

THE SUPREME COURT OF
JUDGMENT



APPEAL OF SOUTH AFRICA

Not Reportable

Case No: 20109/2014

In the matter between:

Gerhardus Ignatius Potgieter

Appellant

and

The State

Respondent

Neutral Citation: *Potgieter v S* (20109/2014) [2015] ZASCA 15 (17 March 2015)

Coram: Lewis, Ponnar, Bosielo and Willis JJA and Van der Merwe AJA

Heard: 17 March 2015

Delivered: 17 March 2015

Summary: In terms of s 16(1)(b) of the Superior Courts Act 10 of 2013, an appeal to this court against a decision of a court on appeal to it lies only with the special leave of the Supreme Court of Appeal. An order granting leave to appeal to this court by the provincial division is a nullity and this court has no jurisdiction to hear the appeal.

ORDER

On appeal from: Free State High Court, Bloemfontein (Rampai and Moloji JJ and Phalatsi AJ sitting as court of appeal)

The appeal is struck from the roll.

JUDGMENT

Lewis JA (Ponnan, Bosielo and Willis JJA and Van der Merwe AJA concurring)

[1] The appellant in this matter was convicted of rape by the regional court, Bloemfontein and sentenced to eight years' imprisonment. The act of rape was the penetration by him of the complainant's vagina with his fingers: section 3 of the Sexual Offences Act 32 of 2007 defines such penetration without the consent of the victim as rape. The regional magistrate accepted the complainant's version of events and rejected the appellant's as not reasonably possibly true.

[2] A full court of the Free State Division of the High Court (Ramphai and Moloji JJ and Phalatsi AJ) dismissed the appeal to it by the appellant, finding that the trial court's findings as to the credibility of the complainant, and that the appellant's version was not reasonably possibly true, were correct. It nonetheless gave leave to the appellant to appeal to this court against its decision.

[3] That it was not able to do. Section 16(1)(b) of the Superior Courts Act 10 of 2013, in operation at the time when the full court heard the appeal and handed down judgment (August and October 2013), provides that an appeal against the decision of an appeal court lies to this court only with special leave granted to it by this court. The full court did not have the power to grant leave to this court. Its order is thus a nullity and this court has no jurisdiction.

[4] And although the appellant was advised of this prior to the hearing, he failed to make any application to this court for special leave. The appellant and the State have filed supplementary heads of argument at the request of the registrar of this court as to this court's jurisdiction to hear the matter. And in her supplementary heads of argument counsel for the appellant requests that we grant special leave. But that is not sufficient. One cannot ask for special leave in heads of argument. A substantive petition, supported by an affidavit, ought to have been filed. And the argument that this court has inherent jurisdiction to regulate its own processes must fail because we have inherent power only where we have jurisdiction in the first place.

[5] A postponement to give the appellant the opportunity to make such application is not, in my view, warranted. No case has been made out for special leave, the requirements for which have been repeatedly set out by this court. Most recently, in *Van Wyk v S* and *Galela v S* [2014] ZASCA 152 (22 September 2014) this court reaffirmed the principles set out by Corbett JA in *Westinghouse Brake and Equipment v Bilger Engineering* 1986 (2) SA 555 (A) at 564H-565E. In addition to showing that there is a reasonable prospect of success on appeal, an applicant must show special circumstances which merit a further appeal to this court. These might be a substantial point of law, a matter of great importance to the public or to the parties, or where the prospects of success on appeal are so strong that refusal of the application would result in a manifest injustice.

[6] In this matter the findings of the full court turn purely on the credibility of the complainant and the appellant. There is no special circumstance and none has been contended for. In my view, there appears to be little prospect of success on appeal, and certainly there are no special circumstances warranting special leave to appeal.

[7] As leave to appeal was granted to this court in error we have no jurisdiction and the appeal must accordingly be struck from the roll.

[8] The appeal is struck from the roll.

CH Lewis
Judge of Appeal

APPEARANCES

For Appellant:

I J Bezuidenhout

Instructed by:

UFS Law Clinic, Bloemfontein

For Respondent:

M A Mohlala

Instructed by:

Director of Public Prosecutions,
Bloemfontein