IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CRIM CASE NO. 268/2020**

In the matter between:

THE KING

vs

NOKULUNGA ZAMBANE SIMELANE

Neutral Citation: *The King v Nokulunga Zambane Simelane (268/2020) [2025] SZHC 45 (18 March 2025)*

CORAM: **N.M. MASEKO J**

FOR THE CROWN: **ATTORNEY MS. NCAMSILE MASUKU**

(PRINCIPAL CROWN COUNSEL DPP's CHAMBERS)

FOR THE ACCUSED: **ATTORNEY MR. P. M. DLAMINI**

DATE OF WRITTEN SUBMISSIONS BY ACCUSED: **05 DECEMBER 2024**

DATE OF WRITTEN SUBMISSIONS BY CROWN: **10 DECEMBER 2024**

DATE OF JUDGMENT ON SENTENCE: **18 MARCH 2025**

Preamble: *Criminal Procedure – Sentence – Factors to be taken into account when imposing a sentence as enunciated in the triad – Factors to be considered in imposing a sentence on an employee who had breached the trust of his/her employer by committing theft – Legal authorities discussed.*

JUDGMENT

MASEKO J

[1] The accused person stands convicted of the offences of Theft of jewellery from her place of employment and also convicted of contravening the Money Laundering and Financing of Terrorism (Prevention) Act of 2011 it being alleged that the accused sold the stolen jewellery and used the proceeds thereof for her personal needs. The Crown alleged that the act of selling the stolen jewellery and deriving cash from such sales generated proceeds of unlawful activities which constitute money laundering.

[2] The Accused has submitted extensive submissions in the mitigation of sentence and why this Court should exercise leniency in whatever sentence it may impose. It is trite law that the trial Court is the one that is better placed to impose an appropriate sentence in any given circumstances.

[3] *In casu* the Accused having been found guilty of two serious offences still deserves to be sentenced fairly in accordance with the **triad**, which directs the Court to consider the following factors when passing sentence:-

(i) the interests of the accused;

(ii) the interests of society, and

(iii) the nature of the offence.

[4] In his submission on behalf of the Accused, Mr. P. M. Dlamini stated that this Court should exercise fairness when imposing the sentence on the Accused. Mr. Dlamini argued that the Accused is a soldier employed in the Eswatini Umbutfo Defence Force, and that the Accused is not an employee of Nkoyoyo Royal Palace, and therefore she cannot be treated like an employee who breached her employer's trust.

[5] Further Mr. Dlamini submitted that there is no evidence that the Accused held or occupied a position of trust at Nkoyoyo Royal Palace. Counsel

argued that the accused therefore deserved to be afforded an opportunity to pay a fine i.e. a sentence with an option to pay a fine.

[6] Mr. Dlamini implored this Court to take into account the following circumstances:-

(i) that she is a first offender and has no previous criminal record, and therefore her case must be treated as an isolated case, and not as a pattern of her behaviour

(ii) that she fully cooperated with the police when she was arrested and also during investigations of this matter as per the evidence led *in casu*

(iii) the extent of her role in the commission of the offence

(iv) that prior to her arrest she had a steady employment as a member of the Eswatini Umbutfo Defence Force and had family responsibilities

(v) that she is an extensively sick person suffering from a chronic disease which requires special medical attention not available at Correctional Services

(vi) that she is capable of being rehabilitated without being sent to goal for a long term of imprisonment hence a suspended sentence would be fair in the circumstances

(vii) that this Court is urged to impose a suspended sentence or a sentence with an option of a fine.

[7] In support of these factors herein referred to above Mr. Dlamini referred the case of **Bhekumusa Mapholoba Mamba v Rex Criminal Appeal Case NO. 17/2010 at pgs. 11-12 para 18-1** where the Supreme Court stated as follows:-

"In considering an appropriate sentence it is always necessary to have regard to the triad consisting of the offence, the offender and the interests of society."

[8] The Supreme Court stated further that:-

"One must be careful not to approach the question of sentence in a spirit of anger. The reason for this is that such an approach can only deter one from keeping the delicate balance between the triad consisting of the crime, the offender and the interests of society."

[9] Mr. Dlamini further referred to the case of **The Minister of Police v Andre Rabie Case No. 487/1982 SCSA** as follows at para 2-3:-

" [2] the cardinal question is whether the respondent has proved that van der Westhuizen was acting **"in the course or scope of his employment"** as a servant of the State, i.e. whether he was doing the State's work, *viz* police work, when he committed the wrongs in question.

[3] two facets of the inquiry may be identified: (a) what was the scope of Van der Westhuizen's employment, and (b) what was the relation of the facts done by Van der Westhuizen to the functions he had to carry out."

[10] Mr. Dlamini also referred to the case of **The King v Makhubu and Others (381/2012) [2018] SZHC 104(31 January 2018)**, and argued that in the Makhubu case the Crown had proven that Mr. Makhubu was an employee of the Crown and that the offences he faced and being charged with were committed by him whilst he was acting within the course and scope of his employment hence the sentence thereat.

[11] Mr. Dlamini submitted further that the Accused deserve to be treated differently from ordinary civilian since she is a soldier. Counsel referred to the case of **The Minister of Defence v Von Benecke (155/2012) [2013] (2) SA 361 (SCA)** in support of his submission basing it on the judgment of Heher JA at para 24 where he stated as follows:-

"[24] The defence force is in this statutory context, a special kind of employer with a relationship towards its employees and the public which requires an approach to liability for the wrongful acts of those employees which is very different from that of an ordinary civilian employer."

[12] Mr. Dlamini implored this Court to consider a similar approach *in casu* because according to Counsel the Accused was not an employee of Nkoyoyo Royal Residence at the time of the commission of the offences for which she has been convicted. Counsel reiterated that at the time the Accused committed the offences in question, there is no evidence that she held a position of trust and that she betrayed her employer's trust.

[13] Mr. Dlamini further referred to the case of **Jele v The King and Another (19/2018) [2020] SZSC 14 (28 May 2020)** in particular paragraph 18. Mr. Dlamini submitted that in the Jele case *(supra)* the Crown was able to prove that the Accused thereon has stolen from his employer, and that he was in a position of trust, and further that he had betrayed the aforesaid position of trust. Counsel Dlamini submitted further that on the contrary this was not the position *in casu*, and Counsel Dlamini pleaded that this Court should not classify this case as one of breach of trust of employer and employee relationship.

[14] Mr. Dlamini further referred to the case of **S v Letsolo 1970 (3) SA 476 (a) at 476 G-H** where His Lordship Holmes JA defined extenuating circumstances as any facts bearing on the commission of the crime which reduce the moral blameworthiness of the accused as distinct from his legal culpability. Mr. Dlamini urged this Court to consider three factors namely, (i) whether there are any facts which might be relevant to extenuation such as *inter alia* immaturity, first offender, (ii) whether such facts, in their cumulative effect probably had a bearing on the accused's state of mind in doing what he did; (iii) whether such facts were sufficiently appreciable to abate the normal blameworthiness he did; and, in deciding this factor, the trial Court exercises a moral judgment.

[15] Mr. Dlamini also implored this Court to take into account the period which the Accused had already spent in custody since her arrest and backdate

the sentence to commence on those dates. The Court is grateful to Counsel Dlamini for submissions and legal authorities.

CROWN'S SUBMISSION

[16] Ms. N. Masuku, Principal Crown Counsel submitted that the Accused has been convicted of serious offences that should be visited with appropriate sentences. Ms. Masuku referred this Court to the landmark case of **S v Zinn 1969 (2) SA 537 (A)** where the Appellate Division set the standard of the **triad** which the trial Court must consider when passing sentence on convicted accused persons in a criminal trial.

ANALYSIS OF THE SUBMISSIONS IN MITIGATION ON SENTENCE AND THE CASE LAW APPLICABLE

[17] Section 294 (1) and (2) of the Criminal Procedure and Evidence Act No. 67/1938 as Amended provides as follows:-

> *294 (1)* *The judgment in every trial in any Court shall be pronounced or the substance of such judgment shall be explained in open Court either immediately after the termination of the hearing or without undue delay at some subsequent time, of which notice shall be given to the parties and their legal representatives, if any:*
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> ---
>
> *(2)* *A Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed.*

[18] *In casu* we are at the stage of subsection (2) herein referred to above wherein the parties i.e. the Accused and the prosecution have tendered their submissions in mitigation of the sentence which this Court must consider, and which mitigation will guide this Court to pass a proper sentence *in casu*.

[19] It is trite law that the stage of passing a sentence in any criminal trial is the preserve and prerogative of the trial Court.

[20] It is also trite law that whatever sentence which the trial Court imposes must be commensurate with the offence(s) committed for which the accused has been convicted. If the trial Court imposes a harsh sentence which induces a sense of shock, then the trial Court commits a misdirection which then entitles the Appellate Court to interfere with the said sentence and impose a proper sentence in the circumstances. In fact if the Appellate Court is of the view that the trial Court did not consider crucial aspects or factors which call for consideration e.g. where the trial Court has not considered the **triad**, the Appellate Court may remit the case to the trial Court for a consideration of such factors and/or circumstances. This therefore demonstrates the utmost importance of passing a sentence which befits the crime and the accused persons convicted of that crime(s).

[21] In the case of **S v Zinn** *supra*, the learned Justices of the Appellate Division stated as follows at page 540 paragraph G when dealing with the factors to be considered by a Court when preparing to pass an appropriate sentence, these factors are called the **triad**; Rumpff JA stated as follows:-

> "G] It then becomes the task of this Court to impose the sentence which it thinks suitable in the circumstances. What has to be considered is the **triad** consisting of the crime, the offender and the interests of society...."

[22] The case of **S v Zinn** *supra* is always complimented by the case of **S v Rabie 1975 (4) SA 855** where Corbett JA stated as follows:-

> "In regard to the guidelines as to punishment it might be thought that the decision of this Court in **S v Narker and Another 1975 (1) SA 583 (AD) and S v Roux 1975 (3) SA 190 (AD)** reveal some slight difference of judicial viewpoint as to the role of mercy in the determination of an appropriate sentence. Having been party to both decisions, I would like, briefly, to make certain observations of my own upon this topic.
>
> In his **Commentary on the Pandects (5.1.57)** Voet writes of the need for judges to be free from hatred, friendship, anger, pity and avarice. In a note

on this section in **his Supplement to the Commentary** (Published in 1793) Van der Linden makes interesting reference to the views of a number of writers, classical and otherwise, as to the proper judicial attitude of mind towards punishment. (A translation of this particular note conveniently appears in the selective Voet - Gane's translation, VOL 2 **at p. 72**) commences:-

> "It is true, as **Cicero** says in his work on **Duties BK 1, ch. 25.** That anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is true also that it would be desirable that they who hold the office of judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity."

Van der Linden further notes that among the most harmful faults of judges is, *inter alia*, a striving after severity *("severitatis affectatio")*. Apropos this a passage is quoted from Seneca on Mercy, including the declaration: **"severity I keep concealed, mercy ever ready"** *(serveritatem, abditam, clementiam in promptu habeo)*. Van der Linden concludes with a warning that misplaced pity *(intempestiva misericordia)* is no less to be censured.

Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances. (They were referred to, with approval, in **S v Zinn 1969 (2) SA 537 at p. 541)**. A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressure of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

[23] In the same case **S v Rabie** *supra* Kotze AJA in concurring with Corbett JA and Holmes JA stated as follows:-

> "---In regard to what has been termed the "approach of mercy", I merely wish to say that I have always understood it to be the duty of a judicial officer, called upon to impose punishment upon an offender, to consider to what extent the particular circumstances of a given case require that justice should be tempered with mercy. I am of the opinion, on a careful consideration of the remarks of the trial judge that he did not overlook this part of his function. Having emphasized this, I feel myself free to express my respectful agreement with the views of both my brothers."

[24] In the same judgment **Rabie** *(supra)* Holmes JA stated as follows:-

"In support of his contention of misdirection, Counsel for the appellant referred to several passages in the judgment. In my view they must not be considered in isolation. On the view of the case as just explained, these passages fall into proper perspective. I am unpersuaded of any misdirection.

The next main contention was that in any event the sentence was disturbingly inappropriate. In considering an appropriate sentence, the following guidelines are of general application –

(a) "Let the punishment fit the crime ---"

(b) That used to be the approach in this country, too; See e.g. **R v Motsepe 1923 TPD 380** in fin. – **"The punishment must be made to fit the crime."** However in 1959 this Court pointed that **the punishment should fit the criminal as well as the crime**. See: **Rex v Zonele and Others 1959 (3) SA 319 (AD) at pg.330 E.**

(c) The interests of society in punishment were noted in **Rex v Karg 1961 (1) SA 231 (AD) at pg. 236 A-B**, and **S v Zinn 1969 (4) SA 537 (AD) at pg. 540 G**.

(d) Then there is the approach of mercy or compassion or plain humanity. It has nothing to do with maudlin sympathy for the accused. While recognizing that fair punishment may sometimes have to be robust, mercy is a balanced and humane quality of thought which tempers one's approach when considering the basic factors of letting the punishment fit the criminal as well as the crime and being fair to society; see: **S v Narker and Another 1975 (1) SA 583 at pg. 586 D.** That decision also pointed out that it would be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and to seek to reduce it for mercy's sake. This was also recognized in **S v Roux 1975 (3) SA 190 (AD)**.

(e) This quality of mercy or compassion is not something that has judicially cropped up recently. It was first mentioned in Court some 40 years ago, by Beyers JA in ***Ex parte* Minister of Justice (*in re* Rex v Berger and Another) 1936 AD 334 at 341** ----------.

(f) The main purpose of punishment are deterrent, preventive, reformative and retributive; see: **Rex v Swanepoel 1945 AD 444 at 455**. As pointed out in **Gordon's** *CRIMINAL LAW OF SCOTLAND (1967)* at pg. 60 **"The retributive theory finds the justification for punishment in a past act, a wrong which requires punishment or expiation..... The other theories, reformative, preventative and deterrent, all find their justification in the future, in the good that will be produced as a result of the punishment."** It is therefore not surprising that in **R v Karg 1961 (1) SA 231 (AD) at 236 A**, Schriener JA observed that, while the deterrent effect of punishment has

remained as important as ever, the retributive aspect has tended to yield ground to the aspects of prevention and correction.

(g) It remains only to add that while fair punishment may sometimes have to be robust, an insensitively censorious attitude is to be avoided in sentencing a fellow mortal, lest the weighing in the scales be tilted by incompleteness..."

[25] In the case of the **State v Bodibe (Sentence) (CC 14/2021) [2021] ZAGPPHC 715 (20 October 2011)** Van Veenendaal AJ states as follows at paras 4, 5, 6 (i-v) and 7 (a-g) when dealing with factors to be taken into account when sentencing an accused person:-

"[4] It is, ultimately, often a matter of reconciling competing interests in order to ensure a fair and just sentence. An appropriate balance must be struck. A sentencing Court 'has a duty to impose an appropriate sentence according to long-standing principles of punishment and judicial discretion' (per Mocumie JA in **S v Mhlongo 2016 (2) SACR (SCA) at [9]**; see also **S v Horn 2018 (1) SACR 685 WCC at [12] n [9]**.

[5] In **S v RO and Another 2010 (2) SACR 248 (SCA)** Heher JA stated at [30]: Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality). The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.

[6] In **S v Van Loggenberg 2012 (1) SACR 462 (GSJ)** Willis J said that a sentence has five important functions at [6]:-

"(i) it must act as a deterrent, in other words, it must deter other members of the community from committing such acts, or thinking that the price of wrongdoing is worthwhile;

(ii) it must act as a specific deterrent, in other words it must deter this individual from being tempted to act in such a manner ever again;

(iii) it must enable the possibility of correction, unless this is very clearly not likely;

(iv) it must be protective of society, in other words, society must be protected from those who do it harm;

(v) it must serve society's desire for retribution, in other words, society's outrage at serious wrongdoing must be placated."

[7] The important functions referred to above should also be read with the following **"basic principles pertaining to sentencing"** as formulated by Myburgh AJ in **S v Tsotetsi 2019 (2) SACR 594 (WCC) at [29]**:-

> "(a) The sentence must be appropriate, based on the circumstances of the case. It must not be too light or too severe.
>
> (b) There must be an appropriate nexus between the sentence and the severity of the crime; full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in **S v Zinn 1969 (2) SA 537 (A)**.
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> (c) Regard must be had to the interests of society (the third element of the **Zinn** triad). This involves a consideration of the protection society so desperately needs. The interests of society are reflected in deterrence, prevention, rehabilitation and retribution.
>
> (d) Deterrence, the important purpose of punishment, has two components, being both the deterrence of the accused from re-offending and the deterrence of would-be-offenders.
>
> (e) Rehabilitation is a purpose of punishment only if there is the potential to achieve it.
>
> (f) Retribution, being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.
>
> (g) Finally, mercy is a factor. A humane and balanced approach must be followed."'

[26] I have carefully considered the whole submissions on mitigation of sentence as made by Mr. P. M. Dlamini for the Accused. This is in accordance with the triad as enunciated in the case of **S v Zinn** *supra* which has received enormous approval from the Roman Dutch Common Law jurisdictions.

[27] However, I am unable to accept the argument that the Accused never committed these offences against her employer and that she did not breach

the trust of her employer. It is common course that the Accused is an employee of the Government of the Kingdom of Eswatini as a soldier based in the Eswatini Umbutfo Defence Force and was based at Nkoyoyo Royal Palace during the commission of the offence with her co-accused Zandile Malinga. The evidence of PW8 Phangisile Mngometulu and the evidence of the accused herself in her defence and in the Confession before Her Worship Lenhle Zulu clearly demonstrates that the offences were committed whilst she was executing her duties as a soldier and based at Nkoyoyo Royal Palace. Her duties as a soldier dictates that she was expected to provide safety and security to both persons and property, but that was not to be, instead she engaged in an elaborative scheme with her co-accused to steal jewellery worth or in excess of E1. 3 Million, which she together with her accomplices meticulously disposed-off in a jewellery shop owned by PW7 in Sandton Johannesburg in the Republic of South Africa.

[28] The proceeds of crime derived from the disposal or sale of the stolen jewellery was then laundered by the Accused. A soldier who is based or stationed at a certain post and then turn around and steal valuable property from that very post where she/he is expected to protect is guilty of breaching the trust bestowed on him/her by her/his employer to perform his/her duties with honesty and integrity. *In casu* what complicates the matter for the Accused is that she is a soldier who held a position of trust at the Palace, and who abused the trust bestowed upon her by virtue of her employment and engaged in an unlawful and elaborate scheme and stole the jewellery with her co-accused who also worked there. Thereafter the Accused together with accomplices some of who later testified as Crown witnesses on how the aforesaid jewellery was eventually sold in South Africa to PW7 at Sandton Johannesburg.

[29] It must be borne in mind that the Accused herself recorded a Confession before the Learned Magistrate Lenhle Zulu on how she stole the jewellery

and eventually sold it in South Africa with the assistance of her accomplices some of whom became prosecution witnesses. At the time when these offences were committed she being a soldier was based at the Palace. She is no ordinary citizen, **or civilian as it were**, she is member of the Eswatini Umbutfo Defence Force who is expected to exercise and execute utmost discipline, honesty and integrity in her conduct, but *in casu* that is not the position. As observed, above herein not only did she steal the jewellery from her workstation, she also contravened The Money Laundering and Financing of Terrorism (Prevention) Act of 2011. The theft of the jewellery is a predicate offence of the money laundering offences. The accused person's act of selling the stolen jewellery and realizing same into monetary value which was given to her in cash and some electronically transferred into her personal account whereupon she then made various payments through bank transfers to her accomplices of the money which is proceeds of crime constitutes money laundering, which in itself is a distinct stand-alone serious criminal offence attracting a minimum sentence of 12 months imprisonment or a minimum fine of E15 000-00. This therefore means that the legislature in its wisdom felt the need to impose such stiff sentences where a person has been convicted of contravening Section 4 (1) of the aforesaid anti-money laundering Act of 2011.

[30] Section 4 (1) of the Money Laundering and Financing of Terrorism (Prevention) Act of 2011 provides as follows:-

Offence of Money Laundering

4. (1) A person who –

(a) converts or transfers property knowing or having reason to believe that the property is derived directly or indirectly from those acts or omissions referred to in paragraph (c), with the aim of concealing or disguising

the illicit origin of that property, or of aiding any person involved in the commission of those acts or omissions to evade the legal consequences of those acts or omissions;

(b) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property knowing or having reason to believe that the property is derived directly or indirectly from those acts or omissions referred to in paragraph (c);

(c) acquires, possesses or uses property, knowing or having reason to believe that it is derived directly or indirectly from acts or omissions –

(i) in Swaziland which constitutes an offence against any law of Swaziland punishable by imprisonment for not less than 12 months or the imposition of a fine of not less than E15 000-00; or

(ii) outside Swaziland, which had they occurred in Swaziland, would have constituted an offence against the law of Swaziland punishable by imprisonment for not less than 12 months or the imposition of a fine of not less than E15 000-00; or

(d) participates in, associates with, conspires or attempts to commit, or aids, abets or facilitates the commission of any of the acts referred to in paragraphs (a) to (c);

Commits the offence of money laundering.

[31] The Accused person *in casu* fits squarely within the ambit of Section 4 (1) (a), (b), (c) and (d) of the Money Laundering and Financing of Terrorism

(Prevention) Act of 2011. It must be noted that the predicate offence (the theft of the jewellery) is committed in Eswatini, and the money laundering offence is committed both in Eswatini and in the Republic of South Africa where the jewellery is sold and then the proceeds of crime are used in South Africa to pay some accomplices there, further the proceeds of crime are deposited into Accused's FNB Bank by the jewellery shop owner in South Africa (PW7) and further laundered by the Accused whilst back in Eswatini through her FNB Bank Account. The money laundering therefore is executed both in the Republic of South Africa and in the Kingdom of Eswatini respectively.

[32] The Accused in the commission of the offence in contravention of Section 4 –

(i) converted the jewellery into monetary value through the sale of the aforesaid jewellery to PW7 thereby transferring such jewellery to PW7 very well knowing that same were stolen with the aim of concealing or disguising the illicit origin of the aforesaid jewellery

(ii) concealed and disguised the true nature, origin, location, disposition, movement or ownership of the aforesaid jewellery very well knowing that the jewellery is stolen property or proceeds of crime by informing PW7 that she is from Royalty and that the jewellery belongs to her whereas that was not true

(iii) accused acquired the jewellery through theft and continued to unlawfully possess same knowing that the aforesaid jewellery is proceeds of crime derived through theft, and which theft occurred in Eswatini and then she together with her accomplices proceed to Johannesburg RSA to launder the aforesaid jewellery, and

(iv) that the accused participated in the theft and sale of the aforesaid jewellery, and equally associated with her accomplices who assisted her to dispose-off the jewellery literally aiding, abetting and facilitating the commission of the money laundering offence with which she is charged and convicted.

[33] It must always be borne in mind that *in casu* the proceeds of crime is the jewellery derived through theft at the Palace. The sale of the jewellery in the Republic of South Africa constitutes the money laundering which is the conversion, transferring of the jewellery and the concealment or disguising the true nature and origin and ownership of the aforesaid jewellery which had been acquired through theft from the Palace, and was being possessed and used by the Accused very well knowing that the aforesaid jewellery is proceeds of unlawful activities. The Accused participated directly in association with her accomplices in the laundering of the aforesaid jewellery both in the Republic of South Africa and in the Kingdom of Eswatini.

[34] The Accused *in casu* accomplished all the three stages of money laundering which are; **placement**, **layering** and **integration**, in the manner herein set out below:-

(i) Placement:

Immediately after the sale of the jewellery to PW7 by the Accused and her accomplices she obtained dirty money which she introduced into the financial system by making cash payments to her accomplices as well as having the money transferred into her FNB Account through electronic funds transfers. This is placement.

(ii) Layering:

The funds obtained from PW7 the jeweler in Sandton Johannesburg who purchased the aforesaid jewellery are classified as illicit funds and/or proceeds of unlawful activities. These funds are moved around from RSA to Eswatini, and vice versa being used to make payments to her accomplices, the aim being to conceal or disguise their origin. The movement of the funds is through bank transfers and cash payments, and this is the layering

(iii) Integration:

These illicit funds or proceeds of unlawful activities btained by the Accused from PW7 when she together with her accomplices laundered the jewellery are now being re-introduced into the legitimate economy by payment transaction to her accomplices, purchasing personal items, transferring substantial amounts to her boyfriend, this is the integration stage of the illicit funds in a money laundering setup.

[35] I have taken considerable time to deal with the money laundering offence in order to demonstrate the extent of its seriousness, and to appraise the reader that the Accused and her accomplices engaged in an elaborate and sophisticated scheme from stealing the jewellery until same were sold to PW7 in Sandton Johannesburg South Africa, and how the three stages of money laundering were all accomplished, i.e. the **placement** of the illicit funds, the **layering** of the illicit funds and the **integration** of the aforesaid illicit funds into the legitimate economy. These activities speaks to the appropriate sentence to be imposed *in casu*, which should be

commensurate with the offences for which the Accused has been convicted.

[36] Considering the issue of sentence where the Accused *in casu* has been found guilty of theft from her place of employment, and thereby breaching the trust of her employer, I hereby refer to the case of **Colisile Mkhonta v Rex (86/2011) [2012] SZHC 255 (16 November 2012)** where **Hlophe J (as he then was)** stated as follows at paras 8, 9, 10, 12, 13 14 and 15 when dealing with an appeal against a custodial sentence imposed on the appellant who had been convicted of theft of items belonging to her employer:-

> '[8] Sentencing is a matter presented for the trial Court's discretion. The law is settled that the appeal Court will interfere therewith only in very limited instances. This will be where the trial Court is shown as not having exercised its discretion judicially or where it is shown that the sentence imposed is so severe that it induces a sense of shock.
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> [9] A discretion would not be judicially or judiciously exercised by the Court where its exercise is vitiated by an irregularity or misdirection. On the other hand a sentence induces a sense of shock where it is so severe that the Appeal Court would not have meted out the same sentence but would have meted out a lesser one. The case of **Ndusha Themba Zwane v Rex 1970-76 SLR 106 at 108** and the unreported case of **John Shilombo v Rex Case No. 65/2011** are instructive in this regard.
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> [10] In S v De Jager and Another 1965 (2) SA 616 at 629 Holmes JA put the position in the following words:-
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> > "It is the trial Court which has a discretion and a Court of Appeal cannot interfere unless the discretion was not judicially exercised that is to say unless the sentence is vitiated by irregularity or misdirection or is so severe that no reasonable Court would have imposed it. In this later regard an accepted test is whether the sentence induces a sense of shock, that is to say there is a striking disparity between the sentence passed and that which the Court of Appeal would have imposed."
>
> [12] It was submitted on behalf of the accused that as a first offender she would not have been sentenced to a custodial sentence. It was contended as well that the accused should not have been sentenced to imprisonment when considering that the offence of which she was convicted had the option of a fine. The Court *a quo*, it was

further argued, should have considered the fact that the accused was a first offender who had pleaded guilty and therefore should not have given her a custodial sentence.

[13] It was argued on behalf of the Crown that the sentencing of the Appellant, the then Accused, to a custodial sentence was unavoidable when considering that she had stolen from her employer. It was contended by the Crown that this is the position in this jurisdiction as concerns the sentencing of an accused person convicted of stealing from his or her employer. Accordingly I was referred to the cases of **R v Mandla Homeboy Dlamini 1982-86 (1) SLR 391** as well as that of **Rex v Sipho Magalela Nkomondze Criminal Case No. 71/2008.**

[14] I agree with Miss Masuku for the Crown that the position is now settled in this jurisdiction that an employee who steals from her employer is punishable through the imposition of a custodial sentence as a mark of disapproval by the Court to the violation of the trust reposed on the accused by the employer.

[15] The position was articulated in the following words in **Rex v Mandla Homeboy Dlamini 1982-86(1) SLR 391 B-C**:-

> "Theft by an employee has to be regarded in a very serious light as it involves a breach of trust reposed in the employee by his employer .... In **S v Mphofu 1985 (4) SA 322 Reynolds J cited, at 325 C-D** the following passage from Ashworth: Sentencing and Penal Policy at 194: "Positions of trust are not normally given to individuals unless they have unblemished references, and so the offence may be seen as a betrayal of those very characteristics. Society operates in certain spheres largely on the basis of trust, and one of the burdens of a position of trust is an undertaking of incorruptibility. The individual who puts himself forward as trustworthy, is trusted by the others and if he then takes advantage of this power for his own personal ends, he can be said to offend in two ways; not only does he commit the crime charged (be it theft, false accounting or sexual offence), but in addition he breaches the trust placed in him by society and the victims of the particular offence." In my respectful opinion this passage sums up the position most aptly and contain the essential reason why the courts will normally feel bound to pass a sentence of imprisonment and in some cases very long sentences of imprisonment."'

[37] In the case of **Piater v The State (A411/2011) [2012] ZAGPHC 366 (7 December 2012)** Makgoka J stated as follows at para 8, 27, 28, 29, 31, 32, 35, 36, 38 when dealing with an appeal wherein the appellant had been convicted of theft from her employer:-

"[8] It is trite that sentencing is generally a matter that falls within the discretion of a trial Court. The Appeal Court's power to interfere with a sentence is limited to instances where the sentence is vitiated by an irregularity, misdirection; or where the sentence is shockingly disproportionate or where there is a striking disparity between the sentence and that which the Appeal Court would have imposed, had it sat as the trial Court. See: generally **S v Snyder 1982 (2) SA 694 (A); S v Petkar 1988 (3) SA 571 (A) and S v Sadler 2000 (1) SACR 331 (SCA)**.

[27] Having established the proper jurisprudential basis on which sentence in cases like the present is to be considered, I proceed to consider what would be appropriate for the appellant. In S v Prinsloo 1998 (2) SACR 669 (W) Leveson J expressed strong views on sentencing accused convicted of theft from employers. The head-note of the case reads as follows:-

> "--- In the word of commerce employers were compelled to place trust in their employees. It was not possible for the employers to conduct the business of their concerns themselves. No alternative remained to them but to repose confident in their employees, and when an employee breached that trust his conduct had to be heavily penalized. The employer was entitled to expect unswerving honesty from the employee in return for the wages he paid and the benefits he gave him. Nothing but implicit acceptance of that obligation by the employee would keep the wheels of commerce turning smoothly. It was the duty of the courts, whenever this sort of misdemour was detected, to send out the message that such conduct would severely punished."

