

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number : P223/2013

In the application between:-

DEXTER EDGAR CHRISTOPHER

Applicant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J et VAN ZYL, J

HEARD ON:

24 FEBRUARY 2014

JUDGMENT BY:

VAN ZYL, J

DELIVERED ON:

12 JUNE 2014

[1] The applicant was charged in the Regional Court, Bloemfontein, with the following main charges:

Charges 1- 8: Fraud, read with the provisions of Act 105 of 1997.

Charges 9 – 16: Money Laundering.

Charge 17: Fraud.

Charges 18 – 25: Forgery.

[2] The applicant pleaded guilty to the aforesaid charges and on 29 November 2012 he was sentenced as follows:

Charges 1 – 4: Three (3) years imprisonment on each charge.

Charges 5, 6 and 7: Four (4) years imprisonment on each charge.

Charge 8 (with a prescribed minimum sentence of 15 years applicable): Eight (8) years imprisonment.

Charges 9 – 16 (taken together): Six (6) years imprisonment.

Charge 17: Three (3) years imprisonment.

Charges 18 – 25 (taken together): Four (4) years imprisonment.

It was further ordered that that the aforesaid sentences are to be served concurrently with the sentence on charge 8 with the result that the applicant was sentenced to an effective sentence of eight (8) years imprisonment.

[3] The applicant applied for leave to appeal against the imposed sentences from the trial court on 13 December 2012, which application was dismissed.

[4] On 10 October 2013 the applicant filed a petition with this Court for leave to appeal against the imposed sentences, which petition was dismissed by Molemela, J and Pohl, AJ on 25 October 2013.

[5] The applicant is now applying for:

(a) Leave to appeal against the refusal of the aforesaid petition for leave to appeal against the imposed

sentences;

- (b) Leave to adduce new/further evidence on the issue of sentence;
- (c) Leave to appeal against the convictions on charges 9 to 16; and
- (d) Leave to adduce new/further evidence on the issue of the applicant's plea of guilty on charges 9 to 16 and hence, his convictions on the said charges.

[6] Because Molemela, J and Pohl, AJ (as he then was) were not available to hear this application, we were instructed by Erasmus, AJP (as he then was) to preside over the matter.

[7] I consider it apposite to deal with the respective applications separately.

APPLICATION FOR LEAVE TO APPEAL AGAINST THE CONVICTIONS ON CHARGES 9 TO 16:

[8] As stated earlier in this judgment, the applicant only applied for leave to appeal against the imposed sentences from the trial court. No application for leave to appeal against any of the convictions has served before the trial court.

[9] In terms of section 309(1) of the Criminal Procedure Act, 51 of 1977 ("the Act"), any person convicted of an offence by any lower court, may appeal against such conviction and

against any resultant sentence or order to the High Court having jurisdiction, subject to leave to appeal being granted in terms of section 309B or 309C.

Section 309B1(a) determines as follows:

“Subject to section 84 of the Child Justice Act, 2008, any accused, who wishes to note an appeal against any conviction or against resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.” (own emphasis)

[10] No appeal is therefore permissible without having first requested such leave from the trial court. Had such leave been applied for from the trial court and the trial court refused the requested leave, then the applicant could have followed the further remedies like he did with regard to his unsuccessful application to the trial court for leave to appeal against his sentences.

[11] We consequently do not have the jurisdiction to entertain this application.

APPLICATION FOR LEAVE TO ADDUCE FURTHER EVIDENCE ON THE CONVICTIONS ON CHARGES 9 TO 16:

[12] Section 309B(5)(a) determines as follows:

“An application for leave to appeal may be accompanied by an application to adduce further evidence...relating to the conviction, sentence or order in respect of which the appeal is

sought to be noted.”

- [13] In addition to the aforesaid, Magistrates’ Courts Rule 67 provides as follows regarding an application for leave to present further evidence:

“(1)(b) An appellant... who wishes to apply for leave to adduce further evidence as contemplated in section 309B(5)(a) of that Act, shall do so in writing to the clerk of the court and shall also send a copy of the application to the Director of Public Prosecutions concerned or, in a case in which the prosecution was not at the public instance, to the prosecutor concerned.”

- [14] From the aforesaid it is evident that an application for leave to present further evidence should be made to the trial court at the stage when the relevant application for leave to appeal is made. Only once that has been unsuccessful, can the High Court be approached for further remedies in terms of section 309C(2)(a)(ii) etc.

