REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A395/18

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date:13 September 2022 Signature: E van der Schyff

In the matter between:

RAATHS WILLIAM ABRAHAM APPLICANT

and

THE STATE RESPONDENT

JUDGMENT

Van der Schyff, J.

[1] On 2 June 2020, the applicant's application for bail pending an application for special leave to appeal to the Supreme Court of Appeal was dismissed. It was clearly stated in the written judgment handed down that this court is not convinced nor satisfied that the applicant has any prospects of success on appeal.

[2] The applicant's application for special leave to appeal and a subsequent application to the President of the Supreme Court of Appeal in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 were dismissed. The applicant filed an application for leave to appeal to the Constitutional Court, including an application to lead further evidence.

[3] It is trite that since the applicant's previous bail application was dismissed, a case needs to be made out that there are new facts that entitle the applicant to launch a renewed bail application after the first application was unsuccessful.[1]

[4] There is no definition of the term 'new facts' in The Criminal Procedure Act 51 of 1977 (the CPA). It has been established through case law that new facts must be 'sufficiently different in character' from the facts presented at the earlier unsuccessful bail application.[2]

[5] Mr. Lazarus, for the applicant, submitted that the Department of Social Work's report on and decision to withdraw the CMR-Pretoria North's designation as a child protective organisation, the rulings by courts in other cases regarding Ms. Stander's conduct, and her expertise (or lack thereof), the fact that the victim (the applicant's daughter) is a party to the proceedings launched in the Constitutional Court, the recanting and supplementation of her evidence by the applicant's former wife and the victim's mother, and the allegation that the medical doctor who testified during the trial examined the victim conducted the medical examination without consent, and in contravention of s 335B of the CPA, holistically seen, constitute the necessary new facts that justify the reconsideration of bail.

[6] Mr. Lazarus also submitted that the applicant's case before the Constitutional Court is materially distinct and differentiated from the applicant's previous grounds of appeal. In addition to what is recorded in paragraph [5] above, Mr. Lazarus submitted that:

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[1] *S v Vermaas* 1996 (1) SACR 528 (T) at 531E; *S v Waldeck* 2006 (2) SACR 120 (NC) at par [53]

[2] *S v Mohammed* 1999 (2) SACR 507 (C) at 512B; *S v Petersen* 2008 (2) SACR 355 (C).

i. The victim's evidence in the court *a quo* in 2010 was given pursuant to coercion by the state witnesses and the applicant's former wife;

ii. The social workers conducted an *ultra vires* investigation and fabricated evidence together with Dr. Gräbe and failed to report the matter immediately to the South African Police Services;

iii. There was no consent for Dr.Gräbe to conduct her medical examination, which contravenes s 335B of the CPA and amounts to an infringement of the applicant's constitutional rights

iv. The court *a quo* and the High Court failed to take the Tuchten-judgment (a judgment in a previous appeal) into account;

v. The court *a quo* and the High Court failed to take into account the Skelton report, which 'clearly indicated that the child stated she was not sexually violated by anyone and had been brainwashed by Wilna Stander';

vi. The 'rejection of the complainant's evidence in 2015 harmed her credibility' and her evidence ought to have been rejected in its entirety;

vii. The appellant was presumed guilty by 'Stander, Van Schalkwyk, and Du Toit' and now has to prove his innocence;

viii. The State introduced new evidence of people who did not testify at the first trial and failed to disclose to the defence, the notes of these witnesses that were relied upon during their evidence.

[7] Mr Luyt, for the respondent, submitted that the allegations of misconduct by police officials, social workers, and medical personnel were not facts, but mere allegations. The trial court has already dealt with these allegations, and they do not constitute new facts. In addition, the allegations were dismissed. The initiation of an investigation by the authorities into the conduct of certain social workers' agencies may be regarded as a fact, but it has no relevance to the bail application. The initiation of an investigation against certain alleged conduct does not convert an allegation into a fact before the investigation's findings were made in terms of the relevant burden of proof and, if so required, confirmed in a court of law. The court cannot revisit the initial denial of bail, as no new facts were tendered.

[8] We agree with the respondent that the issue of the complainant (the victim, Megan) being coerced and compelled to testify against her father had been considered and adjudicated upon by the Regional Court magistrate. The record reflects that the Regional Court magistrate stated:

> '... and how did Megan came to know about the detail she testified about originally? Did any person confuse, instruct, or taught (sic) Megan to say these things in court?'

