

SOUTH AFRICA / JUDGMENT

Bunze v S (CA19/2022) [2024] ZANWHC 276 (5 November 2024)

[2024] ZANWHC 276

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Reddy

CASE / FILE NUMBER

CA 19/2022

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IN

THE HIGH COURT OF SOUTH AFRICA,
NORTH WEST DIVISION,
MAHIKENG

Case No.: CA 19/2022

Regional Magistrates

Case No:RC4/116/2017

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates:

NO

Circulate to Regional

Magistrates: NO

In the matter between: -

APRIL

BUNZE

APPELLANT

AND

THE

STATE

RESPONDENT

Coram:

Petersen J & Reddy J

Date

of hearing:

13 September 2024

Delivered: The judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand-down is deemed to be 05 November 2024 at 10h00.

ORDER

The
appeal is struck from the roll.

APPEAL

JUDGMENT

REDDY J

Introduction

- [1] This matter has engaged the Full Bench for some time because of the failure of Legal Aid South Africa ('LASA') the legal representatives of the appellant to observe peremptory criminal procedures. Resultantly, the right to challenge a decision through the appeal process is being rendered nugatory.
- [2] It is therefore imperative that I set out the history of this matter. This will hopefully remind practitioners of the correct approach to be adopted in this and other matters where a criminal appeal has lapsed.
- [3] The appellant was charged with one count of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (rape) ('the SORMA') read with section 51 (1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 ('the CLAA') in the Regional Court, Klerksdorp. The State averred that on 01 May 2011, the appellant unlawfully and intentionally committed an act of sexual penetration with the victim DML (a minor child) by having sexual intercourse without the consent of DML. The jurisdictional fact alleged to trigger a mandatory sentence of life imprisonment in the event of conviction was based on the fact that DML was born on 21 May 2003.

Background

- [4] The appellant, duly represented by LASA, pleaded not guilty and denied the allegations in its entirety. In terms of section 220 of the Criminal Procedure Act 51 of 1977 ('the CPA'), the appellant admitted that DML was born on 21 May 2003. On 31 March 2017, after a fullblown trial, the appellant was convicted of attempted rape. On the latter date the appellant was sentenced to eighteen
- (18) years imprisonment. Additionally, two consequential orders followed. The appellant was declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000, and in terms of section 50(2) of the Sexual Offences Act 32 of 2007, the particulars of the appellant were to be entered into the

National Register of Sex Offenders.

- [5] The appellant failed to prosecute the appeal timeously. Resultantly, it was incumbent on the appellant to file an application for condonation. The appellant on 14 February 2023, at Rooigrond Correctional Facility, deposed to an affidavit which formed the bulwark of his condonation application. He explains that on 31 March 2017, immediately after being sentenced to eighteen
- (18) years imprisonment he instructed his erstwhile attorney of record Ms Odendaal of LASA, to lodge an application for leave to appeal. Ms Odendaal advised that for the appellant's instruction to be correctly executed the transcribed record of the proceedings had to be secured. On 04 April 2017, Ms Odendaal applied for same. In January 2018 this transcribed record was made available.
- [6] The further delay in the prosecution of this appeal was exacerbated, by the appellant serving his sentence at the Klerksdorp, Rooigrond and Kutama Sinthumule Correctional Facilities. The continuous movement of the appellant scuppered the ability of tracing the appellant. Ultimately, Ms Odendaal located the appellant at the Rooigrond Correctional Facility. Pursuant to this, the necessary affidavits were deposed to which resulted in the appellant's leave to appeal against conviction and sentence being granted on 04 August 2021.
- [7] The appellant was furthermore advised that what followed in the appeal process would be dealt with by LASA, Mahikeng. For LASA to effectively proceed with the appeal, the appellant's file had to be sent to it from LASA Pretoria who were ceased with the matter until April 2018. This caused the appeal process to be further hamstrung. In these overarching facts, the appellant concludes that the delay in the prosecution of his appeal was beyond his control. Moreover, he continues that there is a reasonable prospect of the appeal being successful. The nub of the matter being a condonation application is contained as part of the papers, for at least explaining the delay in prosecuting the appeal. This explanation in ordinary parlance would have been accepted. This matter is, however, hamstrung by further problems, to which I now turn.

A chronology of the Full Bench appeal

- [8] On 27 February 2023, LASA for the first time applied for the allocation of a date for the hearing of the appeal. A date was allocated on 06 March 2023 for the 26 May 2023. The communiqué issued out of the office of the Registrar implored both parties to ensure strict compliance with Rule 49(15) of the Uniform Rules of Court.
- [9] On 26 May 2023, Hendricks JP and Petersen J ordered that the appeal be struck from the roll. The striking off order triggered the operation of section 67 (5A)(a)(ii) of the Magistrates Court Rules, which provides that in the event of an appeal being struck-off or removed from the roll for any reason, the appeal shall be re-enrolled within ten (10) days from the date of striking-off or removal, failing compliance therewith the appeal shall lapse.

[10] The law in this regard was set out by Petersen ADJP (as he then was) with Bodibe-Dibetso AJ concurring, in the unreported matter of the David Ngotao and Another v S (Case CA 10/2016) 23 August 2023. The following was posited in this regard:

"The failure to lodge applications for condonation and reinstatement of the appeal

[11] The time limits for prosecution of appeals are governed by section 309(2) of the Criminal Procedure Act 51 of 1977 ("the CPA"), Rule 67 of the Magistrates' Court Rules promulgated in terms of the Magistrates' Courts Act 32 of 1944 ("the Magistrates' Court Rules") and Rule 51 of the Uniform Rules of Court of the High Court.

