FORM A

FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION JUDGMENT

PARTIES**:**

17. Case Number: **CA & R 195/2006**
18. High Court: **Grahamstown**
19. DATE HEARD: **12 August 2009**

DATE DELIVERED: **2 September 2009**

JUDGE(S): **Nepgen and Chetty JJ**

LEGAL REPRESENTATIVES –

Appearances:

1. for the Applicant(s): **Adv Price**
2. for the Respondent(s): **Adv Van Zyl**

Instructing attorneys:

- Applicant(s):
- Respondent(s):

CASE INFORMATION -

(a) Nature of proceedings: **Appeal**

(b) ***Topic:***

Key Words: Appeal – Against sentence – Appellant defrauded employer of amount in excess of R1.5 million – Magistrate having found that her gambling addiction and other personal factors constituting substantial and compelling circumstances – Sentence of 8 years imprisonment imposed – Appeal dismissed – Sentence Not shockingly severe – Application to lead further evidence – Procedural requirements discussed – Requirements to lead further evidence not complied with - Application dismissed.

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

Case No: CA & R 195/2006

In the matter between:

MARILYN VIVIAN JANSSEN **Appellant**

and

THE STATE **Respondent**

Coram: **Nepgen and Chetty JJ**

Date Heard: **12 August 2009**

Date Delivered: **2 September 2009**

Summary: Appeal – Against sentence – Appellant defrauded employer of amount in excess of R1.5 million – Magistrate having found that her gambling addiction and other personal factors constituting substantial and compelling circumstances – Sentence of 8 years imprisonment imposed – Appeal dismissed – Sentence Not shockingly severe – Application to lead further evidence – Procedural requirements discussed – Requirements to lead further evidence not complied with - Application dismissed.

JUDGMENT

CHETTY, J

[1] This is an appeal against sentence. Simultaneously with the prosecution of her appeal the appellant seeks an order on notice of motion that certain averments, encapsulated in affidavits deposed to by four persons, and annexed to the founding affidavit of her attorney as annexures “DG1” to “DFG4” thereto, be received by this court as further evidence and to be considered by us as part of the evidential material in determining the appellant’s appeal. The application is opposed by the state.

[2] The course proposed by appellant’s counsel is that we, sitting as a Court of Appeal, adjudicate upon the application and, in the event of a decision favourable to the appellant being reached, to then consider the contents of the affidavits, annexures “DG1 - DG4”, as part of the evidential material advanced in mitigation of sentence. The submission advanced is a novel one. We were referred to no authority for the proposition advanced nor have I been able to find any. Counsel’s belated reliance in reply on **S v Marx**[1] is entirely misplaced. In that matter counsel for the appellant, in an appeal against the dismissal by this division of an appeal against a sentence imposed in the regional court, placed before the Court of Appeal a letter setting out facts and circumstances which had arisen after the imposition of sentence by the trial Court. The request was made at the hearing of the appeal for the contents of the letter to be considered in deciding the appeal. No substantive application for the hearing of further evidence was made nor did the state consent to the Court of Appeal considering the allegations contained in the

[1] 1992 (2) SACR 567 (A)

letter. In the absence of such substantive application the Court of Appeal declined to consider such allegations holding[2] -

> "Derhalwe, waar geen substantiewe aansoek geloods is dat hierdie Hof verdure getuienis moet aanhoor nie, is dit onnodig om te besluit of so 'n aansoek sou geslaag het ondanks die beslissings van hierdie Hof dat op appèl die Hof uitsluitend die omstandighede in ag neem wat bestaan het ten tyde van die uitspraak of die vonnis, na gelang van waarteen geappelleer word."

[3] The criteria with reference to which a Court of Appeal will decide whether or not to order the hearing of further evidence is trite. In **S v De Jager**[3] Holmes, JA, summed up the basic approach at p 613C-D as follows –

> "*(a)* There should be some reasonably sufficient explanation based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
> *(b)* There should be a *prima facie* likelihood of the truth of the evidence.
> *(c)* The evidence should be materially relevant to the outcome of the trial."

The case law emphasises the point that non-fulfilment of any one of these requirements would ordinarily be fatal to the application. For purposes of the present appeal it is necessary to say no more than that none of the requirements have been met. There is no reasonably sufficient explanation for the failure to lead such evidence during the sentencing stage nor would such evidence in my view be materially relevant to the outcome of the appeal. The

[2] Per Van den Heever, AJA, at 573i
[3] 1965 (2) SA 612 (A)

evidence that the appellant attended a gambling rehabilitative program and assisted others with similar addictions is adverted to in the report of the clinical psychologist, Mr *Meyer*. The evidence sought to be adduced is merely corroborative and its adduction would serve no useful purpose. I turn thus to consider the appeal against sentence.

