SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 755/18

In the matter between:

SALZMANN: SIEGFRIED ERNST **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Salzmann: Siegfried Ernst v The State* (755/18) [2019] ZASCA 145 (13 November 2019)

Coram: Leach, Saldulker, Molemela, Mokgohloa and Mbatha JJA

Heard: 19 August 2019

Delivered: 13 November 2019

Summary: Criminal procedure – trial of accused commencing in lower court before Superior Courts Act 10 of 2013 came into effect on 23 August 2013 – conviction, sentence and unsuccessful appeal to the high court taking place thereafter – high court not competent to subsequently grant special leave to appeal to Supreme Court of Appeal – such leave to be granted by latter court – special leave to appeal applied for but refused – matter struck from roll.

ORDER

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

1 The appellant's failure to timeously apply to this court for special leave to appeal is condoned.

2 The application for special leave to appeal is dismissed.

3 The matter is struck from the roll.

JUDGMENT

Leach and Mokgohloa JJA (Saldulker JA concurring):

[1] Cell C is a South African mobile cellular company whose website proclaims it to be one of the top four leading cellular network providers in this country. On 7 June 2004, a cyber-attack was launched against Cell C's computer network. To use a common expression, its network was 'hacked'. The invasion penetrated deeply into the system, and disconnected some 80 per cent of it as a result of core network devices becoming non-functional.

[2] In the search to identify the culprit responsible, suspicion fell upon the appellant who, until some three weeks prior to the incident, had been employed by Cell C as an IT Remote Access System Administrator. In due course, the appellant was charged in the Specialised Commercial Crimes Court, Johannesburg (the SCCC) with various contraventions of s 86 of the Electronic Communications and Transactions Act 25 of 2002 (the ECT Act).

[3] The trial was protracted. It commenced on 29 October 2005 when the charges were put to the appellant and he was requested to plead. Almost ten years later, on 14 January 2015, he was convicted on two charges (counts 1 and 3 of the charge) but acquitted on a third on the basis that it constituted an impermissible splitting of charges. On count 1 it was found that he had contravened s 86(1) by having unlawfully accessed Cell C's computer network without authority or permission; and on count 3 he was convicted of having contravened s 86(5) by unlawfully causing data on Cell C's system to be modified or altered or destroyed or rendered ineffective, which resulted in a partial network failure and constituted a denial of service to the legitimate users of the system. On 17 August 2015, the appellant was sentenced to a fine or 12 months' imprisonment on count 1 and to three years' imprisonment on count 3.

[4] The appellant appealed against his conviction and sentence to the Gauteng Division, Johannesburg (the high court) which dismissed his appeal on 9 March 2017. The appellant now seeks to appeal to this court on the strength of leave to appeal having been granted by the high court on 5 June 2018. This immediately gives rise to whether the appeal is properly before this court as the appellant has not obtained its leave to so appeal.

[5] The problem facing the appellant arises from the repeal of the Supreme Court Act 59 of 1959 (the Supreme Court Act) with effect from 23 August 2013 when it was replaced by the Superior Courts Act 10 of 2013 (the Superior Courts Act). As appears from the dates detailed above, the appellant's trial in the SCCC was still proceeding when the latter Act came into operation. Up until then, a high court hearing an appeal from a lower court (and the SCCC is such a court) was competent to grant leave to appeal further to the Supreme Court of Appeal if it

dismissed the appeal; and if it refused such leave, the appellant could then apply to this court for leave– see eg *Khoasasa*[1] paras 22-26 and *Gonya*[2] para 11.

[6] However, this regime was altered with the commencement of the Superior Courts Act, s 16(1)*(b)* of which provides that:

'an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal'.

In the light of this development, in *Van Wyk*[3] this court, after having subjected the legislation to careful and detailed examination, found that special leave of this court[4] is required when leave to appeal is sought in respect of a high court decision given on appeal to it and that the high court is no longer competent to grant such leave.[5]

[7] What appears to have given rise to some confusion, however, is s 52 of the Superior Courts Act which the parties correctly accepted applies to criminal as well as civil proceedings.[6] Inter alia, it provides:

'(1) Subject to section 27, proceedings pending in any court at the commencement of this Act, must be continued and concluded as if this Act had not been passed.

(2) Proceedings must, for the purposes of this section, be deemed to be pending if, at the commencement of this Act, a summons had been issued but judgment had not been passed.[7]

[8] The confusion which has arisen, in this case in particular, relates to the effect of these provisions. As the appellant's trial, which had commenced in 2005, was still on-going before the SCCC when the Superior Courts Act came into

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[1] *S v Khoasasa* [2002] 4 All SA 635 (SCA); 2003 (1) SACR 123 (SCA).
[2] *Gonya v S* [2016] ZASCA 34.
[3] *Van Wyk v S, Galela v S* [2014] ZASCA 152; [2014] 4 All SA 708 (SCA); 2015 (1) SACR 584 (SCA) para 19.
[4] The issue of special leave is a matter dealt with later in this judgment.
[5] See further *Maringa and another v S* [2015] ZASCA 28; 2015 (2) SACR 629 (SCA) para 5 and *Tuntubele v S* [2014] ZAWCHC 91 para 11.
[6] *Gonya* para 7 and *Carneiro v S* [2017] ZASCA 154; 2018 (1) SACR 197 (SCA) para 6.
[7] Section 27 deals with the removal of proceedings from one court to another and is of no relevance in the present matter.

operation in August 2013, it was clearly deemed to be pending under s 52(2) at that time. But the issue which we have to determine is whether that means that the appeal regime under the Supreme Court Act is to be applied to the appellant's subsequent appeals, particularly his application for special leave to appeal to this court, given that his conviction and sentence in the trial court occurred in 2015, well after the Superior Courts Act came into operation. The appellant contended that the high court, rather than this court, had retained jurisdiction to grant special leave to appeal further. The respondent's contrary argument was that special leave had to be obtained from this court.

