THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20841/2014

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE **APPELLANT**

and

BRANHAM DALE KOCK **RESPONDENT**

Neutral citation: *Director of Public Prosecutions, Western Cape v Kock* (20841/2014) [2015] ZASCA 197 (1 December 2015)

Coram: Navsa, Lewis, Pillay, Mbha and Zondi JJA

Heard: **20 November 2015**

Delivered: **1 December 2015**

Summary: Criminal Procedure Act 51 of 1977 (CPA) – section 316B of the CPA grants the State the right to appeal against a sentence imposed by a superior court sitting as a court of first instance to the Supreme Court of Appeal – no provision in the CPA enabling the State to appeal against a sentence imposed by a superior court sitting as a court of appeal against sentence imposed by a regional court – no such right provided

for in s 16(1)(*b*) read with s 17(1)(*a*)(i) and (ii) of the Superior Courts Act 10 of 2013 – this court has no jurisdiction – appeal struck from the roll.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Gamble, Allie and Griesel JJ sitting as court of appeal):

The appeal is struck from the roll.

JUDGMENT

Mbha JA (Navsa, Lewis, Pillay and Zondi JJA concurring):

[1] This appeal concerns the question whether the appellant (the State) has the right to appeal to this court against an order of a division overturning and substituting a sentence imposed by a regional court. Simply put, the question to be addressed is whether the State has the right to appeal against a sentence imposed by the High Court, sitting as court of appeal.

[2] The background is as follows. On 23 April 2013 the respondent, Mr Branham Dale Kock (Kock), pleaded guilty in the Regional Court, Bellville to 27 counts of fraud related to failure to render personal income tax returns and the non-payment of value-

added tax by a closed corporation, Bran-U Construction CC (Bran-U), of which he was the sole member. He also pleaded guilty to one count of failure to keep proper financial records. The fraud was committed over a period of three years.

[3] The regional magistrate took the various charges relating to fraud together for purposes of sentence. Kock was then sentenced to five years' imprisonment, wholly suspended for a period of five years on condition that he was not convicted of fraud or theft during that period. He was also ordered to repay the amount of R777 063 owed to the South African Revenue Service (SARS) in instalments. Bran-U was sentenced to a fine of R200 000, wholly suspended in respect of the fraud charges, and to a fine of R5 000 or 12 months' imprisonment in respect of the failure to keep proper records.

[4] In imposing sentence the regional magistrate committed several irregularities. In particular she omitted to impose sentence in respect of certain charges to which the respondent had pleaded guilty and of which he was convicted. Consequently, the sentence was set aside on review by the Western Cape Division of the High Court, which referred the matter back to the regional magistrate for reconsideration. Upon reconsideration of the sentence on 2 December 2013, the regional magistrate corrected the irregularities but still sentenced Kock to what the State considered to be a lenient sentence, namely, five years' imprisonment, wholly suspended for a period of five years on certain conditions and that the respondent had to repay SARS the amount of R777 062.97 less the amount already paid of R51 468.

[5] The State appealed against this sentence in terms of s 310A of the Criminal Procedure Act 51 of 1977 (the CPA), which it was entitled to do.[1] The Western Cape Division of the High Court (Gamble J, with Allie and Griesel JJ concurring) upheld the appeal in its entirety, set aside the sentence imposed by the regional magistrate and sentenced the respondent to a term of four years' imprisonment, all of which was suspended, on condition that he not be convicted of an offence committed during the period of suspension and of which dishonesty is an element, and further on condition that he complied fully with an order providing for correctional supervision in terms of s 276(1)*(h)* of the CPA. Kock was also ordered to repay the sum of R777 063 together with interest to SARS. An additional fine of R5 000 or six months imprisonment was imposed in respect of the charge of failing to keep proper records.

[6] The State, aggrieved by what it considered to be a very lenient sentence, sought special leave to appeal to this court, purportedly in terms of s 16(1)*(b)* read with s 17(1)*(a)*(i) and (ii) of the Superior Court Act 10 of 2013 (the Act). The State also pointed to the fact that the court a quo, in substituting the sentence, had failed to take into consideration three counts to which Kock had pleaded guilty. In essence, though, the State's principal complaint was that it sought an increase in sentence because it considered the sentence to be startlingly lenient, when compared to a sentence imposed by the North Gauteng High Court, Pretoria, in the matter of *Francois Johan Joubert v State* unreported case no. A410/11 delivered 3 February 2012, in which a

[1] Section 310A is entitled '**Appeal by attorney-general against sentence of lower court**'. The relevant part of s 310A reads as follows:
'The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction . . . .'

sentence of seven years' imprisonment, of which four years were suspended, was imposed. That related to a matter in which SARS had suffered a loss of R425 843.33 as a result of 20 instances of fraud perpetrated by the appellant. This court granted special leave to appeal which formed the basis on which the matter served before us.

