IN THE HIGH COURT OF SOUTH AFRICA
(BOPHUTHATSWANA PROVINCIAL DIVISION)

CA NO : 14\04

In the matter between:

THE STATE **APPELLANT**

and

ELSIBIE JOHANNA ELIZABETH SOPHIA MAREE **1ST RESPONDENT**

WILHEMINA JOHANNA WILLEMSE **2ND RESPONDENT**

J U D G M E N T

LEEUW J:

INTRODUCTION

1. The Respondents are sisters and were both employed by the First National Bank ("the Bank") at the Lichtenburg Branch. The First Respondent was employed as a clerk and the Second Respondent as a supervisor. They were each convicted of one count of Theft at the Regional Court. The First Respondent was convicted of theft of R3 689 546-25 and Second Respondent of theft of R4 181 000-00 from the bank. These offences were committed during the period 1 December 2001 to 28 October 2002. They were each sentenced to a term of six (6) years imprisonment of which three (3) years were suspended for five (5) years on

condition they were not convicted of theft committed during the period of suspension.

2. The State filed an application for leave to appeal against the sentences imposed in terms of section 310 A of the Criminal Procedure Act No 51 of 1977, which leave was granted by this Honourable Court. The Appellant's grounds of appeal are the following:

"(i) The Magistrate exercised his discretion with regard to sentence in an unreasonable manner, by an overemphasis of the personal circumstances of the Respondents, as against the interests of the community and the seriousness of the offences.

ii) The Magistrate erred in finding that substantial and compelling circumstances were in existence, that warranted lighter sentences than the compulsory sentences prescribed in section 51 (2) (a) (i) of Act 105 of 1977.

(iii) The sentences are shockingly in appropriate, when assessed in view of all the circumstances and so light that no reasonable court would have imposed it."

3. In passing sentence, the Learned Magistrate considered the following factors for the purpose of sentence

(a) That the Appellants were first offenders.

(b) That they pleaded guilty to the charges.

(c) That they are suffering from chronic illnesses (high blood pressure) which were normal for their ages, the First Respondent was born on 29 October 1954 and the Second Respondent on 11

July 1952.

(d) That they were both in a position of trust in that they worked for the Bank for almost thirty (30) years;

(e) That the money was stolen over a period;

(f) That the amounts stolen were substantial but that the Bank was compensated to a certain extent when the estates of the Respondents were sequestrated;

(g) That with regard to the First Respondent, she used the stolen money more for gambling at casino's, and

(h) That the Bank was partly to blame for the Respondents' conduct in that they failed to put adequate security measures in place in order to advert theft by the employees.

Did the Learned Magistrate misdirect himself in considering sentence?

4. Section 51 (3) (a) of the Criminal Law Amendment Act No 105 of 1977 (The Act) provides that:

"If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentences prescribed in those subsections, **it shall enter those circumstances on the record of proceedings and may thereupon impose such lesser**

sentence.” (My emphasis).

5. The Learned Magistrate did not enter the circumstances on record which would justify his imposing a lesser sentence as required by section 51 (3) (a) alluded to above, save to state the following:

“Die hof moet bevind dat daar buitengewone omstandighede is wat die voorgeskrewe vonnis neutraliseer of 'n afwyking regverdig. Ons vat ook advies van die Hoër Howe. Ons kyk wat hulle houding is”. He thereafter referred to the case of ***The State v Boesak*** 2001(1) SACR 1 (CC) in order to justify the sentence he imposed, and stated the following:

“…….. dit is ene dominee Boesak wat ook die Tien Gebooie na agt verminder het. Hy **het min of meer soortgelyke bedrae laat wegraak. Ons neem kennis van die vonnisse wat daar opgelë is.”** (My emphasis).

6. The Respondents together defrauded the Bank of a total amount of R7 869 546-25 within a period of eleven (11) months. In respect of the ***S v Boesak*** case ***supra***, the Appellant was convicted of fraud and theft of R406 321-21, and was sentenced to three (3) years effective imprisonment sentence. **“Decided cases dealing with sentence may be of value also as providing guidelines for the trial court’s exercise of discretion (See *S v S* 1977 (3) SA 83 (A) and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See *R v Karg* 1961 (1) SA 231 (A) at 236 G.) But it is an idle exercise to match the colours of the case at hand and the colours of other**

cases with the object of arriving at an appropriate sentence" per van den Heever JA in ***D v Sinden*** 1995 (2) SACR 704 (A) at 708 a - b. The two cases are not comparable to the ***Boesak's*** case and cannot be used as a guide for the purpose of passing sentence in the circumstances.

7. Failure to comply with the provisions of section 51 (3) (a) ***supra*** in itself was an irregularity which amounted to a misdirection on the part of the Learned Magistrate in considering sentence.

8. Section 51 (2) (a) (i) of the Act prescribes a sentence of not less than 15 years for a first offender who has committed an offence referred to in Part II of Schedule 2. The value of the amounts stolen by the Respondents fall within the purview of this schedule.

9. The Learned Magistrate stated that the Bank was compensated to a certain extent after the sequestration of the estate of the Respondents. There is nothing on record to justify this finding because no evidence was placed before him on that aspect.

10. The abovementioned misdirections by the Learned Magistrate entitle this Court to interfere with the sentences imposed and to consider the sentence afresh. Compare ***S v Lekaota*** 1978 (4) SA 684 (A) ***S v Tilotsane*** 1977 BLR 39 and ***S v J*** 1989 (1) SA 669 (A). Furthermore, the Learned Magistrate, by failing to state the substantial and compelling circumstances in this matter, exercised his discretion improperly to the extent of vitiating the sentence imposed. See ***S v Pillay*** 1977 (4) SA 531 (A). Compare ***S***

v Horker 2004 (2) SACR 63 (CPD) and authorities referred to therein; ***S v Malgas*** 2001 (1) SACR 469 (SCA) at 478 d - e par [12].

Are there substantial and compelling circumstances which justify the imposition of a lesser sentence as contemplated in section 51 (3) (a) of the Criminal Law Amendment Act?

11. Respondents did not give evidence in mitigation of sentence. Reliance was placed on the report of the Forensic Criminologist, Dr Irma Louise Labuschagne, which she compiled after interviewing both Respondents.

12. The First Respondent, born on the 29 October 1954, is a widow with two major children. She was employed by the First National Bank from 1973 and was earning R7000.00 per month when she was discharged from employment in 2001. In addition she was earning an amount of R2 600.00 from her deceased husband's pension benefits.

13. The Second Respondent was born on 11 July 1952 and is married. She has two major children and was also employed by the Bank from 1973 until she was dismissed in 2002. She was earning R7050 per month on termination of her service, and her husband was earning R5000.00 per month.

14. Both Respondents were earning a reasonable income, and their children are self-supporting. They have no major expenses. The First Respondent's monthly expenses were stated at R2 130.00 being for Petrol, Food, Telephone and a

Policy. The Second Respondent's expenses were R6 760.00 for DSTV, Cell phone, Petrol, Grocery, Medication and Church dues. Both Respondents suffer from chronic high blood pressure and diabetes, which conditions were controlled through medication. There is nothing extraordinary about the personal circumstances of the Respondents which would justify a lenient sentence to be imposed in their favour.

15. The Forensic Report, which formed part of the record, discloses that the Second Respondent gave the following reasons for stealing from the Bank: **"Ek was moeg om te sukkel en wou graag vir my kinders gee wat hulle wil hê …… Hoe meer geld om (sic) gevat het hoe harder het ek gewerk sonder om te kla."** The Report goes further to state that her husband made use of the loan scheme that was available at the Bank, but that she was embarrassed by the fact that he was known as a "chronic borrower." They stopped taking out the loans and decided on stealing from the bank.

16. The First Respondent continued with the false deposits until she was discovered on the 28 October 2002. She professed to have stolen out of need because she was a sole bread winner. In the same breath, she claimed to have continued with the scheme in order to shield her sister, the Second Respondent from being discovered.

17. The Second Respondent was occupying a responsible position in that she was a checking clerk of the whole branch. She professes to have been strict which resulted in her colleagues being afraid of her. She was overworked and worked for long hours and concludes by saying that

“Baie ure se oortyd is gewerk sonder enige betaling of selfs ’n dankie.”

18. The Report goes further to state that both Respondents were unable to account for the money stolen. The First Respondent informed that she bought two “off road” motorbikes for her son and the Second Respondent bought a motor vehicle of ± R60 000.00 for her daughter. The rest of the money was expended on their gambling activities in the various casinos, where they were issued with VIP cards.

19. The position is therefore that the Respondents, who were in the position of trust with the Bank, stole the money within a period of eleven (11) months and cannot account for the bulk of the money stolen. They are unable to compensate the bank for the loss.

20. Both Respondents were in the employ of the Bank for almost thirty (30) years. They both devised a scheme wherein false deposits were made in the bank accounts of the Respondent, her husband and the Second Respondent’s daughter. These false transactions were made between 1 December 2001 and 28 October 2002. The First Respondent stole a total amount of R3 689 546.25 and the Second Respondent stole a total amount of R4 181 000.00, within a period of eleven (11) months.

21. In my view, the above-mentioned personal circumstances of the Respondents are far much outweighed by the crime itself. The fact that they stole out of greed and cannot even account for the bulk of the money in itself serves as an aggravating factor which would call for a more stringent custodial sentence in the interests of society. Compare ***S v***

Kearns 1999 (2) SACR 660 (SCA) at 663 d–h.

22. The Respondents pleaded guilty to the charges and are both first offenders. Mr Basson, on behalf of the Appellant, submitted in his written and oral submissions that this does not imply remorse on the part of the Respondents. The evidence was overwhelming against them in view of the paper trail discovered during the investigation of the case, as well as the Respondents' failure to disclose to the Court ***a quo*** under oath, through a detailed account of how they disposed of the money stolen. I agree with counsel for the Appellant. I draw an adverse inference for such failure to testify and doubt the genuineness of their contrition. See ***S v Seegers*** 1970 (2) SA 506 (A) at 511 G–H.

23. Furthermore, the Criminologist stated that both Respondents did not appear to accept full responsibility for their own roles in committing the offence, and were of the opinion that the Bank deserved what happened. She refers verbatim to what the Second Respondent said to her, viz.

> "Elke twee jaar het die ouditeure die bank besoek en 2 jaar se werk ge-oudit en hulle het dit nie eers opgetel nie. Dit is omdat hulle mense aanstel wat nie bevoegd is om hulle werk te doen nie. Dit is maklik vir hulle om te sê ek het dit toegesmeer maar wie het dit in die 11 maande wat ek reeds weg was, toegesmeer? My suster was nie 'n nasienklerk nie. Ek dink ek is reeds swaar gestraf want vir 30 jaar het ek soos 'n hond vir hulle gewerk."

24. I am of the view that Respondents showed no sign of remorse. This kind of attitude would send an undesirable message to the society that it is justifiable to steal from an employer if you are dissatisfied with the working

conditions. The aggravating factor is that they betrayed the trust placed in them by the Bank. Their conduct, it would appear was activated by concern for themselves rather than for the Bank. Compare ***S v Sinden*** 1995 (2) SACR 704 (A) at 709 a – b.

25. In an appeal against sentence, it is important that one should not interfere with the discretion of the trial court merely because the Appellate Court would have imposed a heavier or lighter sentence. But where **"the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate"** the Court is at liberty to interfere with the sentence. Per Holmes JA in ***S v Rabie supra*** on 857 D – E.

26. I have already found that the sentence imposed by the Court ***a quo*** is vitiated by irregularity and misdirection and I am also of the view that the sentence imposed is disturbingly inappropriate in that it is excessively lenient.

27. It is important for the Courts to send out a message that "white collar" crime does not pay. Counsel for the Appellant has referred this Court to several decided cases wherein the accused persons were sentenced to longer imprisonment sentences for the theft and fraud of far much lesser amounts than that stolen by the Respondents. Compare ***S v Price and Another*** 2003 (2) SACR 555 (SCA), ***S v Guntenhőner*** 1990 (1) SACR 642 (W) read the remarks at 648 i-j,***S v Rawat*** 1999 (2) SACR 398 (W); ***S v Erasmus*** 1999 (1) SACR (SEC); ***S v Van Niekerk*** 1993 (1) SACR 482 (NC), and the unreported cases of this Division viz. ***S v Gunas Moodley*** CA 78\2003, ***S v Pierrie du Plessis*** CA 41\93 and ***S v Ian Bond*** CC 11\92.

All the abovementioned cases dealt with offences committed by persons in a position of trust.

28. In the circumstances of this case, the Respondents disregarded, deliberately, the controls they had been employed to implement. Their conduct was premeditated and they stole a total amount of R8 870 546.25 between them, which implies that over a period of eleven (11) months, they persistently stole an average of R300 000.00 each per month, which they were unable to account for. The bank was not compensated and the Respondents did not show any sign of remorse. Although they are middle aged and are first offenders who seem to have a stable family life, I am of the view that their personal circumstances are far much outweighed by the offences committed and the interests of society. There are no substantial and compelling circumstances which can be found in their favour. The sentence imposed by the Court ***a quo*** is excessively lenient. I am not persuaded by counsel for the Respondents' submission to the effect that the sentence imposed by the Court ***a quo*** is appropriate.

29. I am of the view that the sentence imposed by the trial court should be set aside and substituted by a sentence which would oblige the Respondents to serve a substantial term of imprisonment. In my view the sentence would properly balance the personal circumstances of the Respondents against the seriousness of the offence and the interests of society.

30. The appeal succeeds;

The sentence imposed by the Court ***a quo*** on the 12 January 2004

is set aside and the following substituted therefor:

"Fifteen (15) years imprisonment in respect of each Respondent."

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M M LEEUW
JUDGE OF THE HIGH COURT

I agree.

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R D HENDRICKS
JUDGE OF THE HIGH COURT

DATE OF HEARING : 12 NOVEMBER 2004
DATE OF JUDGMENT : 24 FEBRUARY 2005

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