[9] The Regional Court magistrate was referred to and considered the aspects where a child recanted original evidence and where single witness evidence of a witness has to be considered. The Regional Court magistrate found, on the evidence before her, that the child victim was coerced into recanting her statement. It is apposite to state that in *Lieshing and Others v The State,*[3] Theron J's reasoning for not accepting the recantation of previous evidence accords with the approach followed by the Regional Court magistrate. Theron J said:

> '[150] In the view I take of the matter, the quality of Mr Arries' recantation is gravely suspect. **First, it is a recantation without more. He simply said** – at the subsequent Saimons' trial – **that he had earlier not been speaking the truth.** There is no externally verifiable signifier of whether he was being truthful at the second trial.
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> [151] This does not mean that a recantation cannot, by itself, constitute exceptional circumstances. It simply means that it will not always suffice. **Generally, more will be required – specifically, some external, verifying indicator or circumstance showing that the original evidence was suspect, and that the subsequent recantation is more plausible**. In this matter, Mr. Arries offered a mere repudiation of his previous testimony. **While his testimony in the trial which saw the applicants convicted was detailed, his recantation was essentially a bare denial** of having witnessed the shooting: "For

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[3] [2018] ZACC 25 at paras [150] and [151].

> the fourth time, I did not see anyone shoot, I ran into the yard. How many times must I tell you that?'" (My emphasis).

[10] The applicant lamented that Stander, Du Toit, and Van Staden were called to testify at the second hearing, even though the purpose of the second hearing was for the court to consider the recanting of evidence by the victim. The principle of *audi et alteram partem* necessitated the court to consider the witnesses' perspectives on the issue precisely because they were implicated as having acted unethical. We are of the view that the issue of coercion and the alleged irregular conduct of professional social workers and police officials have been canvassed fully. For this reason, any findings by the Department of Social Services regarding the designation of CMR North are of no consequence to this matter.

[11] The applicant refers to excerpts from the Skelton report in support of his application to the Constitutional Court. One should, however, have regard to the whole report. In light hereof, it is apposite to quote from the report:

> 'However, other information revealed by the mother shows that there is an entire family atmosphere in which the Appellant is viewed as innocent, and Megan is believed to have lied when she gave evidence in court. It is apparent that this does create a situation of coercion, even if it is being gently applied.
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> A perusal of the record makes it clear that the coercion has at times been far more pointed. ... It is apparent that Megan feels guilty about the fact that her testimony caused the Appellant to be sent to prison ... Her father influenced her into feeling guilty if she testified against him because he would go to prison and he would die there.'

[12] In considering whether to accept new evidence, the principle has been stated in *R v Van Heerden and Another*:[4]

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[4] 1956 (1) SA 366 (A) at 372D-E.

> 'To justify the reception of fresh evidence, some good reason must be shown why a lie was told in the first place'.

The record reflects that Megan knew her father would go to jail for the offence. No 'good reason' has been submitted why she, a young girl who dearly loved her father, would be compelled and coerced into lying to the court. No explanation was provided for how a young child could be taught 'to testify in a credible, reliable and coherent manner with the correct emotional response' in three sessions with an expert. This finding, it must be noted, is vastly different from the position in *Jenkins v The State*, one of the judgments Mr. Lazarus referred to. In *Jenkins,* it was contended that the complainant's evidence 'resembled a recitation, like a rhyme which plays repeatedly' and which caused Maumela J to remark in the appeal judgment[5]:

> 'And it goes further, she does the recitation. What is important is that during her cross-examination she cannot go outside these lines that she was trained to recite.'

[13] Mrs. Kuhn (formerly Raaths) recanting and supplementing evidence need to be considered in light of the fact that it was testified that 'she did not really believe Megan'. In fact, she only attempted to support her because she was told that Megan would be alternatively placed if she did not. Since the recanting and supplementing of Mrs. Kuhn's evidence constitute the only 'new fact' that needs to be considered in this application, this court must be guided by established legal principles in considering the applicant's prospects of success.

[14] In *Liesching and Others v The State,*[6] Theron J, writing for the majority, explained that applicants must show that a matter is a constitutional matter, alternatively that it raises an -

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[5] *Jenkins*, *supra*, at para [28].

[6] [2018] ZACC 25.