- [15] Because an application for leave to appeal against part of the convictions of the applicant has not yet served before the trial court, the application to present further evidence on part of the convictions of the applicant, can and should be heard by the trial court during the hearing of the application for leave to appeal against part of the convictions. This is the position despite the fact that the application for leave to appeal against the sentences has already served before and refused by the trial court. In this regard the following was stated in Commentary on the Criminal Procedure Act, Du Toit *et al*, at p. 31-19 (which discussion deals with section 316 of the Act,

but which principle is *mutatis mutandis* applicable to section 309B):

“Before a trial court may hear an application to lead further evidence, a valid application for leave to appeal must simultaneously be brought before court. Where an accused first applied for leave to appeal against the sentence, but his application was dismissed both by the trial court and by the Supreme Court of Appeal, he may nonetheless apply to the court *a quo* for leave to appeal against the conviction and to lead further evidence in regard thereto (*S v Ebrahim* 1972 (2) SA 61 (C) at 64G – 65A).

[16] In the circumstances we also do not have the jurisdiction to hear this application.

APPLICATION FOR LEAVE TO ADDUCE FURTHER EVIDENCE ON SENTENCE:

[17] Because the application for leave to appeal against the sentences has already been disposed of by the trial court, the application to present further evidence on sentence cannot be considered by the trial court anymore. In this regard the following is stated in Commentary on the Criminal Procedure Act, *supra*, at p. 31-20:

“It has been pointed out many times that an application to lead further evidence may only be made to a trial court in terms of s 316(5) where it is accompanied by an application for leave to appeal. But as soon as the application for leave to appeal is disposed of by the trial court, an application to that court in terms of s 316 to lead further evidence will be late and not considered.”

- [18] The same principle is also stated in Hiemstra's Criminal Procedure, A Kruger, at p. 31-18 (1) (which again deals with section 316, but which principles are also applicable to section 309B):

“Once a court has disposed of an application for leave to appeal, whether by refusal or approval, that application cannot be brought again to that court, even if the application is on the second occasion accompanied by an application to present further evidence. The court is *functus officio*. Furthermore, the wording of subsection (5) only allows an application to lead further evidence in combination with an application for leave to appeal.”

- [19] However, a court of appeal can also hear further evidence or remit the matter to the court *a quo* with directions regarding the hearing of further evidence. In this regard the following is stated in Hiemstra's Criminal Procedure, *supra*, at p. 30-46:

“There are two sources from which this power can be derived. One is section 304(2)(b), which is made applicable to appeals by section 309(3). In terms of section 304(2)(b) the court of appeal can itself hear evidence and, in terms of subsection (2)(c)(5), the case can be remitted to the magistrate with the direction to hear further evidence. The other source of the power is section 22(a) of the Supreme Court Act 59 of 1959 which gives the power to both the Supreme Court of Appeal and the provincial or local division (if it has appeal jurisdiction) to hear evidence itself or to remit the matter to the court of first instance for that purpose (*S v Ross* 2013 (1) SACR 77 (WCC) par [13]).”

- [20] When the aforesaid sections of the Act are read in context, it is evident that these sections apply when the High Court

hears an appeal pertaining to a matter which emanated from a lower court as having been the trial court. It is not applicable when the High Court only deals with an application for leave to appeal (in an instance where the lower court was the trial court) – in such circumstances the High Court is not a court of appeal. This is confirmed by section 22 of the Supreme Court Act, 59 of 1959 (which has been repealed with effect from 23 August 2013, but which Act is still applicable in this instance), which section determines as follows:

“22 POWERS OF COURT ON HEARING OF APPEALS

The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power –

- (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court which judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
- (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.”

In Erasmus Superior Court Practice, Farlam *et al*, the following is stated on p. A1-55:

“The words ‘on the hearing of an appeal’ connote that the court must be seized of the appeal before it can order that further evidence be adduced.”

[21] We are currently dealing with an application for leave to appeal against the refusal of the petition. It does not constitute the hearing of an appeal as such. We, therefore, in my view, do not have the jurisdiction to hear this application either.

APPLICATION FOR LEAVE TO APPEAL AGAINST THE REFUSAL OF THE PETITION FOR LEAVE TO APPEAL AGAINST THE SENTENCE:

[22] If this application is to be granted, the issue before the Supreme Court of Appeal will be whether leave to appeal should have been granted to the High Court. The Supreme Court of Appeal will not at that stage be called upon to consider the appeal as such. The test that will be applied by the SCA is whether there are reasonable prospects of success in the envisaged appeal and if so, it will refer the matter back to the High Court to be heard by two judges as appeals emanating from lower courts are dealt with. See **S v Kriel** 2012 (1) SACR 1 (SCA) pars [1], [11], [12] and [16].

