IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE - GRAHAMSTOWN)

CASE NO: 09/2009

DATE HEARD: 23/3/10

DATE DELIVERED: 30/3/10

NOT REPORTABLE

In the matter between

JAN DANIEL FAURE **Appellant**

and

THE STATE **Respondent**

The appellant had been convicted of a number of counts of fraud and one count of contravening s 218(2) of the Companies Act 61 of 1973. On count 1, the most serious count of fraud, he was sentenced to 15 years imprisonment. All of the other sentences were ordered to run concurrently with this sentence. On appeal, it was held that this sentence was excessive and was altered to a sentence of ten years imprisonment.

JUDGMENT

PLASKET J:

[1] The appellant was convicted, in the Regional Court, Port Elizabeth, of seven counts of fraud -- these being counts 1, 2, 4, 5, 6, 9 and 10 -- and one

count of contravening s 218(2) of the Companies Act 61 of 1973 -- this being count 11. This section creates the offence of acting or purporting to act as a director of a company when disqualified from appointment as such.

[2] The appellant was sentenced to 15 years imprisonment in respect of count 1, five years imprisonment in respect of counts 2, 4, 5, 6 and 9, these counts being taken together for purposes of sentence, three years imprisonment in respect of count 10 and two years imprisonment in respect of count 11. It was ordered that the sentences in respect of counts 2, 4, 5, 6, 9, 10 and 11 were to run concurrently with the sentence of 15 years imprisonment. This appeal is directed only at sentence. While, formally, the appeal is directed at all of the sentences imposed on the appellant with the exception of the sentence in respect of count 11, Ms Theron Le Roux, who appeared for the appellant, confined her argument to the sentence of 15 years imprisonment. I am of the view that she adopted a sensible approach as there is no basis upon which this court can interfere with the other sentences.

[3] The circumstances in which a court of appeal may interfere with the sentencing discretion of a trial court are circumscribed. These are set out as follows by Marais JA in *S v Malgas*:[1]

> '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

[1] 2001 (1) SACR 469 (SCA), para 12.

> 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". It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[4] In order to determine whether a basis for interference exists it is necessary to consider the appellant's conduct, the interests of society and his personal circumstances. It is to these issues that I now turn.

[5] The appellant's fraudulent conduct centres around a company, Jewel of the Ocean (Pty) Ltd, which was the owner of the Seaview Hotel and various other properties in Port Elizabeth. The sole shareholder of Jewel of the Ocean was a Dutch company, Hoofdezaken Beheer, of which one Barend De Ronde was the sole shareholder.

[6] During July 2005, the appellant was introduced to De Ronde as a potential purchaser of Jewel of the Ocean. In due course an agreement of sale was drafted in terms of which Jewel of the Ocean was sold, ultimately, to the Jaydee Trust, a non-existent trust of which the appellant purported to be a trustee and on whose behalf the appellant signed the agreement of sale. The purchase price was R14 000 000,00 to be paid by way of an initial deposit of R1 000 000,00 and a second irrevocable bank guarantee of R13 000 000,00.

This arrangement for payment was later varied, but nothing turns on the variation. Paragraph 4 of the agreement recorded that the 'purchaser warrants that the sum of R14 000 000,00 … is available and that the purchaser will upon signature of this agreement make payment of the sum of R1 000 000,00 … as a deposit'.

[7] It was clear from the circumstances surrounding the agreement and correspondence written by the appellant that he was the driving force behind the transaction: as the magistrate observed, he created the impression that he was the purchaser even if, at some stage after he had signed the agreement, the name of the Jaydee Trust was written into the agreement. It is also important to note that, in order to show that he was not a man of straw, the appellant falsely represented to De Ronde that he owned a game farm worth R30 000 000,00 and that 'I immediately applied for a bond over the property in order to be in a position to pay you'. Thereafter, and without paying a cent, the appellant proceeded to take control of Jewel of the Ocean. This is the basis of count 1.

[8] Once he had taken control of Jewel of the Ocean, the appellant proceeded to enter into a number of agreements with various people for goods and services, falsely representing to them that he was the owner of the Seaview Hotel or the sole shareholder in Jewel of the Ocean and that he was able to pay them for the goods and services they provided. These misrepresentations formed the basis of his convictions in respect of counts 2, 4, 5, 6 and 9.

[9] Finally, Jewel of the Ocean had been the owner of a property – erf 161 – which was leased from it by one Petrus Heynike, who carried on a business there named Seaview Paint and Hardware. The appellant entered into an agreement of sale with Heynike in terms of which erf 161 was sold to him for R500 000,00. Heynike paid an initial amount of R100 000,00. The appellant had represented to Heynike that he was authorised to contract with him in this

way, well knowing that he was not and that he had purported to sell the property to another. This was the basis for the conviction in respect of count 10.

[10] It was argued that the complainant in count 1 had not suffered any great prejudice as a result of the appellant's actions. It would appear that after the sale had been cancelled, De Ronde sold the hotel and it was stated from the bar in the trial by the appellant's attorney that he had made a considerable profit from the sale. Be that as it may, there is no evidence to suggest that the appellant added any value to the hotel. Indeed, the evidence of Ms. Angela Buming, the general manager of the hotel, was that De Ronde had incurred expenses of over R1 800 000,00 as a result of the takeover of the hotel by the appellant.

