



CONSTITUTIONAL COURT OF SOUTH AFRICA

Pieter Pietertjie Liesching and Others v The State and Another

CCT 245/15

Date of hearing: 6 September 2016

Date of judgment: 15 November 2016

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 15 November 2016 the Constitutional Court handed down judgment in a matter concerning whether section 17(2)(f) of the Superior Courts Act (SC Act) applied to convicted persons in criminal proceedings. Section 17(2)(f) provides that the President of the Supreme Court of Appeal (SCA) may in exceptional circumstances refer a decision to the Court for reconsideration and, if necessary, variation.

In the matter, the applicants were convicted of three charges including murder and sentenced to an effective term of life imprisonment by the High Court of South Africa, Gauteng Local Division, Johannesburg. The SCA dismissed an application for leave to appeal against their convictions. Once convicted, further evidence came to light which the applicants believed would lead to their acquittal. The applicants subsequently filed an application in terms of section 17(2)(f) of the SC Act for the President of the SCA to reconsider their petition. The President of the SCA dismissed their application and stated that the evidence which the applicants sought to lead became available after the applicants had, in respect of their convictions, exhausted all the recognised procedures provided for in the Criminal Procedure Act (CPA). He noted that in terms of section 1 of the SC Act, an “appeal” does not include an appeal in a matter regulated by the CPA. As a result, the President of the SCA held that section 327(1) of the CPA, which provides for the procedure to be followed where a convicted person wants to lead further evidence that became available after the recognised legal procedures pertaining to the appeal have been exhausted, should be invoked.

Before the Constitutional Court, the applicants submitted that section 327 serves as a safety net in cases where all appeal processes have been exhausted and therefore could

not be invoked yet as section 17(2)(f) was still available to them. In any event, they argued that section 327 of the CPA is an administrative procedure and not an “appeal” in terms of section 1 of the SC Act. Therefore, they should not be precluded from invoking section 17(2)(f). They argued that it would lead to inequitable results if certain applicants were permitted to rely on section 17(2)(f) whereas others would have to follow a “more onerous procedure” in terms of section 327 of the CPA. The State submitted that on the reading of “appeal”, it was not the intention of the Legislature to have criminal appeals regulated by the SC Act. The Minister of Justice and Correctional Services submitted that the discretion vested in the President of the SCA in terms of section 17(2)(f) will only be exercised when the President of the SCA is satisfied that a grave injustice may result or that some matter of public importance has been overlooked. To this end, because section 327 of the CPA was available to the applicants, the President of the SCA was not able to exercise the powers under section 17(2)(f).

In a unanimous judgment by Musi AJ, (Mogoeng CJ, Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J and Zondo J concurring) the Constitutional Court considered the correct interpretation of, and the interplay between, sections 1 and 17(2)(f) of the SC Act, on the one hand, and section 327 of the CPA, on the other. It held that an application to adduce further evidence on appeal, after a petition had been refused, was not a matter regulated by the CPA or any other criminal procedural law. Therefore, it held that the SC Act was applicable to such matters. The Court held that the purpose of section 17(2)(f) is to keep the door of justice ajar in order to cure errors or mistakes and for the consideration of a circumstance, which, if it was known at the time of the consideration of the petition might have yielded a different outcome. It is therefore a means of preventing an injustice. This, the Court held, would include new or further evidence that has come to light or became known after the petition had been considered and determined.

The Court held that the procedure in section 327 of the CPA is not an appeal. The section makes plain that it may only be utilised after a convicted person has exhausted all recognised legal procedures pertaining to appeal or review or if such procedures are no longer available to him or her. Therefore, the Court held that the section may only apply after an appeal process is no longer available to the convicted person. The President of the SCA did not consider whether the further evidence sought to be adduced was an exceptional circumstance. The Court held that the section enjoins him to apply his mind to the issue and make a determination whether the matter presents an exceptional circumstance that warrants its referral to the SCA for reconsideration or variation, in the interest of justice. It held that the President should be given the opportunity to do so.

The Court granted condonation and leave to appeal. The decision of the President of the SCA refusing to refer the application in terms of section 17(2)(f) of the SC Act was set aside and the matter was remitted to the President of the SCA to consider the application.