

SOUTH AFRICA / JUDGMENT

Cikolo v S (CA55/2023) [2024]

ZAECMKHC 21 (14 February 2024)

[2024] ZAECMKHC 21

COURT

Eastern Cape High Court, Makhanda

BEFORE

Govindjee, ZM Nhlangulela, NW Gqamana

CASE / FILE NUMBER

CA55/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

NOT REPORTABLE

Case no: CA55/2023

In the matter between: BONGANI CIKOLO Appellant and THE STATE Respondent

FULL COURT JUDGMENT

Govindjee J

- [1] Does a full court have jurisdiction to hear an appeal against the decision of a single judge to refuse a bail appeal?
- [2] The appellant was one of three persons who applied for bail during 2022. The presiding magistrate dismissed the application on 12 December 2022. The appellant's application for bail on new facts suffered the same fate on 23 June 2023. Mjali J considered and dismissed an appeal against that refusal. The learned judge granted leave to appeal to this court on 12 October 2023.
- [3] Section 171 of the Constitution provides that all courts function in terms of national legislation, and their rules and procedures must be provided for in national legislation. Section 180 adds that national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution.
- [4] The Superior Courts Act[1] ('the Act') regulates various matters pertaining to the courts, including appeals. The clear intention was to create a regulatory scheme in respect of all appeals from the high court.[2] Section 16, contained in ch 5 of the Act, provides 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; ...’ (Own emphasis.)

[5] The word ‘appeal’, as it is used in ch 5, is defined to exclude ‘...an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977...or in terms of any other criminal procedural law’.[3] The SCA has confirmed that this means that, if an appeal is ‘regulated in terms of’ the Criminal Procedure Act, 1977

(‘the CPA’), the provisions of s 16(1)(b) of the Act requiring special leave to appeal do not apply.[4]

[6] This court issued a directive on 2 February 2024, drawing the parties’ attention to s 16(1)(b) of the Act and enquiring whether this court should be constituted in the circumstances. The crucial question is whether an appeal of this nature is regulated in terms of the CPA. If not, s 16(1)(b) of the Act is applicable so that this court lacks the necessary jurisdiction to hear the matter.

[7] The crux of the appellant’s first argument in response is that s 16(1)(b) of the Act is inapplicable courtesy of s 65 of the CPA. It is readily apparent, however, that s 65 of the CPA pertains to an appeal from a lower court to a superior court with regard to bail. The section heading says as much and ‘lower court’ is defined to mean courts established in terms of the Magistrates’ Courts Act, 1944.[5] The entire section regulates what might be termed a ‘first level appeal’, confirming that such appeals may be heard by a single judge.[6] No part of the section pertains to what may be termed ‘further appeal’, whether to the full court or SCA.[7]

[8] The appellant’s second submission relies on s 65A of the CPA. That section also does not deal with a further appeal following the decision of a division of this court to uphold a magistrate’s refusal of bail. Instead, as the section heading indicates, it only regulates appeals by the National Director of Public Prosecutions (‘NDPP’) in cases where a court decides to release an accused on bail.[8]

[9] There is seemingly no other provision in the CPA, or any other criminal procedural law, providing for further appeal once the high court has decided a bail appeal.[9] Reading the various sections of the CPA referred to by the appellant in conjunction does not alter the position: further appeals are simply not regulated by the CPA.

[10] Any possible alternative interpretations may be debunked with reference to the decision of the SCA in *S v Van Wyk and Another*. [10] That matter included consideration of whether the high court, sitting as a court of appeal, had jurisdiction to grant leave to appeal against its own order dismissing an appeal on its merits. [11] The SCA interpreted the Act as follows:

‘[18] Section 1 of the Act provides that “appeal” in ch 5 does not include an appeal in a matter regulated in terms of the CPA, or in terms of any other criminal procedural law. The CPA does not contain any provision dealing with a right of appeal to this court from a decision of the high court taken on appeal to it from a magistrates’ court. [12] A right of appeal from the high court sitting as an appeal court, to this court in criminal cases, consequently falls within ch 5 of the Act. Section 16(1)(a) and (b), which are relevant, provide as follows ...

