

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: A70-2024

DPP REF: 10/2/5/7 (2024/05)

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

DATE: 30 July 2024 SIGNATURE: _____

In the matter of:

LUCAS PONTO MATLAKALE

Appellant

And

THE STATE

Respondent

Delivered

30 July 2024 – This judgment was handed down electronically by circulation to the parties' representatives via email, by being uploaded to CaseLines and by release to SAFLII.

JUDGMENT

Bester AJ:

- [1] The appellant, Mr Lucas Ponto Matlakale, was convicted on 30 June 2022 on two counts of fraud and one count of corruption as provided for in section 3 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004. The convictions flow from the appellant's role in assisting a criminal syndicate in defrauding the Manguang Municipality of R490 056,50 on 12 September 2014 and R586 056,50 on 25 September 2014. The appellant abused his position as a risk administrator with FNB bank to ensure that the two transactions were processed, even though no basis in fact existed for the money to be paid into an account held by one Mr Mani Pereira, who will be referred to again later. For his efforts, the appellant received R50 000,00 from Mr Pereira, paid from the proceeds of the crime.
- [2] On 20 November 2023, the appellant was sentenced to an effective period of imprisonment of 15 years. Both counts of fraud resort under Part II of Schedule 2 of the Criminal Amendment Act 105 of 1997, and thus ordinarily attract a minimum sentence of 15 years imprisonment in terms of section 51(2)(a)(i) of that Act. The Regional Magistrate imposed the minimum sentence of 15 years in respect of the first conviction but found substantial and compelling circumstances in respect of the second, for which seven years imprisonment was imposed. The conviction on corruption also attracted a seven-year sentence. The Magistrate directed that the sentences be served concurrently, thus imposing an effective 15-year imprisonment on the appellant, and made a forfeiture order in respect of the proceeds of the first transaction. The second transaction was reversed by the appellant shortly after it had been executed.
- [3] On 22 November 2023, the appellant applied to the Magistrate for leave to appeal against both conviction and sentence in respect of all three counts, in terms of section 309B of the Criminal Procedure Act, 51 of 1977 (the CPA). He also applied for bail pending the outcome of an appeal. The Magistrate refused leave to appeal, save that he granted the appellant leave to appeal the forfeiture order. He also denied bail.

- [4] Subsequently, the appellant petitioned the Judge President of the High Court, Gauteng for leave to appeal in terms of section 309C of the CPA and brought an appeal against the refusal of bail in terms of section 65 of the CPA. There seems to have been some initial procedural confusion in respect of the bail appeal, it initially having been brought in the form of a formal substantive common law application. However, the parties agreed that there properly is a bail appeal before me to decide.
- [5] The appellant was on bail prior to and during his trial, and when he awaited sentencing, and duly appeared in court on each occasion.
- [6] Mr Young, appearing for the appellant, informed me from the Bar that the appellant has abandoned his appeal against conviction, and is only persisting with an appeal against sentence.
- [7] Section 65(4) of the CPA provides that a court shall not set aside the decision to refuse bail, unless satisfied that the decision was wrong, in which event the court shall give the decision which in its opinion the lower court should have given.
- [8] The appellant raised the following arguments on appeal:
- a) The Magistrate did not give reasons for the refusal of bail.
 - b) The appellant has prospects of success against his sentences.
 - c) The Magistrate failed to take into account the appellant's personal circumstances and conduct to date.
- [9] The appellant's contention that the Magistrate failed to provide reasons for refusing bail pending appeal is contradicted by the record. The transcript reveals that the Magistrate recorded that he did not grant bail because leave to

appeal was granted only against the forfeiture order, which will have no bearing on the convictions or the effective sentence. Put simply, he reasoned that as there was no appeal pending against conviction or sentence, there could be no bail pending an appeal.

- [10] This is thus not a matter, such as *Ledwaba v Regional Magistrate*,¹ where a magistrate's decision to cancel bail pending appeal was set aside because no reasons were advanced for the decision.
- [11] The appellant was convicted of Schedule 5 offences. Thus, in terms of section 60(11)(b) of the CPA, the appellant had to adduce evidence satisfying the Magistrate that the interests of justice permitted bail pending appeal. The mere fact that a sentenced person has been granted leave to appeal, does not entitle him to bail as a right.²
- [12] In this appeal, the appellant therefore is required to show that he has a real prospect that a non-custodial sentence will be imposed.³
- [13] The appellant's arguments in support of his contention that he has prospects of success in his appeal against his sentences, consists of two legs. He argues that (i) there is a disparity in the sentences for the two fraud convictions; and (ii) there is a disparity between his sentences and Mr Pereira's.
- [14] Whereas the Magistrate imposed the minimum sentence of 15 years in respect of the first conviction, he imposed seven years imprisonment for the second conviction. The distinction between the two offences, according to the Magistrate, lies squarely therein that the appellant had reversed the second

¹ *Ledwaba v Regional Magistrate* 2014 JDR 1771 (GP).

