THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 20339/14

In the matter between:

LESLEY NIEUWENHUIZEN **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nieuwenhuizen v S* (20339/14) [2015] ZASCA 90 (29 May 2015)

Coram: Shongwe, Leach JJA and Mayat AJA

Heard: **14 May 2015**

Delivered: **29 May 2015**

Summary: Criminal Procedure – Sentence – convicted of six counts of fraud to the tune of R130 429.46 – whether sentence is shockingly inappropriate – court of appeal considers whether the trial court and court a quo materially misdirected themselves – each case considered on its own merits – no misdirection found – sentence is not strikingly or disturbingly disproportionate – this court not justified to interfere.

ORDER

On appeal from: The Northern Cape Division of the High Court, Kimberley (Jordaan and Hendricks JJ sitting as court of appeal):
The appeal is dismissed.

JUDGMENT

Shongwe JA (Mayat AJA concurring)

[1] This is an appeal against sentence only. The appellant was convicted of six counts of fraud and sentenced to six years‟ imprisonment, two years of which were suspended for five years on certain conditions. Her application for leave to appeal against the conviction and sentence was refused. She petitioned the Judge President of the Northern Cape High Court for leave against the conviction and sentence. Leave was accordingly granted to the court a quo. However, the appeal was dismissed; likewise her application for a further leave to appeal was unsuccessful. Leave to appeal against sentence only was granted by this court.

[2] She pleaded not guilty on 31 fraud charges but was convicted on counts 12 to 17 which amounted to the value of R130 429. 46 and was acquitted on the other charges. She steadfastly denied the charges against her. The trial court as well as the court a quo were satisfied of her guilt. The court a quo was also satisfied that the trial court did not materially misdirect itself on the sentence imposed. It concluded that had it been in the position of the trial court it would have imposed a lighter sentence, however it was not convinced that the sentence it would have imposed would have differed materially from the one imposed to

the extent of declaring the sentence imposed shockingly inappropriate. Hence the appeal against conviction and sentence were dismissed.

[3] The facts are briefly that the appellant approached the complainant Mr Dawid Hermanus Jansen van Vuuren, an attorney, to do debt collection work for her. She claimed to be collecting debts from a number of government employees. As a result she would receive cheques from some government departments, in particular, the Department of Finance and Economic Affairs. She claimed these cheques would be deposited in the complainant‟s trust account and that the complainant would in turn give her cash. She did not show the complainant the cheques which she had received and the cheques were never deposited in the complainant‟s trust account as promised. For some reason the complainant believed her and he gave her various amounts of cash in anticipation that she would deposit the cheques in his trust account.

[4] At some stage she represented to the complainant that she was expecting a sum of up to R700 000.00 in debt collections. They were seen together at Absa Bank where they conducted various business/financial transactions. She also transferred money from the complainant‟s trust account into her personal account or an account named “New Finance”, which was seemingly her trading name. She also transferred money from the complainant‟s trust account on her own, having forged the complainant‟s signature. During her trial she did not dispute the allegations of transferring money from the complainant‟s trust account into her personal account but averred that it was with the complainant‟s consent.

[5] It is settled law that an appeal court will not interfere on appeal with a sentence imposed, unless the trial court materially misdirected itself or the sentence is shockingly inappropriate. A trial court exercises its judicial discretion depending on the facts of each particular case. Each and every case must be judged on its own merits. Should the appeal court find that the discretion was not judicially exercised it will be at large to interfere. (See *S v Mitchele & another* 2010 (1) SACR 131 (SCA). In *S v De Jager & another* 1965 (2) SA 616 (A) at 628H-629 Holmes JA observed that:

„It would not appear to be sufficiently recognised that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which has the 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 could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock, that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognised that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited.“

[6] An appeal court may also consider the trial court‟s discretion to have been unreasonably exercised if the disparity between the trial court‟s sentence and that which the appellate court would have imposed is „strikingly“ or „startlingly“ or „disturbingly“ inappropriate. However, if it is not so inappropriate the appellate court will not be justified to interfere with the sentence. (*S v Malgas* 2001 (1) SACR 469 para 12. Marais JA held:

„A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an

appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'.