[28] Although the imposition of sentence remains discretionary, it is bound by judicial precedent and authority: **S v Juta 1988 (4) SA 926 (TK) 927 D-F**. It is in that context that I consider sentences imposed by our courts, especially the Supreme Court of Appeal (the SCA) and its predecessor, in comparable cases.

[29] In **S v Lister 1993 (2) SACR 228 (A)** a 34 year old bookkeeper's sentence of 4 years imprisonment was confirmed by the SCA, after she had been convicted of theft of R95 700-00 from her employer, which she stole over a period of 11 months.

[31] In **S v Sinden 1995 (2) SACR 704 (A)** the Appellant Division (as it then was) confirmed an effective sentence of 4 years imprisonment on the appellant, a first offender, for stealing approximately R138 000-00 from her employer. The amount had been stolen over a period of 14 months...

[32] In **S v Kearns 1999 (2) SACR 660 (SCA)** a 28 year old married woman had been convicted in the regional Court of

theft of R67 000-00 from her employer over a period of three months. She was sentenced to an effective 3 years imprisonment. Her appeal to a provincial division having failed, she appealed further to the SCA. It was contended that the trial Court had erred in not imposing a sentence of correctional supervision and had placed insufficient emphasis on the seriousness of the offence. The appellant also had a poor socio-economic background. The SCA confirmed the sentence on appeal to it.

[33] In **S v Sadler 2000 (1) SACR 331 (SCA)** the appellant was a senior manager in a bank. He was convicted in the High Court on numerous counts, including corruption, fraud, and forgery and uttering. He was sentenced to terms of imprisonment which were suspended in their entirety, and to a fine. The Attorney General (the predecessor of the NDPP) noted an appeal against the sentence. The SCA upheld the appeal and set aside the sentence and substituted for it a sentence of 4 years imprisonment, all Counts taken together for purpose of sentence.

[35] In **De Sousa v The State 2008 ZASCA 93 (12 September 2008)** the appellant had pleaded guilty to 13 Counts of fraud. She had been part of a fraudulent scheme involving a total amount of R1 000 228-94. She had benefitted only E90 000-00 for her participation in the scheme. She was 32 years old and a first offender. She had pleaded guilty and shown genuine remorse and contrition. She had also signed an acknowledgment of indebtedness in favour of the complainant in the sum of R90 000-00 being the extent of her benefit from the fraudulent scheme, and thereafter paid the debt in full. She had utilized some of the money to assist her mother, who was in financial difficulty, and her sister (whose husband was in rehabilitation) to pay school fees. All Counts having been taken as one for the purpose of sentence, the appellant was sentenced to VA years' imprisonment, which was confirmed by the High Court. She appealed to the SCA which set aside the sentence and imposed 4 years imprisonment.

[33] In **Pretorius v The State 2008 ZASCA 132 (26 November 2008)**, the appellants, two brothers, had pleaded guilty to 91 Counts of fraud in the regional Court amounting to R122 309-00 committed over a period of more than a year. They had shown remorse. They had admitted to their fraud, and agreed to repay the amount in question plus the costs of investigation into their conduct. Both were first offenders and principal breadwinners in their respective families, with young children. Their families would be disrupted and severely affected by their imprisonment. The Court sentenced them to 5 years imprisonment, and ordered them

to repay the ill-gotten gains, plus the costs of investigation into their fraudulent conduct. Both the High Court and the SCA dismissed their appeal and confirmed their sentences.

[38] In Joubert v The State 2012 ZAFPHC 5 (3 February 2012) the appellant had been convicted of 20 Counts of fraud totaling R425 843-33. This arose from a scheme created for the purpose of defrauding SARS. The scheme comprised of various legal entities which were instrumental in unlawfully inducing SARS into making VAT refund payments to the legal entities. In the regional Court he was sentenced to 7 years imprisonment, **wholly** suspended for 5 years on standard conditions and that he repays the amount of R425 843-33 to SARS with interest. On appeal, this Court set aside the sentence and imposed an effective 3 years imprisonment, in addition to the appellant repaying the stolen amount with interest."

[38] Over the years there have been criminal cases in Eswatini involving accused persons who had breached the trust of their employers by stealing from them. In the landmark case of **Jele v The King and Another (19 of 2018) [2020] SZSC 14 (22 May 2020)**; Cloete JA stated as follows at **paras 18 (1-6), 19, 20 (1-7), 21**:-

"[18] On the other hand Mr. Dlamini for the Crown raised the following legal submissions:-

(1) that the Appellant was employed by his employer in the senior position of General Manager.

(2) As much he was in a position of trust and that he betrayed that trust.

(3) That the theft was not a once-off event and had been perpetrated over a period of years.

(4) That the Appellant only owned up when he was caught.

(5) That the sentence of actual imprisonment of 3 years by no means could be said to induce a sense of shock nor was it excessive or harsh.

(6) That the period of imprisonment should not be tempered with but the suspended portion could be reduced.

