THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 300/10

VALENTINE SENKHANE Appellant

and

THE STATE Respondent

Neutral citation: *Senkhane v S* (300/10) [2011] ZASCA 94 (31 May 2011)

CORAM: Navsa, Snyders, Bosielo, Shongwe and Seriti JJA

HEARD: 20 May 2011

DELIVERED: 31 May 2011

SUMMARY: Refusal of application for condonation by high court sitting as a court of appeal – practice of allowing an automatic right of appeal abandoned – now requiring an application to the high court for leave to appeal – prior practice tending to bring administration of justice into disrepute – principles relating to appeals discussed.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Ebrahim and Jordaan JJ sitting as court of first instance).

The appeal is struck from the roll with the effect that the sentence imposed by the regional magistrate remains effective.

JUDGMENT

NAVSA JA (Snyders, Bosielo, Shongwe and Seriti JJA concurring)

[1] This is an appeal against a refusal by the Free State High Court (Jordaan J, Ebrahim J concurring) of an application for condonation for the late prosecution of an appeal. The appeal in respect of which condonation had been sought was directed against a judgment of the Regional Court, Kroonstad, in terms of which the appellant, Mr Valentine Senkhane, was convicted on one count of contravening s 1(1)(b)(i) read with s 3 of the Corruption Act 94 of 1992 ─ which was in existence at the time of the commission of the alleged offence[1] ─ and on two counts of fraud. The application for condonation was refused by the high court on the basis that there were no prospects of success on the merits of the appeal.

[2] After his conviction in the regional court the appellant was sentenced as follows:

(a) In respect of the corruption conviction, one year's imprisonment;

(b) in respect of the one count of fraud, five years' imprisonment; and

(c) on the other count of fraud, five years' imprisonment.

It was ordered that the sentences on the counts of fraud run concurrently with the sentence imposed in respect of the corruption count in such a way that an effective sentence of six years' imprisonment was imposed by the regional court. The contemplated appeal was directed against both conviction and

1 The Prevention and Combating of Corrupt Activities Act 12 of 2004, which came into operation on 27 April 2004, repealed the Corruption Act 94 of 1992. The offences under the prior legislation were allegedly committed during 2001 and 2003.

sentence.

[3] In terms of established case law the appellant has an automatic right of appeal to this court against the refusal of an application for condonation by a high court sitting as a court of appeal. This is an aspect that will be dealt with extensively later in this judgment. At this juncture it is necessary to set out in some detail the background culminating in the present appeal.

[4] The appellant, a manager of corporate services for the Moqhaka Municipality (the Municipality), was charged in the Regional Court, Kroonstad, with two counts of contravening the Corruption Act and two counts of fraud. The State's case on the two contraventions of the provisions of the Corruption Act was that the appellant had procured payment from members of two businesses who had tendered for municipal projects on the basis that he would secure the tenders for them.[2] In respect of the first of the fraud charges the State's case was that the appellant had arranged for a business, which provided security services to the Municipality, to install palisade fencing, automatic garage doors and gates and an alarm system at his residence in Kroonstad. According to the State, the appellant had thereafter fraudulently arranged for the business to amend its invoice to reflect that services had been rendered to the Municipality at a cost equal to the amount due for the installation of the items referred to above, namely, R39 612.33. The Municipality consequently paid the business concerned that amount.

[5] In respect of the second count of fraud the State's case was that the appellant had been authorised by the Municipality to have five air conditioners

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2 Section 1(1)(b)(i) of the Corruption Act 94 of 1992, under which the appellant was charged, reads as follows:
'(1) Any person—
. . .
(b) upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any post or any relationship of agency or any law and who corruptly receives or obtains or agrees to receive or attempts to obtain any benefit of whatever nature which is not legally due, from any person, either for himself or for anyone else, with the intention—
(i) that he should commit or omit to do any act in relation to such power or duty, whether the giver or offeror of the benefit has the intention to influence the person upon whom such power has been conferred or who has been charged with such duty, so to act or not; . . . shall be guilty of an offence.'

installed at municipal premises but that contrary to the authorisation he had fraudulently arranged for one of the five air conditioners to be installed at his residence in Kroonstad. The Municipality paid the total amount owing for the five air conditioners to the business responsible for the installation, namely, an amount of R25 980. The value of the unit installed at the appellant's house was R5 800.

