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**IN THE HIGH COURT OF SOUTH AFRICA  
EASTERN CAPE DIVISION – GRAHAMSTOWN**

**Reportable**

**Case no: CA&R218/2022**

**Date heard: 28/02/2024**

**Date delivered: 15/03/2024**

In the matter between:

**MORNE CHRISTO PRETORIUS**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**JUDGMENT**

**Notyesi AJ:**

**Introduction**

[1] The appellant, a 38-year-old man, stood trial in the regional court, Port Elizabeth (Eastern Cape). He pleaded guilty to and was convicted of 1 count of theft of stock items from his employer, a trading company. The total value of the stolen stock items is R1 479 521.95. On 26 August 2020, the appellant was sentenced to an effective term of 12 years' imprisonment. The appellant, having successfully petitioned the Judge President of this Division, appeals against the sentence.

[2] In this appeal, it is contended on behalf of the appellant that the sentence imposed by the regional court is shockingly inappropriate and severe and that the Magistrate had erred in finding that there were no substantial and compelling reasons to justify the imposition of a lesser sentence. On the other hand, the state had contended that the sentence imposed by the regional magistrate was proportionate to the offence committed by the appellant and that the sentence is appropriate, more so that the appellant had stolen from his employer.

[3] On a proper conspectus, this appeal turns on one issue, whether the sentence imposed by the regional magistrate was a proportionate sentence to the offence committed, upon consideration of all relevant factors.

### **Background**

[4] The appellant was employed as a manager by a company known as Supply Five Distribution (Pty) Ltd. He was stationed at a Port Elizabeth branch of the company. The branch was situated at 1[...] to 7[...] B[...] Road, Deal Party. The headquarters of the company were in Cape Town. The company traded as wholesalers of shutter plywood and other timber products. The company had stored all its stock in respect of the Port Elizabeth branch at the premises in B[...] Road, Deal Party, Port Elizabeth.

[5] The duties of the appellant included, *inter alia*, sales, marketing, invoicing and stock control. The directors of the main company, Craig and Marlene Bradnick ("Marlene") were the supervisors of the appellant. The directors were based at the head office of the company in Cape Town. During the period between 11 January 2018 and 10 December 2018, on undisclosed occasions, the appellant stole stock items of the company to the value of R1 479 521.95. The appellant did not testify during trial. Marlene testified in aggravation of sentence.

[6] According to Marlene, she had noticed that towards the end of 2018, the sales were lower than normal in the Port Elizabeth branch. It soon came to their attention, as the directors of the company, that there was another company which was selling their products. Based on that information, they commenced with an in-depth investigation. In the process of such investigation, they found out that the stock was missing from the Port Elizabeth warehouse. They later established that the appellant was responsible for the theft of the stock.

[7] The appellant confessed to the theft of the missing items to Marlene on 10 December 2018. He had sent an email embodying his confession to her. He was remorseful of his actions. He was cooperative during the process of the investigation. He also volunteered to help the company in its civil case against Credit Guarantee. Credit Guarantee is a company responsible for payment of debts in circumstances where the debtors are in default or in default of paying or the debtors are unable to honour their obligations for payment. According to Marlene, the assistance of the appellant was significant.

[8] When charges were put to the appellant, at the commencement of the trial, he had pleaded guilty to the charge of theft. The appellant submitted a statement in terms of section 112(2) of the CPA<sup>1</sup>. In his plea statement, the appellant stated that he had formed his own company called Ubuntu Supply. When he started his own company, he had no capital to purchase stock. He then decided to steal stock from his employer, (the complainant company), between the period 11 January 2018 and 10 December 2018. He had arranged for the stolen items to be transported from the company premises at 1[...] B[...] Road to the clients of Ubuntu Supply (his own company). The clients would be invoiced in the name of Ubuntu Supply. The plea statement of the appellant was accepted by the state and he was convicted solely on the basis of the statement. Although the appellant did not testify, submissions from the bar were made on his behalf by his legal representative.

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<sup>1</sup> The Criminal Procedure Act, 51 of 1977 as amended

[9] For sentencing purposes, a probation officer's report from the Department of Social Development was submitted to court. The report was admitted into record by consent of the appellant's legal representative and the state. A further report was received from Correctional Services. The latter report concerns the suitability of the appellant for correctional supervision as a form of punishment. The report was also admitted by consent of the parties.

[10] The probation officer's report was prepared by Mrs Sakhiseni Matshona. She is in the service of the Department of Social Development and is a registered social worker. In the preparation of the report, the probation officer had interviewed the appellant, Marlene, the appellant's mother, Mrs Sharon Pretorius ("Sharon") and Mrs Charmaine ("Charmaine") Pretorius, the appellant's wife. The probation officer set out the appellant's upbringing which is largely uneventful. The appellant was raised in a marital relationship between Mr Christo Erasmus ("Christo") and Sharon. He was provided with his basic needs as both parents were employed. The appellant's parents divorced when he was approximately 9 years old. After the divorce of the parents, the father stopped supporting the appellant.

[11] The appellant first married when he was 27 years old, although he later divorced with his first wife. At the age of 34 years, he married Charmaine. On 13 October 2016, they were blessed with a baby boy. He lived with his wife and child at a rented property at Bluewater Bay, Port Elizabeth. They were able to provide for themselves and the child's needs as both him and the wife were in gainful employment. He was employed by the complainant company at the time. During December 2017, his then directors informed him that they were about to close their Port Elizabeth branch and that his lay off was imminent. The appellant feared that once his employment is terminated, he would no longer be in a position to afford his life and to take care of his family and the interests of the minor child. He conceived an idea of forming his own company, Ubuntu Supply, although he did not have the capital. The employer company was not closed down, although there were new directors who took over.

[12] The appellant confirmed that Marlene and Craig took over the company from the previous directors and retained him as the manager. He had a good relationship with them. He regretted his actions and resigned after the commission of the offence in question. After his resignation, he was then employed as an Uber driver. The appellant had no previous convictions. At the time of the report, their son was 4 years old.

[13] The probation officer reported that the theft of the items negatively affected the business to the extent that the Port Elizabeth branch was closed down and the other employees lost their jobs. According to the probation officer, the appellant had breached the trust of the employer. The appellant was in a position of trust and he betrayed that trust. The probation officer recommended that the court should consider a sentence of direct imprisonment.

[14] The correctional supervision report was also placed before court. The report had been prepared by Ms Ngcebetsha Mongi of the Department of Correctional Services. She concluded that the appellant is a suitable candidate for correctional supervision for the following reasons:

- (a) The appellant has a fixed address and his family is willing to support him.
- (b) He has no previous convictions.
- (c) He is married with a minor child who is his dependent.
- (d) He is working and the employer is willing to accept him, notwithstanding the commission of the offence.
- (e) He is remorseful and he is willing to comply with the conditions of the court as he takes responsibility for his actions.

[15] In mitigation of sentence, it was submitted on behalf of the appellant, that he was 38 years of age, married and has a minor child who was 4 years at the time. The child was attending nursery school. The appellant was in a permanent

employment by Francois Nieuwenhuizen, as an Uber driver earning an income of between R2 500 and R3 500 a week, depending on the circumstances. The employer was aware of the appellant's conviction for the offence and that he was prepared to accept him to continue with his employment. The appellant was a first offender. The appellant committed the offence out of fear that the previous employer had given a notice to lay him off and that the closure of the business was an imminent threat.

[16] On the contrary, the state had led evidence of Marlene in aggravation of sentence. The state had contended that in view of the seriousness of the offence, retribution and deterrence would be the appropriate form of punishment. The state sought a sentence of direct imprisonment.

[17] In sentencing the appellant, the regional court took into account the fact that the appellant was in a position of trust and that he was required, at all times, to act in the interests of the employer. The regional court also considered that the offence was committed over a period of time and that the appellant had an opportunity to reflect on his actions. The regional court had taken into account the psychological effect of the offence on the directors of the complainant company and after analysis of the aggravating factors, the regional court concluded that it should benchmark its sentence with minimum sentence of 15 years and that after careful consideration of the mitigating factors, it was satisfied that 12 years would be an appropriate sentence.

