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

**JUDGMENT**

Case No: 20099/2014
Not Reportable

In the matter between:

**JUAN HATTINGH** **APPELLANT**

and

**THE STATE** **RESPONDENT**

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| **Neutral citation:** | *Hattingh v The State* (20099/2014) [2015] ZASCA 84 (28 May 2015) |
| **Coram:** | Cachalia, Majiedt, Petse and Zondi JJA and Gorven AJA |
| **Heard:** | 20 May 2015 |
| **Delivered:** | 28 May 2015 |

**Summary:** Sentence ─ imposition of ─ factors to be taken into account ─ appellant convicted on 64 counts of fraud, one count of theft and one count of money laundering ─ minimum sentencing provisions of the Criminal Law Amendment Act 105 of 1997 not applicable ─ period spent in prison awaiting trial being one of the factors to take into account in determining appropriate sentence ─ leave to appeal ─ s 16(1)*(b)* of the Superior Courts Act 10 of 2013 ─ an appeal to this court against a decision of a division of the high court on appeal to it competent only with the special leave of the Supreme Court of Appeal.

## ORDER

**On appeal from:** Free State Division of the High Court, Bloemfontein (Rampai AJP and Monaledi AJ sitting as court of appeal):

The following order is made:

1 The appellant is granted special leave to appeal in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 against the sentence imposed by the regional court, Bloemfontein in respect of the 64 counts of fraud, confirmed on appeal by the court a quo.

2 The appeal is upheld. The order of the court a quo is set aside and substituted with the following order:

'The appeal is upheld. The sentences imposed by the trial court in respect of the counts of fraud are set aside and substituted as follows:

(i) On counts 1 to 64 the accused is sentenced to 12 years' imprisonment.

(ii) The sentence of six years' imprisonment imposed in respect of count 65 is ordered to run concurrently with the sentence imposed in respect of counts 1 to 64.

(iii) The sentence is ante-dated to 23 May 2011.'

## JUDGMENT

**Petse JA (Cachalia, Majiedt and Zondi JJA and Gorven AJA concurring):**

[1] The appellant was convicted on his plea of guilty in the regional court, Bloemfontein, on 64 counts of fraud, one count of theft and one count of money laundering in contravention of s 4*(a)* of the Prevention of Organised Crime Act 121 of 1998.

[2] Before the appellant pleaded to the charges the prosecutor informed the trial court that the appellant was represented by counsel and intended pleading guilty to all counts and that to that end counsel had prepared a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA).

[3] Thereafter the appellant pleaded guilty to all counts. The appellant's counsel then handed in the s 112(2) written statement and sought leave of the trial court to read its contents into the record. At the outset the trial court, cognisant of the fact that the charge sheet had made reference to the provisions of s 51(2)*(a)* of the Criminal Law Amendment Act 105 of 1997 (the Act) in respect of 32 of the fraud counts, each involving an amount in excess of R500 000, which would attract a mandatory minimum sentence of 15 years' imprisonment, inquired of the appellant's counsel whether the appellant was alive to that fact. Both the appellant and his counsel confirmed that this was indeed the position.

[4] Once these preliminary issues were resolved, the appellant's written statement was read into the record. In that statement the appellant, with reference to annexure A to the charge sheet, which was a schedule containing, inter alia, (a) the dates on which the various offences were committed; (b) the identities of the victims of his criminal transgressions; (c) the amounts relating to each count; and (d) particulars of the immovable property sold and mortgaged, admitted all the material elements of the various offences as well as the underlying facts but not that the amounts involved in respect of the 32 counts of fraud were in excess of R500 000. Although the appellant had explicitly admitted the amounts relating to the count of theft ─ all of which were less than the threshold that would trigger the application of the minimum sentence legislation ─ he studiously did not do so in relation to all of the fraud counts. On the contrary he maintained that the potential or actual prejudice to his victims, being, amongst others, The Standard Bank of South Africa Ltd, ABSA Bank Ltd, First National Bank Ltd and Nedbank Ltd, would be mitigated by the proceeds of sale of the immovable properties mortgaged in their favour when they are eventually sold and thus their ultimate loss would be substantially less than the amount reflected in column 5 of annexure A to the charge sheet.