[6] The appellant pleaded not guilty to all four counts. The trial proceeded with a number of witnesses testifying against the appellant. In his judgment the regional magistrate examined all the evidence extensively. In respect of the first count it was common cause that R2 000 had been deposited into the appellant's mother's account by a person who had tendered for municipal work. That person also testified that in addition he had handed the appellant R2 000 in cash. The appellant denied that he had received any cash and his explanation for the R2 000 that had been deposited into his mother's account was that it had been a donation to the African National Congress, the ruling political party in the country, for the purposes of a workshop. The regional magistrate accepted the evidence against the appellant and rejected his explanation for the receipt of the money. The magistrate set out a number of criticisms of the appellant's evidence.

[7] In respect of the second count of corruption, the magistrate criticised the evidence of the principal witness against the appellant and acquitted the latter. In respect of both counts of corruption the regional magistrate, in evaluating the evidence, took into account that the complainants were witnesses who had been warned in terms of s 204 of the Criminal Procedure Act 51 of 1977[3] (the 1977 CPA).

[8] In respect of the fraud charges the regional magistrate considered the common cause facts, including documentation as well as the evidence of the employees and owners of the businesses concerned. In addition the evidence of municipal employees and the appellant's was carefully evaluated. In

3 Section 204 deals with witnesses for the prosecution who are required to answer questions that may incriminate them.

respect of the first count of fraud, the regional magistrate concluded that there was no reason for the number of witnesses against the appellant to have concocted a version of events so as to falsely implicate him. In respect of both counts of fraud the appellant's version had been that he had contracted personally with the businesses concerned and had undertaken to pay them sometime in future when his bonus became due. He denied that he had requested them to complete invoices to show that the Municipality was the receiver of services for which it later paid. After considering the common cause facts and the evidence of the witnesses on behalf of the State and the evidence of the appellant the regional magistrate held that the State had proven its case beyond a reasonable doubt on both counts of fraud.

[9] The appellant prosecuted an appeal against his conviction and sentence in the Free State High Court. Initially, the matter was enrolled in that court for hearing on 1 September 2008. The appellant's heads of argument were not filed in time and the appeal was struck off the roll. There were further mishaps. The matter was re-enrolled for 16 February 2009 but did not proceed because a complete record had not been filed on behalf of the appellant. Consequently, the appeal was postponed to 22 June 2009 and it was postponed one more time, to 27 July 2009.

[10] It is common cause that on the last mentioned date an application for condonation for the late prosecution of the appeal was argued on behalf of the appellant. An explanation for the delay was proffered. In the high court counsel for the appellant conceded that in the event of it being held that there were no prospects of success the application for condonation would be bound to fail. The Free State High Court went on to consider the application for condonation on the basis of the strength of the merits of the appellant's case.

[11] The Free State High Court scrutinised the material parts of the evidence adduced during the appellant's trial. It took great care in assessing the regional court's evaluation of the evidence. In respect of the conviction related to a contravention of provisions of the Corruption Act the high court held that the magistrate had correctly rejected the appellant's explanation for

the receipt of R2 000 paid into his mother's account. The high court held that the appellant's conviction on that charge could not be faulted.

[12] In respect of the first count of fraud the high court considered the documentary evidence and the evidence of the witnesses on behalf of the State. It had regard to the appellant's explanation that he had assumed personal responsibility for payment to the security company for the installation of the items set out earlier in this judgment and rejected it. The high court held that the regional court was correct in its acceptance of evidence against the appellant and concluded that he had rightly been convicted on the first count of fraud.

[13] Similarly, the evidence, including documentation, in respect of the second count of fraud was considered by the high court and it concluded that the appellant's conviction on that count was in order.

[14] Insofar as sentence is concerned, the high court reasoned that the appellant occupied a senior position of trust within the municipality and was in a position to take decisions and influence the decisions of others by way of inputs and advice. The high court had regard to his high level of income and considered that he had not resorted to crime because he was in need but because of greed. In respect of the sentence imposed by the regional court the high court concluded that the appellant had no prospects of success. Consequently, the application for condonation coupled to the appeal against conviction and sentence was refused.

