THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 682/2018

In the matter between:

VICTOR KWENDA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Victor Kwenda v The State* (682/2018) [2019] ZASCA 113 (17 September 2019)

Coram: Maya P, Zondi and Mokgohloa JJA and Dolamo and Hughes AJJA

Heard: 16 August 2019

Delivered: 17 September 2019

Summary: Criminal Procedure – Appeal against a refusal to grant leave to appeal on petition – Leave to appeal to the high court was properly refused.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mabesele J and Kolbe AJ sitting as a court of appeal):

The appeal is dismissed.

JUDGMENT

Hughes AJA (Maya P, Zondi and Mokgohloa JJA and Dolamo AJA concurring):

[1] The scourge of white collar crime, especially fraud, is currently the order of the day in our country. Fraud is a cancer that is crippling our country from the core and takes away from the poorest of the poor. In the case before us, those severely affected were about 200 youth from disadvantaged backgrounds who were robbed of education and apprenticeship opportunities which would have enabled them to uplift themselves in society. Ultimately, these apprenticeships would have enabled them to attain jobs, which is a scarce commodity in our country.

[2] The appellant was arraigned in the Specialised Commercial Crimes Court Johannesburg, in the regional division of Gauteng (Regional Magistrate Venter) on 26 counts of fraud totalling an amount of R4 898 158. 21. Pursuant to a guilty plea in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA), in respect of all 26 counts read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA), he was convicted and sentenced to 20 years imprisonment.

[3] The appellant unsuccessfully applied for leave to appeal his sentence in terms of s 309B of the CPA. Subsequently, he petitioned the Gauteng Division of the High Court, Johannesburg (Mabesele J and Kolbe AJ) in terms of s 309C of the CPA. His bid was yet again unsuccessful. Having failed in both the trial court and the high court, he sought leave to appeal against the dismissal of the petition from this Court and, was successful.

[4] It is imperative that from the outset I address the ambit of this appeal. This Court in *Van Wyk v S, Galela v S*[1] endorsed the sentiments expressed in *S v Matshona*[2] and *S v Khoasasa.*[3] In those cases it was held that where an appellant had been refused leave to appeal by the high court either on petition (as is in this case) or as a result of a decision of two judges presiding over an appeal, the issue is not the merits of the appeal. It is rather whether the high court ought to have granted leave to appeal. In addressing the issue at hand we are curtailed to dealing with the merits only to the extent that it establishes whether the appellant has reasonable prospects of success to be granted leave.[4]

[5] As regards what constitutes 'reasonable prospects of success' Plasket AJA in *S v Smith* describes it concisely:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.[5]'

[6] It is necessary to set out the facts of this case in a little more detail than it is usual for cases of this nature, purely to highlight the gravity of the fraud committed by the appellant. The complainant was a Sector Education and Training Authority in the Manufacturing, Engineering and Related Services sector, known as MERSETA. MERSETA was tasked with the facilitation of skills development in four industries, namely; Metal and Engineering, Auto Manufacturing, Motor Retail and Component Manufacturing, Tyre Manufacturing and Plastic Industries.

[7] In terms of the Skills Development Act 97 of 1998, MERSETA's function is to promote economic and employment growth within the specified industries set out

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[1] *Van Wyk v S, Galela v S* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA); [2014] 4 All SA 708 (SCA) para 13 – 14.
[2] *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) para 5.
[3] *S v Khoasasa* 2003 (1) SACR 123 (SCA); [2002] 4 All SA 635 (SCA) para 14.
[4] *S v Smith* [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) para 3.
[5] *Smith* para 7.

above, redress inequalities in education and training and facilitate and advance employment equity in those industries. This they achieve by establishing learnership programmes and approving workplace skills plans; allocating grants to employers, education and training providers and employees; and monitoring education and training in those specific sectors.

[8] The appellant commenced his employment with MERSETA on 17 March 2008 and ascended in the ranks within the agency. At the time of his resignation, on 31 July 2010, he held the position of Grants and Levies Administrator, earning a salary of R16 000 per month. One of his duties was to upload the banking details of beneficiaries of MERSETA onto its payment system for payment to those beneficiaries.

[9] During the course of his employment he uploaded two fraudulent First National Bank (FNB) account details and replaced the true account details of the various beneficiaries of the grants. This was achieved with the assistance of his co-accused who had a contact person that worked at FNB. This contact facilitated the production of false letters purporting to be from FNB advising MERSETA of the amended banking details of the various beneficiaries.

[10] Thus, instead of the beneficiaries receiving the grants due to them, these were transferred into the two fraudulent FNB accounts. The account holder of these fraudulent accounts was, BIU Trading CC, an entity owned by the appellant's co-accused, which was not a beneficiary of MERSETA.

[11] According to the schedule depicting the fraudulent transactions, which was attached to the charge sheet, nine of the 26 counts fell within the purview of s 51(2) of the CLAA. Of the nine, three involved amounts exceeding R500 000 and one was a single fraudulent transaction in the sum of R1 364 070.64. The other 17 counts involved transactions which were under R100 000.

[12] As some of the offences with which the appellant was charged were subject to the provisions of s 51(2) of the CLAA the trial court was obliged upon convicting the appellant to impose the minimum sentences prescribed for those offences unless it

found there were substantial and compelling circumstances justifying it to deviate from imposing the prescribed sentences. The trial court found no such circumstances.

[13] The trial court accordingly imposed the following sentences in respect of the 26 counts of fraud:

(i) For counts 1,2,3,4,7,8,14,19 and 25, a sentence of 15 years imprisonment for each count was imposed, in terms of s 51(2);

(ii) Counts 5,6,9-13,15,18,20-24, and 26 were taken together for purpose of sentencing and a sentence of 15 years imprisonment was imposed;

(iii) Considering the cumulative effect of punishment in terms of s 280(2) of the CPA the trial court ordered that all the sentences except for that of count 14 would run concurrently with the sentence in count 1, being 15 years imprisonment;

(iv) For count 14 the trial court ordered that only 10 years of the 15 years imposed would run concurrently with the sentence imposed in count 1;

(v) Thus, the sentence to be served was 20 years imprisonment.

[14] The question is whether the trial court's finding that the appellant's personal circumstances did not constitute substantial and compelling circumstances to justify it to deviate from imposing lesser sentences, constituted a misdirection entitling this court to interfere in the exercise of its discretion. This court held in *S v Malgas*:

'[14] When applying the provisions of s 51 a trial court is not in appellate mode. It is not confronted by a prior exercise of judicial discretion attuned to the particular circumstances of the case and which is *prima facie* to be respected. Instead, it is faced with a generalised statutory injunction to impose a particular sentence which injunction rests, not upon all the circumstances of the case including the personal circumstances of the offender, but simply upon whether or not the crime falls within the specific categories spelt out in Schedule 2. Concomitantly, there is a provision which vests the sentencing court with the power, indeed the obligation, to consider whether the particular circumstances of the case require a different sentence to be imposed. And a different sentence must be imposed if the court is satisfied that substantial and compelling circumstances exist which *'justify'* (my emphasis) it. In considering that question the trial court is doing so for the first time. There has been no prior consideration of the particular circumstances of the case by either the Legislature or another court. There is

thus no justification for arbitrarily importing into the exercise a test which was evolved in a very different context and which was designed to serve a very different purpose.'[6]

[15] On appeal before us, counsel for the appellant, submitted that the trial court misdirected itself as it failed to take cognisance of the fact that the appellant had pleaded guilty; had made an offer to repay the funds prior to the matter going to court, which offer was not accepted; presented a payment plan at the sentencing stage and that appellant was a first offender who was remorseful for his actions. It was further submitted that the trial court misdirected itself in applying the minimum sentence and failed to take into account the parity in sentences imposed for this type of offence.

[16] On the other hand, counsel for the State, argued that the trial court did not commit a misdirection because the effective sentence was not strikingly or shockingly inappropriate and the prescribed minimum sentence imposed was appropriate in the circumstances. He further contended that the trial court struck a judicious counter-balance between the personal circumstances of the appellant, the seriousness of the offence and the interest of society and did not overemphasise one at the expense of the other.

[17] The sentence imposed by the trial court is prescribed by s 51(2) of the CLAA as the minimum sentence and to deviate therefrom would require substantial and compelling circumstances.[7] The factors advanced in mitigation of sentence by the appellant were general factors. As such, in my view, no substantial and compelling circumstances were submitted to deviate from the imposition of the prescribed minimum sentence. The payment plan offered by the appellant was succinctly addressed by the trial court which rightly concluded that its acceptance would have required a non-custodial sentence to be imposed to operate optimally. The appellant having resigned continued to benefit even though he was no longer in the employ of the complainant. Thus, in my view, he cannot cry foul with regards to the finding that he did not show remorse. The remorse should have in fact set in at his resignation and not when he was fortuitously caught, several months after leaving MERSETA.

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[6] *S v Malgas* 2001 (1) SACR 469 (SCA); [2001] 3 All SA 220 (A) para 14.
[7] *Malgas* para 9.

[18] I am not satisfied therefore that the trial court misdirected itself in not finding that the appellant's personal circumstances constituted substantial and compelling circumstances which would have justified it to deviate from imposing the prescribed minimum sentence. The appeal must fail as the appellant failed to show that there are reasonable prospects of success on appeal.

[19] In the result :
The appeal is dismissed.

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W Hughes
Acting Judge of Appeal

APPEARANCES

For the Appellant:	C De Beer
Instructed by:	Van Der Westhuizen & Associates, Johannesburg
	Symington De Kok, Bloemfontein
For the Respondent:	S J Bhengu
Instructed by:	The Director of Public Prosecution, Johannesburg
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