetence which would justify an impeachment of a judge as envisaged in s 177 of the Constitution. Were this submission to be correct, judges who have their judgments robustly

criticised and overturned by higher courts would fall within the scope of s 177 of the Constitution. The JSC is required to apply a totally different test to assess whether on the facts which are placed before it, the conduct of the applicants falls within the scope of s 177. In short, if this judgment were employed by the JSC as a basis for impeachment without the articulation of a different test and an application thereof to the facts of this case, the JSC would have failed in its constitutional duty.

[17] Yet this represents the high water mark of the applicants' justification for condonation in respect of the delay in lodging an application for leave to appeal. As first applicant stated in his affidavit:

> 'We have since been advised to look into the possibility of appealing and challenging the findings of the High Court because those findings are being used to underpin their complaints of judicial misconduct against us.'

[18] Far from underpinning any complaint, the complainants before the JSC will have to make a showing of a totally different kind than that which was required of this court which carefully eschewed straying into any other territory other than to find for the reasons which are conceded by applicants' counsel as to why it upheld the review application.

Prospects of success

[19] The applicants have also submitted that they have good prospects of success which should thus tip the scales in favour of this Court granting condonation. Initially the complaint raised by the applicants was that the court had not read the 32 000 pages of evidence which had been presented to the Commission. The record put

before the Court comprised of the Commission's report of 737 pages together with parts of record of evidence led before the Commission which the respondents (applicants in the review application) considered to be relevant to their case.

[20] What was thus required of applicants was to show in what way the findings of this Court based as it was on the record of evidence placed before it was subject to reversal on appeal. The difficulty encountered by the applicants is that in the argument presented to the Court in support of this application, counsel for the applicants struggled to show why any of the findings made by this Court fell in that category. Counsel failed to point to any aspect of the reasoning of this Court where the judgement had ignored, misquoted or misrepresented the evidence which formed part of the record.

[21] The only argument presented was that somehow had the Court trawled through the additional 32 000 pages some other picture might have become apparent. However, at the very least, on an application for leave to appeal in support of an argument of prospects of success clear pointers should have been provided as to how this Court had misquoted or misrepresented the evidence which it relied upon to arrive at its conclusion. For example, there was no plausible argument raised that the Court had been incorrect in its assessment of the De Bevoise and Plimpton Report, its analysis of the evidence of Dr Richard Young, the clear failure to question key witnesses such as Mr Chippy Shaik and Advocate Fana Hlongwane or the rejection of applicants claim that they had no power or authority to utilise the provisions of the Mutual Legal Assistance Act, all of which was gainsaid by paragraphs 105 to 115 of the Commissions own report.

[22] In short, on the record made available to this Court there was nothing which was submitted by applicants which indicated that there were any prospects of success that another court would come to a different conclusion with regard to the assessment of the flaws and failures inherent in the Commission's report as was set out in the judgment of this Court.

[23] The alternative argument which was pressed by counsel for the applicants turned on s 17 (1) of the Superior Courts Act 2013 and in particular that there was some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration. The submission was made that the decision to review a Commission's report had not confronted a South African court nor a court on the African continent dealing with this particular question. Accordingly, the dearth of authority in South Africa was, in counsel's view, a convincing and persuasive indicator that another court may come to a different conclusion on the applicable law and hence the outcome of the review court.

[24] In this connection, counsel relied heavily on a full court judgment of this Court in *Hlophe v Judicial Service Commission and others*[2] (a decision of the Gauteng High Court of 21 June 2022) where the Court held in granting Judge President Hlophe leave to appeal to the Supreme Court of Appeal notwithstanding the lack of merits in his case, because he "raised matters of significant public importance" due to the fact that

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[2] [2022] 3 All SA 87 (GJ)

Judge President Hlophe may become the first judge in South African history to be impeached.

[25] The question is whether a similar level of legal importance can be attached to the present case. Hence the question arises as to what point of law would require the attention of a higher court in the disposition of this case.

[26] To recapitulate this Court found that the approach adopted by the Commission to the testimony of key witnesses lacked rigor, particularly where key witnesses testified in support of the version provided by the State. It further found that the Commission had failed to undertake a proper inquiry as would be required by a Judicial Commission acting reasonably within its terms and mandate. In short, the Commission had failed to exercise its investigative powers in a manner required by law.

[27] The law on which these conclusions rest has already been settled in *Public Protector v Mail and Guardian Ltd and others*[3] where Nugent JA on behalf of the unanimous court said:

> 'A proper investigation might take as many forms as there are proper investigators. It is for the Public Protector to decide what is appropriate to each case and not for this Court to supplant that function...but I think there is nonetheless at least one feature of an investigation that must always exist – because it is one that is universal and indispensable to an investigation of any kind which is that the investigation must have

[3] 2011 (4) SA 420 (SCA) at para 20

been conducted with an open and inquiring mind. An investigation that has not conducting with an open and inquiring mind is no investigation at all. That is the benchmark against which I have assessed the investigation in case.'

[28] It is also the benchmark against which this Court assessed the investigation conducted by the Commission but Judge Nugent went further at para 22:

'I think it is necessary to say something about what I mean by open and inquiring mind. That state of mind is one that is open to all possibilities and reflects upon whether the truth has been told. It is not one that is unduly suspicious but is also not one that is unduly believing. It asks whether the pieces that have been presented fit into place. If at first they do not, then it asks questions and seeks out information until they do.' (para 22)

[29] This test was confirmed by the Constitutional Court in *The Public Protector v The President of the Republic of South Africa and Others*[4]. It is the same test that was applied by this Court. There is in our view no possibility that another court would adopt a different test to an investigation whether it be by the Public Protector or by a Judicial Commission of Inquiry such as in this case. In short, there is no legal point which requires the decision of a higher court.

[30] That then circles back to the manner in which the evidence presented to this Court was assessed. As indicated above, there was no basis laid by the applicants that, on the probabilities, another Court could arrive at a different application on the basis of the established legal test for an investigation to the facts of this case. In this

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[4] *2021 (9) BCLR 929(CC)* at para 139

context therefore the recourse to the judgment in the *Hlophe* case is of no assistance to applicants within the context of this case.

[31] To summarise, the application for leave to appeal was more than two years late. The only excuse proffered by the applicants was that their anxiety about the consequences of the judgment was triggered by a complaint lodged before the Judicial Service Commission. For the reasons advanced there is not but a veneer of a justification for applying for leave to appeal in a case in which two senior judges decided to abide the decision of this Court and did nothing to change their mind until the complaint was lodged. On the basis of these conclusions, there is no need to assess the further arguments raised by counsel.

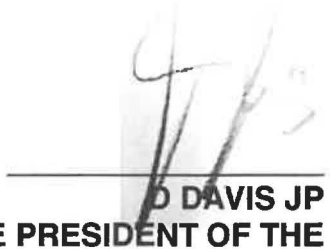
[32] To the extent that prospects of success may tilt the balance in favour of the applicants, the evidence placed before this Court and which would be the record on appeal provides no basis by which there are reasonable prospects that another court might differ from the order granted by this Court.

[33] Having conceded correctly that any exercise of a public power including the conduct of a Judicial Commission must be subject to the principle of legality, the applicants face the insurmountable hurdle that the principle of law upon which the entire judgment rests, that is the failure to conduct a proper investigation as set out in the *Mail and Guardian* case, is dispositive of this case when this principle is applied to the facts as presented to this Court. It must therefore follow that no basis has been laid for this Court to grant condonation of a filing of an application of leave to appeal which is more than two years late. Even if this Court was inclined to be excessively

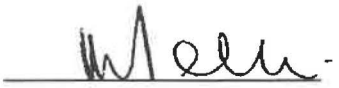
generous, there is no basis by which there are prospects of success nor is there a point of law upon which the disposition of this case rests and which requires the attention of a higher court.

[34] Accordingly, the application for leave to appeal is dismissed with costs including the costs of two counsel.

D MLAMBO JP
JUDGE PRESIDENT OF THE
GAUTENG DIVISION OF THE HIGH COURT



D DAVIS JP
JUDGE PRESIDENT OF THE
COMPETITION APPEAL COURT



LEEUW JP
JUDGE PRESIDENT OF THE
NORTH WEST DIVISION OF THE HIGH COURT

Date of Hearing: 03 August 2022

Date of Judgment: 31 August 2022

APPEARANCES:

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