THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Reportable

CASE NO 509/2007

In the matter between

SIPHO SIANETH LAWRENCE MATSHONA Appellant

and

THE STATE Respondent

Coram: Navsa, Ponnan JJA and Leach AJA

Heard: 07 MAY 2008

Delivered: 28 MAY 2008

Summary: Appeal to Supreme Court of Appeal against the refusal in a high court of a petition seeking leave to appeal against a sentence imposed in a regional court – leave to appeal to the high court should have been granted – merits of the appeal against sentence to be determined by the high court.

Neutral citation: Matshona v The State (509/2007) [2008] ZASCA 58 (28 May 2008)

JUDGMENT

LEACH AJA

[1] The appellant was arraigned in the regional court in Pretoria on 45 charges of fraud. Following a plea of guilty to 37 of these charges which was accepted by the State, the appellant was duly convicted on those counts. They were taken together for the purposes of sentence and the appellant was sentenced to seven years imprisonment. His application for leave to appeal to the high court against the sentence brought under s 309B of the Criminal Procedure Act 51 of 1977 was dismissed. A subsequent petition to the high court under s 309C was similarly unsuccessful, as was a further application for leave to appeal against the refusal of the petition. With the necessary leave of this court, the appellant now appeals against the refusal of his petition in the high court.

[2] It is necessary at the outset to consider the ambit of this appeal, particularly as counsel on both sides urged us to deal with the merits of the appeal against the appellant's sentence. Tempting though it might be to do so as the full record is available, for the reasons set out below the invitation must be declined.

[3] In *S v Khoasasa* 2003 (1) SACR 123 (SCA) ([2002] 4 All SA 635), after a detailed analysis of the relevant provisions relating to appeals, this court concluded that an order of the high court refusing leave to appeal was an order of a provincial division against which an appellant, either with leave of the high court or with leave of this court, could appeal. It also held[1] that a sentence imposed in the regional court can only be appealed against in this court when an appeal against such sentence has failed in the high court.

[4] In my view, the reasoning in *Khoasasa* is unassailable. The appeal of an accused convicted in a regional court lies to the high court under section 309(1)(a), although leave to appeal is required either from the trial court under s 309B or, if such leave is refused, from the high court pursuant to an application made by way of a petition addressed to the judge-president under s 309C(2) and dealt with in chambers. In the event of this petition succeeding, the accused may prosecute the appeal to the high court. But, if it is refused, the refusal constitutes a " judgment or

[1] At [12].

order " or a "ruling" of a high court as envisaged in s 20(1) and s 21(1) of the Supreme Court Act 59 of 1959[2], against which an appeal lies to this court on leave obtained either from the high court which refused the petition or, should such leave be refused, from this court[3] by way of petition.[4]

[5] It is clear from this that where, as is here the case, an accused obtains leave to appeal to this court against the refusal in a high court of a petition seeking leave to appeal against a conviction or sentence in the regional court, the issue before this court is whether leave to appeal should have been granted by the high court and not the appeal itself which has been left in limbo, so to speak, since the accused first sought leave to appeal to the high court. After all, in the present case, the appellant's appeal against his sentence has never been heard in the high court and, as was held in *S v N* 1991 (2) SACR 10 (A) at 16, the power of this court to hear appeals of this nature is limited to its statutory power.[5] Section 309(1) prescribes that an appeal from a magistrates' court lies to the high court, and an appeal against the sentence imposed on the appellant in the regional court is clearly not before this court at this stage. As was observed by Streicher JA in *Khoasasa*:[6]

'Geen jurisdiksie word aan hierdie Hof verleen om 'n appél aan te hoor teen 'n skuldigbevinding en vonnis in 'n laer hof nie. Dit is eers nadat 'n appél vanaf 'n laer hof na 'n Provinsiale of 'n Plaaslike Afdeling misluk het dat 'n beskuldigde met die nodige verlof na hierdie Hof appél kan aanteken.'

[6] Not only does this court lack the authority to determine the merits of the appellant's appeal against his sentence at this stage, but there are sound reasons of policy why this court should refuse to do so even if it could. It would be anomalous and fly in the face of the hierarchy of appeals for this court to hear an appeal directly from a magistrates court without that appeal being adjudicated in the high court, thereby serving, in effect, as the court of both first and last appeal. In addition, all persons are equal under the law and deserve to be treated the same way. This would not be the case if some offenders first had to have their appeals determined in

[2] *Khoasasa* at [14].
[3] Section 20 (4)(b) as read with s 21(1) and (2) of the Supreme Court Act.
[4] Section 23 of the Supreme Court Act.
[5] See s 315(1).
[6] At [12].

the high court before they could seek leave to approach this court if still dissatisfied while others enjoyed the benefit of their appeals being determined firstly in this court. And most importantly, this court should be reserved for complex matters truly deserving its attention, and its rolls should not be clogged with cases which could and should be easily finalised in the high court.

[7] Consequently this court cannot determine the merits of the appeal but must confine itself to the issue before it, namely whether leave to appeal to the high court should have been granted. It follows that in *S v Nel* 2007 (2) SACR 481 (SCA) the court erred in assuming that it had jurisdiction to entertain an appeal against sentence at this stage. While the judgment in that case referred to *Khoasasa*, the ratio set out therein was not applied.

[8] I turn now to consider whether leave to appeal to the high court against the sentence imposed by the regional court should have been granted. The test in that regard is simply whether there is a reasonable prospect of success in the envisaged appeal against sentence, rather than whether the appeal against the sentence ought to succeed or not.

[9] The appellant was a first offender who, at the time of his trial, was 37 years of age. He was employed as the manager of a branch of a country wide-chain store and abused the position of trust in which he had been placed by making fraudulent credit refunds which led to substantial sums of money being paid from his employer's bank account into the accounts of himself, members of his family and friends. The charges to which he pleaded guilty had resulted in a loss of more than R300 000 to his employer, and were committed over a period of some eight months during which he had more than adequate time to reflect on his actions and to decide to desist. He did not.

[10] On the other hand, the appellant has been left in no doubt that crime does not pay. Not surprisingly, he was discharged by his employer and, although he was fortunate enough to obtain other employment, it was at a lesser rate of remuneration. His wife's reaction to learning of his criminal conduct led to the failure of their

marriage and, in addition, a confiscation order in an amount of R309,000.00 was made against him under s 18 of the Prevention of Organised Crime Act 121 of 1998.

[11] In the light of the outcome of this appeal, it is neither necessary nor desirable to deal further with the facts. Suffice it to say that, bearing the factors mentioned above in mind, there exists a reasonable prospect that a court of appeal might consider the sentence imposed to be too severe, even should it take the view that direct imprisonment is warranted. That much was conceded by counsel for the state, and this appeal must therefore succeed.

[12] In the result:

(a) The appeal succeeds.

(b) The order refusing the appellant leave to appeal is set aside and is replaced with an order granting the appellant leave to appeal to the High Court (Pretoria) against the sentence imposed on him in the regional court.

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L E LEACH
ACTING JUDGE OF APPEAL

CONCUR:) NAVSA JA
) PONNAN JA