[19] The jurisdiction of this court to hear appeals from the high court whether as a court of first instance, or an appeal court, is derived from this section and s 19 of the Act... (Footnote included).’

[11] The consequence of all this for the appellant is as follows. The present, attempted further appeal is not against the decision of a court of first instance, but against that of a high court sitting as a court of appeal comprising a single judge. [13] Neither the CPA nor any other criminal procedural law provides for such an appeal, so that the exclusion contained in the definition of ‘appeal’ in the Act does not apply. Van Wyk confirms the further right of appeal from the high court sitting as an appeal court to the SCA in criminal cases. That further appeal, having been left unregulated by the CPA, must fall within ch 5 of the Act. In terms of s 16(1)(b) of the Act, it follows that an appeal against the decision of Mjali J lies to the SCA upon special leave having been granted by that court. This court therefore lacks jurisdiction to entertain the matter.

[12] Arrested, detained and accused persons enjoy various constitutional rights, including the right to be released from detention if the interests of justice permit. Such rights are sacrosanct, subject only to any internal limitations contained in s 35 of the Constitution or to general limitation in terms of s 36 of the Constitution. While the court is alive to these principles, the period of time already spent in detention by the appellant and the importance of bail for an accused person, it would be inappropriate for the court to exercise its appeal powers in circumstances where it lacks the jurisdiction to do so.

[13] The appropriate order is to strike the matter from the roll. [14]

A GOVINDJEE

JUDGE OF THE HIGH COURT

I agree.

ZM NHLANGULELA

ACTING JUDGE PRESIDENT OF THE HIGH COURT

NW GQAMANA

Heard: 12 February 2024 Delivered: 14 February 2024 Appearances: For the Appellant: Mvuzo Notyesi Inc. Durham Street Mthatha Email: mnotyesi@telkomsa.net For the Respondent: Adv T Sellem Director of Public Prosecutions 94 Lower Sisson Street Fortgate Mthatha Email: advtsellem@gmail.com

[1] Act 10 of 2013.

[2] S v Banger 2016

(1) SACR 115 (SCA) para 9.

[3] S 1 of the Act.

[4] DPP v Moloi [2017] ZASCA 78 para 35.

[5] Act 32 of 1944.

[6] S 65(1)(b) of the CPA. Rule 19A of the Joint Rules of Practice for this Division ('the Joint Rules') provides that bail appeals

from a lower court are generally heard by one judge, although in appropriate cases it may be determined that two judges are required.

It is so that such an appeal, namely against a lower court's refusal to admit the accused to bail, may be heard by a 'local

division' with jurisdiction: s 65(1)(c) of the CPA.

[7] S 1 of the Act defines 'full court', in relation to any Division of the High Court, to mean a court consisting of three judges.

[8] The CPA refers to 'attorney-general'. In terms of s 45 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998), that reference is construed as a reference to the National Director of Public Prosecutions appointed in terms of s 179(1)(a) of the Constitution.

[9] The appellant also mistakenly relied on s 310A of the CPA, which deals with an appeal by the NDPP against the sentence of a lower court, and s 316 of the CPA, dealing with applications for leave to appeal against the conviction or sentence by the High Court, suggesting that these sections, perhaps read together with ss 65 and 65A of the CPA, 'expressly' conferred jurisdiction on this court.

[10] S v Van Wyk and Another 2015

(1) SACR 584 (SCA) ('Van Wyk').

[11] The case also considered s 309C of the CPA and cases where the high court dismissed a petition against a magistrate's refusal to grant leave to appeal: Van Wyk above n 10 para 3.

- [12] ‘Sections 315 and 316 of the CPA deal with appeals to this court from the high court sitting as the court of first instance.’
- [13] The position is somewhat different in the case of appeals against the refusal of bail by the high court sitting as a court of first instance: *S v Banger* 2016 (1) SACR 115 (SCA).
- [14] *DPP v Moloi* above n 4 para 39.
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Prepared on 10 October 2026 · Esheria