THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non-reportable

Case No: 887/2015

In the matter between:

DONALD KHOBANE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Khobane v S* (887/15) [2016] ZASCA 124 (26 September 2016)

Coram: Shongwe, Willis, Dambuza, Mathopo and Mocumie JJA

Heard: **2 September 2016**

Delivered: **26 September 2016**

Summary: Sentence – Criminal Law Amendment Act 105 of 1997 (the Act) – Appellant sentenced to 15 years' imprisonment for theft of R3 million from ATMs in terms of the Act – Charge sheet made no mention of possibility of sentence in terms of the Act – Magistrate also failed inter alia to warn the appellant at commencement of trial that if convicted he faced the risk of a sentence imposed in terms of the Act – Criminal petitions procedure requiring convoluted process – Appeal against the high court's dismissal of the petition against regional court sentence upheld – Leave granted to appeal against sentence.

ORDER

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

1. The appeal is upheld.
2. The order of the court below refusing leave to appeal is set aside and replaced with the following:

   'Leave to appeal to the Gauteng Local Division of the High Court, Johannesburg is granted.'

JUDGMENT

Willis JA (Shongwe, Dambuza, Mathopo and Mocumie JJA concurring):

[1] This is an appeal, with the leave of this court, against the dismissal by the Gauteng Local Division, Johannesburg (Borchers J and Karam AJ) of an application for leave to appeal against a sentence of a regional court, Alexandra.

Background

[2] The appellant, Mr Donald Khobane, had been employed by Nedbank as an 'ATM consultant'. As such, his main job had been to balance and cash-replenish the nine automatic teller machines (ATMs) which were assigned to him and were under his control, located at various places in Johannesburg.[1] For this purpose, he had keys and combination numbers for accessing the ATMs. He absconded from work on 30 July 2009. After a few days, his supervisors became suspicious. An inspection

[1] These were: Benmore Gardens, Epsom Downs, Fourways (in two locations), Lonehill, Rivonia, Sandown, Sandton City and Sunninghill.

revealed that there were cash shortages at those ATMs which had been under the appellant's control. The total missing cash was in excess of R3 million.

[3] The appellant was arrested on 19 August 2009. He first appeared before the Alexandra Regional Court on 21 August 2009 and was subsequently granted bail. It appears from a confession which the appellant made to a member of the South African Police Service, Captain Shaun Henry Robson, on 21 August 2009 (which he later disavowed and unsuccessfully challenged in a trial-within-a-trial) that he could have come under the influence of some kind of 'spiritual healer', known as Professor Zao, who had told the appellant that he had a 'symbol of wealth' in his hands and that if the appellant lent him as much money as possible, taken from the ATMs, the 'professor' would use it to 'cleanse' him and that the appellant could then return the money and would never again have financial problems. The appellant took vast amounts of money from the ATMs to Zao on two occasions.

[4] The appellant was arraigned before the Alexandra Regional Court on 24 August 2011 on a charge of stealing an amount in excess of R3 million from his employer, Nedbank, during the period between 30 July 2009 and 1 August 2009. He had the benefit of legal representation during his trial, having pleaded not guilty. He was convicted as charged by the magistrate on 4 September 2012 and on the same day sentenced to 15 years' imprisonment. Inasmuch as the theft involved an amount of more than R500 000, the charge sheet did not indicate that the sentence would be imposed in terms of the provisions of Part II of Schedule 1 of the Criminal Law Amendment Act 105 of 1997[2] – widely known as the 'minimum sentence legislation'.

[5] At the trial, the appellant's supervisor, Mr Sebastian Bowles, also known as his 'field controller', testified that the appellant was the only person who could have removed the money in the manner that it had been. In this regard, Mr Bowles' evidence was corroborated by that of Mr Marcel Rhoda, who at the time was employed at Nedbank as an ATM controller for the West Gauteng region. Concerning conviction, the evidence against the appellant was overwhelming.

