THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 642/2016

In the matter between:

FRANCOIS JOHAN JOUBERT **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Joubert v S* (642/2016) [2017] ZASCA 3 (3 March 2017)

Coram: Shongwe, Majiedt, Van der Merwe and Mocumie JJA and Schippers AJA

Heard: 16 February 2017

Delivered: 3 March 2017

Summary: Criminal Procedure – fatally irregular to increase sentence on appeal absent prior notice by court to appellant of an intention to do so – infringement of fair trial rights – remittal to court of appeal.

ORDER

On appeal from: Gauteng Provincial Division of the High Court, Pretoria (Zondo J and Goodey AJ sitting as court of appeal):

1 The appeal is upheld.

2 The sentence imposed on appeal is set aside.

3 The matter is remitted to the Gauteng Provincial Division of the High Court, Pretoria, for consideration of the appeal against sentence only, in accordance with the guidelines outlined by the Constitutional Court in *S v Bogaards* [2012] JOL 29483 (CC) [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) paragraph 79.

JUDGMENT

Majiedt JA (Shongwe, Van der Merwe and Mocumie JJA and Schippers AJA concurring)

[1] The appellant, Mr Francois Johan Joubert, an accountant by profession, was convicted in the Nelspruit Regional Court on 20 counts of fraud relating to false VAT claims made to the South African Revenue Service. He was sentenced to seven years' imprisonment, wholly suspended on certain conditions for a period of five years. He successfully petitioned the Gauteng Provincial Division of the High Court, Pretoria, for leave to appeal. Although leave to appeal was sought against conviction only, leave was granted, erroneously it would appear, against both conviction and sentence. The court a quo dismissed the appeal against conviction, but increased the sentence to seven years' imprisonment of which four years were conditionally suspended for a period of five years. This appeal against the increased sentence, with leave of the court a quo, turns on the question whether the appellant's right to a fair trial had been infringed due to the failure of the court a quo to give the appellant prior notice of the court's intention to consider increasing the sentence.

[2] When leave was granted to appeal to the high court against both conviction and sentence, the State grasped the opportunity to give notice to the appellant and his attorneys of the State's intention to seek an increase of the sentence on appeal. The notice contained the grounds on which an increase was sought. The appellant filed a notice of opposition accompanied by an affidavit in which he elucidated his opposition. One of the grounds of opposition was the failure on the part of the State to follow the legal prescripts and requirements contained in the Criminal Procedure Act 51 of 1977 (the CPA).

[3] The oral submissions advanced by counsel in the court a quo have been transcribed and form part of the record before us. While these are normally excluded from the record in terms of the rules of this court, the addresses by counsel are of considerable importance in the present instance, as will be demonstrated below.

[4] The appeal was heard in the court a quo on 12 September 2011 and the judgment was delivered on 3 February 2012. Both these dates precede the date of the judgment in *S v Bogaards.*[1] In *Bogaards,* the Constitutional Court held that an accused's right to a fair trial encompasses the right to receive prior notice of a court's intention to increase the accused's sentence on appeal. Failure to give such notice constitutes an irregularity which may result in a failure of justice that renders the appeal unfair. Guidelines were set out regarding the manner in which such notice ought to be given.

[5] *Bogaards* applies squarely to this case – of that there can, in my view, be little doubt. Detailed references to the record must be made to demonstrate the point. It is striking that at the very outset, counsel for the appellant mentioned the peculiarity that, while leave to appeal had been sought against conviction only, leave had in fact been granted against both conviction and sentence. The following exchange occurred between the Bench and counsel in the court a quo:

'ADV DE NECKER ADDRESSES COURT: Thank you M'Lord. M'Lord in this and [indistinct] about the following. Number one ...[indistinct]. Your Lordship might have seen that initially

[1] *S v Bogaards* [2012] JOL 29483 (CC); [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC).

the application for leave to appeal in the Regional Court was only against the convictions, not against the sentence.

ZONDO J: Yes

ADV DE NECKER: The petition itself to the Judge President was also against only the convictions and not the sentence. But, the judges here in the petition then granted leave against the convictions and also the sentence. So we never appealed against the sentence itself.

ZONDO J: Yes

GOODEY J: [Inaudible]

ADV DE NECKER: I absolutely agree with Your Lordship.

GOODEY J: So, in other words if there is a risk that the sentence, that the conviction will stand or convictions and the sentence to be increased, then obviously that is something, a risk that your client must be aware of.

ADV DE NECKER: Yes, M'Lord indeed.

GOODEY J: You are aware of that, is your client present in court?

ADV DE NECKER: He is not.

GOODEY J: Then did you made him aware of that?

ADV DE NECKER: I did. The only reason why I raised it M'Lord is that just as background information regarding the fact that this an appeal against the conviction and also the State, the respondent wants to ask for an increase in the sentence. Which is being imposed by a way of a formal [inaudible]

ZONDO J: Well, the state might not be correct in the procedure that they followed. But of course as my colleague indicates, the court is always within its right *mero muto* to raise the issue of the possibility of increasing sentence in an appropriate case.

ADV DE NECKER: Absolutely M'Lord. The only reason why the notice of …[indistinct] was filed was because I did not have an indication obviously from court. That that would be the question today, but it was and application from the state.

ZONDO J: Yes, no, no I understand, no I understand.

GOODEY J: [inaudible]

ADV DE NECKER: M'Lord as far as possible, the only advise that I can give him, was that the state was seeking an increase in the sentence and that we would oppose that…[indistinct]

ZONDO J: Yes

ADV DE NECKER: Not that the question will be raised by the court and obviously I did not know that that might be the question, so he was not advised on that no.'

[6] This exchange clearly demonstrates that counsel for the appellant had been caught by surprise by the turn of events and that she had not explained to the appellant that the court was minded to mero motu increase the sentence, since that had not been foreshadowed in a prior notice. Moreover, as the extract shows, the appellant was not present in court at that time. It is also evident from these exchanges that the court a quo was alive to the incorrect procedure followed by the State in purporting to seek an increase of the sentence on appeal. During the course of counsel's address, Zondo J asked counsel whether she '. . . had anything to say about the sentence in case . . . we consider this whole appeal.' The learned Judge indicated to counsel that he and his colleague were '. . . disturbed whether it [the sentence] is appropriate.' Counsel then made submissions regarding the correctness and appropriateness of the sentence imposed in the Regional Court.

[7] In this court, counsel for the respondent sought to evade the reach of *Bogaards* in the present instance on two grounds. First, he contended that the State's application to increase the sentence had cured the court's failure to furnish prior notice to the appellant of its intention to increase the sentence. The submission is untenable. The procedure adopted by the State is, on its own, fatally irregular. In *S v Nabolisa,*[2] the Constitutional Court held that the State has to obtain leave to cross-appeal in the event that it seeks to appeal against sentence imposed by a lower court where an accused person lodges an appeal against conviction and/or sentence. In this court, counsel for the respondent readily conceded that in terms of *Nabolisa,* the notice of intention to seek an increase on appeal was fatally irregular. As stated, the court a quo had also recognized the fatal irregularity. That being the case, it is inconceivable that one fatal irregularity can be called into aid to cure another irregularity.

[8] The second contention advanced by counsel for the respondent was that there had been no prejudice to the appellant who, so the argument went, had been afforded an opportunity to make submissions on sentence, both in the opposing affidavit and through his counsel's oral submissions before the court a quo when the matter was (unexpectedly) raised. It is true that not every irregularity constitutes a

[2] *S v Nabolisa* [2013] JOL 30457 (CC) [2013] ZACC 17; 2013 (2) SACR 221 (CC); 2013 (8) BCLR 964 (CC).

failure of justice and an infringement of the right to a fair trial. An accused person must demonstrate that the irregularity had materially prejudiced him or her, such that it has led to a failure of justice and an infringement of the right to a fair trial. And, as was stated in *Key v Attorney-General, Cape Provincial Division and another,*[3] fairness must be determined upon the particular facts of each case and it is context-specific. This was confirmed by the Constitutional Court in *Bogaards.*[4]

[9] On the facts of this case, the appellant had indeed been materially prejudiced. That prejudice goes further than a mere lack of adequate opportunity to prepare properly. The appellant had plainly, on the advice of his attorney and counsel, focused his preparation in response to the State's notice on the procedural defects of the notice. In this regard, the appellant must have been advised that the State had to formally seek leave to appeal against sentence in terms of s 310A(1) of the CPA. The section reads as follows:

'**310A Appeal by attorney-general against sentence of lower court**

(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.'

As the passage quoted above in para 5 shows, the court a quo was mindful of this procedural shortcoming. There had plainly been no reason at all for the appellant and those advising him to consider and prepare on a possible increase of sentence by the court a quo itself, since no such intent had been foreshadowed in a prior notice, as was required.

[10] There is a further and even more compelling reason why the appellant had suffered material prejudice. An accused person who has been given notice by an appellate court that it intends to increase the sentence imposed by the trial court has the option of withdrawing the appeal, with the leave of the appellate court.[5] This practice, together with the requirement of prior notice to an accused person by the appellate court balances the appellant's right to a fair trial and the court's duty to ensure that the sentence is appropriate and, where necessary, to increase an

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[3] *Key v Attorney-General,Cape Provincial Division and another [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) para 13.*
[4] Para 92.
[5] *S v Kirsten* 1988 (1) SA 415 (A) at 420C-J.

inappropriate sentence.[6] In the present instance, the appellant had not been afforded the opportunity to consider such a course of action. As counsel for the appellant correctly contended, a notice of intention to increase sentence is a very weighty consideration, emanating as it does from the judges empowered to increase the sentence. The prejudice and its materiality are self-evident.

[11] In *Bogaards,* the Constitutional Court enunciated the position as follows:

'When accused persons exercise their constitutional right of appeal and appeal against their conviction and/or sentence, they are necessarily attempting to improve their legal fate. The exercise of the right of appeal should, therefore, not be hindered by fear of the possibility of a more severe sentence being imposed without having an opportunity to give pointed submissions on the potential increase . . . Therefore, an appellant's legal position should not be worsened without proper notice, either in the form of a cross-appeal, or notice fro the appellate court that it is considering an increase in sentence . . . .'[7]

The Constitutional Court continued as follows:

'Where the State lodges a cross-appeal against sentence, this alerts an accused person to the possibility of an increase in sentence and provides her with a meaningful opportunity to make pointed argument in regard thereto. In instances where a court is mero motu considering an increase, the constitutional right to a fair trial demands that the accused person should have the benefit of knowing what risk she may run into in her quest to ease a pinching shoe by invoking the appeal process. The accused should be allowed to choose whether to run the risk of a sentence increase, attempt to convince the court to reach the opposite conclusion by making adequate representations on why the sentence should not be increased, or apply to the court for leave to withdraw her appeal.'[8]

Prior notification, the court held, encapsulates the natural justice legal precept of *audi alteram partem*, which is a foundational component of fair procedure.[9]

[12] In the premises, there has been substantial miscarriage of justice and the appeal must therefore succeed and the sentence ought to be set aside. The matter must be remitted. In *Bogaards,* the Constitutional Court had remitted the matter to the Regional Court, holding that as the trial court it was best placed to determine an

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[6] *P*ara 57.
[7] Para 60.
[8] Para 61.
[9] Para 66.

appropriate sentence.[10] But in that instance, the setting aside of the sentence and remittal of the matter had come about due to an alteration on appeal in this court of the appellant's conviction. The original offence on which the appellant had been convicted had been substituted with another offence by this court. That is not the case in this matter. The conviction of the trial court was confirmed on appeal. The only remaining issue before us was the increased sentence. In the circumstances, it seems to me appropriate to remit the matter to the court a quo as the appellate court. The court a quo had been minded to impose a more severe sentence. I express no views on that in order not to fetter that court's sentencing discretion. The proper procedure must be followed in accordance with the guidelines laid down in *Bogaards*.

[13] In the result, the following order is issued:

1 The appeal is upheld.

2 The sentence imposed on appeal is set aside.

3 The matter is remitted to the Gauteng Provincial Division of the High Court, Pretoria, for consideration of the appeal against sentence only, in accordance with the guidelines outlined by the Constitutional Court in *S v Bogaards* [2012] JOL 29483 (CC) [2012] ZACC 23;2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) (28 September 2012), paragraph 79.

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S A Majiedt

Judge of Appeal

[10] Para 80.

APPEARANCES

For Appellant:	P A van Wyk SC
Instructed by:	JB Haasbroek Attorneys, Pretoria
	Matsepes, Bloemfontein
For Respondent:	J P Krause
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein