IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. A524/12

In the appeal:

NKULULEKO TUNTUBELE Appellant

And

THE STATE Respondent

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL
DELIVERED: 6 JUNE 2014

BINNS-WARD *et* SCHIPPERS JJ:

[1] The appellant has applied for leave to appeal against the judgment of this court, delivered on 26 May 2014, dismissing his appeal against his conviction and sentence by the regional court in respect of one count of armed robbery. The appellant also gave notice of his application to have his bail extended pending the determination of such appeal, and, presumably, in the event of our refusing leave to appeal, pending the determination of any application which he might be able to direct to a higher court for leave to appeal.

[2] The notice of application for an extension of bail indicated the appellant's intention to move for the relief urgently, on a date to be arranged by the registrar. The appellant was constrained to treat his application for an extension of bail as a matter of extreme urgency because the terms of his bail conditions, set by the Judge President on 24 October 2013, required him to hand himself over to the clerk of court to commence serving his sentence within three calendar days should his appeal not succeed. The appellant's legal representative and counsel for the state were informed by the presiding judge's registrar during the afternoon of Thursday, 29 May, that the applications had been set down for hearing at 9:45 on Monday, 2 June 2014.

[3] The appellant's legal representative failed to appear at the hearing on 2 June. When he had not arrived by 10:00, the application for leave to appeal was heard in his absence. Counsel for the state raised a preliminary point as to our jurisdiction to deal with the application, or as to the appellant's right to make it. She submitted that this court had no authority to grant leave to appeal against its judgment. Ms *Berry* informed us that the appellant's legal representative, Mr Booth, had been forewarned of the point. She submitted that were this court nevertheless to entertain the

application for leave to appeal, it should be dismissed. The application to extend the appellant's bail was not moved; obviously so, in the context of the failure of his legal representative to appear. In terms of the order granting him bail, his bail has lapsed.

[4] We shall address the preliminary point presently. Before doing so, it is convenient to record at this stage that after the court had adjourned, having reserved judgment, the presiding judge's registrar received an email purporting to emanate from the appellant's legal representative. It read '*Dear Elizabeth Kindly note that we are putting our Application for Leave to Appeal on hold. Kindly acknowledge receipt of this correspondence*.' *Ex facie* the email, it was sent by the appellant's legal representative at 10:13. That was a most irregular manner in which to deal with the matter. When an application has been set down, it may not summarily and unilaterally be 'put on hold' by one of the parties. If a postponement is sought, application for the postponement must be made in the proper form. A postponement is an indulgence, not a right.

[5] Later during the day, a further email was received from the appellant's legal representative. It appears to have been sent at 11:11. It read '*Dear Elizabeth, Please note that Mr Booth was in the High Court doing Jason Elias trial* (sic) *this morning. I failed to bring to Mr Booth's attention the fact that this matter was on the court roll this morning. I humbly apologise for inconvenience caused*'. The content of the second email would suggest that the appellant's attorney's assistant had omitted to record the set down of the applications in the attorney's diary. If that was intended to explain the non-appearance of the appellant's legal representative at court, it was a completely unacceptable way of doing so. It also begs the question on whose instruction the first email had been sent, and when that instruction was given, and to whom.

[6] One assumes that the diary omission must have been drawn to the attorney's attention before or shortly after the second email was sent. He would have been duty-bound in the circumstances to urgently arrange to meet the presiding judge in chambers to tender the explanation for his absence in person. These matters are not dealt with by way of laconic emails from the attorney's secretarial staff. It is unlikely that the appellant's legal representative, who is a senior attorney, could not have appreciated as much. No approach has been made by the attorney to explain his non-appearance in the manner that would be expected. The discourtesy, which is inconsistent with professional conduct, is to be deprecated. In the circumstances we shall direct that a copy of this judgment is to be forwarded to the Cape Law Society for investigation.

[7] Turning now to the preliminary point. Ms *Berry* directed our attention to the judgment of Blignault J (Nyman AJ concurring) in *S v Imador* [2014] ZAWCHC 66, in which it was observed that there were critical differences between the position currently obtaining under the Superior Courts Act 10 of 2013 and that which had obtained previously under its statutory predecessor, the Supreme Court Act 59 of 1959, in respect of the provision of a right of appeal in a criminal matter from a decision of the High Court determining an appeal from a lower court. Under the Supreme Court Act, an appellant

to the High Court could, subject to leave being granted by this court, or, if this Court refused such leave, the Appellate Division, appeal further to the Appellate Division, or, latterly, its successor the Supreme Court of Appeal. This was by virtue of the provisions of s 21(1) and (4) of the Supreme Court Act.

[8] Section 21 of the Supreme Court Act provided:

> In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.

Section 21(4) provided:

> No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except—
> (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in with the special leave of the appellate division;
> (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.

[9] The Superior Courts Act repealed and replaced the Supreme Court Act. It provides for a distinctly different regime. In terms of s 16(1)(b) of the Superior Courts Act, '*an appeal against any decision of a Division* [of the High Court] *on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal*'. The definition of 'appeal' in terms of s 1 of the Act reads as follows: '*"appeal" in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act 51 of 1977), or in terms of any other criminal procedural law*'. Section 16 resorts in chapter 5 of the Act.