[9] Counsel for the appellant supported his argument almost exclusively upon the decision of this court in *Gonya*. In that matter, criminal proceedings against the appellant in a regional court had culminated in him being convicted and sentenced on 23 August 2012 (as counsel pointed out to us, and we verified from the original record, it was erroneously reported in para 1 of the judgment that the conviction was in August 2008). When leave to appeal was refused by the regional court, the appellant applied to the high court for such leave by way of a petition under s 309C of the Criminal Procedure Act 51 of 1977. That application was refused on 1 March 2013, whereupon the appellant applied to this court for such leave. On 3 December 2013, after the Supreme Court Act had been repealed and the Superior Courts Act brought into operation, this court granted leave to appeal against the refusal of the appellant's petition in the high court.

[10] One of the issues this court was called upon to decide in reaching its decision was whether the appellant's application fell to be dealt with in terms of the Superior Courts Act or the Supreme Court Act. In finding that the Supreme Court Act applied, but unfortunately without any detailed reasoning, it concluded that:

'The pure meaning of the words *pending proceedings* must be interpreted to mean the date on which the appellant's proceedings commenced on 21 November 2011. The proceedings were still pending as of the date of promulgation of the Superior Courts Act. It follows that the matter must be dealt with in terms of the Supreme Court Act.'[8]

Later in the judgment, the court commented that the appellant's trial had been conducted when the Supreme Court Act applied and that leave to appeal had been sought under the latter Act. It held that in those circumstances the Supreme Court Act remained of application.[9]

[11] On the basis that the application for leave to appeal was still pending when the Superior Courts Act came into operation, that conclusion seems correct. But we do have difficulty with the unreasoned conclusion that the pending proceedings were those which had commenced on 21 November 2011 when the charge was put and the appellant called upon to plead. What was pending was not the trial which had culminated in the appellant's conviction and sentence, but the application for leave to appeal. There is a considerable conceptual difference between, on the one hand, a prosecution by the State which commences with a charge being put and a plea entered and is finalised either when there is an acquittal or when the accused is convicted and sentenced, and, on the other hand, an appeal brought by a person convicted who seeks to have the judgment against him set aside. To our mind, trial proceedings are separate and distinct from subsequent appeal proceedings. The trial concludes, should there be a conviction, with the imposition of sentence. If there is an appeal thereafter, it is a separate proceeding.

[12] The reasoning in *Gonya* also flies in the face of the conclusion of this court in the earlier judgment in *Van Wyk* which, as we have remarked, closely analysed

[8] *Gonya* para 7.
[9] *Gonya* para 11.

the statutory provisions of relevance. In that matter the appellant was charged with rape and sexual assault. Convicted as charged, he was sentenced to an effective 15 years' imprisonment on 25 March 2011. Although the trial court refused an application for leave to appeal, the appellant petitioned the high court for such leave under s 309C of the Criminal Procedure Act. On 19 March 2013, his petition was refused in respect of conviction but granted in respect of sentence. The appeal against sentence was subsequently heard in the high court on 25 November 2013, but unfortunately for the appellant, was summarily dismissed. He then proceeded in terms of s 16(1) of the Superior Courts Act to file an application for special leave to appeal to this court against his sentence. This court posed the question whether s 16 of the Superior Courts Act was of any application or whether the high court, which had dismissed the appeal, had enjoyed the jurisdiction to consider the application for leave to appeal. Having analysed the statutory provisions, this court concluded that the high court did not have such jurisdiction and that jurisdiction to hear the appellant's application for special leave to appeal against the high court's dismissal of his appeal vested in this court.[10]

[13] This conclusion would have been wrong if the appropriate date to which regard was to be had with the date that the prosecution commenced, as was held in *Gonya*. But it seems to us that the decision in *Van Wyk* is undeniably correct as what was pending when the Superior Courts Act came into operation was the appeal to the high court. Those proceedings terminated thereafter when judgment on the appeal was given on 23 November 2013. The subsequent further application to this court was therefore what may be described as 'fresh' proceedings launched when the Superior Courts Act was already in operation,

[10] *Van Wyk* para 24.

and could not be regarded as 'proceedings pending' when that Act came into effect as it had not yet been instituted.

[14] The final words of s 52(2) of the Superior Courts Act are determinative of the debate. The section provides that proceedings are to be deemed to be pending if at the commencement of the Act a summons had been issued 'but judgment had not been passed'. If it had been the legislature's intention for the Supreme Court Act to have continued to have been of application for all matters in respect of which proceedings had commenced by way of the issue of summons (or in a criminal case the putting of a charge) no purpose would have been served by adding the words 'but judgment had not been passed.' All litigation relevant to the cause on the summons (such as an appeal) would have continued thereafter to have been so deemed, irrespective of judgment having been given. Effect must, however, be given to those words. Their clear meaning is that where a proceeding was commenced, it is to be regarded as 'pending' until such time as judgment has been passed. Once that event has occurred, it is no longer a pending proceeding. Any subsequent, fresh proceedings, such as an application for leave to appeal or an appeal itself, would not be a pending proceeding. That, to our mind, is the clear meaning of s 52(2) and what this court held in *Van Wyk*, a decision further supported by other judgments in other Divisions in the country.[11]

[15] In the light of these circumstances, we are of the view that although the court reached the correct conclusion in *Gonya* in that there were pending application for leave to appeal proceedings when this Superior Courts Act came into operation, and that as a result that appeal was to be determined in terms of the regime of the Supreme Court Act, it was clearly wrong to the extent that it

[11] See fn 10 in *Van Wyk*.

had regard merely to the date the trial proceedings had commenced, but which had been concluded, to determine what was 'pending' as envisaged by s 52.