[18] On behalf of the appellant, it was submitted that the sentence fell to be interfered with on the basis that it induced a sense of shock; that the trial court erred by its conclusion that a 12 year direct imprisonment was a suitable sentence, and not considering other forms of punishment such as a suspended sentence; that the trial court overemphasized the seriousness of the offence and the interests of society at the expense of the appellant's personal circumstances; that the trial court did not properly take into account the element of mercy; that the trial court over-emphasized the elements of retribution and deterrence; that he did not consider adequately the

fact that the appellant is a first offender at the age of 38; that he was in a gainful employment and that the present employer was prepared to keep him; that he had shown remorse and that he has a minor child. The state supported the sentence. It contended that the offence committed by the appellant was serious and aggravated by the fact that he had stolen from his employer. As a result of the appellant's unlawful actions many other employees lost their jobs when the branch was closed. The state further submitted that the regional court did not misdirect itself in imposing direct imprisonment and that on this basis alone the appeal must fail.

## Discussion

[19] It is trite that sentencing is generally a matter that falls within the discretion of a trial court. The appeal court's power to interfere with a sentence is limited to instances where the sentence is vitiated by an irregularity; misdirection; or where the sentence is shockingly disproportionate or where there is a striking disparity between the sentence and that which the appeal court would have imposed, had it sat as the trial court. See generally: *S v Snyder*<sup>2</sup>; *S v Petkar*<sup>3</sup> and *S v Sadler*<sup>4</sup>.

[20] In *S v Rabie*<sup>5</sup> Holmes JA held:

1. 'In every appeal against the sentence, whether imposed by the Magistrate or a judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.

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<sup>2</sup> *S v Snyder* 1982 (2) SA 694 (A)

<sup>3</sup> *S v Petkar* 1988 (3) SA 571 (A)

<sup>4</sup> *S v Sadler* 2000 (1) SACR 331 (SCA)

<sup>5</sup> 1975 (4) SA 855 (A) at [857D-E]

Corbett JA further remarked that:

[a] A judicial officer should not approach punishment in a spirit of anger, because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interest of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender (himself) 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.'

[21] In *E M Piater v The State*<sup>6</sup> Makgoka J, as he then was, discussed the nature of the misdirection that is required for interference with sentence and in this regard, he referred to *S v Pillay*<sup>7</sup> and *S v Malgas*<sup>8</sup>. In *S v Pillay*, it was held:

'Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".'

[22] In *S v Malgas* Marais JA held that:

'... A court exercising appellant 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 up to usurp the sentencing discretion of the trial court ... However,

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<sup>6</sup> *E M Piater v The State* 2013 (2) SACR (GNP) at [9]

<sup>7</sup> *S v Pillay* 1977 (4) SA 531 (A) at 535E-F

<sup>8</sup> *S v Malgas* 2001 (1) SACR 469 (SCA) 2001 (2) SA 1222 at 1232A-D); (2001) 3 All SA 220 [12]



even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. ... 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'.

[23] As aforementioned the appellant did not testify in mitigation of sentence. The only witness that testified is Marlene for the state who was testifying for the aggravation of sentence.

[24] The complainant witness, Marlene, had also confirmed that the appellant was remorseful. In this regard, I quote from the record:

'The Prosecutor: When the theft unfolded or when you found out about the theft, what was his attitude towards having stolen the stock items?

Mrs Bradnick: Well, he actually cried....., he said he was sorry.

The Prosecutor: Did you find him to be genuinely remorseful about what he did?

Mrs Bradnick: At the time I think so, I do not know now.'

[25] The submissions of the appellant's legal representative were never challenged by the prosecutor. On the contrary, he accepted them. The prosecutor had said, in his own submission, referring to the appellant:

'He clearly is a liked person. At a stage there was a person willing to offer up the money to repay on behalf of the accused. So, therefore, he is a liked member of society even though the people know that the accused has done this. So, it is not a situation where he will come with a stigma once he is being released because they clearly have faith in the character of the accused person Your Worship.'

[26] The contention before this Court by the state that the appellant had chosen not to testify or lead any evidence under oath, should be rejected for lack of merit. In

this regard, the general approach is that,<sup>9</sup> statements from the Bar by a practitioner are normally no more than argument. If they are to receive greater weight, they must be admitted by the representative of the State, or accepted facts by the court. If such *ex parte* statements by a defending attorney or counsel or the court, they acquire for purposes of sentencing the weight of facts proved in evidence; and the court is bound to consider them as though they had been proved in evidence. They cannot simply be ignored by the court. Failure to take such statements or mitigating facts implicit in such statements, will in an appropriate case, lead to an interference by a court of appeal or review, *S v Mabala*<sup>10</sup> and *S v Caleni*<sup>11</sup>.

[27] The regional court magistrate seems to have accepted the evidence in mitigation of sentence tendered from the bar, on behalf of the appellant and therefore, the regional court magistrate was bound to consider all the mitigating factors. The regional court magistrate, in the judgment, held that he had considered the mitigating factors presented on behalf of the appellant. That statement does not bear close scrutiny on careful consideration of the sentence. It is clear, in my mind, that in sentencing the appellant, the regional court magistrate had in mind only the provisions of the minimum sentence legislation. In the judgment, the regional court magistrate said-

‘Now the nature of the offence is a very serious offence. Even though the Minimum Sentence Act is not applicable it has reference in that we can use that as a benchmark for an appropriate sentence to be considered. The minimum sentences decree that the Court must impose a minimum sentence of 15 years imprisonment if the amount relevant is above R500 000,00.’

[28] In his conclusion, the regional court magistrate stated again-

“As I have said that the benchmark here is 15 years imprisonment. Given the mitigating factors, I am satisfied that a sentence of 12 years would be an appropriate sentence and that is the sentence which I impose.’

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<sup>9</sup> *E M Pieter* supra at [18]

<sup>10</sup> 1974 (2) SA 413 (C) at 422E-G

<sup>11</sup> 1990 (1) SACR 178 at 181 f-g

[29] I find that the regional court magistrate misdirected himself in the following respects: In cases where minimum sentences are applicable, an accused person must be warned at the pleading stage. The accused should understand the implications of invoking the minimum sentence legislation. In this case, the minimum sentence legislation was never invoked and therefore, it was incorrect of the magistrate to benchmark the sentence by way of minimum sentence legislation. The magistrate was bound to take into account all relevant factors, including the nature and seriousness of the offence, the personal circumstances of the appellant, the mitigating and aggravating factors, as well as the legitimate interest of the society. In his sentence judgment, the magistrate makes no reference to the correctional supervision report and the social worker's report. In my view, he also seemed to pay lip service to the personal circumstances of the appellant and the mitigating factors. The magistrate over emphasized the aggravating circumstances. In this regard, I quote from the record-

'However, on the aggravating side you were in a position of trust where you were supposed to act in the interest of your employer. You did the opposite. You further your own interests to the detriment of the complainant. The other aggravating factor is that this happened over a period of time. You had lots of time to reflect on your conduct and you failed to heed to the interest of the community. You kept on doing, serving your own personal interest.

Further, what I must consider after listening to the evidence of the complainant is the psychological, not only financial impact that this action had on them, and how you placed them under distress. What is also aggravating is that your conduct you knew would have an impact on other people's tenure at the place of employment, yet you persisted in your conduct.'

[30] In my view, the failure in this regard amounted to a misdirection. Had the magistrate accepted the mitigating factors presented on behalf of the appellant, the correctional supervision report and the probation officer's report, and made a careful consideration of the evidence presented by Marlene, the approach to sentence, or at least the period of imprisonment, would necessarily have been different. It is

therefore the type of misdirection which justifies interference by this court. Accordingly, this Court is at large to consider the sentence afresh and impose what it considers to be an appropriate sentence under the circumstances. The sentence has to have regard to the interests of the minor child. I also find too, that the sentence imposed is excessively severe having regard to the personal circumstances of the appellant and the previous sentences.

### **The best interest of the minor child**

[31] In *S v M (Centre for Child Law as Amicus Curiae)*<sup>12</sup>, the court defined a primary caregiver as the person with whom the child lives and who performs every day tasks like ensuring that the child is fed and looked after and that the child attends school regularly. What is expected of the sentencing court is to give sufficient independent and informed attention as required by section 28(2) and section 28(1)(b) of the Constitution to the impact on the children of sending their primary caregiver to prison. The objective is to ensure that the sentencing court was in a position adequately, to balance all the varied interests involved, including those of the children placed at risk. The form of punishment imposed should be the one that least damages the interests of the children, given the legitimate range of choices available to the sentencing court.

