**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NUMBER: A137/2013

DATE: 3 DECEMBER 2014

In the matter between:

**NANDIPHA MSHUDULU** Appellant

and

**THE STATE** Respondent

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**EX TEMPORE JUDGMENT**

**ROGERS J**:

[1] This is an application for leave to appeal against the judgment we delivered on 4 November 2014. Our judgment was in turn given on appeal to us from the regional court against the appellant's conviction and sentence on two counts. Mr van der Berg now appears for the appellant. Ms Mcani continues to represent the State.

[2] The initial question we required counsel to address us on is the question whether we have the jurisdiction to entertain the application for leave to appeal or whether, in terms of the Superior Courts Act, a further appeal can only be pursued on special leave granted by the Supreme Court of Appeal. On the

face of it the judgment of the Supreme Court of Appeal in *Van Wyk v The State* 2014 ZASCA 152 appears to be dispositive against the appellant in the present case. In that case, where judgment was delivered on 29 September 2014, the Supreme Court of Appeal held that where a High Court has, in a criminal matter, dismissed an appeal on appeal to it from a lower court, s 16(1)(b) of the Superior Courts Act has the effect that only the Supreme Court of Appeal can grant leave for a further appeal to be pursued and that the test is the usual one of special leave requiring some special circumstances over and above a reasonable prospect of success.

[3] Mr van der Berg argued, however, that the *Van Wyk* judgment does not address the question as to which cases, if any, fall to be determined with reference to the repealed Supreme Court Act on the basis that the appellant has a vested right to the now repealed appeal procedure. In that regard we were referred to two conflicting judgments in this division, the first being *Imador v The State* 2014 ZAWCHC 66 and the second *Tuntubele v The State* 2014 ZAWCHC 91. Both of these are judgments of two judges of this division.

[4] In the *Imador* case Blignault J with whom Nyman AJ concurred, found, firstly, that on a proper interpretation of the new Superior Courts Act, read with the Criminal Procedure Act,

the right of a further appeal from the High Court to the Supreme Court of Appeal had been abolished all together. In the second instance, he found that this abolition of a further appeal did not affect the appellant's right in *Imador* to pursue a second appeal under the repealed legislation because, so it was held, he had a vested right to that further appeal in accordance with the old procedure.

[5] In *Tuntubele* Binns-Ward and Schippers JJ disagreed with this view, holding that the earliest time at which there could be a vested right to pursue a particular statutory appeal procedure was at the time of delivery of the adverse judgment against which leave to appeal was sought. That contrasts with the finding in *Imador* where it was said that, once an accused person has been convicted and sentenced in the court of first instance, he has a vested right in terms of the then prevailing legislation to pursue all appeal avenues for which the law then allows.

[6] As applied to the facts of the present case, we have the situation that the appellant was convicted in the trial court on 22 February 2013 and sentenced on 9 April 2013. The Superior Courts Act came into force on 23 August 2013. The appeal before us was only heard and decided upon in November 2014. In accordance with the *Imador* judgment, the right to the old

appeal procedures would have vested in the appellant prior to the coming into force of the new legislation. In accordance with *Tuntubele*, the right to pursue a further appeal would only have vested when we delivered judgment in November 2014, which was after the new Act came into force and as a result of which the new procedure rather than the old would apply.

[7] The question of vested rights and the entitlement to rely on the repealed legislation was not specifically addressed in *Van Wyk's* case. What was specifically held was that *Imador* was incorrect in finding that the right to a further appeal had been abolished all together. Now it is clear from the judgment in *Van Wyk* that the Supreme Court of Appeal considered the conflicting decisions which had been given in the provincial divisions, as both *Imador* and *Tuntubele* were cited in a footnote to the judgment.

[8] I think we may accept that if the Supreme Court of Appeal had been persuaded by *Imador's* finding regarding vested rights, the court would have dealt with it, because it is clear that it would have been directly applicable to the disposition of the *Van Wyk* appeal. I say that because in paragraph 33 of the *Van Wyk* judgment it is recorded that the appellant had been in prison since being sentenced on 25 March 2011. It was thus clear to the Supreme Court of Appeal in *Van Wyk* that the

conviction and sentence had occurred well before the coming into force of the Superior Courts Act. That did not prevent the court from finding that, with the coming into force of the Superior Courts Act, the North Gauteng High Court, which had heard the appeal in *Van Wyk*, did not have jurisdiction to consider an application for leave to appeal and that there needed to be a case for special leave under the provisions of s 16(1)(b) of the new Act.