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[2] In terms of s 51(2)*(a)*(i) of the Criminal Law Amendment Act 105 of 1997, the minimum sentence to be imposed on a first offender following a conviction of theft involving an amount of more than R500 000 is 15 years' imprisonment unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[6] As already mentioned above (para 1), the charge sheet made no reference to the possibility of the sentence being imposed in terms of the prescribed minimum sentences set out in the Act. Although parts of the record relating to the initial appearances before court, the bail application and the various remands are missing, it does not appear that the appellant had been warned by the trial court that, if convicted, he faced the risk of 15 years' imprisonment.

[7] The appellant had been 28 years of age at the time of the commission of the offence. He was a first offender and was the father of two young children. In respect of sentence the magistrate found that there were no substantial and compelling circumstances, which would justify a departure from the prescribed minimum sentence. He mentioned the fact that the appellant had shown no remorse and the prevalence of theft involving ATMs, and the inconvenience it caused to many other people, as potentially aggravating circumstances. Immediately after the magistrate had sentenced the appellant, his legal representative made an application for leave to appeal against conviction and sentence from the bar. The magistrate cautioned that he thought it unwise in the circumstances, because petitions so brought were oftentimes not properly formulated and, accordingly, failed to show reasonable prospects of success on appeal. The magistrate dismissed the application for leave to appeal.

[8] The appellant thereupon petitioned the Gauteng Local Division, Johannesburg for leave to appeal against both conviction and sentence. On 8 May 2014, that court (Borchers J and Karam AJ) refused the petition. The appellant thereupon requested leave to appeal against that refusal. On this aspect too, leave was refused. The appellant thereafter petitioned this court. On 8 September 2015, this court granted him leave to appeal to it against the refusal of his petition. In so doing it made the following order:

'Leave to appeal is granted to the Supreme Court of Appeal against the refusal of leave to appeal by two Judges of the Gauteng Local Division of the High Court, Johannesburg against his sentence of 15 years' imprisonment'.

The Minimum Sentence Provisions

[9] In its reasons for dismissing the appeal against its refusal of the petition to it, the Gauteng Local Division referred to the strong case against the appellant in relation to the conviction. Insofar as sentence was concerned, it referred to the fact that the appellant had abused his position of trust as an employee.

[10] The high court also referred to the well-known dictum in *S v Malgas*,[3] where this court said that the courts are: 'to respect and not merely, pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed' and the prescribed minimum sentence is "the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstance" and that "unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are to elicit a severe, standardised and consistent response from the Courts.'[4]

[11] *Malgas* did not dispense with the right of an accused person to be treated fairly when it comes to sentence. The contrary is true.[5] The record shows that the entire question of the imposition of minimum sentences was dealt with perfunctorily. This court has repeatedly stressed the importance of warning a person of the risk of minimum sentences being imposed.[6]

[12] By reason of the fact that there are other relevant considerations – apart from whether the appellant was properly warned about the risk that he faced with regard to sentence – no useful purpose would be served by incurring further delays in an attempt to determine whether he may perhaps have been so warned. It would also, in the circumstances, be unfair to the appellant. The question of the appellant having been under the sinister influence of a 'confidence trickster' was not explored. The facts of the case are so bizarre that they cry out for a full investigation before the

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[3] *S v Malgas* [2001] ZASCA 30; 2001 (2) SA 1222 (SCA).
[4] Para 25.
[5] See paras 7 to 10.
[6] See, for example, *S v Legoa* [2002] ZASCA 122; 2003 (1) SACR 13 (SCA) paras 20 and 21; *S v Ndlovu* [2002] ZASCA 144; 2003 (1) SACR 331 (SCA) para 12; *S v Makatu* [2006] ZASCA 72; 2006 (2) SACR 582 (SCA) paras 3 and 17; and *Negondeni v The State* [2015] ZASCA 132.

imposition of sentence. There was no probation officer's report for the magistrate to consider.

