THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 1209/2017

In the matter between:

KUTLUOANO URIAH MALEKA **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Maleka v The State* (1209/2017) ZASCA 114 (18 September 2018)

Coram: Ponnan, Tshiqi and Mbha JJA

Heard: 15 August 2018

Delivered: 18 September 2018

Summary: Criminal law and procedure – sentence – appellant convicted on 29 counts of theft and sentenced to 15 years' imprisonment – appeal against sentence – leave to appeal refused by trial court – petition in terms of s 309 of the Criminal Procedure Act refused by the high court – special leave to appeal against the refusal of that petition.

ORDER

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

The appeal is dismissed.

JUDGMENT

Mbha JA (Ponnan and Tshiqi JJA concurring):

[1] The appellant was arraigned before the Regional Court for the Regional Division of Gauteng, held at the Specialised Commercial Crimes Court, Johannesburg on 29 counts of fraud, alternatively theft, further alternatively contravening ss 11(1) and 11(2) of the Banks Act 94 of 1990 and s 7(3) read with ss 1, 8 and 36 of the Financial Advisory and Intermediary Services Act 37 of 2002.

[2] The appellant pleaded guilty and was duly convicted of the 29 alternative counts of theft. Those were taken together for the purpose of sentence and the appellant was sentenced to 15 years' imprisonment. The appellant's application to the trial court in terms of s 309B of the Criminal Procedure Act 51 of 1977 (the CPA) for leave to appeal against sentence was dismissed. The appellant then petitioned the Gauteng Local

Division, Johannesburg, for leave to appeal in terms of s 309C(2) of the CPA. His petition was dismissed.

[3] The appellant thereupon petitioned this court in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 (the Act)[1] for special leave to appeal the high court's order dismissing his petition. The two judges, who considered the appellant's petition in chambers, granted the appellant special leave to appeal against the dismissal of his petition.

[4] Accordingly, what this court has to decide is whether or not the high court was correct in dismissing the appellant's petition to it. If that court erred, then this court must set aside the order of the high court; grant the appellant leave to appeal and refer the matter back to that court to hear the appeal on its merits. That requires a consideration of whether or not the appellant enjoys reasonable prospects in his proposed appeal to the high court against sentence.

[5] The background facts are set out in the statement by the appellant in terms of s 112(2) of the CPA.

[6] The appellant incorporated a company, Titus Industries (Pty) Ltd, with company registration number 2011/127978/07 of which he was a director. Thereafter the

[1] 'Section 16 (1) Subject to section 1 (1), the Constitution and any other law-
…
(b) an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having being granted by the Supreme Court of Appeal ….'

appellant approached members of the public, to wit the persons listed in the charge sheet, and invited them to invest their moneys with him and his aforesaid company, with a promise that such investments would yield guaranteed returns at specific times. After such invitation, the appellant furnished the would-be investors with two account numbers, being a Standard Bank account number 021552231 and a Nedbank account 1045146331, into which their investments had to be deposited. The complainants paid various amounts into the appellant's aforementioned bank accounts on the dates reflected in the charge sheet. The total amount that was paid into the accused's aforesaid accounts is R1 877 200. Of this amount, the appellant appropriated approximately R280 000 as a deposit to purchase a luxury motor vehicle ie a Jaguar F model, whilst the rest was spent on trips and to purchase other luxury items.

[7] At the time when the appellant met with and invited the complainants to invest their moneys with him and his company, he knew that neither he nor his company would invest the moneys on the complainants' behalf and that the complainants would not receive the returns as promised. His intention was to permanently deprive the complainants of their moneys in an unlawful manner in order to utilise it for his own needs.

[8] In his statement in terms of s 112(2) of the Act, the appellant admitted that the complainants suffered actual prejudice as a result of his unlawful and wrongful conduct. He expressed regret for his conduct and that he was willing to repay the moneys to the complainants. He also said that he had deposited R80 000 into his attorney's trust

account and undertook to make available a further R500 000 to reimburse the complainants.

