Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CAF 05/2022

In the matter between:

KEDUMETSE MACWILLIAM NGAKANTSI **Appellant**

and

THE STATE **Respondent**

CORAM: HENDRICKS JP et MALOWA AJ et MFENYANA AJ

DATE OF HEARING	:	**18 NOVEMBER 2022**
DATE OF JUDGMENT	:	**16 JANUARY 2023**
FOR THE APPELLANT	:	**ADV. P SMIT**
FOR THE RESPONDENT	:	**ADV. RAMAKGAPHOLA**

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date and time for hand-down is deemed to be 10h00 on 16 January 2023.

ORDER

Consequently, the following order is made:

(i) The appeal against the convictions in respect of contraventions of section 72 (2) of the Criminal Procedure Act 51 of 1977 fails.

(ii) The appeal against the sentence of R200 000.00 (two hundred thousand rands) in respect of each of the two counts of contravening section 72 (2) of the Criminal Procedure Act 51 of 1977 is upheld and the sentence is set aside and is substituted with the following:

"The accused is sentenced to a fine of R200.00 (two hundred rands) or two months imprisonment on each of the two (2) counts."

(iii) The appeal against the sentence of five (5) years imprisonment in terms of section 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 is upheld, and the sentence is set aside and is substituted with the following sentence:

"The accused is sentenced to five (5) years imprisonment of which two (2) years imprisonment is suspended for five (5) years on condition that the accused is not again

convicted of an offence of which dishonesty is an element, committed during the period of suspension."

JUDGMENT

Hendricks JP

Introduction

[1] The appellant was arraigned before the Regional Court, Vryburg and charged with one count of corruption and two counts of failure to appear in court. On the corruption count he was sentenced to five (5) years imprisonment. On the two counts of failure to appear in court on two occasions, he was sentenced to a fine of R200 000.00 on each count. Leave to appeal in the Regional Court was refused by **Regional Magistrate Sevall**. The appellant then petitioned the High Court (Judge President) of this Division. The two judges allocated the petition (**Djaje J** [as she then was] and **Morwane AJ**) refused the petition against both conviction and sentence. Dissatisfied about this outcome of the petition, the appellant then successfully petitioned the Supreme Court of Appeal (SCA). The following order was made by the SCA:

> *"1. The appeal is upheld.*
>
> *2. The order of the high court refusing the appellant leave to appeal in terms of **s 309C** of the **Criminal Procedure Act 51 of 1977**, is set aside and replaced with the following order:*
>
> *'The appellant is granted leave to appeal to the full court of the North West Division of the High Court against:*
>
> *(a) his convictions in respect of the contraventions of **s 72** of the **Criminal Procedure Act 51 of 1977** and the sentences imposed pursuant thereto; and*

(b) *the sentence imposed on him in respect of his conviction of corruption in terms of **s 4** of the **Prevention and Combating of Corrupt Activities Act 12 of 2004**."*

[2] The SCA per **Schippers JA** with whom **Ponnan JA** and **Ledwaba AJA** concurred, succinctly summarized the facts and issues to be decided on appeal. I can do no better than to borrow from their summary. They stated:

> *"[2] The facts are largely common ground. The appellant, a constable in the Stock Theft Unit (the Unit) of the South African Police Service (the SAPS) was charged in the Vryburg Regional Court with one count of corruption under s 4(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the Corrupt Activities Act). The State alleged that in January 2012 the appellant corruptly sold a stray cow for R3 000 in cash for his own benefit. The court convicted him of contravening s 4(1) of the Corrupt Activities Act. The appellant was sentenced to five years' imprisonment for this offence.*
>
> *[3] In the course of the trial the appellant, who had been released on warning, failed to appear in court on two occasions, namely 8 October 2015 and 18 April 2016. A week before he had to appear in court on 8 October 2015, the appellant consulted Dr Mbabane, his family doctor, who referred him to Dr Tshabalala, a psychiatrist. The latter admitted him to hospital where the appellant remained for three weeks. Dr Tshabalala certified that he was unable to attend the court proceedings from 5 October 2015 to 9 December 2015. Regarding his failure to appear on 18 April 2016, the appellant said that his body had become weak and he submitted a medical certificate by Dr Mbabane, stating that he was suffering from psychosis and indisposed from 15 to 19 April 2016.*

[4] At the enquiry into his failure to appear in court in terms of s 72(2) of the CPA, the appellant adduced the evidence of Dr Ntawisi, a psychiatrist whom he consulted on 16 May 2016. His diagnosis was that the appellant suffered from a severe major depressive disorder that could cause a number of physical conditions, and that he had suicidal tendencies. The appellant testified that he became very anxious close to each court date when he was due to be sentenced. His body became weak and he consulted a doctor. He denied that this was planned and said that his body reacted in that way. The trial court concluded that the appellant's failure to appear was wilful, found him guilty on two counts of contravening s 72(2) of the CPA and sentenced him to a fine of R200 000 on each count.

[5] The appellant's application for leave to appeal was dismissed by the regional court. He then petitioned the high court in terms of s 309C of the CPA. Djaje J and Morwane AJ, who considered the petition, dismissed it in chambers on 13 February 2019. The appellant thereupon petitioned this Court for special leave to appeal the dismissal of his petition by the high court. The order of the two judges of this Court, who considered the appellant's petition and referred it to this Court, was limited to the convictions and sentences relating to the contraventions of s 72 of the CPA, and the sentence imposed for the contravention of s 4(1) of the Corrupt Activities Act.

[6] The judgment sought to be appealed against is a judgment of the regional court. Since the petition for leave to appeal was refused by the high court, this Court is not called upon to consider the substantive merits of the appeal, but whether the high court should have granted leave to appeal. The test is whether there are reasonable prospects of success in the envisaged appeal.

[7] Section 72(2) of the CPA provides, inter alia, that an accused released on warning who fails to appear, shall be guilty of an

offence and liable to the punishment prescribed in subsection (4). In terms of s 72(4), if a court is satisfied that an accused was duly warned to appear and has failed to do so, it may,

> *'. . . in a summary manner enquire into his failure and, unless such accused or such person satisfies the court that [there is a reasonable possibility that] his failure was not due to fault on his part, sentence him to a fine not exceeding R300 or to imprisonment for a period not exceeding three months.'*

In S v Singo, the Constitutional Court said that the italicised words in the above quotation should be read as if incorporated in s 72(4). This means that the accused need merely satisfy the court that there is a reasonable possibility that his failure to appear was not due to fault on his part.

[8] The argument advanced in respect of the appellant's conviction on these charges is that on the evidence in its totality, and in particular the medical evidence adduced, there is a reasonable prospect of a court on appeal arriving at the conclusion that his failure to appear in court on the two occasions in question, was not due to any fault on his part. As to the sentence imposed upon the appellant by the regional court for his conviction on each of these two counts, the argument is that the sentence appears, on the face of it, to have exceeded the maximum amount prescribed by the section.

[9] Regarding the sentence for the contravention of s 4(1) of the Corrupt Activities Act, the appellant's counsel made the following submissions. The charge, albeit serious, was a single count that did not involve a large amount. The appellant was a first offender. He was not dismissed from the SAPS after disciplinary proceedings were brought against him, and at the time of sentencing was still employed at the Unit. There is a reasonable

prospect that an appellate court may alter the sentence imposed, or consider another form of sentence to meet the legitimate expectation of society that corrupt officials be duly punished, having regard to the particular circumstances of this case.

[10] There is accordingly much to be said for the argument that there are reasonable prospects of success in the envisaged appeal."

[3] The crisp issues to be decided in this appeal by this Full Court is whether:

(a) the convictions of two counts of contravening section 72 (2) of the Criminal Procedure Act 75 of 1977 (CPA) is in accordance with justice and whether the sentence imposed is appropriate and just;

and

(b) whether the sentence of five (5) years imprisonment for the corruption count is fair, just and appropriate.

[4] As a starting point insofar as the conviction based on the enquiry in terms of section 72 (2) for failure to appear in court are concerned, the SCA did not deal with the merits of the appeal. In paragraph [6] of that judgment it is stated that "*Since the petition for leave to appeal was refused by the high court, this Court is not called upon to consider the substantive merits of the appeal, but whether the high court should have granted leave to appeal. The test is whether there are reasonable prospects of success in the envisaged appeal.*"

See: **S v Khoasasa** 2003 (1) SACR 123 (SCA).

S v Tonkin 2014 (1) SACR 583 (SCA).
De Almeida v S [2019] ZASCA 84.

[5] Insofar as his failure to appear in court is concerned during the enquire held in terms of section 72 (2), the following is stated by the SCA: "*the appellant adduced the evidence of Dr. Ntawisi, a psychiatrist, whom he consulted on 16 May 2016. His diagnosis was that the appellant suffered from a severe major depressive disorder that could cause a number of physical conditions, and that he had suicidal tendencies. The appellant testified that he became very anxious close to each court date when he was due to be sentenced. His body became weak and he consulted a doctor. He denied that this was planned and said that his body reacted in that way*." Whilst there is no onus on the accused to prove his innocence in a section 72 (2) enquiry, (s)he need to satisfy the court that there is a reasonable possibility that his/her failure to appear in court, was not due to fault on his/her part, but due to reasonable circumstances beyond his/her control.
<u>See:</u> **S v Singo** 2022 (2) SACR 160 (CC).

[6] Under the circumstances of this case, I am unconvinced that the explanation for failure to appear proferred is at all reasonable. The history of the matter clearly shows that the appellant, as accused, stood trial and attended court regularly until the eve of the dawning of the day that he had to face the inevitable and be sentenced. It is than that his "*body became weak*." Much as there is no onus or burden of proof on an accused person to prove his innocence in this regard, he has to satisfy the court that there is a reasonable possibility that his

failure to appear was not due to fault on his part. This, the appellant in my view failed to do. I am convinced that the failure to appear was due to fault on his part because he proverbially speaking got cold feet when he were to be sentenced, and he was trying to delay the inevitable outcome and finalization of the case.

[7] Insofar as the sentence of R200 000.00 (two hundred thousand rand) on each count is concerned, it behoves no argument that it is grossly excessive. The prescribed fine in terms of section 72 (2) of the CPA is a maximum of R300.00. The fine imposed should not exceed R300.00. The Regional Magistrate misdirected himself and erred in imposing a fine that is **667 times more** than that prescribed by the legislature. The oft stated maximum that a Magistrate court is a creature of statute finds application in this matter too. The Magistrate was not at liberty to impose such an excessive fine in contrast to what the legislature ordained. This is indeed a gross misdirection that warrants interference by this Court. In my view, a fine of R200.00 for each of the two counts should be imposed.

[8] No appeal lies against the conviction on the count of corruption. The appeal is only against the sentence of five (5) years imposed. This is so because the two judges of the SCA, who considered the appellant's petition and referred it to the SCA Court to consider, limited it to the convictions and sentences relating to the contraventions of section 72 of the CPA, "**and the sentence imposed for the contravention of section 4 (1) of the Corrupt Activities Act**."

(emphasis added)

[9] Sentence is primarily within the discretion of the trial court and a court of appeal with not lightly interference with the exercise of that discretion by the trial court. Only in limited circumstances will a court of appeal interfere for example where the sentence imposed is grossly excessive and totally out of proportion with the crime committed or where the sentence imposed is shockingly inappropriate and totally disproportionate.

<u>See:</u> **S v Kibido** 1998 (2) SACR 213 (SCA).

[10] There was much debate on paper what an appropriate sentence should be with reference to different case law. We are indeed grateful to counsel for their valuable contributions in this regard. Having considered all the relevant facts for the impositioning of a just, suitable and appropriate sentence bearing in mind the trial of the offender, the nature and seriousness of the offence committed, as well as the interest of society, I am of the view that the sentence imposed is harsh and should be blended with a measure of mercy. The fact that that it is only one stray cow which was sold for R3000.00 should also be taken into account. Taken into consideration the personal circumstances of the appellant holistically, the seriousness of the offence, as well as the interest of society, I am of the view that a portion of the sentence imposed on this count, should be suspended on certain conditions.

<u>Order</u>

[11] Consequently, the following order is made:

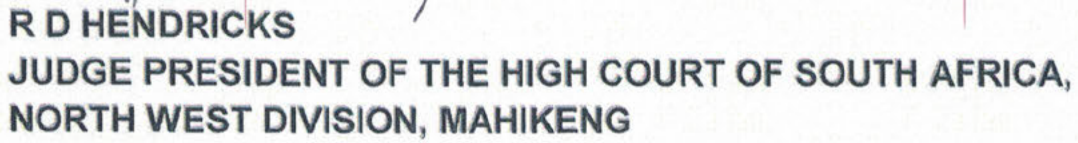
(i) The appeal against the convictions in respect of contraventions of section 72 (2) of the Criminal Procedure Act 51 of 1977 fails.

(ii) The appeal against the sentence of R200 000.00 (two hundred thousand rands) in respect of each of the two counts of contravening section 72 (2) of the Criminal Procedure Act 51 of 1977 is upheld and the sentence is set aside and is substituted with the following:

"The accused is sentenced to a fine of R200.00 (two hundred rands) or two months imprisonment on each of the two (2) counts."

(iii) The appeal against the sentence of five (5) years imprisonment in terms of section 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 is upheld, and the sentence is set aside and is substituted with the following sentence:

"The accused is sentenced to five (5) years imprisonment of which two (2) years imprisonment is suspended for five (5) years on condition that the accused is not again convicted of an offence of which dishonesty is an element, committed during the period of suspension."



R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

S MFENYANA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree

M MALOWA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG