REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: A51/2020

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED:

DATE SIGNATURE

In the matter between:

THE STATE Appellant

and

MAGERU SAMUEL BJANYANE Respondent

Summary: Appeal – Leave to appeal – Criminal Procedure – Application by the State for leave to appeal in terms of sections 315 and 316 of Criminal Procedure Act 51 of 1977 – Whether the State can invoke section 315 and 316 to appeal acquittal – Held: section 315 and 316 only afford a right of appeal to accused persons – the State can only appeal acquittal under section 319 by reserving a question of law arising at trial – Further held: Full Court of a High Court has no jurisdiction to hear an appeal by the State under section 315 and 316 of the CPA – Point *in limine* upheld.

JUDGMENT

BRITZ, AJ

[1] The respondent and his former co-accused (accused 1) were both indicted on charges of murder, attempted murder, possession of an unlicensed firearm, and the unlawful possession of ammunition. Accused 1 was also indicted on two charges of corruption. At the close of the case for the State, accused 1 was found not guilty and discharged on all the charges except for the corruption charges.

[2] At the conclusion of the trial before Ratshibvumo AJ (as he then was) accused 1 was convicted on the corruption charges and the respondent was acquitted on all the charges levelled against him.

[3] During the trial, the State was represented by Adv Wassermann. Both accused were represented by Adv Pool. At the conclusion of the trial, the State was displeased with the outcome in respect of the current respondent. The State applied for leave to appeal in terms of section 316 read with section 315 of the Criminal Procedure Act, 51 of 1977 (CPA).

[4] The application was founded on a wide variety of points which the State framed as questions of law for the court *a quo* to reserve and refer to the Supreme Court of Appeal (SCA). The application was unsurprisingly opposed on the basis that what the State deemed to be questions of law were in contrast questions of fact.

[5] It appears from his judgment in the leave to appeal application that Ratshibvumo AJ was less than persuaded by the State's application. He, however, considered himself bound by precedent to follow the decision in this division *of S v Ndebele*[1] where questions couched in a similar way as in the case before us were found to have been questions of law. Feeling strong-armed by precedent Ratshibvumo AJ reserved the following questions of law:

> "*One, did the court apply the cautionary rules pertaining to single witness correctly when it applied them when approaching the evidence of the complainant in caso (sic) Mr Sibeko? And two, did the court consider inadmissible evidence being hearsay evidence in arriving at its verdict?*

[1] *S v Ndebele* (A207/2016) [2018] ZAGPJHC 960 (26 June 2018).

And if so would the exclusion of such evidence have any impact at the outcome of the case?."

[6] He then ordered that the reserved questions be referred to the full bench (obviously meaning the full court) of this division, hence the appeal before us.

[7] In the papers and before us Mr Gissing, for the respondent, applied for condonation for the late filing of respondent's heads of argument. Mr Wasserman, for the State, decided very grudgingly, but wisely so in our view, not to oppose the application for the sake of progress in the actual hearing of the appeal. Having considered the reasons forwarded by the respondent for the delay, we could not find any fault on his part and granted condonation as prayed for.

[8] In his heads of argument as well as in argument before us Mr Gissing raised a point *in limine* that this court does not have jurisdiction to hear the appeal. Mr Wassermann did not file supplementary heads on this aspect and only addressed us from the bar, opposing the point *in limine*. As the outcome of the point *in limine* is vital to the appeal on the merits, we decided to first hear argument on it and make a finding on the issue of our jurisdiction because if we do not have jurisdiction it would mean the end of the appeal before us, without us deciding the questions reserved by the court *a quo*.

[9] Mr Gissing's arguments in this regard can be summarized as follows: Section 311 of the CPA, referred to by the appellant in its heads of argument, is not applicable to this appeal as the section resorts under chapter 30 of the CPA which deals exclusively with appeals from the lower courts to the superior courts. Sections 315, 316, and 319 which resort under chapter 31 of the CPA are the applicable sections as those sections deal with appeals where the High Court was the court of first instance and where a decision of that court is appealed against. He submitted that section 316 of the CPA is only applicable to an accused and not to the State. The only section under which the State can appeal is section 319 of the CPA. This, so the argument went, can be done during the trial, or after judgment. As authority for the supposition that section

319 can be relied upon after judgment, Mr Gissing referred us to the case of *R v Adams*[2].

