IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT, KIMBERLEY CASE NO. CA & R 41/20

In the matter between:

NATASHA LIEBENBERG	**APPLICANT**
And	
THE STATE	**RESPONDENT**

APPLICANT`S WRITTEN SUBMISSIONS

APPEAL AGAINST THE JUDGEMENT BY THE PRESIDING HONOURABLE WILLIAMS AJP AND HONOURABLE STANTON AJ, ON 10 SEPTEMBER 2021.

ON BEHALF OF THE APPLICANT	**ON BEHALF OF THE RESPONDENT**
MATHEWSON & MATHEWSON INC.	**THE DIRECTOR OF PUBLIC PROSECUTIONS**
ADVOCATE F. VAN HEERDEN	**ADVOCATE I. MPHELA**
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1. Practice Notice;
2. Applicant`s written submissions;
3. List of Authorities

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CC no: CCT 145/22

NORTHERN CAPE HIGH COURT,

KIMBERLEY CASE NO. CA&R 41/20

In the matter between:

NATASHA LIEBENBERG **APPLICANT**

And

THE STATE **RESPONDENT**

PRACTISE NOTICE

(a) NAMES OF THE PARTIES:

ADV CF VAN HEERDEN ON BEHALF OF THE APPLICANT

ADV I MPHELA ON BEHALF OF THE RESPONDENT

(b) NATURE OF THE PROCEEDINGS:

This is an application for leave to appeal and if leave be granted, the merits of the appeal.

(c) THE ISSUES THAT WILL BE ARGUED:

1. That Respondent adduced inadmissible evidence to show the applicants bad character and criminal tendencies;
2. That the evidence contained in Exhibit "C" and the recording that was made was unconstitutionally obtained;
3. That the applicant was compelled to make a statement and that her right to silence was not explained to her;
4. That the proceedings were fundamentally unfair and irregular;
5. That the Respondent did not proof that applicant took the amounts mentioned in the charge sheet for her own use; and
6. That the applicant was convicted and sentenced on the basis that she took the money for her own use.

(d) THE PORTIONS OF THE RECORD THAT ARE NECESSARY FOR THE DETERMINATION OF THE MATTER:

Volume 1: p 39-56

Volume 2, p 98-99

Volume 2, p 105-155

Volume 6, p 462-503

Volume 6, p 527-543

(e) ESTIMATED DURATION OF ORAL ARGUMENT

I hour

(f) SUMMARY OF ARGUMENT:

1. The applicant will argue that evidence was adduced by the Respondent that the applicant was previously convicted on charges of a similar nature in a disciplinary process and had received a final written warning. The applicant will further argue that no legal basis was advanced for the admission of this evidence.

   The legal representative did not object to this evidence nor did the trial Court enquire about the admissibility of the evidence.

   The evidence about bad character and criminal tendencies is inadmissible and that resulted in the trial of the applicant not being conducted in accordance with notions of basic fairness and justice.

That the applicant did not receive a fair trial and that the conviction and sentence should be set aside.

2. The applicant will further argue that, in obtaining Exhibit "C" and the recording that formed part of the investigative process, the constitutional rights of the applicant were infringed.

   That the applicant's right to silence was never explained to her, instead she was told that she had no option but to depose an affidavit.

   Applicant was informed that the evidence may be used against her in a disciplinary hearing, not a criminal trial.

   It was further explained to the applicant that she is not allowed to have her legal representative present during this interview.

   The applicant will argue that the respondent introduced this evidence, that was unconstitutionally obtained by the investigator of ABSA. That this evidence was admitted where the applicant incriminated herself while she was not afforded the opportunity to make use of the protection contained in section 35 (5) of the Constitution.

   That this admission of the impugned evidence led to an unfair trial.

3. The applicant will also argue that the Court on appeal erred in finding that the trial court was not biased. The trials court'sremarks, especially during the argument of respondent, indicates that the trial court had prejudged the matter. The inference that the trial court made is not consistent with all the proven facts and that the respondent did not prove that the applicant took all the money for herself as alleged in the charge sheet. This inference was already made before judgment.

That the legal representative did not argue that the applicant never admitted that she took the money for herself and that there was no evidence to substantiate such a finding, instead he argued that the applicant be convicted as charged.

The applicant will argue that the proceedings in the trial court were fundamentally unfair and that the Court on Appeal should have intervened to set aside those proceedings.

4. The applicant will further argue that the matters above raise constitutional issues or issues connected with decisions on

constitutional matters. That it will be in the interest of justice to grant leave to appeal because the fair trial rights of any person must be protected. That this Court by hearing the issues and deciding on them, will give guidance to other courts and especially lower Courts.

(g)S v Jones 2004 (1) SACR 420 (C)

S v Mgina 2007 (1) SACR 82 (T)

S v Hena and Another 2006 (2) SACR 33 (SE)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT145/22

SCA Case:number:1056/2021

NC High Court :CA& R 41/20

In the matter of:

NATASHIA LIEBENBERG

versus

THE STATE

APPLICANT'S WRITTEN SUBMISSIONS

TABLE OF CONTENTS:

2.Evidence admitted to show the applicants bad character and criminal tendencies.

3.The admission of exhibit "C" and the infringement of applicants Constitutional rights.

4. The proceedings were fundamentally unfair and irregular.

5. Should leave be granted.

6. Other matters raised.

7. Sentence

INTRODUCTION:

1. The applicant was arraigned in the Northern Cape Regional Court in Kimberley on 8 October 2015 in relation to offences that were allegedly committed during 2008 up to 2011.

2. The applicant was convicted on 86 counts of fraud, 85 counts of forgery and 85 counts of uttering and 10 counts of theft. The counts were taken together for purposes of sentence and the applicant was sentenced on 20 February 2019 to 6 years imprisonment.The applicant was taken into custody.

3. The applicant's application for leave to appeal was dismissed on 16 May 2019.

4. A petition for leave to appeal was filed on 28 May 2019 and due to an incomplete record the petition was only granted on 12 November 2019.The applicant then successfully applied for bail.

5. Judgement on appeal was delivered on 10 September 2021. The applicant was acquitted on the forgery and uttering charges. The applicant was sentenced to 4 years imprisonment.

6. The applicant lodged an application for leave to appeal to the Supreme Court of Appeal against her conviction and sentence. This application was dismissed on 22 January 2022 on the grounds that there were no special circumstances meriting a further appeal.

7. An application to the President of the Supreme Court of Appeal for the reconsideration and variation of the refusal of leave to appeal was filed, butwas dismissed on 3 May 2022.

8. The applicant thereafter approached this Honourable Court for leave to appeal against her conviction and sentence in the High Court (Northern Cape, Kimberley)

9. The Honourable Chief Justice issued directions on 1 March 2023:

   9.1 The application is set down for hearing on Thursday, 18 May 2023 at 10h00.

   9.2 Instructing the applicant to file the record in accordance with rule 20 containing only the portions that are strictly necessary for the determination of issues.

9.3 Instructing the parties to lodge written arguments, including the merits of the appeal.

EVIDENCE ADMITTED TO SHOW THE APPLICANTS BAD CHARACTER AND CRIMINAL TENDANCIES:

10. The respondent informed the Trial Court that the first witness will testify on one aspect, namely the disciplinary records of the applicant when she was still employed by Absa.
Volume 1, p 39, line 1-4

11. There was no objection from the defence and the Regional Court Magistrate allowed this evidence.

12. The witness then proceeded and read the disciplinary charges,findings and sanction into the record. This disciplinary hearing was not conducted by the witness but conducted by S M Vermeulen, who did not testify.
Volume 1,p. 43, line 10-13

13. A letter from EreneJanse Van Rensburg was also read into the record. This letter explained the misconduct of the applicant.Van Rensburg also did not testify.

Volume 1, p 43, line 19 –p 45, line 7

14. Another letter from SM Vermeulen was read into the record. In this letter the applicant received a final warning in regard to the misconduct shown from the previous letter.

Volume 1, p 45, line 10-24

15. The prosecutor in the trial court then stated to the witness that the previous misconduct had occurred before the current charges and that it appeared that she continued with the same behaviour. The prosecutor then invited the witness to state his view on whetherthis would constitute a negligent or a deliberate act to which the witness responded that it would be a deliberate act on applicant's part.

Volume 1, p 46, line 1-18

16. The Regional Court Magistrate took this evidence in consideration.

Volume 6: p 495,line 7-9

17. It is submitted that evidence about criminal tendencies and bad character is inadmissible and constituted an irregularity which had resulted in a failure of justice.

18. Evidence about past criminal conduct is irrelevant and not according to the notions of basic fairness and justice and the consequence is an unfair trial.[1]

19. Evidence about previous misconduct is legally irrelevant because of the highly prejudicial effect it has on the mind of the trier of fact and the question is not if such knowledge has caused bias, but whether such knowledge has created a perception that he may have been biased.[2]

20. On appeal The High Court, Northern Cape Division dealt with this aspect by referring to Section 197(1) (d) of the CPA and section 211 of the CPA.

Volume 1: p 6, par [16] to page 7, par [17]

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[1]S v Jones 2004 (1) SACR 420 (C) at 426
[2]S v Hlathi 2000 (2) SACR 325 (N) at 330

21. Section 197 does not however permit evidence of bad character to be adduced by the prosecution but only make provision for cross-examination of an accused under certain circumstances. Section 211 ruled evidence inadmissible that shows that the accused has previously been convicted of any offence, except where otherwise expressly provided for in the CPA or where a previous conviction is an element of an offence.

22. The Court on appeal found that the evidence was accepted into evidence without any objection from the applicant's legal representative.

Volume 1 p7, par [18]

23. In S v Jones[3], evidence was adduced relating to a criminal offence for which the accused was not charged. The Court held that the Magistrate and the prosecutor, as well as the accused attorney, were not bothered by the leading of such evidence. The Court found that no legal basis for the admissibility of such evidence was advanced, nor were any reasons provided in the judgement of the Magistrate.

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[3] *supra* at 424

24. The High Court, in referring to the evidence regarding the disciplinary hearing, found that the record does not reflect any bias on the side of the Regional Court Magistrate. The court found that the Magistrate had only made a cursory comment with regard to this evidence.

Volume 1, p 7,par [19]

25. It was found by this Court[4]that "at the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done."

26. In S v Ramatar[5] the court found that: "Any right-minded and reasonable observer who might have been in court at the time could not have helped but have grave doubts as to whether or not the magistrate would give the accused a fair deal, given that she had elicited his criminal record even before she took his plea, and one would have had a reasonable apprehension of possible bias on the part of the magistrate."

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[4]S v Tshilo 2000 (2) SACR 443 (CC), P 456, par [11]
[5]2018 (2) SACR 414 at p 419 par [16]

27. It is submitted that the applicant's right to a fair trial has been infringed by the admission of this evidence without laying any basis for the admissibility of such evidence.

THE ADMISSION OF EXHIBIT "C" ANDTHE RECORDING OF THE INTERVIEW OF 7 November 2011: INFRINGEMENT OF THE APPLICANTS CONSTITUTIONAL RIGHTS:

The circumstances under which the admissions were made during the disciplinary process:

28. The applicant was interviewed by J Russel, the investigator of ABSA on 4 October 2011. The applicant tried to commit suicide after the interview.

Volume 2: p 159, line 1-6

29. The applicant was hospitalizedand a medical certificate was issued that she was incapacitated until 28 October 2011.

Volume 3: p 181, line 14-15

30. On 7 November 2011 the applicant was informed that she needed to sign documents at ABSA, she was not aware that the investigator was going to interview her again.

Volume 2: p 159, line 20-25

31. During this interview on 7 November 2011, the applicant informed the interviewer that she is on medication for depression. When asked if the applicant is comfortable to proceed with the interview the applicant did not answer but instead enquire about the presence of her lawyer.

Volume 3: p 214, line 19- p 215, line 2

The investigator confirmed that the applicant cried throughout the interview.

Volume 2, p 148, line 10-15

32. It was explained to the applicant that she may only make use of an attorney should it come to a criminal trial, but not during the internal process.

Volume 3: p 215, line 1-14

33. The applicant was further informed that they were aware of the fact that she had contacted and attorney, since the latter had phoned them, but urged her to cooperate.

Volume 3, p 215, line 17-24.

34. The applicant informed the investigator that she was under the impression that she was only going to receive her suspension letter, and that if she had known about the interview, she would have had the attorney present. The investigator reiterated than an attorney may not be present.

Volume 3, p 216, line 1-13

35. The applicant was informed that the recording of the interview may be used in a disciplinary trial and that she may have a colleague, or a union representative represent her at such a disciplinary trial. She was also informed that she may use an attorney, but the attorney cannot be present during the internal process.

Volume 3: p 217, line 3-10

36. The investigator emphasized that they (ABSA) wanted the applicant's cooperation.

Volume 3, p 218, line 8- 12

37. During the interview of 4 October 2011 the applicant was told that she had no option but to explain what happened and to give her side of the matter.

Volume 2, p 99, line 1-6

p102,line 19 - p 103, line 4

The admission of this evidence:

38. The *onus* is on the respondent to prove that the fundamental rights of the applicant was not infringed during the obtaining of a confession, admission or any other evidence.[6]

39. The question is not only if there has been compliance with formalities and rules but whether in all the circumstances the admission of evidence accords with the applicant's right to a fair trial.[7]

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[6]S v Mgina 2007 (1) SACR 82 (T) at 95.
[7]S v Manuel 1997 (2) SACR 505 (C) at 516

40. Section 35(5) also applies where private individuals secure evidence in breach of constitutional rights. The Court also warns that it would undermine both the Constitution and the integrity of the criminal justice system to allow this systemic abuse to go unchecked and it weighs heavily against the admission of the tainted evidence.[8]

The judgement of the Court *a quo* :

41. The Court found that in terms of our common law a person does not have an absolute right to be legally represented and the essential requirement by which the need to permit legal representation is evaluated, is whether fairness necessitates it.

Volume 1: p 9 par [27] and [28]

42. This evidence was admitted in a criminal trial. The applicant was already a suspect at that stage and the investigator was a person in authority. It is submitted that the emphasis must fall on the pre-trial rights of an accused person.

[8]S v Hena and Another 2006 (2) SACR 33 (SE) at p 40 and p 41

43. In S v Botha[9] the Court found that although Eskom did the investigation, the principle still applies that evidence obtained unconstitutionally before a trial is inadmissible evidence.

44. The statement and recording were not made during a disciplinary hearing but during the investigation stage of the matter. It is submitted that the proceedings at that stage is similar to obtaining a warning statement from a suspect. The Court *a quo* however found that she was not precluded from consulting with an attorney prior to the disciplinary hearing and that she was informed that she has the right to be represented by a trade union representative or a colleague and thus her rights were not infringed.

Volume 1: p 9, par [29]

45. The fact is that the applicant was informed that an attorney may not be present during the interviews and the evidence of the interviews was used in the criminal trial.

46. The view of our Courts is that the right to consult with a legal practitioner during the pre-trial procedure and especially the right

[9]1995(2) SACR 598 (W) at 601

to be informed of this right, is closely connected to the presumption of innocence, the right of silence and the proscription of compelled confessions and admissions, in other words to be protected against self-incrimination.[10]

47. It is further clear from the recording that the explanation given to the applicant is that the recording may be used in a disciplinary trial and not that it may be used in a criminal trial.

See: par 35 of the submissions.

48. In S v Orrie[11]the Court found that if a statement is obtained from an accused without the required warning then such was obtained in violation of an accused's constitutional rights and is inadmissible even if the statement is exculpatory on the face of it.

49. The Court *a quo* found that there is no indication that the applicant had been coerced or that the statements were unfairly obtained.

Volume 1: p 9 par [30]

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[10]S v Tsotetsi and Others (1) 2003 SACR (W) at 636.
[11]2005 (1) SACR 63 (C)at 76

50. It is submitted that the warning contained in Exhibit "C" in itself, is a form of coercion. The applicant is threatened with prosecution if she wilfully stated in her statement anything which she believe to be false or which she do not believe to be true. The document does not state that it can be used as evidence against her in a criminal trial.

Volume 6: p 536, Exhibit "(C)

51. It is further submitted that *ex facie* Exhibit "C", there is no indication that she had a choice and that her right to silence was explained to her. There is no indication that she was given adequate time to prepare for any allegation levelled against her, nor was she given the opportunity to even consult with a legal representative.

52. It is further submitted that the wording used by the investigator of the employer, indicates that applicant had no choice in the matter, that she had no free will under the circumstances and again no right to silence was explained to her.

See par 36 and 37 of this submission.[12]

[12]S v Williams and Others 1991(1) SACR 1 (C) at p 14

The proceedings were fundamentally unfair and irregular, resulting in a gross miscarriage of justice:

The impatience of the Regional Court Magistrate:

53. The Court *a quo* found that the Magistrate expressed his frustration due to the various postponements that had been requested by the applicant's legal representative.
Volume 1: p 5, par 9.2.

54. The Regional Court Magistrate knew about the health challenges the legal representative experienced and accommodated him by allowing him to sit during cross-examination and allowed a person to sit next to him to take notes.
Volume1:p 37, line 20 p 38, line 5-6

55. It is common cause that the legal representative of applicant failed to appear in the trial court on many occasions. The regional magistrate responded to this failure in the following ways:

(a) By suggesting that council be appointed;

(b) By saying that the legal representative is messing up the rolls but he cannot proceed like this; and

(c) By saying that the legal representative is dictating the whole show now and he is not willing to work like that.

56. It was however decided that the legal representative will continue to represent the applicant in the trial.

Volume 4: p 254, line 8-17

Impartiality:

57. During respondent's argument before judgement the Regional Court remarked as follows:

57.1 "I have got the impression that the accused want to frustrate the system first, because why, after the evidence nothing was in dispute."

Volume 6, p 487, line 5-6

57.2 "It create such an impression that accused was just frustrating….wants to frustrate the system."

Volume 6, p 487, line 14-15

57.3 "And suddenly everything was admitted today."

Volume 6, p 487, line 12

57.4 "And then the inference is that you never want to pay those people the money."

Volume 6, p 489,line 1- 490,line 1

57.5 "I mean, that is the only reasonable inference."

Volume 6, p 490, line 3

58. The above mentionedcomments were made even before the defence addressed the court.

59. The Regional Court Magistrate had also instructed the applicant to answer the question because she is looking for excuses upfront.

Volume 3: p190, line 15-18

60. The complainant had never admitted that she herself benefitted from any amount in any of the counts against her, not even in the section 220 admissions.

See Exhibit "Y", Volume 6, page 540-543

61. The Magistrate then convicted the applicant as charged, namely on the basis that she benefitted from all the amounts.

See Volume 1: p 19, par 3.5

62. In S v Klaas[13] the magistrate expressed disbelieve of the version of the accused after the plea explanation. The Court found that the remarks made during the judgement of the magistrate, confirmed the earlier expression of disbelieve. It was found that the right to a fair trial was violated.

63. In S v Le Grange[14]the Court found that fairness and impartiality must be both subjectively demonstrated to the informed and reasonable observer. The Court took comments and observations made during judgement and sentence into account in arriving at the conclusion that the matter was prejudged.

64. It is submitted that the evidence in the beginning of the trial about the disciplinary record of the applicant must have played a role in the perception of the trial court that the applicant wanted to frustrate the system. The magistrate's comments during the arguments of the respondent indicates that he had already decided that the applicant took all amounts for her own benefit, before giving the applicant's legal representative a change to argue this aspect.

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[13]2011 (1) SACR 630 (ECG) at 633, par 9
[14]2009(1) SACR 125 (SCA) at p 150, par 21

65. It is respectfully submitted that the applicant did not receive a fair trial.

66. It is further respectfully submitted that the legal representative should have challenged the admissibility of the evidence that the respondent presented with regard to applicant's bad character and previous misconduct which did not form part of the charges levelled against her.

67. The version of applicant is clear, she did not benefit personally from any amount. The legal representative however did not address this issue even after hearing the Magistrate state that the only reasonable inference is that applicant did not intend paying the other people. Instead, the legal representative argued that the applicant should be found guilty, in other words on the basis that she took all the monies for herself.

68. In S v Chabedi[15] the court found that, in our present constitutional setting, the right to a fair trial embraces the right of an accused person to be properly defended.

Should leave to appeal be granted:

69. It is submitted that the above raise constitutional matters or issues connected with decisions on a constitutional matter.[16]

70. It is further submitted that it is in the interest of justice for this Court to grant leave to appeal. Where a trial was not conducted with the "notions of basic fairness and justice" this Court should give content to those notions.[17]

OTHER MATTERS RAISED:

The weight of the section 220 admissions, Exhibit "Y":

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[15]2004 (1) SACR 477 (W) at p 485 par 21
[16]Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC) at p 544, par [45]
[17]S v Zuma and Others 1995 (1) SACR 568 (CC) at 579, par 16

71. The applicant admits basically all the elements of all the counts in the charge sheet, even those on which she was later acquitted onappeal.

72. The applicant stated: "However I have not used the amounts for my own benefit but had given it to the executors of the different estates."

Volume 6: par 6

73. In regard to the charges of theft,the applicant stated:" I admit that I completed the cheques for necessary payees to benefit from these cheques. I personally did not benefit from the pay-outs of these cheques.

Volume 6, par 8

And: "My actions were wrongful and unlawful and I show remorse for it as I had not followed the proper procedure. I had not benefitted at all but I paid the money to the executors of the deceased's estate although they deny it."

Volume 6, par 9

74. The trial court however rejected this version and the applicant was convicted and sentenced as if she received all the amounts herself and for her own benefit as alleged in the charge sheet.

75. If admissions are admitted the court must take into consideration the incriminating parts as well as the exculpatory parts and it must be weighed with all the other evidence.[18]

76. In relation to Counts 259-269 only one witness testified (except the investigator of Absa) namely DS Nanzana. He testified in relation to count 159. He denied receiving the cheque but admitted that he signed the cheque withdrawal slip. He testified that he had signed blank withdrawal slips because applicant explained to him that every time he "tap" on the estate, the money must be deducted .

Volume6, p 467, line 3 to p 468, line 7

77. Mr Nanzana further admitted that he received monies in the form of cash from the applicant for the children, to bury his brother

[18]S v Musingadi and Others 2005 (1) SACR 395 (SCA) at 410 par [44]

whose estate it was, as well as for the brother's tombstone.He also received monies to bury his mother and his brother's child,

Volume 6, p 466,line 1-3

78. Mr Nanzana further testified that whenever he would need money from the estate, he would go to the applicant's office, sign the slip and both of themwould go to the teller. Applicant would then withdraw the money and hand it over to the witness.

Volume 6, p469, line 4-9

79. The Applicant was however convicted on 9 counts of fraud (counts 147-155) in relation to the Mnanzana estate and I count of theft (count 159) on the basis that applicant took all the amounts for herself.

80. The allegation pertaining to the counts of theft is that the applicant did steal the amount of R189 570.23 in cheque forms, as indicated in column 3, 4 and5, the property in the lawful possession of ABSA BANK. If the allegation means "by way of cheques" it is significant that the payee names reflect either other beneficiaries of estates or deceased estates self.

Volume 1, p 35

81. Russel testified in relation to count 260 that the cheque was paid into the account of TY Mosikari, who was a beneficiary of another estate.

Volume 5, p 403 , line 5-9

Volume 4, p 277, line 10-11

This corroborates the version of the applicant.

82. The applicant was also convicted and sentenced on the basis that she personally benefitted from all the amounts as alleged in the charge sheet. The witness, Russel testified that she had an interview with Duncan Hennie, the executor of the estate and he made a statement with regard to funds he did receive and funds he did not received. The respondent informed the trial court that Duncan Hennie will testify on which funds he did receive and which funds he did not received. This witness never testified. The respondent later informed the court that the witness had passed away.

Volume 4, p 276, line 18-25

83. Russel admitted that there is no evidence in relation to count 1-269 to the effect that the applicant had taken the money and used it as her own.

Volume 5, p 438, line 8-12

Although no teller of Absa testified, Russel conceded that sometimes a customer did accompany the applicant to the teller when collecting the money.

Volume 5, p 442, line 23 to p 443 line 1

84. The trial court found however that in the light of the admissions and evidence the only reasonable inference is that applicant took the monies for herself. It is submitted that the trial court erred in this regard.

85. The Court on appeal found that the section 220 admissions put the contested facts beyond issue and that the State had proved all the elements in relation to fraud.

Volume 1, p 5, par [11] and [12]

86. During inferential reasoning the following apply:

'1. The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

2. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'[19]

87. It is submitted that the trial court did not stay "within the four corners of the proved facts" and that the evidence showed that the beneficiaries did receive money. The respondent did not proof that the applicant received the amounts for her own benefit and it is not the only reasonable inference to be made.[20]

SENTENCE:

88. The High Court of South Africa(Northern Cape Division, Kimberley) made the following order:

(c) The sentence imposed is set aside and substituted with the following:

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[19]See S v Nkubungu 2013(2) SACR 388 (ECM) at 393, par 19
[20]S v Ndlovu 1987 1 PH H 37 (A) at 68

"The accused is sentenced to 4 years imprisonment."

Volume 1, p 14

89. The Court did not make an order in relation to what counts the applicant is sentenced or that counts is taken together for purposes of sentence. The applicant therefor does not know on what counts did she received a sentence of 4 years imprisonment.

90. The trial court during sentencing found that applicant used the money as her own.

Volume 6,p 530, line 14

91. The High Court was satisfied that the court *a quo* had properly weighed the seriousness of the offence.

Volume 1: p 13, par [44]

92. In S v Sheppard and Others[21] The Court found that motive is irrelevant to the question of quilt or innocence but of great importance in relation to the question of punishment.

[21]1967 (4) SA 170 (W) at 179

93. The High Court did not take into account that the applicant was incarcerated for 8-9 months before she was released on bail.

94. Applicant pleaded on this matter on 15 October 2015, the matter was finalised on 19 February 2019. Due to an incomplete record the appeal was only finalised on 10 September 2021.

95. It is submitted that this delay with the incarceration hanging over applicant's head must have caused severe anguish and severe prejudice to the applicant and her family.[22]

96. The delay since the alleged offences were committed is now a period of 12 years, during this time the applicant did not commit any offence and has shown that she is not a person who needs to be removed from society. It is submitted that these factors make out a compelling case for a non-custodial sentence.[23]

97. It is submitted that if the appeal on conviction is not successful, that The Court should intervene with regard to the

[22]S v Van Deventer and Another 2012 (2) SACR 263 (WCC) at par 77

[23]S v Grobler 2015 (2) SACR 210 (SCA) at p 213, par [9] and par [12]

sentence. It is further submitted that under the circumstances a non-custodial sentence is the only suitable sentence.

