THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 173/2015

In the matter between:

ZENZELE CLERENCE MNDEBELE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Mndebele v S* (173/2015) [2016] ZASCA 7 (3 March 2016).

Coram: Majiedt and Willis JJA and Baartman AJA

Heard: 24 February 2016

Delivered: 3 March 2016

Summary: Criminal Procedure; appeal against refusal of a petition by High Court - common cause that sentence of 8 years imprisonment unduly harsh - reasonable prospects of success - appeal upheld - leave to appeal to High Court against sentence granted.

ORDER

On appeal from: Gauteng Division of the High Court Pretoria, (Fabricius, Potterill JJ and Jansen AJ as court of appeal).

1 The appeal is upheld.

2 The order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:

'The applicant is granted leave to appeal against the sentence of 8 years' imprisonment imposed by the regional court at Piet Retief to the full bench of the Gauteng Division of the High Court, Pretoria.'

JUDGMENT

Baartman AJA (Majiedt and Willis JJA concurring)

[1] This is an appeal against the refusal of leave to appeal against sentence by the Gauteng Division of the High Court with special leave of this court in terms of s 16(1)(*b*) of the Superior Courts Act 10 of 2013 (the Act).

[2] On 13 June 2013, the regional magistrate at Piet Retief convicted the appellant on one count of stock theft and sentenced him to 8 years' imprisonment. The trial court refused an application for leave to appeal. The appellant unsuccessfully petitioned the Gauteng Division of the High Court, Pretoria. On 16 February 2015, this court granted the appellant special leave to appeal against sentence only. The parties then filed heads of argument dealing with the merits of the appeal and at the direction of this court the parties filed supplementary heads in which they conceded that the only issue on appeal before this court was whether the court below was correct in refusing leave to appeal against sentence. Conversely stated, what is before this court is the question whether there are reasonable prospects of success in an appeal against sentence or some other compelling reason why the appeal should be heard (s 17 (1)(*a*) of the Act).

[3] In *Van Wyk v S, Galela v S,*[1] this court dealt with an unsuccessful petition to the high court as follows:

'A "decision" of the high court in refusing a petition, in terms of s 309C of the CPA for leave to appeal, is one taken on appeal to it and is governed by s 16(1)(*b*) of the Act. *Accordingly, the refusal of leave to appeal by the high court is appealable with the special leave of this court.* Although s 16(1)(*b*) of the Act has ameliorated the "cumbersome procedure" to the extent that an unsuccessful petitioner in the high court no longer has to obtain the leave of the high court to appeal to this court, it has replaced it with the more stringent requirement that "special leave" be obtained from this court.' (My emphasis.)

[4] Ponnan JA, in a concurring judgment, said the following about the procedure following an unsuccessful petition to the high court:

'[39] In *Tonkin* (para 4) Brand JA lamented that cumbersome and wasteful procedure. In answer perhaps, s 16(1)(*b*) has done away with an application for leave to appeal to the high court against that court's refusal of a petition. The result is that once a petition is refused by the high court it is to this court that an accused must turn . . . if this court takes the view that the higher threshold has been met then leave to appeal will be granted to the high court for it to enter into the merits of the appeal. The high court will then, no doubt, enter into the merits of the appeal in the full knowledge that this court has already taken the view that "special circumstances" subsist. If the appeal were to fail on the merits in the high court then, as in the past, a further appeal would lie to this court.'

[5] In *Dipholo v The State,*[2] this court lamented the confusion about the procedure with reference *to S v Tonkin,* [3] *S v Khoasasa*[4] and *Van Wyk v S*[5] at paragraphs 5–6:

'[5] It is correct that in terms of our current law appeals from the magistrates' court must be heard by the high court. Section 309(1)(*a*) of the Criminal Procedure Act 51 of 1977 (CPA). There is no provision in the law for this court to hear appeals on the merits directly from the magistrates' courts. However, confusion has reigned in the various divisions of the high court

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[1] *Van Wyk v S, Galela v S* (20273/2014, 20448/2014) [2014] ZASCA152 (29 September 2014); 2015 (1) SACR 584 (SCA); [2014] 4 All SA 708 (SCA) para 20.
[2] *Dipholo v The State* (094/2015) [2015] ZASCA 120 (16 September 2015).
[3] *S v Tonkin* (938/12) [2013] ZASCA 179; 2014 (1) SACR 583 (SCA)**.**
[4] *S v Khoasasa* (515/2001) [2002] ZASCA 113 (20 September 2002); 2003 (1) SACR 123 (SCA).
[5] *Van Wyk v S, Galela v S* (20273/2014, 20448/2014) [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015(1) SACR 584 (SCA).

in recent times regarding the proper procedure to be followed by an accused in instances where a high court has refused leave to appeal a judgment from the magistrates' court . . . . [6] It follows therefore that what is before us is not an appeal on the merits, as the high court has not heard the appeal on the merits, but an appeal against the refusal of leave to appeal by the high court . . . .'

[6] As correctly conceded by the parties, we have before us an appeal against the refusal of the court below of leave to appeal against sentence. I turn to that enquiry. It is settled law that leave to appeal is only granted where there are reasonable prospects of success.[6] The appellant's counsel submitted that, in the circumstances of this matter, the sentence was unduly harsh in that the trial court overemphasised the seriousness of the offence 'whilst the personal circumstances of the appellant (especially the role he played in the commission of the offence and the benefit which he received) were under emphasised'. Counsel for the State submitted although direct imprisonment was appropriate; the sentence of 8 years' imprisonment was 'inappropriately harsh'. This concession was properly made and indicates that there are indeed reasonable prospects of success in the prospective appeal against sentence. In the circumstances, leave to appeal against sentence should be granted to the full bench of the Gauteng Division, Pretoria.

[7] In the result, the following order is made:

1 The appeal is upheld.

2 The order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:

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[6] *Mdluli v S* (20513/2014) [2015] ZASCA 178 (27 November 2015) para 3 ' . . . A mere possibility of success or that the case is arguable or cannot be described as hopeless, does not constitute reasonable prospects of success. The appellant must convince this court on a sound basis that there is a realistic chance that his appeal might succeed….'

‘The applicant is granted leave to appeal against the sentence of 8 years’ imprisonment imposed by the regional court at Piet Retief to the full bench of the Gauteng Division of the High Court, Pretoria.’

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E D BAARTMAN
ACTING JUDGE OF APPEAL

Appearances

For Appellant:	M van Wyngaard Instructed by: Saayman Attorneys, Benoni Phatsoane Henney Attorneys, Bloemfontein
For Respondent:	F W van der Merwe Instructed by: Director of Public Prosecutions, Johannesburg Director of Public Prosecutions, Bloemfontein