'arguable point of law of general public importance, in order for this Court's jurisdiction to be engaged. In addition, they must demonstrate that it is in the interests of justice for leave to appeal to be granted.'[7]

[15] Theron J held that what was –

'at issue was whether the court had the necessary jurisdiction to determine an appeal against a decision of the President [of the Supreme Court of Appeal], in terms of section 17(2)(f) of the Superior Courts Act that no exceptional circumstances were shown to exist, as envisaged in that section, to warrant a referral of a refusal of an application for leave to appeal to the Supreme Court of Appeal for reconsideration'.[8]

The parties in the *Liesching*-matter assumed that the Constitutional Court has the jurisdiction to entertain such an appeal, and the matter proceeded on that basis, but Theron J emphasised that:[9]

'There is no doubt that the nature and justiciability of such an appeal requires detailed legal argument and thought. The issue is complex…'

[16] Theron J dealt extensively with the meaning of 'exceptional circumstances' in the context of s 17(2)(f) of the Superior Courts Act.[10] She concluded that:[11]

'… section 17(2)(f) is not intended to afford disappointed litigants a further attempt to procure relief that has already been refused. It is intended to enable the President to deal with a situation where otherwise injustice might result and does not afford litigants a parallel

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[7] *Liesching, supra*, at para [123].

[8] *Liesching, supra*, at para [124].

[9] *Liesching, supra*, at para [[125].

[10] *Liesching, supra* at paras [128] – [139].

[11] *Liesching, supra*, at para [139].

appeal process in order to pursue additional bites at the proverbial appeal cherry.'

[17] The relief sought by the applicant in this matter, resonates with the relief sought by the applicants in the *Liesching* matter. Theron J explained in this regard:[12]

'The relief sought by the applicants, on appeal to the Supreme Court of Appeal, is that their convictions and sentences be set aside and the case sent back to the High Court for the hearing of further evidence. The President, in considering whether or not there are exceptional circumstances, would no doubt have had regard to the likelihood of such relief being granted. It is trite that such relief will only be granted in exceptional circumstances. Holmes JA stated the rationale for this succinctly in *De Jager*:

"It is clearly not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified. And there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."

[18] Theron J quoted the three requirements identified by Holmes JA that need to be met before such an application can proceed, and explained that non-fulfilment of any one of these requirements would ordinarily be fatal to the application:[13]

'(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
(b) There should be a prima facie likelihood of the truth of the evidence.

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[12] *Liesching, supra* at para [145].

[13] *Liesching, supra* at para [146].

(c) The evidence should be materially relevant to the outcome of the trial.'

[19] The principles enunciated by the Constitutional Court need to be applied in this application when the issue of Mrs. Kuhn's evidence is considered. The first requirement is that there must be an explanation why the evidence was not led at the trial based on allegations that may be true. Mrs. Kuhn does not explain why she did not explain in the Regional Court in 2015 that she assisted her daughter in lying to the court by drawing from her own experience of having sexual encounters with the applicant. She does not explain why, if she explicitly informed the social workers that Mr. Raaths had not committed the offence, she chose not to inform the court. Her attempt at explaining by stating that she was afraid that Megan would be placed in foster care does not hold water since the court would have been able to come to her aid if she informed the court that she had been threatened with Megan being removed from her care if she did not prepare her to lie to the court. In these circumstances, we find Mrs. Kuhn's recantation suspect.

[20] Based on the principles reiterated and set out in *Liesching* we doubt whether the applicant would be able to establish that there is a *prima facie* likelihood of the truth of Mrs. Kuhn's evidence. This does, in our view, not constitute exceptional circumstances conferring a discretion on the President of the Supreme Court of Appeal as envisaged in s 17(2)(f). As a result, we are not convinced that the applications issued in the Constitutional Court have reasonable prospects of success.

[21] As a result, the application to be released on bail pending the finalisation of the application for leave to appeal to the Constitutional Court stands to be dismissed.

Order

1. **The applicant's application to be released on bail is dismissed.**

E van der Schyff

Judge of the High Court, Gauteng, Pretoria

I agree, and it is so ordered.

C J van der Westhuizen
Judge of the High Court, Gauteng, Pretoria

For the applicant:	Mr. J Lazarus
Instructed by:	Shapiro & Ledwaba Inc.
Counsel for the respondent:	Adv P C B Luyt
Instructed by:	Director of Public Prosecutions
Date of the hearing:	6 September 2022
Delivered:	13 September 2022