THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 479/08

GERHARD VAN DER WESTHUIZEN **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Van der Westhuizen v The State* (479/08) [2009] ZASCA 48 (22 MAY 2009)

Coram: CLOETE, SNYDERS JJA and GRIESEL AJA

Heard: 06 MAY 2009

Delivered: 22 MAY 2009

Summary: Condonation – failure to prosecute appeal in compliance with the rules – explanation for delay and prospects of success evaluated

ORDER

On appeal from: High Court, Pretoria (Claassen and Basson JJ sitting as court of appeal from a regional court):

The appeal against the refusal of the application for condonation is dismissed.

The order by the court a quo dismissing the appeal is set aside.

JUDGMENT

SNYDERS JA: (CLOETE JA and GRIESEL AJA concurring)

[1] This is an appeal against the refusal of condonation by the High Court in Pretoria (Claassen and Basson JJ). The appellant applied for condonation as he had failed to comply with several rules of court in the prosecution of his appeal. The matter is before this court as the appellant exercised his automatic right of appeal that arises from s 21(1)[1] of the Supreme Court Act 59 of 1959 (despite the provisions of s 20(4)[2]) as explained in *S v Gopal* 1993 (2) SACR 584 (A) at 585c-d:[3]

'. . . indien 'n persoon in die landdroshof aan 'n misdryf skuldig bevind en gevonnis word en sy appèl na die Provinsiale (of, indien van toepassing, die Plaaslike) Afdeling van die Hooggeregshof misluk, mag hy alleen met die nodige verlof na hierdie Hof appelleer. As hy egter sou nalaat om sy eerste appèl na behore voort te sit en dit nodig is om kondonasie te verkry (soos bv vir die laat aantekening van appèl) en dié aansoek misluk, het hy 'n outomatiese reg van appèl teen die afwys van sy aansoek na hierdie Hof.'

[2] The appeal that the appellant sought to pursue in the court a quo was from the Special Commercial Crimes Court for the Regional Division of the Northern Transvaal in Pretoria, where he was convicted of fraud and sentenced to five years' imprisonment in terms of s 276(1)(i) of the Criminal

[1] Section 21(1): 'In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.'

[2] Section 20(4): 'No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except – (a) in the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division; (b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.'

[3] See also *S v Moosajee* 2000 (1) SACR 615 (SCA) at 615i-j and 618d-h; *S v Farmer* 2001 (2) SACR 103 (SCA) at 104d-i.

Procedure Act 51 of 1977 (CPA). The appellant appealed against his conviction and sentence. His appeal was enrolled in the court a quo on 30 January 2006. On that day it was struck off the roll due to the fact that no heads of argument were filed and there was no appearance by the appellant, or on his behalf.

[3] On 14 June 2006 the appellant launched an application for condonation. In that application he sought the re-instatement and enrolment of his appeal, condonation for the failure to appear in his appeal on 30 January 2006 and condonation for the lateness of the application for condonation. This application was heard and dismissed on 13 August 2007.

[4] When an application for condonation is considered the court has to exercise a judicial discretion upon a consideration of all the relevant facts. Factors such as the degree of non-compliance, the explanation for the delay, the prospects of success, the importance of the case, the nature of the relief, the interests in finality, the convenience of the court, the avoidance of unnecessary delay in the administration of justice and the degree of negligence of the persons responsible for non-compliance are taken into account. These factors are interrelated, for example, good prospects of success on appeal may compensate for a bad explanation for the delay.[4]

[5] This court is only entitled to interfere with the discretion exercised by the court a quo if it was done capriciously or upon a wrong principle, if it has not brought an unbiased judgment to bear on the question or has not acted for substantial reasons.[5]

[6] The appellant was obliged to file heads of argument in his appeal before the end of December 2005.[6] He failed to do so. There was no appearance on his behalf on 30 January 2006. To have his appeal re-instated

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[4] *S v Mohlathe* 2000 (2) SACR 530 (SCA) at 535g-536a; *S v Leon* 1995 (2) SACR 594 (C) at 595 e-h; Harms *Civil Procedure in the Supreme Court* at B-182.
[5] *S v Leon* 1996 (1) SACR 671 (A) at 672j-673h.
[6] One month prior to 30 January 2006 in terms of Transvaal Rule 8(1) read with rule 51(4) of the Uniform Rules of Court.

and re-enrolled those failures had to be condoned.[7] He waited until 14 June 2006 to lodge an application for condonation.

[7] The appellant explains that the reason for these failures is that there was 'an innocent misunderstanding' between him and his attorney which caused him not to contact his attorney, not to place his attorney in funds and caused his attorney to assume that he was not interested in prosecuting his appeal.

[8] As a consequence of his appeal having been struck off the roll, the appellant was contacted during March 2006 and instructed to hand himself over in order to start serving his sentence. This prompted him to contact his attorney for the first time since his conviction and sentence in December 2002. He also suggests that he had been unable to make contact with a certain Erasmus, whose existence he claims to be vital to his appeal, until two months prior to the application for condonation when he 'serendipitously' came upon Erasmus' business card, which enabled him to make contact.

[9] In the appellant's own words he explains the misunderstanding as follows:

'8 Immediately following my conviction, I discussed the matter with my attorney and instructed him regarding my appeal.

9 As I recall, part of the reason for the appeal inter alia concerned the magistrate's finding that a certain person whom I referred to in my evidence did not exist. This person is a Mr. Pieter Erasmus ("Mr. Erasmus"), who is more commonly known as Rassie Erasmus, and who is employed by the National Intelligence Service.

10 It was necessary and of utmost and crucial importance for the purposes of my appeal that I furnish further instructions to my legal representatives regarding the existence of Mr. Erasmus. It has always been my contention that I was the victim of an elaborate "sting", orchestrated by Boer Barnard during which I was convinced that I needed to open an account for the entity known as "Proliferation Intelligence Services". At the time I verily believed that Proliferation Intelligence Services was a part of the South African Intelligence Services in the general sense. It was also my version before the court a quo that Mr. Erasmus was a member of the National Intelligence Service and that I had first met him when approached to open the

[7] Uniform Rules of Court, rule 27.

account. This was material in my recommendation to Dunlop to open the account against which the first accused perpetrated the fraud.

11 When the presiding officer had found that Mr. Erasmus did not exist, he had done so on the basis of the evidence of an official of the National Intelligence Service who indicated that no such person was employed by the National Intelligence Service. I wish at this early juncture to humbly submit that this finding of the court a quo was, inter alia, a material misdirection.

12 As such, an adverse (and I humbly submit wrong) finding in respect of my credibility had been made, and I submit that this had played a significant role in my conviction in the matter.

13 I had advised my attorney that Mr. Erasmus does exist, contrary to the evidence of the official from the National Intelligence Service (and as will become apparent during the course of this affidavit, my attorney, Mr. Wayne Venter from Lindsay Keller & Partners, has indeed spoken to Mr. Erasmus).

14 As such, it was necessary for me to consult with both my attorney and counsel regarding this issue and to amend the Notice of Appeal and acquire the necessary affidavits relating to the actual existence of Mr. Erasmus of the National Intelligence Service.

15 The period during which these events transpired was shortly before Christmas, and I was scheduled to go on annual leave with my family. I did not believe that there was any necessity to consult with my legal representative over Christmas and New Year, when they in any event would not have been available, in particular Mr. Van der Sandt, who had been involved in the matter from the outset.

16 I therefore advised my attorney that I would contact him, only in the event of it being necessary, at a stage subsequent to my return from holiday.

17 Upon my return from holiday, and in the mistaken belief that the matter was being dealt with by my legal representatives, I did not deem it necessary to contact my attorney.

18 My attorney was however labouring under the impression that I had specifically undertaken to contact him subsequent to my return from holiday.

19 In the premises, and in the light of the facts as set forth hereinabove, it is my humble submission that, already at that early juncture, an innocent misunderstanding had prevailed between myself and my attorney, which ultimately led to the matter being struck off the roll.'

[10] The explanation carries the seeds of its own destruction. The appellant's subjective belief that it was 'necessary and of utmost and crucial importance' that he furnish instructions to his attorney for the purpose of his appeal (para 10) belies his allegation that he did not deem it necessary to contact him (para 17).

[11] From December 2002 until March 2006 the appellant, on his own version, did absolutely nothing to pursue his appeal: he did not contact his attorney, he did not place his attorney in funds, he did not attempt to find Erasmus and he did not enquire about the progress of his appeal. His attorney reasonably inferred that the appellant was no longer interested in pursuing his appeal and took no further action on his behalf. The inertia by the appellant ultimately led to the failure to file heads of argument and the failure to appear in the appeal.

[12] The appellant alleges that the magistrate found that Erasmus does not exist and that he believed it crucial to his appeal to show that Erasmus does in fact exist. Yet he did nothing, from the time of his conviction on 2 December 2002 until two months before his application for condonation, April 2006, when he 'serendipitously' came upon Erasmus' contact details. This is yet another example of the appellant's inaction.

[13] It was necessary for the appellant to explain not only why heads of argument were not filed and why there was no appearance, but also the delay in bringing an application for condonation.[8] There is no attempt by the appellant to explain why it took him until 14 June 2006 to bring an application for condonation when he was alerted to all the problems surrounding his appeal during March 2006.

[14] The appellant's explanation for the non-compliance with the rules amounts to no explanation at all. In addition, there are no prospects of success on appeal.

[15] On the merits of his appeal the appellant contends that he should not have been convicted, but that even if he was rightly convicted the magistrate should not have made a distinction between his sentence and that of his co-accused, Barnard, and given him (the appellant) a heavier sentence.

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[8] *Darries v Sheriff, Magistrate's Court, Wynberg* 1998 (3) SA 34 (SCA) at 40I-41A.

[16] The following common cause facts gave rise to the appellant's conviction: He was the National Contracts Manager for Dunlop Tyres (Pty) Ltd (Dunlop) when he opened a so-called secret account with Dunlop for a secret customer, connected to the National Intelligence Service of South Africa (NI) for the sale of tyres to this customer at the usual 45% discount available to government departments. He specifically instructed the staff at Dunlop that queries on the account were not to be dealt with in the ordinary course but only by him. He instructed the Senior Clearance Clerk of Dunlop, Ms Scheepers, not to try and make contact with anybody in relation to the account by using the contact telephone number supplied by him. When she ultimately did try the contact number provided by the appellant, she discovered that it did not exist. He also instructed staff to ignore the usual procedures that require an official order form from government departments but to accept oral and informal orders by him and Barnard on this account. The appellant placed orders and furnished different delivery addresses for the orders. Numerous of the delivery addresses supplied by the appellant was the address of a private individual, Ms Kruger, also a state witness, who did business for her own account. She started buying tyres from Condor Enterprises, a business that Barnard, a buyer of tyres from Dunlop for the South African Police Services (SAPS), set up in order to do private business. Kruger placed her orders and made payments through an intermediary, Mulder. Invoices and delivery notes handed in at the trial corroborated Kruger's evidence that purchases made by her were on this secret account and were delivered to her business address. At least one cheque payment for these purchases was handed by Mulder to Barnard in the presence of the appellant. The accused even assisted an employee of Dunlop, Mr Bali, to purchase tyres for his personal use from Kruger at a reduced price.

[17] The facts summarised in the previous paragraph are common cause as the appellant's legal representative at the trial did not challenge the state witnesses on their evidence during cross examination. The cross examination was of an exploratory nature and the appellant's version was not put to the state witnesses.

[18] During his evidence the appellant tried to meet the state's version by explaining that he was approached by three men, Stefan Terblanche, Pieter Erasmus and an unknown black person, who identified themselves as employees of NI. They wanted to open an official account with Dunlop for the division of NI that they allegedly worked for. It was to be a highly secret account. The appellant took their details which included copies of their identity documents. A few days later they urgently wanted tyres which were then supplied on the instructions of the appellant on the account of another state department, delivered and paid. The appellant even visited their premises on their invitation to make an assessment of their likely need for tyres. He had no suspicion that they were not from NI, nor that the account that they opened were not for a government department. In terms of s 220 of the CPA the appellant ultimately admitted that the account was not opened for a department of NI. He received orders telephonically from Mulder and Barnard on this account, which he instructed members of Dunlop's staff to process. He knew that Barnard made purchases on that account for his private business. He was aware that Barnard received cheques in payment for tyres ordered on that account from Kruger through Mulder.

[19] Significantly, he did not testify that he ever received any orders on this account from any of the three men that initially approached him to open this account. He only went so far as to say that Terblanche asked him for a reference to a person with experience in the handling of a tyre account with Dunlop. He referred Terblance to Barnard. The appellant did not testify that Barnard was operating this account for the three men that opened the account, nor was any of this evidence put to Barnard.

[20] This summary of the appellant's evidence shows that he did not address the case against him. The only piece of evidence that has exculpatory potential is that he did not know that the three men did not in truth and reality represent a government institution.

[21] The uncontested evidence of the state witnesses gives rise to only one reasonable inference: that the appellant opened this account with the intention

to defraud Dunlop by allowing purchases on that account at the usual 45% discount to government departments, by persons and businesses that were not entitled to such discount from Dunlop. His attempt to hide behind the alleged secrecy of the account serves only to illustrate a false gullibility on his part and extraordinary improbabilities. It is simply unbelievable that as the National Contracts Manager of Dunlop he was so gullible that he believed that to open a highly secretive account for NI without any official documentation, to allow that account to be conducted informally and with the complete absence of any official documentation, and to allow individuals and businesses unconnected to NI - or to the individuals who opened the account - to make purchases on that account, did not amount to fraud.

[22] Insofar as the appellant suggests in his application for condonation, for the first time, that his true defence is that he has been the victim of the deceit of Barnard, this was never put to Barnard and is contrary to his own evidence insofar as he allowed people to purchase on that account for their own benefit.