[23] If this application for leave is to be refused, the applicant can direct a petition to the President of the Supreme Court of Appeal. See **S v Khoasasa** 2003 (1) SACR 123 (SCA) pars [19] – [22]. In considering the current application, we therefore have to consider whether there are reasonable prospects that the Supreme Court of Appeal will find that the petition to the High Court should have been granted. Considering the procedural aspects alluded to in the previous paragraph, it consequently means that we should

decide whether there are reasonable prospects that the Supreme Court of Appeal will find that there are reasonable prospects of success in the envisaged appeal. In deciding this question, the approach of the Supreme Court of Appeal will be, and hence our approach should be, the following as set out in the unreported judgment of **Molema v S** (555/10) [2011] ZASCA 62 (1 April 2011):

“[7] With that prelude I turn now to consider whether leave to appeal to the high court against conviction and sentence should have been granted. The test in an application such as the one under consideration in this appeal is whether there is a reasonable prospect of success in the envisaged appeal.

[8] In deciding on the fate of this appeal we are thus enjoined by judicial authority to reflect dispassionately upon the judgments sought to be appealed against, and reach a conclusion as to whether or not there is a reasonable prospect that the appellate court may come to a different conclusion to that reached by the trial court.”

[24] The applicant, who appeared in person, submitted comprehensive and detailed heads of argument, the contents of which he repeated in his oral submissions during the hearing of this matter. The grounds he relies on for his submission that there are reasonable prospects of success in the envisaged appeal against the sentences, is more particularly set out in pars 10 – 34 of his heads of argument. He submitted that correctional supervision was an appropriate sentence and that this aspect, together with the

principles of restorative justice, was not properly considered by the trial court. He referred to certain alleged misdirections by the trial court in concluding that imprisonment was the only appropriate sentence option.

[25] Me Van Wyk, on behalf of the state, emphasized the fact that a prescribed minimum sentence of 15 years is applicable to charge 8 and that the trial court has already found in favour of the appellant that substantial and compelling circumstances exist which obligated her to impose a lesser sentence. Me Van Wyk submitted that this finding is indicative of the fact that the trial court properly considered all the mitigating factors in favour of the applicant.

[26] I have meticulously studied the judgment of the trial court and in my view the trial court's approach in determining an appropriate sentence, was exemplary. She properly and in a balanced manner dealt with all the relevant mitigating and aggravating factors in her judgment.

[27] I am furthermore unable to find that she misdirected herself in any manner in deciding on an appropriate sentence. I can also not find that the sentences imposed, and more specifically the term of effective imprisonment, are shockingly inappropriate. In this regard the trial court referred to other judgments dealing with so-called white collar crimes and the current approach of our courts regarding the seriousness of such offences and the principles that should be applied in the consideration of what constitutes an appropriate sentence for such crimes.

In this regard and in addition to the judgments she already referred to, I can also refer to the judgment in **Pretorius v The State** (271/2008) [2008] ZASCA 132 (26 November 2008). In that matter a sentence of five years imprisonment for 91 counts of fraud was imposed. Although there were more charges of fraud than in the current instance, the total amount of the fraud in that matter amounted to R122 039,00 and were therefore much less than in the current instance. The personal circumstances of the appellants in that matter were very similar to those of the applicant and the appellants also pleaded guilty. The court expressed itself strongly in favour of stricter sentences for white collar crimes and quoted the judgment in **S v Sadler** 2000 (1) SACR 331 (SCA) to which the trial court also referred. The Supreme Court of Appeal found the sentence to be appropriate and dismissed the appeal against the sentence.

[28] In the circumstances I cannot find that there are reasonable prospects of success in the proposed appeal to the High Court. This have the result that I consequently also cannot find that there are reasonable prospects that the Supreme Court of Appeal will find that the petition against the sentences should have been granted.

[29] The application for leave to appeal against the refusal of the petition for leave to appeal against the sentences can therefore not be successful.

[30] For the sake of clarity, I record that pertaining to the applications in which I found that we do not have the

jurisdiction to hear the applications, I consider the appropriate order to be that the said applications be removed from the roll. This is to ensure that it will be evident from the Court Order as such that we have not adjudicated upon the merits of any of the said applications.

ORDERS:

[31] The following orders are consequently made:

1. The application for leave to appeal against the refusal of the petition for leave to appeal against the imposed sentences, is dismissed.
2. The application for leave to adduce new/further evidence on the issue of sentence, is removed from the roll.
3. The application for leave to appeal against the convictions on charges 9 to 16, is removed from the roll.
4. The application for leave to adduce new/further evidence on the issue of the applicant's plea of guilty on charges 9 to 16 and hence, his convictions on the said charges, is removed from the roll.

I concur.

S. EBRAHIM, J

On behalf of applicant: E.C. Dexter (In person)
Goedemoed Correctional Centre
Medium A
ALIWAL NORTH

On behalf of respondent: Adv A. van Wyk
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN