



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 1040/2016

In the matter between:

JOSE PEDRO MORAIS CARNEIRO

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Carneiro v The State* (1040/2016) ZASCA 154 (24 November 2017)

Coram: Shongwe AP and Tshiqi, Majiedt, Mocumie JJA and Tsoka AJA

Heard: 1 November 2017

Delivered: 24 November 2017

Summary: Criminal law and procedure – application for leave to appeal against appeal court striking off application for leave to appeal against its order in terms of the Superior Court Act 10 of 2013 – application for leave to appeal pending at promulgation of Act 10 of 2013 – Act not only regulating procedural issues but substantive rights as well – prospective only – applicable legislation Supreme Court Act 59 of 1959.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Moshidi J and Nichols J sitting as court of appeal)

1 The appeal succeeds.

2 The high court's order striking off the matter from the roll is set aside,

3 The high court is directed to deal, in terms of the Supreme Court Act 59 of 1959, with the application for leave to appeal against its order of 29 April 2016.

JUDGMENT

Tsoka AJA (Shongwe AP and Tshiqi, Majiedt and Mocumie JJA concurring):

[1] The issue in this appeal is whether an application for leave to appeal against an order of two judges sitting as a court of appeal is governed by the provisions of the Supreme Court Act 59 of 1959 (the old Act) or the Superior Courts Act 10 of 2013 (the new Act), notwithstanding the fact that the application was launched and still pending at the promulgation of the new Act. The court below found that the application was governed by the new Act and it struck the application off the roll on the basis that it lacked jurisdiction. Special leave to appeal against that order was granted by this court.

[2] The background facts of this matter, which are common cause, are as follows.

The appellant, Jose Pedro Morais Carneiro, was charged and convicted of murder by

the Regional Court, Johannesburg on 12 September 2006. On 20 November 2006 he was sentenced to seven years imprisonment. Dissatisfied with his conviction, he applied for leave to appeal his conviction only. He also applied to be released on bail pending the outcome of his appeal. The regional court granted both applications.

[3] The appeal against his conviction was enrolled at the Gauteng Local Division, Johannesburg on 14 June 2010 and that court (Moshidi and Nichols JJ), on 1 December 2010, dismissed the appeal . On 8 December 2010 the appellant filed an application for leave to appeal against the order dismissing the appeal. That application was heard on 29 April 2016, and it is that order of striking it off the roll that is the subject of this appeal.

[4] The main reasoning of the court below for striking the application off the roll was based on its interpretation of the provisions of s 16(1)(a) and (b) of the new Act, which provides :

‘Subject to section 15(1), the Constitution and any other law –

(a) . . .

(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,’

[5] According to the court below, the new Act is regulatory in nature with the result that the appellant’s application for leave to appeal is governed by the provisions of s16(1)(a) and (b). It reasoned that the new Act, being regulatory in nature, was retrospective and that the appellant’s application for leave to appeal therefore had to be

sought with special leave from this court. To support its reasoning the court erroneously relied on the decision of this court in *Nkabinde & another v Judicial Service Commission & others*.¹ The facts in *Nkabinde* are, however, distinguishable from the facts in this matter. In that matter, this court only dealt with the amendment of procedural rules regulating judicial misconduct of judges. Nothing more. No existing rights were impacted upon or prejudiced. In para 73 of the judgment, Navsa ADP observed ‘I have difficulty in appreciating the appellant’s general objections to the inquiry being conducted in terms of the new statutory regime. I can see no existing rights being affected, nor any material prejudice’. The court below therefore erred in placing reliance on that decision in that when the new Act was promulgated in August 2013, the appellant’s application for leave to appeal was still pending as the matter which had commenced in 2006 had not yet been finalized. That being the case, the application was therefore governed by s20 of the old Act. Although the appellant’s conviction, sentence and appeal were finalised prior to August 2013, his legal redress from the court had not yet been finalized. As at the promulgation of the new Act, the application was still pending. The court below therefore ought to have disposed of the application in terms of s 20 of the old Act.

[6] The reliance of the court below on the provisions of s 55(2) of the new Act was also incorrect. The section provides that anything done under any provision of a law repealed or amended by subsection (1) shall, insofar as it may be necessary or appropriate, be deemed to have been done under the corresponding provision of the

¹ *Nkabinde & another v Judicial Service Commission & others* [2016] ZASCA 12; 2016 (4) SA 1 SCA para 73.

new Act. The relevant provision which the court below should have relied on is s 52 of the new Act, headed 'Pending proceedings when the Act commences'. It provides:

'Subject to section 27, proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed.

