REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: AR 463/2007

In the matter of:

SANDILE SAMSON MTHETHANDABA Applicant

and

THE STATE Respondent

And in the matter of an Application for Leave to Appeal against the refusal of a Petition for Leave to Appeal

JUDGMENT

Delivered on 21 January 2014

Vahed J:

[1] On 16 August 2006 the applicant and a co-accused were convicted in the Regional Court, Durban on charges of robbery with aggravating circumstances (Count 1) and attempted murder (Count 2) and were each sentenced to serve terms of imprisonment of 15 years on Count 1 and 10 years on Count 2. 5 years of the sentence in respect of Count 2 were ordered to run concurrently with the sentence on Count 1. Their effective term of imprisonment was thus 20 years.

[2] On 23 July 2007 the applicant's application for leave to appeal against sentence only was dismissed. He subsequently applied on petition to this Court against that refusal. The petition was dealt with in chambers by Hugo and Niles-Dunér JJ, who, on 10 December 2007, refused same.

[3] Duly supported by an application for condonation for the delay, the applicant now, in terms of an application delivered on 8 November 2013, applies for leave to appeal to the Supreme Court of Appeal against that last refusal. Hugo and Niles-Dunér JJ are no longer serving members of this Court[1] with the result that the application was placed before Koen J and me.

[4] In *S v Khoasasa*[2] :

'The appellant was convicted in a regional court. After he had been convicted and sentenced, he applied for leave from the trial court, in terms of s 309B of the Criminal Procedure Act 51 of 1977, to appeal against his conviction and sentence. The application was refused. Thereafter he petitioned the Judge President of a Provincial Division in terms of s 309C of the Criminal Procedure Act for such leave. The application was refused by two Judges of the Provincial Division. Subsequently the appellant, by means of a petition to the Chief Justice, applied to the Supreme Court of Appeal ("SCA") for leave to appeal against his sentence. The application was considered by two Judges of the SCA and they ordered that leave be granted to appeal to the SCA, subject to the condition that the question whether that Court had the jurisdiction to hear the matter be argued *in limine*. The appellant thereupon appealed to the SCA.

The SCA held that there was no doubt that the refusal, by two Judges of the Provincial Division, of leave to appeal was a 'judgment or order' or 'a ruling' of the Court of the Provincial Division as intended in s 20(1) or s 21(1) of the Supreme Court Act 59 of 1959.

It held further that the application directed to the Judge President of a Provincial Division for leave to appeal against a conviction or sentence in a lower court after

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1 Both have retired from active service and Hugo J has subsequently died.

2 2003 (1) SACR 123 (SCA)

such leave had been refused by the lower court was not described in s 309C as an appeal, but it was still directed at correcting what the applicant regarded as an incorrect decision in the lower court. In effect it was nothing other than an appeal against the magistrate's refusal of leave to appeal.

Accordingly, the SCA held, that the order of the Court *a quo* in terms of which the appellant had been refused leave to appeal was an order of that Court which had been given on appeal, as intended by s 20(3) of the Supreme Court Act. The appellant, with the necessary leave, could have appealed to the SCA against the Court *a quo's* order refusing leave to appeal. The leave required was the leave of the Court *a quo* or, where such leave was refused, the leave of the SCA.

The SCA went on to hold that the appellant had not applied to the Court *a quo* for leave to appeal before he applied to the SCA for such leave. Therefore leave to appeal had not been refused by the Court *a quo* before the appellant's application for leave to the SCA. In the circumstances, the SCA did not have jurisdiction to grant leave to appeal against the Court *a quo's* order to the appellant and the order in terms of which such leave had been granted to the appellant was a nullity.

It held, accordingly, that the appellant had not obtained leave to appeal from the Court *a quo*. The result was that the SCA was not competent to hear the appeal against the Court *a quo's* order and the appeal had to be scrapped from the roll.'[3]

[5] The approach adopted in *Khoasasa* was approved of in a number of decisions[4] and in at least one of those decisions[5] the reasoning in *Khoasasa* has been described as being unassailable.

[6] *Khoasasa* was decided upon an interpretation of sections 20(1), 20(4) and 21(1) of the Supreme Court Act, 59 of 1959. The question that arises is whether, with the repeal of the Supreme Court Act and its

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3 I quote liberally from the English headnote to the case with appropriate changes for grammar and tense etc.

4 See, eg, *Matshona v S* [2008] ZASCA 58, *Hibbert v S* [2011] ZASCA 18, *AD v S* [2011] ZASCA 215, *Mkhize v S* [2012] ZASCA 74 and *Thekiso v S* [2012] ZASCA 129.

5 *Matshona v S* [2008] ZASCA 58.

replacement by the Superior Courts Act, 10 of 2013, which came into force on 23 August 2013[6], the procedure determined in *Khoasasa* stills holds? In other words: Does the applicant still require our leave or must he look elsewhere?

[7] Sections 20(1), 20(4) and 21(1) of the Supreme Court Act provided as follows:

'**20 Appeals to Supreme Court in general**

(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.

...

(4) 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) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;

(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.

21 Appeals to appellate division

(1) In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.'

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6 See Proclamation R. 36 of 2013 dated 22 August 2013 (Government Gazette 36774).

[8] Appeals are now governed by sections 16 and 17 of the Superior Courts Act, 10 of 2013. Those sections provide[7]:

'**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; and

(c) an appeal against any decision of a court of a status similar to the High Court, lies to the Supreme Court of Appeal upon leave having been granted by that court or the Supreme Court of Appeal, and the provisions of section 17 apply with the changes required by the context.

(2) *(a)* (i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.

(b) If, at any time prior to the hearing of an appeal, the President of the Supreme Court of Appeal or the Judge President or the judge presiding, as the case may be, is *prima facie* of the view that it would be appropriate to dismiss the appeal on the ground set out in paragraph *(a)*, he or she must call for written representations from the respective parties as to why the appeal should not be so dismissed.

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7 These sections are reproduced in full because of the observation made in paragraph [9]

(c) Upon receipt of the representations or, failing which, at the expiry of the time determined for their lodging, the President of the Supreme Court of Appeal or the Judge President, as the case may be, must refer the matter to three judges for their consideration.

(d) The judges considering the matter may order that the question whether the appeal should be dismissed on the ground set out in paragraph *(a)* be argued before them at a place and time appointed, and may, whether or not they have so ordered-

(i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or

(ii) order that the appeal proceed in the ordinary course.

(3) Notwithstanding any other law, no appeal lies from any judgment or order in proceedings in connection with an application-

(a) by one spouse against the other for maintenance *pendente lite*;

(b) for contribution towards the costs of a pending matrimonial action;

(c) for the interim custody of a child when a matrimonial action between his or her parents is pending or is about to be instituted; or

(d) by one parent against the other for interim access to a child when a matrimonial action between the parents is pending or about to be instituted.

17 Leave to appeal

(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2) *(a)*; and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

(2) *(a)* Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.

(b) If leave to appeal in terms of paragraph *(a)* is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

(c) An application referred to in paragraph *(b)* must be considered by two judges of the Supreme Court of Appeal designated by the President of the Supreme Court of Appeal and, in the case of a difference of opinion, also by the President of the Supreme Court of Appeal or any other judge of the Supreme Court of Appeal likewise designated.

(d) The judges considering an application referred to in paragraph *(b)* may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.

(e) Where an application has been referred to the court in terms of paragraph *(d)*, the court may thereupon grant or refuse it.

(f) The decision of the majority of the judges considering an application referred to in paragraph *(b)*, or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.

(3) An application for special leave to appeal under section 16 (1) *(b)* may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2) *(c)* to *(f)* shall apply with the changes required by the context.

(4) The power to grant leave to appeal-

(a) is not limited by reason only of the fact that the matter in dispute is incapable of being valued in money; and

(b) is subject to the provisions of any other law which specifically limits it or specifically grants or limits any right of appeal.

(5) Any leave to appeal may be granted subject to such conditions as the court concerned may determine, including a condition-

(a) limiting the issues on appeal; or

(b) that the appellant pay the costs of the appeal.

(6) *(a)* If leave is granted under subsection (2) *(a)* or *(b)* to appeal against a decision of a Division as a court of first instance consisting of a single judge, the judge or judges granting leave must direct that the appeal be heard by a full court of that Division, unless they consider-

(i) that the decision to be appealed involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the Supreme Court of Appeal is required to resolve differences of opinion; or

(ii) that the administration of justice, either generally or in the particular case, requires consideration by the Supreme Court of Appeal of the decision, in which case they must direct that the appeal be heard by the Supreme Court of Appeal.

(b) Any direction by the court of a Division in terms of paragraph *(a)*, may be set aside by the Supreme Court of Appeal of its own accord, or on application by any interested party filed with the registrar within one month after the direction was given, or such longer period as may on good cause be allowed, and may be replaced by another direction in terms of paragraph *(a)*.

(7) Subsection (2) *(c)* to *(f)* apply with the changes required by the context to any application to the Supreme Court of Appeal relating to an issue connected with an appeal.'

[9] It will immediately be seen that the Superior Courts Act contains no provision similar to section 20(4) of the Supreme Court Act.

[10] Prior to the coming into force of the Superior Courts Act appeals in criminal matters were regulated by the Criminal Procedure Act, 51 of 1977 and by the provisions of the Supreme Court Act referred to above.

[11] Previously, interpreting sections 20(4)(b) and 21(1) of the Supreme Court Act, it has been held that the Supreme Court of Appeal (formerly the Appellate Division) had no jurisdiction to entertain appeals directly from the lower courts.[8] This view was reinforced by the provisions of section 309(1) of the Criminal Procedure Act which provide for an appeal from the lower court to the High Court. In *S v* Kriel[9] the appellant was convicted and sentenced in a regional court. The judgment, after setting out the facts and the background, then records the following (footnotes omitted):

'[10] A petition to the KwaZulu-Natal High Court, Pietermaritzburg, for leave to appeal against sentence was refused on 14 August 2009. The appellant then applied to the High Court for leave to appeal to this court against the refusal by the High Court of his petition for leave to appeal. Nicholson J and Swain J, sitting as a full bench in granting leave to appeal, cited *S v Khoasasa* and then proceeded to grant leave to appeal directly to this court against the sentence imposed by the regional court. They were wrong in so doing, as, in *S v Khoasasa*, it was held that a sentence imposed in the regional court can only be appealed against in this court when an appeal against such sentence has failed in the High Court.

[11] In *Matshona v S*, a case similar to the present, this court was asked to consider an appeal against a sentence imposed in the Pretoria regional court. A petition for leave to appeal had been refused in the High Court and leave to appeal was granted to this court. Leach AJA in paras 4 to 6 set out why the appeal on its merits could not be entertained. These paragraphs are repeated:

> "[4] In my view, the reasoning in *Khoasasa* (supra) is unassailable. The appeal of an accused convicted in a regional court lies to the High Court under section 309(1)*(a)*, although leave to appeal is required either from the trial court under section 309B or, if such leave is refused, from the High Court

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8 See *Attorney-General, Transvaal v Nokwe & Ors* 1962 (3) SA 803 (T) and *S v Kriel* 2012 (1) SACR 1 (SCA).

9 2012 (1) SACR 1 (SCA).

pursuant to an application made by way of a petition addressed to the Judge-President under section 309C(2) and dealt with in chambers. In the event of this petition succeeding, the accused may prosecute the appeal to the High Court. But, if it is refused, the refusal constitutes a judgment or order or a ruling of a High Court as envisaged in section 20(1) and section 21(1) of the Supreme Court Act 59 of 1959, against which an appeal lies to this court on leave obtained either from the High Court which refused the petition or, should such leave be refused, from this court by way of petition.

[5] It is clear from this that where, as is here the case, an accused obtains leave to appeal to this Court against the refusal in a High Court of a petition seeking leave to appeal against a conviction or sentence in the regional court, the issue before this Court is whether leave to appeal should have been granted by the High Court and not the appeal itself which has been left in limbo, so to speak, since the accused first sought leave to appeal to the High Court. After all, in the present case, the appellant's appeal against his sentence has never been heard in the High Court and, as was held in *S v N* 1991 (2) SACR 10 (A) at 16, the power of this Court to hear appeals of this nature is limited to its statutory power. Section 309(1) prescribes that an appeal from a Magistrates' Court lies to the High Court, and an appeal against the sentence imposed on the appellant in the regional court is clearly not before this Court at this stage. As was observed by Streicher JA in *Khoasasa*:

> ‘Geen jurisdiksie word aan hierdie Hof verleen om 'n appél aan te hoor teen 'n skuldigbevinding en vonnis in 'n laer hof nie. Dit is eers nadat 'n appél vanaf 'n laer hof na 'n Provinsiale of 'n Plaaslike Afdeling misluk het dat 'n beskuldigde met die nodige verlof na hierdie Hof appél kan aanteken.’

[6] Not only does this Court lack the authority to determine the merits of the appellant's appeal against his sentence at this stage, but there are sound reasons of policy why this Court should refuse to do so even if it could. It would be anomalous and fly in the face of the hierarchy of appeals for this Court to hear an appeal directly from a Magistrates' Court without that appeal being adjudicated in the High Court, thereby serving, in effect, as the court of both first and last appeal. In addition, all persons are equal under the law and deserve to be treated the same way. This would not be the case if some offenders first had to have their appeals determined in the High Court before they could seek leave to approach this Court if still dissatisfied while others enjoyed the benefit of their appeals being determined firstly in this Court. And most importantly, this Court should be reserved for complex matters truly deserving its attention, and its rolls should not be clogged with cases which could and should be easily finalised in the High Court.

[7] Consequently this Court cannot determine the merits of the appeal but must confine itself to the issue before it, namely whether leave to appeal to the High Court should have been granted.” ‘

[12] The Superior Courts Act defines *appeal*, unless the context otherwise indicates as not to include "…an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 …, or in terms of any other criminal procedural law".

[13] The Criminal Procedure Act contains no provisions regulating how appeals from the decisions of a full bench (ie. a court consisting of two judges) are to be handled. For that reason, it appears that previous decisions employed the provisions of the Supreme Court Act to determine firstly, that appeals from the lower courts were disposed of by the High Court and, secondly, that appeals from the High Court, on appeal to it, required the leave of the High Court.[10] Appeals from the Full Court however required special leave in terms of the Criminal Procedure Act.[11]

[14] Applying the 'unassailable' logic in *Khoasasa* and the reasoning in *Kriel*, read with sections 16 and 17 of the Superior Courts Act, it seems to me that that the position is, since 23 August 2013, as follows:

a. A petition delivered in terms of section 309C of the Criminal Procedure Act, 1977 directed to a Judge President of a division of the High Court and placed by her or him before two Judges of the High Court for consideration by them is in effect an appeal against an incorrect decision of a lower court.

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10 See for example *Khoasasa* and *Kriel*.

11 See section 316(3)

b. When considering that petition the two judges concerned are not sitting as a court of first instance and their refusal of the petition is in any event a decision of the High Court delivered consequent upon an appeal to the division concerned.

c. An appeal against the refusal of that petition lies to the Supreme Court of Appeal but only with the special leave of the Supreme Court of Appeal.

[15] It seems also that some comfort may be drawn from the manner in which civil appeals (and applications for leave to appeal) are dealt with. Civil appeals from the Magistrates' Courts are usually heard and disposed of by two Judges of a Provincial Division of the High Court. Previously a further appeal required the leave of the two Judges concerned. It was only in full court appeals (ie. three Judges sitting in appeal) that the special leave of the Supreme Court of Appeal was required for a further appeal. In terms of the Superior Courts Act that situation has now changed in that all decisions made by a High Court on appeal to it now require the special leave of the Supreme Court of Appeal[12]. There seems to be no logical reason for civil and criminal appeals to be treated differently.

[16] When this matter first served before us it was considered prudent to canvass the views of the parties and we subsequently received

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12 Section 16(1)(b).

submissions from the Durban Justice Centre (representing the applicant) and from Kwazulu-Natal Director of Public Prosecutions ("the DPP"). Mr *Sankar* from the DPP's office made submissions which resonate with the views expressed in this judgment. In contrast, the Durban Justice Centre, relying on *Mkhize v S*[13], submitted that the procedure remained unchanged. I do not agree.

[17] It follows that we have no jurisdiction to entertain the application and it is accordingly struck from the roll.

VAHED J

I agree and it is so ordered.

KOEN J

Date of Judgment:	21 January 2014
Applicant's Representative:	Durban Justice Centre Durban
Respondent's Representative:	Director of Public Prosecutions Pietermaritzburg

13 (741/11) [2012] ZASCA 74 (25 May 2012).