[7] At the commencement of the hearing of the appeal in this court, a point *in limine* was raised on behalf of Kock, namely, that the appeal before us is procedurally flawed as ss 16 and 17 of the Act do not find application in respect of appeals by the State against a sentence imposed by a division sitting as a court of appeal. It was accordingly contended that this court had no jurisdiction to entertain the appeal. As that question might prove dispositive it is necessary to deal with it first.

[8] In considering that issue, it is necessary to have regard to the history and policy that has restricted the State's right to appeal. That was given extensive consideration by this court in *Director of Public Prosecutions v Olivier* 2006 (1) SACR 380 (SCA). There this court referred with approval to the useful discussion of the right to appeal in South African criminal procedure in the South African Law Reform Commission's *Third Interim Report on Simplification of Criminal Procedure (The right of the Director of Public Prosecutions to appeal on questions of fact)* (November 2000) and had regard to the position in comparable foreign jurisdictions.[2] The court observed the following:

'[I]t appears that by and large, common law legal systems are loath to grant rights to the State to appeal convictions on the basis of factual errors*, and that the right of the State to appeal against sentence is limited.* In some instances, only one right of appeal against sentence is permitted.

[2] *DPP v Olivier* 2006 (1) SACR 380 (SCA) paras 20-22.

The motivation appears to be that on one occasion, at least, a higher court should scrutinise a sentence for error. The provisions of our CPA are to this effect. . . .'[3] (My emphasis.)

[9] The limitation of the right of the State to appeal against both conviction and sentence is underpinned by constitutional and policy considerations. In the first place, granting the State the unlimited right to appeal against sentence through several tiers of appeal might well be unconstitutional. In *Olivier* reference was made to the decision in *Cox v Hakes* 1890 15 (AC) 506, decided more than a century ago, where Lord Halsbury (at 522) said the following:

'It is the right of personal freedom in this country which is in debate; and I for one would be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary legislation, so that the final determination upon that question may be arrived at by the last Court of Appeal.'

In *Olivier*, this court recognised that what is set out in that dictum was the very foundation upon which the restriction of the State's right to appeal is founded.[4]

[10] In *Olivier*, reference was made to the Canadian case, *Cullen v R* [1949] SCR 658, where, in a dissenting judgment, the following was said (para 23):

'At the foundation of criminal law lies the cardinal principle that no man shall be placed in jeopardy twice for the same matter and the reasons underlying that principle are grounded in deep social instincts. It is the supreme invasion of the rights of an individual to subject him by the physical powers of the community to a test which may mean the loss of his liberty or his life;

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[3] *DPP v Olivier* (above) para 21.
[4] In para 22.

and there is a basic repugnance against the repeated exercise of that power on the same facts unless for strong reasons of public policy.' See also the judgment of the Constitutional Court in *S v Nabolisa* 2013 (2) SACR 221 (CC) para 81 where *Olivier* was considered with approval and the following was said:

'The point that appeals are regulated by statute is underscored in yet another judgment of the Supreme Court of Appeal in *Director of Public Prosecutions v Olivier.* In that case the state, invoking s 316B, sought to appeal against a lenient sentence imposed by the high court on appeal against a judgment of the magistrates' court. The Supreme Court of Appeal held that the state's right to appeal against sentence is to be found in the Criminal Procedure Act. Since that Act did not, reasoned the court, cater for an appeal against sentence imposed by the high court on appeal, the Supreme Court of Appeal had no jurisdiction to entertain the appeal. This was so, held the court, because s 316B gives a right of appeal to the state which is limited to cases where the trial took place in the high court.'

[11] The position in South Africa is that prior to the introduction of ss 310A and 316B into the CPA,[5] the State had no right to appeal against sentence. These sections afforded the Director of Public Prosecutions (previously known as the Attorney-General) the right to appeal against sentences imposed by lower and superior courts. The provisions read as follows in relevant part:

'**310A Appeal by attorney-general against sentence of lower court**

[5] These sections were introduced through the promulgation in *GG* 18519, 19 December 1997 of the Criminal Law Amendment Act 107 of 1990 (which came into effect on 27 July 1990).

(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers'.

'**316B Appeal by attorney-general against sentence of superior court**

(1) Subject to subsection (2), the attorney-general may appeal to the [Supreme Court of Appeal] against a sentence imposed upon an accused in a criminal case in a superior court'.

[12] Section 316B(1) thus provided for appeals by the State to this court against sentences imposed by a superior court sitting as a court of first instance and not as a court of appeal. There is no specific provision in the CPA empowering the State to appeal against an order by a division of the High Court substituting a sentence imposed by a magistrates' court.[6] The State will, of course, have the right when the accused has appealed against his conviction or sentence, to apply to the Court of appeal to increase the sentence.[7]

[13] These provisions of the CPA had to be considered alongside ss 20(1) and 21(1) of the Supreme Court Act 59 of 1959 which previously regulated the procedure of appeals from the High Court to this court. Section 20(1) provided that:

'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'.

Section 21(1) of that Act stated that:

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[6] Etienne du Toit *et al Du Toit: Commentary on the Criminal Procedure Act* (Revision Service 54, 2015), Supplementary vol at 31-25.