(2) Proceedings must, for the purpose of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed.

(3) . . .'

Although the provisions of s 52 quoted above appear to be referring to civil proceedings as it alludes to "summons", in *Gonya v S*,² this court at para 7 reasoned that:

'The plain meaning of the words "proceedings pending in any court" as referred to in s 52 of the Act must include criminal proceedings . . .'

[7] In addition, the new Act not only governs procedure, but it affects existing rights as well. In terms of the old Act, the appellant had to establish reasonable prospects of success that another court may come to a different finding to the one reached by the court below. The provisions of the new Act however, carry a higher threshold for applications for leave to appeal. In terms of s17(1) of the New Act, not only must an appellant establish reasonable prospect of success of the appeal, but he or she must also establish some other compelling reason why his or her appeal should be heard, including conflicting judgments on the matter under consideration. The new Act, therefore does not only regulate procedural issues but existing rights as well. That being the case, its operation cannot be retrospective but prospective only. In addition, the

² *Gonya v S* [2016] ZASCA 34

provisions of s 12(2) of the Interpretation Act 33 of 1957 support this conclusion. The relevant portion of s 12(2) headed 'Effect of repeal of a law' provides:

'(1) . . .

(2) Where a law repeals any other law, then unless the contrary intention appears, the repeal shall not –

(a) . . .

(b) . . .

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed . . .'

[8] In the instant matter, the appellant therefore needed to meet a lower threshold in his application for leave to appeal than what is required in terms of the new Act. I conclude therefore that the appellant's existing right cannot be prejudiced by the provisions of the new Act which requires 'a higher threshold'. That being the case, the appellant's application should have been dealt with in terms of the old Act and not the new Act. In *Gonya* at para 8, this court reaffirmed the appropriate procedure to be followed when an application for leave to appeal or petition is refused by the high court. It is apt to reiterate what this court said:

'Owing to the confusion in the wording of the order granted on 3 December 2013 it is necessary to reaffirm the appropriate procedure when a petition [**application for leave to appeal**] is refused by the high court. Streicher JA in *S v Koasasa* [2002] ZASCA 113, 2003 (1) SACR 123 (SCA) clarified the procedural steps as set out in the Supreme Court Act. The petition [**application for leave to appeal**] to a high court is in terms of s 309C of the Criminal Procedure Act. It was in effect an appeal against the refusal of leave to appeal by the magistrate's court in terms of s 309B of that Act. Streicher JA concluded that such refusal of leave to appeal

[striking off] by the high court was a judgment or order of the high court as contemplated in ss 20(1) and 20(4) of the Supreme Court Act, given by the high court on appeal to it. Accordingly, in terms of s 20(4)(b), the refusal of leave to appeal by the high court [striking off] was appealable to the Supreme Court of Appeal with leave of the high court (being the court against whose order the appeal was to be made) or, where leave was refused, with leave of this court. The order appealed against was the refusal of leave [striking off], with the result that this court could not decide the appeal'. (My emphasis)

[9] As pointed out above, in the instant matter, the application of the new Act by the court below had the effect of burdening the appellant with a stringent requirement of not only establishing that there are reasonable prospects of success but also that there are compelling reasons why the appeal should be heard.³ The error should therefore be corrected.

[10] In the result, the appeal must succeed. The matter should be referred back to the high court to dispose of the appellant's application for leave to appeal in terms of the old Act. The delay in finalising this matter is regrettable but unavoidable. Justice must not only be done but must be seen to be done. It is hoped that the matter will be dealt with expeditiously from now on.

[11] The following order is granted:

1 The appeal succeeds.

2 The high court's order striking off the matter from the roll is set aside.

³ *Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA) para13.

3 The high court is directed to deal, in terms of the Superior Court Act 59 of 1959, with the application for leave to appeal against its order of 29 April 2016.

M Tsoka
Acting Judge of Appeal

APPEARANCES:

For Appellant:

E Kilian SC

Instructed by:

Gascoigne Randon & Attorneys, Edenvale

Honey Attorneys Inc, Bloemfontein

For Respondents:

RN Mogagabe

Instructed by:

Director of Public Prosecutions, Pretoria

Director of Public Prosecutions, Bloemfontein