THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable/ Not Reportable
Case No: 829/18

In the matter between:

DAWID JOHANNES MALHERBE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Malherbe v The State* (829/18) ZASCA 120 (25 September 2019)

Coram: Tshiqi, Mbha, Van Der Merwe and Mocumie JJA and Weiner AJA

Heard: 16 August 2019

Delivered: 25 September 2019

Summary: Criminal Procedure – appeal against refusal by the high court to grant leave to it to appeal on petition – issue is whether the appellant has reasonable prospects of success on appeal and not the merits of the appeal – reasonable prospects of success present if a sound, rational, basis exists for the conclusion that the appellant has prospects of success on appeal.

ORDER

On appeal from: Western Cape Division, Cape Town (Ndita J and Kose AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the high court refusing the appellant's petition for leave to appeal against his convictions and sentence, in terms of s 309C of the Criminal Procedure Act 51 of 1977, is set aside and replaced with the following:

'The applicant is granted leave to appeal against his convictions and sentence to the Western Cape Division, Cape Town.'

JUDGMENT

Mocumie JA (Tshiqi, Mbha, Van der Merwe JJA and Weiner AJA concurring):

[1] This is an appeal against the refusal by the Western Cape Division, Cape Town, of the appellant's application for leave to appeal to that court against the convictions of fraud and money laundering, as well as the sentence imposed in the Bellville Regional court, sitting as a Specialised Commercial Crime Court (the regional court). The appellant was charged in the regional court with several counts of fraud, contravention of the Public Finance Management Act 1 of 1997 and money laundering in contravention of s 4 read with ss 1 and 8 of the Prevention of Organised Crimes Act 21 of 1998. He was convicted of only one count of fraud on the basis that he made misrepresentations with the intent to defraud, which misrepresentation resulted in Eskom's prejudice in the amount of over R10 million, in loss of profits. He was also convicted of money laundering in respect of the proceeds of the fraud. In imposing

sentence, the regional court found that compelling and substantial circumstances existed which justified the imposition of a lesser sentence under the Criminal Law Amendment Act 105 of 1997 (Minimum Sentences Act). He was sentenced to 10 years' imprisonment on each count. Five years' imprisonment in respect of count 2 was ordered to run concurrently with the sentence imposed in respect of count 1. The appellant was therefore sentenced to an effective fifteen years' imprisonment.

[2] The appellant's application, to the regional court, for leave to appeal to the high court against both convictions and sentence in terms of s 309B of the Criminal Procedure Act 51 of 1977 (the CPA) was refused. Consequently, the appellant petitioned the Judge President of the Western Cape Division in terms of s 309C of the CPA, which application suffered the same fate. Thereafter the appellant sought special leave to appeal to this court in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 against the refusal of leave to appeal. Special leave was granted on 26 June 2018 by two judges of this court.

[3] In *S v Khoasasa*,[1] almost sixteen years ago, this court, held that a refusal of leave to appeal on petition, in terms of s 309C of the CPA, by two judges of a high court, is 'a judgment or order' or a 'ruling' as contemplated in s 20(1) and s 21(1) of the Supreme Court Act 59 of 1959. A petition for leave to appeal to the high court is in essence an appeal against the refusal of leave to appeal by the court of first instance, the magistrate court. The refusal of leave to appeal by the high court is only appealable to this court with the necessary special leave having been granted. A number of judgments from this court have subsequently confirmed, applied and endorsed the reasoning in *Khoasasa*.[2]

[4] In a matter such as this, this court has to consider whether leave to appeal to the high court against the convictions and sentence imposed by the regional court should have been granted. The test is straightforward namely, whether there are reasonable

[1] *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 14 and 19-22.
[2] *Matshona v S* [2008] 4 All SA 69 (SCA) para 3-4; *Smith v S* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 2; *Tonkin v The State* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 2.

prospects of success in the envisaged appeal against the conviction and sentence, rather than whether or not the appeal ought to succeed.[3] When this court grants leave to appeal, it should be careful not to influence the outcome of the appeal, and for this reason, it is curtailed in dealing with the merits to the limited extent necessary to explain its reasoning for granting leave to appeal.[4]

[5] Briefly stated, the background of the matter is as follows. During 2002, the appellant was a managing director (MD) at Eskom which seconded him to serve as the MD of PN Energy Services (Pty) Ltd (PNES). At the time, PNES was a joint venture company in which Eskom held shares. PNES provided electricity services to the Khayelitsha area in Cape Town. During 2007 PNES became wholly owned by Eskom. The appellant also served on the board of directors of PNES. The other directors were Mr Machinjike, the chairperson, and Mr Sebola. Mr Machinjike testified for the prosecution. Mr Sebola was a co-accused of the appellant, but was discharged after the close of the state case and therefore did not testify. Both Mr Machinjike and Mr Sebola were also employees of Eskom.

[6] During January 2009 Eskom decided to 'decorporatise' PNES. It was also decided that during the process of integrating the business of PNES into Eskom, the core services and non-core services of PNES would in terms of two separate contracts be outsourced to a third party. On 10 December 2008, the board of PNES held a meeting. The idea was mooted by the appellant that a company, in which he had an interest, would be able to perform the core and non-core services required during the integration period. On 14 January 2009, the board of PNES held a further meeting and considered amongst other items on the agenda whether the two contracts should be awarded to Energy Utility Services (Pty) Ltd (EUS). The appellant declared that he was a significant shareholder in EUS and recused himself from the deliberations of this item on the agenda. The board resolved to award both contracts to EUS and both contracts were signed on the same day. The execution of these contracts, during the period from

[3] *Mdluli v S* [2015] ZASCA 178 para 3.
[4] *S v Smith* [2011] ZASCA.

1 February 2009 to 11 February 2010, resulted in a profit of approximately R10,2 million to EUS.

[7] The appellant acquired EUS on 3 December 2008. On 10 December 2008 and 14 January 2009, the appellant was the 100% shareholder and sole director of EUS. Save for the period from 21 October 2009 to 21 July 2010, when an employee share trust held 5 per cent thereof, the shares in EUS were at all relevant times held either by the appellant or by a company of which he was the sole shareholder.

[8] The regional court found that all the elements of the offences in question had been proven to justify the convictions. Whilst the application for leave to appeal is against all the findings of the regional court, I will, for the purposes of this application, only refer to the main area of concern that occupied the attention of this court during the hearing of the appeal. The debate centred around whether the appellant misrepresented the BEE status of EUS to the other members of the PNES board.

[9] On this crucial issue the regional court and the high court found that the misrepresentation had been established by the evidence of Mr Machinjike. However, it is clear that during cross examination, Mr Machinjike contradicted his evidence-in-chief in certain respects on this issue. It is therefore necessary to consider whether these contradictions are material and whether they affected his credibility. A firm of attorneys representing both PNES and Eskom, Cliffe Dekker Hofmeyr Attorneys, was requested to review the process leading to the appointment of EUS in respect of the two contracts in issue. It was common cause that Mr Jeftha from Cliffe Dekker Hofmeyr Attorneys was given all the information about EUS by the appellant. Prior to the review process, in a letter dated 5 January 2009 which was placed before the Board, Mr Jeftha, who drafted the memorandum attached to this letter stated that EUS was already BEE compliant. When Mr Machinjike was cross examined about this, he gave a different version which may reasonably be regarded as tantamount to a denial of this version. He conceded that he was not misled by the appellant, and that he was aware that the BEE shareholding involved a lengthy process, which could not proceed until the contracts

were concluded. In the result, I conclude that another court may find that the state did not prove the guilt of the appellant beyond a reasonable doubt on both counts, in particular on the question whether the appellant made the alleged misrepresentation with the necessary intention to commit fraud.

[10] With regards to sentence, although the regional court found that there were substantial and compelling circumstances that justified a deviation from the prescribed minimum sentence, it imposed a sentence that in effect does not reflect such a deviation. For this reason, I find that there are reasonable prospects of success on appeal against sentence as well.

[11] In the result, the following order is granted:

1 The appeal is upheld.

2 The order of the high court refusing the appellant's petition for leave to appeal against his convictions and sentence, in terms of s 309C of the Criminal Procedure Act 51 of 1977, is set aside and replaced with the following:

'The applicant is granted leave to appeal against his convictions and sentence to the Western Cape Division, Cape Town.'

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B C Mocumie

Judge of Appeal

APPEARANCES:

For Appellant:	C Webster SC (with him R Liddel)
Instructed by:	Keith Gess Attorneys, Cape Town
	Symington & De Kok, Bloemfontein
For Respondent:	M Govender
Instructed by:	The Director of Public Prosecutions, Cape Town
	The Director of Public Prosecutions, Bloemfontein