SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 20215/2014

Not Reportable

In the matter between:

CORNELIA STRYDOM **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Strydom v The State* (20215/14) [2015] ZASCA 29 (23 March 2015).

Coram: Lewis, Pillay et Mbha JJA

Heard: 12 March 2015

Delivered: 23 March 2015

Summary: Sentence – imprisonment of non-parole period ordered in terms of s 276B(1) of Criminal Procedure Act 51 of 1977 – non-parole order to be made only in exceptional circumstances - court required to afford parties opportunity to address court on making such an order and the period thereof – failure to do so constitutes misdirection.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Borchers J sitting as court of first instance)

1 The appeal is upheld.

2 the order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:

'The appellant is granted special leave to appeal to the Gauteng Local Division,

Johannesburg, against the sentence imposed by the Regional Court';

3 The appellant is directed to deliver her notice of appeal on or before 17 March 2015 based on the findings made in this judgment and containing such further grounds of appeal as may be permitted by the court of appeal.

4 The Director of Public Prosecutions, Gauteng Local Division, is requested to place this appeal on the roll as a matter of urgency on a date to be arranged with the appellant's counsel.

5 The registrar of this court is requested to make three copies of the record filed in this court available to the appellant's attorney for use in the appeal to the Gauteng Local Division, Johannesburg, should the Judge President of that division sanction this arrangement.

REASONS FOR JUDGMENT

Pillay JA (Lewis et Mbha JJA Concurring)

[1] The order set out above was made by this court with the agreement of the parties at the hearing of the appeal. The reasons for making the order follow. The appeal is against the order of the Gauteng Local Division, Johannesburg refusing the appellant's application for leave to appeal to that court against her sentence imposed in the Gauteng Regional Court (Specialised Commercial Crime Court) sitting at Johannesburg. Her conviction was based on 36 charges of fraud involving a benefit to her of R375 816.92. She was consequently sentenced to serve a term of five years' imprisonment with the proviso that in terms of s 276B of the Criminal Procedure Act 51 of 1977 (CPA) the appellant serve three years of imprisonment before being placed or being considered eligible for parole.

[2] The appellant's application for leave to appeal in terms of s 309B of the CPA to the regional magistrate against sentence was dismissed. She then petitioned the Judge President of the Gauteng Local Division in terms of s 309C of the CPA for such leave. This application was also dismissed whereupon she sought and obtained leave to appeal to this court against the dismissal of the petition.

[3] Thus, the issue before this court is whether the application in terms of s 309B of the CPA was correctly dismissed or not.

[4] The background to this matter is as follows. The appellant was employed by the City of Johannesburg as a Specialist Pension Administrator. Her duties included paying out expenses incurred for specialised home care by former employees of the municipality who were injured on duty and required such care. During the course of her employment, the appellant became involved in a scam to defraud the municipality. She colluded with one Marlene Horn who would submit false invoices for

treatment not in fact administered. The appellant would then arrange payment to Horn in terms of the false invoices. The two of them would then share the spoils of their scheme which occurred between 6 June 2007 and 30 September 2009. She and Horn were charged with 36 counts of fraud. Horn for her part entered into an agreement with the prosecution in terms of s 105A of the CPA and their trials were consequently separated.

[5] The appellant pleaded guilty to all the charges and admitted in a written plea submitted in terms of s 112 of the CPA to having committed all the offences referred to in the charge sheet and that she had benefitted to the tune of R375 816.92 from this illegal venture. The necessary elements of fraud were admitted and she was consequently convicted as charged.

[6] The appellant admitted to one previous conviction of fraud of her former employer (prior to City of Johannesburg) – having committed that offence in 1998 and in respect of which she was sentenced to correctional supervision. It is unclear whether this included any directives for her to attend any course within the Correctional Services system in order to enhance her rehabilitation.

[7] Prior to sentence, two reports – a pre-sentence report and one in respect of the interests of her three children – were prepared by social worker Daleen van Biljon. In the first report, as Van Biljon testified, her investigations disclosed allegations of abuse and financial demands on the appellant by her husband. The alleged abuse entailed physical and mental abuse from the time they got married when she was still in her teens.

[8] The appellant relied on these reports to explain that the aforementioned abuse and demands by her husband played a significant role in her committing these crimes. She also relied on the reports in respect of the children's interest presumably in an attempt to avoid a sentence of direct imprisonment in the light of the age of her young daughter – seven years old - who lives with her.

[9] A number of issues in the record and judgment on sentence lay the magistrate open to criticism. I will confine this judgment to only one aspect as it is unnecessary to deal with every aspect that gives rise to concern.

[10] In regard to the imposition of the non-parole period, s 276B of the CPA reads as follows:

> '**276B Fixing of non-parole-period**
>
> (1)(*a*) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(*b*) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1) *(b)*, fix the non-parole-period in respect of the effective period of imprisonment.'

Though not specifically stated by the magistrate, she clearly imposed the order by invoking s 276B(1)*(a)*.

[11] The appellant was not provided with an opportunity of addressing the court when the magistrate invoked s 276B of the CPA in order to fix a period during which she could not be placed on or considered for parole. This is precisely the issue raised by the appellant in this appeal. The appellant contends that she ought to have been afforded an opportunity to address the court prior to the imposition of the non-parole order. It is unnecessary to further discuss this aspect since counsel for the State has very fairly conceded that the magistrate ought to have afforded the appellant an opportunity to address the court on the order prior to making it. The failure to do so constituted a misdirection. It is also noteworthy that the magistrate did not give any reasons for invoking this section in her judgment.

[12] It is however necessary to deal with this matter in a little bit more detail despite the concession. In *S v Stander*[1] in which s 276B was invoked without invitation to the parties to address the court on it and where no reason for invoking it was given, it was explained that when considering whether the petition was wrongly refused – and therefore whether there are reasonable prospects of success on appeal – three issues arise. First, whether the magistrate was obliged to give reasons for imposing a non-parole portion of the prison sentence, second, the circumstances under which the court would be entitled to impose a non-parole order as part of the sentence and, third, whether the magistrate was obliged to invite or allow argument before the imposition of a non-parole order.

[13] Regarding the first issue, accused persons are always entitled to the reasons for decisions which will affect them. They are entitled to understand why and how such decisions have been arrived at. As Corbett JA said in *S v Immelman**[2]***,

'It has been decided in this Court, with reference to the verdict of the Court, that, although there is no provision in the Criminal Procedure Code for the delivery of a judgment when a Judge sits alone or with assessors (when these decisions were given the alternative system of trial by jury still obtained), in practice such a judgment is invariably given and that it is clearly in the

interests of justice that it should be given (see *R v Majerero and Others* 1948 (3) SA 1032 (A); *R v Van der Walt* 1952 (4) SA 382 (A)). It seems to me that, with regard to the sentence of the Court in cases where the trial Judge enjoys a discretion, a statement of the reasons which move him to impose the sentence which he does also serve the interests of justice. The absence of such reasons may operate unfairly, as against both the accused person and the State.'

[14] The magistrate's failure to give reasons for invoking s 276B of the CPA leaves one none the wiser as to why she did so. It is not only unfair to both the appellant and the respondent but also to the public. While the statutes do not demand this, it is a salutary practice developed and generally adhered to over a long period of time. In my view the reasons as set out by Corbett JA in *Immelman* justify strict adherence to the practice of giving reasons for decisions.

[15] With regard to the second issue, the circumstances under which such an order could be imposed, Snyders JA, in *Stander*, recognising the provisions of the Correctional Services Act 111 of 1998 (CSA) as amended, articulated the history and the development of the courts' approach to this aspect of the imposition of a non-parole order. In referring to a number of decisions,[3] she concluded that while the legislation empowers the courts to impose such an order when sentencing, it should only do so when the circumstances specifically relevant to parole in addition to any aggravating factors pertaining to the commission of the crime, and where a proper, evidential basis had been laid for a finding that such circumstances exist so as to justify the imposition of such an order.[4] This court held that a court should not resort to s 276B of the CPA lightly and rather, as this court has often indicated, allow the officials of the Department of Correctional Services, who are guided by the CSA and the attendant regulations, to make such assessments and decisions as well as the parole board.

[16] The third issue is whether a magistrate should allow or invite argument prior to the imposition of a non-parole period. The imposition of such an order has a drastic impact on sentence. In this matter invoking s 276B came as a surprise to both the appellant and the respondent. It was not suggested by the prosecution and, as indicated above, there was no warning that it was being contemplated. Section 276B entails an order which is a determination in the present for the future behavior of the person to be affected thereby. In other words, it is an order that a person does not deserve being released on parole in future. (See: *S v Bull; S v Chavulla & others).****[5]*** Such an order should only be made in exceptional circumstances which can only be established by investigation and a consideration of salient facts, legal argument and perhaps further evidence upon which such a decision rests.

[17] In another similar case, *S v Mthimkulu*,[6] this court dealt with an order of a parole period imposed

in terms of s 276B(2). In this case also there was no invitation to address the court prior to the imposition of the non-parole order. It needs to be noted that this case dealt with what appeared to the trial court to be a peremptory imposition of a non-parole order which this court rejected. The judgment is relevant in as far as it deals with the failure to afford the parties an opportunity to address the court in that regard prior to the imposition of such an order. This court held that a failure to afford the parties the opportunity to address the sentencing court might, depending on the case, well constitute an infringement of such fair-trial rights. In the present case, I am of the view that the failure to do so indeed constitutes a misdirection. On this ground alone there is a reasonable prospect of success on appeal. In the circumstances, leave to appeal against the sentence (as it stands) should have been granted, as there are clearly prospects of success on appeal.

[18] The appellant has already served two years and six months' imprisonment of the sentence. But for the non-parole order, her incarceration would already have been reduced or at least consideration would already have been given to that by the authorities. The prejudice caused by the non-parole order may be reduced if the appeal is successful. This highlights the need for the appeal to be dealt with as soon as possible. The order I propose to hand down ought to expedite it.

[19] The following order is made:

1 The appeal is upheld.

2 the order of the court below refusing the appellant leave to appeal is set aside and replaced with the following:

> 'The appellant is granted special leave to appeal to the Gauteng Local Division, Johannesburg, against the sentence imposed by the Regional Court';

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R PILLAY

JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT: Mr B Roux S C

Instructed by:

Jan Ellis Attorneys, c/o Smit & Grové, Johannesburg

Kramer Weihmann & Joubert , Bloemfontein

FOR RESPONDENT: Mr T Zitha

Instructed by:

The Director of Public Prosecutions, Johannesburg

The Director of Public Prosecutions, Bloemfontein

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[1] *S v Stander* 2012 (1) SACR 537 (SCA) para 3.

[2] *S v Immelman* 1978 (3) SA 726 (A) at 729C.

[3] *S v Mhlakaza & another* 1997 (1) SACR 515 (SCA) at 521d-i; *S v Pauls* 2011 (2) SACR 417 (ECG); *S v Williams; S v Papier* 2006 (2) SACR 101 (C); *S v Mshumpa & another* 2008 (1) SACR 126 (E).

[4] See *Stander* para 20.

[5] *S v Bull; S v Chavulla* & others 2001 (~~1~~2) SACR 681 (SCA) at 692d-i, 693d-g, and 697a.

[6] *S v Mthimkulu* 2012 (2) SACR 89 (SCA).