

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: A167/2013

In the matter between

LUCKY IMADOR

Applicant /Appellant

and

THE STATE

Respondent

**JUDGMENT IN APPLICANT'S APPLICATION FOR LEAVE TO APPEAL
DELIVERED ON 3 APRIL 2014**

BLIGNAULT J:

[1] Applicant (appellant in the appeal heard by this court) was convicted on 13 August 2012 in the regional court at Bellville on a charge of money laundering in contravention of s 4 of the Prevention of Organised Crime Act 121 of 1988. He was sentenced on 26 November 2012 to 5 years' imprisonment.

[2] Applicant appealed against his conviction and sentence to this Division of the High Court. The appeal was heard by this court, a full bench consisting of two judges. On 9 December 2013 his appeal against his conviction was dismissed but his appeal against his sentence was upheld. His sentence of 5 (five) years' imprisonment was set aside and replaced by a sentence of 3 (three) years' imprisonment.

[3] Applicant thereafter brought an application in this court for leave to appeal to the Supreme Court of Appeal against his conviction. He did not apply for leave to appeal against the sentence imposed by the regional court and varied by this court.

[4] At the hearing of the application the preliminary question arose whether this court has the power to entertain applicant's application for leave to appeal. This question is dependent on a more fundamental issue, namely whether the Supreme Court of Appeal has jurisdiction to consider applicant's proposed appeal.

[5] Prior to the commencement of the Superior Courts Act 10 of 2013 ('the Superior Courts Act') on 23 August 2013 it was settled law that the Supreme Court of Appeal had the power to determine a second appeal of an accused person against his conviction or sentence in a lower court in the event of his first appeal to the High Court being unsuccessful. This power was derived from the provisions of s 20(1) read with s 21(1) of the Supreme Court Act 59 of 1959 ('the Supreme Court Act'). They read as follows:

'20 Appeals to Supreme Court in general.

- (1) *An appeal from a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of such a court given on appeal shall be heard by the appellate division.*

... ..

21 Appeals to appellate division

- (1) *In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.'*

[6] The right of the accused person to pursue a second appeal against his conviction to the Supreme Court of Appeal was, however, subject to leave to appeal being granted by the High Court or, failing that, by the Supreme Court of Appeal. See section 20(4) of the Supreme Court Act:

- ‘(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except—*
- (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in with the special leave of the appellate division;*
 - (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.’*

[7] Du Toit *et al* *Commentary on the Criminal Procedure Act*, at 30-48D, in a discussion of appeals from criminal proceedings in the lower courts, summarises the position that pertained under the Supreme Court Act as follows:

‘The decision given on appeal by a provincial or local division of the High Court is final in the sense that such court on appeal may not reconsider it. But if the accused’s appeal is dismissed, with the leave of the court against whose decision he wishes to appeal or with the special leave of the Supreme Court of Appeal, he may appeal further to the latter division. The power to appeal further in this way is derived from s 21 of the Supreme Court Act 59 of 1959.’

[8] The Superior Courts Act came into operation on 23 August 2013. In terms of s 55(1) thereof, read with Schedule 1 to the statute, it repealed the whole of the Supreme Court Act.

[9] The Superior Courts Act contains a section, numbered 16, which contains provisions that are comparable to s 21 of the Supreme Court Act. It reads as follows:

'16 Appeals generally

(1) Subject to section 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 a full court of that Division, depending on the direction issued in terms of section 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; and*
- (c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.'*

[10] The power of the High Court to grant leave to appeal is found in s 17 of the Superior Courts Act. These provisions do not, however, expand the ambit of the kind of cases in which the Supreme Court is empowered to consider appeals.

[11] Sections 16 and 17 of the Superior Courts Act are, however, subject to the definition of ‘*appeal*’ in s 1 thereof which reads as follows:

“appeal” in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law;’

[12] Sections 16 and 17 of the Superior Courts Act both appear in Chapter 5 of the Superior Courts Act. They do not, therefore, apply to applicant’s proposed appeal to the Supreme Court of Appeal.

[13] Section 52 of the Superior Courts Act contains certain transitional provisions. The section reads as follows:

‘52 Pending proceedings when the Act commences

(1) Subject to section 27, proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed.

(2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed.’

[14] Sub-section s 52(1) of the Superior Courts Act thus provides that ‘*pending proceedings*’ must be continued and concluded as if the Superior Courts Act had not been passed. The definition of ‘*pending proceedings*’ is found in sub-sec 52(2). In my view the use of terms ‘*summons*’ and ‘*judgment*’ is a strong indication that the latter sub-section applies to civil matters only. Even if it is assumed that these terms are to be interpreted as applying, *mutatis mutandis*, to criminal matters, then it seems to me that a ‘*judgment*’ should be equated to a conviction and sentence in a

criminal trial. Applicant's criminal trial was therefore no longer '*pending*' in the regional court within the meaning of s 52 of the Superior Courts Act when it came into operation.

[15] I conclude therefore that sections 20 and 21 of the Supreme Court Act have been repealed and, as far as they dealt with criminal appeals, no comparable provision of the Superior Courts Act has been substituted for them.

