THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 889/2015

In the matter between:

KARIN BRITZ **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Britz v S* (889/2015) [2016] ZASCA 86 (31 May 2016)

Coram: Tshiqi and Theron JJA and Fourie AJA

Heard: **24 May 2016**

Delivered: **31 May 2016**

Summary: Sentence – non-parole period in terms of s 276B(1) of the Criminal Procedure Act 51 of 1977 – imposed without affording the appellant an opportunity to address the court – that portion of the sentence set aside – sentence of 15 years' imprisonment shockingly inappropriate and reduced to 10 years' imprisonment.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Fourie J and Smith AJ, sitting as the court of appeal):

1. The appeal is upheld to the limited extent set out below.
2. The order of the trial court is set aside and in its stead is substituted:
   'The accused is sentenced to a period of 10 years' imprisonment antedated from 1 November 2011.'

JUDGMENT

Tshiqi JA (Theron JA and Fourie AJA concurring)

[1] This appeal is against sentence only. The appellant, Ms Karin Britz, was convicted in the Gauteng Specialised Commercial Crimes Regional Court, Johannesburg, on 81 counts of theft of money totalling R3.9 million, after she pleaded guilty to all the counts in terms s 112(2) of Criminal Procedure Act 51 of 1977 (the Act). She was sentenced to 15 years' imprisonment and a non-parole period of ten years was imposed in terms of s 276B of the Act. The trial court and subsequently the Gauteng Local Division, Johannesburg (Fourie J and Smith AJ) refused leave to appeal against sentence. The appellant appeals to this court with its special leave. It was contended on her behalf that the trial court misdirected itself in two respects with regard to the sentence imposed: First, in that a sentence of 15 years' imprisonment is shockingly inappropriate; and second, that the court did not provide the parties with an opportunity to address it before it imposed a non-parole period of imprisonment in terms of s 276B of the Act.[1]

[1] Section 276B of the Act provides:

[2] The offences for which the appellant was convicted occurred at her workplace and against her employer, Delmont Caldow Caterers (Pty) Ltd (Delmont), where she was employed as a bookkeeper and also tasked with making payments to the company's creditors. The payments to the creditors were either made by means of electronic transfer, cheque or in cash. Delmont had two bank accounts in two separate banking institutions and the appellant had a unique user-name and two passwords allocated to her to enable her to access both bank accounts. She committed the theft on separate occasions between January 2006 and February 2010. Her modus operandi was the same: she would make double payments simultaneously; one to a genuine creditor and the other fraudulently to her bank account or that of her husband or pay their own debts.

[3] Before she was sentenced she secured a pre-sentencing report prepared by a social worker. The report highlighted the following personal circumstances: She was a first offender and has since been divorced from her husband. During the subsistence of her marriage relationship, she had difficulty conceiving children naturally, and had used a small portion of the stolen amount towards fertility treatments and pregnancy tests. She had lost twins that she had conceived through the fertility treatments and attended counselling as a result thereof. She admitted that she had lived an unrealistic lifestyle. She also informed the social worker that she was involved in community based projects and one of her friends stated that she took care of his children when he was hospitalised for a period of four months after he had been in a motor vehicle accident. The complainant, a director of Delmont, was also interviewed. He stated that he felt aggrieved by the failure on the part of the appellant to explain what she had done with the money.

'**Fixing of non-parole-period**

(1)*(a)* If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)*(b)*, fix the non-parole-period in respect of the effective period of imprisonment.'

[4] The appellant's counsel, in mitigation, informed the trial court that she and her husband had repaid an amount of R50 000 and that an additional amount of R210 000, which was held in trust on her behalf after the sale of her immovable property, was attached and paid to the complainant.

[5] Sentencing is a matter pre-eminently in the discretion of the trial court.[2] The State has correctly conceded that that court erred in failing to afford the appellant an opportunity to address it before it imposed a non-parole period of imprisonment in terms of s 276B(1) of the Act. A sentencing court should only exercise its discretion to impose a non-parole period in exceptional circumstances. In *Strydom v The State* [2015] ZASCA 29 (23 March 2015), this court had occasion to consider s 276B(1). It held that a failure to afford the appellant an opportunity to address the court before it imposed a non-parole period of imprisonment constituted a misdirection.[3] It instructively held inter alia as follows (para 16):

'Section 276B entails an order which is a determination in the present for the future behaviour of the person to be affected thereby. . . . it is an order that a person does not deserve parole in future. . . . *Such an order should only be made in exceptional circumstances which can only be established by investigation and a consideration of salient facts, legal argument and perhaps further evidence upon which such a decision rests*.' (My emphasis.)

In *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA) para 22, an earlier judgment of this court considered in *Strydom*, the trial court, as in this case, had given no indication that the imposition of a non-parole order was being considered. It thus came as a surprise to the parties. On appeal this court said (para 12):

'Despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the Executive, it remains generally desirable for the court not to exercise that power'.

Regarding the process to be followed before such a sentence is imposed the court said (para 22):

'At least two questions arise when such an order is considered: first, whether to impose such an order and, second, what period to attach to the order. In respect of both considerations

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[2] See dictum by Innes CJ in *R v Mapumulo* 1920 AD 56 at 57.

[3] Paragraph 11. See also in relation to s 276B(2) of the Act, *S v Mthimkulu* [2013] ZASCA 53; 2012 (2) SACR 89 (SCA) para 21, where this court held that 'a failure to afford the parties the opportunity to address the sentencing court might . . . well constitute an infringement of . . . fair-trial rights.'

the parties are entitled to address the sentencing court. Failure to afford them the opportunity to do so constitutes a misdirection'. (My emphasis.)

[6] Since the trial court did not afford the parties an opportunity to address it before it imposed the non-parole period, there was no proper evidential basis laid for it and it is not clear whether there were any exceptional circumstances that informed the court's decision. As stated by this court in *Strydom*, the failure by a trial court to state its reasons for its decision is not only unfair to the respective litigants but also to the public.[4] Whilst the statutes do not demand this, it is a salutary practice developed and generally adhered to over a long period of time.[5] It follows that the failure by the trial court to follow due process before it imposed a non-parole order constituted a misdirection.

[7] However, consistent with the preservation of the trial court's discretion,[6] such a finding does not necessarily mean that the whole sentence imposed by the trial court needs to be set aside. It only affects that portion of the sentence which the trial court has declared to be a non-parole period. The question whether the sentence of 15 years' imprisonment is shockingly inappropriate is a separate issue and needs to be considered separately. I now proceed to deal with it.

[8] The trial court prepared a comprehensive judgment in which it carefully dealt with all the factors relevant when considering an appropriate sentence. It considered the personal circumstances of the appellant as highlighted in the pre-sentencing report, including her involvement in community based projects and her difficulty in conceiving children, and the loss of her twins. It however noted that it is not clear to what extent the appellant's state of mind had contributed to the commission of the offences, observing:

'I c[ould] understand if I had evidence before me that you were emotionally distressed and that your levels of thinking were reduced to a certain extent . . . that could offer some kind of mitigation.'

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[4] Paragraph 14.
[5] Ibid; *S v Immelman* 1978 (3) SA 726 (A) at 792C.
[6] *S v Pillay* 1977 (4) SA 531 (A) at 534H-535G. See also S S Terblanche *The guide to sentencing in South Africa* 2 ed (2007) at 410-411. See further *S v Fazzie & others* 1964 (4) SA 673 (A) at 684B-C.

I endorse that reasoning by the trial court. There is no evidence that shows any connection between the appellant's difficulties to conceive children naturally and the loss of her twins and her criminal actions.

[9] The court also considered the aggravating circumstances. It was disturbed by the fact that the appellant had not disclosed what she had done with the money and held a view that she was not prepared to take it fully into her confidence. I cannot fault the trial court's impression in that regard. There is paucity of information on what motivated the appellant's conduct and on how she used the money.