[12] Section 309 of the CPA in particular provides that:

"309 Appeal from lower court by person convicted

(1)

(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).

(2) An appeal under this section shall be noted and be prosecuted within the period and in the manner prescribed by the rules of court: Provided that the magistrate against whose decision or order the appeal is to be noted, or if he or she is unavailable any other magistrate of the court concerned, may on application and on good cause shown, extend such period.

(3) The provincial or local division concerned shall thereupon have the powers referred to in section 304(2), and, unless the appeal is based solely upon a question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, no conviction or sentence shall be reversed or altered by reason of any irregularity of or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect.

[13] Rule 67 of the Magistrates' Court Rules deals with criminal appeals. Rule 67(5A)(a)(ii), in particular, which is relevant to the prosecution of a criminal appeal in the High Court was substituted in the Government Gazette by GN R2134 of 3 June 2022 with effect from 8 July 2022 and by GN R2434 of 2 September 2022 also with effect from 8 July 2022. The substituted Rule 67(5A)(a)(ii) brought about a change to the status of appeals from the Magistrates' Court, that were either struck-off or removed from the roll for any reason by providing that:

“(5A)(a)(i)....

(ii) In the event of the appeal being struck-off or removed from the roll for any reason: the appeal shall then be re-enrolled within 10 days of the date of such striking-off or removal. failing compliance therewith the appeal shall lapse. "

(my emphasis)

[14] Uniform Rule 51 of the High Court Rules provides that:

"51 Criminal appeals from magistrates' courts

- (1) An appeal by a convicted person against a conviction, sentence or order made by a magistrate's court in a criminal matter, or an appeal by the director of public prosecutions or other prosecutor against a dismissal of a summons or charge or other decision of a magistrate's court in such a matter, shall be set down by the director of public prosecutions or registrar on notice to the appellant or his or her legal representative for hearing on such day as the judge president may appoint for such matters.
 - (2) Notwithstanding anything to the contrary in any rule contained, a notice may be served on an appellant or his or her legal representative by sending it by registered post, addressed to the appellant or his or her legal representative at an address appearing on the notice of appeal or at an address which the appellant or his or her legal representative has subsequently furnished to the registrar in writing.
 - (3) The ultimate responsibility for ensuring that all copies of the record on appeal are in all respects properly before the court shall rest on the appellant or his or her legal representative: Provided that where the appellant is not represented by a legal representative, such responsibility shall rest on the director of public prosecutions.
 - (4)(a) Written argument shall be delivered on behalf of the appellant and the director of public prosecutions within the time periods prescribed by the registrar. (b) The provisions of rule 49A(2)(b) and (c) shall apply mutatis mutandis to the written argument.
-”

- [11] The appellant failed to re-enrol the appeal within ten (10) days of 26 May 2023. Instead, there was a hiatus between 26 May 2023 to 18 October 2023, marked by inaction on the part of the appellant.
- [12] On 19 October 2023, Adv Molefe for the respondent applied for a new date (the second date) to be allocated for the hearing of the appeal. A date was allocated on 30 October 2023 for 22 March 2024.
- [13] On 22 March 2024, Mfenyana J and Scholtz AJ ordered that the appeal be removed from the roll for the respondent to file its heads of argument within 10 (ten) days of this order. On 09 April 2024, the respondent filed its heads of argument in compliance with the court order of 22 March 2024.
- [14] LASA applied for a new date (the third date) for the hearing of the appeal. To this end, the appeal was set down for 13 September 2024. On the latter date, the parties acquiesced in a request that the appeal be heard on the papers as ensconced in section 19 (a) of the Superior Courts Act 10 of 2013. Judgment was reserved.

The effect of the order of 26 May 2023

- [15] It appears that Mr Madiba and Adv Molefe were oblivious to the peremptory provisions of Rule 67(5A) (a) (ii) which has been extant in our law since 08 July 2022. See: GN R2134 of 03 June 2022 with effect from 08 July 2022 and by GN R 2434 of 02 September 2022 with effect from 08 July 2022.
- [16] That being so, the order of 26 May 2023, required of the appellant to comply with a mandatory timeline as evinced in section 67(5A) (a)(ii). The appellant was constrained to re-enrol the appeal within 10 (ten) days of the striking off order. The appellant failed to do so. The fact that the respondent had applied for the second date on 19 October 2023 is of no moment. The order of 26 May 2023 remained extant. It follows that the order of the Full Bench of 22 March 2024 was inconsequential for the very same reason.

Conclusion

- [17] It follows that there is no appeal before the Full Bench absent a substantive application for re-instatement of the appeal accompanied by a condonation application for the periods after the striking off order of 26 May 2023.

Order

- [18] In the result, the following order is made:

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

A H PETERSEN

APPEARANCES

For the Appellant: Mr. O Madiba Instructed by: Legal Aid South Africa No 742 Dr James Moroka Drive Mafikeng Justice Centre Mmabatho For the Respondent: Advocate Molefe Instructed by: The Director of Public Prosecutions Megacity Complex East Gallery 3139 Sekame Road Mmabatho

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