FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A40/10

In the appeal between:-

ANTON GERHARD VAN NIEUWENHUIZEN Appellant

and

THE STATE Respondent

CORAM: RAMPAI, J *et* EBRAHIM, J

HEARD ON: 6 DESEMBER 2010

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 27 JANUARY 2011

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[1] The appellant was convicted of fraud in the Bloemfontein Regional Court on 17 September 2008 and sentenced to an effective jail-term of five and a half years imprisonment. Initially he came on appeal against the sentence only.

[2] On 29 October 2010 my brother Cillié J sent an invitation to the Director of Public Prosecutions. He expressed some reservations in connection with the appropriateness of certain convictions in respect of 15 of the charges, as well as some reservations concerning the correctness of the written

charge-sheet in the court *a quo*. He requested the respondent to prepare argument in connection with two questions of law.

[3] The appellant's appeal, as regards sentence, was on the roll of 1 November 2010. The appeal was held back for the time being and the points of law apparently took the centre stage. At the end of the day the court *a quo* (per Cillié J *et* Claasen AJ) postponed the appeal *sine die* to afford the appellant an opportunity approaching the trial court for leave to appeal his conviction as well in respect of charge 3 and charges 5 to 18.

[4] The appellant successfully launched such an application in the Bloemfontein Regional Court on 3 November 2010 for leave to appeal against such convictions. He came before us on appeal against the specified 15 convictions and all the sentences with the leave of the court *a quo*.

[5] The appellant was charged with 17 counts of fraud and 15 counts of uttering. He was convicted as charged. He was sentenced to nine years and nine months imprisonment of which four years and nine months imprisonment were to be served together with the four year jail-term he was already

serving. Therefore, he was effectively sentenced to five years imprisonment.

[6] As regards the merits of the charge of fraud:

Count 3: The respondent alleged in the charge-sheet that the appellant committed this particular crime in Bloemfontein on 6 January 2006 by representing to a certain Ms Vanessa Graham, an employee of a law-firm Krohn Attorneys, that he had paid an amount of R3 000,00 into the bank account of Krohn Attorneys by way of an internet transfer for the credit of their client, Mr. G. Beukes, being payment of the instalment due on 7 December 2005. The respondent further alleged that the appellant made the false representation with intent to deceive Ms Graham; that through the misrepresentation the appellant induced Ms Graham or Krohn Attorneys or Mr. Beukes to accept to their loss or potential prejudice that he actually made such payment whereas, in truth and in fact, he knew, at the time he made the internet slip, that it was fake and that he factually made no such payment.

[7] I deem expedient to give a concise background to the aforesaid charge of fraud for the sake of clarity. Between 8 August 2004 and 18 September 2004 Mr. Gerhard Beukes paid the sum of R171 500,00 to the appellant as the purchase price of four motor vehicles, namely 3 x Volkswagen Jetta, plus 1 x Volkswagen Golf. Notwithstanding the payment the appellant, as the seller, failed to deliver the sedans to Mr. Beukes, as the purchaser on 20 September 2004 in terms of the agreement.

[8] As a result of the appellant's breach of the contract, Mr. Beukes appointed Messrs Krohn Attorneys to reclaim the sum of money he paid to the appellant. There the matter was handled by Ms Vanessa Graham, apparently an attorney. She demanded the repayment of the money. The appellant admitted his indebtedness and signed an acknowledgement of debt to that effect. However, the appellant defaulted. Mr. Beukes' attorney then took further legal steps against him. In due course judgment was taken against the appellant in favour of Mr. Beukes.

[9] The appellant again made an undertaking to repay the debt. On this occasion he offered to liquidate the debt at the rateof

R3 000,00 per month as from 7 September 2005 and thereafter on or before the 7th day of each succeeding month. He was obliged to make all the payments into the trust account of Krohn Attorneys Incorporated for the credit of their client, Mr. Gerhard Beukes.

