

SOUTH AFRICA / JUDGMENT

S v O'Kelly (P105/05) [2006] ZAGPHC 160 (31 March 2006)

[2006] ZAGPHC 160**COURT**

High Courts - Gauteng

BEFORE

B.R. Southwood, R.D. Claassen

CASE / FILE NUMBER

P105/05

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Case No: P105/05

In the matter of:

SOUTHWOOD J

- [1] On 17 March 2005 the applicant was convicted in the Pretoria regional court of dealing in dagga in contravention of section 5(b) of Act 140 of 1992. The applicant was sentenced to five years imprisonment in terms of section 276(1)(i) of Act 51 of 1977 (“the Act”).
- [2] The applicant unsuccessfully applied to the regional magistrate for leave to appeal against the conviction and sentence .
- [3] In May 2005 the applicant unsuccessfully petitioned the Judge President of the Transvaal Provincial Division in terms of section 309C of the Act for leave to appeal against the conviction. The petition was dismissed on 5 May 2005.
- [4] The applicant then attempted to appeal to the Supreme Court of Appeal against the order dismissing the petition for leave to appeal. The registrar of the Supreme Court of Appeal informed the applicant that, because of the judgment in *S v Khoasasa* 2003 (1) SACR 123 (SCA) , he was not entitled to appeal to the Supreme Court of Appeal until he had been refused leave to appeal by the Transvaal Provincial Division. Hence this application.
- [5] The applicant’s notice of application for leave to appeal states that on a date and at a time determined by the registrar the applicant will apply for leave to appeal against the order dismissing his petition. This implies a hearing in open court.

- [6] In view of section 309C (5) which provides that the petition must be considered in chambers - unless the judge / s, in exceptional circumstances, order /s that the petition or any part thereof be argued before them (section 309C(6))
- the parties were requested to present argument as to why the application for leave to appeal against the dismissal of the petition should be heard in open court. The Legislature clearly contemplated a summary procedure for the disposal of petitions and made no provision for a procedure such as the present.
- [7] Counsel for the parties are agreed that the application (i.e. an application for leave to appeal against the refusal of a petition) should be heard in open court but only referred to the general rules pertaining to applications for leave to appeal. They were not able to refer to any statute or rule or practice which would require that this application be heard in open court. There is clearly a lacuna in the Act and rules of court. The reason is probably that until the judgment in *S v Khoasasa* supra it was generally accepted that the refusal of a petition was the last step in the appeal process and that there would not be an appeal to the Supreme Court of Appeal against the dismissal of a petition.
- [8] There are no exceptional circumstances which would require that this court hear argument on the application in open court. In my view the summary procedure of considering the application in chambers is consistent with the summary procedure envisaged by the section.
- [9] The following order is made:
- (1) The application is removed from the roll;
 - (2) The application for leave to appeal to the Supreme Court of Appeal against the order dismissing the applicant's petition, made in terms of section 309C of Act 51 of 1977, is refused.

B.R. SOUTHWOOD JUDGE OF THE HIGH COURT

I agree

R.D. CLAASSEN JUDGE OF THE HIGH COURT

HEARD ON: 31/3/2006 FOR THE APPLICANT: ADV J HENZEN INSTRUCTED BY: MR D NELL OF DEON NELL PROKUREURS FOR THE RESPONDENT: ADV J P KRAUSE INSTRUCTED BY: STATE ATTORNEY

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