[7] The appellant argued that the sentence of six years‟ imprisonment, two years of which is suspended on certain conditions is shockingly inappropriate and is very harsh. She contended that a custodial sentence was not the only option. She contended further that the trial court as well as the court a quo misdirected themselves by over-emphasising the seriousness of the offences. She argued that a wholly suspended sentence alternatively a non-custodial sentence would be appropriate in the circumstances. For example a sentence which would include an element of correctional supervision.

[8] It was stated that the appellant was a caregiver of a three year old child – therefore if she went to prison, the child‟s interests would be jeopardised. From the evidence before us it is clear that the appellant is not the primary care giver of this child. The mother of the child is alive and well and employed. In my view the appellant was helping out in looking after the child. The child is now about seven years old – circumstances may have changed since then. A custodial sentence would not prejudice the interest of the child and is the only appropriate sentence in the circumstances. The present case is distinguishable from *S v M* (Centre for Child Law as *Amicus Curiae*) 2007 (2) SACR 539 (CC) where the accused person was the biological mother of the minor children.

[9] On the other hand the State contended that the offences are of a serious nature and need to be treated with the seriousness they deserve. It argued further that an aggravating factor was the fact that the offences were committed over a period of about three months. That even after the complainant had warned her that he would not pay her any further cash until the other cheques were paid into his trust account – she continued performing more unlawful transfers. It was argued on behalf of the State that the offences were well planned and meticulously executed. Counsel for the State argued further that the appellant expressed no contrition for her criminal wrong-doing – therefore she could not be heard to plead rehabilitation as „any hope of rehabilitation becomes illusory and thus an unrealistic expectation…" (See *S v Dyantyi* 2011 (1) SACR 540 (ECG) at 552C-D)

[10] In considering an appropriate sentence, the trial court did consider her personal circumstances – she was 42 years old at the time of the commission of the offence and 49 years old at the time of her sentencing – she was divorced – although still living with her ex-husband. She was unemployed but her two self-supporting children were financially assisting her on a monthly basis. She was fostering a three year old child even though she was not the primary care-giver. She is a first offender. First offenders are not by law entitled to non-custodial sentences. The purpose and objectives of punishment have been repeatedly mentioned by our courts as deterrence, rehabilitation and retribution. These objectives must be balanced and individualized.

[11] The appellant has a constitutional right to remain silent (s 35)(1)*(a)*) and cannot be compelled to give evidence. However, it is crucial when considering an appropriate sentence for the court to know exactly what she wanted to do

with the money and what she actually did with it. Very little, if anything, is known of the motive because she maintains her innocence. It is significant to note that she meticulously planned this scheme to syphon money from the trust account of the complainant, with confidence tricks. She did not stop even after she had been warned. No element of remorse is displayed at all.

[12] It is argued that some of the money has been returned. However, that, in my view, is no excuse. Yes, it may mitigate the damage but the damage had already been done. Some of the money was paid back by Absa Bank and not by the appellant. Marias JA in *S v Sadler* 2000 (1) SACR 331 (SCA) at 335G-336B decried the so called „white collar" crime and called for stiffer sentences to discourage would be perpetrators. Fraud, even if it is not a violent crime, remains a serious offence which does not only affect the particular complainant but also affects the growth of the country"s economy. Insurance premiums are soaring, security measures must be put in place to prevent fraudsters from benefiting without producing. What is clear to me is that the appellant embarked on this criminal path solely for personal financial gain which, to me translates to avarice and nothing less.

[13] It is a healthy practice from a jurisprudential point of view to look at other cases similar to this one, however, it is simply for guidance and not as authority to impose the same sentences imposed in those cases. Each case must be considered on its own merits.

[14] The sentence imposed is, in my view appropriate. I am unable to find any material misdirection on the part of the trial court as well as the court a quo to

justify interference. The disparity between the sentence which I would have imposed, and the one imposed is not striking nor is it startling. Therefore the appeal against sentence falls to be dismissed.

[15] The appeal is dismissed.

J B Z Shongwe
Judge of Appeal

LEACH JA:

[16] The appellant was convicted on six counts of fraud that resulted in the misappropriation by her of a total sum of R130 429.46 from the trust account of an attorney, Mr Janse van Vuuren (the complainant), and was sentenced to six years‟ imprisonment of which a period of two years was conditionally suspended. I have read the judgment of my learned colleague Shongwe JA, but find myself unable to agree with his conclusion that the appeal against this sentence should be dismissed. In my view the sentence imposed on the appellant was far too severe, justifying interference by this court on appeal.

[17] The appellant, who traded as a debt collector under the name of New Finance, had approached the complainant for his assistance, informing him that she had a number of debtors ─ from whom she collected money on a monthly basis ─ who were employed by a number of government departments. These departments, so she alleged, withheld certain amounts from the salaries of these debtors that were then paid to her to redistribute to creditors. However, so she

stated, government policy had changed and the departments were no longer willing to pay directly to a private person as they had done in the past, but that they would pay an attorney. Her proposal was that these payments would be paid to the complainant who, in turn, would then effect payment of the amounts to her to distribute amongst the various creditors. As an inducement, she told the complainant that there was a sum of approximately R700 000 that would be collected in this way.

[18] The complainant agreed to the proposal and, shortly thereafter, the appellant produced a state cheque made out in favour of „Attorney ─ New Finance‟ in the amount of some R14 000. On seeing this, the complainant told the appellant that the cheque could not be paid into his account because it was not made out to him and asked her to take the necessary steps to ensure either that a cheque that had been correctly made out was procured or that the amount was paid electronically into his trust account at Absa Bank. A few weeks later, the appellant presented him with two further cheques, one in the sum of approximately R54 000 and the other for some R39 500. As was the case with the first cheque, both were drawn in favour of „Attorney ─ New Finance‟. Again he informed the appellant to take the necessary steps to have them re-issued or to arrange for the amounts to be electronically deposited into his trust account.

[19] All three of these cheques were false. Precisely how they came into the possession of the appellant and drawn as they were, was never explained. However, despite the fact that they were not paid into his account and that he never received the funds reflected thereon, the complainant succumbed to the appellant‟s entreaty to make funds over to her. He trusted her and, on the strength of the three cheques she had shown to him, he paid her amounts totalling approximately R107 500 out of his trust account as an advance, so to

speak, in respect of the moneys that he was sure she would pay him in due course.

[20] This involved him, on one occasion, accompanying the appellant to the Absa Bank branch where both he and the appellant held their accounts and where he effected a transfer of funds from his trust account into her account simply by way of completing a transfer slip. On a subsequent occasion when an amount was incorrectly transferred to another account, he telephoned the bank and made arrangements for the appellant to visit the branch in order to effect a transfer into her account.

[21] These payments were made by the complainant during or about June 2004. Early in July 2004, the complainant told the appellant that he would not be able to make further payments to her until she had placed him in funds. However, on 12 July 2004, he was contacted by a bank official who informed him that the appellant had attempted to effect a further transfer of which he was not aware. He instructed the bank not to do so and, on proceeding to the bank and making further enquiries, ascertained that on a number of other occasions commencing on 3 July 2004, the appellant had been able to transfer funds in amounts ranging from R5000 to R8000 out of his trust account into her own account. This had occurred as she had misrepresented to the bank that she had been authorised by him to do so, the bank official concerned having been under the impression that she was in his employ.

[22] The transfer of funds from the complainant‟s trust account, both with and without the complainant‟s knowledge, led to the appellant‟s conviction on six counts of fraud. It is accepted that the total sum of the amounts paid out of the complainant‟s trust account into the account of the appellant was R130 429.46. The bank repaid R23 000 to the appellant in respect of the transfers made without his authority and the complainant collected payments made by debtors

to his office for the account of the appellant that totalled some R65 000. In addition another firm of attorneys collected R21 000 in respect of similar payments and was holding that sum in trust on the complainant‟s behalf. However, there is no merit in the argument advanced on behalf of the appellant that these amounts should be deducted from the actual loss for purposes of the consideration of sentence. The appellant herself has never repaid any of the amounts she embezzled. The bank repaid what it had to, but it suffered a loss in that amount. The other amounts collected were not due to the complainant but were for distribution amongst creditors. The fact that the actual loss was split between the complainant and any other persons affected by her fraudulent deeds is irrelevant.

[23] The appellant was 42 years of age at the time she committed the offences and, by the time sentence was imposed upon her in the trial court, had reached the age of 49 years. She was at that stage divorced, although she was living in a permanent relationship with her former husband. Her two adult children were self-supporting although the appellant and her partner were caring for a young child on a daily basis. The appellant is a first offender, and the fact that she had reached middle age without having previously offended is, in my view, a material factor to take into account in the assessment of sentence. And although her offences were obviously planned, they were committed over a relatively short period and were obviously made easy by the gullibility of the complainant whose laxity in regard to his professional obligations relating to his trust account helped to facilitate the commission of the frauds.

[24] In considering what is an appropriate sentence in the light of the facts and circumstances outlined above, it is of course true that „white-collar‟ crime such as fraud, motivated by personal greed, has a „corrosive impact‟ upon society[1] and is by its very nature a serious matter. This court has recognised that fraud

[1]Compare *S v Sadler* 2000 (1) SACR 331 (SCA); (57/99) [2000] ZASCA 13 (28 March 2000) para 13.

is, unfortunately, endemic in our society at present and that there is a need to impose appropriate sentences with a deterrent effect in such cases.[2] That being said, however, it is also well established that although retribution and deterrence are proper purposes of punishment, they must not be afforded undue weight and that an offender being sentenced should not be sacrificed on the altar of deterrence.[3] Thus an „insensitively censorious attitude is to be avoided".[4] As Corbett JA stated in *Rabie*:

„A judicial officer should not . . . 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 pressures of society which contribute to criminality."[5]

[25] The court a quo, in considering the appellant"s appeal, remarked that the sentence of six years" imprisonment, two years conditionally suspended, was a stiff sentence and on the heavy side and that, had it sat as a court of first instance, it would have imposed a somewhat lighter sentence. However it concluded that it could not find that the sentence was so heavy that it could interfere. It is on this issue that, in my respectful view, the court a quo erred.

[26] Although comparisons are often odious, and each case must be decided on its own particular facts and circumstances, consideration of other reported decisions is illuminating. Those of particular significance include the following: *S v Blank* 1995 (1) SACR 62 (A); (22/93) [1994] ZASCA 115 (15 September 1994): In this case a stockbroker embarked on a fraudulent share purchase scheme. His conviction involved 48 fraudulent transactions committed over 17 months leading to profits of R9,75 million of which he received approximately

[2] *S v Engelbrecht* 2011 (2) SACR 540 (SCA); (446/10) [2011] ZASCA 68 (17 May 2011) para 31.
[3] *S v Muller & another* 2012 (2) SACR 545 (SCA); (855/10) [2011] ZASCA 151 (27 September 2011) para 9.
[4] Per Holmes JA in *S v Rabie* 1975 (4) SA 855 (A) at 862C-D.

[5] *Rabie* at 866A-C.

R1,5 million. An appeal against a sentence of 8 years‟ imprisonment was dismissed by this court.

S v Flanagan 1995 (1) SACR 13 (A); (583/92) [1994] ZASCA 125 (22 September 1994): In this case the appellant, a 31 year old bank clerk, was sentenced to seven years‟ imprisonment, of which two were suspended, for having fraudulently transferred R8,5 million from one account to another while acting under the influence of her husband, although no actual loss was suffered. This court set aside her sentence and imposed a sentence of four years‟ imprisonment subject to the provisions of s 276(1)(*i*) of the Criminal Procedure Act 51 of 1977.

S v Nagrani 1997 (2) SACR 98 (W): The appellant, a married first offender with two children, was convicted on 21 counts of fraud arising from her having lodged false VAT claims involving millions of rand. She was sentenced to eight years‟ imprisonment, two years thereof being conditionally suspended. The sentence was confirmed on appeal.

S v Kwatsha 2004 (2) SACR 564 (E): The appellant, a 29 year old unmarried father of a single child employed by the Provincial Government, was charged and convicted of the theft of five government cheques and a conspiracy to commit fraud by using the cheques to draw a sum of R2 million. A sentence of seven years‟ imprisonment, two of which were suspended on certain conditions, was confirmed on appeal.

S v Michele & another 2010 (1) SACR 131 (SCA); (477/08 [2009] ZASCA 116 (25 September 2009: The appellant defrauded a life insurance company by submitting a false claim stating that the person whose life was insured had died in a motor vehicle accident. The insurer immediately paid out funeral cover of R20 000 but subsequently discovered that the claim was false and refused to pay out the insured balance of R357 520 although the potential prejudice had been substantial. A sentence of seven years‟ imprisonment, two years conditionally suspended, was reduced on appeal, this court finding that a

sentence of no more than five years‟ imprisonment, two years suspended, should have been imposed and that there was sufficient disparity between that sentence and the sentence imposed to interfere.

