REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

9 May 2024
DATE SIGNATURE

CASE NUMBER: A127/2023

In the matter between:

HARISU BUKARI **Appellant**

and

THE STATE **Respondent**

Coram: DOSIO J and KUNY J

Heard: **6 May 2024**

Delivered: **9 May 2024**

ORDER

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1. The appeal in respect to the sentence is upheld.

2. The sentence of twelve years imprisonment is set aside and replaced with the following order: 'The accused is sentenced to eleven (11) years imprisonment. Five (5) years imprisonment are suspended for a period of five years on condition that the accused is not again found guilty of fraud, forgery or uttering, committed during the period of suspension.'

JUDGMENT

DOSIO J:

Introduction

[1] The appellant appeared in the Specialized Commercial Crimes Court, in Palm Ridge Regional Court on the following charges: -

(a) Counts 1 to 19 – Fraud, alternatively contravention of section 235(1)(a) read with s1 and s238 of the Tax Administration Act 28 of 2011;

(b) Count 20 – Forgery;

(c) Count 21 – Uttering.

[2] Accused one, namely, Mark Two Electronics CC, was a juristic person that was duly registered on 12 July 2005 and incorporated in terms of the laws of the Republic of South Africa. Accused one is not part of these appeal proceedings. The appellant, who was accused two, was the sole member of accused one.

[3] The appellant was legally represented and pleaded guilty to all charges.

[4] The lower court convicted the appellant on all 21 counts.

[5] On 23 March 2023, the court a quo cautioned and discharged accused one. Accused two was sentenced as follows: -

(a) Counts 1 to 19 (fraud), were taken as one for the purpose of sentencing and the appellant was sentenced to 12 years' imprisonment.

(b) Counts 20 to 21 (forgery and Uttering) were taken as one for the purpose of sentencing and the appellant was sentenced to two years' direct imprisonment.

(c) In terms of s280(2) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977') the Court a quo ordered that the sentence imposed on counts 20 and 21 run concurrently with the sentence imposed on counts 1 to 19.

[6] The appellant's leave to appeal in the Court a quo was unsuccessful.

[7] Leave to appeal the sentence was granted by the High Court by way of petition.

Ad sentence

[8] It is trite that in an appeal against sentence, a Court of Appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the Court of Appeal should be careful not to erode that discretion.

[9] A sentence imposed by a lower court should only be altered if;

(a) An irregularity took place during the trial or sentencing stage.

(b) The trial court misdirected itself in respect to the imposition of the sentence.

(c) The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.[1]

[10] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[11] In the matter of *S v Malgas*[2] ('*Malgas*'), the Supreme Court of Appeal held that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing of the trial court.'

[12] In *S v Bogaards*,[3] the Constitutional Court held that an Appeal Court can only interfere where:

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[1] See *S v De Jager and Another* 1965 (2) SA 616 (A), *S v Rabie* 1975 (4) SA 855 (A) and *S v Petkar* 1988 (3) SA 571 at 574 C

[2] *S v Malgas* 2001 (1) SACR 496 SCA

[3] *S v Bogaards* [2012] ZACC 23; 2012 BCLR 1261 (CC); 2013 (1) SACR 1 (CC)

> '…there has been an irregularity that results in a failure of justice; [and] the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it'.[4]

[13] The following factors were presented in mitigation of sentence, namely:

(a) That the appellant was 47 years old and had no previous convictions;

(b) That he was married to a South African woman and that he has three children, aged 21 years, four years, and eight months;

(c) That he pleaded guilty to all the charges;

(d) That he had offered to repay the complainant for its loss, but the latter rejected his offer and;

(e) That he was a suitable candidate for a correctional supervision sentence in terms of s276(i) of Act 51 of 1977.

[14] The appellant's counsel contended that all the above-mentioned factors constitute sufficient reasons to allow a Court of Appeal to interfere and impose a lesser sentence, even one of correctional supervision. Reference was made to the case of *Grundling v The State*[5] ('*Grundling*').