[15] Aggrieved, the appellant applied to the high court for leave to appeal to this court against the former's refusal of condonation. That application too was unsuccessful. This was followed by an application for leave to appeal to this court which was also refused. That notwithstanding, the appellant, relying on decisions of this court to the effect that an appellant has an automatic right of appeal to this court against the refusal of an application for condonation by a high court sitting as a court of appeal, prosecuted the present appeal.

[16] It is necessary to examine the genesis and the development of the established practice reflected in the decisions of this court, referred to in the preceding paragraph, and then to proceed to consider whether it should be continued. It will ultimately be necessary to decide how best to dispose of the present appeal.

[17] Section 20(1) of the Supreme Court Act 59 of 1959 under the heading 'Appeals to the Supreme Court in general' reads as follows:

'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.'

As can be seen from the provisions of this subsection any appeal against an order of a provincial or local division given on appeal to it lies to a full court or to this court. In the present case, the decision given on appeal by two judges lies only to this court.

[18] Section 21(1) of the Supreme Court Act provides:

'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.'

[19] Sections 362 and 363 of the Criminal Procedure Act 56 of 1955 (the 1955 CPA) prior to its amendment by the 1977 CPA provided for appeals from judgments of superior courts sitting as courts of first instance. Section 363 of the 1955 CPA obliged an accused convicted of any offence, who intended to pursue an appeal against his conviction or against any sentence or order following thereon, to apply first to that court for leave to appeal and then upon refusal to this court.[4]

4 Section 363(6) of the 1955 Act read as follows:
'If any application under subsection (1) for condonation or leave to appeal is refused or if in any application for leave to appeal an application for leave to call further evidence is refused, the accused may, within a period of twenty-one days of such refusal, or within such extended period as may on good cause be allowed, by petition addressed to the Chief Justice submit his application for condonation or for leave to appeal or his application for leave to call further evidence, or all such applications, as the case may be, to the court of appeal, at the same time giving written notice that this has been done to the registrar of the provincial or local division (other than a circuit court) within whose jurisdiction the trial has taken place, and of which the judge who presided at the trial was a member when he so presided. Such registrar shall forward to the court of appeal a copy of the application or applications in question and of the reasons for refusing such application or applications.'

[20] Section 316 of the 1977 CPA, which is currently in operation, is entitled 'Applications for condonation, leave to appeal and further evidence' and in essence mirrors the material provisions of s 363 of the 1955 CPA. It provides that an accused convicted of any offence by a high court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order. Section 316(3)(a) provides that no appeal shall lie against a judgment or order of a full court given on appeal to it in terms of s 315(3), except with the leave of this court, on application made to it by an accused. The full court contemplated by this section sitting as a court of appeal is a court hearing an appeal against a judgment or order of a high court in a criminal case heard by a single judge.[5]

[21] Neither the 1955 CPA nor the 1977 CPA nor the Supreme Court Act made express provision for the situation where a superior court sitting as a court of appeal refused an application for condonation related to the prosecution of such an appeal.

[22] It is against that statutory framework that decisions of this court dealing with decisions on condonation by a high court sitting as a court of appeal have to be understood. The first decision that we could find in this regard is *Sweigers v S* 1969 (1) PH H110. The following appears in the judgment, per Botha AJ:

'Appellant het sy regsmiddel teen die afwysing deur die Hof *a quo* van sy aangeskrewe tydperk appèl aan te teken teen sy skuldigbevinding op die eerste en tweede aanklagte, verkeerd begryp. Daar is geen voorgeskrewe prosedure waarvolgens hy by die Hof *a quo*, en by die Hoofregter, na die afwysing van sy aansoek om kondonasie, aansoek kon doen om teen sy skuldigbevinding deur die landdros op bedoelde aanklagte na hierdie Hof in hoër beroep te gaan nie. Daar bestaan trouens geen voorsiening vir 'n regstreekse appèl na hierdie Hof teen 'n skuldigbevinding deur 'n landdros nie. Die enigste regsmiddel tot sy beskikking teen die afwysing van sy aansoek om kondonasie was 'n appèl na hierdie Hof teen bedoelde afwysing ingevolge die bepalings van artikel 21 (1) van die Wet op die Hooggeregshof, 1959.'

[23] The next case in chronological order is *S v Tsedi* 1984 (1) SA 565 (A).