[16] I turn to the relevant provisions of the Criminal Procedure Act 51 of 1977 ('the CPA') in order to determine whether they provide applicant with a right of a second appeal against his conviction in the regional court. Chapter 31 thereof is headed '*Appeals in Criminal Proceedings in Superior Courts*'. The first section in this chapter is s 315. It reads as follows:

'315 Court of appeal in respect of superior court judgments

- (1) (a) *In respect of appeals and questions of law reserved in connection with criminal cases heard by a High Court, the court of appeal shall be the Supreme Court of Appeal, except in so far as subsections (2) and (3) otherwise provides.'*

[17] Kruger *Hiemstra's Criminal Procedure* 31-1 expresses the view that chapter 31 of the CPA applies only to criminal cases that were heard by the high court as a court of first instance and not to further appeals in cases which originated in a lower court. The author relies for this statement, in my view with justification, on the judgment of the Appellate Division in *S v Mahomed* 1977 (2) SA 531 (A). In *Mahomed* the court was dealing with s 362 of the Criminal Procedure Act 56 of 1955

(‘the 1955 CPA’). Its wording and context were similar to those of s 315(1) of the CPA. It read as follows:

‘362 (1) *In respect of appeals and questions of law reserved in connection with criminal cases dealt with by a provincial or local division of the Supreme Court... the court of appeal shall be the Appellate Division of the Supreme Court.*

(2) *An appeal shall lie to the court of appeal only as provided in secs 363 to 366 inclusive, and not as of right.’*

[18] In *S v Mahomed*, *supra*, Trollip J said the following, at 541 C-G:

‘In my view the answer to Mr. Stephen's contention is that the limitation on appeals in criminal cases contained in sec. 362 (2) only extends to those cases that are dealt with by Superior Courts as Courts of first instance; both Lembada's and Heller's were cases of that kind; it does not apply to those criminal matters, like appeals under sec. 97, which originate in the magistrates' courts and are dealt with by Superior Courts as Courts of second instance. That is clear, I think from the whole context of Chap of the Code that contains, inter alia, secs. 362 to 366. Lembada's case, supra, in fact recognized and drew that distinction at p. 420C - F. It also seems to have been assumed in Sita's case, supra. And in S. v Mtimkulu, 1975 (1) SA 209 (T), the distinction was expressly and correctly affirmed and given effect to. It was there held that the refusal by the T.P.D. to condone an inadequate notice of appeal against a magistrate's decision in a criminal case was appealable under sec. 21 (1) of the Supreme Court Act.’

[19] The CPA also contains provisions regulating criminal appeals against the conviction and sentence of an accused person in a magistrate's court. They are governed by the provisions of sections 309, 309A, 309B and 309C of the CPA. They do not contain any provision granting an accused person the right to a second appeal against his/her conviction or sentence.

[20] In *Sefatsa and Others v Attorney-General, Transvaal, and Another* 1989 (1) SA 821 (A) the Appellate Division confirmed that a superior court - including itself - is a creature of statute and that it does not have a jurisdiction which is general and unlimited unless cut down or forbidden by law. It follows from this judgment and the authorities referred to therein that the Supreme Court of Appeal has no inherent jurisdiction to determine applicant's proposed appeal.

[21] In these circumstances it seems to me that an accused in a criminal case that was heard in the first instance in a lower court, does not have a further right of appeal to the Supreme Court of Appeal after his/her appeal has been determined by a full bench of the High Court. The concomitant legal position is that the Supreme Court of Appeal has no jurisdiction to hear such an appeal.

[22] A final question that arises is whether applicant is not able to rely on the common law principle, embodied in sub-sections 12(2)(c) and (d) of the Interpretation Act 33 of 1957, that the repeal of a statute does not affect pending legal proceedings.

[23] The leading case is *Bell v Voorsitter van die Rasklassifikasieraad* 1968 (2) SA 678 (A). At 684 E-F, Botha JA said the following:

'Die aanvaarding as deel van ons reg van die reël dat waar 'n wetsbepaling terugwerkend of andersins gewysig word onderwyl 'n geding hangende is, die regte van die gedingvoerende partye, by ontstentenis van 'n ander bedoeling, volgens die wetsbepalings wat ten tyde van die instelling van die geding gegeld het, beoordeel moet word, blyk dus duidelik te wees. Dat dit die reël is wat ook deur die Engelse Howe by die uitleg van Wette toegepas word, blyk duidelik uit die gewysdes waarna in Bartman v Dempers, supra, verwys word. (Sien ook Maxwell, Interpretation of Statutes, 11de uitg., bl. 212).

[24] The learned judge pointed out that the position under the common law corresponds with the provisions of sub-sec 12(2) of the Interpretation Act 33 of 1957 which read as follows:

'Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not-

... ..

- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or*
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed;*

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.'

[25] In *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para [67] the Constitutional Court formulated this principle as follows:

'[67] There is still another well-established rule of construction namely, that even if a new statute is intended to be retrospective insofar as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject of pending legal proceedings. See Bell v Voorsitter van die Rasklassifikasieraad en Andere [1968 (2) SA 678 (A)]; Bellairs v Hodnett and Another [1978 (1) SA 1109 (A)] at 1148.'

[26] At the time of applicant's conviction and sentence in the regional court he had the statutory right of appeal to this court and the right of a second appeal to the Supreme Court of Appeal. It seems to me therefore that applicant's right to a second appeal to the Supreme Court of Appeal was not affected by the repeal of the Supreme Court Act.

[27] Applicant's right to a second appeal to the Supreme Court of Appeal was subject to the condition that leave to appeal be granted by the High Court or, failing that, by the Supreme Court of Appeal. In my view applicant's right to pursue a second appeal must as a matter of logic be subject to the same condition.

[28] I am accordingly of the view that this court has jurisdiction to consider applicant's application for leave to appeal against his conviction to the Supreme Court of Appeal.

[29] I proceed to deal with the merits of applicant's application. I have considered applicant's grounds of appeal as set forth in his application for leave to appeal and the oral argument presented to the court at the hearing of the application. In my view, however, he does not have any prospects of success on appeal.

[30] Applicant's application for leave to appeal to the Supreme Court of Appeal against his conviction is accordingly dismissed.

A P BLIGNAULT

NYMAN AJ: I agree

R NYMAN