IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF KWAZULU-NATAL

HELD AT DURBAN IN THE SCCC2 SITTING IN T COURT

CASE NO: 41 / 454 / 2019

IN THE MATTER BETWEEN:

THE STATE

And

CINDY SAUNDERS ACCUSED

LEAVE TO APPEAL RULING

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[1] On the 14th of February 2023 this court imposed the following sentence upon the applicant, who now applies for leave to appeal.

> On counts 12-36 which this court took as one for purposes of sentence, noting that these counts did not attract prescribed minimum sentencing legislation and are in comparison lower amounts compared to the other counts and cumulatively totalled, R840 332-00, wherein the complainant in this matter was her former employer Marc Edwards of Nicholson shipping:
>
> 1. Six years Imprisonment.
>
> On counts 36 – 54, which I took as one for purposes of sentence, wherein the complainant was also Marc Edwards, the cumulative total of the fraud is R10 592 195 accused was sentenced as follows:

2. Twelve years' imprisonment of which three years' imprisonment is suspended for five years on condition accused is not convicted of fraud or theft, or any attempt thereto, committed during the period of suspension for which imprisonment is imposed without the option of a fine.

   On counts 133-135 which I took as one for purposes of sentence, where the complainant was the entity SK BOYZ represented by Mr Sukdeo , and the cumulative amount of the fraud was R5 428 000 the accused was sentenced as follows:

3. Eight years Imprisonment

[2] The sentence imposed in paragraphs one and three are to run concurrently with the sentences imposed in paragraph 2, namely counts 36-54.

The effective term of imprisonment was thus Nine Years Imprisonment.

No Order was made in terms of section 103(1) of the Firearms Control Act.

The Clerk of this court is ordered to immediately direct the Department of Social Development to do the following:

(a) The Department must appoint a designated social worker as contemplated by the Children's Act 38 of 2005 to investigate in terms of **ss 47(1)** and **155**(2) of the Act, whether the accused's children are minor children in need of care. The Department must do this without delay and take all steps necessary to ensure that:

(i) they are properly cared for in all respects;

(ii) they remain in contact with the accused during the period of imprisonment, and has contact with her insofar as it is permitted by the Department of Correctional Services.

[3] It is against these sentences that the applicant seeks leave to appeal. The applicant was represented during the sentencing proceedings by Advocate Van Schalkwyk SC instructed by Carl Van Der Merwe and Associates; however the applicant is now represented by Advocate Jorgenson instructed by DMI Attorneys.

Senior State Advocate Cole has represented the State and has resisted the application.

LEAVE TO APPEAL TEST

[4] Before amendment it was generally accepted that for leave to appeal be granted it was sufficient if an appeal is arguable and not manifestly doomed to failure1. The question was not whether the appeal will succeed, but a lesser standard of whether the appeal is free from predictable failure.2 The position in *S v Naidoo3* indicated the prevailing test namely "the possibility of success on appeal" was held to be sufficient.

[5] It is accepted that now the law requires that before leave to appeal be granted the appeal **must** have reasonable prospects of success.

> '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.'4

1*S v Anderson* **1991 (1) SACR 525** (C)
2 *S v Hudson* **1996 (1) SACR 431** (W) at 43c
3**1996 (2) SACR 250** (W)
4 S v Smith (Supra) at [7].

[6] An application for leave to appeal is on the basis that there is a reasonable prospect of success that another court could or would not may find that the sentences imposed are inconsistent with the facts and induce a sense of shock5.

School Governing Body Grey College, Bloemfontein vs Dion Scheepers and Others6 the following was stated:

> "This application was predicated upon sections 17(1)(a)(i) and/or (ii). Section 17(1)(a)(i) has not only raised the bar for applications for leave to appeal but also fettered the Judge's discretion when considering such applications. Leave to appeal may only be given when the Judge or Judges are of the opinion that the appeal would have reasonable prospects of success. The word "only" is indicative of the fact that this section limits the Judge's discretion to grant leave to appeal. The Judge's discretion is circumscribed because he or she may not grant leave to appeal based on a reason other than the one mentioned in it. Considerations such as an applicant, for leave to appeal, having an arguable case or that there is a possibility of success on appeal are irrelevant."

[7] The test, with the utmost respect to what is contained in paragraph 2 that another court may come to a different finding but rather 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"[7].

5Soni v S (CC29/2014P) [2019] ZAKZPHC 42 (4 June 2019)-Per Henriques J :In Acting National Director of Public Prosecutions & others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions & others,**[8]** Ledwaba DJP writing for the full court considered the test as envisaged in **s 17** of the **Superior Courts Act. At** para 25 of the judgment he dealt with the test set out in para 6 of The Mont Chevaux Trust judgment above where Bertelsmann J held the following:
'It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright & Others* **1985 (2) SA 342** (T) at 343H. The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.'
Thus, in relation to the provisions of **s 17** of the **Superior Courts Act, the** test in respect of an application for leave to appeal is not whether another court "may" come to a different decision but the test is "would" another court come to a different decision. I thus have to determine whether the appellant has succeeded in establishing whether there are reasonable prospects that another court **would** come to a different decision in respect of the application for bail pending appeal.
6Case No 2612/2018 FSHC delivered on 17 January 2019 para 4.
[7] S v Smith (supra)

GROUNDS OF APPEAL

[8] The application was served on the 27th day of February 2023 and the matter first appeared in court on the 2nd March 2023 when it was postponed to the 9th day of March when it was argued. At the appearance in court on the 2nd of march 2023 the Court indicated to counsel for the applicant that it would like counsel to address it on the submissions by previous counsel during sentence wherein then counsel for the applicant Advocate Van Schalkwyk SC has argued that although imprisonment was unavoidable the defence were seeking a sentence in which a large portion of that imprisonment be suspended.

[9] Immediately prior to the matter been argued the court indicated to the applicant's counsel that it would also like to hear him on the issue of a "primary care-giver" and on the issue of bail pending appeal. The State has opposed bail and the State filed detailed Heads of Argument opposing the application.

[10] In summary, the grounds of appeal can be summarized as follows: -

1. This court failed to attach sufficient weight to the inherent display of remorse contained in the applicant's guilty plea and her full disclosure including the implication of others.
2. This court attached insufficient weight to her personal circumstances, the effect on her formative years of her father's gambling and that effect on the family.
3. The court did not factor into its sentence the applicant's diminished responsibility or diminished moral blameworthiness as a result of this diminished responsibility.
4. The court failed to consider the fact that the accused as a primary care-giver that the removal of the applicant from her children for a lengthy period would have a detrimental effect on the children.
5. The court erred in its application of the paramountcy principle in litigation that affects children and in particular the investigation done in this regard prior to imposition of sentence.
6. That in the circumstances a sentence in terms of section 276(1) (i) or 276 (1) (h), namely correctional supervision should have been imposed.

[11] The response to the question that the arguments contained in the Heads of the leave to appeal differ from those argued during the sentencing proceedings by senior counsel which was premised on the basis that a term of imprisonment was inevitable it was, correctly pointed out by Mr. Jorgenson that notwithstanding any suggestions by counsel on sentence the ultimate responsibility to impose an appropriate sentence resides with the court irrespective of the arguments made before it. As Counsel put it, colloquially "the buck stops with the court."

[12] **In essence the arguments of counsel, is that I failed to attach the proper weight to the accused's personal circumstances, her diminished responsibility arising out of her childhood exposure to gambling and the toxic effects this had on her upbringing. The diagnosis of pathological gambling addiction and the effect that this had in her moral blameworthiness when committing these crimes and this is always an important factor in sentencing. Her remorse is also under emphasized by this court and that the sentences is excessive in light of the fact that she is a primary care-giver. -**

[13] During my reasons for sentence I alluded to the vast amount of evidentiary material placed before this court and advised;

> "It is impossible to record everything that has been lead in the evidence presented, it is not that I do not take it all into account. I am of necessity required to summarise some of the information and focus on what I consider the most important aspects"

[14] To the extent that I did not deal in depth with the arguments as put forward by Mr Jorgenson .it was largely as the focus and arguments of the respective counsel for the applicant and the State were focussed on other aspects. This is not to say that they were not dealt with in the reasons, I believe they were, but I will use this opportunity to directly deal with the submissions of counsel for the applicant.

[15] It is this courts respectful view as set out in the Precedent contained in the decided cases in matters such as this, is that, with respect Counsel for the applicant is over-emphasizing the personal circumstances of the applicant over and above the other aspects of the trial, namely the seriousness of the offence in particular and also the interests of society.

[16] The offence the applicant is convicted of is extremely serious. It is 45 counts of fraud in extremely large amounts. It bears repeating, the Accused has been convicted of 45 counts of Fraud between October 2017 and August 2018 totaling R16 860 527-53. The 45 counts are made up as follows: -

1. Counts 12-54, in which she pleaded to defrauding her employer, Nicolson Shipping which is owned by Marc Edwards, on 42 occasions she defrauded Nicholson Shipping in the amount of R11 432 527-53.

2. On Counts 38-54, due to the amounts involved these charges need to be considered under the prescripts of the prescribed minimum sentencing legislation contained in Act 105 of 1977.Thes constitute 42 of the 45 counts she has been convicted of.

3. Counts 133-135, in which similarly she pleaded to defrauding S K Boyz a commercial entity whose owner is Manohar Sukdeo on three occasions in the total amount of R5 428 000-00.

4. All three counts due to the sums of money[8] involved attract the prescripts of the same legislation.

[8] Any offence relating to exchange control. corruption. extortion. fraud, forgery. uttering or theft, (u) involving amounts of more than R500 000.00: (b) involving amounts of more than R1 00000.00. 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 (c) 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

[17] In my reasons for sentence, I refer to the seminal judgment of Marais JA on "white-collar crime" wherein the learned judge in Sadler[9] in 2000 stated unequivocally: -

> "I regret to have to say, [white collar crime has] often been visited in South African courts with penalties which are calculated to make the game seem worth the candle[10]"

[18] The myth that those persons involved in serious large-scale theft or fraud and corruption are not really prison material or criminals needs to be dispelled. As Marais JA[11] pointed out this is a heresy and needs to be removed. These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it. [13] It is unnecessary to repeat yet again what this court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration.

[19] Whereas the same learned judge of Appeal authored the leading judgment on the imposition of prescribed minimum sentences when in Malgas, Marais JA although stating that the imposition of minimum sentences should not be departed from for flimsy reasons appositely set out what the court must do when deciding whether or not substantial circumstances and this process is what was followed when this court made the finding of substantial and compelling circumstances been present, but in Malgas Marais JA issued a warning to presiding officers of the impact of Act 105 of 1997.

[9] S v Sadler (57/99) [2000] ZASCA 13; [2000] 2 All SA 121 (A)

[10] S v Sadler (57/99) [2000] ZASCA 13; [2000] 2 All SA 121 (A)

[20] At page 30 of the judgment in Malgas Marais JA said;

> "The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
>
> All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
>
> The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.
>
> In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
>
> If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
>
> In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided"[12]

[21] Both judgments of the learned judge of Appeal Marais JA are quoted with approval by the SCA today. Hughes AJA[13] in 2019 approved of the dicta in Sadler as she stated in S v Kwenda:

[12] S v Malgas (117/2000) [2001] ZASCA 30 - SAFLII

[13] S v Sadler (57/99) [2000] ZASCA 13; [2000] 2 All SA 121 (A) @ [11] ;[12] and [13]

"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"

