REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: A217/2012

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE Applicant

and

FRANCISCA MALAN Respondent

JUDGMENT: 29 OCTOBER2013

Schippers J:

[1] This is an application for leave to appeal to the Supreme Court of Appeal (SCA), in terms of s 311(1) of the Criminal Procedure Act 51 of 1977 ("theCPA"), against the orders contained in paragraph 22(1) and (2) of this Court's order dated 30 April 2013, in terms of which it set aside the

respondent's convictions of fraud on counts 1 to 7 and count 9, referred to in the relevant charge sheet.

[2] On 17 September 2013 the respondent filed an application for leave to cross-appeal against paragraph 22(4) of the order dated 30 April 2013, together with an application for condonation of the late filing of the cross-appeal.

[3] At the hearing of the application for leave to appeal on 11 September 2013,Mr De La Harpe, for the respondent, submitted that the Court could not consider it because the notice of application for leave to appeal had not been filed timeously and the State had not sought condonationfor the late filing of that application. Mr Geyser, on behalf of the applicant, submitted that an application for condonation was unnecessary as the appeal was one in terms of s 311(1) of the CPA. Since s 311(1) prescribes no time period within which an appeal on a question of law must be lodged, so it was argued, such an appeal must be lodged within a reasonable time, which was done in this case.

[4] Given that the point in relation to the late filing of the application for leave to appeal was taken for the first time at the hearing of the application, the applicant was granted an opportunity to consider his position and to file an application for condonation if so advised, which he did on 13 September 2013.

[5] The first issue then, is whether an application for leave to appeal in terms of s 311(1) of the CPA must be made within a reasonable time, or whether it is governed by the Rules of Court.

[6] Section 20(4)(b) of the Supreme Court Act 59 of 1959 provides inter alia that no appeal shall lie against any judgment or order of a provincial division given on appeal, except with the leave of the court against whose judgment or order the appeal is to be made.[1]The purpose of leave is to limit appeals to those which have reasonable prospects of success.[2]

[7] The cases say that leave to appeal is required when the State wishes to appeal on a matter of law under s 311 of the CPA.[3]However, the time within whichthe State must bring an application for leave to appeal under s 311(1) of the CPA is not stated in that provision. It appears therefore that an application for leave to appeal in terms of s 311(1) must be made within a reasonable time.

[8] The question then arises: what is a reasonable time?

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1 Section 20(4) reads as follows:
"No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except –
(a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;
(b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division."

2 *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 689B.

3 *Attorney-General Transvaal v Nokwe and Others* 1962 (3) SA 803 (T) at 806D, approved in *S v Stevens* 1983 (3) SA 649 (A) at 662D-E. But see *S v Marais* 1982 (3) SA 988 (A) at 998B.

[9] It seems to me that this question may be answered with reference to comparable provisions in other statutes and rules regarding the period within which an application for leave to appeal must be brought, for two reasons. First, what constitutes a reasonable time must be determined objectively, and comparable provisions and rules are a helpful guideline as to what is a reasonable time. Second, s 8(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law, and thus there should generally be parity in the treatment of applicants for leave to appeal.

[10] In civil appeals under rule 49(1)(b) of the Rules of Court the period is 15 courtdays. More closely related however, are appeals in criminal cases. Thus, in a case where the Director of Public Prosecutions (DPP) seeks leave to appeal to a high court against a sentence imposed on an accused by a lower court under s 310A of the CPA, the period is 30 ordinary days of the date of the passing of sentence or within such extended period as may on application on good cause be allowed. Under s 315 of the CPA an application to the SCA by an accused or the DPP to set aside a direction that an appeal be heard by a full court, must be made within 21 ordinary days or such longer period as may on application to the SCA on good cause shown be allowed. In terms of s 316(1) of the CPA, subject to s 84 of the Child Justice Act 2008, any accused convicted of any offence by a high court must apply for leave to appeal against conviction or

sentence within 14 ordinary days of the passing of sentence or order following on the conviction. The provisions of s 316 of the CPA apply *mutatis mutandis* to appeals by the DPP to the SCA against a sentence imposed on an accused in a criminal case in a superior court under s 316B. Finally, s 21(2) of the Supreme Court Act provides that the SCA may grant leave to appeal to it under s 20(4), on application made within 21 days, or such longer period as may on good cause be allowed.

[11] These provisions indicate that the periods during which an application for leave to appeal must be lodged are within the rangeof 15 court days and 14 to 30 ordinary days of the decision appealed against. It thus appears that the outer limit for the lodgment of an application for leave to appeal is 30 ordinary days, and that any time beyond thatperiod would be unreasonable.

[12] In this case the order sought to be appealed was made on 30 April 2013. The notice of application for leave to appeal was delivered on 26 June 2013, nearly two months later. The application was thus not lodged within a reasonable time.