5 See s 315(2)(a) read with s 316(1)(a) and s 316(3)(a) of the 1977 CPA.

The headnote, which correctly reflects the findings of the court, reads as follows:

'Where a Provincial Division, having dismissed a criminal appeal originating in a magistrate's court, refuses to grant an order condoning the late noting of an appeal to the Appellate Division, the only remedy available is an appeal to the Appellate Division against such refusal in terms of s 21(1) of the Supreme Court Act 59 of 1959, for which appeal no leave is required in terms of s 22(2) of the said Act. There is no provision for an application to the Provincial Division concerned for leave to appeal against its refusal to grant condonation, and should such an application indeed be made and granted, the purported order will be ineffective.'

[24] In *S v Gopal* 1993 (2) SACR 584 (A) at 585b-e the following appears:

'Hierdie appèl illustreer die ongewenstheid van die (vermoedelik onvoorsiene) teenstrydigheid tussen die bepalings van die Strafproseswet 51 van 1977 ten aansien van appèlle en art 21(1) . . . van die Wet op die Hooggeregshof 59 van 1959. Meer spesifiek, indien 'n persoon in die landdroshof aan 'n misdryf skuldig bevind en gevonnis word en sy appèl na die Provinsiale (of, indien van toepassing, die Plaaslike) Afdeling van die Hooggeregshof misluk, mag hy alleen met die nodige verlof na hierdie Hof appelleer. As hy egter sou nalaat om sy eerste appèl na behore voort te sit en dit nodig is om kondonasie te verkry (soos bv vir die laat aantekening van appèl) en dié aansoek misluk, het hy 'n outomatiese reg van appèl teen die afwys van sy aansoek na hierdie Hof. Dit geld selfs indien sy aansoek vanweë 'n gebrek aan vooruitsigte op appèl afgewys is. *S v Tsedi* 1984 (1) SA 565 (A); *S v Absalom* 1989 (3) SA 154 (A). En sou hierdie Hof argumentsonthalwe bevind dat die Hof *a quo* verkeerd was in sy beoordeling van die kanse op sukses, en die appèl slaag, moet die strafappèl dan waarskynlik deur daardie Hof bereg word met die wete dat hierdie Hof reeds oordeel, wat nie bindend is nie, oor die meriete uitgespreek het.'

[25] The reservation expressed in the last sentence of the dictum in the preceding paragraph is with respect correct and, as will be demonstrated in this case, such a view on the merits in the present case will have been expressed several times even though an appeal proper on the merits of the case had not yet been heard. In *Gopal*, the following incongruity was highlighted: When a person is convicted and sentenced by a magistrate's court and his appeal to a local or provincial division fails he can only appeal to this court with the necessary leave but where he neglects to prosecute his appeal in terms of the applicable legislation and rules of court and requires condonation but is unsuccessful in an application to court in relation thereto he has an automatic right of appeal.

[26] In *S v Farmer* 2001 (2) SACR 103 (SCA) para 6, after the cases cited above were referred to, the following was stated:

''n Afwysing van 'n aansoek vir kondonasie bloot op die basis dat daar nie redelike vooruitsigte van sukses is nie, kan dus onwenslike gevolge hê. Na my mening blyk die praktiese oplossing die volgende te wees. Waar die enigste dispuut in 'n aansoek om kondonasie die meriete van 'n beoogde appèl is moet die appèl as sulks afgehandel word. Dit sal dan die onwenslikheid wat in die *Gopal* saak, *supra*, beskryf is, uitsluit. In die huidige geval is hierdie roete ongelukkig nie gevolg nie. Dit is dus nodig om die appèl soos hy tans voor ons dien te besleg.'

[27] It is now necessary to consider briefly the criteria to be applied in considering an application for condonation. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) this court, in dealing with whether or not sufficient cause had been shown in terms of rule 13 of the then Appellate Rules of Court for condonation for non-compliance stated the following (at 532C-F):

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.'

