IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A179/2006

DATE: 1 FEBRUARY 2008

In the matter between:

KARIN MOUTON Appellant

and

THE STATE Respondent

J U D G M E N T

BOZALEK, J:

[1] The appellant was convicted on 1 September 2004 on a charge of fraud in the Clanwilliam Magistrate's Court and sentenced to two years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. With the leave of the magistrate she now appeals against both her conviction and sentence.

[2] At the relevant time the appellant was employed as a teller at First National Bank in Clanwilliam. She pleaded not guilty to the charge that on six separate occasions between 16 and 25 July 2001 she falsely represented to

the bank that a bank customer, one M J Waldeck, had made withdrawals from his account in various amounting totalling R9 700, whereas in truth it was not Waldeck who had made the withdrawals but herself. In passing, it is not clear why the appellant was charged with one count of fraud incorporating the six separate withdrawals, whereas what was in fact being dealt with were six separate counts of fraud. Be that as it may, this formulation of the charge did not prejudice the accused, in fact the opposite was the case.

[3] For the State, the complainant Waldeck and a bank official, one Harlow, testified. The appellant also testified and admitted virtually the entire factual content of the State's case. It is common cause that:

1. The appellant opened a savings account for the complainant who was literate and provided a specimen signature.
2. When making a withdrawal, such accounts are operated by the customer tendering his or her savings book to the teller, signing a withdrawal slip and, in appropriate circumstances, tendering proof of identity. In the case of the six withdrawals in question the complainant had neither made the withdrawals

nor signed any of the withdrawal slips. Instead, on each occasion the withdrawal slips had been signed by the making of a mark, an "X".

[4] The appellant had noted in writing on each withdrawal slip that she had verified the signature (in fact the mark) of the person making the withdrawal and, moreover, that the person making the withdrawal was known to her. In each case however the appellant had not verified the mark of the withdrawer which ordinarily requires the teller to personally compare the customer's signature with his or her specimen signature, or have this attended to by someone at the enquiry desk. Nor in each case had the withdrawer been known to the appellant. The appellant had also not obtained management's authorisation for any of the withdrawals.

[5] The manner in which the appellant had dealt with each withdrawal had been contrary to established bank procedures and not in accordance with her training on a teller's course which she had successfully passed approximately a year earlier.

In convicting the appellant, the magistrate accepted the State's evidence and, on the basis of circumstantial evidence, concluded that the only inference which could be drawn from the proven facts was that she had herself completed the withdrawal forms and pocketed the proceeds of the withdrawals, thereby defrauding the bank.

[6] On appeal it was contended on behalf of the appellant that the magistrate had erred in finding that the aforesaid inference was the only reasonable one which could be drawn from the proven facts and further that the State had proved only negligence on the part of the appellant, with the result that she should have been acquitted on the charge.

[7] The magistrate gave a comprehensive and reasoned judgment. He recognised that in order to convict the appellant upon the basis of circumstantial evidence, not only had that inference to be in accordance with all the proven facts, but that all other reasonable inferences were excluded. He correctly approached the matter furthermore on the basis that if the appellant's version was reasonably possibly true, even though he might have

considered it to be false, the appellant was entitled to the benefit of the doubt.

[8] Having regard to the proven facts set out above, I can find no fault with the magistrate's conclusion that these are congruent with the appellant having completed the withdrawal forms herself, with fraudulent intent.

[9] Furthermore, I am in agreement with the magistrate's conclusion that this is the only reasonable inference which may be drawn from the proven facts. In the first place it is highly unlikely that a bank teller would expose herself on six separate occasions to the risk of disbursing relatively large sums of money to a stranger who produces neither a bank book nor proof of his identity or without, at the very least, verifying his signature or having this done at the enquiries desk. The only explanation which the appellant could give in this regard was that she was trying to be helpful and avoid a long queue and that this was how things were done in the bank. I fail to see how checking a signature or a customer's identity would cause long queues and even less so if this was done by the enquiry counter staff. The appellant's claim that the manner in which she dealt with the withdrawals was how it was customarily done at the

bank, not only runs counter to the evidence of the bank official, Harlow, but is highly improbable given the risk of fraud such a casual method of business would promote.

[10] The suggestion as to who could have made these withdrawals other than the appellant was that the complainant's cousin or someone else known to the complainant could have been aware of his bank account and pretended to be him. Not only is this suggestion entirely speculative but it does not explain how such person could have obtained the number of the complainant's savings account when, according to the complainant's evidence, the book was safely locked up at all times. The appellant herself claimed no recollection at all of any of the transactions. Even if this speculative explanation of events was reasonably possible, it does not explain how any such person could make six withdrawals effectively cleaning out the complainant's account in a period of less than 10 days, without exciting any suspicion on the part of the appellant. I am satisfied therefore that the magistrate correctly convicted the appellant on the charge of fraud.