[16] Bearing the above in mind, the high court did not have the jurisdiction to grant special leave to appeal to this court. The proceedings pending when the Superior Courts Act came into effect was the appellant's trial itself. Those proceedings terminated when the appellant was convicted and sentenced. The deeming provision in s 52(2) of the Superior Courts Act therefore has no relevance to the appellant's subsequent appeal to this court following the dismissal of his appeal in the high court. The latter accordingly had no jurisdiction to grant leave to appeal to this court. Without this court giving leave, the appeal is not properly before us and we have no jurisdiction to hear it.

[17] In the light of the possibility of us reaching this conclusion, and with the consent of the President of this court, the parties agreed to argue the matter on the following basis: that the proceedings before this court would, if necessary[12] be regarded as an application to this court for special leave to appeal against both the appellant's convictions and sentences; the failure to timeously bring the application for special leave would be regarded as condoned; in the event of special leave being granted, this court may determine the appeal; the matter would therefore be fully argued as encompassing both an application for special leave and the merits of the appeal itself.

[18] Having determined that leave to appeal is required, and accepting that the failure to apply in time to this court for leave is to be condoned, we turn to consider whether leave should be granted. As the Superior Courts Act applies, it must be remembered that s 16(1)*(b)* thereof prescribes that an appeal against a

[12] Which in the light of our finding above is now the case.

decision of a Division of the high court heard on appeal, lies to this court with its 'special leave'. What is meant by special leave is now well established. It is more than merely the reasonable prospect of success on appeal. The party applying for such leave has already enjoyed, albeit unsuccessfully, a right of appeal to the high court, and so must show special circumstances which merit a further appeal. As this court said in *Van Wyk*:[13]

'This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance to the parties or of great public importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.'

[19] In the present case it is neither suggested that there is a substantial point of law nor that the matter is of such great importance to the parties or the public that by its very nature there are special circumstances demanding it to be heard. The question then becomes are there reasonable prospects of success so strong that the refusal of leave will probably result in a manifest denial of justice?

[20] Bearing that in mind, we turn to deal, first, with the merits of the appellant's conviction. As already mentioned, on 7 June 2004 a cyber-attack was perpetrated against the computer network of Cell C. The cardinal issue for us to decide is whether the appellant was the person responsible. He admitted that Cell C's system had been logged into at about the relevant time from his personal computer, but alleged that his wife (who was not called to testify) had done so accidentally and that he immediately disconnected without doing any damage to Cell C's system.

[21] The appellant argued that the security at Cell C's network was in such a dire state that unauthorised access by hackers could be easily gained. This,

[13] Paragraph 21.

according to the appellant, was due to the inexperience of the Cell C personnel in charge of its network and sloppy security practices, including the failure to change passwords upon the resignation of staff members with access to passwords. The appellant argued further that the investigation into the attack was conducted in a way which lacked integrity, particularly in regard to discovering the machine under attack and the commands issued in the course of the investigation being inter-laced with commands issued by the attackers.

[22] The appellant submitted that there was at least one other confirmed instance of unauthorised access on the date and around the time the attack is alleged to have occurred. There is no log shown, in terms of which a connection was established between the appellant's computer and the network devices which were attacked.

[23] The appellant's conviction is based primarily on the evidence of Christopher Marrian, the Information Security Manager at Cell C at the time of the attack. During his testimony, Marrian referred to a number of exhibits that were used in conducting the investigation relating to this attack. He stated that on the evening of 7 June 2004 he was called by his senior, Christoph Schetelich, who informed him that there was a network failure and that he would have to come to work. Marrian proceeded to Cell C's office and realised that the critical components of the network were not working. By then there was a team of network engineers who were looking at the problem.

[24] In order to determine the cause of the problem, Marrian looked at the network monitoring server (NMS) and the access control server (ACS) because everything on the network is logged there. He noticed on the ACS that commands had been executed on the network devices to delete the configuration data. These commands had been executed by the NMIS user (a system account used by the

NMS to access all the network devices) to access all the network devices. At that stage it looked as if the entire network was down because Cell C's call switches were down.

[25] He observed that about 23 of their network devices had been logged onto and their configurations erased. He noticed further that whoever had logged on to the system had dialled up to the Cell C network through the dial-up procedure. That same evening Marrian extracted the information from the NMS and saved it in what is known as the chrisNB file. The report by Superintendent Grobler corroborated the evidence of Marrian that the data from the NMS was extracted on the evening of 7 June 2004 and had been saved in the chrisNB file.

[26] Marrian stated that the logs were automatically generated and had accurately logged all the connections to the network. He checked the file permission and compared the system to the back-up and determined that the ACS was running and working properly and it had not been affected by the attack. The logs had not been tampered with. He stated that although it was possible to corrupt logs with super user access (unrestrained access), the ACS would show that the log was tampered with and he would have been able to determine that from the logs. According to Marrian, the only super users were the appellant (whilst still employed at Cell C), Marrian and Schetelich. The evidence later showed that there were three other super users, however, only Marrian, Schetelich and the appellant had intensive knowledge of the unique c-login commands which would have been required by the hacker.

[27] Marrian referred to exhibit C and D (print-outs of the logs of the ACS) and explained that when a person logged onto the network using a user name and password, the ACS would automatically write to the log file. According to Marrian, exhibit C is a log of all the authentication that occurred on the network

and exhibit D is a log from the same server of all the successful authentications that occurred on the network.

