REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A449/07

In the appeal of:

CHRISTIAAN VAN DER MERWE Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 30 MAY 2008

E J S STEYN AJ:

[1] This is a judgment on a point raised *in limine* when the appeal was first argued in this court on 18 April 2008 before us.

[2] The relevant facts that gave rise to such appeal were that the appellant was convicted in the Regional Court Parow on 4 counts of indecent assault and was sentenced to effectively 12 years imprisonment; leave to appeal however was granted only on sentence but not conviction by this division in terms of s 309C(7)(a) of the Criminal Procedure Act 51 of 1977 ("the Act").

The appellant sought leave to appeal against the conviction and sentence when he petitioned this division.

[3] After perusing the record Moosa J and I, both had serious reservations regarding the conviction. We requested counsel to argue at the hearing of the 18th April 2008 *in limine* whether this court had the necessary jurisdiction to interfere with the conviction, bearing in mind that two judges of this division, after perusal of the record, had decided that leave to appeal should be granted only against the sentence imposed.

[4] At the time of argument on the point *in limine* we were of the view that the appellant should no longer be detained. The appellant was then released, conditionally on R2 000.00 (Two thousand rand) bail pending the outcome of this judgment. Counsel acting for Mr van der Merwe confirmed that the amount is within the means and resources of the appellant.

[5] Applications for leave to appeal from the lower court to the High court are governed by s 309 of the Act which provides that an accused may, subject to leave to appeal being granted in terms of s 309B or s 309C of the Act, appeal against conviction and

sentence. The right to appeal in a criminal matter is therefore not unlimited except where the convicted person was at the time of the commission of the offence:

> *"(i) below the age of 14 years;*
> *(ii) at least 14 but below the age of 16 years and was not assisted by a legal representative at the time of conviction in a regional court; and*
> *(iii) was sentenced to any form of imprisonment as contemplated in s 276 (1) of the Act, that was not wholly suspended."*[1]

The categories listed in s 309(1)(a) are not applicable to the appellant. Whether these excepting provisions of the section discriminate against the appellant or infringes upon his right to equality[2] as provided for in the Constitution of the Republic of South Africa, 1996 ("the Constitution") is not a matter I need express an opinion on at this point.

[6] Where an application in terms of s 309B is refused by a lower court, the accused may by way of the petition apply to a

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1 See s 309 (1)(a) of the Act.

2 See s 9 and more specifically s 9(1) of the Constitution that provides as follows:
"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law."

Judge President of a High Court having jurisdiction to grant the application in terms of s 309C(7)(a).

[7] Section 309C(5)(a) of the Act provides:

> *"... that a petition contemplated in this section must be considered in chambers by a judge designated by the Judge President; Provided that the Judge President may, in exceptional circumstances, at any stage designate two judges to consider such petition".*

[8] In accordance with the rule laid down in *Shinga v the State and another (Society of Advocates, Pietermaritzburg Bar, as Amicus Curiae); O'Connel and Others v The State(1)*[3] the legal position now is to appoint two judges to consider each and every petition submitted in terms of s 309(C) of the Act in chambers. In the appellant's case it was no different and two judges of this division decided on the merits of his petition and granted leave only against the sentence imposed.

[9] I will now turn to deal with the arguments raised and other issues relevant to the point *in limine* to consider whether this court has the jurisdiction to consider an appeal against conviction in

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3 2007 (4) SA 611 (CC).

circumstances where leave to appeal was granted only against sentence.

[10] Generally the right of appeal must be exercised against the background of existing legislation.[4] When dealing with appeals it should always be borne in mind that in terms of the provisions of the Act, different procedures apply to appealing against convictions in the lower court as opposed to convictions by the Superior Court. There is a plethora of statutory provisions, cases and views of different scholars on this topic, so much so that one has to tread cautiously not to loose your way in the legal labyrinth.

[11] In *S v Langa en Andere*[5] the Supreme Court of Appeal held that a court of appeal lacks jurisdiction to consider any appeal against conviction in circumstances where leave to appeal was granted only against sentence.[6] In 2003 the Supreme Court of

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4 See s 171 of the Constitution that provides as follows:
"all courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation."
See s 173 of the Constitution that reads:
"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

5 1981 (3) SA 186 (A).

6 Ibid at 189.

Appeal in *S v Khoasasa*[7] held that the refusal of two Judges of a Provincial Division, to grant leave to appeal, sought by way of a petition in terms of s 309C of the Act, is a ruling of the Court of the Provincial Division as intended in s 20(1) and s 21(1) of the Supreme Court Act 59 of 1959. In *S v Khoasasa,* supra, at 131G-H, Streicher JA, with reference to the nature of the prescribed process in terms of s 309C of the Act, stated the following:

> [19] Die aansoek om verlof om te appelleer teen 'n skuldigbevinding of vonnis in '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 bepaal in art 20(4)."[8]

[12] It was argued by counsel for the appellant that this court by way of its inherent jurisdiction has the necessary jurisdiction to hear the appeal against conviction. Another argument advanced was that this court has statutory and inherent review jurisdiction to

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7 2003 (1) SACR 123 (SCA).

8 At para 19.

deal with the matter. Lastly it was argued that this court should rely on its expanded jurisdiction in terms of s 173 of the Constitution[9] to entertain an appeal against conviction when such leave against conviction had not been granted in terms of s 309C of the Act. Each of these will be considered.

Inherent Jurisdiction

[13] The essential question to be considered is whether this court does have such power to interfere with a conviction based on its inherent jurisdiction as provided for in ss 19(1)(a) and 19(3) of the Supreme Court Act 59 of 1959, when leave to appeal against such conviction was not granted by two judges of this Division. Inherent jurisdiction has been defined at times as jurisdiction which is 'general and unlimited unless cut down or forbidden by law.'[10]

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9 For a discussion of the constitutional provisions applicable to reviews and appeals, see N Steytler 'Constitutional Criminal Procedure – A commentary on the Constitution of the Republic of South Afica, 1996' (Butterworths) 1998 at 391 et seq.

10 See *S v Sefatsa* 1989 (1) SA 831 (A) at 832C-F. For a discussion of inherent jurisdiction see Van Winsen et al 'Civil Practice of the Superior Courts in South Africa' 4th ed at 33 et seq and the statement by Botha J in *Moulded Components and Rotomoulding South South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 463A that '... the Court will exercise an inherent jurisdiction whenever justice requires that it should do so.'

[14] Our courts have, however, always dealt with appeals within the four corners of existing legislation. In *S v Matshoba and Another*[11] **Galgut AJA** at 677 H, in dealing with s 363(2) of Act 56 of 1955,[12] held that the words in the aforementioned sub-section preclude the Appeal Court from expanding the ambit of an appeal against the sentence so as to include an appeal against the conviction. I am mindful of the statement by the learned judge, that pointed to the possibility of an expanded jurisdiction:

> *"I pause to say that it may well be that in an exceptional and proper case the Appeal Court, being as it is the ultimate Court of the land, might decide to assume jurisdiction not expressly provided for in the Statute. I express no opinion".*

[15] More recently, however, in *S v Zulu*[13] the Supreme Court of Appeal held that a court has no jurisdiction to act contrary to the statutory powers under which it operates.[14] In *S v Fourie*[15] it was held that the power of a Superior Court to regulate its procedure

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11 1977(2) SA 671 (A).

12 Section 363(2) of the Previous Criminal Procedure Act provides as
"2. Upon an appeal under s 363 against any sentence, the court of appeal may confirm the sentence, or may delete or amend the sentence and impose such punishment as ought to have been imposed at the trial."

13 2003 (2) SACR 22 (SCA).

14 See *S v Phakati and Another* 2005 (2) SACR 361 (W) that confirms this approach.

15 2001 (2) SACR 118 (SCA).

does not include the power to hear a matter which is not the proper subject of the appeal, moreover it reaffirmed the notion that the Court's appellate jurisdiction is not an inherent jurisdiction. In *S v Gentle,*[16]however, **Knoll J** referred to s 168 of the Constitution, 1996 and held:

> *"In my view inasmuch as s 168(3) of the Constitution has been held not to have changed the position that the Supreme Court of Appeal's appellate jurisdiction is not an inherent one, (S v Fourie (supra)), so also did s 169(b) of the Constitution not change the position with regard to a High Court's appellate jurisdiction".*[17]

[16] *Matjila v DPP, Transvaal Provincial Division*[18] dealt with an application for leave to appeal and an application to amend the grounds for leave to appeal in terms of ss 316(1) and (3) and s 317 after leave to appeal was refused. **Jordaan AJ** held that there is a long line of cases in our law which indicates that once an application for leave to appeal has been refused a subsequent

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16 2003 (1) SACR 395 (C). Also see *S v Gentle* (1) SACR 420 (SCA) at 425h –i, where the Supreme Court of Appeal held that leave to appeal against conviction was required where the accused had been sentenced by the High Court in terms of the Criminal Law Amendment Act 105 of 1997.

17 See *S v Gentle* 2003(1) SACR 395 (C) at 402c –d.

18 2002 (1) SACR 507 (T).

new application for leave to appeal cannot be entertained by the Court which refused the application for leave to appeal.[19]

[17] I am not persuaded that jurisdiction can be assumed by the High Court's inherent jurisdiction powers in this matter.[20]

Review jurisdiction

[18] I turn now to deal with the argument that relied on this court's inherent and statutory review powers. These are the types contemplated by ss 302[21] and 304 of the Act and the types listed in terms of s 24 of the Supreme Court Act 59 of 1959.[22] My clear view is that a provincial division, unlike the Supreme Court of Appeal, is in a position to exercise at times not only its appeal jurisdiction as provided for by statute but could also exercise its

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19 *Matjila*, *supra* at 511 D.

20 See *S v Shezi* 1984 (2) SA 577 (N) where the Natal Division held that in instances of grave injustices the Supreme Court should exercise its inherent power to set a conviction aside.

21 s 302 of the Act provides for an automatic review process and will not be discussed since it is not applicable to the present case.

22 See comments of Bekker et al 'Criminal Procedure Handbook' 7th ed (Juta) 2005 at 304 where the authors state that hearing a review in terms of s 24 of the Supreme Court Act is confined to the relevant provisions, strictly formal and expensive in its execution.

review jurisdiction in terms of s 304(4)[23] of the Act. As stated in *S v Zulu*, by Cloete JA:

> *"This Court cannot, as is frequently done in Provincial divisions in cases which have merit but are not properly before the Court on appeal, deal with the matter on review in terms of s 304(4) of the Act: those powers are limited to Provincial and Local Divisions".*[24]

[19] In *S v Mwambazi*[25] the Court provided a good explanation of when a specific procedure, i.e. appeal or review, would be apposite. The Court stated as follows:

> *"Proceedings of any magistrate's court can be brought before the High Court of Namibia by way of appeal or by way of review, depending on the nature of the complaint. Where an accused complains about his conviction or sentence, he should approach the High Court by way of appeal, but where his complaint is about an irregularity involved in arriving at the conviction, the best procedure is to bring his complaint by way of review. Should he wish to bring an appeal as well as review proceedings, he can do so simultaneously and both can be set down before the same Court on the same day. In Ellis v Morgan; Ellis v Dessai 1909 TS 576 at 581* ***Mason J*** *said:*

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23 Section 304(4) of the Act is generally referred to as the extraordinary review procedure.

24 At para 8.

25 1991 (2) SACR 149 (Nm).

> *'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."*[26]

[20] In the arguments addressed to us much reliance was placed on the court's review jurisdiction and more specifically the powers in terms of s 304(4) of the Act which provides as follows:

> *"If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."*

I am in agreement that s 304(4) of the Act is designed to intervene, especially where a failure of justice is brought to a court's attention in respect of a judgment of an inferior court.[27] An examination of

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26 Ibid at 151g-n.