[10] Once again the appellant defaulted. He neglected to make payment of R3 000,00, which had become due and payable on 7 December 2005 at the very latest. Ms Graham confronted him about the overdue instalment. Thereupon the appellant, on 6 January 2006, produced an internet slip to prove to Ms Graham that he indeed paid the instalment for 7 December 2005. The internet document in question was falsified. It was that fake document which gave rise to the criminal charge of fraud – count 3.

[11] The point of law pertaining to count 3 was formulated as follows:

> "Dit kom voor asof dit reeds bestaande skulde was ten aansien waarvan die beskuldigde later wanvoorstellings gemaak het dat dit betaal is.
>
> Kan dit ooit bedrog wees? Die posisie is vergelykbaar met die

betaling van ‘n reeds bestaande skuld met ‘n waardelose tjek. Die skuld word tog nie daardeur uitgewis nie.”

[12] On behalf of the appellant Mr Van der Merwe submitted that seeing that the falsified internet payments’ slip was made out in respect of an existing debt, the appellant’s action of 6 January 2006 hardly induced the complainant to act to their prejudice or that they were, through such actions, placed in a weaker position than they were before the appellant presented the fake document - **S v ELLIS** 1969 (2) SA 622 (N). Therefore counsel urged us to decide the point of law in favour of the appellant by setting aside the count 3 conviction.

[13] On behalf of the respondent Mr. Swanepoel differed. He submitted that the correct point of departure in a case of fraud was the intention of the fraudster – **R v DYONTA AND ANOTHER** 1935 AD 52. Counsel submitted that when the principle was applied to the instant case and regard was had to the record as a whole, it became very clear that when the appellant sent the falsified internet document or payment slip to Krohn Attorneys Incorporated, his intention was not to defray the existing debt, but rather to prevent, by deceptive

actions, the complainant from speedily exercising their available rights by issuing a writ of execution against him by virtue of the civil judgment.

[14] The appellant's argument that because the existing debt was not extinguished by his sending of the document he had falsified, his actions did not amount to fraud, seemingly has its origin in **R v JONES AND MORE** 1926 AD 350. On p. 353 Solomon JA qualified his earlier decision in **R v HERZFELDER** 1907 TH 244 where he said:

> "As a general rule I think it may be said that where the design, if carried out, does not cause prejudice, the perversion of the truth cannot be said to be calculated to cause prejudice."

[15] In **S v ELLIS** 1969 (2) SA 622 (N) at 623 D Miller J in pretty much a similar vein said the following about the effects on the complainant's pre-existing debt of a dishonoured cheque drawn by the accused:

> "The cheque which the accused handed to the complainant was for arrear rental which he owed her. He did not induce or intend or attempt to induce her to act to her prejudice nor did she in fact alter her position for the worse or suffer any loss or prejudice as

a result of his handing her the cheque. The debt in respect of which the cheque was given was a pre-existing debt for which she had and still has a claim against the accused and she was in no better or worse position after the accused had handed her the cheque than she was before he handed it to her."

See also **S v RAUTENBACH** 1990 (2) SACR 195 (N);

S v CALITZ 1992 (2) SACR 66 (O);

S v LABUSCHAGNE 1997 (2) SACR 6 (NC)

[16] In the instant case the pre-existing debt itself came about as a result of the appellant's fraudulent design. By means of deception he induced Mr. Beukes to hand in R175 500,00 under the false pretext that he would reciprocate by delivering four cars to him. When he made such representation in 2004 he knew it was false, but made it with the fraudulent intention of inducing Mr. Beukes to act to his prejudice and he did suffer actual prejudice – hence the civil judgment and the criminal conviction in respect of count 1 *in casu*.