[23] The appellant challenges the magistrate's finding that the failure to put his version to the state witnesses indicates that his version was a recent fabrication. He explains that it would have been senseless to put his version to the state witnesses as they would have been unable to comment on it. This is desperate and unfounded speculation by the appellant. The answers of the state witnesses to the appellant's version do not lie in the mouth of the appellant and, at the very least, a finding of recent fabrication would not have been possible if his version was put, even if it was not answered.

[24] Another alleged material misdirection that the appellant relies upon in his application for condonation is that the magistrate found that Erasmus does not exist. He alleges that Erasmus does indeed exist, that he has managed to make contact with him again and that his attorney has spoken to Erasmus over the telephone (this latter fact is confirmed by the attorney). But the magistrate did not find that Erasmus does not exist. Insofar as the appellant understood that he did, he fails to say how proof of the mere existence of

Erasmus would change the facts relied upon for conviction, or whether leave would be sought to introduce evidence that Erasmus did exist. In my view, the summary of the uncontested evidence above clearly shows that a finding of fact that Erasmus exists, would not change the inevitable conclusion that the appellant committed fraud.

[25] In relation to sentence the appellant relies on three alleged misdirections by the magistrate: that his admission to the probation officer, that the account that was opened was fictitious, was taken out of context to be an admission of knowledge that he was committing fraud; that the disparity in the sentence imposed on him and that imposed on Barnard is unsubstantiated (Barnard was sentenced to three years' imprisonment in terms of s 276(1)(h) of the CPA); and that the sentence imposed on him is shockingly inappropriate. (The latter alleged misdirection was not pursued in the heads of argument or during argument.)

[26] The first misdirection was not material. The magistrate used the finding only to find that the appellant had no remorse – and that fact was established independently of the misdirection.

[27] I turn to consider the argument based on the disparity of the sentences. The appellant defrauded his employer. The extent of Dunlop's loss as a result of this fraud is uncertain. It is common cause that an amount of approximately R165 000 remained outstanding on the account and was ultimately written off. The total amount of sales on that account, at an unjustified discount of 45%, was put by Scheepers as having been more than R300 000. The nature of the fraud is serious and the potential loss to Dunlop was huge.

[28] The magistrate distinguished between Barnard and the appellant because, unlike Barnard, the appellant defrauded his employer and made it possible for Barnard also to defraud Dunlop. The breach of a relationship of trust through the commission of fraud or theft is generally regarded as an aggravating factor, but a consideration of all other relevant factors still

remains essential in arriving at an appropriate sentence.[9] This the magistrate did. He individualised the sentences in express terms by taking the personal circumstances of the appellant and Barnard into account. (There was no intimation in this court that there was any failure by the magistrate to take the appellant's personal circumstances into account.)

[29] That the appellant perpetrated the fraud on his employer was not the only basis for the distinction drawn by the magistrate between Barnard and the appellant. Barnard's personal circumstances were vastly different to the appellant's: he had lost a young child; his financial circumstances were trying; he showed remorse; he was a soft hearted person who could easily be taken advantage of; and he suffered from depression which resulted from post traumatic stress disorder that arose from his active service in the South African Police Services. Similar mitigating factors are not evident from the appellant's circumstances. The magistrate's attempts to individualise the sentences, are sound and reflect that Barnard was given a lighter sentence rather than the appellant having been given a heavier sentence.

[30] Considering a fraud of this nature, committed by a person in the circumstances of the appellant, the sentence imposed does not induce a sense of shock.[10]

[31] There are no prospects of success on appeal in relation to conviction or sentence. No other factors relevant to condonation were raised or argued by any of the parties.

[32] Condonation was therefore rightly refused. The order dismissing the appeal that followed the order by the court a quo refusing condonation was however not a competent one as the appeal was not heard, and that order has to be set aside.

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[9] *S v Kunene* 2001 (1) SACR 199 (W) at 200d.

[10] To compare sentences in different matters is not a reliable guide to sentencing, but provides only a broad and general perspective. For that purpose reference is made to *S v Sindhi* 1993 (2) SACR 371 (A); *S v Howells* 1999 (1) SACR 675 (C); *S v Landau* 2000 (2) SACR 673 (W); *S v Kwatsha* 2004 (2) SACR 564 (E). See also *S v Blank* 1995 (1) SACR 62 (A) at 70b-71g and 81e-h.

[33] The following order is made:

The appeal against the refusal of the application for condonation is dismissed.

The order by the court a quo dismissing the appeal is set aside.

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S SNYDERS

Judge of Appeal

APPEARANCES:

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