THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case no: 318/06
REPORTABLE

In the matter between:

JOHANNES DE WET NEL **APPELLANT**

and

THE STATE **RESPONDENT**

Before: Cameron et Mlambo JJA et Musi AJA

Heard: 20 March 2007

Delivered: 11 May 2007

Summary: Sentence - substantial and compelling circumstances – financial pressures and drug addiction - and other factors – on appeal - sentence of fifteen years set aside – *S v Wasserman* 2004 (1) SACR 251 (T) criticised.

Neutral citation: **This judgment may be referred to as *Nel v The State* [2007] SCA 51 (RSA)**

MLAMBO JA

[1] On 2 March 1999 the regional court sitting in Port Elizabeth convicted the appellant, pursuant to his guilty plea, of armed robbery with aggravating circumstances. He had committed the robbery on 19 February 1999. On 13 August 1999 after hearing expert evidence in mitigation the regional court sentenced him to 15 years' imprisonment in terms of s 51(2)(b) of the minimum sentencing legislation (Criminal Law Amendment Act, Act 105 of 1997).

[2] The protracted delay in the appeal being heard eight years later deserves explanation. The regional court refused appellant's application for leave to appeal in terms of s 309(1)(c) of the Criminal Procedure Act 51 of 1977. He then petitioned the Eastern Cape division of the High Court for leave to appeal against sentence. This also was refused on 28 September 2000. Four years later, on 3 November 2004, the appellant lodged a review application in that division seeking an order to set aside the refusal of his petition and an order granting him leave to appeal to that division alternatively to this court. This was a strange step and obviously ill-conceived as Froneman J (Erasmus and Plasket JJ concurring), pointed out when he dismissed that application on 26 October 2005.

[3] No doubt having at last received correct advice, the appellant applied to the Eastern Cape division for leave to appeal to this court against the decision refusing his petition. That application was granted by Pickering J (Plasket J concurring). This is therefore an appeal against the refusal of the appellant's petition (see *S v Khoasasa* 2003 (1) SA 123 (SCA)).

[4] The undisputed facts are the following: on the morning of 19 February 1999, the appellant, armed with a firearm, went to the Lorraine Entertainment Centre in Port Elizabeth, held up the staff, locked them in the ladies' toilet and robbed them of an amount of R32 595. He was arrested on the same day and when he appeared in the regional court on 2 March 1999 he pleaded guilty and was convicted.

[5] His guilty plea in terms of s 112 of Act 51 of 1977 states, *inter alia*, that he 'committed this crime as a result of financial pressure from gambling and my business enterprises'. It also states that he used his personal revolver, having removed the bullets before the robbery. These facts were not disputed by the state when accepting the plea.

[6] The appellant testified in mitigation of sentence and also called a clinical psychologist, Mr Barend Christoffel Breedt. The appellant's evidence was that he was suffering from a gambling addiction which had started in 1994 and which he had failed to kick despite stopping for a short while in 1995 but which flared up again in 1996. In 1998 he gambled away ±R400 000 (R300 000 at the Fish River Sun, R40 000 at the Lorraine Entertainment Centre and R60 000 at the 777 Casino also in Port Elizabeth). He stated that gambling had consumed him to such an extent that gambling houses had recognised him as one of the top ten gamblers and rewarded him with the status of 'most valued guest' (MVG). This status entitled him to free accommodation, food and drinks whenever he visited the casinos. He testified that he spent practically all his weekends and spare time gambling.

[7] He had been generating an income in the region of R117 000 per month from a Telkom guarding contract and from his gardening contracts. Despite this income he steadily sank into the red because of his penchant for gambling. He had a monthly wage bill of some R87 000 and because of gambling he found himself in dire straits from November 1998 when Telkom opted to pay him monthly instead of weekly. On 5 February 1999 Telkom cancelled his contract. In addition he was experiencing problems with his gardening contracts – a situation that led to his overheads far outstripping his income and rendering him unable to pay his staff their wages. He started taking loans from money lenders but gambled the money away in the hope of winning.

[8] On the morning of 19 February 1999, he told the court, he desperately needed money to pay his guards who were camped at his house waiting for their wages. He was able to source a loan of R1 200 early that morning from a money lender, and proceeded to Lorraine Entertainment Centre to gamble – hoping to make more money to be able to pay his guards. He hit a winning streak and at some stage had R4 500. As this was not enough to pay his guards he continued gambling but then lost everything. That was (he said) when he decided to rob the Lorraine Entertainment Centre.

[9] He went to his house, took his firearm and emptied it of all live rounds, put on a balaclava to cover his face, and put a falsified number plate at the front (though not the back) of his car and drove to the Lorraine Entertainment Centre. On arrival he sat in his car for some time contemplating whether to go ahead with his plan. He eventually decided that he had no choice and went in. He proceeded to hold up the manageress, rounded up all the staff, locked them inside the ladies' toilet and then took an amount of R32 595 and left. He went to his girlfriend's house where he left the loot and took R500 and went to the 777 Casino to gamble yet more. In a very short time, that is where the long arm of the law caught up with him and he was arrested followed by the recovery of the loot at his girlfriend's residence the next day. It appears from his evidence that his childhood was by no means happy, being apparently dominated by feelings of inadequacy in relation to his father. This, too, he and his expert witness linked to his gambling pathology.

