

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: A125/2010 & A389/2015  
DPP REF NO: JAP 2010/0132**

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

.....  
DATE

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SIGNATURE

In the matter between:

**CARNEIRO, JOSE PEDRO MORAIS**

Appellant/Applicant

And

**THE STATE**

Respondent

**SUMMARY**

Criminal procedure – appeals – dismissal of appeal by high court comprising of two judges against conviction imposed by regional court – whether high

court, sitting as court of appeal, consisting of two judges, has requisite jurisdiction to consider subsequent application for leave to appeal to the Supreme Court of Appeal – sec 16(1)(b) of the Superior Courts Act 10 of 2013 provides for refusal of leave to appeal by high court appealable with the special leave of Supreme Court of Appeal – court of appeal entitled to raise question of jurisdiction *mero motu* – bail pending appeal dependent on whether high court enjoined to consider merits of application for leave to appeal, i.e. whether reasonable prospects of success on appeal present – if high court consisting of more than one judge, appeal lies directly to the Supreme Court of Appeal – retroactivity of provisions of sec 16 of the Superior Courts Act 10 of 2013 – matter struck off the roll.

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## JUDGMENT ON LEAVE TO APPEAL

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**MOSHIDI, J:**

### INTRODUCTION

[1] The appellant applies for leave to appeal against the judgment of this court in dismissing his appeal against conviction on 1 December 2010. This, pursuant to the appellant having been convicted on a charge of murder by the regional court.

### THE NOTICE OF APPLICATION FOR LEAVE TO APPEAL

[2] In the notice of application for leave to appeal, dated 7 December 2010, the appellant also seeks an order that his bail be extended pending the outcome of the application. In essence, the appellant prays that in the event of the application for leave to appeal being successful, his bail ought to be extended pending the outcome of his appeal.

### JURISDICTION OF THIS COURT

[3] It is plain to me that it is neither necessary nor permissible to consider the merits, i.e. whether or not there are present reasonable prospects of success on appeal, of the application before us. So too, is the issue of condonation. The reason is conspicuous, as mentioned immediately below.

### THE LEGAL PRINCIPLES APPLICABLE

[4] This court, sitting as a court of appeal, and consisting of two judges, in dismissing the appellant's appeal on 1 December 2010, has no jurisdiction to entertain the present application for leave to appeal to the Supreme Court of Appeal. The appellant requires special leave to appeal to be considered by the Supreme Court of Appeal as stipulated in sec 16(1) of the Superior Courts Act 10 of 2003 (*"the Superior Courts Act"*). Sections 16(1)(a) and (b) of the Superior Courts Act provide as follows:

- “(1) Subject to s 15(1), the Constitution and any other law –
- (a) *an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted –*
    - (i) *if the court consisted of a single judge, either to the Supreme Court of Appeal or to the full court of that Division, depending on the direction it should in terms of s 17(6); or*
    - (ii) *if the court consisted of more than one judge, to the Supreme Court of Appeal;*
  - (b) *an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal ...”*

[5] In *Johannes Windvogel v The State*,<sup>1</sup> the appellant was convicted by the Johannesburg Regional Court of certain counts of dealing in prohibited substances in contravention of sec 5(b) of the Drugs and Drug Trafficking Act 140 of 1992. On 31 January 2003 the Regional Court imposed a sentence of eight years’ imprisonment on each count. The Regional Court later granted the appellant leave to appeal against sentence. On 6 July 2005 the appellant was released on bail pending appeal. On 7 November 2013, the appeal came before two judges of this Division. The appeal court judges dismissed the appeal against conviction and interfered with the sentence imposed in some limited manner. On 12 November 2013 the appellant, aggrieved by the outcome, applied for leave to appeal to the Supreme Court of Appeal. On 29 November 2013 the High Court Appeal Court (the two judges) granted leave to appeal to the Supreme Court of Appeal. In the course of the judgment, and

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<sup>1</sup> (2009) 1 /2014 [2015] ZASCA 63 (8 May 2015).

in dealing with the provisions of sec 16(1)(b) of the Superior Courts Act, the Court said:

*“..., it became apparent that the court a quo (two judges) did not have jurisdiction to hear an application for leave to appeal to this court as s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Act), which came into operation on 23 August 2013, provided that an appeal against any decision of a division on appeal to it lies to the Supreme Court of Appeal upon special leave having been granted by this court. Consequently, the jurisdictional basis for an appeal to this court was absent. In the result, the court a quo did not have the power to grant the appellant leave to appeal to this court ...”<sup>2</sup> (my insertion)*

