

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A183/2013

In the matter between:

DANNY MEKGOE

Applicant

and

THE STATE

Respondent

CORAM: DAFFUE, J *et* NAIDOO, J

JUDGMENT BY: DAFFUE, J

HEARD ON: 20 MARCH 2015

DELIVERED ON: 20 MARCH 2015

- [1] This is an application by the applicant, Mr Danny Mekgoe, for leave to appeal to the Supreme Court of Appeal against our judgment delivered on 13 March 2014. Adv J. Nel appears for the applicant and Adv J. Swanepoel for the DPP.
- [2] On 3 March 2014 we heard an appeal by Mr Mekgoe directed at his conviction of fraud by the regional court, sitting at Bothaville. He was sentenced to 15 years' imprisonment, but there was no appeal against sentence.

- [3] As mentioned, we dismissed the appeal in a judgment delivered on 13 March 2014.
- [4] On 27 November 2014, eight and a half months later and hopelessly out of time, an application for leave to appeal our judgment was filed. It was accompanied by an application for condonation.
- [5] My clerk's e-mail dated 2 February 2015 sent to Mr B. Jacobs (the applicant's present attorney) and Mr Swanepoel, written at my request, reads as follows:

“Daffue R het my versoek om hierdie skrywe aan u te rig na aanleiding van die gesprekke met Mnr Jacobs en Adv Nel die afgelope Vrydag.

Anders as vermeld is Naidoo R nie meer beskikbaar op Vrydag 6 Februarie 2015 nie. Die enigste week hierdie kwartaal wat beide regters saam in Bloemfontein is (behalwe vir hierdie week), is die week van 16 tot 20 Maart 2015. Die regters kan die aansoek aanhoor om 08h30 op enige dag vanaf Dinsdag 17 tot Vrydag 20 Maart, onderhewig aan die aspek vermeld te word in die volgende paragraaf. Kommunikeer asseblief met mekaar en laat weet my teen Woensdag 4 Februarie watter datum beide advokate pas.

Ek bevestig ook dat Daffue R reeds vroeër 'n kennisgewing van Rampai wnde R aan u Mnr Jacobs oorhandig het met betrekking tot die huidige regsposisie ten aansien van appèlle vanaf die Hoë Hof wat voortspruit uit verrigtinge in die laer howe. *Prima facie* wil dit voorkom soos aan u oorgedra in kamers dat die twee regters nie die aansoek kan beslis nie. Sou u egter volhard dat die aansoek wel deur hulle aangehoor behoort te word nieteenstaande die wetswysiging, moet u

my dienooreenkomstig inlig en ook bereid wees om hulle toe te spreek in hierdie verband.

Ek sien uit om van u te verneem soos hierbo versoek en indien u sou besluit om nie met die aansoek voort te gaan nie, moet u so spoedig doenlik 'n kennisgewing van terugtrekking liasseer.”

- [6] I confirm that I informed Messrs Jacobs and Nel in chambers that I was *prima facie* of the view that this court does not have jurisdiction to entertain the application and that special leave to appeal had to be obtained from the Supreme Court of Appeal. I even handed them a copy of a circular by Rampai AJP (as he then was) to judges of this division confirming my viewpoint.
- [7] Notwithstanding my viewpoint the legal team of the applicant insisted that we hear the matter and it was enrolled for hearing on 20 March 2015 at 08h30.
- [8] On 18 March 2015 I obtained an e-mail from the librarian of the Free State High Court with the SCA judgments delivered on the 17th of March 2015. The judgment of **Potgieter v S** (20109/2014) [2015] ZASCA 15 (17 March 2015) was amongst these judgments. Co-incidentally, Mr Swanepoel of the DPP's office brought a copy of this judgment to my chambers that same afternoon. The judgment is marked “not reportable”.
- [9] I quote from paragraphs 2 and 3 of the judgment:

“[2] A full court of the Free State Division of the High Court (Rampai and Moloi JJ and Phalatsi AJ) dismissed the appeal to it by the appellant, finding that the trial court’s findings as to the credibility of the complainant, and that the appellant’s version was not reasonably possibly true, were correct. It nonetheless gave leave to the appellant to appeal to this court against its decision.

[3] That it was not able to do. Section 16(1)(b) of the Superior Courts Act 10 of 2013, in operation at the time when the full court heard the appeal and handed down judgment (August and October 2013), provides that an appeal against the decision of an appeal court lies to this court only with special leave granted to it by this court. The full court did not have the power to grant leave to this court. Its order is thus a nullity and this court has no jurisdiction.”

[10] On 13 March 2015 we were again reminded of the obligation to observe the *maxim stare decisis*, the doctrine of precedents. I refer to the judgment of the SCA in **First Rand Bank v Kona and another** 20003/2014 [2015] ZASCA 11 (13 March 2015) and I quote from paragraphs 21 and 22:

“[21] The decision of this court in *Naidoo* and that of the Constitutional Court in *Ferris* were referred to in the judgment of the high court. The legal principles enunciated in the two decisions were binding on that court and precluded it from arriving at any of the three conclusions to which I have referred. The statement of principle by Didcott J in *Credex Finance (Pty) Ltd v Kuhn* 1977 (3) SA 482 (N) that is thus concisely summarised in the headnote to that judgment is in point:

‘The doctrine of judicial precedent would be subverted if judicial officers, of their own accord or at the instance of litigants, were to

refuse to follow decisions binding on them in the hope that appellate tribunals with the power to do so might be persuaded to reverse the decisions and thus to vindicate them *ex post facto*. Such a course cannot be tolerated.'

[22] The Constitutional Court, in *Camps Bay Ratepayers' and Residents' Association & another v Harrison & another* 2011 (4) SA 42 (CC), paras 28-30, expressed itself in no uncertain terms about observance by courts of the maxim *stare decisis* or the doctrine of precedent. Brand AJ, in delivering the unanimous judgment of the court said:

'Considerations underlying the doctrine were formulated extensively by Hahlo & Kahn [Hahlo & Kahn *The South African Legal System and its Background* (Juta), Cape Town 1968) at 214-15]. What it boils down to, according to the authors, is: '(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*.' Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'"

[11] It is so that Mr Nel indicated when he stood up this morning that he considered himself bound by the **Potgieter** judgment and that he would ask that the matter be struck from the roll as it appears to be the only order that he could ask for, although he was of the

view that the SCA judgment was wrong, bearing in mind the clear indications in the Superior Courts Act.

[12] We are bound by judgments of the SCA, irrespective of what we believe the correct legal position should be.

[13] The SCA did not set out full reasons for its conclusion in **Potgieter** *loc cit* and it is perhaps necessary to refer to the following which confirm why I am of the view that the SCA judgment is beyond reproach.

[14] The Superior Courts Act, 10 of 2013, (“the Act”) came into operation on 23 August 2013 and before we considered the appeal in March last year and more than a year before the filing of the present application for leave to appeal. Section 16(1)(b) of the Act reads as follows:

“16(1) Subject to section 15(1), the Constitution and any other law-
(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;” (emphasis added.)

[15] It is true that “appeal” in Chapter 5 (section 16 falls within Chapter 5) “does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 51 of 1977, or in terms of any other criminal procedural law” – See section 1 of the Act.

[16] Section 52 of the Act deals with pending proceedings in any court at the commencement of the Act. These must be continued and

conducted as if this Act had not been passed. Proceedings are deemed pending – section 52(2) – if at the commencement of the Act a summons had been issued, but judgment had not been passed. No summons had been issued in the High Court in this regard and no judgment still has to be delivered. This section would apparently be applicable to pending civil matters only.

- [17] An issue to be considered is whether the application for leave to appeal is not excluded from the effect of section 16(1)(b) based on the definition of “appeal” in section 1 of the Act and thus, whether it is not regulated by the Criminal Procedure Act (“the CPA”) or any other criminal procedural law.
- [18] Reviews and appeals in cases of criminal proceedings in the lower courts are dealt with in Chapter 30 of the CPA – sections 302 to 314. Section 309 deals with appeals from the lower courts. Section 309B deals with applications for leave to appeal in the lower courts. Appeals in cases of criminal proceedings in the High Courts are dealt with in Chapter 31 – sections 315 to 324. Section 316 deals with applications for leave to appeal in the High Courts. Subsection 316(1) makes it clear that the section regulates applications for leave to appeal against convictions and sentences of the High Court.
- [19] Nowhere in the CPA or in any other criminal procedural law is any procedure to be found which regulates applications for leave to appeal judgments given by the High Court on appeal, save for sub-section 316(3)(a) which stipulates that no appeal shall lie against the judgment or order of a full court given on appeal to it

in terms of section 315(3), except with the special leave of the Supreme Court of Appeal.

- [20] Applications for leave to appeal in respect of judgments or orders of the High Court given on appeal have been dealt with in the past in terms of section 20(1), read with section 20(4)(b) of the Supreme Court Act, 59 of 1959, which Act has been repealed by the Superior Courts Act. Section 20 (1) stipulated as follows:

“(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 or a full court as the case may be.” (emphasis added.)

Section 20 (4) stipulated as follows:

“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).....

(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.”

See also Farlam *et al*, **Erasmus, Superior Court Practice**, A1-40 and **Prokureursorde, Oranje-Vrystaat v Louw** 1989 (1) SA 310 at 315A. Sub-sections 20(1) and (4) regulated the procedure to be followed until the commencement of the Superior Courts Act in 2013.

- [21] The effect of all this is that neither the CPA, nor any other criminal procedural law, regulates applications for leave to appeal

judgments or orders of the High Court given on appeal such as *in casu*. We cannot adjudicate the application for leave to appeal and special leave to appeal should be obtained from the Supreme Court of Appeal in terms of section 16(1)(b) of the Superior Courts Act, 10 of 2013.

[22] Mr Nel is correct that, notwithstanding his own view of the legal position, this court has no other option than to strike the matter from the roll.

[23] Consequently the following order is made:

The applications for leave to appeal and condonation are struck from the roll.

J. P. DAFFUE, J

I concur.

S NAIDOO, J

On behalf of appellant:

Mr J Nel
Instructed by:
Jacobs Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv J Swanepoel
Instructed by:
Director: Public Prosecutions
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