[13] It is indeed so that in *S v Legoa*,[7] *S v Ndlovu* [8]and *S v Makatu*,[9] this court has been careful not to stipulate that the failure to warn an accused person that faces a prescribed minimum sentence will necessarily result in an unfair trial. In *Legoa*, Cameron JA said (para 7):

'A general requirement to this effect, if applied with undue formalism, may create intolerable complexities in the administration of justice and may be insufficiently heedful of the practical realities under which charge-sheets are frequently drawn up.'

The learned judge also stressed the need for a 'vigilant examination of the relevant circumstances'.[10] Under our constitutional dispensation the importance of an accused person receiving a warning relating to the possible minimum sentence by reference to the relevant penalty clause in the charge sheet is large.[11] The issue is inextricably linked to the right of every person to a fair trial, which includes the right to be informed of the charge with sufficient particularity to enable answering it.[12]

[14] In *Makatu*, Lewis JA accepted the need to adopt an approach that was 'neither absolute nor inflexible'.[13] In *S v Ndlovu; S v Sibisi*,[14] which was cited with approval by this court in *S v Mabuza & others*,[15] it was said that:

'[I]t will not be essential to inform [the accused person] that he is facing the possibility of a substantial prison sentence or a sentence which may be 'materially prejudicial' if he can reasonably be expected already to be aware of this.'[16]

A crucial question, if the charge sheet omits a reference to the Act, is whether the accused nevertheless had a fair trial if the sentence is determined in terms thereof. This was made clear in *S v Ndlovu* (para 12):[17]

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[7] *S v Legoa* (above) paras 21. See S S Terblanche *The guide to sentencing in South Africa* 2 ed (2007), discussion under '3.4 Reference to the Act in the charge sheet' at 46-47.
[8] *S v Ndlovu* (above) paras 12-14.
[9] S *v Makatu* (above) paras 4-7.
[10] Ibid.
[11] *S v Legoa* (above) para 20; *S v Cunningham* 2004 (2) SACR 16 (E) at 19*b-c*. See also *S v Ndlovu* 1999 (2) SACR 645 (W) at 649. Terblanche op cit at 46.
[12] Section 35(3)*(a)* of the Constitution.
[13] Para 7.
[14] *S v Ndlovu; S v Sibisi* 2005 (2) SACR 645 (W)
[15] *S v Mabuza & others* [2007] ZASCA 110; 2009 (2) SACR 435 (SCA) para 15.
[16] At 654*f-g*.

'[w]here the State intends relying upon the sentencing regime created by the Act a fair trial will generally demand that its intention pertinently be brought to the attention of the accused at the outset of the trial, if not in the charge sheet then in some other form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible consequences'.

[15] Although theft is a common law crime, the statutory minimum sentence of 15 years' imprisonment, where the amount involved exceeds R 500 000, is severely at variance with the kind of sentencing for theft with which most people would have been familiar, prior to the enactment of the legislation.

[16] In the circumstances of this particular case, there is a strong likelihood of an injustice in regard to the appellant's sentence if the question is not reconsidered. When accused persons have the benefit of legal representation, the reluctance of magistrates to 'descend into the arena', even when they have the best interests of an accused person at heart, is quite understandable. A few delicate immersions by the magistrate into the waters of an accused person's defence would not be out of place in balancing the fair trial rights of the accused against the proper prosecutions of crime. It would certainly not have been improper for the magistrate to have asked at the commencement of the trial, whether the appellant knew that, if convicted, he was at risk for 15 years' imprisonment.

[17] In the light of the observations above, there clearly are more than reasonable prospects that, on appeal, another court may interfere with the sentence. The appellant was sentenced on 4 September 2012. Leave by this court to appeal to it was granted on 8 September 2015. The question has arisen as to whether leave by this court was given in terms of the Superior Courts Act 10 of 2013 (the Superior Courts Act), which came into operation on 23 August 2013 (ie after the conviction and sentence of the appellant) or its predecessor, the Supreme Court Act 59 of 1959 (the Supreme Court Act).