[10] The essential features of the evidence of Mr Breedt were that: generally the appellant was emotionally immature and compulsive, had feelings of inadequacy and low esteem which drove him to live in a fantasy world, which enabled him to compensate for those feelings and which affected his ability to take rational decisions within the context of his circumstances; that he was a compulsive gambler with little or no insight into that situation, that he suffered from a personality defect manifesting in a pathological gambling problem and a narcissistic personality; that he had reached

the third and last phase of gambling addiction which was a disorganised phase where gambling had completely taken over his life manifested by him completely losing control over his life, and that he remained a danger to society unless he received treatment for his addiction.

[11] Mr Breedt testified that the appellant needed long-term psychological treatment to deal with his gambling addiction and that long-term imprisonment and the appellant's removal from gambling facilities without the necessary psychological treatment would have no effect on him. He refuted the notion that the appellant was driven merely by egocentricism and self-centredness when he committed the offence. He stated that as far as he was concerned the stupidity of the appellant in robbing a place in which he was well-known showed that he had become desperate in his specific gambling situation, a direct indication that his ability to take rational decisions had become impaired.

[12] In imposing the sentence of 15 years the regional magistrate treated the appellant as a first offender, and stated that he was enjoined to apply s 51(2)(b) of Act 105 of 1997 and further that, as robbery with aggravating circumstances was a very serious offence, he was obliged to impose a minimum sentence of 15 years unless it was shown that there were substantial and compelling circumstances justifying the imposition of a lesser sentence. The regional magistrate found that the fact that the appellant had emptied his firearm before he committed the robbery was irrelevant because his victims had no way of knowing that he had done so, that the fact that the money he robbed had been recovered was not due to his cooperation but was due to the diligence of the police and therefore this did not lower the moral blameworthiness of his deed. The regional magistrate reasoned that the fact that the appellant derived no benefit from the robbery, that he had led an exemplary life and was, in his middle age, a first offender and had showed remorse by pleading guilty, that there was no harm occasioned to his victims and his unfortunate childhood were all factors which any court would take into account in the normal course in mitigation of sentence. In his view however the minimum sentencing legislation required something more to

qualify as substantial and compelling circumstances: the mere absence of aggravating circumstances did not imply there were substantial and compelling circumstances. He found that in the appellant's personal circumstances he could find nothing exceptional save that his personal situation was a lot better than the average robber. He found that the appellant committed the offence to maintain a certain lifestyle which could never be an acceptable reason. He concluded that even if he were to accept that the appellant was a compulsive gambler he could not accept that it was a valid excuse.

[13] In this court counsel for the appellant criticised the regional court's reasoning as rigid and incorrect. Counsel submitted that the regional magistrate was clearly wrong in the light of *S v Malgas* 2001 (1) SACR 469 (SCA). Counsel submitted that the appellant's pathological gambling had made drastic inroads into his ability to make rational decisions and should have been viewed on its own as a mitigating factor and was in the nature of things a substantial and compelling circumstance justifying the imposition of a sentence less than the ordained minimum.

[14] Counsel relied for these submissions on the decision in *S v Wasserman* 2004 (1) SACR 251 (T). In that case the Pretoria High Court (Patel J, Fourie AJ concurring) imposed a sentence of correctional supervision in terms of s 276(1)(i) on a person who had stolen more than R1 million to finance a gambling addiction. The Court arrived at this sentence by relying, firstly, on an academic article which apparently suggests that pathological gambling is a disease. The Court also referred to the Canadian decision in *R v Daniel S Bambury* 2001 NSSC 73 and the Australian decision in *R v Petrovic* [1998] VSCA 95 and concluded that pathological gambling was on its own a mitigating factor and qualified as a substantial and compelling circumstance justifying the imposition of a sentence less than the ordained minimum.

[15] In my view the reasoning in *Wasserman* was unnecessarily overbroad, and it is not surprising that the Court was unable to find support for its views in the South

African jurisprudence. In my view the Court's approach was so broadly expressed as to amount to an undue relegation of the retributive and deterrent elements in sentencing in favour of the rehabilitative and reformative elements. Indeed it could open the door to undue reliance by gambling addicts on their addiction to escape an appropriate sentence in the form of direct imprisonment.

[16] A gambling addiction, like alcohol or drug addiction, can never operate as an excuse for the commission of an offence. In *S v Sithole* 2003 (1) SACR 326 (SCA) this court found that alcohol addiction can not be an excuse for driving under the influence of alcohol. Conradie JA stated at 329g–h:

'[7] Courts in this country have long acknowledged that alcohol addiction is a disease and that it would be to the benefit of society and of the offender if the condition can be cured. But it is necessary to make the obvious point that drunken driving is not a disease. One is distressingly familiar with maudlin pleas in mitigation that the drunken driver in the dock is an alcoholic, as if the disease excused the crime. It does not.'

