



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**Frank Nabolisa v The State**

**CCT 105/12**

**Date of Hearing: 7 March 2013**

**Date of Judgment: 12 June 2013**

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### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today the Constitutional Court delivered a judgment upholding an appeal against the judgment and order of the Supreme Court of Appeal.

Mr Frank Nabolisa (applicant), together with his co-accused Ms Sheryl Cwele, were tried and convicted in the KwaZulu-Natal High Court, Pietermaritzburg (High Court) of dealing in dangerous dependence-producing drugs, namely cocaine, with a street value of approximately R2 million. Having been convicted and sentenced each to 12 years imprisonment, the applicant and Ms Cwele appealed to the Supreme Court of Appeal. Ms Cwele appealed against her conviction only whilst the applicant challenged the conviction and the sentence imposed on him.

The State did not seek leave to cross-appeal against the sentence. However in its written submissions, the State asked for an increase in sentence from 12 years' to 15 years' imprisonment. Emboldened by a later confirmation of a sentence of 20 years' imprisonment by the Supreme Court of Appeal in another case, the State filed supplementary written submissions, stating that it would argue for the sentence imposed to be increased to 20 years' imprisonment.

The Supreme Court of Appeal found in the State's favour and increased the sentence to 20 years' imprisonment. The applicant's complaint against the increased sentence is that the Supreme Court of Appeal acceded to the State's request and increased the sentence to 20 years' imprisonment, in circumstances where the State had failed to comply with section 316B of the Criminal Procedure Act. This section confers on the State the right to appeal against a sentence imposed in a criminal trial in the High Court. The applicant

contended that the procedure followed in the Supreme Court of Appeal violated his constitutional right to a fair hearing on appeal.

In a majority judgment prepared by Jafta J in which Mogoeng CJ, Froneman J, Mhlantla AJ, Nkabinde J, Khampepe J and Zondo J concurred; it was held that a close examination of the text of section 316B shows that it imposes on the State the same obligations placed on an accused person by section 316 of the Criminal Procedure Act. The most important being the obligation to apply for leave which must be lodged with the trial Court within 14 days after the passing of the sentence. The record shows that the State failed to apply for leave to cross-appeal in the case against the applicant and to appeal against the sentence imposed on Ms Cwele. Majority reasoned, the State lost its right to appeal. Moreover, no extension was asked for and obtained.

The majority held that the proposition that where an accused person appeals against conviction only, it would be improper to increase the sentence imposed based on the State's request contained in argument cannot be gainsaid. The majority held that the failure to apply for leave to appeal the sentence goes to the root of the proceedings in the Supreme Court of Appeal in relation to the increase of sentence. It is fatal to the increase imposed by that Court, because it means the Supreme Court of Appeal simply did not have jurisdiction to consider the issue of an increase in sentence. The Majority held that the appeal should succeed and the sentence of 20 years imposed by the Supreme Court of Appeal must be set aside. The High Court sentence of 12 years' imprisonment must be reinstated.

In a dissenting judgment prepared by Skweyiya J, in which Moseneke DCJ and Van der Westhuizen J concurred, it was held that an informal practice continued to exist whereby the State could motivate for an increase in sentence without a cross-appeal in instances where the accused instigates an appeal. The minority found that section 316B of the Criminal Procedure Act does not require the State to cross-appeal, but merely creates a right for the State to appeal against an overly lenient sentence when the accused declined to appeal. No irregularity thus occurred to render Mr Nabolisa's trial unfair. Skweyiya J further held that there had been no failure of justice in this case as the issue of sentence was ventilated in the Supreme Court of Appeal and Mr Nabolisa had received adequate notice that the State sought to increase his sentence. Accordingly, the minority concluded, it would not be appropriate for this Court to interfere with the sentence imposed by the Supreme Court of Appeal. The minority would have dismissed the appeal.