[15] The aggravating circumstances in this matter are the following:

(a) The offences for which the appellant has been found guilty are serious offences. The appellant committed several offences of fraud, which involved an element of gross dishonesty and a substantial amount of money. The 19 counts of fraud, resulted in SARS incurring an actual loss amounting to R1 257 345.55 and the potential loss amounting to R1 092 516.19. The fiscus was accordingly disadvantaged by the appellant's conduct.

(b) The offences did not occur on the spur of the moment. The appellant over a period of three years resorted to milking SARS of the taxes which it collected and then utilized this money for his own benefit. He accordingly lived on the proceeds of his crime.

(c) There was careful planning and forging of documents from 2012 to 2015 which was detected in 2020. The appellant registered the business entity Mark Two CC (accused one), with the Companies Intellectual Property Commission (CIPC) on 12 July 2005 and as the sole member, started claiming false or fraudulent VAT refunds from SARS for the period 25/02/2012 to 06/10/2015 totalling R2 667 183.74.

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[4] Ibid para 4

[5] *Grundling v The State* (20616)/2014 [2015] ZASCA (28 September 2015)

(d) When he was engaged by SARS auditors, he prepared and presented false and fraudulent invoices as supporting documents, in order to justify the business's VAT refund claims. These fraudulent invoices were from reputable companies like Makro and Spar which resulted in the charges on counts 20 and 21 of forgery and uttering.

(e) The VAT system is a self-assessment tax and SARS places a high priority on the good faith and honesty of each and every tax payer. There is therefore a trust relationship between SARS and the tax payer. This trust was betrayed by the appellant.

[16] In the matter of *S v Delport and Others*[6] ('*Delport*'), the accused was charged with VAT related fraud. He pleaded guilty and was a first offender. The Court took together 136 counts of VAT fraud, which involved an actual loss to SARS of more than R60 million rands and imposed a sentence of 15 years' imprisonment.

[17] The pecuniary losses that SARS suffered in the matter of *Delport*[7] was significantly more than in the case of the appellant in the matter in casu, where SARS suffered a loss of just over R1,2 million.

[18] In the matter of *S v Brown*[8] ('*Brown*') the accused had been indicted in the Western Cape High Court on various counts of fraud. He initially pleaded not guilty and later made admissions in respect to two counts. He was acquitted on the remaining counts. The Court a quo sentenced the accused to a fine of R75 000.00 or a suspended sentence of 18 months on each count. The Supreme Court of Appeal held that the sentence imposed by the Court a quo tended towards bringing the administration of justice into disrepute as the accused was found guilty of fraud totalling tens of millions. The Supreme Court of Appeal accordingly increased his sentence to 15 years imprisonment, stating that:

'…it is quite clear that the message by the legislature is that white collar criminals who commit offences of a certain magnitude must not be permitted a soft landing.' [9]

[19] In the matter of *S v Blank*[10] ('*Blank*'), the appellant pleaded guilty and was convicted on 48 counts of fraud as a stockbroker which spanned over 17 months. The total profits exceeded R9,75 million and he received close to Rl,5 million. Having pleaded guilty for

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[6] *S v Delport and Others* (80/2017) ZAFSHC 243, 2020 (2) SACR 179 (FB) (10 December 2019)
[7] Ibid
[8] *S v Brown* [2014] ZASCA 217; [2015] 1 All SA 452 (SCA); 2015 (1) SACR 211 (SCA)
[9] Ibid para 120
[10] *S v Blank* 1994 ZASCA 115

his fraudulent activities, he was sentenced to eight years' imprisonment by the trial court. The Supreme Court of Appeal upheld the sentence of eight years' imprisonment.

[20] In the matter of *S v Assante*[11] ('*Assante*') the appellant was a 50-year old father of two and had no previous convictions. He was convicted of 108 counts of fraud perpetrated against a bank of which he was a branch manager, which together totalled an amount of R345 million. He was sentenced on each of the counts to 15 years' imprisonment. The sentences on all the counts, except one, were ordered to run concurrently. The effective sentence was 24 years' imprisonment.

[21] It clear that in the matter of *Blank*[12] and *Assante*[13] the pecuniary losses suffered by the complainants were far greater than the amount suffered by SARS in the matter in casu.

[22] In the matter of *Grundling*[14] the accused who was a first offender, pleaded guilty and was convicted and sentenced for 30 counts of contravention s59(1) (a) of the Value Added Tax 89 of 1991 pertaining to unlawful claims or receipts of VAT refunds. The actual loss to the fiscus was R18 780 334.00. The trial court imposed 10 years' imprisonment. On appeal, the High Court reduced the term of imprisonment to 8 years' imprisonment. The Supreme Court of appeal set aside the original sentence and replaced it with a sentence of correctional supervision in terms of s276(1) of Act 51 of 1977. In the matter of *Grundling* the appellant was 67 years old and it was her husband who was responsible for all the operational activities which led to the fraud being committed. Although the appellant merely signed the invoices and foresaw the possibility that the invoices were based on false figures, her role was far less that the role her husband played.

[23] The matter of *Grundling* is distinguishable from the matter in casu, in that the appellant in the matter in case was the sole member of accused one and 20 years younger than the appellant in the matter of *Grundling*. The appellant in the matter in casu was the person responsible for the operational activities which is different to the role that the appellant assumed in the matter of *Grundling*.

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[11] *S v Assante* 2003 (2) SACR 117 (SCA)
[12] *Blank* (note 19 above)
[13] *Assante* (note 11 above)
[14] *Grundling* (note 5 above)

[24] Although the correctional supervision officer in the matter in casu suggested a shorter term of imprisonment in terms of s 276(1)(i) of Act 51 of 1977, the Court a quo was not bound by this recommendation. This Court finds that a term of correctional supervision in terms of s276(1)(i) of Act 51 of 1977 is not appropriate.

[25] In the matter of *Malgas*[15] the Supreme Court of Appeal stated that:

'if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.'[16]

[26] In the matter of *S v Make*[17] the Supreme Court of Appeal held that:

'When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard a matter made the order which it did. Broader considerations come into play. It is in the interests of the open and proper administration of justice that courts state publicly the reasons for their decisions. A statement of reasons gives some assurance that the court gave due consideration to the matter and did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice'.[18] [my emphasis]

[27] After a consideration of the cases in paras [16] to [21], this Court finds that the Court a quo failed to formulate an appropriate sentence in that it failed to perform a comparative assessment of similar cases dealt with by the High Courts.

[28] The mitigating factors alluded to by the appellant's counsel have been considered by this Court in determining whether the sentence imposed by the court *a quo* is appropriate. I am satisfied that the circumstances of this case do render the sentence of twelve years imprisonment too severe.

[29] In the premises, I find that the sentence imposed is disturbingly inappropriate and induces a sense of shock.

[30] In the premises I make the following order:

1. The appeal in respect to the sentence is upheld.

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[15] *Malgas* (note 6 above)
[16] Ibid paragraph I
[17] *S v Make* 2011 (1) SACR SCA 263
[18] Ibid page 269 paras 20

2. The sentence of twelve years imprisonment is set aside and replaced with the following order:

‘The accused is sentenced to eleven (11) years imprisonment. Five (5) years imprisonment are suspended for a period of five years on condition that the accused is not again found guilty of fraud, forgery or uttering, committed during the period of suspension.’

D DOSIO
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree, and it is so ordered

S KUNY
JUDGE OF THE HIGH COURT
JOHANNESBURG

This judgment was handed down electronically by circulation to the parties’ representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 9 May 2024

Appearances:

On behalf of the Appellant	:	Adv. Z. Zakwe
Instructed by	:	Fluxmans Inc.
On behalf of the Respondent	:	Adv. M. Mcosini
Instructed by :	:	Office of the DPP, Johannesburg