



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not reportable
Case No: 1020/2020

In the matter between:

KEDUMETSE MACWILLIAM NGAKANTSI

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Kedumetse M Ngakantsi v The State* (1020/2020) [2020]
ZASCA 94 (19 August 2020)

Coram: Ponnan and Schippers JJA and Ledwaba AJA

Heard: 19 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and publication on the Supreme Court of Appeal website. The date and time of hand-down is deemed to be 10h00 on 19 August 2020.

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

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Djaje J and Morwane AJ sitting as court of appeal):

- 1 The appeal is upheld.
- 2 The order of the high court refusing the appellant leave to appeal in terms of s 309C of the Criminal Procedure Act 51 of 1977, is set aside and replaced with the following order:
‘The appellant is granted leave to appeal to the full court of the North West Division of the High Court against:
 - (a) his convictions in respect of the contraventions of s 72 of the Criminal Procedure Act 51 of 1977 and the sentences imposed pursuant thereto; and
 - (b) the sentence imposed on him in respect of his conviction of corruption in terms of s 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.’

JUDGMENT

Schippers JA (Ponnan JA and Ledwaba AJA concurring):

[1] The issue in this appeal, with the special leave of this Court, is whether the appellant’s petition for leave to appeal in terms of s 309C of the Criminal Procedure Act 51 of 1977 (the CPA) ought to have been refused by the North West Division of the High Court, Mahikeng (the high court). The parties have

agreed that the appeal may be disposed of without the hearing of oral argument, in terms of s 19(1)(a) of the Superior Courts Act 10 of 2013.¹

[2] The facts are largely common ground. The appellant, a constable in the Stock Theft Unit (the Unit) of the South African Police Service (the SAPS) was charged in the Vryburg Regional Court with one count of corruption under s 4(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Corrupt Activities Act). The State alleged that in January 2012 the appellant corruptly sold a stray cow for R3 000 in cash for his own benefit. The court convicted him of contravening s 4(1) of the Corrupt Activities Act. The appellant was sentenced to five years' imprisonment for this offence.

[3] In the course of the trial the appellant, who had been released on warning, failed to appear in court on two occasions, namely 8 October 2015 and 18 April 2016. A week before he had to appear in court on 8 October 2015, the appellant consulted Dr Mbabane, his family doctor, who referred him to Dr Tshabalala, a psychiatrist. The latter admitted him to hospital where the appellant remained for three weeks. Dr Tshabalala certified that he was unable to attend the court proceedings from 5 October 2015 to 9 December 2015. Regarding his failure to appear on 18 April 2016, the appellant said that his body had become weak and he submitted a medical certificate by Dr Mbabane, stating that he was suffering from psychosis and indisposed from 15 to 19 April 2016.

[4] At the enquiry into his failure to appear in court in terms of s 72(2) of the CPA, the appellant adduced the evidence of Dr Ntawisi, a psychiatrist whom he consulted on 16 May 2016. His diagnosis was that the appellant suffered from a

¹ Section 19(a) provides: 'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any law - dispose of an appeal without the hearing of oral argument.'

severe major depressive disorder that could cause a number of physical conditions, and that he had suicidal tendencies. The appellant testified that he became very anxious close to each court date when he was due to be sentenced. His body became weak and he consulted a doctor. He denied that this was planned and said that his body reacted in that way. The trial court concluded that the appellant's failure to appear was wilful, found him guilty on two counts of contravening s 72(2) of the CPA and sentenced him to a fine of R200 000 on each count.

[5] The appellant's application for leave to appeal was dismissed by the regional court. He then petitioned the high court in terms of s 309C of the CPA. Djaje J and Morwane AJ, who considered the petition, dismissed it in chambers on 13 February 2019. The appellant thereupon petitioned this Court for special leave to appeal the dismissal of his petition by the high court. The order of the two judges of this Court, who considered the appellant's petition and referred it to this Court, was limited to the convictions and sentences relating to the contraventions of s 72 of the CPA, and the sentence imposed for the contravention of s 4(1) of the Corrupt Activities Act.

[6] The judgment sought to be appealed against is a judgment of the regional court. Since the petition for leave to appeal was refused by the high court, this Court is not called upon to consider the substantive merits of the appeal, but whether the high court should have granted leave to appeal.² The test is whether there are reasonable prospects of success in the envisaged appeal.³

² *S v Khoasasa* 2003 (1) SACR 123 (SCA) paras 19-22; *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA) para 3.

³ *Tonkin* fn 2 para 3; *De Almeida v S* [2019] ZASCA 84 para 5.

[7] Section 72(2) of the CPA provides, inter alia, that an accused released on warning who fails to appear, shall be guilty of an offence and liable to the punishment prescribed in subsection (4). In terms of s 72(4), if a court is satisfied that an accused was duly warned to appear and has failed to do so, it may,

‘. . . in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that [*there is a reasonable possibility that*] his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.’

In *S v Singo*,⁴ the Constitutional Court said that the italicised words in the above quotation should be read as if incorporated in s 72(4). This means that the accused need merely satisfy the court that there is a reasonable possibility that his failure to appear was not due to fault on his part.⁵

[8] The argument advanced in respect of the appellant’s conviction on these charges is that on the evidence in its totality, and in particular the medical evidence adduced, there is a reasonable prospect of a court on appeal arriving at the conclusion that his failure to appear in court on the two occasions in question, was not due to any fault on his part. As to the sentence imposed upon the appellant by the regional court for his conviction on each of these two counts, the argument is that the sentence appears, on the face of it, to have exceeded the maximum amount prescribed by the section.

[9] Regarding the sentence for the contravention of s 4(1) of the Corrupt Activities Act, the appellant’s counsel made the following submissions. The charge, albeit serious, was a single count that did not involve a large amount. The appellant was a first offender. He was not dismissed from the SAPS after disciplinary proceedings were brought against him, and at the time of sentencing

⁴ 2002 (2) SACR 160 (CC) para 44.

⁵ A Kruger *Hiemstra’s Criminal Procedure* (Service Issue 12) at 10-2.

was still employed at the Unit. There is a reasonable prospect that an appellate court may alter the sentence imposed, or consider another form of sentence to meet the legitimate expectation of society that corrupt officials be duly punished, having regard to the particular circumstances of this case.

[10] There is accordingly much to be said for the argument that there are reasonable prospects of success in the envisaged appeal.

[11] In the result, the following order is made:

- 1 The appeal is upheld.
- 2 The order of the high court refusing the appellant leave to appeal in terms of s 309C of the Criminal Procedure Act 51 of 1977, is set aside and replaced with the following order:
‘The appellant is granted leave to appeal to the full court of the North West Division of the High Court against:
 - (a) his convictions in respect of the contraventions of s 72 of the Criminal Procedure Act 51 of 1977 and the sentences imposed pursuant thereto; and
 - (b) the sentence imposed on him in respect of his conviction of corruption in terms of s 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004.’

A Schippers
Judge of Appeal

APPEARANCES

For appellant:

P J S Smit

Instructed by:

Herman Scholtz Attorneys, Mafikeng

Rossouws Attorneys, Bloemfontein

No appearance for respondent