[10] Mr Wassermann's arguments can be summarized as follows: The references in his heads of argument to section 311 of the CPA were typographical errors and should be read as references to section 316 read with section 315 of the CPA. Section 316 specifically deals with appeals from the State as the section refers to the Director of Public Prosecutions. Further authority for this argument is to be found in Du Toit *et al* Commentary on the Criminal Procedure Act, where the learned authors deal with the provisions of sections 315 and 316, and conclude that the purpose of those sections is to alleviate the burden on the SCA. He further argued that section 319 of the CPA is not applicable as that section only deals with matters that are still pending before the trial court. He pointed out that the present appeal is not a matter still pending before the trial court and added that no question of law arose during the trial of the accused and therefore no question of law was reserved during the trial. In support of this argument, he referred us to the decision in *Director of Public Prosecutions, KwaZulu-Natal v Ramdass*[3].

[11] It is trite that the State can only appeal on a question of law and not on any incorrect factual findings of a trial court.[4] This appeal asks the question of whether it is permissible for the State to use sections 315 and 316 of the CPA to prosecute such an appeal or whether the State is restricted to use section 319 of the CPA. We are therefore required to interpret the provisions of the aforementioned sections of the CPA.

[12] The correct approach to legal interpretation has been stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] as follows:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or

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[2] *R v Adams* 1959 (3) SA 753 (A).
[3] *Director of Public Prosecutions, Kwazulu-Natal v Ramdass* [2019] ZASCA; 2019 (2) SACR 1 (SCA) ("*Ramdass*").
[4] *S v Basson* 2003 (2) SACR 373 (SCA).
[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) ("*Endumeni*")

provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." (footnotes omitted)

[13] The starting point when dealing with appeals where the court of first instance was a High Court is section 315(1)(a) which provides as follows:

> "In respect of appeals and questions of law reserved in connection with criminal cases heard by a High Court, the court of appeal shall be the Supreme Court of Appeal, except in so far as subsections (2) or (3) otherwise provides."

[14] Subsection 2 of section 315 makes provision for the judge hearing an application for leave to appeal under the provisions of section 316 to give a direction that the appeal be heard by a full court if he or she is of the opinion that the appeal does not require the attention of the SCA. Subsection 3 deals with the specific forum of the full court which is to hear an appeal under subsection 2 and the extra-ordinary jurisdiction of the Witwatersrand Local Division (now the Gauteng Local Division).

[15] Subsection 4 provides that "[a]n appeal in terms of this Chapter shall lie only as provided in sections 316 to 319 inclusive, and not as of right."

[16] It is clear from the plain wording of section 315 that the Legislature intended for appeals originating from the High Court as court of first instance to be heard by the SCA. The only exclusion provided for is where an application for leave to appeal under the provisions of section 316 is applicable and the judge hearing the application is of the view that the issues raised is not deserving of the direct attention of the SCA.

[17] Subsection 4 affirms the position that neither the State nor an accused person has an inherent right of appeal. Both must first comply with the provisions of sections 316 to 319 before they can lodge an appeal.

[18] Section 316(1)(a) provides as follows:

> "Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order."

[19] Subsection 2 deals with the time frames within which the application for leave to appeal is to be made, the judge who must hear the application and peripheral issues.

[20] Subsection 3(a) provides as follows:

> "No appeal shall lie against the judgment or order of a full court given on appeal to it in terms of section 315(3), except with the special leave of the Supreme Court of Appeal on application made to it by the accused, or where a full court has for purposes of such judgment or order given a decision in favour of the accused on a question of law, on application on the grounds of such decision made to that court by the Director of Public Prosecutions or other prosecutor against whom the decision was given."

[21] The plain text of section 316(1)(a) makes it clear that the section only has reference to an accused. References to the Director of Public Prosecutions or other prosecutor only appear from subsection 3 onwards. A plain reading of

subsection 3 makes it clear that the subsection refers to a further appeal from a decision of a full court and not to an appeal to a full court.

[22] Section 319 of the CPA deals specifically with the reservation of a question of law – the only ground of appeal for the State – on the trial in a superior court. Subsection 1 thereof provides as follows:

> *"*If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or of the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specifically entered in the record and a copy thereof be transmitted to the registrar of the Appellate Division.*"*

[23] From what I have stated herein I find it difficult to understand how there could have been any confusion in the mind of the State, as admitted to in argument before us by Mr Wasserman and as is evident from its Application for Leave to Appeal and Notice of Appeal, as to the section of the CPA to be used by it for an appeal as well as the forum for the hearing of the appeal. An application of the principles stated in *Endumeni* above should have cleared any possible confusion. In my view, there is nothing in the text or the context of sections 315 and 316 to suggest that an appeal by the State can lie to a full court. If those sections were to be interpreted as giving the State such option it would be in direct conflict with section 319 of the CPA and would therefore in the words of *Endumeni* be 'insensible' and 'unbussinesslike'.

[24] I am further unable to agree with Mr Wassermann's contention that section 319 can only be used during the course of a trial. The section specifically refers to a question of law that "arises <u>on</u> the trial in a superior court. . ." (own emphasis). It is worthy to note that the Legislature did not use the prepositions 'in' or 'during' when constructing section 319, but 'on'. Logic dictates that by doing so the Legislature did not intend to restrict the time during which a question of law can be raised for reservation, but left it open to include the period after verdict and/or sentence. I am fortified in this view by the fact that I could not find any authority for the view of the appellant, nor were we referred to any such

authority by the appellant. It appears that in the ordinary course of events, a trial court is asked to reserve questions of law after completion of the trial.

[25] I am also unable to agree with Mr Wassermann's argument that section 319 is the wrong catalyst for the State to use in noting an appeal from the decision of the High Court as a court of first instance. The appellant's reliance on *Ramdass* above in support of this argument is in my view misplaced. The issue in *Ramdass* was an application for leave to appeal which was refused by the High Court. In the process of appealing that decision by the High Court, the State used section 16(1)(b) of the Superior Courts Act[6]. The SCA did not agree with this route followed by the State. Swain JA, writing for the court, stated the following in paragraph 4: *"The starting point, in determining the correct jurisdictional path that should have been followed by the state, is section 319 of the Criminal Procedure Act."*

[26] It is not only clear from the above that the appeal before us can be distinguished from that in *Ramdass*, but also that *Ramdass* is, in fact, authority for the proposition that section 319 of the CPA is the correct catalyst for an appeal by the State against a decision of the High Court as the court of first instance.

[27] From the above, it follows that this court does not have jurisdiction to hear the appeal and that the point *in limine* must therefore succeed. It is clear that the appellant unwittingly led the court *a quo* astray to believe that it can exercise the discretion afforded to it under the provisions of section 315(2)(a) of the CPA. The obvious question for the State must then now be: *Quo vadis*? The answer, quite fortunately, appears to be at hand and uncomplicated. It can be found in section 315(2)(b) of the CPA which provides that:

> "Any such direction by the court or a judge of the High Court may be set aside by the Supreme Court of Appeal on application made to it by the accused or Director of Public Prosecutions or other prosecutor within 21 days, or such longer period as may on application to the Supreme Court of Appeal on good cause shown, be allowed, after the direction was given."

[6]Superior Courts Act 10 of 2013.

[28] For these reasons I make the following orders:

Order

1. The point in *limine* is upheld.

2. The appeal is struck off the roll

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WJ BRITZ

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

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M A MAKUME

JUDGE OF THE HIGH COURT

JOHANNESBURG

I agree, and it is so ordered.

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S JOHNSON

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

I agree.

Appearances*:*

For the Appellant:

For the Respondent:

Date of hearing: 4 September 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via *e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 14h00 on 28 September 2023.*

Adv J G Wassermann instructed by Director of Public Prosecutions, Johannesburg.

Adv R Gissing instructed by Maile & Associates Attorneys, Kempton Park.

THE STATE V MAGERU SAMUEL BYANJA

Case Number: A51/2020

Date of Judgment: 28 September 2023

SUMMARY

[29] The respondent and a co-accused were charged with murder, attempted murder, firearm offences, and corruption. The co-accused was acquitted on all charges except corruption. The respondent was acquitted on all charges against him.

[30] The State applied for leave to appeal the respondent's acquittals under sections 315 and 316 of the Criminal Procedure Act (CPA). The court *a quo* reserved two questions of law and referred them to the Full Court. The respondent excepted to the jurisdiction of the Full Court to hear the appeal, on the basis that sections 315 and 316 only apply to appeals by accused persons, not the State. The State can only appeal under section 319 of the CPA.

[31] The court agreed with the respondent's arguments after analysing the wording and purpose of sections 315, 316 and 319 of the CPA. Section 319 allows the State to reserve a question of law arising "on the trial", which includes after judgment. The court concluded it does not have jurisdiction over the appeal as section 319 of the CPA was the proper procedure for the State to follow. The State should have reserved questions of law under section 319 and referred them to the Supreme Court of Appeal.

[32] In sum, the court found that it did not have jurisdiction over the State's appeal as the wrong statutory procedure was followed. The State must use section 319 to reserve questions of law for the Supreme Court of Appeal. Held – The Full Court had no jurisdiction to hear the appeal as sections 315 and 316 of the CPA only provide a right of appeal to accused persons, not the State. The State can only

appeal an acquittal under section 319 of the CPA by reserving a question of law arising on the trial. Further held – Section 319 is not limited to reserving questions during the trial – it extends to after judgment. The point *in limine* was upheld, and the appeal struck off the roll.