[10] In *Imador*, it was held that an appeal from a judgment of the High Court given on appeal from a lower court in a criminal matter did not qualify as an appeal in terms of chapter 5 of the Superior Courts Act by virtue of the aforementioned statutory definition of 'appeal', and that in the absence in the Superior Courts Act of provisions equivalent to those in s 21(1) and 21(4)(b), a further right of appeal to the Supreme Court of Appeal no longer exists. For the reasons that follow, we find ourselves in respectful disagreement with the first of those conclusions, and are in some doubt as to the correctness of the second.

[11] The provisions of the Criminal Procedure Act that regulate appeals are contained in chapters 30 and 31. Those provisions respectively regulate appeals from the lower courts to the High Court and from judgments of the High Court sitting as a court of first instance. Nothing in the Criminal Procedure Act thus regulates or provides for an appeal in a criminal matter from the decision of the High Court constituted as a court of appeal. We are not aware of the existence of 'any other criminal procedural law' that might apply, apart from the rules of court. Rules 49A, 51 and 52 of the Uniform

Rules are directed at regulating procedures contemplated in terms of chapters 30 and 31 of the Criminal Procedure Act. Thus, assuming that there is a right of further appeal in the current matter, it follows that it would indeed be an appeal within the meaning of chapter 5 of the Superior Courts Act because it would *not* fall within the category of appeals excluded therefrom by the definition of 'appeal' in s 1. Any such appeal would thus fall to be regulated in terms of s 16(1)(b) of the Superior Courts Act. The contemplated appeal would therefore lie only upon special leave having been granted by the Supreme Court of Appeal.

[12] Section 2(2) of the Superior Courts Act provides '*This Act must be read in conjunction with Chapter 8 of the Constitution, which contains the founding provisions for the structure and jurisdiction of the Superior Courts, the appointment of judges of the Superior Courts and matters related to the Superior Courts.*' Chapter 8 of the Constitution includes s 168(3)(a), which provides '*The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament*' Whether s 168(3) of the Constitution creates a right of further appeal in case like the current matter is debatable. As pointed out in *National Union of Metalworkers of South Africa and Others v Fry's Metals* 2005 (5) SA 433 (SCA), [2005] 3 All SA 318, at para 29, concerning the earlier iteration of s 168(3), before its substitution by s 4 of the Constitution Seventeenth Amendment Act of 2012, one should not '*confuse the existence of appellate jurisdiction with the question whether a right of appeal exists at all. The scope of institutional authority is one thing; the question whether and under what conditions it can be invoked is quite another. Differently stated, a general right of appeal from all other appellate bodies to* [the SCA] *does not entail that every determination of a justiciable right must be appealable*'. The appellant's basic right to an appeal in terms of s 35(3)(o) of the Constitution has been vouchsafed in his appeal to this court. So if there were no right of further appeal, the resulting position would not be unconstitutional. But if subsections 21(1) and (4)(b) of the Supreme Court Act were considered sufficient to afford a right of appeal in a case like this, it is difficult to see why s 168(3)(a) read with the provisions of the Superior Courts Act should not be given an equivalent effect. However, it is not necessary for us to determine that question.

[13] In *Imador*, the court held that it was able to entertain the application for leave to appeal because the appellant's conditional right to a further appeal in terms of the Supreme Court Act had accrued before the Superior Courts Act came into operation. The court reasoned its approach on the principle that, in the absence of express provision to the contrary, new legislation is presumed not to derogate from accrued rights. Assuming the correctness in principle of that approach, it begs the question of whether the appellant had an accrued right of appeal from a judgment on appeal by the High Court when the Superior Courts Act came into operation in August 2013. In our view he did not. No right of appeal can vest before there is an adverse judgment to appeal against.

[14] We have thus concluded that the preliminary point taken by the state is well-taken. On any approach, we have no jurisdiction to entertain an application for leave to appeal against our judgment. The proper course would therefore be to strike the application from the roll.

[15] The matter has a long history, characterised by repeated and lengthy delays. We thus consider it appropriate, lest we be wrong in our finding that we could not entertain the application, to record how we would have determined it if we did have the jurisdiction to do so. We do this so that it would be unnecessary, if a higher court should find that we should have decided the application, for further delay to be occasioned by the remittal of the matter for our decision.

[16] If we had the authority to determine it, the application could succeed only if we were of the opinion that the proposed appeal would have a reasonable prospect of success.

[17] The appellant set out 13 grounds in support of the application for leave to appeal. They were essentially a restatement of the bases on which the appeal from the judgment of the trial court was argued before us. Save for one point, which we shall address presently, these aspects were sufficiently canvassed in our judgment handed down last week and it is thus unnecessary to rehearse them.

[18] The aspect that might perhaps usefully be addressed is the appellant's special invocation in his grounds for leave to appeal of the judgment in *S v Charzan and Another* 2006 (2) SA 143 (SCA). The appellant's legal representative had referred to this judgment, amongst others, in his heads of argument and in his oral argument in the appeal before us. The fact that we made no reference to the case in our judgment should not imply that we did not have regard to it; on the contrary. The appellant's special reliance on the judgment at this stage makes it appropriate for us to explain briefly why we do not consider that it affords the appellant the support he seeks to find in it.

[19] The outcome of the appeal in *Charzan* turned on the evidence in the case. The complainant's identification of the accused in that case was found to have been unreliable. This was because soon after the incident concerned he had described to the police that one of his attackers had worn dreadlocks. The dreadlocks were mentioned twice in the written statement he had made to the police. Neither of the persons he pointed out at an identity parade 16 days later had been wearing dreadlocks. When he was challenged about this in his evidence, he stated that '*there may have been no dreadlocks at all*'. The witness sought to deal with the difficulty by stating '*Well, to me what he was wearing is not very important. To me the face mattered most, because I knew that I cannot go for identity parade to identify somebody who has got dreadlocks, or who has got a hat. To me, what matters most is the face. You cannot identify someone by a hat or dreadlocks. The face matters most.*'

[20] Cameron JA treated of the issue as follows at para 14-15 of the judgment in *Charzan*:

> [14] The complainant's observation is correct: facial characteristics are a more reliable and enduring source of identification than variable features such as hairstyle or clothing. But that assertion -

> propounded repeatedly during his cross-examination - underscores the significance of his mention of the dreadlocks. If they were immaterial to his recollection, why did he mention them at all? On the other hand, if they were material, but there were no dreadlocks, his error is unignorable.
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> [15] The mystery was not cleared up during the complainant's evidence, for he neither insisted that there were dreadlocks during the robbery (which must have been shaved off later), nor conceded that he had made an error: instead, he attempted to minimise the importance of what was in his statement by insisting on the irrelevance of non-facial features. In keeping with this approach, counsel for the State urged us on appeal to find that the complainant was an impressive witness overall, and that the dreadlocks were immaterial. But they cannot be dismissed, for the complainant's statement mentions them twice; and his very articulacy as a witness, and the precision of his recall in other respects, make the unaccounted-for error the more obtrusive. It unavoidably raises the question of how reliable his recall was in other respects. And it makes it the more regrettable that the police officers who arrested the accused were not called to testify, since they would have been able to relate whether accused 1 had dreadlocks two days after the robbery. We shall never know.

[21] An additional factor that weighed against the reliability of the complainant's identification in *Charzan* was his insistence that the incident had happened at about 19:15 and that the sun had been shining. The appeal court took judicial notice that at the time given by the complainant the sun would have set and dusk would have set in. Not only did this call into question the reliability of the complainant's observations, but it also highlighted that, were he correct as to the time of the occurrence, the lighting conditions inside the garage in which he was confronted by his assailants would have been distinctly gloomy. In the result, observed Cameron JA (at para 17), '*…the unsettling uncertainty must obtrude that he may have mistaken the nature and appearance of his first attacker's headgear because the light was bad. And if that is so, then there must be a measure of perceptible doubt also about his identification of his attackers' faces*'. In the context of the absence of any objective corroboration of the complainant's identification of the accused in *Charzan*, they were entitled to the benefit of the doubt because of the demonstrated problems with the reliability of the complainant's identification of them.

[22] In the current matter, by contrast, the complainant's identification of the appellant was not susceptible to the criticism that was brought against that of the complainant in *Charzan*, and, moreover, objective corroboration of the reliability of the identification was provided by the evidence that the cell phone number used by the appellant and given by him to an investigating officer in an unrelated matter as his contact details, had been used in the vicinity of the robbery within a short time of its commission. (The suggestion in the grounds of appeal that the cell phone-related evidence '*did no more than place the person using the relevant cell phone number within five to ten kilometres of the said incident*' is misconceived. As recorded in the principal judgment, the evidence was that the cell phone had been within 500m of the Groote Schuur Hospital relay tower. This court can take

judicial notice of the fact that Groote Schuur Hospital is between two and three kilometres from Woodstock, where the robbery occurred.)

[23] We are of the opinion that the proposed appeal against conviction would not enjoy a reasonable prospect of success. Likewise, we are of the opinion that any further appeal against sentence would be most unlikely to succeed. In the result, were we able to entertain it, the application for leave to appeal would have been dismissed. If, contrary to our finding, we do in fact have jurisdiction to determine the application for leave to appeal, it should be deemed to have been dismissed.

[24] The application for an extension of the appellant's bail will be struck from the roll for want of prosecution.

[25] In the circumstances the following orders are made:

1. The application for leave to appeal against the judgment of this court of 26 May 2014 is struck from the roll by virtue of an absence of jurisdiction in this court to entertain it.
2. The application for the extension of the appellant's bail is struck from the roll for want of prosecution.
3. The Registrar is directed to forward a copy of this judgment to the Director of the Cape Law Society, with reference to paragraphs 2-6, above.

A.G. BINNS-WARD
Judge of the High Court

A. SCHIPPERS
Judge of the High Court