[19] As set out in paragraph 17 above and in the judgment of Silolo *supra*, this Court will not readily interfere with the sentence imposed by the Court *a quo*.

[20] If one looks at the judgment on sentence of the Court *a quo* (pages 38 of record onwards) one finds the following recorded:-

(1) The Appellant pleaded guilty.

(2) The Appellant was a first offender.

(4) The Appellant was sixty years old married with a minor child of two years, that he is diabetic and that he was unlikely to be employed again as his dishonesty was widely published, that he was self with an income of E200 000-00 per annum.

(6) The interests of society expects protection from Courts against criminals.

(7) As regards the sentence he carefully compared other similar matters including:-

(a) R v Thembela Simelane, Criminal Case No. 01/2010. He stole the sum of E600 000-00. He was sentenced to an effective term of 5 years imprisonment. On appeal the sentence was increased to a further fine of E50 000-00 or twelve months imprisonment because the Supreme Court considered that the sentence of 5 (five) years imprisonment was inadequate.

(b) In R v Charles Myeza the amount involved was the sum of E661 042.13 and he was sentenced to 5 (five) years imprisonment.

(c) In R v Polycarp Dlamini, he was sentenced to 9 (nine) years imprisonment (in respect of Counts 1-9 which were taken as one for the purpose of sentence) 3 (three) years of which were suspended for a period of 3 (three) years."

[39] In the case **of The King v Makhubu** *supra* Mamba J (as he then was) found that the accused who was a Principal at Mhlatane High School was indeed acting within the course and scope of his employment when he committed the offences and thereby breached the trust reposed upon by the employer being the Eswatini Government. Mamba J sentenced the accused to an effective sentence of 19 years imprisonment for the 80

(eighty) Counts, and in some Counts there was an option to pay a fine, and the accused was also ordered to refund the complainant, failing which to serve specific term of imprisonment for those Counts wherein he failed to make reparation.

At pages 3-4 paragraph 5, Mamba J stated (as he then was) stated as follows:-

> "[5] As a school principal, one would want to believe or assume that the Accused was sufficiently knowledgeable or trained on the responsibilities relevant to his duties as such head. He held a position of trust. The monies that he unlawfully diverted had been placed in his trust or care by his employer. His employees were the many parents who had children schooling at the school of which he was the principal or head. His immediate employer or supervisor was the Ministry of Education, which represented the said parents. By unlawfully diverting and stealing the monies entrusted on him, the Accused betrayed that trust that the public had bestowed on him."

[40] There is no doubt that Courts generally frown upon accused persons who are repose with their employer's trust but instead breach or betray their employer's trust which therefore result to direct imprisonment with or without conditions. Such is the unfortunate scenario *in casu* where the offences committed by the accused invite a custodial sentence.

[41] I have set out numerous judgments above to demonstrate the seriousness which courts adopt when imposing sentences of accused persons who had been convicted of theft from their employers, and thereby betraying the trust reposed on them. It is also crystal clear from the authorities referred to that any form of theft or dishonesty resulting to financial prejudice is in most instances punishable by sentences of imprisonment which vary according to the circumstances and amounts involved in the cases referred to. In the cases referred to in the case of Piater *(supra)* the appellants had pleaded guilty and even offered to repay the stolen money, however, the SCA always ended up imposing custodial sentences and also ordered the appellants to repay the money stolen.

[42] *In casu* that is not the position, the Accused pleaded not guilty and a full scale trial was conducted resulting to her being found guilty and there was never any offer for reparation. It must be borne in mind that she was convicted of the two (2) Counts namely:-

(i) Theft of the jewellery in the lawful possession of Phangisile Mngometulu worth E1 300 000-00 and

(ii) Contravention of The Money Laundering and Financing of Terrorism Act (Prevention) of 2011.

[43] These are separate and distinct offences, even though the theft is a predicate offence of the money laundering these offences attract different sentences. Further these offences are both serious offences in their respective categories and they cannot be deemed to be resultant from one transaction for purposes of sentence and possibly resulting to a concurrent sentence. Instead the money laundering is both an exceptional circumstance as well as an aggravating circumstance because the Accused betrayed the trust of her employer by committing these offences at her place of work. Therefore in these peculiar circumstances of this case the sentences to be imposed on the Accused are consecutive in nature. In order to commit the money laundering there must have been the theft of the items or properties, and *in casu* it is the jewellery that was stolen and once in the possession of the Accused, it became proceeds of unlawful activities and the aforesaid jewellery was then laundered to PW7 and the proceeds thereof were subjected to the three stages of money laundering being **placement**, **layering** and **integration** as explained above herein. The sentences therefore shall run consecutively to each other.

It is my considered view that the appropriate sentence to be imposed herein in consideration of the Accused's personal circumstances, and in full compliance with the triad is as follows:-

1. Count 1: Three (3) years' imprisonment without an option of a fine.
2. Count 2: Two (2) years' imprisonment with the option to pay a fine of E30 000-00 (Emalangeni Thirty Thousand).
3. The sentence in Count 1 shall run consecutively with the sentence in Count 2.
4. The sentences are backdated to the 20th November 2024 and the period spent by the Accused after her arrest and before she was admitted to bail is also to be taken into account as well.

N.M. MASEKO
JUDGE