

SOUTH AFRICA / JUDGMENT

Evans v S (171/2022) [2023] ZASCA 123; 2023 (2) SACR 541 (SCA) (26 September 2023) [2023] ZASCA 123

COURT

Supreme Court of Appeal

BEFORE

Saldulker, Carelse, Hughes, Nhlangulela, Mali

CASE / FILE NUMBER

171/2022

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THE SUPREME COURT OF
APPEAL OF SOUTH AFRICA JUDGMENT

Not

reportable

Case

no: 171/2022

In

the matter between:

NATASHA TANYA

EVANS

APPELLANT

and

THE

STATE

RESPONDENT

Neutral

Citation: Evans

v The State

(171/2022) [2023]

ZASCA 123 (26 September 2023)

Coram:

SALDULKER, CARELSE and HUGHES JJA and NHLANGULELA and MALI AJJA

Heard:

2 May 2023

Delivered:

26 September 2023

Summary:	Criminal law – fraud – sentence – prescribed minimum sentence – appeal – cumulative convictions of fraud – applicability of section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 – whether the trial court was correct when it applied s 51(2)(a) of Act 105 of 1997 – prescribed minimum sentences not applicable. ORDER On appeal from: Gauteng Division of the High Court, Pretoria (Maumela J with Kollapen J concurring, sitting
as court of appeal):	1 The appeal against sentence succeeds. 2 The order of the full bench is set aside and replaced with the
following order:	“1. The sentence imposed by the trial court is set aside and replaced with the following: ‘Accused number 1 is sentenced to a period of eight years’ imprisonment, of which five years is suspended for a period of five years, on condition that she is not convicted of fraud, attempted fraud, theft or attempted theft, or any offence involving dishonesty, committed during the period of suspension.’ ”

JUDGMENT

Mali AJA (Saldulker, Carelse and Hughes JJA and Nhlangulela AJA concurring):

- [1] This appeal is against sentence only. The appellant, Ms Natasha Tanya Evans (accused 1 in the trial court), together with her former husband, Mr Eduan Gert Botha (accused 2 in the trial court), was charged with 60 counts of fraud, alternatively theft read with s 51(2)(a) of the Criminal Law Amendment Act 105 of 1997[1] (CLAA) (minimum sentence legislation). The total amount involved was R1 489 694.96. Of this, an amount of R297 460.68 was transferred directly into Mr Botha’s bank account and the balance was transferred into the appellant’s personal bank account. They were both convicted on all 60 counts of fraud on the basis of common purpose. In respect of the appellant, all 60 counts were taken together as one for the purposes of sentence and she was sentenced to a period of 15 years’ imprisonment. No substantial and compelling circumstances were found to be present by the trial court in mitigation of sentence. Her former husband was sentenced to a period of five years’ imprisonment, in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977[2] (CPA), and a further two years’ imprisonment was suspended for a period of five years, on condition that he is not convicted of fraud, attempted fraud, theft or attempted theft, during

the period of suspension. In sentencing the appellant, the trial court found that the convictions of the appellant fell within the ambit of s 51(2)(a) of the CLAA. The trial court did not invoke the provisions of s 51(2)(a) of the CLAA in respect of Mr Botha.

- [2] The trial court granted the appellant leave to appeal to the Gauteng Division of the High Court, Pretoria (the full bench) against sentence only. The full bench dismissed the appeal on sentence and this Court granted leave to appeal on sentence only.
- [3] The common cause facts are that the appellant was employed as a bookkeeper and paymaster by Silver Dove Import and Export CC. Its sole member was Mr Neves. The appellant's duties included the loading of the various creditors for payment and to authorise payments from three different bank accounts, two of which were the company's bank account and the third was Mr Neves' personal bank account. Mr Neves and his wife went on vacation, leaving the appellant with the necessary passwords to effect payments during their absence. This responsibility continued even after their return from vacation. Later on, the appellant had an argument with Mr Neves, during which the appellant informed him that the finances of the company were not in a good state. As a result, Mrs Neves conducted an investigation in which it was discovered that from August 2014 until August 2015, the appellant authorised and made fictitious payments to herself and her ex-husband.
- [4] The appellant's modus operandi involved changing the banking details of the company's creditors to reflect the details of her former husband and herself, and then to make payments to these accounts. Each transaction did not exceed an amount of R50 000 as the amounts during the period ranged between R6 520 to R50 000.
- 000. From these illicit proceeds, her former husband bought inter alia a motorcycle and a Mercedes-Benz motor vehicle. As a result of the fraud committed by the appellant, the CC was liquidated. However, it was later resuscitated.
- [5] The issue in this appeal is whether the prescribed minimum sentence applies. Central to this is whether the counts should be taken cumulatively or individually for purposes of sentence as the full bench did not deal with this issue. From the judgment of the full bench, it appears that the full bench accepted that the minimum sentence applied. However, no reasons were given.
- [6] The nub of the appellant's grounds of appeal was that the trial court misdirected itself in invoking the provisions of s 51(2)(a) of the CLAA. Another ground raised was that the trial court misdirected itself when it sentenced the appellant for fraud in the amount of R1 489 694.96 instead of the amount of R1 192 224.20. The question is accordingly: does s 51(2)(a) of the CLAA apply?
- [7] It is common cause that, individually, none of the 60 counts of fraud exceeded the amount of R500 000.[3] Relying on *Van Der Walt v S*[4] (*Van der Walt*), the appellant submits that to invoke the provisions of s 51(2)(a) of the CLAA there must be at least one count where the amount in question exceeds R500 000. The same does not hold true where there are several

counts which cumulatively exceed R500 000. The facts were similar to the facts in this case, save that in Van der Walt there were twenty-one different complainants, whereas in this case there was only one.

[8] In Van der Walt, Moseneke J held:

‘. . . [I]n my view . . . a statutory provision creating a criminal offence or a penalty clause should be interpreted restrictively. Its scope of application should not be extended beyond the ordinary meaning of its language. *R v Ackerman* 1931 OPD 69. If a penal stipulation lends itself to a reasonable or less onerous interpretation, the court should adopt that construction.’[5] The learned Judge continued:

‘In my view the words “any offence . . . of fraud or theft . . .” in Schedule 2 are not open to ambiguity. They relate to a conviction on an offence, that is a single offence, which involves one or more amounts exceeding the prescribed threshold of R500,000. The usage of the word “amounts” in Schedule 2 does not detract from the appropriateness of this construction. The lawgiver sought to cover continuous or repetitive acts of theft or fraud, closely connected in time, place and context and perpetrated with a single intent, but within the confines of one offence. Otherwise, it would be permissible to trigger the minimum sentence provisions by adding together an unrelated motley of fraud or theft charges spun over any period of time, relating to diverse contexts, bound together only by the sum total of the amounts charged in the same trial. That would be untenable. Consequently, the provisions of section 51(2)(a) of Act 105 of 1997 are not applicable to a person convicted of multiple counts of theft or fraud, where none of the convictions, taken alone, exceeds the prescribed threshold. The court a quo was not entitled, as a matter of law, to apply the provisions of Part II of Schedule 2 of Act 105 of 1997 to any of the convictions of the appellant.’[6]

[9] The State referred us to *S v De Sousa*[7] (De Sousa), wherein the appellant was convicted of 13 counts of fraud, involving a total amount of R1 000 228.94. All 13 counts were taken together as one for the purposes of sentencing and the appellant was sentenced to seven and a half years’ imprisonment. On appeal to this Court, the sentence was reduced to four years’ imprisonment. In this regard, it was held:

‘It is common cause that Act 105 of 1997 – the so-called minimum sentencing legislation, finds application and that the matter falls within the purview of Part 2 of Schedule 2 of the Act. In terms of s 51(2)(a)(i), the legislature has ordained 15 years’ imprisonment for a first offender found guilty of an offence of this kind, unless substantial and compelling circumstances in terms of s 51(3)(a) which would justify the imposition of a lesser sentence are found to exist. The trial court did indeed find such circumstances to be present. It thus departed from the statutorily prescribed minimum sentence.’[8]

[10] However, this case does not assist the respondent. In *De Sousa*, this Court was not called upon to determine whether the minimum sentence applied, because it was common cause that the minimum

sentence was applicable. Pertinently, it is not apparent from that judgment whether any one of the 13 counts exceeded the amount of R500 000.

- [11] In our view Van der Walt was a well-reasoned judgment and correctly decided by the full bench. In this case, not a single count exceeded the amount of R500 000 and in our view that the prescribed minimum sentence does not find application in this case. On a careful reading of the record, it is clear that the appellant defrauded her employer's company for a total amount of R1 489 694.96 and not R1 192 224.20.
- [12] The appellant submitted that the trial court committed a further misdirection in that the appellant's personal circumstances were not taken into consideration, namely: the appellant was a first offender; at the time of sentencing she was 43 years old; she was married to the second accused for approximately seven years; and she has three children born from her first marriage. The twins were aged 16 and a daughter was aged 13, all still enrolled at school during the time of sentencing. It is not disputed that at the time of sentencing, the appellant was the primary caregiver of the three children. Their father is able and willing to care for the children if the appellant receives a custodial sentence. In addition, the appellant repaid the complainant a cash amount of R470 000. The motorcycle, with a value between R60 000 and R80 000, and a Mercedes-Benz motor vehicle were also forfeited to the complainant. The appellant further offered to pay the balance of the stolen money, which was refused by the complainant. At the time of sentencing the appellant was employed by Transvaal Electrical as a Human Resource

Assistant. The appellant further submitted that there was a great disparity between her sentences and that of her former husband.

- [13] It is not necessary to remit this matter to the court below for sentencing, since all the facts pertaining to sentencing are before us. Notwithstanding the misdirection by the full bench, a custodial sentence in our view is an appropriate sentence. The application of the prescribed minimum sentence is a material misdirection[9] which entitles this Court to reconsider the sentence on appeal.
- [14] Crimes against employers by employees who are in positions of trust are grave and are on the increase. The appellant has advanced no justification for her behaviour. Even though the complainant managed to restart his business, he had initially lost everything. As a result of the appellant's conduct, her co-workers were affected: some had to work reduced hours while others were, unfortunately, laid-off. Additionally, if her employer had not discovered the fraud, she would still have continued her illicit activities. Fraud is a sophisticated crime; there was planning and creative bookkeeping by the appellant.

[15] In this case, the interests of society will be best served by the imposition of a custodial sentence. Having regard to the triad of factors, as well as the discussed aggravating factors, a sentence of eight years' imprisonment should be imposed, of which five years is suspended for a period of five years, on condition that accused 1 is not convicted of fraud, attempted fraud, theft or attempted theft, or any offence involving dishonesty, committed during the period of suspension.

[16] In the result, the following order is made:

1 The appeal against sentence succeeds.

2 The order of the full bench is set aside and replaced with the following order:

N P MALI

ACTING JUDGE OF APPEAL

Appearances

For the appellant: J Huysamen Instructed by HJ Van der Westhuizen Attorneys, Roodepoort
Wessels & Smith Attorneys, Bloemfontein For the respondent: Instructed by: M Jansen van
Vuuren Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein

[1] 1 Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 provides: '(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in- (a) Part II of Schedule 2, in the case of- (i) a first offender, to imprisonment for a period not less than 15 years; (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.'

[1] 1 Section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997 provides:

'(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years;
and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.'

[2] Section 276(1)(i) of the Criminal Procedure Act 51 of 1977 provides: ‘Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely- . . . (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a

parole board.’

[2] Section 276(1)(i) of the Criminal Procedure Act 51 of 1977 provides:

‘Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

. . .

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a

parole board.’

[3] Part II of Schedule 2 to the CLAA provides: ‘Any offence relating to . . . fraud, . . . theft . . . – (b) involving amounts of more than R500 000,00; (c) involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate

or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or (d) if it is proved that the offence was committed by any law enforcement officer— (i) involving amounts of more than R10 000,00; or (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.’

[3] Part II of Schedule 2 to the CLAA provides:

‘Any offence relating to . . . fraud, . . . theft . . . –

(b) involving amounts of more than R500 000,00;

(c) involving amounts of more than R100 000,00, if it is proved that the offence was committed by a person, group of persons, syndicate

or any enterprise acting in the execution or furtherance of a common purpose or conspiracy; or

(d) if it is proved that the offence was committed by any law enforcement officer—

(i) involving amounts of more than R10 000,00; or

(ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.’

[4] Van der Walt v S [2003] 2 All SA 587 (T).

[5] Ibid at 589

- [6] Ibid at 593.
- [7] S v De Sousa [2008] ZASCA 93; [2009] 1 All SA 26 (SCA).
- [8] Ibid para 3.
- [9] Van der Walt at 594.
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