REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: A470/2011

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

30 April 2012 **TP MUDAU**

In the matter between

SWART, PHILLIPUS PETRUS **1ST APPELLANT**

MTHIMKHULU, RAYMOND **2ND APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU AJ:

[1] The two appellants were convicted in the magistrate court, Kempton Park, after pleading guilty to 17 counts of theft involving an amount of R293,069.92. Consequently, they were each sentenced to an effective 87 months'

imprisonment which is an equivalent of 7 years and 3 months. The first appellant is before us on appeal against sentence .The first appellant initially sought leave to appeal against both the conviction and sentence before the trial court. Leave to appeal was granted against sentence only. A petition to appeal against the conviction by the first appellant was dismissed by this court. For some obscure reasons, leave to appeal against the conviction and sentence was granted to the second appellant by the trial court.

[2] In amplification of their plea, the appellants adduced a joint statement through their legal representative and on their behalf in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977, which read:

"We, the undersigned

Phillipus Petrus Swarts

Raymond Mthimkhulu

Hereby freely, voluntarily and without any undue influence make this statement in our true and sober senses. We admit that we are the accused in this matter facing 17 counts of theft. We heard the charges against us and we understand the contents thereof. We admit the following: That on the dates or during the period as stated in column 1 in annexure "A" as attached, we were present at Ndlovu Wire Ropes a place which resorts within the district of Kempton Park.

The incident materialised as follows: Customers phoned to place orders or inquire about prices and stock. We told or informed them that we will sell to them the steel wires at a reasonable and cheaper price if they agree to such offer. We furnished them with our personal bank accounts respectively being ABSA and First National Bank. And when the order was made as per the above offer, we delivered. After delivery, the customers deposit the money agreed upon for the steel wires. The money was deposited in our personal accounts. And we shared the money equally. We had intention to use the money for our personal benefit and permanently deprive the owner these.

We further admit that during all times relevant to our above actions we knew and understand that it was wrong and it constituted an offence, and yet we persisted with our actions. We had no right or lawful justification to act as above mentioned. We therefore plead guilty to charge of theft". The statement was signed by both appellants and also signed by their attorney.

[3] In the light of this statement, the trial court was rightly satisfied that the appellants were guilty as charged and convicted them accordingly.

[4] The magistrate proceeded to impose terms of imprisonment in respect of each count ranging from 3 to 9 months, which total 87 months or an equivalent of 7years and 3 months. However, when the magistrate pronounced the totality of the months of imprisonment for each appellant, he referred to 84 months instead of 87 months. As the trial magistrate imposed a sentence for each count, it is therefore fair to assume that he erroneously calculated the total number of months to be served when he pronounced it as 84, instead of 87 months. In my view, nothing turns on this aspect.

[5] It is a cumulative total of 87 months or 7 years and 3 months imprisonment that that both appellants are aggrieved about, and in the case of the second appellant, his conviction as well, emanating from his plea of guilt. It is disputed that the second appellant admitted al the essential elements of the offence.

AD CONVICTION

[6] The second appellant contends that he "*did not admit that he stole the monies which were the property or in the lawful possession of Johannes de Lange as set out in the charge sheet…What the appellant indeed admitted was that he would sell certain steel wires (it is uncertain as to who the owner of the steel*

wires was as this was not dealt with in the section 112(2) statement) to certain clients. He would then receive the monies from the clients for the steel which were sold to them. The appellant could not have stolen any monies from the complainant as the monies were paid into the bank account of inter alia the appellant, no monies of the complainant were stolen as the monies were paid by the clients to the appellant and his co accused."

[7] The charge sheet reads: "*THAT the accused are guilty of the crime of Theft. IN THAT upon or about the date or during the period as stated in Column 1 and at or near the place as stated in column 2 in the District of* ***Kempton Park,*** *the accused did unlawfully and intentionally steel the goods as stated in Column 3 the property of or in the lawful possession of the person/persons as stated in Column 4."*The person stated in column 4 is Johan De Lange. The learned author, C R Snyman (Criminal Law Fourth Edition at page 469), describes the crime of theft as follows: "*A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which*

a) *belongs to, and is in the possession of, another;*

b) *belongs to another but is in the perpetrator's own possession; or*

c) *belongs to the perpetrator but is in another's possession and such other person has a right to possess it which legally prevails against the perpetrator's own right of possession*

Provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property." From their statement, the appellants sold steel wires albeit at discounted prices, that belonged to the complainant. The monetary value thereof was deposited in their respective accounts which, they shared. According to the appellants, they "*had intention to use the money for our personal benefit and permanently deprive the owner these*".

[8] I hold the view that the proceeds (the money) of the sale of steel wires belonged to the complainant De Lange, but were illegally diverted to the appellants' personal bank accounts. In as much as the money was deposited in the appellants' respective accounts, it did not belong to them, but to the complainant (this satisfies the requirement described by Snyman in Para 7 –b, referred to above). Any argument to the contrary is devoid of any merit. The second appellant also, was correctly convicted.

AD SENTENCE

[9] The primary question for consideration by this court is whether the court below correctly assessed all the factors relevant for purposes of sentence.

[10] It is trite that the imposition of sentence is pre-eminently a matter for the trial court to exercise its discretion. An appeal court will only interfere with the sentence imposed by the trial court if the latter exercised its discretion in an inappropriate manner. In S v Barnard 2004 (1) SACR 191 (SCA) the court cautioned that:

> *'A Court sitting on appeal on sentence should always guard against eroding the trial court's discretion in this regard, and should interfere only where the discretion was not exercised judicially or properly. A misdirection that would justify interference by an appeal Court should not be trivial but should be of such a nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably.'*

Where there is no clear misdirection by the trial court to justify interference by an appeal court, the remaining question, as was held by the SCA in S v Whitehead 1970 (4) SA 424 (A) is:

> *'(W) whether there exists such a striking disparity between the sentences passed by the learned trial Judge and the sentences which this Court would have passed — or, to pose the enquiry in the phraseology employed in other cases, whether the sentences appealed against appear to this Court to be so startlingly or disturbingly inappropriate — as to warrant interference with the exercise of the learned Judge's discretion regarding sentence.'*

[11] It is not necessary to set out all the material facts of the crime that the appellants were convicted of. This aspect was dealt with above.

[12] It is trite that the determination of an appropriate sentence requires that proper regard be heard to the well known triad namely: the seriousness of the crime, the circumstances of the offenders, as well as the interest of the society. Equally important is the aspect of mercy which is a concomitant of justice. A sentence must be individualized and each case must be dealt with in its own peculiar facts (see *State v Samuel* 2011 (1) SACR 9 (SCA) par 9).

[13] Before sentences were imposed, pre-sentencing reports in respect of both appellants compiled by probation officers were presented for consideration by the trial court. The first appellant was 54 years old at the time of sentencing. At the time of the incidents of theft, the first appellant worked as a sales manager until 30th April 2010 when he resigned. He is a divorcee with 3 adult children. He lived with a girlfriend. At the time of sentencing, he held a new sales job earning a salary of about R5000.00 based on commission. The first appellant was a first offender. The second appellant was a black economic director of the company with 30% worth of shares. The second appellant (41years old then) was also a divorcee, but a father to 3 minor children born to 3 different mothers. He lived with his girlfriend. The state did not prove any previous convictions against him as well. At the time of sentencing, the second appellant worked as a taxi driver, earning R500-00 a week.

[14] It has been submitted on behalf of the two appellants that the cumulative effect of the sentences imposed, are shockingly harsh. On the other hand, we were urged by counsel on behalf of the respondent in their written submissions not interfere with the sentence as it is neither severe nor an inappropriate sentence. However, in oral arguments before us, the respondent conceded that the sentence imposed by the trial court, seems harsh.

[15] It is clear from the facts of the case that the appellants had abused their positions of trust when they committed these crimes. This amounts to an aggravating factor. The offences committed had a serious impact on the performance of the company that employed them. As a result, many people were laid off. In general, white collar crime is on the increase. In as much as this calls for a stiff sentence, an effective sentence of 7 years and 3 months imprisonment in respect of each appellant, is under the circumstances, unduly harsh. This court is therefore at liberty to interfere with the sentence.

A sentence of 5 years' imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act 51 of 1977, in my view, will be just in the circumstances of this case.

[16] In the result I propose the following order:

1. The appeal against conviction by the second appellant is dismissed.
2. The appeal against the sentences by both appellants is upheld to the extent that the sentences imposed are altered to read:

> "Each accused is sentenced to 5 years' imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act 51 of 1977. All the counts were taken together for purposes of sentence."

T P MUDAU
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

B SPILG
JUDGE OF THE HIGH COURT

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COUNSEL FOR THE SECOND APPELLANT	ADV VAN WYNGAARD
COUNSEL FOR THE RESPONDENT	ADV N MATHABATHE
DATE OF HEARING	30 APRIL 2012
DATE OF JUDGMENT	30 APRIL 2012