[5] The prosecutor accepted the plea and the trial court, being satisfied that the appellant had 'correctly pleaded to the elements of fraud relating to count 1 to 64' convicted the appellant 'as charged in respect of counts 1 to count 64'. The appellant was similarly convicted as charged in respect of the counts of theft and money laundering. In this appeal we are concerned only with the sentence for the 64 counts of fraud. The crisp issue is whether the 32 counts where the State alleged that the prejudice suffered equalled or exceeded R500 000, brought the convictions on those counts within the ambit of the Act. This issue revolves around the precise scope of the plea of guilty as substantiated by the s 112(2) statement, and whether the evidence adduced after conviction during the sentencing stage should have been taken into account in relation to the conviction. As to the latter point, it is clear that no such evidence can be taken into account as forming the basis for the conviction. Once a plea explanation has been accepted, that alone forms the factual matrix for the conviction. This means that any evidence led after conviction which may place the matter within the ambit of the minimum sentencing provisions must be disregarded.

[6] At the conclusion of the evidence led in aggravation and mitigation of sentence the trial court proceeded to consider what the appropriate sentence should be. After setting out the principles relevant to sentence it went on to deal with the mandatory minimum sentencing provisions prescribed in terms of s 51(2)*(a)* of the Act. It found that these were applicable but that substantial and compelling circumstances justifying a lesser sentence than the mandatory one existed. In consequence it imposed a composite sentence of 10 years' imprisonment in respect of the 32 counts of fraud to which s 51(2)*(a)* of the Act applied. In respect of the remaining counts of fraud the trial court, again taking them together for purposes of sentence, also imposed a sentence of 10 years' imprisonment. A sentence of six years' imprisonment was imposed on count 65 (theft) which was ordered to run concurrently with the combined sentence of 20 years' imprisonment. Eight years' imprisonment, wholly suspended conditionally, was imposed on count 66 (money laundering). The end result was an effective sentence of 20 years' imprisonment. It

subsequently granted the appellant leave to appeal against that sentence to the Free State Division.

[7] The appeal to the court a quo was dismissed in a judgment of Rampai AJP (in which Monaledi AJ concurred). Disenchanted with the outcome of his appeal, the appellant applied for leave to appeal to this court. In granting leave, the court a quo, in a judgment by C J Musi J in which Rampai J concurred, said the following:

'[15] It is clear that the applicant did not admit the amounts as per the charge sheet. He admitted that the prejudice or potential prejudice suffered is a lesser amount than that stated in the charge sheet in respect of counts 1 to 58.

[16] It is clear that neither the regional magistrate nor the prosecutor properly understood the import of the statement in amplification of the plea . . . In my view the [appellant] did not admit the amounts in column 5 of annexure "a" to the charge sheet.'

Since the coming into effect of the Superior Courts Act 10 of 2013, the position regarding the grant of leave to appeal to this court in those circumstances has changed. The provisions of s 16(1)(*b*) of that Act applies in that, '. . . an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal'. Since this is an appeal as defined in that Act, the court a quo lacked jurisdiction to entertain such an application.[1] At the outset of the hearing, this provision was quite properly drawn to our attention by Mr Nel, who appeared for the appellant, and an application was sought for special leave to appeal to be granted. In the light of the test for special leave, it is appropriate to grant special leave and it was also appropriate to deal with the substance of the appeal.

[8] It is unnecessary to recapitulate the evidence adduced during the sentencing stage in detail. It will suffice to set out the background in broad outline. The appellant, who was 36 years of age at the time of his trial, was practising as an attorney and conveyancer in Bloemfontein. Amongst his clients, he counted the so-called big four local banks, namely, The Standard Bank of South Africa Ltd, First National Bank Ltd, ABSA Bank Ltd and Nedbank Ltd. The work that he received

[1] *Van Wyk v The State; Galela v The State* [2014] ZASCA 152 (22 September 2014) para 24(b). [2014] 4 All SA 708 (SCA) para 24(b).

from these banks encompassed the registration of transfers of immovable property, registration of mortgage bonds in favour of the banks to secure moneys lent by the banks to their clients, cancellation of mortgage bonds and issuing money guarantees to third parties on behalf of the banks. Apart from his firm, Hattingh Attorneys, of which he was the sole proprietor, he also held interests in other local firms of attorneys. As his practice flourished he ventured into other enterprises such as property development, construction, an estate agency and a franchise in Quatro Home Loans, who were bond originators.

[9] His professional relationship with his clients was founded on the absolute trust that the clients reposed in him. For this reason the banks, in particular, placed absolute reliance on him that the mortgage bonds that he was, from time to time, instructed to register would afford the banks valid and enforceable rights at all times given the risk that the banks undertook when lending money to their clients. The appellant's decision to venture into construction and property development was motivated by his belief that those were lucrative enterprises. But he soon ran into financial difficulties when he could not recoup a sum of R800 000 that he had invested in the construction of 12 houses as a sub-contractor to R J Contractors. This was the origin of the trail of his criminal escapades that persisted over a period of four years until his exposure.