[17] Now in 2006 the appellant was at it again. For a very nefarious purpose he went about creating a fake document

on a computer. He falsified an internet document. He gave a fake document with the appearance of a genuine proof of payment. When he sent such a fake document to the attorney in 2006, he knew he had not paid the amount of R3 000,00, which had become due and payable on 7 December 2005, as the internet slip purported he did. Whereas on the previous occasion in 2004 the appellant's perversion of the truth was fraudulently designed to induce the victim to give away his money for the appellant's undue benefit. On this occasion in 2006 the appellant's perversion of the truth was fraudulently designed to induce the victim or her appointed agent(s) to give him credit, which he knew at the time he made such representation, that he did not deserve.

[18] By sending such false document to the judgment creditor's lawyers his intention was to induce them to act on it, as if its contents were true, to their prejudice. In my view, it cannot be convincingly contended in these circumstances that the appellant did not induce or intend to induce or attempted to induce the complainant to act to their prejudice.

[19] The primary objective of his pervasive design was to avoid paying the due instalment for the particular month. He

clearly intended to deceive and had the design been carried out the complainants would have suffered prejudice. The deceitful design of the appellant was particularly prejudicial, because the false document was sent to the attorneys. An unwary attorney could easily have accepted the internet slip as a true and a valid proof of payment. Had it not been for the attorney's vigilance, the appellant would probably have, by deception, received the credit of R3 000,00 at the expense of his defrauded creditor or cheated agent(s).

[20] In **R v DYONTA AND ANOTHER** 1935 AD 52 on 57 the court held that in a case of fraud:

> "The law looks at the matter from the point of view of the deceiver. If he intended to deceive, it is immaterial whether the person to be deceived is actually deceived or whether his prejudice is only potential."

per Wessels CJ.

[21] *In casu* the appellant again intended to deceive. His intention (2006) was something new. It was distinct and independent from his intention (2004) when he defrauded

Mr. Beukes. The argument that his recent design (2006) with all its inherent hallmarks of deception and prejudice did not legally constitute a crime of fraud since it related to a pre-existing debt is unconvincing.

[22] The notion that the pre-existing debt insulates a dishonest person from future prosecution as long as his subsequent deceptive design of his actions can tenuously be linked to such a pre-existing debt is something the law does not countenance. It will be a sad state of affairs if our law indemnifies fraudsters in this way. The one instructive feature of the authoritative decision in **R v DYONTA**, *supra*, is that in a case of fraud the law looks at the matter from the deceiver's mental perspective. It is his intention at the time he created the design, which is decisive. Anything else, before, during or after such despatch of a false document, is immaterial.

[23] It was common cause that before 6 January 2006 there was judgment taken against the appellant; that the appellant offered to repay the judgment debt by way of fixed regular instalments; that he duly paid the instalments for the first three months in accordance with his offer; that he then failed

to pay the instalment for the fourth month; that he was confronted by the attorneys during January 2006 about his default; that he falsely denied any arrears, created a false document as proof of payment for 7 December 2005 and sent it to the attorney.

[24] The question is why did the appellant do so? He intended to deceive. Firstly, he induced the attorney to accept his false representation so that he could credit. Secondly, he induced the attorney to take no immediate legal steps to have his property attached and sold by way of public auction to satisfy the judgment. Certainly the false document must have retarded the execution process somehow. The judgment creditor was therefore worse off after than he was before the false representation. The retardation or creation to buy the deceitful design delayed and thus frustrated the immediate steps that could have been taken against the appellant.

[25] The attorney probably had to verify the alleged internet payment before he could decide his next line of action. It is not unthinkable that he might have given the appellant provisional credit pending receipt of the relevant bank statement or he might have contacted his bank for

confirmation before he gave credit to the appellant or she might even have accepted the document as true proof of payment and without more accounted to his client and paid over the money to him at once. This last instance, if carried out, would have entailed an element of actual prejudice. The first two instances would have involved an element of potential prejudice. However, it is immaterial what the attorney was induced to do on account of the false representation or whether there was a pre-existing debt or not.