[32] In *E M Pieter v The State*, Makgoka J held –

‘The court developed the following guidelines in applying the principles set out above: Firstly, a sentencing court should determine whether an accused is a primary caregiver, wherever there were indications that this might be so. Secondly, the court should ascertain the effect on the children of a custodial sentence if such a sentence was being considered. Thirdly, if on the “*Zinn triad*” approach (which requires the court to consider the crime, the offender and the interests of society) the appropriate sentence were clearly custodial and the accused was a primary caregiver, the court must apply its mind to the question of whether it was necessary to take steps to ensure that the children would be adequately cared for while the caregiver was incarcerated. Fourthly, where the appropriate sentence was clearly non-custodial, it

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<sup>12</sup> 2007 (2) SACR 539 (CC); see also *E M Pieter v State supra* at [22]

must be determined bearing in mind the interests of the children. Fifthly, if there were a range of appropriate sentences, the court must use the paramountcy principle as an important guide in deciding which sentence to impose.'

[33] In the present case, had the regional court magistrate considered the interests of the child properly, together with all the other factors, he would have found that those interests would be inappropriately compromised by a lengthy custodial sentence. I have no doubt that the imprisonment of the appellant would have a negative impact on the minor child. However, the appropriate sentence in this matter is clearly custodial. The appellant is not the child's sole caregiver, he shares the responsibilities of the child with the wife. They both stay with the minor child. The child is attending school. The appellant seems to be responsible for the child. He was in a gainful employment as an Uber driver prior to his incarceration. The employer is ready to accept him. It is self-evident that a lengthy custodial sentence would result in him losing his employment. The nett income for the family would be substantially reduced during the custodial term of the appellant. In these circumstances a long custodial sentence would not be an appropriate sentence, although, custodial sentence would still be an appropriate sentence. The interests of the minor child must be considered with other factors. I take into account these factors.

1. The appellant was 38 years old at the time of his sentence.
2. He pleaded guilty and showed remorse for his actions.
3. The appellant is a first offender at his age.
4. The appellant had self-confessed the offence and committed to assist the complainant

in pursuing civil action against Credit Guarantee.

5. He is married and the father of a minor child.
6. The appellant was permanently employed and the employer would accept him back at

work, despite the commission of the offence.

[34] I am mindful of the aggravating factors and that the appellant had stolen from his employer. In *S v Prinsloo*<sup>13</sup> the court stated –

‘...I(n) the world of commerce employers were compelled to place trust in their employees. It is not possible for them to conduct all the business of their concerns themselves. If they were able to there would no employment for the employees. No alternative remains to them but to repose confidence in their employees, and when an employee breaches that trust his conduct had to be heavily penalised. The employer is entitled to expect unswerving honesty from the employee in return for the wages he pays and the benefits he gave him. Nothing but implicit acceptance of that obligation (by the employee) will keep the wheels of commerce turning smoothly. ...I consider it the duty of the courts, whenever this sort of misdemeanour is detected, to send out the message that such conduct would be severely punished.’

[35] I agree with the submission by the state that the appellant was convicted of a serious offence being aggravated by the fact that he stole from his employer, resulting in a substantial financial loss suffered by the employer. In such circumstances, I accept that the court should carefully consider the interests of society and recognition that commerce demands business owners to trust their employees with the responsibility of managing their affairs, as they cannot always be present in the place of business. The disruption of trust could negatively affect business operations.

[36] The proper approach to sentencing is to be guided by the trial which involves a balancing act that takes into account the offence, the offender and societal interests. In the present case, the magistrate was heavily influenced by the consideration that the theft was committed by the employee and he failed to appreciate that other non-custodial sentences still remain an available penalty for the offence of theft where the accused steals from the employer. The imposition of

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<sup>13</sup> 1998 (2) SACR 669 (WLD) at 672b-e and also also *E M Pieter v State* supra at [27]

sentence still remains discretionary. The court is bound by judicial precedent and authority. In *S v Juta*<sup>14</sup> Van Reenen CJ said -

‘Conflicting consideration abound, such as the effect upon the accused, his family and dependants, the requirements of the law, the interests of the society and so on. Care should also be taken not to stress too much the peculiar circumstances of the individual accused. It would appear to be safer to regard him as an average representative of a class and consider the various factors in that light.

