

**IN THE HIGH COURT OF SOUTH AFRICA  
BISHO**

**CASE NO. CA&R**

**32/2007**

In the matter between:

**LULAMILE BENJAMIN KWAZA  
APPELLANT**

**and**

**THE STATE  
RESPONDENT**

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**JUDGMENT**

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**DHLODHLO ADJP:**

1. The appellant was charged with twenty five (25) counts of money laundering in contravening of section 4 of the Prevention of Organised Crime Act 121 of 1998 and 25 counts of fraud in the alternative, subject to

the provisions section 51(2)(a) the Criminal Law Amendment Act 105 of 1997, hereinafter referred to as the Act. In terms of this subsection a person who has been convicted of an offence referred to in Part II of Schedule 2 to the Act shall be sentenced to imprisonment for a period not less than fifteen (15) years if he / she is a first offender. Fraud is one of the offences referred to in Part II of this Schedule. Subsection 3(a) of the Act provides that if a Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed one, it shall enter those circumstances on the record of the proceedings and may thereupon impose a lesser sentence.

2. The appellant was convicted on 25 counts of fraud. The 25 counts were treated as one for the purpose of sentence and he was sentenced to undergo imprisonment for nineteen (19) years after the Regional Magistrate found that there were no

substantial and compelling circumstances. He now appeals against this sentence after the Magistrate granted him leave to appeal against the sentence. The appeal is opposed.

3. According to the indictment the appellant's acts of fraud caused actual prejudice to the Department of Social Development in the Province of the Eastern Cape amounting to of R563 395,77 which was paid to 25 persons. The Court *a quo* found that the Department suffered actual prejudice in the sum of R235 618,12.
4. In his judgment the Regional Magistrate clearly set out the procedure which is followed when applications for social grants are made, considered and decided upon. We do not deem it necessary to burden this judgment with details of the procedure. It is, however, necessary to mention that in this case the capturing and approval of some of the irregular 25 applications for social grants were done by the appellant. In some cases his wife

who was charged with him and was convicted and sentenced for money laundering, would *'go about canvassing people who wanted pension or grants.'* No files of the irregular applications could be found at application centres, the district office and the head office.

5. According to Mr Bandile Maqetuka, hereinafter referred to as Mr Maqetuka, who is a Chief Director for social security in the Eastern Cape Province, the appellant was an employee of the department and worked in the social security section at the head office in Bhisho. According to evidence adduced the appellant obtained national identity document numbers of persons who had not formally applied for social grants or pension, and entered their names in the system and back-dated payments of others. As a result thereof these persons received pensions or grants.
6. Of the amount of R235 618,12 which was received by these persons, the appellant received an amount of R22 700,00, a bottle of

brandy and a bottle of soft drink.

7. The grounds of appeal against the sentence include the following:

that the Court a quo erred in finding that in this case there were no substantial and compelling circumstances in terms of section 51(3)(a) of the Act, that the court over-emphasized the seriousness of the offences and the interests of society and that, in imposing the sentence, the Court ought to have shown the element of mercy.

8. Mr Dorfling who appeared for the appellant on appeal argued that the Court a quo had paid little attention to the Appellant's personal circumstances, namely that at the age 40 he was a first offender, had lost his job and that the actual benefit he derived from the fraud is an amount of R22 700,00, a bottle of brandy and a soft drink. Mr Dorfling submitted that, had the Regional Magistrate given attention to these factors, he would have found that substantial and compelling circumstances existed and would have imposed a lesser sentence than the one prescribed by section 51(2)(a) of the Act.

9. Ms de Kock who appeared for the Respondent referred to **S v Malgas 2001(1) SACR 469(SCA)** wherein it was held that all factors which are traditionally considered in sentencing (whether or not they diminish moral blameworthiness) will continue to play a role in deciding whether or not substantial and compelling circumstances exist in a given case. Ms de Kock submitted that, if the Court, after considering the circumstances in the present case, is of the view that the appellant's circumstances would render the sentence imposed by the Court a quo disproportionate to the crime and unjust, it is entitled to impose a lesser sentence than the prescribed one. She however felt that the Regional Magistrate properly applied his mind to the relevant factors before he found that there were no substantial and compelling circumstances.
10. We have considered the seriousness of the case, personal circumstances of the appellant, including the fact that he is a first offender at

the age of 40 years, that he is married with three children, two of whom are minors and that, as a result of the convictions, he has lost his job. We have also considered the fact that, as the Court a quo correctly pointed out, he was prompted not by need but by greed to commit the offences. He abused his position of trust. He defrauded the department of the amount of R235 618,12 but benefited only R22 700,00, a share of a bottle of brandy and a bottle of soft drink.

11. We are persuaded that the fact that the appellant is a first offender at the age of 40 years, that he has dependants to maintain and that from the fraud he benefited only R22 700,00, a share of a bottle of brandy and a bottle of soft drink, do constitute substantial and compelling circumstances.
12. Mr Maqetuka told the Court a quo that the department was experiencing financial losses as a result of corruption, fraud and theft involving social grant money. He said that this

is a national problem and that the province was losing approximately R600 million per annum. Mr Maqetuka over-emphasized the fact that the mandate of social security was to take care of those who are unable to care for themselves – *“the poorest of the poor”*. He said that, for a person to defraud the department, he/she would need the assistance of someone in the department who holds a position of trust. That person would be part of the syndicate. Mr Maqetuka said that there are about 41 000 government employees countrywide who receive social grants illegally and that, of these, more than 2000 are employees of the Eastern Cape Government. He appealed to the court to send a strong message in its sentence that acts of fraud will not be tolerated.

13. We were referred to three cases in connection with abuse of positions of trust and white – collar crimes.

13.1In **S v Erasmus 1998(2) SACR 466(E)**



the accused, a first offender, had pleaded guilty to the theft of an amount totalling R1 995 857,81 from his employer Union Spinning Mills (Pty) Ltd. He had lost his job. The money was stolen over a period of more than two and a half years. The accused was 43 years of age and was a financial manager earning a nett income of approximately R20 000 per month. He pleaded guilty. He had sold his assets and paid back the money. His former employer still had civil claims against him which, together with costs, totalled approximately R200 000. He had undertaken to pay this amount to his former employer. He had used the money not for his needs, ‘. . . but simply to boost his ego, to impress his friends, and to attempt to enhance his status in the eyes of the community’ (at 471f).

It is generally accepted that because of his childhood family problems, he lacked both emotional and financial security. He

had expressed genuine remorse and wished to compensate for the wrongs he had committed. He still suffered from certain emotional instabilities and stood to benefit from sociological and psychological therapy programmes. It was recommended that he be placed under correctional supervision with a condition that he undergoes sociological and psychological counselling. It was suggested that he be sentenced to correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977. Commenting on the suggested sentence, Zietsman JP said:

*'Such a sentence in this case will not in my opinion serve the interests of society and the element of deterrence needed to stamp out the ever increasing incidence of white-collar crime in this country. In this case the interests of society must be balanced against the personal interests of the accused, and I come to the conclusion that the accused will have to serve a term of imprisonment bearing in mind the magnitude of his crime.'* (at 473 a – b).

The Judge President was, however, of the view that there were facts which distinguished that case

from many other similar cases. Such facts include that, although the accused had stolen a large sum of money, all of it had been returned to the complainant. He still owed the complainant approximately R200 000 which arose from the whole transaction. He had expressed his willingness to pay to the complainant everything of his loss. The complainant did not want the accused to be imprisoned at all and had accepted his apology for the wrong he had done. Zietsman JP imposed the sentence of imprisonment for five (5) years in terms of section 276(1)(i) of the Criminal Procedure Act.

13.2 The fight against corruption is costly and it constitutes a substantial drain on the State's coffers. This was said in **S v Kwatsha 2004(2) SACR 564(E)**. In casu the appellant had been charged with and convicted of theft of five government cheques and of conspiracy to commit fraud involving these cheques. The appellant was an employee of the Department of Home Affairs in the Eastern Cape government. He was charged with the theft of five government cheques which were the property of the Department of Public Works of the Eastern Cape Government and also with

conspiracy to commit fraud involving these cheques. He and his co-accused who was a fellow employee pleaded not guilty. They were, however, convicted on both counts. The Magistrate before whom they appeared treated the two counts as one for the purpose of sentence. Both were sentenced to imprisonment for seven years of which two years were suspended for five years on condition that they were not convicted of theft or fraud nor an attempt to commit theft or fraud committed during the period of suspension.

The appellant was a 29 - year - old unmarried father of a seven - year - old child. After deductions he earned R1500,00 per month. It was argued on appeal that the sentence imposed by the Magistrate was unduly severe and that the Magistrate had misdirected himself by not imposing correctional supervision as had been suggested.

Leach J said:

*'However, although the intrinsic value of the cheques themselves was minimal, the potential prejudice to the Eastern Cape Government in this case was substantial and, if the appellant's scheme had succeeded, the State coffers would have been defrauded by a sum in the vicinity of R2 million. The appellant therefore made himself guilty of extremely severe crimes.'* (at 568 i – j).

Judge Leach found that the appellant's actions were premeditated and calculated, that he had shown no signs of remorse and that he had persisted in denying his guilt up to the day of the appeal. The Judge said that it was important to consider that corruption was unfortunately prevalent in the Eastern Cape Government. (at 569 i – j)

After considering the factors which have been referred to, Leach J said that the sentence imposed by the court a quo did

not raise a sense of shock. In his view there was no merit in the appeal against the sentence. The appeal was dismissed and the conviction and the sentence were confirmed.

13.3In **S v Vorster 2007(2) SACR 283(E)**

the accused had formerly practised as an attorney at Maclear in the Eastern Cape. He was charged with the theft of an amount of R1 625 887,98 from 47 trust creditors. He pleaded guilty and was convicted of the theft of the amount. He had been struck off the roll of attorneys.

His personal circumstances are briefly as follows:

He was 43 years old and was married with four children. Three of the children were still schooling. The eldest child, a son, was doing apprenticeship as a diesel engineer and earned about R478,00 per week. All the four children were still dependent on him for the living. He paid school fees for them. His wife was

unemployed. He was later employed by a farmer and served as a salesperson. His basic salary was R2500,00 per month plus a 10% commission on profit. He estimated his average gross income per month at about R7 500,00.

Passing sentence, Sandi J said, among others, the following:

*'In this matter the accused stole a large amount of money over a period of 18 months. He has not refunded even a portion thereof. He was quite aware that what he was doing was wrong and what the consequences of the theft would be. His erstwhile partner, Mr Hills, was involved in a similar situation and the accused must have learnt a lesson from that. What is unfortunate in this case is that, even though the accused admitted his wrongdoing to the Law Society and pleaded guilty to the charge, he has not shown remorse . . . although I have sympathy with the family of the accused, I am of the view that this case calls for a sentence of imprisonment . . .'*

After taking into account the accused's personal circumstances, the seriousness of the offence and the interests of society, Sandi J sentenced the accused to undergo imprisonment for eight (8) years.

14. We now revert to the present case. Although

we found that substantial and compelling circumstances exist which justify a lesser sentence than the prescribed one, we have a duty to impose an appropriate sentence. Most of the money of which the State was defrauded, benefited several persons. It is obvious that the primary aim of the appellant was to receive his share from those who were paid the money.

15. The appellant has not paid back the amount of which the State was defrauded, not even a portion thereof. There is no indication that he has attempted to or is willing to pay it back. He has thus far shown no remorse. He was in fulltime employment when he committed the offences. It appears that greed, not need drove him to commit the offences. His actions were premeditated and calculated. He abused his position of trust.

In the words of Leach J in the **Kwatsha** case referred above:

*'The fight against corruption is therefore costly and ongoing and amounts to a substantial drain upon the State's coffers. Notwithstanding the State's attempts, it is unfortunately a fact of*



*life that almost daily offences similar to the present come before courts. Salutory sentences have been imposed in similar cases in the past and must continue to be imposed until this evil has been rooted out' (at 570).*

16. According to Mr Maqetuka the department is experiencing financial losses as a result of corruption, fraud and theft involving social grants money. This is a national problem. The Eastern Cape Government, with the highest number of employees who receive social grants illegally, loses approximately R600 million per annum. Mr Maqetuka urged the Court to send a strong message in imposing its sentence that acts of fraud will not be tolerated. We have a duty to send this message.

17. Having considered, among others, the seriousness of the offences and the circumstances in which they were committed, the appellant's personal circumstances and the interests of society, we feel that the appellant deserves a lengthy term of imprisonment.

We order as follows:

The convictions are confirmed. The sentence

imposed by the Court a quo is set aside. It is substituted with the following:

The 25 counts are treated as one for the purpose of sentence. Sentenced to undergo imprisonment for twelve (12) years. This sentence is antedated to 30 November 2005. A period of two (2) years of this sentence is suspended for a period of five years on condition that the appellant is not convicted of fraud or attempted fraud and theft or attempted theft committed during the period of suspension of this sentence.

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**A E B DHLODHLO**  
**JUDGE OF THE HIGH COURT**  
**ACTING DEPUTY JUDGE PRESIDENT**  
**4<sup>TH</sup> APRIL 2008**

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**M G NDZONDO**  
**ACTING JUDGE**  
**4<sup>TH</sup> APRIL 2008**

Heard on: 08 February 2008

For the Appellant: Mr A Dorfling  
Instructed by Sonamzi & Mkata  
Attorneys, Butterworth

For the Respondent: Ms C Ke Kock  
Instructed by the Director of  
Public Prosecutions, Bhisho