[26] The crux of the matter, according to law, was the appellant's intention at the time he sent out the false document. He intended to deceive. See **S v CAMPBELL** 1991 (1) SACR 503 (NM) and **S v SWARTS EN 'N ANDER** 1961 (4) SA 589 (GW). The first point of law reserved, must be answered in favour of the state. Therefore the conviction stands to be confirmed.

[27] The second point of law, pertinently raised, was whether the conviction in respect of count 3 could legally follow seeing that the element of potential prejudice was missing from the charge sheet or from the questioning in terms of section

112(1)(c), Act No. 51 of 1977.

[28] Section 103, Criminal Procedure Act 51 of 1977 provides:

> "**103 Charge alleging intent to defraud need not allege or prove such intent in respect of particular person or mention owner of property or set forth details of deceit**
>
> In any charge in which it is necessary to allege that the accused performed an act with an intent to defraud, it shall be sufficient to allege and to prove that the accused performed the act with intent to defraud without alleging and proving that it was the intention of the accused to defraud any particular person, and such a charge need not mention the owner of any property involved or set forth the details of any deceit."

[29] The charge sheet specifically alleged in count 3 the names of the particular persons defrauded, namely Mr. G. Beukes, Ms V. Graham and Krohn Attorneys Incorporated. Moreover the element of prejudice (actual or potential) was also specifically alleged. The contention of the appellant, at par. 205, appellant's heads of argument as drawn by Mr. K. Pretorius, that the charge sheet contained no such

allegation, is not correct.

[30] The following exchange in terms of section 112(1)(c) between the appellant and the court *a quo* is relevant.

> "BESKULDIGDE: Ek het, ek was onder druk gewees om 'n betalingsbewys te gee, wat ek wel toe op 'n latere stadium aan Kroon Prokureurs se kantore wel gemaak het en ek het op die 7de, ook op die 7de van daardie maand dink ek van, ek dink dit was Januariemaand gewees as ek dit nie mis het nie, het ek 'n vals internet dokument aan me Venessa Graham by Kroon Prokureurs gestuur vir die betaling daarvan.
>
> HOF: Erken u dat u vir Vanessa Graham en/of Kroon Prokureurs benadeel het of potensieel benadeel het deur u optrede?
>
> BESKULDIGDE: Dit is korrek.
>
> HOF: Het u geweet wat u doen daardie tyd, is verkeerd, strafbaar ... (onduidelik) skuldig bevind?
>
> BESKULDIGDE: Dit is korrek."

In my view the appellant admitted that he knew at the time he made the false representation to the attorney that such representation was prejudicial and wrong.

[31] The authors Du Toit *et al*: **Commentary on the Criminal**

Procedure Act, p. 14 – 44/5 comments appositely as follows on the section:

> "Because it is often difficult to identify the person who has been prejudiced by an accused's fraudulent action, the State is exempted from the requirement of making such an indication. Although the State need not indicate a specific person who has been prejudiced, it is nonetheless necessary that the charge contain an allegation that somebody has been prejudiced or potentially prejudiced. If the charge does not contain such an allegation, it must at least be possible to infer this from the charge (*R v Jones & More* 1926 AD 350 354).
>
> Although an allegation of prejudice is not a requirement for a valid charge of forgery (*R v Hymans* 1927 AD 35 39), the position was qualified in *R v Adams* 1948 (1) SA 1199 (N). An allegation of prejudice may only be omitted from the charge of forgery if the forged document could have caused prejudice to the person who was acquainted with it and who dealt with it.
>
> If possible, in the interests of efficiency and fairness towards the accused, the person who was allegedly prejudiced should be made known despite the exemption. Because the State need not indicate the person who was prejudiced by the fraudulent action, the State is also not bound by an erroneous indication that any particular person was the victim of the fraud (*S v Avion Motor Enterprises (Pty) Ltd* 1978 (4) SA 692 (T) 694G)."

[32] I am in respectful agreement with the aforesaid opinions.

The second point of law reserved must also be answered in favour of the respondent. I can find no reason to interfere with the conviction on the ground that the charge sheet was defective or the questioning in terms of section 112(1)(c) was incomplete.

[33] I turn now to count 5. It was also a charge of fraud. Here the prosecution alleged that the appellant defrauded Ms M.H. Massyn or Department of Correctional Services in Bloemfontein on 7 August 2007 in that he represented to her by means of an internet payment slip that he had paid an amount of R523,00 to Ms M. Griesel on 7 August 2007 knowing at the time he made the representation that it was false.

[34] Some brief background to this particular charge is necessary. The appellant pleaded guilty to count 5 on 19 September 2008 under case number 17(183)2008 Bloemfontein Regional Court. About a year or so earlier, on 27 July 2007 to be precise, the appellant was convicted for fraud in the Bloemfontein Regional Court under case number 17(116)2002. The court made a compensation order against the appellant in favour of the victim, Ms M. Griesel. He was

obliged in terms of the court order to repay the amount of R31 380,00 to the victim at the rate of R523,00 per month from 7 August 2007 until the date of final payment. The appellant was then apparently sentenced to four years imprisonment which was wholly, but conditionally suspended for five years. One of the conditions was that he should make regular payments to the victim in terms of the compensation order. Of course, another condition of the suspension was that he should not be found guilty again of fraud committed during the period of suspension.

[35] The appellant did not comply with the compensatory condition relating to his suspension. Instead of paying the required instalment, he sent a false internet payment slip to Ms M.H. Massyn as proof that he had paid such an instalment. Precisely the same *modus operandi* was used by the appellant in respect of the same victim on four different occasions afterwards.

See count 9 - fraud committed on 10 September 2007;

Count 10 - fraud committed on 22 October 2007;

Count 14 - fraud committed on 7 December 2007; and

Count 17 - fraud committed on 7 February 2008.

[36] It will be readily appreciated that the appellant breached the terms of his suspended sentence in two ways: firstly, he did not make regular payments and secondly, he committed fraud during the period of his suspension and was accordingly convicted on his plea, not only in respect of count 5, but all the aforesaid five counts.

[37] As a result of his violation of the conditions of suspension, the four years suspended sentence was put into operation on 15 April 2008.

[38] It is my considered view that the appellant's intention was to deceive at the time he sent the false internet slip to Ms M.H. Massyn at the Department of Correctional Services. That is the essence of fraud - **R v DYONTA**, *supra*. We do not have to look beyond his intention to determine whether his conviction was sound in law. Such a fraudulent intent cannot simply evaporate into thin air by virtue of the pre-existing debt which itself was tainted by *ex turpi causa*. He did not have any serious intention to compensate the victim for the pre-existing debt. He was fully aware of the implication of his breach of an important condition of his suspended sentence.

He then created or uttered a pervasive design deliberately calculated to frustrate the putting into operation of the suspended sentence.

[39] At the time he sent the relative document, he intended to induce the aforesaid official or her department or any other unnamed person with interest in the matter, including but not limited to the public agencies, such as the prosecuting authority and the police, to act upon it and not to take appropriate steps against him. The prejudice of his pervasive design is self-evident. He apparently managed to deceive all and sundry for sometime which was why he repeatedly made a series of such false representations. His first court appearance was 29 January 2008. Herein lies the obvious prejudice. Since his first deception was not immediately detected, he reckoned he could carry on deceiving the complainants. He delayed paying the victim for a substantial period of time. He, in fact, altered the victim's already bad position for the worse. The victim financially suffered loss, call it prejudice if you will, as a result of the appellant's sending the false document.

[40] In these circumstances, I have come to the conclusion that

the first point of law must be answered in favour of the respondent in connection with this count. That being the case, I am not persuaded that the appellant's conviction in respect of count 5 was unsound or unsustainable in law. I am inclined to uphold his conviction by the court *a quo*.

[41] As regards the second point of law, I could find no fatal defect in the charge sheet. The necessary averments were pertinently made about all the essential elements of fraud.

[42] As regards count 5 the questioning in terms of section 112(1)(c) was indeed materially inadequate. The exchange between the magistrate and the appellant was captured as follows:

> "BESKULDIGDE: Dit is korrek.
>
> HOF: Aanklagtes 5 ... (onduidelik) 18 loop saam.
>
> BESKULDIGDE: Skuldig daarso. Dit ... (tussenbei).
>
> HOF: ... (onduidelik) dit is nou die hoof aanklagte van bedrog.
>
> BESKULDIGDE: Dit is korrek.
>
> HOF: ... (onduidelik) dit het betrekking op verskeie persone en die datums is van 7 Augustus ... (onduidelik) 7 Desember ... (onduidelik) eers vir die hof vertel ... (onduidelik) 7 Augustus ... (onduidelik) Griesel ... (onduidelik).

BESKULDIGDE: Dit is dieselfde soos in die vorige klagte verduidelik het, dit is vals internet betalings wat ek gemaak het, wat ek wel op 'n stadium ... (onduidelik) kleiner bedrae direk by mnr Arendse se kantore betaal het, maar wat wel ... (onduidelik), ek het ook vals internet betalings op presies dieselfde wyse deurgegee.

HOF: ... (onduidelik) wat u vooruitgedateerde ... (tussenbei).

BESKULDIGDE: Presies dieselfde.

HOF: Strokie voltooi het, daar is nie geld in die rekening ... (onduidelik).

BESKULDIGDE: Dit is reg, dit is van klag 5 tot 18, en dieselfde sal ook geld van 19 tot ... (onduidelik). Dit is presies dieselfde.

HOF: Aanklagte 5, erken u die beweringe van die datum, 7 Augustus 2007, bedrag vyf honderd drie en twintig rand en die persoon is mnr M Griesel?

BESKULDIGDE: Dit is korrek."

There was no question asked and thus no admission made as regards the element of prejudice. If count 5, or the similar cluster of counts, was the only charge or were the only charges, I would have been inclined to interfere with the conviction.

[43] But one must not lose sight of the bigger picture. The appellant's grand design from count 5 to 18 was precisely

the same. He admitted that by saying:

> "Ek het ook vals internet betalings op presies dieselfde wyse deurgegee."

He admitted he generated such false slips when he had no money in his bank account. This is what he said:

> "Dit is reg, dit is van klag 5 tot 18, en dieselfde sal ook geld van 19 tot ... (onduidelik). Dit is presies dieselfde."

[44] The following question was put to the appellant in connection with charge 15:

> "HOF: U het geweet dat die persone benadeel word?"

Now charge 15 concerned one person only, namely Ms A.C. Griesel. However from charge 15 – 32 three persons were involved, namely: Ms M. Griesel, Ms A.C. Griesel and Ms G. Scheepers. It is also very obvious according to his last mentioned answer in the previous paragraph that the appellant preferred the fraud group of charges (count 5 – 18) to be treated together by the magistrate because they were precisely the same in the sense that he committed them in

the same manner. His attitude in respect of the corresponding forgery group of charges (count 19 – 32) was the same. It seemed to me that it was precisely that wish of the appellant which prompted the magistrate to shorten a seemingly long and cumbersome story or procedure in terms of section 112(1)(c) by asking the one comprehensive question as to whether the appellant knew that the persons concerned in these charges were prejudiced. See also page 41, 8 – 9. It will serve no useful purpose to remit the matter to the court *a quo* to ascertain whether the appellant admits the element of prejudice in respect of charge 5 and the rest of the fraud charges 6 – 18 - **S v VAN ASWEGEN** 1992 (1) SACR 487 (O).

[45] When all these aspects are objectively considered, together with the first four charges, taking into account the admissions there made by the appellant, as well as the record as a whole, I am persuaded the appellant indeed knew, at the time he made the various false representations in connection with all the fraud charges we were here grappling with, that the misrepresentations he made were prejudicial to all concerned. The second point of law must, in my view, also be answered in favour of the respondent as regards charge

5. Naturally the same applies to count 6 – 18 as well. All these charges were precisely the same as charge 5. Therefore I deem it unnecessary to deal with them individually. I would, therefore, uphold these convictions. In respect of each one of them, both points of law must be answered in favour of the respondent.

[46] As regards sentence, the salient principle is that a court with appellate jurisdiction will only interfere with the sentence imposed on an offender only if it is satisfied that the trial court has not properly exercised its sentencing discretion and that the sentence so imposed, is shockingly severe and inappropriate - **S v PIETERS** 1987 (3) SA 717 (A); **VERMAAK v S** [2005] JOL 15404 (E).

[47] The following were the mitigating factors: The appellant was 47 years of age; he was a divorced man; he was the father of two minor children; he pleaded guilty to the various charges; he expressed remorse and he repaid R50 000,00 to Mr. Beukes and he rendered community service for nine months as part of his sentence of correctional supervision.

[48] The following were the aggravating factors: The appellant defrauded Mr. Beukes of R171 500,00 on 17 September

2004 and Mr. Solomon Zweni of R7 000,00 on 6 July 2007; he had thoroughly planned these crimes. He had two previous convictions of theft for which he was sentenced to R180,00 or six months imprisonment and R2 000,00 or 18 months on 18 June 1982 and 27 October 1986 and he had eleven convictions of fraud in respect of which he was sentenced on 27 July 2007 to 36 months correctional service in terms of section 276(1), Act No. 51 of 1977 plus a total period of 578 hours community service and in addition to this he was further sentenced to four years imprisonment suspended for five years on condition that he was not again convicted of fraud committed during the period of suspension.

[49] The historical perspective of the appellant's crime is important:

11 June 1982:

Committed theft Sentenced 11.06.1982

22 September 1986:

Committed theft Sentenced 27.10.1986

Between 1.11.1988 and 30.09.2000:

Committed 11 counts of fraud Sentenced 27.07.2007

19 September 2004:

Committed fraud count 1 Sentenced 19.09.2008

6 January 2006:

Committed uttering count 4 Sentenced 19.09.2008

7 July 2007:

Committed fraud count 2 Sentenced 19.09.2008

7 August 2007:

Committed fraud counts 5,6,7 Sentenced 19.09.2008

7 August 2007:

Committed uttering counts 19,20,21 Sentenced 19.09.2008

10 September 2007:

Committed fraud counts 8,9 Sentenced 19.09.2008

10 September 2007:

Committed uttering counts 22,23 Sentenced 19.09.2008

22 October 2007:

Committed fraud counts 10,11,12 Sentenced 19.09.2008

22 October 2007:

Committed uttering counts 24,26 Sentenced 19.09.2008

7 December 2007:

Committed fraud counts 13,14,15 Sentenced 19.09.2008

7 December 2007:

Committed uttering counts 27,28,29 Sentenced 19.09.2008

18 January 2008:

Committed fraud count 16 Sentenced 19.09.2008

18 January 2008:

Committed uttering counts 18,31,32 Sentenced 19.09.2008

[50] The critical time line was 27 July 2007. The analysis of the aforesaid crime record reveals that before this particular date there was a pending case against the appellant. In that case eleven counts of fraud, the last of which was committed in September 2000, were involved. While that case was still pending, the appellant committed four more crimes of dishonesty (*vide* count 1 – 4) between 16 September 2004 and 8 July 2007, both dates inclusive.

[51] On 27 July 2007 he was then sentenced in respect of the eleven counts of fraud. The sentence of four years imprisonment was conditionally suspended for five years. Hardly two weeks after the five year suspension was imposed on him, the appellant committed three crimes of fraud (*vide* count 5 – 7) in one day on 7 August 2007. By 7 February 2008, approximately four years before the expiry date of his conditional suspension, the appellant had already committed multiple crimes of fraud and uttering (*vide* count 8 – 32) while he was busy serving a sentence of corrective supervision outside a correctional facility.