[22] It is precisely on an application of the dicta in Malgas that this court came to the conclusion that the seriousness of the offence and the interests of society left no other option other than a custodial sentence and that this term of imprisonment needed to reflect the seriousness of the offence. The offence was serious not only because of the inordinate amount of money defrauded, in excess of 16 million rand in under a year but the following aspects were important considerations: - In S v Prinsloo, Leveson J expressed strong views when dealing with sentencing an accused convicted of misappropriation of funds from employers. The head-note of the case reads as follows:

> "....I(n) the world of commerce employers were compelled to place trust in their employees. It was not possible for the employers to conduct the business of their concerns themselves. No alternative remained to them but to repose confidence in their employees, and when an employee breached that trust his conduct had to be heavily penalised. The employer was entitled to expect unswerving honesty from the employee in return for the wages he paid and the benefits he gave him. Nothing but implicit acceptance of that obligation by the employee would keep the wheels of commerce turning smoothly. It was the duty of the courts, whenever this sort of misdemeanour was detected, to send out the message that such conduct would be severely punished'.

[23] And importantly, A reminder is necessary at this point; Cameron JA as he then was said in S v Abrahams[14]'said;

> "Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as "ordinarily appropriate" is a consideration that the courts are "to respect and not merely pay lip service to". When sentence is

Victor Kwenda v The State (682/2018) [2019] ZASCA 113 delivered on (17 September 2019)

[14] **2002 (1) SACR 116** (SCA), Cameron JA at 126

ultimately imposed due regard must therefore be paid to what the Legislature has set as the bench mark.'

[24] And in Nel the SCA specifically stated in connection with the issue of pathological gambling addiction, Mlambo JA (as he then was) held as follows:

"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."

[25] Inevitably with the applicant having been convicted of such serious offences her personal circumstances need to recede in importance to the other factors such as the interests of society and the seriousness of the offence.

[26] The comments of the SCA in The Director of Public Prosecutions, Gauteng v Pistorius[15] resonates;

"[22] Having perused the judgment on sentence by the court a quo I am of the view that the trial court over emphasised the personal circumstances of the respondent. In *S v Vilakazi* **2009 (1) SACR 552** (SCA) para 58 this court said that '[i]n cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background'. See also *S v RO & another* **2010 (2) SACR 248** (SCA) para 20 where this court said '[t]o elevate the appellants' personal circumstances above that of society in general and these two child victims in particular would not serve the well-

[15] **[2017] ZASCA 158** (24 November 2017)

established aims of sentencing, including deterrence and retribution'. Based on the above-mentioned cases I am of the view that the court a quo misdirected itself in its assessment of an appropriate sentence.

[23] The court a quo also stated that in its view there was an indication that the respondent was a good candidate for rehabilitation and that the other purposes of punishment although important ought not to play a dominant role in the sentencing process. The court a quo seemed to have given rehabilitation undue weight as against the other purposes of punishment being prevention, deterrence and retribution. This court in *S v Swart* **2004 (2) SACR 370** (SCA) para 12 stated the correct legal position as follows: '[s]erious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role'.

[27] In the context of this matter, this made as conceded by counsel during the sentencing proceedings, imprisonment inevitable and with the amount involved a moderate term of imprisonment.

Primary Care-Giver and section 28 paramountcy argument.

[28] A great deal of evidence was led during the course of the hearing, much of it on the personal circumstances of the accused and her children, both in her evidence and the evidence of the probation officer[16]. Counsel has suggested that the Order

[16] A pre-sentence report compiled by Sthembile Qwabe a probation officer with the department of Social Development Kwazulu-Natal.

The accused gave evidence and handed in a 103 page affidavit pertaining to her life and the circumstances surrounding the commission of the offence.[16]
Exhibit B also contains a confirmation letter from Dr. Motloung that the accused was referred and completed counselling session for the treatment of her gambling issues[16].