² *S v Oosthuizen and Another* 2018 (2) SACR 237 (SCA) in [29]. See also *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA) in [14].

³ *S v Oosthuizen* 2018 (2) SACR 237 (SCA).

transaction shortly after it had been executed, thereby preventing an actual loss.

- [15] The appellant argues that the Magistrate erred in not also finding substantial and compelling circumstances in respect of the first count, allowing for a deviation from the minimum prescribed sentence. However, the first transaction was not reversed. The factor that caused the Magistrate to impose a lesser sentence on the second conviction, does not apply to the first conviction.
- [16] Given that the sentences are to be served concurrently, even if the sentence for the first conviction was treated as on par with the second, the appellant would still be required to serve seven years effective imprisonment.
- [17] The second leg of the argument thus becomes relevant: the disparity in the sentencing of the appellant compared to that of Mr Pereira. The latter, who was the holder of the bank account (through a legal entity) into which the amounts were paid and was a co-conspirator with the appellant to commit the fraud, pleaded guilty and was given a suspended sentence with a fine. He subsequently testified against the appellant at the latter's trial.
- [18] The appellant relied on *S v Smith*,⁴ where the parity principle between two co-perpetrators was addressed in the following terms:⁵

“Generally one should strive to punish co-perpetrators equally unless there are circumstances justifying differential treatment. Justice must not only be done but be seen to be done. The imposition of unequal sentences on equally guilty perpetrators violates one's sense of justice. This principle applies even where co-perpetrators have been tried separately. Where there is a disturbing disparity in sentences, and the degrees of participation are more or less equal, and there are

⁴ *S v Smith* 2017 (1) SACR 520 (WCC).

⁵ *Smith supra* in [109].

not personal circumstances warranting the disparity, appellate interference may be warranted on the ground that the harsher sentence is disturbingly inappropriate. If the milder sentence was clearly inappropriate an appeal against the harsher sentence would have to be assessed on its own merits and subject to the usual restraints on appellate interference.”

- [19] It seems to me that there is indeed a stark contrast between the imposition of a fine on the one hand, and the imposition of direct imprisonment of 15, or even seven years, for the same offences. However, nothing was placed before the court in respect of Mr Pereira’s circumstances, and the reasons for his sentencing. He appeared before a different magistrate. That leaves me in a difficult position. Where an offence ordinarily would attract a minimum sentence of 15 years direct imprisonment, the imposition of a fine, looked at in isolation, appears to be an inappropriately lenient sentence. However, I cannot practically consider the disparity between the sentencing of Mr Pereira and the appellant. The appellant did not present evidence to have this issue resolved in his favour in this appeal.
- [20] I am therefore constrained to consider the appellant’s prospects of securing a non-custodial sentence on appeal on its own merits and keeping in mind the restraints on appellate interference in sentencing.
- [21] The appellant argued that given his personal circumstances, there is a realistic possibility that he may receive a suspended sentence just like Pereira. In this regard he specifically relied heavily on the fact that the probation officer recommended to the court to consider a non-custodial sentence in terms of section 276(1)(h) of the CPA. The probation officer’s recommendation was primarily based on the fact that, since the appellant’s employment was terminated by FNB as a result of these events in 2015, he had built a successful business, which employs nine people, whose families are dependent on that business. The Magistrate did not find this factor compelling.

[22] The appellant also criticised the Magistrate's statement that the appellant's wife and daughter could look after the business, correctly pointing out that there was no evidence to that effect before the Magistrate. However, it was for the appellant to place facts before the court in support of his bail. He did not place evidence before the court that the business cannot be continued by another person. In any event, in my view having created employment opportunities for others would not on appeal be elevated to a factor that would cause the court of appeal to amend the sentences to become wholly non-custodial. No other evidence supporting such an outcome served before the Magistrate during sentencing proceedings.

[23] In the circumstances, the appellant has not shown that he has prospects on appeal that the Court will find that the sentences imposed by the trial court are shocking 'startling' or 'disturbingly inappropriate',⁶ and that the appeal court would interfere to the extent that it would reduce the two direct imprisonment sentences to non-custodial sentences.

[24] I therefore do not find that the Magistrate was wrong to refuse to extend bail pending appeal.

[25] In the result, the appeal is dismissed.



A Bester
Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg

⁶ *S v Malgas supra* in [12].

Heard on: 5 July 2024

Judgment Date: 30 July 2024

Counsel for the Appellant: Advocate GM Young

Instructed by: Botha Massyn & Thobejane Associated Attorneys

Counsel for the Respondent: Adv A Morton

Instructed by: Office of the Director of Public Prosecutions, Gauteng