[52] The aforegoing crime record is indicative of the appellant's character. All this portrays him as a person with a callous propensity to defraud others. He started cheating others back in 1982 when he was 21 years of age. Since then he was never slowed down. If the latest spate of his acts of dishonesty is anything to judge him by, his disposition to defraud has drastically worsened. He is a cunning person. He meticulously planned these crimes. He committed the crimes over and over again. He seriously abused the opportunity he was afforded in terms of section 271(1)(h) to honestly rehabilitate himself in the community.

[53] Mr. Van der Merwe argued that the magistrate intended to sentence the appellant to five and a half years imprisonment and to direct that the appellant must serve the four years thereof together with the four years imprisonment, which he was already serving after the suspension was put into operation. Mr. Swanepoel conceded.

[54] The aforesaid submissions were based on the exchange between the appellant and the trial magistrate:

"BESKULDIGDE: Vir my familie se doeleindes ... (onduidelik) hof, daar is baie gesê, ek het 'n vier jaar gevangenisstraf wat ek reeds uitdien. Ek wil net vra, die globale som, wat is ekstra by, as mens dit nou kan vat ... (tussenbei).

HOF: Ek dink dit sal seker so een en 'n half jaar wees."

[55] It must be appreciated that the discussion between the appellant and the magistrate, concerning the effective sentence, took place after he had already sentenced the appellant. The remark is ambiguous. It can be construed in the sense as Mr. Van der Merwe contended it should. In that sense it would mean that the five year effective sentence actually imposed, was three and a half years wrong or off the line, but it can also be construed to mean that the magistrate wanted to say that effectively the sentence he imposed on the appellant was more or less one and a half years longer as compared to the sentence of four years he was already serving. In the sense it would mean that there was virtually no discrepancy between the five year effective sentence, in other words four plus one, actually imposed and the remark or that such effective sentence was half a year less than the four plus one and a half years which is five and a half years. The three and a half year margin of error is so big and

remote from the actual effective sentence that I am not persuaded that the trial magistrate could have intended to mean what counsel contended he did. At any rate, the remark made as it were post the sentence, has no legal status. Therefore it really serves no useful purpose speculating about what the true meaning of such a belated remark could have been.

[56] In my view, the four individual components of the sentence cannot, in them self, be fairly criticised as it was done on behalf of the appellant. However, the direction as to how such sentences should be served may be fairly criticised. I consider that an effective sentence of two and a half years imprisonment would have been an appropriate sentence in the circumstances of this particular case. The disparity between that and the effective five year imprisonment is huge. I am of the firm view the court *a quo* materially misdirected itself on that aspect. I would therefore be inclined to interfere with such an improper exercise of the sentencing discretion.

[57] Accordingly I make the following order:

57.1 The appeal fails as regards conviction. The conviction is confirmed in respect of all the charges.

57.2 The appeal succeeds as regards sentence. The sentences are all set aside and substituted with the sentence and direction as set out below.

57.3 The appellant is sentenced to:

five years imprisonment in respect of count 1;

one year imprisonment in respect of count 2;

nine months imprisonment in respect of count 3;

four months imprisonment in respect of each of counts 5 to 18; and

two months imprisonment in respect of each of counts 19 to 32.

57.4 It is directed that the appellant serve all these sentences save for two and a half years in respect of count 1 together with the four year jail-term he was already serving as on 17 September 2008, the effective sentence being two and half years imprisonment.

M.H. RAMPAI, J

I concur.

S. EBRAHIM, J

On behalf of appellant:	Attorney P. van der Merwe Instructed by: Legal Aid S A BLOEMFONTEIN
On behalf of respondent:	Adv. J.B.K. Swanepoel Instructed by: Director Public Prosecutions BLOEMFONTEIN

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