27 See *S v Eli* 1978 (1) SA 451 (E) and *S v Mafu* 1966 (2) SA 240 (E) at 241 where **O'Hagan J** with reference to extraordinary review powers stated as follows:
"where the interests of justice clearly require the intervention of this Court we will not hesitate to exercise the powers conferred by s 98(4)."

the review provisions and the jurisprudence relating to a High Court's powers to intervene in terms of s 304(4) reveals ample authority that real and substantial justice should always prevail over strict adherence to legal principle. (See *S v Kubheka*[28] and *Hansen v The Regional Magistrate, Cape Town and Another*[29]). In dealing with a High Court's inherent power to review, **Van Dijkhorst** AJ, as he then was, stated in *S v Mametja*:[30]

> "[I]n these circumstances review proceedings are possible in terms of this Court's inherent power to restrain illegalities in inferior courts. Having said this it should immediately be stated that, as set out in *Walhaus v Additional Magistrate, Johannesburg* 1959 (3) SA 113 (A) at 119 and 120, this power should be sparingly exercised."[31]

[21] In my view this court will not have the jurisdiction to exercise its review powers if the decision taken by the two judges in dealing with the petition is considered to be judicial in nature. The SCA in *S v Khoasasa supra* at para [11] at 130d-e ruled that a decision in terms of s 309C of the Act is a ruling or judgment of a Provincial

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28 1999 (1) SACR 65 (W).

29 1999 (2) SACR 430 (C).

30 1979 (1) SA 767 (T).

31 At 768E-F.

Division as intended in ss 20(1) or 21(1) of the Supreme Court Act 59 of 1959 meaning that the decision is judicial in nature.[32]

[22] Once it has been established that the decision of the two judges upon the petition was judicial in nature, then I am bound by the decision of *Portland Cement Co Ltd and Another v Competition Commission and Others*[33] where the Court had held that it was only the proceedings of inferior courts which could be reviewed and that proceedings of the High Court are not reviewable.[34]

'Expanded' jurisdiction

[23] Having found that this Court does not have inherent or review jurisdiction as argued, I now deal with the argument that this court should exercise its powers in terms of the Constitution. In consideration of this 'expanded' jurisdiction I have considered what **Froneman J** stated in *Pohlman and Others v Van Schalkwyk and Others*:[35]

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32 Before judgment was delivered on 30 May 2008, the decision of the SCA in *Matshona v The State* (509/2007) [2008] ZASCA 58 (28 May 2008) came to my notice on the 29th May, which confirms this reasoning at para 4 of the judgment.

33 2003(2) SA 385 (SCA).

34 *Ibid* at 401G – 402C. It is clear that the Pretoria Portland decision reaffirmed a principle of law set forth in *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 601E – F.

35 2001 (1) SA 690 (E) at 697C-F.

> *"Where previously the inherent powers of superior Courts were developed under the common law to control, amongst others, the exercise of public power and also its own process, these are now regulated by the Constitution (cf Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) (2000 (3) BCLR 241) para [41]). The practical reason is that s 173 allows for the inherent power of the Court to be used by taking into account 'the interests of justice'. It appears to me that this provision allows for flexibility and builds upon the previous superior Courts' inherent powers - powers which in cases of this kind were expressly stated to be exercised 'in the interests of the proper administration of justice' (per Corbett JA (as he then was) in Universal City Studios Inc and Others v Network Video (Pty) Ltd 1986 (2) SA 734 (A) at 754G - 755E; cf Knox D'Arcy and Others v Jamieson and Others (supra))."* (My emphasis)

In *Hansen* **Davis J** held that s 173 of the Constitution confirmed a concept of inherent jurisdiction which promotes the interests of justice within the context of the values of the Constitution. Furthermore that such jurisdiction is a wider concept than that provided for in ss 19 (1)(a) and 19(3) of the Supreme Court Act 59 of 1959 which formed the basis of the analysis of inherent jurisdiction in *Sefatsa*.[36]

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[36] 1989 (1) SA 821 (A).

[24] Although I am in agreement with the view held by **Davis J** in *Hansen* I am of the opinion that Hansen's case is distinguishable from the present matter. While I am in support of the view that s 173 of the Constitution does expand the jurisdiction of the Supreme Court, I am not convinced that the provision confers additional rights on the High Court to grant leave to appeal over and above the clear provisions and processes created by the statutes and the various Rules of Court.

[25] What then of the appellant's fair trial rights in terms of the Constitution and in particular Section 35(3)(o) which provides as follows:

> *"Every accused person has a right to a fair trial, which includes the right-*
>
> *(o) of appeal to, or review by, a higher court."*

In my view the rationale for a provision like s 35(3)(o) of our Constitution is of vital importance in ensuring that a reasonable procedure exists to correct errors that occur at the trial. There clearly rests a constitutional duty on High Courts to protect each and every appellant's fundamental rights and that includes the right to a fair trial as provided for by s 35(3) of the Constitution.