[9] Mr van der Berg raised an alternative argument which was to the effect that the vested right, if it did not vest when the accused person was convicted and sentenced in the trial court, at least vested once the appeal to the High Court became pending in this court. There is some difficulty in knowing at precisely what point in the appellate procedure an appeal in this court can be said to become pending and whether that event occurred before or after 23 August 2013. However, I do not think it is necessary to resolve that question. I say so because I am in respectful concurrence with the view that was reached in *Tuntubele* that the right to pursue a particular appeal procedure cannot vest until the adverse judgment against which one wishes to appeal has been handed down. That, as we know in this case, occurred well after the Superior Courts Act came into force.

[10] Reference was made in passing to the provisions of s 52(1) of the Superior Courts Act where it is provided that, subject to section 27, proceedings pending in any court at the commencement of the Act must be continued and concluded as if the Act had not been passed. Subsection 2 says that proceedings must, for purposes of s 52, be deemed to be pending if, at the commencement of the Act, a summons has been issued but judgment has not been passed.

[11] In my view 'proceedings' as contemplated in section 52 are proceedings which terminate in a judgment. From that it seems to me to be clear that, in the course of the criminal justice process in relation to a particular person, there may be a sequence of 'proceedings'. The first proceedings start in the trial court and are concluded upon sentence and conviction. If the accused person wishes to appeal, he commences further proceedings by delivering an application for leave to appeal and those proceedings are terminated upon the giving of a decision thereon by the trial court. There then starts appeal proceedings in the High Court which are terminated with a judgment of this court. If this Court has jurisdiction, further proceedings may then be commenced by way of an application for leave to further appeal to the Supreme Court of Appeal, and such proceedings would be terminated by the judgment of this court giving or refusing leave. Appeal proceedings might

then commence in the Supreme Court of Appeal, again terminated by that court's judgment on further appeal.

[12] On the assumption that the appellant's appeal in this court became pending in this court before 23 August 2013, the appellant had a right to have her appeal in this court determined in accordance with the law as it stood prior to the coming into force of the Superior Courts Act (assuming that the Superior Courts Act otherwise has any bearing on the determination of the appeal). Her application to us for leave to appeal against our judgment is a new proceeding which has been instituted after the coming into force of the Superior Courts Act.

[13] The question of the effect of procedural amendments on pending proceedings has been the subject of many decisions, one of the more recent being *Unitrans Passenger (Pty) Limited t/a Greyhound Coach Lines v Chairman National Transport Commission and Others* 1999 (4) SA 1 (SCA). That case refers to the trend in case law towards the view that statutory amendments of a procedural nature tend to operate prospectively in regard to matters already before the courts, whereas statutory amendments affecting the substantive rights of parties generally do not affect pending proceedings. Olivier JA pointed out that the distinction was not all together

satisfactory because amendments which may appear to be of a procedural nature may be found on analysis to have substantive effects. He said that ultimately it was a matter of the proper interpretation of the relevant legislation, a process in which questions of fairness and equity should be considered.

[14] In that case and in the earlier leading case of *Bell v Voorsitter van die Rasklassifikasie Raad en Andere* 1968 (2) SA 678 (A) the courts were concerned with proceedings of quasi-judicial nature before administrative bodies, where a person had initiated proceedings before the administrative body only to find that, midway through those proceedings, some change in procedure was effected by statute which effectively took away their right to take the proceedings to completion. It was in those circumstances that one would more readily find that the amendment does not affect pending proceedings. That was the situation in the *Unitrans* case where Olivier JA said the following in para 23:

'Of course there may be cases where an amending statute introduces new procedural provisions which may, on a proper interpretation, leave intact the steps that have already been taken and operate prospectively only. But that will not be the position where a prospective operation would render abortive the steps taken in the past – unless such was the clear intention of the legislator. To apply the statute to the pending application in the present case would extinguish there and then the ability to proceed

with the application. It would nullify the steps already taken by Interkaap.'

[15] I have already indicated how I would interpret the notion of pending proceedings in s 52. Such an interpretation would avoid the situation contemplated in para 23 of *Unitrans* where steps taken in certain proceeding might be rendered abortive because of a change of procedure midstream. It is clear that in the present case no steps which the appellant has taken up to now will have been rendered abortive. She pursued her appeal in this court to its conclusion in accordance with the law as it prevailed at all material times. No application for leave to pursue a further appeal has been rendered abortive, after it was instituted, by virtue of the statutory amendment. The application for further leave to appeal was only instituted very recently and well after the Superior Courts Act came into force.

[16] Apart from those considerations of fairness and equity, I do not think that fairness and equity requires that accused persons should have a right to pursue an appeal by using an old procedure merely because that was the procedure which applied either when they were convicted or when the appeal became pending in the intermediate court. The lawmaker has evidently thought it fair and right that to pursue a second

appeal certain particular requirements should be met and there is no unfairness in saying that the appellant, like a great many other accused persons, will need to satisfy that test if she is to pursue a further appeal.

[17] Mr van der Berg referred us to s 35(1)(o) of the Constitution which says that a right of appeal is one of the fundamental fair trial rights of an accused person. However, that section does not give an unqualified right of appeal because, as we know, requirements for leave to appeal have been found to be constitutionally valid. Moreover, the right to appeal, which is guaranteed, is not the right to use a procedure which happens to be in place at a particular point in time or when the Constitution was enacted but merely a right to pursue an appeal in accordance with the law that prevails at the relevant time. The new appeal procedures under the Superior Courts Act are not challenged for constitutional invalidity. I therefore do not think that s 35(1)(o) of the Constitution affects the question of the interpretation of s 52 of the Superior Courts Act or the question as to when a vested right to pursue an appeal accrues.

[18] It seems that, if Mr van der Berg's argument were correct, it would effectively mean that s 16(1)(b) of the Superior Courts Act would not find actual operation in any cases for a number

of months, even several years. All pending cases would have to be concluded to finality, including appeals to the Supreme Court of Appeal, under old legislation. I do not think that could have been the intention of the lawmaker.

[19] For these reasons I conclude that we do not have jurisdiction to entertain the present application and that it should be struck from the roll. We raised with counsel whether, in the event that we should be wrong in this conclusion, it would be desirable for us to express any view on the prospects of success with a view perhaps to short-circuiting a referral back to us. However, counsel on both sides took the view that if we do not have jurisdiction we should leave it at that and express no views on prospects of success.

[20] The other matter which is before us is an application by the appellant for the extension of bail, to cover the eventuality that we might find we do not have jurisdiction or the eventuality that we might refuse leave to appeal (in which case the extended bail would operate either until a petition to the Supreme Court of Appeal has been rejected or until any appeal which is permitted to that court has been finalised). The appellant has been on bail since some time in 2009. After she was convicted and sentenced in the lower court, her bail was extended. Bail pending the appeal to this court was set at

R10 000. The conditions included that she should not reside in the Province of the Western Cape pending the determination of her appeal, that she should report to a police station once a week, being the CR Swart police station in Durban, and that although she would be permitted to travel within the borders of South Africa she would not be allowed to go on any international flights or leave the country for any reason, work or leisure. I also understand that her passport has been surrendered to enforce the bail conditions.

[21] Mr van der Berg referred us to various authorities which deal with the test to be applied in extending bail pending an appeal or a possible appeal. The trend of the later cases is that, even if a court considers that there are no reasonable prospects of success, bail may be granted if the appellant does not pose a flight risk and if the appeal cannot be said to be completely hopeless or, putting it differently, except in those cases which are completely cut and dried against the appellant a court will lean towards extending bail if there is no flight risk.

[22] It seems to me that, subject to a modest increase in the amount of bail, it would be just to extend it. If the Supreme Court of Appeal grants leave, that will indicate that there are some prospects of success. If the Supreme Court of Appeal

refuses leave to appeal, that will happen in the relatively near future. The injustice for the appellant, if she were required now to be incarcerated but were then after a month or two released again pending an appeal, would be greater than is posed by the risk of flight.

[23] For all these reasons the following order is made:[1]

[1] In regard to the application for leave to appeal, the application is struck from the roll on the grounds that in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 this court does not have jurisdiction to entertain the application.

[2] In regards to the bail application, the appellant's bail is extended subject to an additional amount of R5 000 being lodged as bail (bringing the total amount of bail to R15 000) and subject to the conditions set out in 3 and 4 below.

[3] The appellant's bail shall automatically lapse on the earlier of the following events:

(a) if she has not, by Friday 16 January 2015, delivered an application for special leave to appeal to the Supreme Court of Appeal in terms of s 16(1)(b) of the Superior Courts Act

[1] The order which follows substitutes the one give orally and is in a form to which both counsel agreed after the hearing.

together with any application for condonation which she may require;

(b) if the Supreme Court of Appeal refuses the application for special leave to appeal or refuses any related condonation application for the late filing of the application for special leave;

(c) if the Supreme Court of Appeal, having granted special leave to appeal, dismisses the resultant appeal.

[4] The existing bail conditions continue to apply, namely:

(a) The appellant is not, pending the determination of her application for special leave or any ensuing appeal, to reside in the Western Cape Province.

(b) The appellant must report once a week to the CR Swart Police Station in Durban between the hours of 18h00 and 20h00.

(c) The appellant may travel within the borders of the Republic but may not leave the Republic or board any international flight, whether for work or leisure.

(d) The appellant's passport shall remain surrendered in the custody of the South African Police.

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**ROGERS, J**

I agree.

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**VAN STADEN, AJ**