[10] To make up for the cash shortfall in his business ventures he devised an elaborate scheme to perpetrate fraud against the banks and the entities that extended bridging finance to third parties through his practice. He issued guarantees on behalf of the banks and when he received the money in the fullness of time he appropriated it for his own use. On several occasions he registered double mortgage bonds over properties without the knowledge of the banks. He sometimes misrepresented to the banks that mortgage bonds that he had been instructed to register had been registered when in truth that was not the case. He lured unsuspecting third parties to become participants in what, on the face of it, were legitimate activities, in order to effectively execute his nefarious schemes.

[11] The State called four witnesses in aggravation of sentence. They were the representatives of the four banks affected by the appellant's crimes. The State's evidence in essence was that the appellant was one of the attorneys who were on the panel of attorneys retained by the affected banks to undertake conveyancing work on their behalf. For a long time the banks believed all was well until the appellant's machinations came to light. When this occurred, the true state of affairs set out in the preceding paragraph, was exposed. On occasions the banks were induced to believe, through false representations made by the appellant, that certain persons or legal entities received advances from them, thus concealing from the banks the extent of their exposure. And whilst the various properties remained unsold the banks were obliged to secure them in order to mitigate their potential losses.

**Aggravating factors**

[12] The crimes committed by the appellant are undoubtedly serious. And, it is sad to say, they are also prevalent. He was an attorney from whom the highest standards of propriety, honour and impeccable integrity were expected. He used his practice as an attorney to perpetrate fraud, theft and money laundering thus manifesting conduct that is anathema to the practice of an attorney. He deliberately subverted all the controls that the banks expected him to uphold. His malpractices were premeditated, carefully planned and executed and persisted in over four years. He betrayed the trust that his clients and those who dealt with him reposed in him. He engineered a deceitful scheme to conceal what he was about in his practice and thereby debased his profession. He employed the trust account of his practice to give legitimacy to the disbursements effected through it, indifferent to the enormous risks that exacerbated the banks' exposure.

**Mitigating factors**

[13] There are, however, a number of factors which count in the appellant's favour and I will mention some of them. He pleaded guilty to all of the charges of which he was convicted thereby manifesting contrition. He co-operated with the police investigation and even assisted the State to formulate the charges against himself. He was struck off the roll and suffered an ignominious fall from grace. He is a first offender. As an inevitable consequence of his misconduct and given the scale of his fraudulent activities his joint estate was sequestrated. After his initial attempt to evade justice he had cause to pause and surrendered himself to the authorities. He co-operated with the trustee of his insolvent estate in identifying and tracing his assets for the benefit of his creditors. He was incarcerated for almost a year awaiting trial. Although the appellant is the author of his own misfortune, he must have suffered embarrassment, disgrace and humiliation in the aftermath of his arrest, prosecution and conviction. He will live with a sense of shame for the anguish that he has caused those who are close to and looked up to him.

[14] I now turn to a consideration of the merits of the appeal. In summary the gravamen of the appellant's submissions in this court is that: (a) s 51(2)*(a)* of the Act, read with Part II of Schedule 2, was not applicable and should not have been invoked by the trial court; (b) there were material misdirections committed by the trial court and perpetuated by the high court; (c) that aggravating circumstances were overemphasised whilst mitigating circumstances were underemphasised; and (d) that the mitigating effect of the period spent in gaol awaiting trial was not accorded due weight.

[15] The circumstances in which an appellate court will interfere with a sentence imposed by a court of first instance are trite. They were reiterated by this court in *S v Sadler* 2000 (1) SACR 331 (SCA).[2] Sentencing is a matter pre-eminently within the discretion of the trial court and a court of appeal will interfere with the exercise of such discretion only on limited grounds.

[2] *S v Sadler* 2000 (1) SACR 331 (SCA) at 334d-335g.

[16] In *S v Malgas*[3] this court restated the test as follows:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned.'

[17] It is evident from the judgments of this court and other courts that offences involving dishonesty, such as those of which the appellant was convicted, have always been viewed in a serious light. Their gravity is, for example, underscored by what this court said in *S v Blank* 1995 (1) SACR 62 (A) at 73b-d:

'In view of all these facts, I feel fully justified in imposing a sentence which will deter not only the accused and other stockbrokers from committing crimes similar to those of which the accused has been convicted, but also others involved in business who may be tempted to indulge in larger-scale crimes of dishonesty. The time has already arrived when the severity of punishments imposed for this sort of crime while of course taking the personal circumstances of a particular accused into account, should proclaim that society has had enough and that the courts, who are the mouthpiece of society, will not tolerate such crimes and will severely punish offenders: cf *S v Zinn* 1969 (2) SA 837 (A) at 542D-E.'