[11] From the above summary, it is clear that the frauds committed by the appellant – and particularly count 1 – were serious and prejudiced the complainants, particularly De Ronde. At the same time, it is obvious that the appellant's scheme had no long term prospect of success – for two or three months he played out the role of a businessman in his own fantasy world.

[12] The appellant was 58 years old at the time he was sentenced. He is not in good health and is HIV positive. He is single, having got divorced in 1983. He has two children, both of whom work. He is not a first offender. He has a number of previous convictions for fraud, the two most recent being in 1996, in which he was sentenced to seven years imprisonment, and in 1999, in which he was sentenced to four years imprisonment. The appellant's record indicates that, since 1982, he has displayed a propensity to commit crimes of dishonesty.

[13] The magistrate considered the factors that I have set out above as well as the interests of society. The issue to be determined is whether he achieved

a proper and just balance in considering these factors. In this respect, it is apposite to refer to *S v Vilakazi*[2] in which, albeit in the context of prescribed sentences, Nugent JA stressed the importance of courts avoiding sentences that are disproportionate.[3] Using the language of the *Zinn* triad,[4] Marais JA in *S v Malgas*[5] spoke of the imposition of a prescribed sentence being unjust if it would be disproportionate to the crime, the criminal and the needs of society. The same applies to the imposition of sentence in circumstances not contemplated by the Criminal Law Amendment Act 105 of 1997.

[14] While I accept that each case must be decided on its own facts and that sentences imposed in other cases do not necessarily bind a sentencing court's discretion, they nonetheless serve as guidelines for what is an appropriate, proportionate sentence.[6] They also contribute to consistency and certainty.[7] That said, however, I do not lose sight of the prime importance of the individualisation of sentences.[8]

[15] Ms. Theron Le Roux referred us to a number of matters involving sentences for fraud and theft. I do not intend to discuss the cases separately. Suffice it to say that they cover widely divergent forms of fraud or theft; that in some, positions of trust were abused;[9] in most, the accused were first offenders; in most of them the motive was greed while in one – *S v M*[10] – trust money had been stolen by an attorney to ward off insolvency caused by the financial demands of his children, particularly one who was disabled; the ages of the accused varied from the early 20's[11] to the mid 60's;[12] and the amounts

[2] 2009 (1) SACR 552 (SCA).
[3] Para 14.
[4] *S v Zinn* 1969 (2) SA 537 (A), 540G: 'What has to be considered is the triad consisting of the crime, the offender and the interests of society.'
[5] Note 1, para 25.
[6] See *S v McMillan* 2003 (1) SACR 27 (SCA), para 10.
[7] See *Gerber v S* [2006] 4 All SA 423 (SCA), para 11-12.
[8] See *R v Karg* 1961 (1) SA 231 (A), 236G-H.
[9] See for instance, *S v M* 1998 (1) SACR 162 (W) and *S v Vorster* 2007 (2) SACR 283 (E). In both cases the accused were attorneys.
[10] Note 9.
[11] *S v Kwatsha* 2004 (2) SACR 564 (E).
[12] *S v Clifford and others* ECP 3 March 2009 (case no. CC62/04) unreported.

involved tended to be high, all being in excess of R1 600 000,00. In these cases the sentences varied from six years imprisonment[13] to 12 years imprisonment.[14] From these cases, I conclude that a sentence of 15 years imprisonment for fraud would be most unusual.

[16] While that was the sentence confirmed on appeal (in respect of the first appellant) in *S v Price and another*,[15] it is noteworthy that Farlam JA held that had a prescribed sentence of 15 years imprisonment not applied (in terms of s 51 of the Criminal Law Amendment Act) 'a lesser sentence in the region of 10 years imprisonment, part of which would be suspended, would have been appropriate'.[16]

[17] I am of the view that when the nature of the appellant's conduct, his personal circumstances and the interests of society are considered against the backdrop of the cases I have mentioned, a sentence of 15 years imprisonment in respect of count 1 is disproportionate and excessive.

[18] In the *Clifford* matter, the accused had conducted a pyramid scheme over a substantial period of time and, in so doing, had defrauded a substantial number of people of a substantial amount of money in total. Despite being older than the appellant and also being in bad health, accused 1, a first offender, was sentenced to 12 years imprisonment. The fraudulent conduct of the appellant was of much shorter duration and caused a far smaller loss to De Ronde. That said, however, the appellant's previous convictions weigh heavily against him.

[19] In these circumstances, I consider an appropriate sentence to be ten years imprisonment in respect of count 1. As there is a striking disparity

[13] *S v Oates* 2008 JDR 1215 (W).
[14] *S v Clifford and others* (note 12).
[15] 2003 (2) SACR 551 (SCA).
[16] Para 30.

between the sentence imposed in the court below and the sentence I consider appropriate, we are entitled, on appeal, to interfere with the sentence.

[20] The following order is accordingly made:

(a) The appeal succeeds to the extent set out below.

(b) The sentence of 15 years imprisonment imposed on the appellant in respect of count 1 is set aside and replaced with a sentence of ten years imprisonment backdated to 9 May 2008.

(c) The sentences imposed in respect of counts 2, 4, 5, 6, 9, 10 and 11 are confirmed. They shall run concurrently with the sentence in respect of count 1.

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C. PLASKET

JUDGE OF THE HIGH COURT

I agree,

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J. ROBERSON

JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant: Ms E Theron Le Roux of Legal Aid South Africa, Port Elizabeth

For the respondent: Mr H.J. Van Der Walt of the Director of Public Prosecutions, Port Elizabeth