See also *S v Mohlathe* 2000 (2) SACR 530 (SCA) para 9.[6]

[28] In *S v Di Blasi* 1996 (1) SACR 1 (A) at 3f-g the following appears:

'The general approach of this Court to applications of this kind is well established. (See, eg, *Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F-H; *S v Adonis* 1982 (4) SA 901 (A) at 908H-909A and *Ferreira v Ntshingila* 1990 (4) SA 271 (A) at 281D-F.) Relevant considerations include the degree of

6 *Mohlathe* was also an appeal against a refusal of an application for condonation by a high court sitting as a court of appeal.

non-compliance, the explanation therefor, the prospects of success, the importance of the case, the respondent's interest in the finality of the judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice.'

[29] It is clear that in the ordinary course a consideration of the merits is essential to an adjudication of an application for condonation. In the present case the court below did not follow the approach suggested in *Farmer*. It is abundantly clear that the problems envisaged by *Gopal* and *Farmer* continue to endure with the result that cases of the kind in question continue in a path to and fro between a high court and this court.

[30] Section 35(3)(o) of the Constitution gives every accused person the right to a fair trial, which includes the right of appeal to, or review by, a higher court. In *S v Rens* 1996 (1) SACR 105 (CC) the Constitutional Court considered whether a person convicted by the high court has an absolute right of appeal. It had regard to a decision of the European Court of Human Rights. It considered leave to appeal procedures in the high court and in this court were constitutionally justifiable.[7] Restrictive procedures such as an application for leave to appeal have as their objective the avoidance of court rolls being clogged by wholly unmeritorious cases. Of course the procedures that apply should be such as to minimise the risk of wrongful convictions and inappropriate sentences. In this regard the judgment of the Constitutional Court in *S v Steyn* 2001 (1) SACR 25 (CC) is instructive.[8] That case held that a prior statutory procedure for applications for leave to appeal from a magistrate's court to the high court was unconstitutional. The Constitutional Court was particularly concerned about the paucity of information that was required to be placed before the high court in terms of the statutory scheme and the concomitant margin for error.

[31] The problems alluded to at the end of the preceding paragraph do not impact on the question presently being addressed. The high court constituted as a court of appeal determining the correctness of the conviction or sentence usually, as in the present case, has a full record before it. This ought to be so

7 See paras 22 to 29.
8 See para 13 et seq.

even when condonation is sought in relation to an appeal. When condonation is sought for failure to comply with prescribed time limits the high court, sitting as a court of appeal, has all the relevant information before it.

[32] When a condonation application is being considered by a high court in relation to an appeal sought to be prosecuted before it ─ in line with the authorities cited above ─ it has to have regard to the merits of the appeal. Put differently, it has to consider the prospects of success and must of necessity consider the merits. It is specious to conclude that the merits have not been seriously considered, particularly when a high court sitting as a court of appeal has the complete record before it.

[33] In *Gopal* this court pointed out that if an appeal against refusal of condonation to this court succeeds it will lead to the high court having to deal with the appeal on the merits after this court had already formed and stated a view thereon. It gets worse. After the appeal is disposed of by the high court it might lead to a further appeal to this court where another view on the merits has to be expressed. A further anomaly is that if this court decides that condonation was rightly refused that effectively would be the end of the road for an accused. I can conceive of no other way in which the merits can then be canvassed before any court. It cannot be in the interest of the administration of justice for this practice to continue. The issues raised above do not appear to have been raised in the decisions before *Gopal* and *Farmer*.

[34] Presently, as recognised by earlier decisions of this court, there is no statutory provision or rule of court providing for an access-regulating measure such as an application for leave to appeal from a high court which refuses an application for condonation. The question arises whether we can lay down such a requirement.

[35] This court does not have original jurisdiction: its jurisdiction derives from the Constitution.[9] It is true that at common law a court has no automatic jurisdiction to hear an appeal from another court. An appeal could only lie by virtue of some statutory provision. The Constitution subsumed the common

9 See *Numsa & others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) para 23.

law powers of this court.[10] Section 173 of the Constitution states:

'The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[36] In *Numsa & others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) this court, after deciding that it had jurisdiction to decide appeals from the Labour Appeal Court (LAC), concluded that in order to do so there ought to be a procedure in terms of which special leave to appeal should first be sought from that court. At para 35 it said the following:

'Strong considerations suggest that the path from the LAC to this Court should not be untrammelled. The first is the benefit of institutional expertise. The second is the imperative of expedition. The third (and only last in order of importance) is the workload of this Court, which is already such as to burden its members very considerably, without a new inundation of cases. Nothing more need be said about this consideration, and we turn to the first two.'