What is more, a reading of *R v Petrovic* [1998] (supra) reveals that it does not support the approach in *Wasserman*. That case, like *Wasserman* and this case, had to do with a pathological gambler who had committed crimes actuated by the addiction (the offences in *Petrovic* ranged from theft to fraud). Delivering the main judgment, Charles JA stated:

'20. The fact that an offender was motivated to the commission of the crimes in question by an addiction to gambling will, no doubt, usually be a relevant, and may be an important consideration for a judge sentencing the offender for these crimes. But as Tagdell, J.A. said in *R. v Cavallin* (…) "It is . . . important that the public does not assume that a crime which is to some extent generated by a gambling addiction, even if it is pathological, will, on that count, necessarily be immune from punishment by imprisonment."

21. It is considerations such as these which have led this Court to say more than once that it will be a rare case indeed where an offender can properly call for mitigation of penalty on the ground

that the crime was committed to feed a gambling addiction;. . .'

The ratio is thus clear. Whilst a gambling addiction may be found to cause the commission of an offence, even if it is pathological (as in this case), it cannot on its own immunise an offender from direct imprisonment. Nor indeed can it on its own '*be a mitigating factor, let alone a substantial and compelling circumstance justifying a departure from the prescribed sentence'*, in the words of Stephan Terblanche in *South African Journal of Criminal Justice* (2004) 17 at 443 who, correctly in my view, criticises the approach in *Wasserman*.

[17] To find substantial and compelling circumstances, we must thus look more broadly. I turn therefore to consider the alternative submission advanced by the appellant's counsel that the appellant's addiction viewed with the other factors amounted to substantial and compelling circumstances. Counsel for the state, whilst lamenting the reliance on *Malgas*, which was not available when the regional magistrate passed sentence and when the Eastern Cape High Court refused the petition, submitted in this court that none of the other factors advanced amounted to substantial and compelling circumstances, that in fact the appellant was driven by egocentricism and the desire to maintain a certain lifestyle when he committed the robbery. For these reasons she submitted that the 15-year sentence was justified.

[18] The plain fact is that when the regional magistrate imposed the sentence, and the Eastern Cape High Court refused the petition, the decision in *S v Malgas* (supra) had not yet been handed down. There this court settled the issue regarding the correct meaning of 'substantial and compelling circumstances' and the approach to be followed in applying it. It was not and cannot be contended that the decision is not applicable. This court stated at 477j–478b:

'To the extent therefore that there are *dicta* in the previously decided cases that suggest that there are such factors which fall to be eliminated entirely either at the outset of the enquiry or at any subsequent stage (eg age or the absence of previous convictions), I consider them to be erroneous.

Equally erroneous, so it seems to me, are *dicta* which suggest that for circumstances to qualify as substantial and compelling they must be "exceptional" in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling.'

[19] It is apparent therefore, with the hindsight of the *Malgas* decision, that the regional magistrate was incorrect in his approach. Clearly all factors are relevant; the essential question is whether any or some or all of them amount to substantial and compelling circumstances within the contemplation of the legislation.

[20] As previously mentioned, in his written guilty plea the appellant stated that he 'committed this crime as a result of financial pressure from gambling and my business activities'. These facts were accepted by the state and in convicting him the regional magistrate stated that the appellant was found guilty 'ooreenkomstig u pleit van skuldig'. Clearly this entails that the state is bound by those facts (compare *S v Groenewald* 2005 (2) SACR 597 (SCA)). Those facts show that the appellant's financial pressures and his gambling addiction were inextricably linked to the other relevant factors, such as that he was a first offender and showed remorse by his guilty plea. They certainly should not have been found to be irrelevant but deserved appropriate consideration and effect in the sentencing process. The financial pressures caused by the gambling addiction were clearly pivotal in the appellant's decision to commit the robbery. His objective, in that skewed state of mind, attested to by Mr Breedt, was to rob to have access to money to ease his financial burdens which in turn would enable him to continue gambling. In this regard Breedt testified, and he was not seriously challenged in this, that the appellant was at the third and last phase of gambling addiction and that he was in an almost panic condition illustrated by the absurdity and improbability of how he went about committing the robbery. These factors and others – such as that he ultimately derived no benefit from the offence, emptied his firearm, did not physically injure the victims, that the robbery was amateurish to say the least, involving a place where he was so well known – are demonstrably weighty in assessing whether there are substantial and compelling

circumstances.

[21] In my view all these factors show that there were indeed substantial and compelling circumstances that permitted the regional court to impose a sentence less than the ordained minimum of 15 years. In my view, instead of the 15 year sentence a sentence of 10 years was appropriate in the circumstances.

[22] In the circumstances the appeal succeeds and the sentence imposed by the regional court is set aside and replaced with a sentence of 10 years' imprisonment.

D MLAMBO
JUDGE OF APPEAL

CONCUR:
CAMERON JA
MUSI AJA