[13] However, the applicant has filed an application for condonation, the grounds of whichmay be summarized as follows. There is a procedure in terms of which permission to prosecute all appeals by the State must be obtained from

the applicant. Much time was taken up in following this procedure and researching the questions of law raised in the matter. By 31 May 2013 a provisional notice of intention to appeal had been filed when the final notice had been drafted but not yet completed. The notice of appeal together with an affidavit was forwarded to the applicant on 7 June 2013, but due to other pressing work commitments, he could not deal with it before 23 June 2013.

[14] In the circumstances and given that the period between 31 May and 23 June 2013 when the application was filed is not lengthy, I consider that condonation of the late filing of the application for leave to appeal should be granted.

[15] I turn now to consider whether leave to appeal should be granted.

[16] As set out in the notice of application for leave to appeal, the applicant does not appeal against the factual findings of this Court; and accepts the facts as found and summarized in paragraphs 1 to 6 of the judgment.

[17] Before leave to appeal may be granted in terms of s 311(1) of the CPA, the applicant must meet three requirements: (1) the order sought to be appealed against must constitute a decision in favour of the respondent on a question of law; (2) the matter must be one of substantial importance to the State or to the

State and the accused, requiringthat the question of law should authoritatively be determined by the SCA; and (3) there must be a reasonable prospect of success on appeal.[4]

[18] As to (1), it was rightly submitted by Mr Geyserthatthe respondent's acquittal on the fraud charges involvesquestions of law, more specifically, that the State did not prove a misrepresentation (the conduct element of fraud) or intent to defraud.

[19] As regards (2), the question of law raised by the appeal is not merely academic. The founding affidavit states that there are many other cases being heard in the lower courts in the Western Cape, where the issues are similar. The appeal is thus one of material importance to the State and it is important that clarity and certainty be obtained regarding the questions of law referred to.

[20] What remains then is requirement (3) – whether there is a reasonable prospect of success on appeal.

[21] Mr Geyser referred us to *Metcash*,[5] for the submission that the respondent had to register as a vendor under the Value-Added Tax Act 89 of 1991 ("the

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4 *Nokwe* n 3 at 807D-G.

5 *Metcash Trading Ltd v Commissioner, South African Revenue Service and Another* 2001 (1) SA 1109 (CC) paras 13-20.

VAT Act"), and that in relation to fraud, there was a legal duty on the respondent to disclose her existence to the South African Revenue Service (SARS). I do not think that Mr Geyser's extensive reference to an outline of the main provisions of the VAT Act in*Metcash*is helpful. Those provisions were outlinedso as to appreciate the effect of a constitutional challenge to certain provisions of the VAT Act and to evaluate the cogency of that challenge.[6]The case has got nothing to do with the question in what circumstances the non-disclosure of a fact amounts to criminal fraud.

[22] Likewise, the applicant's reliance on *Yengeni*[7]is misplaced. It is submitted that the definition of fraud is broad; that the persons affected by fraud can be very wide; and that non-disclosure in the face of a duty to speak may constitute criminal fraud even if the failure to comply with that duty is not visited by a criminal sanction. In *Yengeni*the court held that individual and other entities of Parliament were at the relevant times within the range of the misrepresentation by the appellant in that case (the failure to disclose a benefit – the supply of a Mercedes Benz motor vehicle at a discount of 47%). But the court made this finding in the context of the appellant's contention that Parliament could not be defrauded because it is not a juristic person.[8] The court held that as an assembly of natural persons performing tasks of national

6 *Metcash* n 5para 11.
7 *S v Yengeni* 2006 (1) SACR 405 (T)
8 *Yengeni* n 7paras 36-41.

importance, Parliament has a vital interest in not being misled; that it required correct and accurate information relating to the propriety or otherwise of its members; and that it would be misled if an intention to mislead was present in the mind of the perpetrator.[9] But more fundamentally, there was a duty on MrYengenito disclose the benefit by virtue of the relationship between the parties – hewas a member of Parliament and the latter had a vital interest in the disclosure of information relating to benefits received by members over and above their emoluments.[10]

[23] The applicant's reliance on *Shaik*[11] is also misplaced. Hecontends that in *Shaik*there was no evidence showing that SARS, shareholders or banks were aware of false entries in certain journals and annual financial statements, but that these entities would have been prejudiced if the annual financial statements had been passed on to them. However, the applicant misses the point. The crime of fraud was committed upon communication of a misrepresentation to the accounting staff of the Nkobi group of companies. There was potential prejudice in that the annual financial statements may have been passed on to shareholders, SARS and banks.[12]

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9 *Yengeni*n 7 para 36.
10 *Yengeni* n 7 para 37.
11 *S v Shaik and Others* 2007 (1) SA 240 (SCA).
12 *Shaik*n 11 paras 163 and 164.