[7] *DPP v Olivier* (above) para 15-20.

'In addition to any jurisdiction conferred upon it by Act or any other law the [Supreme Court of Appeal] 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 provisional or local division'.

These sections clearly predated the introduction of ss 310A and 316B of the CPA.

[14] The appeal procedure is now regulated by s 16(1)*(b)* of the Act which provides that:

'Any 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'.

This general provision has to be read in conjunction with s 1 of the Act which specifically defines 'appeal' for purposes of the Act as excluding '*an appeal in a matter regulated in terms of the Criminal Procedure Act*, or in terms of any other criminal procedural law'. (My emphasis.)

[15] Sections 17(1)*(a)*(i) and (ii) read as follows:

'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;'

[16] The State relied on this court's decision in *S v Van Wyk & another* 2015 (1) SACR 584 (SCA), in support of the proposition that the sections of the Act referred to in the preceding two paragraphs might rightly be employed by the State in an appeal

against sentence beyond the parameters set by ss 310A and 316B. It should be borne in mind, however, in *Van Wyk*, this court was dealing with the right of a convicted person and not the right to appeal by the State. Furthermore, it emphasised in para 18 that s 1 of the Act provided that an appeal in Chapter 5 (which contains the two sections set out above), does not include an appeal 'in a matter *regulated in terms of the [CPA]*, or in terms of any other criminal procedural law.'

[17] *Van Wyk* also dealt with the more restrictive requirement that an applicant must comply with, when seeking leave to appeal a decision of a division refusing a petition in terms of s 309C of the CPA. In addition to the ordinary requirement of reasonable prospects of success, there must now be special circumstances which merit a further appeal to this court.[8]

[18] What *Van Wyk* determined was the manner in which leave to appeal had to be sought from a division of the High Court sitting as courts of appeal which included a decision by a division refusing an application for leave to appeal. The provisions of s 16 read with s 17 of the Act do not provide a substantive basis for the right to appeal. It determines, in general terms, to which court such an application for leave to appeal has to be directed. That matter is not regulated by the CPA, hence those provisions find application. The State's right of appeal is specifically regulated by the CPA, therefor the provisions of s 16(1)(*b*) do not find application.

[8] In paras 20 and 21.

[19] This accords with the canon of interpretation *'generalia specialibus derogant'* (general rules or provisions do not derogate from special or specific). This principle was explained as follows in *R v Gwantshu* 1931 EDL 29 at 31:

'When the Legislature has given attention to a separate subject and made provision for it the presumption is that a subsequent general enactment is not intended to interfere with the special provision, unless it manifests that intention very clearly. Each enactment must be construed in that respect according to its own subject-matter and its own terms.'

Having regard to the constitutional and policy imperatives dealt with earlier in this judgment, the question of a further right of appeal by the State in respect of sentence would have to be specifically dealt with in legislation that is clear and precise. As stated above, legislation to that effect might well be challengeable.

[20] In light of what is set out above, it is in my view clear that in the present case the State has no further right to appeal to this court.[9] It follows that this court has no jurisdiction to hear this appeal which must be struck from the roll.

[21] It is necessary to record that the court a quo appears to have given too little emphasis to the aggravating circumstances of the case, which were rightly highlighted by the regional magistrate. The fraud in this case was perpetrated over a lengthy period. It was well planned and actuated by factors other than need and involved a large amount of money. The regional magistrate correctly found that the fraud to SARS specifically prejudiced the larger South African community whose welfare the fiscus is

[9] See also commentary of s 316B in E Du Toit *et al Du Toit Commentary on the Criminal Procedure Act*, (Revision Service 53) at 31-24B.

by law obliged to protect. In addition, the high court appears to have unduly over-emphasized the personal circumstances of the respondent against the seriousness of the offence. This court is therefore not unsympathetic towards the appellant's challenges in this case.

[22] Even more worrisome is the trend by courts to impose lenient sentences in cases of so-called 'white collar' crimes, despite repeated warnings by this court that in suitable cases terms of imprisonment ought to be imposed, even in cases of first offenders. Thus in *S v Brown* 2015 (1) SACR 211 (SCA)[10] involving such white collar crime, this court cautioned that even though the court below was correct in its conclusion that the minimum sentence did not find application in that case, that it ought to have considered, given the objective gravity of the offences, whether a custodial sentence was nonetheless called for. In *Brown* this court warned that courts should guard against creating the impression that there are two streams of justice, one for the rich and one for the poor. The court in *Olivier* expressed similar concerns.[11] These are issues that courts should give serious consideration to lest the administration of justice falls into disrepute.

[23] For the reason aforesaid the appeal is struck from the roll.

[10] Paragraph 118.
[11] *DPP v Olivier* (above) para 25.

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BH Mbha

Judge of Appeal

APPEARANCES:

For Appellant:	B Hendry-Sidaki
Instructed by:	The Director of Public Prosecutions, Cape Town
	The State Attorney, Bloemfontein
For Respondents:	A V Dawson attorney for respondent
Instructed by:	A V Dawson & Co, Bellville
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