For instance, the effect of a prison sentence would be far greater on a highly sensitive person than on an insensitive, callous one, but such extreme cases must be discounted.

Ideally, the sentence, both the primary fine, and the secondary, alternative prison sentence, must satisfy the requirements of justice, in all that that term connotes. Unfortunately, it is not given to mortals to be perfectly just in all circumstances. We can but do our best.’

[37] In *Evans v S*<sup>15</sup>, the appellant, together with her former husband, was charged with 60 counts of fraud, alternatively theft, read with section 51(2)(a) of the Criminal Law Amendment Act 105 of 1997. The total amount involved was R1 489 694-96, of this, an amount of R297 460-68 was transferred directly into Mr Botha’s bank account and the balance was transferred into the appellant’s personal bank account. The appellant was sentenced to a period of 15 years imprisonment. On appeal, the SCA set aside the sentence and replaced with a sentence of 8 years imprisonment of which 5 years was suspended for a period of 5 years on condition that the appellant is not convicted of fraud, attempted fraud, theft or attempted theft, or any offence involving dishonesty, committed during the period of suspension.

[38] In *E M Pieter v State*<sup>16</sup>, the court set aside a sentence imposed by the regional court for a period of 7 years and replaced it with a period of 4 years. That sentence was confirmed in the Supreme Court of Appeal. In this case, Makgoka JA

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<sup>14</sup> 1988 (4) SA 926 (TK) 928B-E

<sup>15</sup> 2023 (2) SACR 541 (SCA), Also (171/2022 [2023] ZASCA 123 (26 September 2023)

<sup>16</sup> *E M Pieter v State* supra

gave an analysis of judicial precedent of sentences imposed by the courts in similar cases and I find myself constrained to agree with his eloquent analysis.

[39] In *S v Lister*<sup>17</sup>, a 34-year-old bookkeeper's sentence of 4 years' imprisonment was confirmed by the SCA, after she had been convicted of theft of R95 700 from her employer, which she stole over a period of 11 months.

[40] In *Howells v S*<sup>18</sup>, the appellant was sentenced for 4 years' imprisonment in terms of s 276(1)(i) of the CPA in the regional court for defrauding her employer of a sum of R100 000, the offence having been committed over a period of two years. On appeal, the High Court considered the interests of her minor children but held that there was no misdirection by the regional court in sentencing the appellant to direct imprisonment. The court however, altered the period of suspension from 2 years to 1 year. The altered sentence by the High Court was confirmed on further appeal by the SCA.

[41] In *S v Sindeni*<sup>19</sup>, the Appellate Division confirmed an effective sentence of 4 years' imprisonment on the appellant, a first offender, for stealing approximately R138 000 from her employer. The amount had been stolen over a period of 14 months. The appellant was married and had three minor children.

[42] In *S v Kearns*<sup>20</sup> a 28-year-old unmarried woman had been convicted in the regional court of theft of R67 000 from her employer over a period of three months. She was sentenced to an effective 3 years' imprisonment. Her appeal to a provincial division having failed, she appealed further to the SCA. It was contended that the trial court had erred in not imposing a sentence of correctional supervision and had placed insufficient emphasis on the seriousness of the offence. The appellant also had a poor socio-economic background. The SCA confirmed the sentence on appeal to it.

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<sup>17</sup> *S v Lister* 1993 (2) SACR 228 (A)

<sup>18</sup> *Howells v S*

<sup>19</sup> 1995 (2) SACR 704 (A)

<sup>20</sup> 1999 (2) SACR 660 (SCA)



[43] In *S v Sadler* (above) the appellant was a senior manager in a bank. He was convicted in the High Court of numerous counts, including corruption, fraud, forgery and uttering. He was sentenced to terms of imprisonment which were suspended in their entirety, and to a fine. The Attorney-General (the predecessor of the National Director of Public Prosecutions) noted an appeal against the sentence. The SCA upheld the appeal and set aside the sentence and substituted for it with a sentence of 4 years' imprisonment, all counts taken together for purposes of sentence.

[44] In *De Sousa v The State*<sup>21</sup> the appellant had pleaded guilty to 13 counts of fraud. She had been part of a fraudulent scheme involving a total amount of R1 000 228.94. She had benefitted R90 000. She was 32 years old and a first offender. She had pleaded guilty and shown genuine remorse and contrition. She had also signed an acknowledgement of indebtedness in favour of the complainant in the sum of R90 000, being the extent of her benefit from the fraudulent scheme, and thereafter paid the debt in full. She had utilized some of the money to assist her mother, who was in financial difficulty, and her sister (whose husband was in rehabilitation) to pay school fees. All counts having been taken as one for the purposes of sentence, the appellant was sentenced to 7½ years' imprisonment, which was confirmed by the High Court. She appealed further to the SCA, which set aside the sentence and imposed 4 years' imprisonment.' Ponnann JA, in this case, remarked –

'The approach of a sentencing tribunal to the imposition of the minimum sentences prescribed by the Act is to be found in the detailed judgment of Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA). The main principles appearing in that judgment which are of particular application to the present appeal are: first, the court has a duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders; second, for circumstances to qualify as substantial and compelling, they do not have to be exceptional in the sense of seldom encountered or rare; third, although the prescribed sentences required a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response, the statutory framework nonetheless left the courts free to

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<sup>21</sup> *De Sousa v The State* [2008] ZASCA 93 para 4 (12 September 2008J

continue to exercise a substantial measure of judicial discretion in imposing sentence.'

[45] In the *De Souza* case the minimum sentence legislation was invoked and nevertheless, the SCA imposed a lesser sentence of 4 years direct imprisonment.

[46] In *Pretorius v The State*<sup>22</sup>, the appellants, two brothers, had pleaded guilty to 91 counts of fraud in the regional court amounting to R122 309, committed over a period of more than a year. They had shown remorse. They had admitted to their fraud and agreed to repay the amount in question plus the costs of investigation into their conduct. Both were first offenders, and principal breadwinners in their respective families, with young children. Their families would be disrupted and severely affected by their imprisonment. The court sentenced them to 5 years' imprisonment, and ordered them to repay the ill-gotten gains, plus the costs of investigation into their fraudulent conduct. Both the High Court and the SCA dismissed their appeal and confirmed the sentences.

[47] In *MS v S*<sup>23</sup> a 33-year-old married mother of two young children pleaded guilty in the regional court to, and was convicted, of forgery, uttering and fraud with a potential loss of R42 000. The offences were committed during her course of employment at a firm of insurance brokers. She had a previous conviction for fraud, also committed in the course of her employment with her previous employer. The counts of forgery and uttering were taken together for the purposes of sentencing. She was sentenced to 2 years' imprisonment, conditionally suspended for five years. On the count of fraud, she was sentenced to 5 years' imprisonment with the conditional correctional supervision in terms of s 276 (1)(i) of the CPA, of which the High Court, the SCA and the Constitutional Court, upheld.

[48] In *Joubert v The State*<sup>24</sup>, the appellant had been convicted of 20 counts of

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<sup>22</sup> [2008] ZASCA 132 (26 November 2008)

<sup>23</sup> *MS v S* supra

<sup>24</sup> [2012] ZAGPPHC 5 (3 February 2012)

fraud totalling R425 843.33. This arose from a scheme created for the purpose of defrauding SARS. The scheme comprised of various legal entities which were instrumental in unlawfully inducing SARS into making VAT refund payments to the legal entities. In the regional court he was sentenced to 7 years' imprisonment, wholly suspended for 5 years on standard conditions and that he repays the amount of R425 843.33 to SARS with interest. On appeal, the sentence was set aside and the Court imposed an effective 3 years' imprisonment, in addition to the appellant repaying the stolen amount with interest.

[49] On behalf of the appellant, it was submitted that the appellant's plea of guilty in the trial court demonstrated his contrition and remorse. Remorse is obviously an important consideration in sentence. Genuine remorse must be distinguished from self-pity and an unavoidable acknowledgement of guilt (when the evidence is so overwhelming that admission of guilt is unavoidable). Before remorse could be a valid factor in the imposition of sentence, it has to be sincere, and the accused had to take the court completely into his confidence. See *S v Gerber*<sup>25</sup>; *S v Seegers*<sup>26</sup>, *S v Matyityi*<sup>27</sup> and *E M Piater v The State*<sup>28</sup>.

[50] I agree that the appellant has shown genuine remorse. First, he cooperated with the complainant and confessed. I reject the submission by the state that at the time of confessing on 10 December 2018, that the state had a strong case against him. The evidence of Marlene does not support the proposition of the state in this regard. The appellant voluntarily resigned from his employment and despite his resignation, remained cooperative with the complainant. The appellant tendered to repay the stolen money, although he had no means. The appellant had also volunteered to assist the complainant in respect of the civil case and that was confirmed by the complainant.

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<sup>25</sup> 1998 (2) SACR 441 (NIC) at 449h-i

<sup>26</sup> 1970 (2) SA 506 (a) at 511G-H

<sup>27</sup> 2011 (1) SACR 40 (SCA) para 13

<sup>28</sup> *E M Piater v The State* supra [39]

[51] I also take into account that the appellant has since been in a gainful employment as an Uber driver. The current employer, though aware of the offence committed by the appellant, trust him. The current employer had made an undertaking to keep the appellant in his employment irrespective of the outcome of the criminal proceedings. To his credit, he still enjoys the trust of his employer. It is self-evident that the appellant, his family and wife had been embarrassed by the actions of the appellant. That evidence is clear from the probation officer's report. The Correctional Services had concluded, in their assessment of the appellant, that he is a suitable candidate for correctional supervision. I also consider the remarks of the magistrate when sentencing the appellant. In this regard, the magistrate had made this observation-

‘I do not deem that, although you are a suitable candidate for correctional supervision, I do not deem it a suitable sentence because of the gravity of this specific offence.’

[52] On the other hand, there are obviously aggravating factors. The offence was committed when the appellant was placed in a position of trust by his employer, concerning stock control. The offence was committed over a period of time where the appellant had an opportunity for reflection and to stop his criminal conduct. There is no evidence to suggest that the appellant would have stopped stealing, if the crime was not discovered.

[53] The new directors of the company had offered employment to the appellant and other workers. The company suffered financial loss and that resulted in the closure of its Port Elizabeth branch. Accordingly, it is an aggravating factor that, as a result of the appellant's criminal conduct, other employees lost their employment.

[54] The Correctional Services has recommended correctional supervision. While a non-custodial sentence of correctional supervision in terms of section 276(1)(h) is appreciable, it is my view that such sentence would be inappropriate in light of all the circumstances of the present case. Although the interests of the appellant and his family called out for a sentence of correctional supervision, the interests of society

outweighed his own. The offence is serious and the sentence, as such, does more than deal with him; it also constitutes a message to the society in which the offence occurred. It is so that it was not vigorously contended that a non-custodial sentence should be imposed against the appellant. I also agree with the regional court magistrate that non-custodial sentence would not be appropriate.

[55] In the main, it was contended, on behalf of the appellant, that the degree of disparity between the sentence imposed and that which this Court would have imposed, is such that interference is competent and required. I agree with the submission made on behalf of the appellant in this regard.

### **Conclusion**

[56] For all the above-mentioned reasons, I consider a period of 5 years' imprisonment to be appropriate in the circumstances of this case.

[57] In the result, I would make the following Order –

1. **The appeal succeeds to the extent that the sentence of 12 years' imprisonment imposed by the regional court magistrate is set aside and replaced with the following sentence –**

**“The accused is sentenced to undergo 5 years' imprisonment and the sentence is antedated to 26 August 2020.”**

**M NOTYESI  
ACTING JUDGE OF THE HIGH COURT**

I agree

**T V NORMAN  
JUDGE OF THE HIGH COURT**

**Appearances**

Counsel for the Appellant: *Adv H Charles*

Instructed by: *Legal Aid South Africa*

Counsel for the Respondent: *Adv T de Jager*

Instructed by : *The Director of Public Prosecutions*

Makhanda