[10] Counsel for the appellant urged us to find that her plea of guilty was a sign of genuine remorse. I am not persuaded. The appellant, although having confessed immediately to her employer after the crime was discovered, probably pleaded guilty because she had no cogent defence. She had been a bookkeeper in the company and in order to access the accounts, she used her unique user-name and the passwords allocated to her. It was thus easy to link the theft to her and she probably could not explain how another person had accessed the bank accounts using her user-name and passwords. In *S v Seegers* 1970 (2) SA 506 (A) at 511G-H, this court stated:

'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'

[11] The trial court also considered as aggravating, the fact that the theft occurred over a lengthy period of time and regarded as 'manipulative', the fact that the appellant made double payments simultaneously: one to a genuine creditor and the other fraudulently and in equal amounts to herself (into her personal account, to her ex-husband, or to her creditors). Thus, making it difficult for the employer to detect the crime. This the court found to be 'premeditated' and 'well planned'. It also found as aggravating, the fact that the appellant stole from her employer, thus violating her position of trust. In all those respects the trial court's reasoning is sound and there is no basis to conclude otherwise.

[12] Before deciding on an appropriate sentence, the trial court considered several sentencing options such as a suspended sentence, imposition of a fine and correctional supervision, but found all those options unsuitable. In the end it settled on direct imprisonment as the only suitable option. Before imposing sentence, it gave a synopsis of the different sentences imposed by the courts for similar offences: In *S v Sinden* [1995] ZASCA 104; 1995 (2) SACR 704 (A), the accused had also been employed as a bookkeeper during which time she had stolen an amount of R138 000 from her employer over a period of 14 months. She had a family and children but this court found that she had shown no sign of remorse and thus upheld a sentence of an effective term of four years' imprisonment. In *S v Sadler* [2000] ZASCA 13; 2000 (1) SACR 331 (A), the accused had stolen an amount of R300 000 from his employer, a bank. He had also been a first offender and the trial court had imposed a wholly suspended sentence which had been coupled with community service, but this court, on appeal, substituted it with a sentence of four years' imprisonment. In *S v Lister* [1993] ZASCA 82; 1993 (2) SACR 228 (A), which also concerned theft by a bookkeeper from an employer in the amount of R95 000 over a period of 11 months; a sentence of four years' imprisonment which had been imposed by the trial court was confirmed on appeal. That sentence was heavily influenced by the appellant's previous convictions for which she received a suspended sentence; and also by the fact that she committed the offences within the period of suspension.[7]

[13] In support for its contention that the sentence imposed is disproportionate counsel for the appellant has also referred to the following cases: In *S v Blank* [1994] ZASCA 115; 1995 (1) SACR 62 (A), a stockbroker was convicted for fraud involving two schemes spanning over a period of 17 months during which he made profits exceeding R9.75 million, of which he had personally benefited in the amount of R1.5 million. He was sentenced to eight years' imprisonment. In *S v Gardener & another* [2011] ZASCA 24; 2011 (4) SA 79 (SCA), the accused were implicated in the collapse of a JSE listed company, Health & Racquet Club Ltd, which affected many shareholders throughout the country. The accused, who had benefited in the amount of R6 million, were both sentenced to seven years' imprisonment.

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[7] At 229*h*-230*a*.

[14] As the trial court noted, white-collar crime does not only affect the particular complainant but has huge implications for the economy as a whole, including ordinary citizens whose employment may be affected, if, for example, a business that has become a target of theft of huge sums of money is rendered insolvent. The picture that emerges from a summary of the above cases shows that the courts regard white-collar crime as a serious offence and do not hesitate to impose direct imprisonment where necessary.

[15] In *Sadler*, the court lamented (para 11-13):

'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 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 this 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.

. . . 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 punishment will be fostered and more will be tempted to indulge in it.

. . . It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration.'

[16] The trial court was thus justified in finding that a lengthy term of imprisonment was appropriate. However, the trial court failed to exercise its discretion judiciously in imposing a sentence of 15 years. The appellant was a first offender and a conspectus of the similar cases cited above[8] shows that there is a striking disparity between the sentence imposed by the court a quo and that which this court would have imposed. This court is thus justified to interfere with the sentence imposed. I am of the view that a sentence of 10 years' imprisonment should have been imposed.

[8] See also *S v Van Niekerk* 1993 (1) SACR 482 (NC).

[17] I therefore make the following order:

1. The appeal is upheld to the limited extent set out below.
2. The order of the trial court is set aside and in its stead is substituted:

   'The accused is sentenced to a period of 10 years' imprisonment antedated from 1 November 2011.'

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

For Appellant:	L C Jansen van Vuuren
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