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[17] See also *S v Legoa* (above) para 22; and *S v Makatu* (above) paras 3-7. Terblanche notes that two scenarios have crystallised where there would be a clear indication of unfairness in this regard, namely (a) where the accused was misled by the charge sheet believing the State to rely on a different sentencing regiem; or (b) where the accused is unrepresented.

Criminal petition procedure

[18] In *S v Khoasasa*,[18] this court held that a refusal of leave to appeal to two judges of a high court is a 'judgment or order' or a 'ruling' as contemplated by s 20(1) and 21(1) of the now repealed Supreme Court Act 59 of 1959.[19] This court thus held that a petition for leave to appeal to a high court is, in effect, an appeal against the refusal of leave to appeal by the magistrates' court. This means that the refusal of leave to appeal by the high court in terms of s 309C is appealable to this court with the leave of the high court or, where such leave has been refused, with the leave of this court. In either event, so it was held in *Khoasasa*, the order appealed against is the refusal of leave, with the result that this court cannot decide the appeal itself. It follows, as Brand JA said, that in an appeal of this kind, the issue to be determined by this court is not whether the appeal against conviction and sentence should succeed, but rather whether the high court should have granted leave, which in turn depends on whether the appellant could be said to have reasonable prospects of success on appeal. The position thus stated has since been confirmed in a number of decisions by this court.[20]

[19] The Superior Courts Act 10 of 2013, which came into effect on 23 August 2013 has since replaced the Supreme Court Act, provides in s 16(1)*(b)* that an appeal against any decision of a division of the high court on appeal to it, lies to this court upon 'special leave' having been granted by this court. Since *R v Sillas*,[21] the test as to whether to apply amending legislation that came into operation after an offence had been committed has been driven by considerations of reasonableness and fairness to the accused person.[22] Here, it makes no difference.[23] The appellant's petition was commenced in the regional court on 4 September 2012. This court was therefore at liberty to make the order that it did on 8 September 2015. The

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[18] *S v Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA) para 14. In *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA) para 4, Leach AJA described the reasoning in *Khoasasa* as unassailable.

[19] See also *S v Smith* [2011] ZASCA; 2012 (1) SACR 567 (SCA) para 3.

[20] See, for example, *S v Kriel* [2011] ZASCA 113; 2012 (1) SACR 1 (SCA) paras 11-12; *S v Smith* (above) paras 2-3; *S v AD* [2011] ZASCA 215 paras 3-6.

[21] *R v Sillas* 1959 (4) SA 305 (A) at 312F-H.

[22] At 309F-312H and 313E-315E. See also *Oudebaaskraal (Edms) Bpk v Jansen Van Vuuren* 2001 (2) SA 806 (SCA) at 811H; and *Naude en andere v Heatlie en andere; Naude en andere v Worcester-Oos Hoofbesproeiingsraad* 2001 (2) SA 815 (SCA) at 820I-821A.

[23] *Gonya v S* [2016] ZASCA 34 paras 5-10.

matter is properly before us. This court in *Gonya v S*,[24] considered the transitional provisions (s 52) of the Superior Courts Act in relation to pending matters. It held that 'proceedings pending in any court' as referred to in s 52 of the Act must include criminal proceedings.[25] Accordingly, this court found on the basis of the date of the commencement of the trial (which was before the promulgation of the Superior Courts Act) that the case had been a matter pending between the two Acts.[26] Whether the leave given in this case was that for which provision was made under the Supreme Court Act or the 'special leave' of the new Superior Courts Act, in the words of Ponnan JA in *S v Van Wyk & another*,[27] 'the higher threshold' of 'special circumstances' has been met so as to justify leave to appeal to this court being granted: in this case it makes no difference, either way.