The last mentioned consideration is of course something that has already been touched on earlier in this judgment.

[37] In *Fry's Metals* this court was faced with the problem that there was no statute or rule of court in place providing for a path for appeals to take from the LAC to this court. The Constitution did not provide that the legislature must enact 'access-regulating measures' in relation to appeals before this court. In *Fry's Metals* this court reasoned that the Constitution did not leave us bereft of solutions. In holding that it was necessary to apply for leave to appeal from the LAC before proceeding to this court it relied on s 173 of the Constitution, which is set out above. In doing so it considered that it was following the lead of the Constitutional Court in *S v Pennington* 1997 (4) SA 1076 (CC).[11] At para 40 of *Fry's Metals* this court said the following:

'The same principles apply here. Although the Constitution spells out no principles on which access to this Court should be regulated, we consider that this Court's inherent power to regulate its own process, "taking into account the interests of justice", empower it to lay down the requirement that prospective appellants from the LAC apply for special leave to appeal. While it is true that this Court's inherent power to protect and regulate its own process is not unlimited ─ it does not, for instance, "extend to the assumption of jurisdiction not conferred upon it by statute" ─ the inherent regulatory power the Constitution confers is broad and

10 See *Fry's Metals* op cit, para 23.
11 Paras 11 to 28.

unqualified. The CC has recently emphasised the ambit of this power, and the importance of interpreting it so as to enhance "the SCA's autonomous regulations of its own process". We consider it broad enough to deal with the situation here.'

[38] Section 20(1) and s 21(1) confer jurisdiction on this court. In my view, the time has come for us to exercise our inherent jurisdiction and to lay down that leave to appeal should be sought first from the high court against a refusal by it, sitting as a court of appeal, of a condonation application related to the appeal. In doing so, we will be regulating the procedure to be followed for appeals to be heard by us. This conclusion does not, in my view, offend against constitutional values. As pointed out in *Rens* a person applying for leave to appeal against a conviction in a superior court has two bites of the cherry. On being convicted and sentenced, the accused person has an opportunity of approaching and seeking leave from that court to appeal against the conviction or sentence, or both. If the application is refused the person may then seek leave to appeal from this court by way of petition. The prescribed procedures relating to applications for leave to appeal make provision for argument to be set out in writing in the petition. The judges of this court to whom the petition is referred may call for further information or for oral argument or refer the matter to the court for its consideration. The judges of this court will refuse the leave sought only if they are satisfied that there are no reasonable prospects of success on appeal.[12]

[39] The same safeguards apply in respect of the proposed new procedure; obliging an unsuccessful applicant for condonation in the high court when it is sitting as a court of appeal to apply to it for leave to appeal. The high court constituted as a court of appeal provides its reasons for its refusal and when faced with an application for leave to appeal will deal with it on its merits. If that is refused an accused person will have further recourse to this court by way of petition.

[40] Because it was an important issue essential to the proper administration of justice counsel were requested in advance of the hearing of

12 See *S v Rens* op cit, para 23.

the appeal to be ready to argue the desirability of the former practice being continued and to make legal submissions in relation thereto. Counsel on behalf of the State supported a change. Counsel on behalf of the appellant was unable to advance reasons to the contrary.

[41] In the present case, because the appellant was ignorant of the decisions referred to earlier in this judgment, in terms of which he had an automatic right of appeal, he applied to the court below for leave to appeal against its decision refusing condonation. Thereafter he applied for leave to appeal to this court which was refused.

[42] We can discern no error in the refusal of the application for condonation by the court below, nor the rejection by our two colleagues of the application for leave to appeal. There is no merit in the submission on behalf of the appellant that because there was no evidence that the appellant had in fact participated in the decision to grant the tender he did not fall within the ambit of the provisions of the Corruption Act referred to above. It is clear from the admissible and credible evidence that the appellant received the money with the intention specified in s 1(1)(b)(i) of the Act.

[43] Having regard to the conclusions reached above, the following order is made:

The appeal is struck from the roll with the effect that the sentence imposed by the regional magistrate remains effective.

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M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: P Greyling

Instructed by
Goodrick & Franklin Bloemfontein

For Respondent: K D Govender

Instructed by
Director of Public Prosecution Bloemfontein