Signed at Kimberley on the 29th day of March 2023

Adv CF van Heerden

On behalf of applicant

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LIST OF AUTHORITIES

1. S v Jones 2004 (1) SACR 420 (C)

2. S v Hlathi 2000 (2) SACR 325 (N)

3. S v Dzukuda and Others:
   S v Tshilo 2000 (2) SACR 443 (CC)

4. S v Ramatar 2018 (2) SACR 414

5. S v Mgina 2007 (1) SACR 82 (T)

6. S v Manuel 1997 (2) SACR 505 (C)

7. S v Hena and Another 2006 (2) SACR 33 (SE)

8. S v Botha 1995(2) SACR 598 (W)

9. S v Tsotetsi and Others (1) 2003 SACR (W) at 636.

10. S v Orrie 2005 (1) SACR 63 (C)

11. S v Williams and Others 1991(1) SACR 1 (C)

12. S v Klaas 2011 (1) SACR 630 (ECG)

13. S v Le Grange 2009(1) SACR 125 (SCA)

14. S v Chabedi 2004 (1) SACR 477 (W)

15. Prophet v National Director of Public Prosecutions 2006 (2) SACR 525 (CC)

16. S v Zuma and Others 1995 (1) SACR 568 (CC)

17. S v Musingadi and Others 2005 (1) SACR 395 (SCA)

18. S v Nkubungu 2013(2) SACR 388 (ECM)

19. S v Ndlovu 1987 1 PH H 37 (A)

20. S v Sheppard and Others 1967 (4) SA 170 (W)

21. S v Van Deventer and Another 2012 (2) SACR 263 (WCC)

22. S v Grobler 2015 (2) SACR 210 (SCA)

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT, KIMBERLEY CASE NO. CA & R 41/20

In the matter between:

NATASHA LIEBENBERG **APPLICANT**

And

THE STATE **RESPONDENT**

APPLICANT`S WRITTEN SUBMISSIONS

APPEAL AGAINST THE JUDGEMENT BY THE PRESIDING HONOURABLE WILLIAMS AJP AND HONOURABLE STANTON AJ, ON 10 SEPTEMBER 2021.

ON BEHALF OF THE APPLICANT

MATHEWSON & MATHEWSON INC.

ADVOCATE F. VAN HEERDEN

MATHEWSON & MATHEWSON INC.

9 TAPSCOTT STREET

ON BEHALF OF THE RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS

ADVOCATE I. MPHELA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

KIMBERLEY

REF: AMATH/EEE087

EMAIL: admin@mathlaw.co.za

TEL: 053 1100 285

CELL: 082 855 8898

WILCON HOUSE

22 FABRICIA ROAD, KIMBERLEY

REF: S 17(2)(f)

EMAIL:IMphela@npa.gov.za

TEL: 053 807 4590

FILING NOTICE

I, the undersigned, Alexander Mathewson, file hereby file:

1. Practice Notice;
2. Applicant`s written submissions;
3. List of Authorities

ALEXANDER MATHEWSON

ATTORNEY FOR THE APPLICANT

MATHEWSON & MATHEWSON INC.

9 TAPSCOTT STREET

KIMBERLEY

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT, KIMBERLEY CASE NO. CA & R 41/20

In the matter between:

NATASHA LIEBENBERG APPLICANT

And

THE STATE RESPONDENT

FILING NOTICE

KINDLY TAKE NOTE THAT THE APPLICANT HEREBY FILES:

1. Practice Notice;
2. Applicant`s written submissions;
3. List of Authorities

SIGNED AT KIMBERLEY ON THIS 30TH DAY OF MARCH 2023.

AND TO: **THE DIRECTOR OF PUBLIC PROSECUTIONS**

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

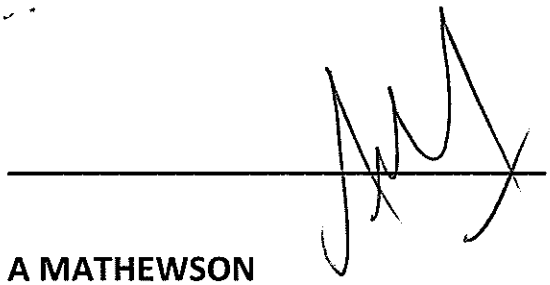
WILCON HOUSE

22 FABRICIA ROAD

KIMBERLEY

DIRECTOR OF PUBLIC PROSECUTIONS
KIMBERLEY 09:45
2023 -03- 30
DOCUMENT CENTRE
DIREKTEUR VAN OPENBARE VERVOLGINGS

REF: ADV I MPHELA **BY HAND**



A MATHEWSON

MATHEWSON & MATHEWSON INC.

9 TAPSCOTT STREET

KIMBERLEY

8301

TEL: 053 1100 285

EMAIL: admin@mathlaw.co.za

TO: CONSTITUTIONAL COURT OF SOUTH AFRICA

1 HOSPITAL STREET

BRAAMFONTEIN

2017 **BY EMAIL:** registrar@concourt.org.za

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT, KIMBERLEY CASE NO. CA & R 41/20

In the matter between:

NATASHA LIEBENBERG **APPLICANT**

And

THE STATE **RESPONDENT**

FILING NOTICE

KINDLY TAKE NOTE THAT THE APPLICANT HEREBY FILES VOLUME 1 TO 6.

SIGNED AT KIMBERLEY ON THIS 24TH DAY OF MARCH 2023.

A MATHEWSON

MATHEWSON & MATHEWSON INC.

9 TAPSCOTT STREET

KIMBERLEY

REF: AMATH/EEE195

DIRECTOR OF PUBLIC PROSECUTIONS
KIMBERLEY 9:29
2023 -03- 23
DOCUMENT CENTRE
DIREKTEUR VAN OPENBARE VERVOLGINGS

TO: THE DIRECTOR OF PUBLIC PROSECUTIONS

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

WILCON HOUSE

22 FABRICIA ROAD

KIMBERLEY

REF : ADV I. MPHELA

DIRECTOR OF PUBLIC PROSECUTIONS

Northern Cape Division
Tel: +27 53 807 4500 | Wilcon House, 22 Fabrica Road,
Kimberly, 8301 | P/Bag X5037, Kimberly, 8301, South Africa

REF/VERW: KAP 16/19 **03 APRIL 2023**

The Registrar
Constitutional Court
1 Hospital Street
BRAAMFONTEIN
2017

FILING NOTICE LEAVE TO APPEAL IN NATASHA LIEBENBERG v THE STATE: CONSTITUTIONAL CASE NUMBER: CCT 145/22

I, the undersigned, Isaac Mapale Mphela, hereby file:

1. Practice Notice;
2. Respondent's written submissions; and
3. List of Authorities

Adv I.M Mphela
On behalf of Respondent

DIRECTOR OF PUBLIC PROSECUTIONS
NORTHERN CAPE

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT, KIMBERLEY CASE NUMBER:CA & R 41/20

In the matter between:

NATASHA LIEBENBERG APPLICANT

And

THE STATE RESPONDENT

FILING NOTICE

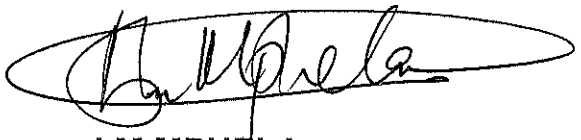
KINDLY TAKE NOTE THAT THE RESPONDENT HEREBY FILES:

1. Practice Notice;

2. Respondent's written submissions; and

3. List of Authorities

SIGNED AT KIMBERLEY ON THIS 3RD DAY OF APRIL 2023



I.M MPHELA

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

WILCON HOUSE

22 FABRICIA ROAD

KIMBERLEY

8301

TEL: 053 8074590

EMAIL: IMphela@npa.gov.za

TO: CONSTITUTIONAL COURT OF SOUTH AFRICA

1 HOSPITAL STREET

BRAAMFONTEIN

2017

BY EMAIL: registrar@concourt.org.za,

generaloffice@concourt.org.za

AND TO: MATHEWSON & MATHEWSON INC

9 TAPSCOTT STREET

KIMBERLEY

8301

TEL: 053 1100285

MATHEWSON & MATHEWSON INC. 2025 -04- 03 9 Tapscott Street, Kimberley

Bekoux 10:25

REF: MR A MATHEWSON BY HAND

ADV. F. VAN HEERDEN BY HAND

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT,KIMBERLEY CASE NUMBER: A & R41/20

In the matter between:

NATASHA LIEBENBERG APPLICANT

And

THE STATE RESPONDENT

RESPONDENT'S WRITTEN SUBMISSIONS

APPEAL AGAINST THE JUDGEMENT BY THE PRESIDING HONOURABLE WILLIAMS AJP AND HONOURABLE STANTON AJ, ON 10 SEPTEMBER 21

ON BEHALF OF THE RESPONDENT ON BEHALF OF APPLICANT

DIRECTOR OF PUBLIC PROSECUTIONS	MATHEWSON & MATHEWSON INC
ADV.I MPHELA	ADVOCATE.F VAN HEERDEN
WILCON HOUSE	MATHEWSON &MATHEWSON INC
22 FABRICIA ROAD	9 TAPSCOTT STREET
KIMBERLEY	KIMBERLEY
REF: S 17 (2) (f)	REF: AMATH/EEE087
EMAIL: IMphela@npa.gov.za	EMAIL: admin@matlaw.co.za
TEL: 053 8074590	TEL: 053 1100285
CELL:0845200514	CELL: 082 855 8898

---

1. Practice Notice;

2. Respondent's written submissions; and

3. List of Authorities

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT,KIMBERLEY CASE NUMBER: A & R41 20

In the matter between:

NATASHA LIEBENBERG APPLICANT

And

THE STATE RESPONDENT

RESPONDENT'S PRACTICE NOTICE

(A) NAMES OF LEGAL PRACTITIONERS:

ADV CF VAN HEERDEN FOR APPLICANT

ADV IM MPHELA ON BEHALF OF RESPONDENT

(B) NATURE OF THE PROCEEDINGS:

The Respondent agrees that this is an application for leave to appeal and if leave is granted, the merits of the appeal.

(C) THE ISSUES THAT WILL BE ARGUED:

The Respondent agrees that Applicant issues to be argued, are as indicated in paragraphs 1-6.

(D) THE PORTIONS OF THE RECORD THAT ARE NECESSARY FOR THE DETERMINATION OF THE MATTER:

Volume 1: p 39-56

Volume 2: p 97-99

Volume 2: p 105-157

Volume 5: p 350-352

Volume 6: p 462-503

Volume 6: p 527-543

(E) ESTIMATED DURATION OF ORAL ARGUMENT:

1 hour

(F) SUMMARY OF ARGUMENT:

1. The Respondent will argue that evidence that was led with regard to written warnings that were issued as against Applicant by ABSA, was admitted into evidence to proof that Applicant acted with intention in the commission of the offences she was charged with.

   That Respondent introduced the evidence, as it was relevant to the facts in issue before the court *a quo*, further that the evidence was not led to proof bad character of the Applicant.

   That the rights of the Applicant were not infringed and that the trial court correctly convicted the Applicant.

2. The Respondent will further argue that Exhibit C was properly admitted by the trial court, after a trial -within a-trial was conducted.

That Applicant was appraised of her rights when one refers to the contents of Exhibit C.

The Respondent will argue that even if the evidence in Exhibit C, may be found to have been unconstitutionally obtained, that the admission of the evidence did not render the entire trial unfair or detrimental to the administration of Justice.

Respondent will further argue that the trial court ultimately convicted the Applicant on the strength of section 220 admissions that were tendered by Applicant.

3. The Respondent will argue that the trial court correctly found that Applicant must have appropriated the money for her own use, in terms of inferences drawn out of the proven facts.

4. The Respondent will argue that the appeal court inclusive of the Supreme Court of Appeal are well vested with the inherent powers to adjudicate on any matter wherein the constitutional rights of any accused to fair trial are raised, further that Applicant's matter does not raise special circumstances that warrants to be adjudicated by constitutional court.

The Respondent agrees that fair trial rights of any person, any accused person, inclusive of the Applicant must be protected, however the South African courts hierarchy, are well in place to deal with any infringements of the rights to fair trial.

That it will not be in the interest of justice to grant leave to appeal, to the Applicant, further that the sentence imposed by the appeal court is appropriate.

(G) AUTHORITIES TO WHICH RESPONDENT REFERS

S v Naido 2009 (2) SACR 674 (GSJ)

Key v Attorney-General 1996 (4) SA 187 (CC)

S v Smith 2012 (1) SACR 567 (SCA)

S v Kruger 2014 (1) SACR 647 (SCA)

S v Romer 2011 (2) SACR 153 (SCA)

STATUTES:

Criminal Procedure Act, 51 of 1977

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT,KIMBERLEY CASE NUMBER: A & R41 20

In the matter between:

NATASHA LIEBENBERG **APPLICANT**

And

THE STATE **RESPONDENT**

RESPONDENT'S WRITTEN SUBMISSIONS

TABLE OF CONTENTS: **PAGES**

INTRODUCTION:

1. The Applicant was convicted on the 20th February 2019, in the Regional Court Kimberley of counts 1-86 of Fraud, counts 87-172 of Forgery, counts 173-258 of Uttering and counts 259-269 of Theft.

1.1 The Applicant was sentenced on the 20th February 2019 to 6 years imprisonment, all counts were taken together for purposes of sentence.

1.2 The Applicant's leave to appeal was dismissed on the 16th May 2019, whereafter Applicant petitioned on the 28th May 2019 and leave to appeal was granted on the 12th November 2019.

1.3 On the 31st day of May 2021 the appeal was heard before the honorable Williams AJP and the honourable Stanton AJ.

1.4 On the 10th September 2021 the Appeal court ordered as follows:

1.4.1 The appeal against the conviction and sentence succeeds in part.

1.4.2.The appellant is found not guilty on counts 87-172 (forgery) and counts 173 to 258 (uttering).