Dr R I Savov, a psychiatrist testified virtually via an audio-visual link, his report and explanatory references is in the defence bundle from page 105-121 with a detailed curriculum vitae qualifying him as an expert handed in subsequently.[16]
The accused also called Rakesh Ramandin of the support group Gambler's Anonymous in mitigation of sentence.
Further, the wife of the pastor of the church that the accused attends, Cheryl Stone gave evidence of her interaction with the accused in the past few years.
The complainant in counts 12-45, Marc Edwards the owner of Nicolson Shipping testified in aggravation of sentence.
The state also called the accountant or representative of SK Boyz to testify, the owner being unavailable due to ill health.

made by the court that probation officers should have conducted a proper investigation is made as a result of his heads been confined as I understand it to a copy of the J15 and this courts reasons. This courts final order was made by the court almost as a "safety valve" to ensure that if difficulties arose then at least there was some court oversight of any issues that might arise. Investigations contained in the reports handed in and the evidence of the people that testified along with the addresses by counsel reveal that the interests of the children were addressed during the sentencing proceedings and that the family in the form of the husband and the grandparents were prepared and able to look after the children. The decision was made by the court fully cogniscant of the circumstances of the minor children.

[29] For the record the court found in its reasons on this aspect the following: -

> "I am sensitive to the challenges and the effect of removal of the accused but on a consideration of the Triad in Zinn as required by Sachs J in 'M[17]' and the related principles as set out in the case law I believe that the only appropriate sentence is clearly a custodial sentence, the real issue is the length thereof, a non-custodial sentence would in my view, be by a considerable margin inappropriate.

[30] In light of the argument of counsel in this appeal I will set out the approach of the court on this aspect of the law that was followed in arriving at this conclusion. Section 28 of the Constitution enjoins the court as the upper guardian of minor children to consider the best interests of children. Among the factors to be considered are the interests of the children when sentencing a primary caregiver.

The defence have handed in detailed Heads of Argument and referred to both local and overseas authority in support of their submissions.
The State has responded with written Heads and cited case law in support of their submissions, both local and from abroad.
Both the State and senior Counsel has addressed the court in terms of section 274 of the Criminal Procedure Act.

[17] S v M (Supra)

[31] In *S v M (Centre for Child Law as Amicus Curiae*[18]*)* Sachs J, dealing with the need to consider the interests of children during sentencing proceedings of an accused who is a mother of minor children, said the following[19]:

> 'Focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process. The objective is to ensure that the sentencing court is in a position adequately to balance all the varied interests involved, including those of the children placed at risk. This should become a standard preoccupation of all sentencing courts. To the extent that the current practice of sentencing courts may fall short in this respect, proper regard for constitutional requirements necessitates a degree of change in judicial mindset. Specific and well-informed attention will always have to be given to ensuring that the form of punishment imposed is the one that is least damaging to the interests of the children, given the legitimate range of choices in the circumstances available to the sentencing court.'

[32] The following guidelines are set out in *S v M*[20]:

> 'There is no formula that can guarantee right results. However, the guidelines that follow would, I believe, promote uniformity of principle, consistency of treatment and individualisation of outcome.

(a) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so.

> *(b)* A probation officer's report is not needed to determine this in each case. The convicted person can be asked for the information and if the presiding officer has reason to doubt the answer, he or she can ask the convicted person to lead evidence to establish the fact. The prosecution should also contribute what information it can; its normal adversarial posture should be relaxed when the interests of children are involved. The court should also ascertain the effect on the children of a custodial sentence if such a sentence is being considered[21].

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[18] 2007 (12) BCLR 1312 (CC)
[19] S V M (supra) at [33]
[20] para [36] supra
[21] see further State v Chetty 2013 ZASCA 6

(c) **If on the *Zinn*-triad approach the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated. [my emphasis]**

(d) If the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, bearing in mind the interests of the children.

(e) Finally, if there is a range of appropriate sentences on the *Zinn* approach, then the court must use the paramountcy principle concerning the interests of the child as an important guide in deciding which sentence to impose.'

[33] Furthermore a court considering a custodial sentence must have regard to the impact such sentence might have on children and has a duty to ensure that as far as possible, the children's rights are protected[22]. A child's best interests are of paramount importance in every matter concerning the child as referred to in s 28(2) of the Constitution. In *MS v S,* Khampepe J held[23]:

'I am mindful that a sentencing court is not required to protect the children from the negative consequences of being separated from their primary caregivers. It is required only to pay appropriate attention to their interests and take reasonable steps to minimise damage. This requires a balancing exercise that takes account of the competing interests.'

[34] Further at para 45 of the judgment the constitutional court held the following:

'I accept, as the curator found, that the children will be adversely affected by the incarceration of their mother, as she is their primary caregiver. However, this on its own does not impose any obligation on the sentencing courts to protect, at all costs, the children from the inevitable consequences of losing their primary caregiver if she is incarcerated. All that is required is that the court must pay proper attention to these issues and take measures to minimise damage when weighing up the competing needs of the children, on

[22](*S v de Villiers* **2016 (1) SACR 148** (SCA)).
[23]MS v S [supra] para 35

the one hand, and the need to punish the accused for her misconduct, on the other.'

[35] The importance of *M supra* is that a court in sentencing a primary caregiver, should consider the child's interest as one of the factors in addition to the *Zinn* triad. At 562a-c Sachs J concluded:

> **'Sentencing officers cannot always protect the children from these consequences. They can, however, pay appropriate attention to them and take reasonable steps to minimise damage. The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned.**'[my emphasis]

[36] This is precisely what the court did in this matter, and indeed in all issues dealing with sentence where an accused is the primary care-giver. Whereas the court was satisfied that steps had been taken to take care of the minor children, the biological father and maternal grandparents are involved in the children's lives and appear willing to and are capable of taking care of the children the court following the sage precedent of the learned judge Steyn in S v S ordered judicial oversight over the well-being of the children going forward.

[37] In the circumstances I was satisfied that the offences were of such a serious nature that the personal circumstances of the accused should yield to the other purposes of punishment, in particular deterrence and retribution. As the learned judge Steyn said in S v S[24]:

> "If I was solely guided by the accused's individual circumstances then correctional supervision in terms of **s 276(1)(h)** of the **Criminal Procedure Act 51 of 1977** would have suited his needs. The aforesaid section however provides for a sentence not exceeding 3 years' imprisonment. It is expected

[24] S v S (AR233/05) [2017] ZAKZDHC 13 (22 March 2017) [23]

of me not to find a sentence that fits the needs of the accused. The sentence should also be in the interests of society and serve as a deterrent to prevent others from doing the same"

[38] I then made an ancillary order to try to ensure that the affected children are protected from harm. With respect, the accused's personal circumstances were not under-emphasised, recognition was given to the remorse she showed even if State Counsel has argued that this remorse falls well short of what Matithyi requires, her addiction was factored in but in light of the principles of sentence that have to be applied and that her gambling addiction, even if pathological does not immunize her from the consequences of the massive and systematic frauds that she perpetrated against the complainants.

[39] With respect, from the outset the issue was correctly outlined by senior counsel during sentencing proceedings, namely that although the accused in light of the serious nature of the offences and the amounts involved had to be imprisoned the lis was in fact the term to be imposed. Comparatively the applicant's sentence might be viewed by some as lenient, especially in light of the fact that more than half of the counts faced by the accused attracted a prescribed minimum sentence of 15 years' imprisonment[25].

[40] The test in this application is whether or not the court of appeal could reasonably arrive at a conclusion different to that of this court in regard to sentence. In order to succeed, therefore, the applicant must convince this court on proper grounds that she has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding"[26]. The applicant has in my view failed to show on proper grounds that she prospects of success on appeal.

[41] The application for leave to appeal is refused.

Handed down, dated and signed this 13th day of March 2023.

Time of handing down is deemed to be 9-30am on 13 March 2023.

Garth Davis Regional Magistrate

[25] 21 counts 36-54 and the final three counts.
[26] S v Smith (supra)