[20] Changes in the legislation and court rules governing court procedure and the consequential intertemporal arrangements have always presented challenges to our courts.[28] When examining transitional provisions relating to questions of court procedure, the starting point is to look at when the date on which proceedings commenced.[29] As mentioned above, in this instance we are dealing with petitions proceedings, thus the appropriate point to look at to determine whether proceedings are pending, is the point from which the petition proceedings themselves were lodged.[30]

[21] The decision of the high court against which the appeal in this case is concerned is the dismissal of an appeal to it of its decision to refuse a petition to appeal. This court cannot, at this stage, make an order pertaining to how the question of sentence should be dealt with. It would have been in the interests of the State, the appellant and society if we could have set the sentence aside and directed that the magistrate consider the question of sentence afresh. Somewhat

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[24] *Gonya v S* [2016] ZASCA 34 paras 5-10.
[25] Paragraph 7.
[26] Ibid.
[27] *S v Van Wyk & another* [2014] ZASCA 152; 2015 (1) SACR 584 (SCA).
[28] In fact, the very first case that began the business of this court on 4 June 1910 arose out of similar circumstances. When the Appellate Division (as this court was then called) assumed the appellate jurisdiction for the newly establish Union of South Africa's Supreme Courts, it succeeded the Judicial Committee of the Privy Council. See *Fichardt Ltd v Faustman* 1910 AD 1.
[29] *Fichardt Ltd v Faustman* (above) at 3. See also, for an analogous example, Magistrates' Court rule 69.
[30] Ibid.

incongruously, for reasons that follow, the appeal must be directed to the high court for it to consider, once again, the question of sentence.[31] The principle has been well-established in this court on the basis of the legislation as it currently stands. I refer to the following, in particular: *S v Essop*;[32] *S v Mndebele*;[33] *S v Dipholo*;[34] *S v Van Wyk & another*;[35] *S v Tonkin;*[36] *S v Matshona*;[37] *S v Slinger*;[38] *S v Kriel*; [39] *S v Smith*;[40] *S v AD*[41] and *S v Khoasasa*.[42]

[22] The legally required process may be distressingly convoluted but in the absence of a statutory amendment to the process of appeals, the correct order is to remit the matter back to the high court to hear the appeal when finding that the high court ought to have granted the appellant leave to appeal to it against the trial court's sentence. The high court could then, in turn, remit the matter to the regional court for sentencing afresh, after setting the sentence aside. The high court could also decide, depending on the facts and submissions before it when hearing the appeal, to substitute its own sentence there and then. How the appeal is best to be dealt with is a matter for the high court to decide. As Brand JA lamented in *Tonkin*, the process is 'cumbersome and wasteful of both time and money', with obvious injustices.[43]

[23] The following order is made:

1. The appeal is upheld.
2. The order of the court below refusing leave to appeal is set aside and replaced with the following:

   'Leave to appeal to the Gauteng Local Division of the High Court, Johannesburg is granted.'

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[31] Para 39.
[32] *Essop v S* [2016] ZASCA 114.
[33] *Mndebele v S* [2016] ZASCA 7.
[34] *Dipholo v S* [2015] ZASCA 120.
[35] *S v Van Wyk* (above).
[36] *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA).
[37] *S v Matshona* [2008] ZASCA 58; 2013 (2) SACR 126 (SCA).
[38] *Slinger v S* [2013] ZASCA 197.
[39] *S v Kriel* (above).
[40] S v *Smith* (above).
[41] *AD v S* ZASCA 215.
[42] S v *Khoasasa* [2002] ZASCA 113; 2003 (1) SACR 123 (SCA).
[43] *S v Tonkin* [2013] ZASCA 179; 2014 (1) SACR 583 (SCA), followed and approved in *S v Van Wyk* (above) para 39.

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N P Willis
Judge of Appeal

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