1.4.3.The sentences imposed is set aside and substituted with the following:

1.4.4.The accused is sentenced to 4 years imprisonment.

1.5 The Applicant lodged her special leave to appeal as against conviction and sentence to the Supreme Court of Appeal in terms of the provisions of section 16 (1) (b) of the Superior Court's Act , Act 10 of 2013 on the 04th October 2021, such an application was opposed by the Respondent and on

the 28th January 2022 the application was dismissed as per the order of the honourable Justices Molemela and Gorven JJA.

1.6 On the 1st March 2022, Applicant lodged an application to the honourable President of the Supreme Court of Appeal in terms of the provisions of section 17 (2) (f) of the Superior Court's Act, Act 10 of 2013, such an application was dismissed with costs on the 29th April 2022.

1.6.1The current application was lodged on the 20th May 2022 in terms of Constitutional Court rule 19 (4) (a).

1.7. The Honourable Chief Justice issued directions on the 1st March 2023:

1.7.1 The application is set down for hearing on Thursday, 18 May 2023

1.7.2 Instructing the Applicant to file the record in accordance with rule 20, containing only the portions that are strictly necessary for the determination of issues.

1.7.3 Instructing the parties to lodge written arguments, including the merits of the appeal.

SUMMARY OF APPLICANT'S GROUNDS

2. Admission of disciplinary hearings to show bad character of Applicant.

3. Statement that contains admissions, made by Applicant during disciplinary process was admitted into evidence by the trial court, resulting in the Applicant's right to fair trial being infringed.

4. Section 220 admissions that was made during the trial proceedings by the Applicant, Exhibit Y, led to Applicant receiving an unfair trial.

5. The sentence that was imposed by the Appeal court is inappropriate.

EVIDENCE TO SHOW APPLICANT BAD CHARACTER

6. The Applicant submit that evidence was admitted about previous disciplinary hearings were the Respondent presented evidence about final written warnings that were issued to Applicant by the then employer of the Applicant, ABSA bank.

That such evidence was aimed at showing bad character and criminal tendencies of the Applicant.

Further that such character evidence constituted an infringement of Applicant right to fair trial.

6.1 Character evidence in our law is clearly dealt with under the provision of section 197 (a), (b), (c) and (d) of the Criminal Procedure Act 51 of 1977 which provides as follows:

"An accused who gives evidence at criminal proceedings shall not be asked or required to answer any question tending to show that he has committed or has been convicted of or has been charged with any offence other than offence with which he is charged, or that he is of bad character, unless-.

(a) he or his legal representative asks any question of any witness with a view to establishing his own good character or he himself gives evidence of his own good character, or the nature or conduct of the defence is such as to involve imputation of the character of the complainant or any other witness for the prosecution.

(b) he gives evidence against any other person charged with the same offence or an offence in respect of the same facts.

(c) the proceedings against him are such as are described in section 240 or 241 and the notice under those sections has been given to him or

(d) the proof that he has committed or has been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is charged."

The Respondent submit that the evidence that was led with regard to the final written warnings Applicant received, issued previously by ABSA bank, the employer of the Applicant as at that time, was to proof that the Applicant acted with intention to commit the offences she was charged with.

6.2The Respondent further submit that it was not the sole intention of the prosecution to show bad character of the Applicant.

See: record vol 6 Exhibit A pages 533,543 and 535

6.3During the trial the Applicant submitted a written statement in terms of section 220 of the Criminal Procedure Act 51 of 1977.The statement was admitted as Exhibit Y

6.4The Applicant in Exhibit Y indicates that she did not follow proper procedure when she completed the cheques for

necessary payees to benefit from the cheques, however Exhibit A proof that she was warned previously not to be involved in any payments regarding deceased estate, it is the Respondent submission that it was necessary to lead evidence regarding written warnings to proof that despite been warned more than once, Applicant committed the offences she was charged with.

See: record vol 6 Exhibit Y p 542 paragraph 9

6.5 The evidence regarding written warning statements, Exhibit A, that Applicant received from her previous employer ABSA, Respondent submit that it was also relevant to the facts in issue before the court *a quo.*

In S v Naido 2009 (2) SACR 674 (GSJ) at 683 J and 684 A-B[1],the court said the following:

"*Counsel further argued that evidence relating to trap, and the taped conversation, will be akin to the State proving a previous conviction which is tendered to prove mens rea, and is*

[1] Sv Naidoo 2009 (2) SACR 674 (GSJ) at 683 J and 684 A -B

permissible in terms of s 197(d) of the Criminal Procedure Act, as well as s22 of the POCA. In the circumstances, so it was submitted, if a previous conviction is admissible to prove mens rea of one accused, so should the proving of the commission of an individual offence be. It ought to be admitted in the interest of justice because of the relevancy, and because it provides proof of the elements of mens rea against accused 1 and the other accused, as regards the other transactions charged in the indictment."

6.6 Respondent submit that the rights of Applicant as enshrined in section 35 of the Constitution was not infringed and it was in the interest of justice to lead such evidence.

ADMISSION OF EXHIBIT C

7. The Applicant submits that statement that contains admissions made by her during disciplinary hearings, Exhibit C, were admitted into evidence by the trial court.

That such statement was made by her when she was informed by Russel, who was the investigator of the employer ABSA

bank, that she had no option but to explain what happened and to give her side of the matter.

7.1 That Applicant's rights to fair trial as contained in section 35 (5) of the Constitution were infringed.

7.2 Further that during the interview by the employer, ABSA bank, Applicant was not afforded legal representative.

7.3 The Respondent submit that Applicant's constitutional rights were not infringed due to the admission of Exhibit C.

7.4. Admissions in our law are dealt with under the provisions of Section 219A of the ***Criminal Procedure Act 51 of 1977*** which provides as follows:

"Evidence of any admission made extra-judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible in evidence against him at criminal proceedings relating to that offence."

7.5 It must be noted that Exhibit C was admitted by the trial court after a trial- within a-trial was held, further that the trial court did not find that the evidence was involuntary made by the Applicant.

In Exhibit C, Applicant made a statement and signed it, which contains the following:

"I declare that I made this statement freely and voluntarily, that I am in my sound and sober senses and that I was not unduly influenced thereto.I have been warned that anything I say may be reduced to writing and that it may be used as evidence against me".

7.6 The Respondent submit that in the light of the above Applicant statement it cannot be said that she made admissions contained in Exhibit C forcefully.

See: record vol 6/6 Exhibit C p 536 lines 22-25 and p 539 lines 5-7

7.7. Applicant submit that the wording used by the investigator of the employer, indicates that Applicant had no choice in the matter, that she had no free will under the circumstances and again no right to silence was explained to her.

7.8 Respondent submit that Applicant was informed of her right not to incriminate herself during the interview.

"Jy het die reg om nie vir jou te inkrimineer nie"

See: record vol 2/6 p 107 lines 9-11

7.9 In ***Key v Attorney-General***[2] , *the court, with reference to* ***Ferreira v Levin NO; Vryenhoek v Powell NO 1996 (1) SA 984 (CC),*** *confirmed that "fairness is an issue which has to be decided upon the facts of each case, and the trial Judge is the person best placed to take that decision. Fairness may at times require that evidence unconstitutionally obtained be excluded. But at times fairness may require that evidence, albeit obtained unconstitutionally, nevertheless be admitted".*

[2] 1996 (4) SA 187 (CC) at 196 A/B

7.10. Even if the evidence in Exhibit C, may be found to have been unconstitutionally obtained, the court must still be satisfied in the mosaic of the entire trial, whether the admission of the evidence will render the trial unfair or be detrimental to the administration of justice.

7.11 It is important to note that Applicant was not convicted on the strength of Exhibit C only, she was ultimately convicted on the strength of Section 220 admissions she made in court.

SECTION 220 ADMISSIONS

8. The Applicant submit that the trial proceedings were fundamentally unfair and irregular, resulting in a gross miscarriage of justice, Applicant further submit that the trial court was partial in adjudicating the matter.

8.1 The Respondent submit that the comments made by the trial court, were made after section 220 admissions were made. Section 220 admissions, Exhibit Y were admitted as evidence

on the 30th November 2018 and the address before judgment were made on the 14 February 2019.

See: record vol 6/6 p 460 lines 10-13

8.2 The Respondent further submit that contents of Exhibit Y, are indicative of a change of plea from not guilty, to a guilty plea, all elements of the offences the Applicant was charged with were admitted, the then legal representative of the Applicant said the following:

"As the court pleases, your Worship. Your Worship, after receiving instructions from the accused, my hands are tied, Your Worship. Those 220 instructions gives the court an indication that the accused wants to plead guilty in the matter"

See: record vol 6/6 p 490 lines 20-23

8.3 The Respondent submit that the comments made by the trial court did not result in an unfair trial towards the Applicant.

9. The Applicant submit that the Respondent did not proof that the Applicant received the amounts for her own benefit and it is not the only reasonable inference to be made.

9.1 The Respondent submits that Applicant's submission that there is no evidence that she took the money for herself is based on the reasoning that there was no direct evidence that she took the money, however circumstantial evidence is there, the Respondent referred the trial court to ***R v Blom*** and requested the trial court to draw inferences out of the following proven facts *inter alia:*

9.2 The Applicant cannot explain as to who would have received the amounts of money in count 61, computer printout depicts that the identity number completed in the cash withdrawal slip in count 61 was invalid.

See: record vol 5/6 p 352 lines 10-15, 16-21

9.3 At count 59, Mr Mnanzana testified that he did not receive the amount of R2153,63 and that the Applicant made him to

sign blank cash withdrawal slips, the question is what happened to the money, who benefitted out of this cheque.

See: record vol 6/6 p 466 lines 13-15, p 467 lines 3-6

9.4 At paragraph 5 of section 220 admissions, Exhibit Y , the Applicant admitted that the withdrawal slips were completed by her in a manner that reflected as if they were completed by the beneficiaries as mentioned in column 4 of schedule B and that she forged the signatures of the beneficiaries, the question is, if her whole intention was just to help beneficiaries why did the Applicant forge the beneficiaries signatures?

See: record vol 6/6 p 541 paragraph 5

SHOULD LEAVE TO APPEAL BE GRANTED:

10. The Respondent submit that in deciding to grant leave to appeal, the honorable Court may be guided by whether there are reasonable prospects of success.

10.1 In ***S v Smith*** [3] *the court said that "what the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court in order to succeed, therefore, the appellant must convince court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be sound, rational basis for the conclusion that there are prospects of success on appeal."*

10.2 And In ***S v Kruger***[4]***,*** Leach JA said the following at 648, that "*what has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And that regard more is required than the mere possibility that another court might arrive at a different conclusion."*

---

[3] 2012 (1) SACR 567 (SCA) at 570 B-C
[4] 2014 (1) SACR 647 (SCA) at 648 para 2

10.3The Respondent submit that the issue of fair trial, although it is a constitutional issue the Appeal court and the Supreme Court of Appeal, are well vested with inherent powers to adjudicate on matters of fair trial infringement, and based on that we request the honorable court to dismiss this application.

AD SENTENCE

11. Applicant submit that the High Court did not take into account that the Applicant was incarcerated for 8-9 months before she was released on bail, further that non-custodial sentence is a suitable sentence.

11.1 The Respondent submit that the sentence imposed by the Appeal court is suitable in the sense that there are aggravating circumstances in this matter, Applicant stole from the employer ABSA bank wherein she was in a position of trust.

11.2 Respondent submit further that , there is no indication that the Appeal court misdirected itself regarding the sentence that was imposed.

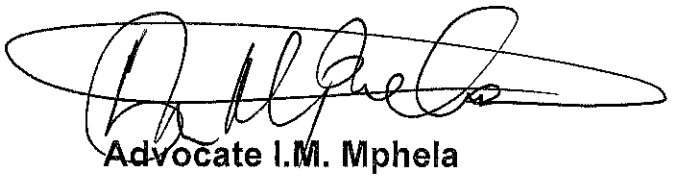
11.3 In ***S v Romer***[5], it was said that *" in order for the sentence to be interfered with the appellant must show that sentence is disturbingly inappropriate, so totally out of proportion to the magnitude of offence, sufficiently disparate; vitiated by misdirections showing that the trial court exercised its discretion unreasonably, and is otherwise such that no reasonable court would have imposed it"*

CONCLUSION

12. Respondent submit accordingly that it will not be in the interest of justice to grant leave to appeal and to set aside the sentence.

[5] 2011 (2) SACR 153 (SCA) at 159 C

Signed at Kimberley on the 03rd day of April 2023



Advocate I.M. Mphela

On behalf of Respondent

Director of Public Prosecution

Wilcon House

22 Fabricia Road

KIMBERLEY

Tel: 053 807 4590/0845200514

Email: IMphela@npa.gov.za

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CONSTITUTIONAL COURT CASE NUMBER: CCT 145/22

NORTHERN CAPE HIGH COURT,KIMBERLEY CASE NUMBER: A & R41/20

In the matter between:

NATASHA LIEBENBERG APPLICANT

And

THE STATE RESPONDENT

LIST OF AUTHORITES

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2. Key v Attorney-General 1996 (4) SA 187 (CC)

3. S v Smith 2012 (1) SACR 567 (SCA)

4. S v Kruger 2014 (1) SACR 647 (SCA)

5. S v Romer 2011 (2) SACR 153 (SCA)

STATUTES:

6. Criminal Procedure Act, 51 of 1977