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[3] *S v Malgas* 2001 (1) SACR 469 (SCA); (2001 (2) SA 1222 (SCA); [2001] 3 AllSA 220 (SCA) para 12.

[18] In *Sadler* this court recognised the seriousness of crimes such as fraud and their corrosive impact upon society. Concerning the appellant, the situation is exacerbated by the fact that he was also an attorney and thus occupied a position of trust vis-à-vis his clients. Our courts have for a long time taken a dim view of attorneys who betray the trust of their clients. Attorneys are, for reasons too obvious to require elaboration, expected to scrupulously observe the highest standard of professional integrity. A deviation from those standards not only impairs the integrity of those who stray from the path of rectitude but also debase their entire profession. As long ago as 1954 in *R v Roux* 1954 (4) SA 110 (T) Ramsbottom J said the following (at 111F-H):

'I have been asked by your counsel to say that because of your high position in the profession and because of your position in society your fall is all the greater and the suffering which comes to you by reason of that fall is all the greater. But I have some difficulty in giving effect to that argument. There is another side to that. The profession of the law is a most honourable profession. A very high standard of honour is required from its members. An attorney owes the greatest good faith to his partners and to his clients, and the higher he rises in his profession the greater is the responsibility which rests upon him. It must not and cannot be thought that greater leniency can be shown towards those members of the profession who have reached positions of eminence than to other practitioners who have not risen so high in the profession. All must be treated alike. Theft is always a serious crime. When it is committed by an attorney, who is in a position of trust, that is an aggravating circumstance.'

See also *S v Brown* 2015 (1) SACR 211 (SCA) para 123. Accordingly, it is in the light of the foregoing backdrop that this appeal must be considered.

**Application of s 51(2)*(a)***

[19] As I have stated before, the guilty plea tendered by the appellant was accepted by both the trial court and the prosecution. And having regard to the tenor of the appellant's s 112(2) statement and as observed by the court a quo in granting leave to this court it is evident that all those involved in the trial failed to appreciate the import of the admissions made by the appellant. They laboured under a misconception that the appellant had admitted not only the elements of the offences with which he was charged but most importantly also all of the amounts involved including those that would have triggered the applicability of s 51(2)*(a)* had they been admitted.

[20] In *S v Legoa* 2003 (1) SACR 13 (SCA)[4] this court dealt with the import of s 51(2)*(a)* and noted that for the minimum sentencing jurisdiction to exist in respect of an offence, the accused's conviction must encompass all the elements of the offence set out in the Schedule. It went further and said the following (para 15):

'It is an established principle of our law that a criminal trial has two stages - verdict and sentence. The first stage concerns the guilt or innocence of the accused on the offence charged. The second concerns the question of sentence. Findings of fact may be relevant to both stages. However, those in the first stage relate to the elements of the offence (or the specific form of the offence) with which the accused is charged. Those in the second mitigate or aggravate the sentence appropriate to the form of the offence of which the accused has been convicted.'

[21] It therefore goes without saying that for s 51(2)*(a)* to find application in this case it was incumbent upon the prosecution to prove all the elements of the offence of the affected fraud counts 'in the form specified in the Schedule'. This entailed that the evidence regarding all the elements of the form of the scheduled offence ought to have been led before verdict and for the trial court to find, as a matter of fact, that those elements specified in the Schedule were present.[5] This, the prosecution failed to do. Accordingly, where an accused is convicted solely on the basis of a s 112(2) statement, the offence contemplated in s 51(2)*(a)* of the Act must be determined only with reference to the contents of that statement.[6]

[22] Thus, having regard to the absence of a crucial element of the form of the scheduled offence charged before verdict, the trial court did not acquire the requisite jurisdiction to invoke s 51(2)*(a)* of the Act. Put differently, the trial court had 'a clean slate on which to inscribe whatever sentence it thought fit'[7] untrammelled by s 51(2)*(a)*. Accordingly, it was impermissible for the trial court to rely on the evidence adduced during the sentencing stage to the extent that it sought to cure the shortcomings in the State's case before conviction. This amounted to a clear and material misdirection as was mentioned in *Malgas*. This much was conceded by

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[4] Pararaph 15.
[5] Fn 2 paras 17-18.
[6] *S v Gagu & another* 2006 (1) SACR 547 (SCA) para 7.
[7] *S v Malgas* 2001 (1) SACR 469 (SCA); (2001 (2) SA 1222 (SCA); [2001] 3 All SA 220 (SCA)) para 8.

Mr Mlotshwa, who appeared for the State. Consequently the sentence imposed in respect of the 32 counts of fraud thought by the trial court to fall within the purview of s 51(2)*(a)* falls to be reconsidered and a fresh sentence imposed in respect of counts 1 to 64. In my view, these should be treated, as the trial court did, as one for purposes of sentence. Mr Mlotshwa agreed that this should be the case.

**Misdirections**

[23] The main thrust of the appellant's argument on this score is that both the trial court and the court a quo made certain factual findings that cannot be sustained on the evidence adduced during the sentencing stage. Counsel's heads of argument contain references to instances where the trial court and the court a quo misdirected themselves. I have already said that evidence which seeks to bring the offences within the purview of the minimum sentencing provisions cannot operate to do so. On the view I take of the matter I do not propose to traverse the balance of these submissions in this judgment. Suffice it to say that they do not seem to me in themselves to be of such magnitude as to demonstrate that those courts did not exercise their sentencing discretion properly and judicially.

**Appropriate sentence**

[24] As I have already found, both the trial court and the court a quo erroneously thought that s 51(2)*(a)* was applicable. But for that erroneous view there can be no doubt that the trial court would have imposed a composite sentence in respect of counts 1 to 64. A reading of the trial court's judgment on sentence otherwise reveals that it painstakingly weighed all the relevant factors in determining appropriate sentences. It took into account the cumulative effect of all the sentences and decided to ameliorate the appellant's situation by ordering the sentence imposed in respect of the count of theft to run concurrently with the sentences imposed for fraud and suspending the whole of the sentence imposed on the count of money laundering. It erred only to the extent that it treated some of the fraud charges differently from the rest as a consequence of the misconception under which it was labouring.

[25] I am therefore driven to the conclusion that the gravity of the offences of which the appellant was convicted undoubtedly calls for a severe sentence.

However, the severity of that sentence will be tempered by mercy. In *S v Muller*[8] this court said:

'When dealing with multiple offences, a sentencing court must have regard to the totality of the offender's criminal conduct and moral blameworthiness in determining what effective sentence should be imposed, in order to ensure that the aggregate penalty is not too severe. In doing so, while punishment and deterrence indeed come to the fore when imposing sentences for armed robbery, it must be remembered, as Holmes JA pointed out in his inimitable style, that mercy, and not a sledgehammer, is the concomitant of justice. And while a judicial officer must not hesitate to be firm when necessary, 'he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'. In addition, although it is in the interest of the general public that a sentence for armed robbery should act as a deterrent to others, an offender should not be sacrificed on the altar of deterrence.'[9]

In the light of both aggravating and mitigating circumstances, the cumulative effect of the sentence and taking into account the period that the appellant spent in prison awaiting trial as one of the relevant factors, [10] I am of the view that a period of twelve years' imprisonment is appropriate on counts 1 - 64. The learned magistrate had good reason to make the period of six years' imprisonment imposed in respect of count 65 run concurrently with the sentence imposed for counts 1 – 64 and this shall remain the case.

[26] In the result the following order is made:

1 The appellant is granted special leave to appeal in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 against the sentence imposed by the regional court, Bloemfontein in respect of the 64 counts of fraud, confirmed on appeal by the court a quo.

2 The appeal is upheld. The order of the court a quo is set aside and substituted with the following order:

'The appeal is upheld. The sentences imposed by the trial court in respect of the counts of fraud are set aside and substituted as follows:

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[8] *S v Muller & another* 2012 (2) SACR 545 (SCA).

[9] Footnotes omitted.

[10] *S v Radebe & another* 2013 (2) SACR 165 (SCA) para 14; *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala & others* 2014 (2) SACR 337 (SCA) paras 15-18.

(i) On counts 1 to 64 the accused is sentenced to 12 years' imprisonment.

(ii) The sentence of six years' imprisonment imposed in respect of count 65 is ordered to run concurrently with the sentence imposed in respect of counts 1 to 64.

(iii) The sentence is ante-dated to 23 May 2011.'

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X M PETSE
JUDGE OF APPEAL

APPEARANCES:

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|---|---|
| For Appellant: | J Nel<br>Instructed by:<br>Kramer Weihmann & Joubert, Bloemfontein |
| For Respondent: | J J Mlotshwa<br>Instructed by:<br>The Director of Public Prosecutions, Bloemfontein |