CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 145/22

In the matter between:

NATASHA LIEBENBERG Applicant

and

THE STATE Respondent

Neutral citation: *Liebenberg v The State* [2023] ZACC 33

Coram: Zondo CJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Potterill AJ, Rogers J, Theron J and Van Zyl AJ

Judgment: Potterill AJ

Heard on: 18 May 2023

Decided on: 10 October 2023

Summary: Admissions in terms of **s**ection 220 of the Criminal Procedure Act 57 of 1977 — admissibility of evidence in disciplinary hearing — lack of jurisdiction

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ORDER

On appeal from the High Court of South Africa, Northern Cape Division, Kimberley:

1. Leave to appeal is refused.

JUDGMENT

POTTERILL AJ (Zondo CJ, Kollapen J, Madlanga J; Majiedt J, Makgoka AJ, Rogers J, Theron J and Van Zyl AJ concurring):

Introduction

[1] This is an application for leave to appeal against the judgment and sentence of the High Court of South Africa, Northern Cape Division, Kimberley (High Court). The matter was on appeal from the Northern Cape Regional Court, Kimberley, where the applicant, Ms Natasha Liebenberg, was convicted of 86 counts of fraud, 84 counts of forgery, 84 counts of uttering and 10 counts of fraud. The applicant was sentenced to six years' imprisonment. On appeal, the High Court acquitted the applicant on the charges of forgery and uttering and reduced the sentence from six years' imprisonment to four years' imprisonment. The applicant applied for special leave to appeal to the Supreme Court of Appeal, which refused her application. The President of the Supreme Court of Appeal dismissed her application for reconsideration.

[2] The questions before this Court are: (a) whether evidence arising during the course of the applicant's employer's disciplinary processes was admissible at the applicant's criminal trial; and, (b) if not, whether the applicant's right to a fair trial was infringed.

Background

[3] The applicant was employed by Amalgamated Banks of South Africa Limited (ABSA) as an estate administrator. When administering an estate, the applicant had to

follow the procedures, rules and policies of ABSA. ABSA's policies and procedures pertaining to the payment of monies out of deceased estates conform with section 11(1)(b) of the Administration of Estates Act,[1] in that no monies may be paid out prior to the finalisation of the liquidation and distribution account except in two special circumstances: funeral costs and the subsistence of family members.

[4] ABSA held investigative consultations that led to the applicant being charged for negligently failing to follow the procedures, rules and policies of ABSA. The applicant was sanctioned with written warnings on 27 January 2010 and 30 March 2010. The applicant undertook, in future, to discuss any payments out of estates with the estates office and obtain written consent from the office before making payments. The applicant was then investigated for further transgressions. Ms Russell, an ABSA Forensic Investigator, interviewed the applicant on 4 October 2011 and again on 7 November 2011. These interviews were recorded and the applicant deposed to written statements during these two interviews. Transcripts of the recordings were subsequently prepared.

[5] The applicant was suspended pursuant to the disciplinary hearing and later dismissed. The applicant was subsequently charged criminally with 269 counts in respect of the matters uncovered by ABSA. There were 86 counts of fraud, alternatively theft, totalling R645 231.87; 86 counts of forgery and 86 counts of uttering, arising from the same conduct as that alleged in the first 86 counts; and 11 further counts of theft.

Litigation history

Regional Court

[6] The applicant pleaded not guilty on all counts and proffered no plea explanation. She had legal representation throughout. The prosecutor called as a witness Mr du Toit, the branch manager of the estate division of ABSA in Bloemfontein. Mr du Toit testified with regard to investigative consultations that were recorded in writing prior to

[1] 66 of 1965.

the disciplinary charges being brought against the applicant. He also read into the record a letter written by Ms Janse van Rensburg, who was described as an ABSA official, explaining the nature of the misconduct. The applicant allegedly transgressed the ABSA policy by facilitating cash payments out of estates to receivers of the money who did not qualify under any of the exceptions. This resulted in a monetary loss for ABSA due to shortfalls in the estate accounts.

[7] The state proceeded to call Ms Russell and her evidence dealt with five of the fraud charges. She also made reference to investigative interviews she had with the applicant. The applicant's attorney objected to these statements being handed in as exhibits at the trial, arguing that they were not obtained voluntarily and that his client was coerced into making the statements.

[8] A trial-within-a-trial was held to establish whether the statements were made voluntarily. The statements had a section where the applicant could indicate whether she had been treated fairly. The applicant indicated that she had been treated fairly during the course of the interview and that she had not been promised anything, coerced or threatened in any way. The audio recording of the interview of 4 October 2011 was played in the Regional Court and Ms Russell was questioned and cross-examined thereon. Ms Russell testified that, because it was an informal gathering of information only, a staff member or union member was permitted to be present when the statement was made. ABSA's policy, however, was that no legal representative may be present at these investigatory sessions. She explained how the cash withdrawals out of the estate accounts took place. I need not deal with this evidence in any detail, because it was not disputed that the cash withdrawals did occur as alleged in the charge sheet and as testified to by Ms Russell.

[9] The applicant also testified during the trial-within-a-trial and stated that if she had had an attorney present, she would not have said the things she did. Furthermore, the applicant alleged that Ms Russell had treated her badly by asking where she got the money that was in her purse, and she spoke to her harshly. She testified that not

everything Ms Russell said to her was recorded. She thought she was being called to the office to sign her suspension forms, not to be interviewed. The applicant testified that she had signed the statement to get the entire debacle behind her and to get out of the office as soon as possible. She stated that at that stage she had been suffering from depression and had even wanted to commit suicide. The applicant stated that she had not been forced to sign the statement, but that she had been affected by her medication.

[10] The Regional Court found that the statements were made voluntarily and that this was confirmed by the applicant during the admissibility trial. The Regional Court held that her reasons as to why she had signed the statements were inconsistent. Although it was not initially raised as an independent ground during the trial-within-a-trial, the Regional Court entertained the argument regarding the applicant not being legally represented. It held that it was clear from the recordings that the applicant had been treated fairly and that none of her rights had been infringed. The Regional Court admitted the two statements into evidence.

[11] The state then continued with the evidence in the main trial and Ms Russell testified regarding the cash withdrawals relating to counts 5 to 86. She testified that the cash withdrawal slips were forged in that they were signed by the applicant as though it was a beneficiary or executor who had signed them. The forged withdrawal slips were then used to effect payment from ABSA's estate accounts, as a result of which it suffered a loss.

[12] Ms Russell next testified with regards to counts 259-269, which were not cash withdrawals but related to cheques drawn against the estate accounts. These cheques were drawn by the applicant as though they were payments to beneficiaries or executors, or payments made on behalf of beneficiaries to third parties, or payments made from one estate to another. The cheques were, however, not deposited into the accounts of beneficiaries and where the payments were made to third parties the executors did not know of such payments. The applicant had no authority to draw these cheques.

[13] The applicant's legal representative focused his cross-examination on the fact that Ms Russell was not a handwriting expert. The state had given notice that a handwriting expert was still to be called. Ms Russell conceded that she had no direct proof that the applicant benefitted from the cash and cheque withdrawals and payments as testified to by her. On resumption of the trial the applicant made a number of formal admissions in terms of section 220.[2]

[14] The relevant parts of her section 220 statement read as follows:

> "2. I make the admissions freely and voluntarily without any influence.
>
> 3. I admit to all the charges as put to me in the charge sheet.
>
> 4. The admissions I make are shortly as follows:
>
> 4.1 I worked at ABSA Branch, 80 Bultfontein Road. My position was a fiduciary consultant since 1992. I have been working with estates and administration thereof. In the performance of my duties I had access to various estates funds under the control of ABSA bank at my branch.
>
> 4.2 I admit that during the dates mentioned in column 2 of Schedule A to the charge sheet I had unlawfully and falsely with the intention to defraud ABSA bank and its employees completed cash withdrawal slips and withdrew money from the bank accounts of the account holders as mentioned in all the exhibits handed up in court as well as it is mentioned in column 4 of Schedule A to the charge sheet.
>
> 4.3 The charges I admit to is charges 1 to 86 in this regard.
>
> 5. In relation to count 87 to 172 I admit further that withdrawal slips were completed in the manner that reflected as if they were completed by the beneficiaries as mentioned in column 4 of Schedule B and therefore I admit forging their signatures.

[2] It reads:

> "An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact."

6. I have withdrawn all the amounts as stated in in column 7 of Schedule B which was not due to me. However, I have not used the amounts for my own benefit but had given it to the executors of the different estates.

7. Pertaining to counts 173-258 I admit I am guilty of the crime of uttering as read with the provisions of section 51(2) of Act 105 of 1997. I admit that I had presented withdrawal slips to the tellers of the bank to withdraw money from the various estate accounts as mentioned in column 3 and 4 of Schedule C to the charge sheet.

8. Insofar as counts 259 to 269 are concerned, I admit that I completed the cheques for necessary payees to benefit from these cheques. I personally did not benefit from the pay-outs of these cheques.

9. My actions were wrongful and unlawful and I show remorse now as I had not followed the proper procedure. I had not benefitted at all but I paid the money to the executors of the deceased's estate although they deny it.

10. I admit guilt to defrauding ABSA by forging the signatures of the beneficiaries of the deceased's estate.

11. The epiphany I had during the trial itself made me realise that my actions were wrongful and unlawful and had caused ABSA a loss.

12. After my investigation conducted by ABSA, all the affected estate beneficiaries were paid their money by ABSA."

[15] The state proceeded to call Mr Nanzana to confirm the hearsay evidence that was provisionally admitted in terms of section 3(1)(b) of the Law of Evidence Amendment Act,[3] when Ms Russell testified on the investigations into cheques and specifically on count 259, a cheque drawn in the amount of R2153.63 for the benefit of Mr Nanzana. He testified that as a beneficiary of his brother's estate he never received a cheque in the amount of R2153.63. He also confirmed that he often signed blank cash withdrawal slips at the instance of and upon presentation by the applicant. These withdrawals were not for his benefit.

[3] 45 of 1988.

[16] In light of the admissions made by the applicant, the only question that remained to be answered was what had happened to the money that the beneficiaries and the executors failed to receive. Although the applicant denied that she benefitted from the money, she admitted that ABSA suffered a loss and that her pension money was utilised to recuperate some of the shortfall. The Court found that the only inference was that the applicant had enriched herself with the money. It concluded that the state had proved all the elements of all the offences, except count 261, and the applicant was found guilty as charged.

[17] The applicant was sentenced to six years' imprisonment. An application for a confiscation order in terms of section 18 of the Prevention of Organised Crime Act[4] was brought before the Regional Magistrate. A confiscation order for the amount of R2 309 386.52 was made. The amount of R347 455.29 was recovered by means of the applicant's pension interest. ABSA recovered the amount of R1 761 931.23 from an insurance payment, the balance of R200 000 was to be paid by the applicant.

High Court

[18] The applicant appealed both her conviction and sentence to the High Court. The ground of appeal was that there had been a duplication of charges was upheld, with the High Court finding that the charges of fraud and those of forgery and uttering amounted to a duplication of charges.

[19] The High Court rejected the applicant's submission that the Regional Court had erred in finding that the state had proved all the elements in respect of the fraud charges (counts 1 to 86). It found that the applicant's section 220 admissions had put the contested facts beyond issue and the applicant had admitted committing the offences of fraud.

[4] 121 of 1989.

[20] The High Court further found that the record did not reflect any bias by the Regional Magistrate in being privy to the content of the two written warnings, and that the evidence relating to the disciplinary hearings was admitted without any objection from the applicant's legal representative. The High Court held that the Regional Magistrate only made a cursory remark about this evidence, but did not rely thereon to arrive at a finding of guilt. That finding was made on the strength of the formal admissions made by the applicant.

[21] The High Court found no evidence in the record of the trial-within-a-trial before the Regional Court or the transcribed record of the disciplinary interview that the applicant had been coerced or that her statements were unfairly obtained. The applicant had in both statements confirmed that the statements were made freely and voluntarily without being unduly influenced while in her sound and sober senses. She confirmed that she was warned that anything she said may be reduced to writing and may be used as evidence against her and that she was not obliged to answer incriminating questions. The submission that the applicant was treated unfairly, or that the trial was unfair or her constitutional rights infringed, was rejected.

[22] With regard to sentence, the High Court rejected the submission that the sentence was shockingly inappropriate and that correctional supervision would have been appropriate in the light of the confiscation order that had been granted, the applicant having lost her pension, the trial having run for four years and the applicant not having personally benefitted from the money. The High Court did, however, reduce the sentence due to it holding that there had been a duplication of the charges and convictions.

Submissions before this Court

Applicant's submissions

Jurisdiction and leave to appeal

[23] The applicant submits that the matter raises constitutional issues or issues connected with decisions on constitutional matters. These issues are that the state adduced inadmissible evidence of the applicant's prior conduct and the disciplinary hearings depicting the applicant's bad character and criminal tendencies. Further, that the evidence of the statement made during the disciplinary process was unconstitutionally obtained, because the applicant was compelled to make a statement and her right to silence was not explained to her. The applicant argues that the proceedings were thus fundamentally unfair and irregular and that it would be in the interests of justice to grant leave to appeal.

Merits

[24] The applicant's main focus is the evidence pertaining to the disciplinary hearings, labelling it as legally irrelevant and highly prejudicial due to it portraying her as a person of bad character and criminal tendencies. The submission is that this evidence was inadmissible; its admission led to a failure of justice and the Regional Magistrate's knowledge of the disciplinary hearings and sanctions created a perception that he may have been biased.

[25] It was argued by the applicant that the admission of the statement and recording of the investigation led to an infringement of her constitutional rights. The High Court should have taken into account that at that time, the applicant was depressed and on medication, that she cried throughout the interview and that she was suicidal. She was denied the right to have legal representation during the interview and was in fact unaware that the investigation was to take place as she was under the impression that she was only going to receive her suspension letter. The warning in the statement that she could be prosecuted if she wilfully told an untruth was in itself coercion. The High Court erred in not treating this statement as evidence obtained unconstitutionally

and akin to an infringement of her pre-trial rights,[5] leaving her unprotected against self-incrimination.

[26] It was submitted that as far as the criminal trial was concerned, the proceedings were fundamentally unfair because the Regional Magistrate was impatient and showed bias by remarking that after all the evidence led by the state, there were no facts in dispute, creating the impression that the applicant wanted to unnecessarily delay the proceedings. The further argument was that the evidence about the disciplinary record must have influenced the Magistrate for him to have made such a remark. As in *Le Grange*,[6] the High Court should have found that the comments made during judgment showed that the Regional Magistrate had prejudged the matter, thereby rendering the trial unfair.

[27] The applicant persisted with the argument that the High Court should have found that the Regional Magistrate erred in finding the applicant guilty of theft because she denied that she personally benefitted from the cash and cheque transactions.

[28] On sentence, the applicant submits that a non-custodial sentence is the most appropriate in view of the eight to nine months that the applicant was incarcerated awaiting trial. In the 12 years that have lapsed since the matter commenced the applicant did not commit further offences. It was argued by the applicant that this lengthy delay caused her severe prejudice and mental anguish.

Respondent's submissions.

Jurisdiction and leave to appeal

[29] The respondent submitted that although the averred fair trial infringement is a constitutional issue, there are no prospects of success and that the application for leave to appeal should be dismissed.

[5] See *S v Botha* 1995 (2) SACR 605 (W); (11) BCLR 1489 at 610.
[6] *S v Le Grange* [2008] ZASCA 102; 2009 (1) SACR 125 (SCA) at paras 21-3 and 29.

Merits

[30] Pertaining to the evidence of the investigations prior to the disciplinary hearings and the disciplinary sanctions, the state argued that the evidence was merely tendered to prove that the applicant had acted with the intention to commit the offences.

[31] The state argued that the statements made by the applicant were made freely and voluntarily. Additionally, it argued that the High Court correctly held that the evidence led in the trial-within-the-trial proved that the applicant was not coerced into making these statements. In respect of the written statements, the state contended that the applicant was informed that she had the right not to incriminate herself. The state emphasised that the applicant was convicted on the strength of the section 220 admissions she had made.

[32] The state argued that, although there was no direct evidence that the applicant did benefit from the theft and fraud, the circumstantial evidence before the Regional Court was such that the only inference to be drawn therefrom was that she did in fact benefit. The state thus argued that the applicant was correctly convicted on the charges of theft and fraud.

[33] In respect of sentence, the state submitted that there was no misdirection and the High Court was correct to confirm a custodial sentence because an important aggravating circumstance was that the applicant stole from her employer, ABSA, where she was in a position of trust.

Jurisdiction and leave to appeal

[34] The first issue to be decided is whether this matter engages this Court's jurisdiction. If the initial hurdle of jurisdiction is not overcome the matter cannot be entertained by this Court. If the jurisdictional threshold has been met, this Court proceeds to assess whether it is in the interests of justice to grant leave to appeal.

[35] The Constitution provides that this Court's jurisdiction is engaged in constitutional matters and matters that raise an arguable point of law of general public importance that ought to be decided by this Court. By contrast, this Court has refused to entertain appeals that seek to challenge only factual findings or incorrect application of the law by the lower courts.[7]

[36] In this matter the issue raised as engaging this Court's jurisdiction is the admission of evidence pertaining to the investigations prior to the disciplinary hearings. The applicant's argument is that this evidence was unconstitutionally obtained because the applicant was compelled to give a statement and her right to silence was infringed. She contends that this rendered the trial unfair. The unfairness was compounded, so it is submitted, because this inadmissible evidence must have influenced the Regional Magistrate to perceive the applicant as having a bad character and criminal tendencies.

[37] Section 35(5) of the Constitution provides as follows:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[38] In *Key*, this Court set out the general approach as to what constitutes a fair trial:

> "In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for

[7] *Mankayi v Anglogold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 12.

> technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in *Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."[8]

[39] As a starting point, evidence obtained unconstitutionally can only render a trial unfair if a trial court relied on that evidence in convicting the accused. If the evidence played no role in convicting an accused, that evidence could not render the trial unfair or be detrimental to the administration of justice. Counsel for the applicant conceded during oral argument that in the Regional Court's reasons regarding conviction there is no indication that the Magistrate placed any reliance on the evidence pertaining to the disciplinary hearings. In finding the applicant guilty, the Regional Court relied on the section 220 admissions and the totality of the evidence that was led on each of the counts of theft and fraud, excluding the evidence pertaining to the disciplinary hearings. What was contended to be inadmissible evidence did not have any bearing on the applicant's convictions. There is no mention of that evidence in the Regional Magistrate's reasons for convicting the applicant. This is unsurprising, as the applicant effectively pleaded guilty by admitting all the elements of the offences in question. There was, therefore, no need for the Regional Magistrate to have had regard to any of the evidence that preceded the applicant's formal admissions.

[40] In *Van der Walt*,[9] this Court held that in deciding whether an alleged violation of fair trial rights engages the Court's jurisdiction, the Court assesses the extent of the alleged violation. Further, that a procedural irregularity will raise a constitutional matter only if it is sufficiently serious to undermine basic notions of trial fairness. In this matter there is no such violation that raises a constitutional matter and this Court consequently does not have jurisdiction.

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[8] *Key v Attorney-General, Cape Provincial Division* [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (CC) at para 13.
[9] *Van der Walt v S* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) at para 15.

[41] The argument that the Regional Magistrate must have been influenced by this impugned evidence is pure speculation. There is not a single fact or finding in the record of the proceedings to sustain this argument. The applicant relies on the remark made by the Regional Magistrate, during argument prior to conviction, that after all the evidence led by the prosecution "nothing was in dispute", the applicant wants to "frustrate the system". The argument, as advanced by the applicant, is that the evidence about the disciplinary hearings must have influenced the Regional Magistrate for him to have made this remark. The applicant also argues that, as in *Le Grange*,[10] the High Court in this matter should have found that the comment made by the Regional Magistrate showed that he prejudged the matter, thus rendering the trial unfair. On no reasonable construction can that remark be linked to the evidence pertaining to the disciplinary hearing. There is simply no room to accept the contention that, despite the absence of any reference to the impugned evidence in the Regional Magistrate's reasons for conviction, it nonetheless influenced the Court in coming to its finding. It is not possible to come to a conclusion of this nature on the judgment and the record. If one were to accept that what the applicant contends is inadmissible evidence was not relied upon by the Regional Court in its conviction of the applicant, it follows that there is no basis for establishing this Court's jurisdiction.

[42] Counsel for the applicant in this Court persisted with the argument that the High Court incorrectly found the applicant guilty on the section 220 admissions because the applicant never admitted that she personally benefitted from the theft and fraud. First, a factual challenge does not clothe this Court with jurisdiction. Second, in view of counsel's concession that all the elements for theft and fraud were admitted by the applicant in the formal admissions, this argument is fallacious. It was also conceded by counsel for the applicant that personal benefit is not an element that needs to be proved for the offences of fraud and theft. No further comment is required, perhaps only to highlight the following:

[10] *S v Le Grange* above n 5.

> "For so long as a formal admission stands, it cannot be contradicted by an accused, whether by way of evidence or in argument. To hold otherwise would defeat the purpose of [section 220], eliminate the distinction between a formal admission in terms of that section and an informal admission which may be qualified or explained away, and thereby lead to confusion in criminal trials. As Viljoen JA said in *S* v *Mjoli,* in a concurring judgment:
>
> > 'By reason of the fact that an admission formally made by or on behalf of the accused is "sufficient evidence", the effect is that such fact virtually becomes conclusive proof against him because the accused himself or his legal representative on his behalf has made the admission and any effort by him or on his behalf to adduce evidence countervailing such fact would be inconsistent with his having made the admission.'"[11]

[43] Additionally, in *S v Groenewald* the effect of formal admissions is explained as follows:

> "An admission is an acknowledgment of a fact. When proved or made formally during judicial proceedings, it dispenses with the need for proof in regard to that fact. *Wigmore on Evidence* calls it 'a method of escaping from the necessity of offering any evidence at all': a 'waiver relieving the opposing party from the need of any evidence.' Section 220 of the Act accordingly makes it possible for a contested fact to be put beyond issue, since once made the admission constitutes 'sufficient proof' of it."[12]

[44] From the record of the proceedings, the High Court could not find any evidence of bias on the part of the Regional Magistrate that could have resulted in the applicant's decision to make the formal admissions. That finding is unassailable. Expressing frustration at the many postponements sought and commenting that accused persons would always experience a criminal court as stressful, did not show actual bias or reasonable perception of bias. The two comments were in any event made two years before the admissions were made. The submission that this Court must find the

[11] *Van der Westhuizen v S* [2011] ZASCA 36; 2011 (2) SACR 26 (SCA) at para 34.
[12] *S v Groenewald* [2005] ZASCA 71; 2005 (2) SACR 597 (SCA) at para 33.

existence of bias is based on an assessment of factual findings that does not attract this Court's jurisdiction.

[45] Since there is no constitutional issue, this Court need not assess the merits of the case. Similarly, there is no arguable point of law of general public importance raised that carries any prospects of success. In the result, leave to appeal must be refused.

[46] In arguing that the sentence should be set aside and substituted with a non-custodial sentence, the only factors raised by the applicant are: (a) the awaiting trial period of between eight to nine months; and (b) at the time of argument the offences had been committed 12 years previously. Absent any constitutional issue, the question of sentence will generally not be a constitutional matter. In *Van der Walt*, this Court confirmed that for this Court to assume jurisdiction on sentence, an irregularity must have led to a failure of justice.[13] There is nothing to suggest that the sentencing was so unfair as to amount to a "failure of justice".[14] Therefore, this Court's jurisdiction is not engaged on this aspect either.

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

1. Leave to appeal is refused.

[13] *Van der Walt v S* above n 9 at para 18.
[14] See *Bogaards v S* [2012] ZACC 23; 2013(1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) at para 42.

For the Applicant:	Christiaan F van Heerden instructed by Mathewson & Mathewson Incorporated
For the Respondent:	I M Mphela and B Mdlalose instructed by Director of Public Prosecutions, Kimberly