[24] It appears howeverthat there is authority for the proposition that a representation "to the world", may constitute criminal fraud. In *Madantile*[13]theaccused was charged with fraud. He went to a train station but walked past the ticket-sales office. He proceeded straight to the platform security gate, manned by a security guard. At that checkpoint, only passengers with tickets were allowed to go through on to the platform. He gave the security guard R20 to allow him on to the platform as if he was the holder of a valid train ticket and boarded a train. On the train a ticket examiner asked to see his ticket, which he could not produce. He was arrested and charged with fraud. The court held that if a deceiver intends to defraud and his behaviour and actions are consistent with that intention, it is immaterial whether the false representation was manifested to a specific person by way of an explicit or implicit distortion of the truth. In giving the security guard R20 and causing the security gate to be opened, the accused represented to the world that he had a valid ticket, knowing that that representation was false.

[25] The applicanttherefore argues that the mere fact that the accused was present on the platform and inside the train was a misrepresentation on his part to the world that he had a ticket and could use the train; that Transnet was not even aware of his existence or that he was on the platform; and that his fraudulent conduct was unilateral.

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[13] *S v Madantile* 2011 (2) SACR 142 (FB).

[26] It seems to me that in the light of the holding in *Madantile*, and the often difficult question whether silence or non-disclosure is criminally fraudulent, there is a reasonable prospect of success on appeal.

[27] The last issue to be dealt with is the cross-appeal. The respondent contends that the Court erred in setting aside the sentence imposed by the trial court on charges 8 and 11 to 18 and increasing that sentence, in circumstances where there was no cross-appeal by the State, as required in terms of s 316 of the CPA. For this proposition she relies on *Nabolisa*.[14]

[28] The respondent is however mistaken. Unlike *Nabolisa*, this is not a case in which the State sought an increase of the sentence. Instead, this Court imposed a more severe sentence in respect of counts 8 and 11 to 18 than that imposed by the trial court, pursuant to its powers under s 22 of the Supreme Court Act and s 322 of the CPA.

[29] This is not new. The practice of an appeal court giving an accused person notice where that court *meromotu* considers increasing a sentence on appeal is recognized at common law. A formal notice is not required and the failure to give it is not an irregularity.

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14 *S v Nabolisa* 2013 (2) SACR 221 (CC).

[30] However, in *Bogaards*,[15] the Constitutional Court decided that the practice should be elevated to a formal requirement in order to enable an accused person to properly exercise the right of appeal to a higher court under s 35(3)(o) of the Constitution. It held that the notification practice ensures substantive fairness in two ways: first, by facilitating an informed exercise of the right of appeal; and secondly, by ensuring that the *audialterampartem* principle is observed.[16] The true basis of the notice practice, the court said, is the need for an appellant to be aware of possible jeopardy, and to be given a meaningful and adequate opportunity to make submissions to the court on the appropriateness of a sentence increase.[17]

[31] If a court does not give notice of its intention*meromotu*to increase a sentence, this will amount to an infringement of the right of appeal, a component of the right to a fair trial. The infringement will constitute an irregularity and the court will then need to consider whether the irregularity amounts to a failure of justice which would renderthe trial unfair.[18]

[32] To return to the cross-appeal. As stated in paragraphs 19 and 20 of the judgment, the legal representatives of the parties were formally notified that the Court was considering increasing the sentence on counts 8 and 11 to 18. They

15 *S v Bogaards* 2013 (1) SACR 1 (CC).
16 *Bogaards* n 15 paras 45, 58 and 59.
17 *Bogaards* n 15 para 64.
18 *Bogaards* n 15 para 71.

were granted an opportunity to make written submissions and to indicate whether they wished to address the Court regarding sentence. Boththe State and the respondent filed further submissions and indicated that they did not wish to address the court orally.

[33] The basis on which leave to cross-appeal is sought is therefore unsustainable, and the cross-appeal has no reasonable prospect of success.

[34] I would make the following order:

(1) Condonation of the late filing of the application for leave to appeal is granted.

(2) Leave to appeal to the Supreme Court of Appeal against paragraph 22(1) and (2) of this Court's order dated 30 April 2013, is granted.

(3) The application for leave to appeal to the Supreme Court of Appeal against paragraph 22(4) of this Court's order dated 30 April 2013 is refused. There is no order as to costs.

(4) The costs of the application for leave to appeal shall be costs in the appeal.

SCHIPPERSJ

I agree.Itis so ordered.

NDITA J

For the Applicant(s)	:	Adv. F GEYSER Adv. D Y BOOYSEN
Instructed by	:	OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE
For the Respondent(s)	:	MR M DE LA HARPE (ATTORNEYS)
Instructed by	:	MILTON DE LA HARPE ATTORNEYS 201 Piazza on Church Square 39 Adderley Street Cape Town
Date(s) of hearing	:	Wednesday, 11 SEPTEMBER 2013 & Thursday, 24 OCTOBER 2013
Judgment delivered	:	Tuesday, 29 OCTOBER 2013