[28] Referring to exhibit C, Marrian testified that the relevant portion of the dial-up connections were of V Raseroka at 19h30 and T Walter at 19h38. The connection of T Walter at 19h38 coincided with the call made at the same time from the appellant's house. The T Walter account was part of the IP pool range and an IP address from this pool was used to logon to the NMS. The recording on exhibit C read as follows: '07/06/2004 19:38:02 twalter Tim Walter ISDN Dial-async/5950 192.168.50.1'.

[29] From exhibit C it is apparent that at 19:38:02 there was an authentication entry with the credentials of T Walter and that the dial-up had been established to Cell C dial-up number 011 505 5950 via a normal telephone line. The dial-up connection lasted until 19:59:23. Exhibit D proved that a successful authenticated dial-up connection had been established to Cell C with T Walter's credentials at 19:38:01. Marrian testified that the IP address 192.168.50.1 was the dial-up router and that when a user logs onto the network the dial-up router creates a log event and it is automatically sent to the ACS for storage.

[30] The manner the attack was made was explained by Marrian as follows: The logon to the NMS took place directly from a personal computer; the commands were issued by the NMIS user and were issued from the NMS; the relevant commands were issued from 19:47:16 to 19:58:04; the *write erase* command deleted the configuration but the device would still have been able to read the configuration from memory; once the device had been rebooted with the *reload* command the device would not have been able to work as it no longer could obtain the configuration data from memory; after a *reload* command had been issued, the user's connection to the specific device is automatically ended.

[31] Of importance and connected to exhibits C and D, are Telkom records (exhibits N, V and W), and exhibit AF, being the images from the appellant's home computer. The Telkom records and the evidence of Dennis Tessendorf, a nodal point officer at Telkom, proved that a call had been made from the appellant's home landline being 011 622 9713 to Cell C dial-up line 011 505 5950 at 19:37:28. The call had lasted for 1312 seconds (21`minutes and 52 seconds). Marrian testified that it normally took about 20 seconds to dial-up to the network. The call according to exhibit N had been initiated at 19:37:28 and the successful authentication on the network as per exhibit D had taken place at 19:38:01. It is to be noted at this stage that the connection by V Raseroka was successfully authenticated on the ACS at 19:06:32. According to Telkom records this call commenced at 19:06:28 and lasted for 1435 seconds. This means that the connection lasted until 19:30:23. Exhibit C also reflected an entry with V Raseroka's credentials at 19:30:24 which was a log-off. It is therefore clear that when the call was made from the appellant's computer at 19:38, V Raseroka was no longer dialled up.

[32] The images from the appellant's home computer (exhibit AF) were used during the trial. Marrian, working on this computer, clicked on the Cell C dial-up program on the appellant's computer and noticed that T Walter's user name was in the username field and the password had been saved. The dial-up number of Cell C was entered. Marrian determined from the system log on the appellant's home computer that it had successfully been connected to Cell C's system on 7 June 2004 at 19:39:11 using T Walter's login credentials. This connection lasted until 20:00:29.

[33] Michael Donovan Köhn, the appellant's expert witness, confirmed that the home computer of the appellant was used to dial up to the Cell C network with

an internal modem via a Telkom line. He confirmed further that T Walter's credentials were used to do so.

[34] T Walter's undisputed evidence was that he did not perform the dial-up and that the telephone number used was not his home number. He stated that on 19 February 2004 he logged a call to the Cell C helpdesk requesting access to the Cell C network. His request was allocated to the appellant. The appellant, who had administrative access to the ACS, created the username and password and e-mailed the credentials together with the dial-up number to him. He experienced problems with these dial-up credentials and there was interaction between him and the appellant concerning this.

[35] The appellant's version was that at about 20:00 on 7 June 2004 he was home when his wife called him to his computer. He noticed a blank internet page on the computer and ascertained that a connection had been established to Cell C and not the internet. He alleged that such access was accidentally obtained by his wife in the process of her using the computer and that no damage was done in the process to the Cell C network. However, his wife was not called to corroborate this version, and there was no suggestion that she was not available to do so. And the fact that the dial-up from his computer was at the same time that Cell C's computer was hacked by someone who would have required detailed knowledge of its system, seems to be just too much of a coincidence.

[36] Regarding T Walter's credentials on his home computer and the subsequent use of these credentials to dial-up, the appellant explained that whilst employed at Cell C and as an administrator, he had created the user name and password for T Walter. On 29 February 2004, T Walter experienced problems with the dial-up and he assisted with the troubleshooting to test T Walter's credentials. This was done from the appellant's home computer as he did not

have a laptop at work. This, according to the appellant, resulted in him saving these dial-up credentials on his home computer.

[37] As stated earlier, the appellant's home computer was used as a workable machine during the trial. Several dial-up connections dated as far back as 26 January 2004 were found on his home computer. This included the connection with T Walter's dial-up credentials on the day of the attack. However, the alleged troubleshooting connection of 29 February 2004 was not found on the appellant's home computer. Neither did his witness, David Oswald, find any such previous troubleshoot connection. There is therefore no evidence of the troubleshooting on 29 February 2004. This only means that no such troubleshoot connection was made.

[38] From the above evidence, the inference is irresistible that the appellant, with extensive knowledge of the Cell C network, and not his wife, intentionally and without authority made a dial-up to Cell C using T Walter's credentials. He issued commands that deleted the configuration data on Cell C network devices. Therefore, we cannot find any misdirection relating to his conviction on either counts, and there are no circumstances that justify the appellant being granted special leave to appeal against his convictions.

[39] Turning to the question of sentence, we did not understand the appellant to quarrel in regard to that imposed on count 1 but to confine his argument in regard to the sentence of three years' imprisonment imposed in respect of count 3. His counsel submitted that the trial court misdirected itself in imposing this sentence as the appellant was a first offender who comes from a good background, and is presently gainfully employed earning a good income. He submitted that the damages occasioned by the appellant's actions were limited. He argued that the trial court failed to take into consideration that the trial itself took too long to be

finalised and submitted that the offence is not prevalent, and that the trial court had over-emphasised the retributive and deterrent objects of punishment and ignored the object of rehabilitation. He submitted that a sentence suspended on condition that the appellant compensate the complainant for the damage done, would be appropriate in these circumstances.

[40] Section 89 of the ECT Act prescribes a maximum sentence of a fine or imprisonment not exceeding five years for a contravention of s 86(5). The fact that the legislature found it necessary to place this offence on the statute book is in itself a clear indication of the prevalence of the unlawful hacking of others computers and networks. The offence is by its very nature a severe one. It invades the privacy of others, something our law earnestly protects, and may have far reaching consequences. In the present case it affected some 80% of the network of a large mobile cellular operator, and it took a week to restore the mischief that had been done. The cost to Cell C was not trifling. It is so that there is no definite figure on record, but the two albeit varying estimates that it lost revenue of some R76 000 to R 492 000 which, even if not accurately proved, is an indication that this was not a piffling affair. And of course, it was directed at the appellant's former employer which indicates at least a hint of malice. What is also aggravating in this case is that the appellant breached the trust his ex-employer had in him. Companies entrust their employees with serious and classified secrets hoping that the trust will not be breached. The appellant did not only breach the trust Cell C had in him but he betrayed his former colleague, T Walker, by using his credentials during the attack to cover his own tracks.

[41] In seeking to persuade us that special leave should be granted, counsel for the appellant made great play on the duration of the proceedings and argued that it would not now be fair for him to be incarcerated. The appellant has been out on bail throughout and has not yet been denied his freedom. The fact remains

however that it was he who committed the offence and he who must now pay the price. The duration argument is in any event a double edged sword. Throughout the trial the appellant had the opportunity of considering what he had done and making a clean breast of things. He did not, and has really only himself to blame for the wheels of justice having ground as slowly as they did. Furthermore, he has persistently denied guilt, and still does. He has shown no remorse whatsoever for his actions and, indeed, sought to deflect at least a portion of the blame towards his wife.

[42] Ordinarily sentencing is a matter which falls within the discretion of the trial court. An appeal court can only interfere with the sentence imposed if such trial court misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.[14] In the present case, the appellant not only has to establish a reasonable prospect of success but must go further and show that his prospects of success are so strong that there will be a manifest denial of justice if leave is not granted.

[43] In determining a proper sentence for the appellant, the trial court considered other non-custodial sentences and found that the seriousness of the offence warranted a custodial sentence. It further took all the features relevant to sentence into account. Bearing the sentence laid down by the legislature and the severity of this offence, we are of the view that the appellant has failed to show that a manifest failure of justice will occur if he is obliged to serve a period of three years' imprisonment. We would therefore not grant him special leave to appeal against his sentence on either count.

[14] *Bogaards v S* [2012] ZACC 23; 2012 (12) BCLR 1261; 2013 (1) SACR 1 (CC) para 41 .

[44] For these reasons the application for special leave to appeal to this court against both the appellant's convictions and sentences must fail, and the appeal be struck off the roll.

[45] It is ordered:

1 The appellant's failure to timeously apply to this court for special leave to appeal is condoned.

2 The application for special leave to appeal is dismissed.

3 The matter is struck from the roll.

LE Leach
Judge of Appeal

FE Mokgohloa
Judge of Appeal

Molemela JA (dissenting):

[46] I have read the first judgment and support its findings in relation to the appellant's conviction. I, however, disagree with its findings directed at the sentence imposed on the appellant, which in turn leads me to disagree with its proposed outcome.

[47] Although I agree that, ordinarily, sentencing is within the discretion of the trial court and that an appellate court's power to interfere is circumscribed,[15] I am of the view that the sentence imposed by the trial court is far too severe and has been vitiated by several instances of material misdirection. This material misdirection is evident from the paragraphs that follow.

[48] In the first place, the trial court has failed to demonstrate that it paid any consideration to the cumulative effect of the sentences it imposed on the appellant. It imposed a sentence of R100 000 or twelve months imprisonment in respect of count 1, the maximum permissible penalty envisaged in respect of that count, nonchalantly mentioning that there were no grades of unauthorised access to data. I make reference to this sentence being well aware of the fact that leave to appeal in respect of this sentence was refused and its correctness is therefore not before us. The context in which I allude to the sentence in relation to count 1 is merely to make the point that when the trial court imposed the sentence in respect of count 3, it disregarded the fact that counts 1 and 3 were committed simultaneously and were closely connected. As such, they were part of the same transaction.[16] In so far as the trial court failed to pay due regard to this aspect, it misdirected itself.

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[15] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC) para 41.
[16] *S v Kruger* 2012 (1) SACR (SCA) at para 10.

[49] Second, where a maximum sentence is set out in the penalty clause of a statute, a court that is considering the crime component should consider in each instance the offender's particular crime and its seriousness, as opposed to following a rigid approach that the maximum sentence set out in the penalty clause is in itself indicative of the seriousness of that crime.[17] The trial court's failure to take this aspect into account constitutes a misdirection.

[50] Third, the following remarks of the trial court reveal that it materially misdirected itself when considering the sentence prescribed in the penalty clause of the Act:

'Allow me a few words in relation to the penal provisions of the ECT Act. I had the opportunity of adjudicating a matter that was probably one of the first, well it was even before the ECT Act, where I had the opportunity of looking at the penal provisions relating to a hacking incident, denial of service incident. One of the drafters of the legislation was one of my assessors and I think it was generally accepted by himself and by the authors commenting about that matter that the penal provisions are sorely lacking. *The five year maximum is so vastly inappropriately lined that it comes as no surprise that there is a need to have it increased*.' (emphasis added).

[51] The last remark is disquieting in that it illustrates that while the legislature identified five years' imprisonment as the maximum sentence in respect of count 3, the trial court considered that period to be inadequate. Based on the comments made by the trial court, the irresistible inference is that the fallacious consideration of the maximum sentence as being inadequate is what in fact led it to impose the harsh sentence it eventually imposed on the appellant. It is clear

[17] *S v Sibisi* 1998 (1) SACR 248 (SCA) at 251f-I; *S v Ingram* 1995 (1) SACR 1 (A) at 8j.

that the trial court paid no regard to the following dictum of this court in *S v Rabie*:[18]

'A judicial officer should not . . . strive after severity; nor on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality'.

[52] Fourth, the trial court paid insufficient regard to the inordinate delay in finalising the appellant's trial, which ran for a period of eleven years from the date of his first appearance to the date of his sentencing. Although the trial court stated that it considered that delay as a mitigating factor, it is clear from its remarks, which will be canvassed shortly, that it merely paid lip service thereto. Of crucial importance is that the trial court stated that the delay could not be attributed to the appellant. I interpose to consider the remarks made in the first judgment on this aspect. The first judgment states:

'The appellant has been on bail throughout and has not yet been denied his freedom. The fact remains however that it was he who committed the offence and must now pay the price. The duration argument is in any event a double-edged sword. Throughout the trial the appellant had the opportunity of considering what he had done and making a clean breast of things. He did not, and has really only himself to blame for the wheels of justice having ground as slowly as they did. Furthermore, has persistently denied guilt and still does. He has shown no remorse whatsoever for his actions and, indeed, sought to deflect at least a portion of the blame towards his wife'.[19]

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[18] *S v Rabie* 1975 (4) SA 855 (A) at 866A-C.
[19] Para 41 of the first judgment.

[53] I disagree with the sentiments expressed in that passage, as they pay insufficient regard to s 35(3)*(d)* of the Constitution, which entrenches the right to have a trial begin and conclude without unreasonable delay. The right to be tried without unreasonable delay is a well-established component of the right to a fair trial dating back to the decreeing of the Magna Carta[20] more than 800 years ago.

[54] In *Sanderson v Attorney-General, Eastern Cape*,[21] the Constitutional Court recognised that an accused person is subject to various forms of prejudice and penalty, merely by virtue of being an accused. That court noted that socially, doubt would have been sown in the eyes of family, friends and colleagues as to the accused person's integrity and conduct. Of particular significance is that the court also recognised that in addition to social prejudice, an accused person is also subject to invasions of liberty that range from incarceration or onerous bail conditions to repeated attendance at remote courts for formal remands. It was observed that this kind of prejudice resembled the kind of "punishment" that ought only and ideally to be imposed on convicted persons. It is also of significance that the court recognised the three basic forms of prejudice which can be caused by unreasonable delays: loss of personal liberty; impairment of personal security; and trial-related prejudice. It observed that 'of the three forms of prejudice, the trial-related variety is possibly hardest to establish, and here as in the case of other forms of prejudice, trial courts will have to draw sensible inferences from the evidence.'

[20] *Wikepedia* describes the Magna Carta (the Great Charter) as a document that has influenced English law and is regarded as the cornerstone of the idea of liberty of citizens. The right to access to swift justice was embodied in the following clause: 'To no one will we sell, to no one deny or delay right or justice'.
[21] *Sanderson v Attorney-General, Eastern Cape (Sanderson)* [1997] ZACC 18; 1997 (12) BCLR 1675; 1998 (2) SA 38 (2 December 1997) at para 23.

[55] That court also said:

'Judges must bring their own experiences to bear in determining whether a delay seems over-lengthy. This is not simply a matter of contrasting intrinsically simple and complex cases. Certainly, a case requiring the testimony of witnesses or experts, or requiring the detailed analysis of documents is likely to take longer than one which does not. But the prosecution should also be aware of these inherent delays and factor them into the decision of when to charge a suspect. If a person has been charged very early in a complex case that has been inadequately prepared, and there is no compelling reason for this, a court should not allow the complexity of the case to justify an over-lengthy delay.'

[56] Although those remarks were made in the context of appeals relating to an application for a permanent stay of prosecution, the principles laid down in *Sanderson* are, by parity of reasoning, applicable in this matter. Significantly, s 35(3)*(d)* of the Constitution, in granting an accused person the right to have their trial begin and conclude without unreasonable delay, does not distinguish between an accused person that is in custody and the one released on bail.

[57] In this matter, despite the fact that the trial court claimed to have considered the long delay as a mitigating factor, it evidently paid insufficient regard to that aspect. That it paid lip service to the inordinate delay of the trial is evident from this passage:

'The deterrent aspect, I cannot even begin to understand how you have lived for the past ten years plus with this hanging over your head. I do not have that social context to imagine that. I can only but assume that it has been hell. For any honest person having a guilty conscience to have to carry that for a period of, such a long period of time must be hell, an inherently honest person and therefore the finding

of the Court is that the personal deterrent effect of the aims of punishment is somewhat at the background, is not so important. . . . The general deterrent effect however is of more importance, that persons in the IT Field do not emulate you, that there is in the IT community a ripple if that be the case that if you do this, the Court frowns upon this. You will not just get a slap on the wrist. You will not just get employed by the next big company to be a white hat hacker. There must be consequences.'

[58] I find it quite ironic that the trial leaned so heavily on the deterrence element of the aims of punishment despite having acknowledged that it could not 'by any stretch of the imagination' find that the offence committed by the appellant was prevalent. As correctly stated in *Nieuwenhuizen v S,*[22] 'an offender being sentenced should not be sacrificed on the altar of deterrence[23] and an 'insensitively censorious attitude is to be avoided'.[24]

[59] It is clear that the trial court did not regard the appellant as capable of being rehabilitated, emphasising that he had not accepted responsibility for his actions. While a plea of guilty may, in appropriate circumstances, be regarded as indicative of remorse, this court has acknowledged that a lack of remorse is not an aggravating factor.[25] I am not aware of any judgment of this court that has held to the contrary. An offender cannot be penalised simply because they wish to challenge allegations made by the State against them. The wrong premise from which the trial court approached the appellant's alleged lack of remorse is evident from the following remarks:

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[22] (20339/14) [2015] ZASCA 90 (29 May 2015) at para 24
[23] *S v Muller & another* 2012 (2) SACR 545 (SCA); (855/10) [2011] ZASCA 151 (27 September 2011) para 9.
[24] *S v Rabie* 1975 (4) SA 855 (A) at 862C-D.
[25] *S v Hewitt* [2016] ZASCA 100 at para 16; *Otto v S* (988/2016) [2017] ZASCA 114; 2019 (3) SA 189 (WCC) (21 September 2017); Compare *Duncan* [1998] 3 VR 208 at 214-215.

‘The court’s point of view has always been up to a few weeks ago where I did research into remorse again to follow the Appellate Division, Rhodesian Appellate Division case of *Koen Deshara* 1976 (4) SA 51 where it is, where the point has been made that if you show true contrition, it is a mitigating factor. The court went as far in that matter as to suggest that the lack of remorse is not an aggravating factor. However the South African courts have differed and I take the point made by your advocate, and Stefan Terblanche similarly makes the point in this book, that we, the South African Court have not gone into the merit of the matter. I think it is a dangerous area to wander into, but the Supreme Court of Appeal has indicated that the court should look into it as an aggravating factor and in this instance I can, and I might be criticised for this at a later stage, but it made a direct difference in the type of sentence that I would have imposed. True contrition at this point would have shown the court that further action would not have been necessary.’

[60] A failure to plead guilty alone is not sufficient to warrant a positive finding that an offender has no prospects of being rehabilitated. It is clear from the trial court’s judgment that no regard, whatsoever, was paid to the fact that it was placed on record that the social worker who testified in mitigation of sentence had raised the appellant’s willingness to pay compensation with the complainant, but the complainant’s witness had rejected that offer on the basis that the trial had dragged on for too long and also stated that he did not want to make the appellant’s case ‘easier or more difficult’, but would rather leave the matter in the hands of the court. I am of the view that the appellant’s willingness to pay compensation was a weighty consideration in determining his capacity to be rehabilitated. Instead of taking this into account, the trial court erroneously stated that ‘there was no mention of compensation’.

[61] Emphasising how the appellant had not shown remorse and how this impacted on his sentence, the trial court stated:

‘ ‘The fact that you do not realise what you have done, that you do not own up to it has caused the Court to come to the following conclusion, periodical imprisonment, inappropriately light, a fine equally inappropriately light in the light of the offence of which you have been convicted and the fact that you have not shown any remorse.

Summarily a sentence in terms of section 276(1)(h) is not appropriate. The prognosis for you completing such a sentence in the process, in the state of mind as it was suggested to me that you do not feel that you did something wrong, makes the sentence inappropriate an inappropriate sentencing option. Similarly in terms of subsection (i), the realisation and the owning up is in this Court’s opinion a prerequisite for this Court imposing such a sentence.

I have taken into consideration various of these sentences taken together to form an appropriate sentence and I could not come to a conclusion that that would form an appropriate sentence. Imprisonment, wholly suspended, is similarly too light a sentence and *I must be honest, this would have changed ha[d] you come clean at sentencing stage, you have shown true remorse, contrition, come to the witness box and explained why you have done this, what your motives were. This has not happened and therefore the Court comes to the conclusion that on the second count the only appropriate sentence is a term of direct imprisonment*. *You are sentenced to three years imprisonment*.’ (emphasis added).

[62] I am perturbed by the unjustified and startling remarks made by the trial court in the above extract in the course of determining the appropriate sentence. The italicised portion brings to mind the following remarks made by this court in *S v Sibisi*,[26] with which I am in full agreement:

[26] *S v Sibisi* 1998 (1) SACR 248 (A) at 254*a-e*.

'This remark was made immediately before the imposition of sentence and would appear to have been taken into account in its determination. As such, in my view, it amounts to a misdirection and renders the whole sentence open to reconsideration.'

[63] The judgments alluded to, above, have illustrated that the fact that an accused person is on bail and not in custody awaiting trial does not, in itself, reduce the emotional trauma that comes with facing prosecution. In *S v Roberts*,[27] this court stated that it would be 'callous to leave out of account the mental anguish the [appellant] must have endured' as a result of the delay between the commencement of prosecution and the sentencing of the appellant. This, however, does not mean that a delay in the finalisation of the trial in itself entitles an accused person to a free pass or constitutes a windfall. Its acceptance as a mitigating factor still does not take away the stigma and social prejudice that often results from a conviction.[28] The fact of the matter is that an unreasonable delay in the finalisation of criminal proceedings has been recognised as a mitigating factor in various judgments of this court, which still constitute good law.[29]

[64] Against the background of the cases discussed in the preceding paragraphs, it is clear that due regard must be paid to the fact that the appellant, for a period of 11 years, had a sword hanging over his head due to the inordinate delay of the trial. The delay was systemic and not of the appellant's making. The substantial prejudice he suffered is evident from the fact that he and his wife took a conscious decision not to have any children during this period, as the appellant felt that he would not want to be responsible to put a child and his wife 'through this

[27] *S v Roberts* 2000 (2) SACR 522 (SCA) at para 22.
[28] Compare *Sanderson*, supra, at para 23.
[29] Also see *S v Michele* & another 2010 (1) SACR 131 (SCA) at para 13; *S v Jaftha* 2010 (1) SACR 136 (SCA).

emotional roller-coaster'. During that period, he could also not obtain a fixed working position other than contract work.

[65] It has to be acknowledged that the case was a fairly complex one and that in itself would play a role on the duration of the trial. However, a period of eleven years from the date of the first appearance to the date of sentencing, is an inordinately long period of time from any point of view. As the trial court correctly pointed out, none of the delay could be attributed to the appellant. I cannot say the same about the prosecution, because a portion of the delay was caused by the fact that the state re-called one of its witnesses before closing its case. After the testimony of one of the defence witnesses, the state re-opened its case, which prompted the defence to thereafter, re-open its case. One of the postponements was due to the fact that the state still needed to consult with a particular witness as part of the investigation.

[66] The prosecution seemed content to postpone the case for short periods of time, and on a number of occasions postponed the case because it had been 'crowded out' notwithstanding the fact that the trial had already been running for a number of years. There seemed to be no initiative to give preference to this matter in recognition of the delay in its finalisation. After lamenting the fact that the matter could not have been placed on a 'rolling roll in order to expedite it', the trial court stated: 'I would have liked to have dealt with it sooner, but there was nothing to be done in the manner in which the lower courts deal with these matters'. Having already waited a period of eleven years from the date of his first appearance on 5 November 2004 to the date of his sentencing in the SCCC on 17 August 2015, the appellant was to wait for three more years for the High Court to finalise his appeal and his application for leave to appeal. Approximately one year later, his appeal was enrolled before this court. All in all, the appellant's case has been pending in different courts for a period of fifteen years. There is no doubt

in mind that this ordinate delay ought to be a weighty mitigating factor counting in the appellant's favour, given all the circumstances of this case.

[67] While I have highlighted the various instances of the trial court's wrong approach to sentencing, this should not detract from the seriousness of the offence committed by the appellant. Nor should it create the impression that courts should not visit such offences with severe penalties. This court has previously dispelled the notion that persons convicted of 'white collar crime' were not offenders.[30] I agree. At the end of the day, each case must be considered on its own merits. The sentence imposed must fit the crime, the offender and the interests of the community. In my view, a balanced consideration of this well-known triad of sentencing constitutes a fundamental element of the right to a fair trial.

[68] The various extracts from the judgment of the trial court attest to the fact that the triad of sentencing was not properly considered. Put simply, its sentencing discretion was not judicially exercised. In my view, a wholly suspended sentence of three years' imprisonment, in respect of count 3, suspended on condition that the appellant pay compensation to the complainant in the amount of R100 000, would reflect the seriousness of the offence in proportion to the personal circumstances of the appellant and the interests of the community. Clearly, there is substantial disparity between that sentence and the sentence imposed by the trial court, which was endorsed by the court a quo and is now supported by the first judgment. The disparity is so marked that the sentence of the trial court can be properly described as 'shocking', 'startling' or 'disturbingly inappropriate'.[31] Where material misdirection by the trial court has vitiated its judicial exercise of the sentencing discretion, an appellate court is

[30] *S v Barnard* 2004 (1) SACR 191 (SCA) at para 15.
[31] *S v Malgas 2001(1) SACR 469* (SCA) at para 12.

entitled to consider the question of sentence afresh. In doing so, it is entitled to assess the sentence as if it were a court of first instance.[32]

[69] In the light of both the disparity and the various instances of material misdirection I have mentioned above, I conclude that the trial court did not exercise its sentencing discretion judicially and that this court is entitled to interfere. I would therefore grant special leave to appeal to this court on the basis that the errors committed by the trial court regarding the sentencing principles constitute a substantial point of law that is of great public importance and that the prospects of success, as highlighted in this judgment, are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice.[33] In line with the parties' agreement that this court may determine the appeal if special leave to appeal is granted,[34] I would uphold the appeal against sentence and impose the sentence proposed in the preceding paragraph of this judgment.

[70] I have read the judgment of my sister Mbatha JA and agree with the sentiments she has expressed in relation to the individualisation of sentence. The trial court's reasoning, captured in the various passages alluded to, above, attests to its failure to individualise the appellant's sentence.

M B Molemela

Judge of Appeal

[32] Ibid. Compare *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and another* (CCT198/14) [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (26 June 2015) at para 88.
[33] See *van Wyk* at para 21.
[34] See para 18 of the first judgment.

Mbatha JA:

I have had the pleasure of reading the majority judgment and the dissenting judgment. I concur with the order that Molemela JA proposes in the dissenting judgment on the delay on the finalisation of the criminal proceedings. I also deem it necessary to deal with the issue of sentence.

I align myself with the views expressed by this court in *Jan Karel Els v The State*[35] where this court stated that 'Furthermore, it remains a salutary principle of our law that sentences have to be individualised to fit the peculiar circumstances of each accused.'[36]

In Malawi, *Kalambo v Republic*,[37] Chatsika J stated that '[i]t has been proved in certain cases that certain persons who are tempted to commit offences thinking that they would not be found, refrain from falling into similar temptations when they have once been found guilty and subjected to terms of imprisonment which have been suspended'. In that regard I am of the view that another court as a measure of deterrence, may reconsider the sentence of direct imprisonment imposed on the appellant in this case.

In the result, I would grant special leave to appeal on sentence to this court, and concur with the order proposed by Molemela JA.

YT Mbatha

Judge of Appeal

[35] *Jan Karel Els v The State* [2017] ZASCA 117.
[36] *Jan Karel Els v The State* para 19.
[37] *Kalambo v Republic* Criminal Appeal No 199 of 1975 (HC).

Appearances

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