[6] In *Van Wyk v S; Galela v S*,<sup>3</sup> the Court, in dealing with two separate appeals in which the appellants’ petitions were unsuccessful, said:

*“The jurisdiction of this Court to hear appeals from the High Court whether as a court of first instance, or on appeal is derived from this section (section 16(1)(a) and (b) and 19 of the Act. Whereas under section 20(4) of the SC Act, the special leave of this Court was only required in respect of an application from a decision of the Full Court (three judges) given on appeal to it, the special leave of this Court is now also required where leave to appeal is sought in respect of a decision of two judges, given on appeal to it.” (my insertion and underlining)*

See also, more recently, *S v Banger*.<sup>4</sup>

[7] From the above, it is more than plain that an appeal from a decision of an appeal court, consisting of two judges, as is the case here, must be lodged with the Supreme Court of Appeal. It is equally clear that such a court comprising of two judges, has no jurisdiction to hear an application for leave

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<sup>2</sup> At para [8]. (My insertion.)

<sup>3</sup> [2014] 4 All SA 708 (SCA) para [19].

<sup>4</sup> 2016 (1) SACR 115 (SCA).

to appeal following the dismissal of an appeal to it. In *S v Banger supra*, at para [12] the Court said:

*“If, as is the case here, the High Court of first instance consisted of more than one judge, the appeal lies directly to this court.”*

The same applies to the applicant’s accompanying application for the extension of his bail pending the outcome of the appeal, however tempting it may be since bail appeals are inherently urgent in nature. In any event, the question of bail will depend entirely on the issue whether there are reasonable prospects of success on appeal.

[8] The appellant requires special leave to be considered by the Supreme Court of Appeal as provided by sec 16(1)(b) of the Superior Courts Act. The appellant was informed of this procedure by Matthys AJ during December 2015 when the learned acting judge was approached to hear an application for bail pending applicant’s application for leave to appeal to the Supreme Court of Appeal. The question of non-applicability of the provisions of sec 16 of the Superior Courts Act on the basis that such Act does not operate retrospectively does not arise. This is so for the reason that sec 55(2) of the Superior Courts Act provides that:

*“Anything done under any provision of a law repealed or amended by subsection (1), shall, insofar it may be necessary or appropriate, be deemed to have been done under the corresponding provision of this Act.”*

It is common knowledge that the latter Act came into operation on 23 August 2013 (*cf National Director of Public Prosecutions v Basson*<sup>5</sup>). I in any event, deal further with this issue later below.

#### JURISDICTION RAISED BY COURT *MERO MOTU*

[9] It is also so that in the context of this matter, the Court is perfectly obliged to raise the issue of lack of jurisdiction *mero motu* even on appeal. In *Communication Workers Union v Telkom SA Ltd*,<sup>6</sup> the Court said:

*“A court must have jurisdiction for its judgment and/or order to be valid. If the court does not have jurisdiction its judgment and/or order is a nullity. No pronouncement to that effect is required. It is simply treated as such ...”*

This Court has no jurisdiction to hear the instant leave to appeal should put an end to the matter.

[10] However, during closing argument, the parties, in particular counsel for the appellant, requested the opportunity to file supplementary heads of argument on the issue of the retrospectivity of the provisions of sec 16(1) of the Superior Courts Act. The request was granted and the parties have since filed such heads and for which we are extremely grateful. I have already dealt briefly with the issue in para [8] of the judgment.

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<sup>5</sup> [2002] 2 All SA 255 (A), also at 2002 (1) SA 419 (SCA).

<sup>6</sup> 1999 (2) SA 586 (T), also at [1999] 2 All SA 113 (T).

[11] In short, and in contending that the Superior Courts Act does not operate retrospectively, the appellant asserts that prior to the commencement of the latter Act, the appellant had a second appeal against his conviction to the Supreme Court of Appeal subject to leave being granted by the High Court. It is contended that since the appellant is now encumbered with a more onerous duty to persuade the court of appeal to grant leave, the present application for leave to appeal must be heard in accordance with the provisions of the Supreme Court Act 59 of 1959 (*“the Old Act”*). In this regard reliance is placed on, *inter alia*, *S v Imador* (unreported, WCC case number A167/2013, reported on 3 April 2014); the provisions of sec 12 of the Interpretation Act 33 of 1957; as well as numerous other case law. On the basis of the above, so the argument proceeded, that the filing of the appellant’s notice of application for leave to appeal during December 2010, makes the current matter pending before this Court. As such, the argument went on, sec 12(2)(c) and (d) of the Interpretation Act is applicable. In this regard, reliance was placed on case law such as *Bell v Voorsitter van die Rasklassifikasieraad*,<sup>7</sup> and *S v Mhlungu and Others*.<sup>8</sup>

[12] However, the difficulty I have with the appellant’s submissions based on the Old Act is this: the submissions plainly ignore the fact that, the provisions of sec 16 of the Superior Courts Act are characterized as regulating poorly procedural matters as opposed to substantive legal ones. In *Minister of Public Works v Haffejee NO*,<sup>9</sup> the following is stated:

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<sup>7</sup> 1968 (2) SA 678 (A).

<sup>8</sup> 1995 (3) SA 867 (CC) at para [67].

<sup>9</sup> 1996 (3) SA 745 (A) at 752A-F.

*“Now, although it has often been said that the presumption against statutory retrospectivity does not apply to procedural provisions, the realisation has grown that the distinction between procedural and substantive provisions cannot always be decisive in the context of statutory interpretation. Thus, in *New Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833 (PC) at 836b-d Lord Brightman said:*

*‘A statute is retrospective if it takes away or impairs a vested right acquired on the existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, only a right to prosecute or defend a suit according to the rules for the conduct of an for the time being prescribed ...’*

At 753B-C of the judgment, the Court went on to say that:

*“In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of an enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. Aliter if they are not.”*

At p 755B-E, the Court went on to say that:

*“As we have already seen, the common law recognises no vested right in procedure simpliciter ... Where it otherwise, no procedural amendment would apply to cases or causes of action arising before their commencement and that is certainly not the law. Most procedural provisions regulating the institution and conduct of litigious proceedings have a cost implication and many have a tactical implication. Yet that has never in the past been regarded as imparting to them a special character taking them out of the realm of purely procedural provisions and subjecting them to the presumption against legislature interference with vested rights. I see no good reason to commence doing so now. To label procedural provisions instead as conferrers of privileges does nothing, in my view, to improve their claim to be regarded as anything more than what they truly and essentially are, namely purely procedural provisions designed to regulate the institution and conduct of litigious proceedings. So much for the common law.”*

Interestingly, the Court also discounted contentions based on the provisions of sec 12(2) of the Interpretation Act 33 of 1957 which provisions are also relied upon by the appellant in the present matter.

[13] More recently, and in *Nkabinde and Another v Judicial Service Commission and Others*,<sup>10</sup> the Supreme Court of Appeal referred with approval and reaffirming the principles enunciated in *Minister of Public Works v Havenga NO (supra)*. In that appeal, the Supreme Court of Appeal was called upon to determine whether a complaint instituted by the Judicial Service Commission (JSC) against a Judge, which had commenced previously, could be proceeded with in terms of a new procedure under the amendments to the Judicial Service Commission Act 9 of 1994 (JSCA). In essence, the appellants argued that it is a fundamental principle that statutes generally apply prospectively unless a retrospective application is contemplated by the statute itself. The appellants further contended that the JSC incorrectly applied the subsequent amendments retrospectively. In the course of the judgment, and prior to dismissing the appeal, Navsa JA at para [73] said:

*“I have difficulty in appreciating the appellants’ general objections to the enquiry being conducted in terms of the new statutory regime. I can see no existing rights being affected, nor any material prejudice. That conclusion is buttressed by a comparison of the procedures under the old Rules with the processes established in terms of the amendments to the JSCA ...”*

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<sup>10</sup> (20857/2014) [2016] ZASCA 12 (10 March 2016).

[14] From the above, it is more than plain that, in the context of the present application for leave to appeal: the challenge of the applicability of the provisions of sec 16 of the Superior Courts Act, read with the provisions of sec 55(2) thereof, quoted above, cannot be interpreted as applying prospectively only. The provisions in their nature, do not deprive the appellant of any vested rights under the Old Act. This is so since the provisions are purely procedural in nature and in direct contrast to what is contended in the appellant's heads of argument. I conclude therefore that, for this reason too, coupled with the obvious reason that this Court has no jurisdiction, as discussed above, the application for leave to appeal must fail, and be correctly struck off the roll.

### CONCLUSION

[15] For all the foregoing, the conclusion that the present application for leave to appeal is not properly before us, since we lack the requisite jurisdiction, became irresistible. The matter must be struck off the roll.

### ORDER

[16] In the result the following order is made:

16.1 The matter is struck off the roll.

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**D S S MOSHIDI**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

I concur:

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**C E HILTON-NICHOLS  
JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

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