[9] Mr Van Schalkwyk, appearing for the appellant, submitted that the regional magistrate exercised his discretion unreasonably in imposing a sentence of 15 years' imprisonment and should have imposed a community based sentence, alternatively should have suspended part of the sentence of imprisonment imposed. He further submitted that the regional magistrate accorded undue weight to the aspects of deterrence and retribution, and failed to consider the appellant's relative youthfulness and prospects of rehabilitation in light of the fact that he was a first offender. In addition, the regional magistrate ought to have considered correctional supervision coupled with restitution to the complainants as an alternative sentencing option.

[10] It is trite that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial court. This principle was aptly described by E M Grosskopf JA in *S v Blank* 1995 (1) SACR 62 (A) as follows:

'It has repeatedly been emphasised by this Court that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial Judge and that a Court of appeal can interfere only where such discretion was not properly exercised. One of the ways in which it may be shown that a trial court's discretion was not properly exercised is by pointing to a misdirection in the court's reasons for sentence. The principle in this regard is expressed as follows by Trollip JA in *S v Pillay* 1977 (4) SA 531 (A) at 553E-F:

"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the

essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".'

[11] I am not satisfied that the magistrate did not properly exercise the sentencing discretion in this case. At the commencement of his judgment on sentencing, the regional magistrate asserted that he was going to be guided by the well-known triad set out in *S v Zinn*[2] namely, the personal circumstances of the accused, the seriousness of the offence, and the interests of society. He also precisely set out the purposes of punishment as being deterrence, preventative, reformative and retributive. The regional magistrate then took into consideration the fact that the appellant was a young person and was 21 years old when he committed the offences, that he was a first offender, that he pleaded guilty to the offences and that he was single with no dependants.

[12] The regional magistrate also took into account the following pertinent facts namely, that the losses were substantial and in fact only a negligible amount had been repaid to each of the complainants, that the offences were well planned amounting to what the regional magistrate appropriately identified as a pyramid scheme, that the offences were committed over a protracted period of time, that the appellant at no stage

[2] *S v Zinn* 1969 (2) SA 537 (A) at 540.

considered stopping the commission of the offences and that he had not displayed genuine remorse for his conduct. Furthermore, some of the persons the appellant had targeted were vulnerable, elderly pensioners. To make matters worse, some of the complainants were related to him. What aggravates the matter is that the offences, pre-meditated as they were, were actuated by greed and the illicit gains were used to buy a luxurious Jaguar motor vehicle, other unspecified luxurious items and were spent on trips.

[13] The record shows that the regional magistrate also gave due consideration to the undertaking the appellant had made to reimburse the complainants. In this regard, one of the complainants Ms Theodora Mtembu, who testified in aggravation of sentence, expressed the wish that the appellant should compensate her for her loss. It is common cause that the matter was postponed on several occasions to afford the appellant an opportunity to repay the stolen money. However, all promises to repay by the appellant amounted to nought and in fact proved him to be a pathetic and dishonest liar. On one occasion his attorney informed the court that the appellant told her that he had deposited R1 million into her trust account but when she went to check with her bank, she discovered this was not true. On another occasion the appellant deposited a cheque of R322 000 into her trust account which was later dishonoured. Small wonder that ultimately the regional magistrate made the finding, in reference to the appellant, that '… the person standing in front of this court, is a very, very dishonest person'.

[14] It follows from what I have said that there are no reasonable prospects of the proposed appeal against sentence succeeding. The appeal is accordingly dismissed.

_____

B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:	J O van Schalkwyk
Instructed by:	BDK Attorneys, Johannesburg
	c/o Symington de Kok, Bloemfontein
For First Respondent:	B C Chauke
Instructed by:	The Director of Public Prosecutions, Johannesburg
	c/o The Director of Public Prosecutions, Bloemfontein