**IN THE SOUTH GAUTENG HIGH COURT**
**(JOHANNESBURG)**

**CASE NO: A243/09**

| **DELETE WHICHEVER IS NOT APPLICABLE** | |
|---|---|
| (1) REPORTABLE: NO | |
| (2) OF INTEREST TO OTHER JUDGES: NO | |
| (3) REVISED. | |
| **10 September2009** DATE | **MP Tsoka** SIGNATURE |

In the matter between

**RICHARD JAMES GARDINER** **APPELLANT**

and

**THE STATE** **RESPONDENT**

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**J U D G M E N T**

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**TSOKA J:**

[1] On 10 August 2004 the appellant was convicted in the Regional Court sitting in Wynberg on all together six charges, including robbery with aggravating circumstances. He was sentenced to an effective term of imprisonment of 17 years.

[2] On 10 May 2005, in terms of s 309(B) of the Criminal Procedure Act 51 of 1977 (the Act), the appellant applied to the trial court for leave to appeal against his convictions and sentences. The application was refused.

[3] In terms of s 309(C) of the Act, the appellant petitioned the Judge President of this Division for leave to appeal which was considered by Willis J.

On 22 June 2005 Willis J granted the appellant's petition for leave to appeal against the sentences, but refused leave to appeal against the convictions.

[4] The appellant's appeal against sentence proceeded and was heard on 26 February 2008 by Tshiqi J and Hoffman AJ. The appeal was upheld. The sentences imposed by the trial court were reduced *inter alia* to an effective term of 5 years imprisonment and the appellant's immediate release from prison was ordered.

[5] The appellant in the meanwhile launched an application for leave to appeal against Willis J's order of 22 June 2005. On 21 January 2009 the learned Judge granted leave to appeal in the following terms:

1. The applicant is granted leave to appeal against the order of this Court (in terms of Section 309C of the Criminal Procedure Act, No.51 of 1977 as amended) dismissing the Applicant's leave to appeal on convictions on 22nd June 2005.
2. The appeal is directed to the Full Bench of this division.
3. The Court hearing the appeal is called upon to consider and give judgment on whether there are reasonable prospects of success on an appeal against convictions.
4. In the event of the Court hearing the appeal referred to in 2 above, finding that such reasonable prospects of success on appeal against convictions exist, the Court is called upon, in the exercise of its inherent jurisdiction, to consider hearing and disposing of the appeal immediately.

This is the appeal presently before us.

[6] Prior to the hearing of the appeal counsel were requested to file supplementary heads of argument on the question whether Willis J was competent to grant the appellant leave to appeal to this Court. In the view I take of the matter it is only necessary to decide this issue.

[7] In terms of s 309(C)(5)(a) of the Act, and on 22 June 2005, a petition was considered by a single judge designated by the Judge President. Since the decision in *Shinga v The State and Another (Society of Advocates (Pietermaritzburg Bar) intervening as amicus curiae); S v O'Connell and Others* 2007 (2) SACR 28 (CC), a petition in terms of this section now has to be considered by two judges. The petition in this matter was considered prior to the decision in *Shinga* by a single judge. Nothing however turns on this point.

[8] In order to resolve the issue, it is essential to properly characterize the function performed by the learned judge when he granted leave to appeal to this Court. Failure to properly characterize the function will inevitably lead to a wrong conclusion.

[9] The starting point is to consider the provisions of s 20 of the Supreme Court Act 59 of 1959 (the Supreme Court Act). The section deals with appeals to the High Court in general, regarding judgments or orders made by either a provincial or local division. Although Section 20 deals with civil appeals, the power of the Supreme Court of Appeal to deal with appeals from a provincial or local division in terms of Section 21(1) of the Supreme Court Act is not limited to civil appeals. It applies to criminal appeals as well (see *S v Khoasasa* 2003 (1) SACR 123 (SCA), 2002 4 All SA 635 (SCA) para [12]). Of relevance in this matter is s 20(4)(b) of the Supreme Court Act. It provides that no appeal shall lie against an order of a provincial or local division, where such leave has been refused, except with the leave of the Supreme Court of Appeal.

[10] The question that arise is: Does the order of Willis J of the 21 January 2009 fall within the provisions of Section 20(4)(b) of the Supreme Court Act?

[11] This question was affirmatively answered in *S v Khoasasa* supra, where Streicher JA, writing for the court, put it thus-

> [19] Die aansoek om verlof om te appelleer teen ‘n skuldigbevinding of vonnis van ‘n laer hof gerig aan die Regter-President van ‘n Provinsiale Afdeling nadat verlof deur die laer hof geweier is, word nie in art 309C beskryf as ‘n appél nie maar is nogtans daarop gerig om ‘n regstelling te verkry van wat die aansoeker beskou as ‘n verkeerde beslissing in die laer hof. In effek is dit niks anders as ‘n appél teen die landdros se weiering van verlof om te appelleer nie. Ek is gevolglik van mening dat die bevel van die Hof benede ingevolge waarvan verlof om te appelleer aan die appellant geweier is, ‘n bevel van daardie Hof is wat op appél na hom gegee is, soos bedoel in art 20(4).

[12] Having regard to the statutes and the case law, the correct procedure to be followed where leave to appeal against either the conviction or sentence or both, was refused, is firstly, to petition the Judge President of a division for leave to appeal and secondly, in the event that such petition for leave to

appeal is refused, to petition the President of the Supreme Court of Appeal for leave to appeal.

[13] In the present matter, the appellant followed an incorrect procedure. Willis J had no jurisdiction to grant the appellant leave to appeal to the full Court (see *S v Zulu* 2003 (2) SACR 22 (SCA) para [6]). The order accordingly is a nullity. There is therefore no proper appeal before this Court. The appeal ought to be struck off the roll.

[14] In the result the appeal is struck off the roll.

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**M P TSOKA**
**JUDGE OF THE HIGH COURT**

I agree.

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**F H D VAN OOSTEN**
**JUDGE OF THE HIGH COURT**

I agree.

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**M JAJBHAY**
**JUDGE OF THE HIGH COURT**

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|---|---|
| ***COUNSEL FOR THE APPELLANT*** | ***ADV CTH MCKELVEY*** |
| ***COUNSEL FOR THE RESPONDENT*** | ***ADV P MARASELA*** |