[4] This appeal, with the leave of the court below, is directed at a sentence of 8 years imprisonment imposed upon the appellant following her conviction on 144 counts of fraud in a globular amount of R1 587 805, 85. The offences were committed over the period 19 December 2002 to 25 October 2003 whilst the appellant was in the employ of a company, styled Tread 2 Tread, in Port Elizabeth as its bookkeeper. The company formed part of a national group under the aegis of its parent company, Turbo Tyres, based in Johannesburg.

[5] In August 2002, and in an attempt to boost dwindling sales in the Port Elizabeth outlet, Mr *F.A Niewenhuysen* was transferred to Port Elizabeth by the parent company and charged with developing a turn around strategy to achieve the desired objective. Through a personnel agency, Top Personnel, it invited applications from aspirant employees with the requisite skills in its bookkeeping and computer systems. The appellant was the only applicant who fulfilled the criteria sought. The evidence adduced at the trial establishes that she was an expert in the operation of the company's CAT system in terms of which payments of the latter's debts and pension contributions were effected by means of electronic transfer payments via the internet, the debts and payments were captured by the appellant, collated and presented to Mr

Niewenhuysen who authorised payment to the recipients reflected on the statements presented to him. Mr *Niewenhuysen* testified that the computer generated documentation did not however reflect the account numbers of the intended recipients and having authorised payment he assumed that the appellant would electronically pay the money so authorised. Unbeknown to him however, she misappropriated the money. The appellant's *modus operandi* was fairly straightforward. After having inveigled Mr *Niewenhuysen* to authorise the payments she substituted the account numbers of the intended recipients with that of her own and transferred the money into her own account.

[6] As adverted to hereinbefore, Mr *Niewenhuysen* was dispatched to Port Elizabeth to attempt to improve the company's dwindling sales. He succeeded to the extent that its sales increased substantially. Inexplicably however, from an accounting point of view, its financial woes worsened progressively. Mr *Niewenhuysen* was unable to establish the reason therefore and he even sought the appellant's assistance to explain the company's anomalous financial situation. I interpolate to say that it is not surprising that the appellant could not provide any assistance to Mr *Niewenhuysen*. As part of a restructuring process to minimise its losses, the company moved to smaller premises, streamlined its business by retrenching seventeen employees and adopted other costs cutting measures. These efforts however proved futile – its parlous financial predicament continued.

[7] This state of affairs endured throughout the appellant's tenure of employment with the company. She resigned in November 2003 for reasons

not readily apparent from the record. During 2004, after the appellant's departure, Mr *Niewenhuysen* uncovered the source of the company's financial troubles. It occurred in the following manner. The company had leased premises in Mthatha for one its employees and payment of the rental therefor had been authorised by Mr *Niewenhuysen* on the strength of the relevant documentation being furnished to him by the appellant. When it was established that the rental had not in fact been paid, an investigation ensued which uncovered that the recipient of the rental was the appellant. The matter was reported to the South African Police Services and further investigation revealed the full extent of the appellant's fraudulent conduct. As a direct consequence of the fraud perpetrated on the company, it was eventually forced to cease its Port Elizabeth operations in August 2004 and relocated to Queenstown. The losses suffered in Port Elizabeth however proved devastating, the company could not be sustained and finally closed its doors after a few months when a further eight people joined the ranks of the unemployed.

[8] It is not in issue that the company's loss was not limited to the R1 587 805, 85 fraudulently pilfered from its coffers. Its creditors, to whom Mr *Niewenhuysen* had authorised payments, still had to be paid, the extent to which was never explored during the trial, but it would, given the amount misappropriated, have been quite substantial.

[9] At the time the appellant perpetrated the fraud upon the company, she was 50 years old. According to the report compiled by the correctional official

she was twice divorced and the mother of three adult children. She was, since her resignation from the company, permanently employed in another company, Compucut, one of its directors being one of her sons, one *Shaun Slabbert*. She earned R3750, 00 per month and supplemented her income by doing part-time typing for an entity styled Eyethu Promotions. It appears further from the report that she enjoys a good relationship with her sons who are supportive of her. The report furthermore adverts to the fact that the appellant consulted a psychologist who diagnosed her as a pathological gambler.

[10] The appellant's addiction to gambling, foreshadowed in a report compiled by a clinical psychologist, Mr *Ian Meyer*, formed the cornerstone of the appellant's clamour, both in the court below and now on appeal, to be spared a custodial sentence. Mr *Meyer* was called to testify in mitigation of sentence and his report received in evidence. The trial court accepted that the appellant suffered from a pathological addiction to gambling and that it *per se* amounted to a substantial and compelling circumstance as envisaged in the minimum sentencing legislation, the **Criminal Law Amendment Act**[4], warranting the imposition of a sentence other than the ordained sentence of 15 years imprisonment. In so finding the trial magistrate analysed the judgment of Patel J, in **S v Wasserman**[5] and the authorities cited therein. Having found in favour of the appellant on that issue, the trial magistrate proceeded to examine various sentencing options including those provided for in s 276 (1) (h) and s 276 (1) (i) of the **Criminal Procedure Act**[6]. At the end of

[4] Act No 105 of 1997
[5] 2004 (1) SACR 251 (TPD)
[6] Act No 51 of 1977

that exercise the trial magistrate concluded that a custodial sentence of 8 years imprisonment was the only appropriate punishment.

[11] The basis upon which leave to appeal was sought was not that the trial magistrate in any way misdirected himself. The application for leave to appeal was premised on the basis that the sentence was shockingly inappropriate. On appeal before us counsel for the appellant sought to persuade us to uphold the appeal on a similar basis, the thrust of the submissions advanced being that the trial court erred in not attaching sufficient weight to the appellant's addiction to gambling.

[12] The trial court delivered a careful and well reasoned judgment on sentence. It commenced by correctly categorising the offence as one which attracted a mandatory sentence of 15 years imprisonment absent a finding of substantial and compelling circumstances. It then proceeded to examine what has colloquially been described as the triad, viz., the crime, the offender and the interests of society. It properly characterised the crime as serious and considered the unfortunate consequences the fraud exacted on the company and its employees. It dealt with the appellant's employment record, her knowledge of the company's computer systems through which she undoubtedly inveigled her employers to regard her as trustworthy. The judgment detailed the prolonged manner in which the appellant systematically defrauded her employer and commented on the fact that in a significant proportion of matters of similar ilk in its area of jurisdiction the perpetrators were females.

[13] The court then analysed the correctional supervision and the psychologist's reports and accepted that at the time the appellant committed the offences she suffered from a pathological gambling addiction. As adumbrated hereinbefore the principal submission advanced on behalf of the appellant is that the trial court erred in not attaching sufficient weight to such diagnosis. In arguing against the imposition of a custodial sentence, in favour of one of correctional supervision, counsel for the appellant, as stated earlier, relied principally upon the judgment of Patel J, in **Wasserman** (*supra*). In that matter after a thorough analysis of various judgments both foreign and local, the learned judge concluded that a pathological gambling disorder amounts to a substantial and compelling circumstance justifying the imposition of a lesser sentence than that prescribed by the minimum sentence regime. In the exercise of his discretion regarding the punishment to be imposed on the appellant the learned judge found that the latter's addiction persisted and that psychological intervention was imperatively called for to cure her addiction. The judge further found that such treatment could not be provided for in the correctional facility regard being had to the fact that the appellant had been incarcerated for more than two years and had received no counselling during that period. It is apparent from the judgment that a non-custodial sentence was imposed to enable the appellant to continue a normal working life whilst seeking therapy and undergoing treatment. The facts in *casu* save for the commonality of the gambling addiction, are wholly dissimilar to the facts in **Wasserman** (*supra*).

[14] The judgment in **Wasserman** (supra) came under the scrutiny of the Supreme Court of Appeal in **S v Nel**[7], an appeal against the refusal of the appellant's petition. The appellant had pleaded guilty in the regional court to robbery with aggravating circumstances. In mitigation of sentence a number of factors, including his addiction to gambling were proffered as circumstances militating against the imposition of the prescribed sentence of 15 years imprisonment. The regional magistrate dismissed the argument advanced on behalf of the appellant and imposed the ordained sentence. On appeal, the judgment in **Wasserman** was relied upon in support of the submission that an addiction to gambling warranted a departure from the prescribed minimum sentence. The Court of Appeal found that the appellant's financial pressures, his gambling addiction, his admitted remorse, the amateurish execution of the offence, the fact that the firearm had purposely been unloaded and the fact that he was a first offender, cumulatively with his personal circumstances, amounted to substantial and compelling circumstances, allowed the appeal and altered the sentence to one of 10 years imprisonment.

[15] Dealing pertinently with the judgment in **Wasserman**, Mlambo JA, made the following trenchant remarks apropos the submissions made concerning the appellant's addiction to gambling–

> "[15] In my view the reasoning in *Wasserman* was unnecessarily overbroad, and it is not surprising that the Court was unable to find support for its views in the South African jurisprudence. In my view the Court's approach was so broadly expressed as to amount to an undue relegation of the retributive and deterrent elements in sentencing in favour of the rehabilitative and

[7] 2007 (2) SACR 481 (SCA)

reformative elements. Indeed it could open the door to undue reliance by gambling addicts on their addiction to escape an appropriate sentence in the form of direct imprisonment.

[16] A gambling addiction, like alcohol or drug addiction, can never operate as an excuse for the commission of an offence. In *S v Sithole* 2003 (1) SACR 326 (SCA) this Court found that alcohol addiction cannot be an excuse for driving under the influence of alcohol. Conradie JA stated at 329 *g* - *h* :

'[7] Courts in this country have long acknowledged that alcohol addiction is a disease and that it would be to the benefit of society and of the offender if the condition can be cured. But it is necessary to make the obvious point that drunken driving is not a disease. One is distressingly familiar with maudlin pleas in mitigation that the drunken driver in the dock is an alcoholic, as if the disease excused the crime. It does not.'

What is more, a reading of *R v Petrovic* (*supra*) reveals that it does not support the approach in *Wasserman* . That case, like *Wasserman* and this case, had to do with a pathological gambler who had committed crimes actuated by the addiction (the offences in *Petrovic* ranged from theft to fraud). Delivering the main judgment, Charles JA stated:
'20. The fact that an offender was motivated to the commission of the crimes in question by an addiction to gambling will, no doubt, usually be a relevant, and may be an important consideration for a judge sentencing the offender for these crimes. But as Tagdell JA said in *R v Cavallin* (. . .) ''It is . . . important that the public does not assume that a crime which is to some extent generated by a gambling addiction, even if it is pathological, will, on that count, necessarily be immune from punishment by imprisonment.''
21. It is considerations such as these which have led this Court to say more than once that it will be a rare case indeed where an offender can properly call for mitigation of penalty on the ground that the crime was committed to feed a gambling addiction;. . .'.

The *ratio* is thus clear. Whilst a gambling addiction may be found to cause the commission of an offence, even if it is pathological (as in this case), it cannot on its own immunise an offender from direct imprisonment. Nor indeed can it on its own ' *be a mitigating factor, let alone a substantial and compelling circumstance justifying a departure from the prescribed sentence* ', in the words of Stephan Terblanche in *South African Journal of Criminal Justice* (2004) 17 at 443 who, correctly in my view, criticises the approach in *Wasserman*."

[16] In argument before us, counsel for the appellant submitted that the appellant did not seek to rely on the gambling addiction to excuse her fraudulent conduct but that it provided an explanation therefore. The argument is a convoluted one and overlooks the fact that this is precisely what the Supreme Court of Appeal did in **Nel** and the magistrate in *casu*. Properly

construed the judgment in **Nel** shows that the attempt to distinguish it cannot be sustained.

[17] The appellant's clamour throughout has been to be spared incarceration. A recurrent theme throughout the trial and before us was that the appellant was not a criminal in the true sense of the word and that given the overcrowding and absence of rehabilitative programs in prison it was not the type of institution the appellant ought to be confined to. Whilst overcrowding in male correctional centres appears to be the norm, no evidence was adduced in the court below to establish that similar conditions prevail in facilities reserved for female offenders. As regards the contention that prisons are reserved for persons convicted of violent crimes it is apposite merely to refer to the judgment of Marais JA, in **S v Sadler**[8] where the learned judge stated[9] -

> "[11] . . .So called 'white-collar' crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.
>
> [12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous

[8] 2000 (1) SACR 331
[9] At para [11] to [12] and [13]

> punishment will be fostered and more will be tempted to indulge in it.
>
> [13] It is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration. . .

[18] In my judgment it cannot be said that in determining that a custodial sentence was the appropriate punishment the trial court did not exercise its sentencing discretion judicially or properly.

[19] In the result the following order will issue:-

1. **The application to lead further evidence is dismissed.**
2. **The appeal is dismissed.**

_____
D. CHETTY
JUDGE OF THE HIGH COURT

Nepgen, J

I agree.

_____
J.J NEPGEN
JUDGE OF THE HIGH COURT

Obo the Appellant: Adv Price

Obo the Respondent: Adv Van Zyl