

SOUTH AFRICA / JUDGMENT

Nontshinga and Others v S (770/2015) [2016] ZASCA 76 (27 May 2016)

[2016] ZASCA 76

COURT

Supreme Court of Appeal

BEFORE

Leach, Saldulker, Dambuza

CASE / FILE NUMBER

770/2015

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 770/2015

In the matter between:

MFUNDO NONTSHINGA

APPELLANT

MZWEKHAYA ZAGANA

MANDLA MAZWI

DUMISANI SIKAKANA

and

THE STATE

RESPONDENT

Neutral citation: Mfundo Nontshinga v S (770/2015) [2016] ZASCA 76 (27May 2016)

Bench:

Leach, Saldulker and Dambuza JJA

Heard:

04 May 2016

Delivered: 27 May 2016

Summary:

Criminal Procedure: Appeal against the refusal of a petition for leave to appeal by High Court before the commencement of the Superior Courts Act 10 of 2013 – No leave sought from the court refusing the petition – special leave to appeal granted against conviction by the Supreme Court of Appeal – order a nullity – Supreme Court of Appeal having no jurisdiction.

ORDER

On appeal from: Eastern Cape Division of the High Court (Somyalo J.P sitting as court of appeal).

The following order was made on 4 May 2016:

The matter is struck from the roll.

Saldulker JA (Leach and Dambuza JJA concurring):

[1] On 4 May 2016, this court struck this matter off the roll, with reasons to follow. These are the reasons. The appellants together

with a co-accused, Mr Vusumzi Bolo, were each charged with nine counts, namely: one count of housebreaking with the intention to rob and robbery, six counts of kidnapping, one count of unlawful possession of a fire arm and one count of unlawful possession of ammunition. At the end of the trial, on 6 August 2010 the Regional Court in Port Elizabeth (the trial court) convicted them on all nine counts and sentenced them to an effective 17 years' imprisonment. Their application for leave to appeal against their convictions and sentences was dismissed by the regional magistrate on 9 August 2010.

[2] Aggrieved, the appellants lodged a petition for leave to appeal to the Eastern Cape Division, Grahamstown (the high court), against their convictions and sentences. Their petitions were refused on 12 March 2011. Subsequently, their co - accused, Mr Bolo, relying on s 309C of the Criminal Procedure Act 51 of 1977, also petitioned the high court, for leave to appeal against his convictions. His petition was granted, but only in respect of the convictions for unlawful possession of the firearm and ammunition, that is counts eight and nine. In the event, his appeal on these counts was upheld by Plasket J with Brooks J concurring (Bolo v S [2014] ZAECHGHC 99), and his convictions on counts eight and nine were set aside. Plasket J directed that the appellants be informed of this judgment.

[3] Following from that the appellants lodged an application to this court for special leave to appeal against their convictions on counts eight and nine being the unlawful possession of a firearm and ammunition, and resulting sentences. This court granted the appellants special leave. In this way the appellants came before us purportedly on an appeal against the refusal of a petition by the high court.

[4] Before us, the parties were agreed that the appellants' trial, their convictions and sentences, and the subsequent refusal of their petitions by the high court on 12 March 2013 took place prior to the promulgation of the Superior Courts Act 10 of 2013. As a result, this matter must be determined in terms of the Supreme Court Act 59 of

1959. In *S v Khoasasa*

[2002] ZASCA 113; 2003

(1) SACR 123 (SCA) it was held that a refusal of leave to appeal by the high court, is an order as contemplated in ss 20(1) and 20(4) of the Supreme Court Act, and was appealable to the Supreme Court of Appeal only with the leave of the high court, (being the court against whose order the appeal was to be made) or, where leave was refused, with the leave of this court. This judgment has consistently been followed in this court: See *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA), *S v Tonkin*

[2013] ZASCA 179; 2014 (1) SACR 583 (SCA); *S v Robert Brown* (SCA) unreported case no: 988/2013 (17 March 2015); *Johannes Windvogel v S* [2015] ZASCA 63 (SCA). In the matter before us, no such leave was sought from the high court against the refusal of their petitions before the appellants proceeded to this court for special leave. That being the case, the order of this court granting special leave to the appellants is a nullity as this court had no jurisdiction to hear the application. Accordingly leave had not validly been granted to appeal to this court. When this was pointed out to the parties, both sides acknowledged that the appeal was not properly before us and cannot now be heard.

[5] In the light of the outcome in *Bolo*, there should be little difficulty in the appellants obtaining the necessary leave to appeal from the high court. But without that step having yet being taken, this court lacks jurisdiction to hear the matter. For these reasons the matter was struck from the roll.

HK Saldulker

Judge of Appeal

APPEARANCES:

For Appellant:

L Crouse (and H Charles)

Instructed by:

Port Elizabeth Justice Centre, Port Elizabeth

Bloemfontein Justice Centre. Bloemfontein

For Respondent:

M Stander

Instructed by:

Director of Public Prosecutions, Grahamstown

Director of Public Prosecutions, Bloemfontein

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