[26] Given the circumstances of this case, I am not convinced that no reasonable procedure exists, to address any error made by the regional magistrate at the trial, and henceforth that there is a need for this court to look at s 173 of the Constitution to find expanded jurisdiction to correct any trial error.

[27] To my mind the provisions of the Constitution should be resorted to by an appellant in instances where the absence of an appeal would result in a failure of justice and no remedy exists to protect the infringed right of the appellant. The appellant like any appellant who considers that their rights have been violated is entitled to seek a remedy to address such infringement but such remedy should be sought in the appropriate forum.

[28] In *S v Steyn*[37] the **Madlanga AJ,** in dealing with the constitutionality of 309B of the Act, said the following:

> *"In a substantial number of criminal cases, convictions result in prison sentences. During its term, imprisonment brings the liberty of the individual to a halt. It also impacts on the individual's dignity. Therefore, it cannot be overemphasised that before this happens, there must be procedural checks and balances of such a nature that wrong convictions and inappropriate sentences are*

[37] 2001 (1) SACR 25 (**CC**).

> *reduced to the barest minimum: an appropriate reassessment mechanism is an important cog in this scheme of things. For it to serve the desired purpose, the appeal procedure must be suited to the correction of error. Where (as in the magistrates' courts) the potential for error is greater, the threshold of what accords with fairness cannot appropriately be pitched at a similar level as in the procedure for appeal from High Courts. In those foreign jurisdictions where restrictive appeal procedures have been introduced, the restrictions have little to do with the self-evident truth that a less restrictive appeal procedure is more likely to lead to the discovery of error than a restrictive one".* (My emphasis)

[29] A review of all the statutory provisions dealing with appeals from the lower courts to the High Courts shows that there are sufficient procedural checks in place to deal with wrong convictions and inappropriate sentences. In my view it is not a matter of legislative shortcomings that has resulted in the appellant's present dilemma but rather his failure to appeal against the 'ruling' of the two judges who considered the petition.

[30] After careful consideration of all the relevant issues it is my view that there is no power conferred upon us, either by statute or inherently, to deal with the question of conviction where leave to appeal was granted to deal only with sentence by this division. If the legislature had intended for this Court to have such special

jurisdiction in terms of s 309C, it would have accordingly and expressly provided for such jurisdiction.

[31] The finding that we have no jurisdiction to grant leave to appeal against conviction however, does not close the door to the appellant seeking relief from a higher tribunal. If the appellant is convinced that his conviction was not in accordance with the law and dissatisfied with the decision of the two judges of this division in only granting leave against sentence, his proper recourse is to petition the President of the Supreme Court of Appeal. Such procedure is provided in s 21 of the Supreme Court Act.[38]

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[38] See s 21 of the Act that provides as follows:

"(1) In addition.....

(2) The leave of the appellate division to appeal referred to in subsection (4) of section 20 may be granted by it on application made to it within 21 days, or such longer period as may on good cause be allowed, after the judgment or order referred to in paragraph (a) of that subsection against which appeal is to be made, was given or after the court referred to in paragraph (b) of that subsection refused leave to appeal, as the case may be.

(3) (a) An application to the appellate division under subsection (2) shall be submitted by petition addressed to the Chief Justice.

(b) The petition shall be considered by two judges of the appellate division designated by the Chief Justice, and in the case of a difference of opinion, also by the Chief Justice or any other such judge so designated.

In the result, the following order is made:

1. The appeal of the appellant is postponed sine die.

2. The petition by the appellant, Christiaan van der Merwe, for leave to appeal against his conviction, is to be addressed to the President of the Supreme Court of Appeal within 21 days from date hereof or within such further period as the President of the Supreme Court of Appeal may allow.

3. The application for leave to appeal should be proceeded with in accordance with the Rules of the Court.

4. The appellant's bail is extended on the same conditions as ordered on 18 April 2008.

E J S STEYN

Moosa J: I agree, it is so ordered.

E MOOSA