[11] On appeal it was contended that in sentencing the appellant to two years' imprisonment the magistrate had

misdirected himself in not placing sufficient emphasis on her personal circumstances. At the time of sentencing the appellant was 27 years old, employed as a clerk at the South African Police Service and was a single parent of two children aged four years and one year of age. Those children will now be approximately seven years and four years old respectively. Appellant was a first offender and had the financial ability to pay a fine. A probation officer's report regarding the suitability of a community service sentence was obtained but it was not handed in by the defence because it had been unfavourable to the appellant.

[12] The magistrate stated that he took into account that appellant had two young children but added that this factor should not influence the Court to impose a sentence which was inappropriate. There is no evidence in the record however concerning how the appellant's children would be cared for in the event that she was incarcerated, nor did the magistrate make any enquiries in this regard. In M v S 2007(12) BCLR 1312 (CC), the Constitutional Court considered what the duties of a sentencing court are in the light of section 28(2) of the Constitution when the person being sentenced is the

primary caregiver of minor children. That section provides that:

> "A child's best interests are of paramount importance in every matter concerning the child".

The Court held that section 28(2) read with section 28(1(b) provided that every child has a right to family or parental care or appropriate alternative care when removed from the family environment. It imposed four responsibilities on a sentencing court when a custodial sentence for a primary caregiver was in issue. They are:

1. To establish whether there would be an impact on the child.
2. To consider independently the child's best interest.
3. To attach appropriate weight to the child's best interests.
4. To ensure that the child would be taken care of if the primary caregiver was sent to prison.

The Court laid down guidelines to promote uniformity of principles, consistency of treatment and the individualisation of outcomes in such matters. One guideline is that if there is a range of appropriate sentences on the well-known Zinn or triad approach, then the court must use the paramountcy principle concerning the interests of the child as an important guideline in

deciding which sentence to impose. In effect, a court sentencing a primary caregiver must undertake a balancing exercise. The two competing considerations to be weighed by the court are, firstly the importance of maintaining the integrity of family care and, secondly the duty on the State to punish criminal misconduct.

[13] In my view, these duties on the part of the sentencing court, although of course yet to be spelt out by the Constitutional Court, were nevertheless not adequately observed by the magistrate. No enquiry at all was directed at the interests of the appellant's minor children and, more specifically, how they would be cared for in her absence.

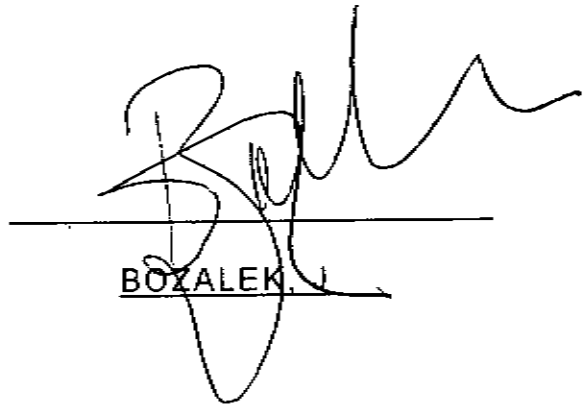
[14] In my view, furthermore, this case is clearly not one where only a custodial sentence was appropriate. The appellant was found guilty of a serious offence involving a breach of trust and she expressed no meaningful remorse for her actions. Taking all the circumstances of the matter into account, however, a range of sentencing options including, but not limited to a fine, suspended sentence or a community service sentence, were *prima facie* appropriate.

[15] In this regard it is unfortunate that, notwithstanding the attitude of the appellant's legal representative, the magistrate did not insist that the probation officer's report in regard to a sentence of community service be placed before him. The magistrate's failure to give proper weight to the interests of the appellant's minor children was, in my view, a misdirection entitling this Court to interfere with the sentence.

[16] Taking all relevant factors into account I consider an appropriate sentence to be a fine of R5 000 or one year's imprisonment with a further period of imprisonment of one year suspended for five years on condition that the accused is not found guilty during this period of any offence involving dishonesty. Should the appellant be unable to pay the entire fine immediately she may approach the clerk of the criminal court in Clanwilliam with a view to making payment thereof in instalments over a limited period of time. I may add she may approach the clerk of the criminal court or a magistrate in Clanwilliam.

[17] In the result I would dismiss the appeal against conviction but uphold the appeal against sentence. I

would set aside the sentence imposed by the magistrate and replace it with the sentence set out above.



BOZALEK, J

MOTALA, J: I agree and it is so ordered.

MOTALA, J