S v Janssen 2010 (1) SACR 237 (ECG); (CA&R 195/2006) [2009] ZAECGHC 58 (2 September 2009): The appellant had been convicted on 144 counts of fraud involving an amount in excess of R1,5 million, an offence which attracted a prescribed minimum sentence of 15 years‟ imprisonment. An appeal against a sentence of eight years‟ imprisonment was dismissed.

S v Engelbrecht 2011 (2) SACR 540 (SCA); (446/10) [2011] ZASCA 68 (17 May 2011): The appellant had falsified documents in respect of the sale of motor vehicles so that the transactions would be zero rated for VAT as exports when in fact the vehicles were sold locally. The appellant was convicted of 157 counts of fraud which had resulted in the South African Revenue Service being defrauded of approximately R1,6 million. As in the case of the present appellant, he was sentenced to six years‟ imprisonment, two years of which were conditionally suspended. This was confirmed by this court.

[27] As I have said, each case must be considered in the light of its own particular facts and circumstances, and although the imposition of sentence is not an exact science, involving as it does the exercise of a judicial discretion, previous decisions have a not inconsiderable degree of relevance to show trends and judicial attitudes. Bearing this in mind, the cases referred to above illustrate that a sentence imposed of six years‟ imprisonment, two of which are conditionally suspended, falls within a range generally regarded as being appropriate for white-collar crimes far more serious than those committed by the appellant in the present case. I do not wish to trivialise the appellant‟s crimes. By their very nature they were severe and must be treated as such. However, the amount involved, while not insubstantial, does not result in this case falling within the echelon of those cases in which a sentence as substantial

as six years“ imprisonment, albeit partially suspended, is as a rule generally imposed.

[28] Indeed, had there been any indication of remorse on the part of the appellant, this is a case in which, in my view, a period of imprisonment subject to the provisions of s 276(1)(*i*) of the Criminal Procedure Act may well have been appropriate. Unfortunately there was no such indication on the part of the appellant. She persisted in an abjectly false defence, not only in the trial court but on appeal to the court a quo. Whether or not this was as a result of misleading legal advice is neither here nor there: the fact remains that she has not recognised the criminality of her actions and shown no contrition. Accordingly, in the light of the other circumstances that I have mentioned, a period of direct imprisonment seems to be called for, but not a sentence as severe as that imposed by the trial court.

[29] There is one further feature to be considered. The offences were committed in 2004. Criminal proceedings against the appellant only commenced some two years later, the appellant having made her first appearance in court on 31 March 2006. The matter was then postponed on several occasions until, on 1 August 2006, the charge was eventually put to her and the trial commenced. Despite the dispute being of a narrow ambit, the trial proceeded at the pace of a snail and dragged on interminably. During the course of more than four years it was postponed on numerous occasions until eventually, on 15 October 2010, the appellant was found guilty. Thereafter it took until 11 February 2011, a date almost five years after the charges were initially instituted against her and almost seven years after the offences were committed, for the appellant to be sentenced. As this court has previously observed,[6] it would be „callous to leave out of account the mental anguish the

[6]Compare *S v Roberts* 2000 (2) SACR at 522 (SCA) para 22 and *S v Michele* at 135 para 13.

[appellant] must have endured‟ during the extended period after criminal proceedings were instituted against her until sentence was imposed.

[30] Bearing all the aforegoing in mind, I am of the view that a sentence of no more than three years‟ imprisonment, one year of which is conditionally suspended on appropriate conditions, is the sentence which should have been imposed upon the appellant. There is sufficient disparity between such a sentence and that imposed on the appellant to render interference on appeal both justified and necessary.

[31] I would therefore allow the appeal, set aside the order of the court a quo and replace it with the following:

„1 The appeal against conviction is dismissed.

2 The appeal against sentence is upheld. The sentence imposed by the magistrate is set aside and is substituted with the following:

“Three years‟ imprisonment, one year of which is suspended for five years on condition that the accused is not convicted of fraud or theft committed during the period of suspension and in respect of which she is sentenced to imprisonment without the option of a fine.”‟

L E Leach
Judge of Appeal

Appearances

For the Appellant:	R van der Merwe Instructed by: Haarhoffs Inc., Kimberley; Phatshoane Henney Inc., Bloemfontein.
For the Respondent:	A H van Heerden Instructed by: The Director of Public Prosecutions, Kimberley; The Director of Public Prosecutions, Bloemfontein.