IN THE HIGH COURT OF SOUTH AFRICA (NOT REPORTABLE)

(TRANSKEI DIVISION)

Case No.: CA & R 122/07

Date delivered: 2 October 2008

In the matter between:

NTSIKANE ZIM MTSHABE Appellant

and

THE STATE Respondent

JUDGMENT

JANSEN , J:

This is an appeal with leave granted on petition against a sentence of 8 years imprisonment imposed upon the appellant having been convicted on a count of fraud. This is my minority judgment.

The appellant, an attorney, committed the crime of fraud during the period March to June 1998. During this period the appellant submitted fifteen statements of account to the State Attorney, Mthatha where payment of these statements of account was approved, whereafter these statements of account were presented to the Registrar of the High Court, Mthatha, who issued various vouchers which vouchers were then deposited into the bank account of the appellant. At the time the appellant submitted the statements of account, he pretended and gave out that he had performed the services as stipulated in the statements of account, that he was entitled to claim the

amounts stipulated in each statement of account and that he performed professional services which entitled him to claim the amounts specified, well-knowing that these representations made by him were false. The total amount fraudulently claimed by the appellant was R458 406,75.

The trial commenced in the Transkei Division of the High Court on 18 April 2006. Judgment was delivered on 26 July 2006. Sentence was imposed on 4 December 2006 and leave to appeal was granted on 23 March 2007. The matter only now came before this Court as certain problems were experienced with the construction of the record. The appellant was released on bail pending the finalisation of the appeal.

A Court of Appeal does not readily interfere with a sentence imposed in the exercise of its discretion by the trial Court. Interference is only justified if the trial Court misdirected itself or if the sentence imposed is so shockingly inappropriate that no other reasonable court would have imposed it. Formulated differently, interference with a sentence imposed would be justified if there is a striking disparity between the sentence imposed and the sentence the Court of Appeal would have imposed had it been sitting as a court of first instance.

The appellant was admitted as an attorney during 1995. At the time when he committed the crimes he was practising for his own account as an attorney in Mthatha. At the date of sentence he was still practising as such. He was then 47 years of age, married and the father of four children. The eldest child was

managing the appellant's guest house in Mthatha and also operated a tow truck business. The second child was a fourth year medical student at the University of the Witwatersrand. The youngest two children were still at school.

The appellant himself gave evidence in mitigation. Four witnesses were also called on his behalf to persuade the learned trial Judge not to impose a custodial sentence.

The first witness called on behalf of the appellant was Melamli Matyumza. He was an admitted advocate. He was also chairperson of the Transkei Society of Advocates. He has been engaged in the practise of law for approximately twenty years. In addition thereto he was the head of the Walter Sisulu University School of Law in Mthatha. He knew the appellant as a colleague at the University and as a practising attorney. He described the appellant as a dedicated lecturer. The appellant was the only member in the facility capable of teaching conveyancing and the law of negotiable instruments. The appellant had a number of staff members under his wing. Although the appellant was entitled to claim compensation for his overtime lectures, he never did it. He regarded the appellant as a good attorney. Mr Matyumza testified that the appellant was a member of the Southernwood Extension Men's Association, a community based organisation performing work of a charitable nature. He was highly respected by the community. In spite of the appellant's conviction of fraud Mr Matyumza was still prepared to allow him to continue with his lecturing at the University.

The next witness in mitigation was Brenda Ann Beukman, who holds a PhD in Criminology which she obtained through the University of South Africa. In her work she mostly focuses on forensic work. She compiled a report and emphasised that the report's primary focus was on the appellant as a person. She conducted interviews with the appellant, family members and Mr Matyumza. She also received a report from a clinical psychologist, Dr Greeff, which was also handed in as an exhibit. She came to the conclusion that the most appropriate sentence for the appellant would be a non-custodial one. It was correctly pointed out by the learned Judge *a quo* that Dr Beukman's evidence was based on a false premise. Throughout her report and that of Dr Greeff the denial of the appellant that he drafted the various statements of account were repeated. The only mistake conveyed by the appellant to them was that he was negligent in failing to check the statements. Even after the findings of the Court on the merits were brought to her attention, in particular the fact the appellant intentionally defrauded the fiscus, she persisted in her view that a custodial sentence would be inappropriate for the appellant. It was quite correctly pointed out by the learned Judge *a quo* that objectivity, which is expected of a professional witness, was not Dr Beukman's forte. She stated categorically that no person who matches the appellant's profile should be sentenced to imprisonment for a crime of fraud.

George Winson Moolman, an admitted attorney who used to serve on the Disciplinary Committee of the Cape Law Society, was the next witness. His

evidence amounted only to the fact that the appellant would in all probability be struck from the roll of attorneys upon his conviction.

Reverend Ashlington Majija is an ordained Minister of Religion in the Anglican Church since 1967. He came to the St Andrews parish as a rector in 1974. The appellant was then 15 years old. The appellant became a member of St Andrews Youth Club. He also became a lay preacher. He is a committed church member. He is leading a Christian life. He got involved in community affairs. He gives a lot to the church. It was Reverend Majija's view that if the appellant be sent to prison the community and the congregation would be devastated if consideration is given to what the appellant had done in the community.

The appellant also gave evidence. He accepted that if he is struck from the roll of attorneys that he would have to earn his income from lecturing at the University. He also had other business interests such as a Bed and Breakfast with an average of 50% occupancy. Ten people are employed in that business. He also runs a cleaning service, a car wash and he owns immovable property worth ±R3 million. His income from his property is approximately R7 000 per month. He promised to help at the Law Clinic at the University if sentenced to community service. He promised to repay everything that he got from the State as a result of the submission of the various statements of account. His conviction had an adverse effect on his life as well as on the lives of his family members. He has already paid back an amount of R235 000 to the State. When questioned by counsel for the

State he, in spite of the Court's finding, insisted that his conviction was only caused by his negligence.

A reading of the judgment on sentence indicates that all the evidence tendered in mitigation of sentence was properly considered by the learned trial Judge. The personal circumstances of the appellant were carefully taken into account. When a sentence is considered the interests of society should also be taken into account. The learned Judge *a quo* did it. He clearly did not over-emphasise it.

The crime committed by the appellant was correctly described by the learned trial Judge as a serious crime. It was premeditated and committed over a period of time. He also involved a fellow attorney at the State Attorney's offices. The fact that the appellant was a practising attorney was correctly taken into account by the learned trial Judge as an aggravating feature. The position of an attorney demands *inter alia* an inflexible regard for the truth, a high sense of honour and incorruptible integrity. The appellant's conduct fell short of that. That factor was correctly in my view taken into account by the learned Judge *a quo* when he decided to impose direct imprisonment on the appellant.

Counsel for the State, in support of the sentence imposed, referred us to various decisions in various Divisions where imprisonment was imposed upon an accused convicted of a so-called "white collar" crime. The first was ***S v Price and Another*** 2003 (2) SACR 551 (SCA). The accused, who was a

practising attorney, was convicted on two counts of fraud with a total amount of almost R2 million involved. A sentence of 15 years imprisonment imposed upon him in terms of the provisions of section 51 of Act No. 105 of 1997 was confirmed on appeal. In ***S v Kwatsha*** 2004 (2) SACR 564 (ECD) the accused, an employee of the Department of Home Affairs, was convicted of theft and conspiracy to commit fraud involving government cheques. The Department did not suffer any real loss as the accused was timeously arrested. An amount of almost R2 million was involved. The accused was sentenced to 7 years imprisonment of which 2 years were conditionally suspended. In ***S v Lando*** 2000 (2) SACR 673 (WLD) the accused was convicted on 48 counts of theft. The total amount of money was unknown. He was sentenced to undergo 5 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. In ***S v Erasmus*** 1998 (2) SACR 466 (SE) the accused was convicted of theft in an amount of almost R2 million from his employer over a period of 2½ years. He was also sentenced to 5 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. In ***S v Botha*** 1998 (2) SACR 207 (SCA) the accused was convicted on 12 counts of theft, 10 counts of forgery and 4 counts of fraud. The crimes were committed over a period of 6 months. She was sentenced to 5 years imprisonment of which 2½ years were suspended. In ***S v Sinden*** 1995 (2) SACR 704 (AD) the accused was convicted on 43 counts of theft. She stole an amount of R138 000 over a period of 14 months from her employer. She was sentenced to 6 years imprisonment of which 2 years were conditionally suspended. In ***S v Kleinhans*** 2005 (2) SACR 582 (WLD) the accused was convicted of theft of an amount of R198 000 from her employer over a period

of 12 months. She was also sentenced to 5 years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. From these cases it is clear that the Courts see white collar crimes in a very serious light. In the ***Kwatsha*** case (*supra*) Leach J indicated that these types of crimes are serious and would be visited with rigorous punishment. It was pointed out that these type of crimes are endemic in the Eastern Cape Government and notwithstanding the State's attempts these crimes still appear almost daily before our Courts. It was also pointed out in the ***Erasmus*** case (*supra)* by Zietsman JP that white collar crimes have reached alarming proportions in our country. It has become so alarming that the Legislature decided to pass an Act prescribing as a general rule minimum sentences for serious cases of white collar crimes. In a recent case in the Eastern Cape Division ***S v Dumisa Gozana*** case no. 112/06, Leach J imposed a sentence of 8 years imprisonment upon an accused who had stolen R1,3 million from the bank, where he was employed, in order to help a friend. The accused did not benefit at all by the theft. In another unreported judgment in the Eastern Cape Division ***Lindinkosi Ntintelo v The State*** case no. CA&R 23/02 Pickering J referred to the fact that attorneys may now in certain circumstances be elevated to the Bench. That fact so much more requires absolute honesty from members of the attorneys profession. Dishonest conduct causes irreparable harm to the profession. In another matter in the Eastern Cape Division ***Pieter Johannes Vorster v The State*** case no. CC123/07 the appellant, who practised as an attorney, was convicted on 47 charges of theft of monies held in his trust account amounting in total to just over R1,6 million. He stole it over a period

of 18 months. He was sentenced by Sandi J to 8 years imprisonment. That sentence was confirmed on appeal.

I take into account that decided cases dealing with sentences can only be used as a guideline to establish an appropriate sentence. Each case, however, should be dealt with on its own facts connected with the crime and the criminal.

It was vigorously argued on behalf of the appellant in this Court and also before Chetty J that the appellant should not be sentenced to direct imprisonment. A suspended term of imprisonment was suggested as well as correctional supervision and also a fine coupled with a suspended term of imprisonment. All those options were taken into account by the learned Judge *a quo.* He considered it, but after careful consideration came to the conclusion that the crime committed by the appellant was of such a nature that he could not accede to the plea that the appellant not be sentenced to direct imprisonment.

On appeal it was argued that the learned Judge *a quo* misdirected himself by imposing a term of direct imprisonment. The mere fact that a term of imprisonment was imposed cannot amount to a misdirection. In his heads of argument the appellant went so far as to argue that the learned Judge *a quo* erred in not taking into account that it was unconstitutional to send the appellant to imprisonment to an institution which is overcrowded and which would result in the deterioration of the appellant's health. There is no merit in

that submission. If that argument is sustained no criminal in South Africa would under prevailing circumstances be sent to any prison because it is well-known that almost all the prisons in South Africa are over-crowded. A prison is not a congenial place. It is primarily an institution of punishment.

Nothing that is contained in the record and nothing submitted on behalf of the appellant has persuaded me that the learned trial Judge in any manner misdirected himself. I am in particular satisfied that the Court *a quo* did not misdirect itself when it came to the conclusion that correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act would not be a suitable sentence for the appellant.

In my view this Court is not at large to interfere with the sentence on a ground of any misdirection committed by the trial Court. The only basis upon which this Court may therefore interfere is on the basis that this Court, had it been sitting as a Court of first instance, would have imposed a sentence strikingly different from the sentence imposed.

I was a member of the Full Bench dealing with the appeal of ***Vorster,*** referred to above. As mentioned, he was sentenced to 8 years imprisonment on 47 counts of theft of trust money to the value of R1,6 million. He did it over a period of 18 months. ***Vorster's*** crimes, in my view, were more serious than the crimes committed by the appellant. The appellant committed his crimes over a period of 4 months. A far lesser amount of money was involved. The

appellant thereafter continued his practise and did not commit any further crimes from June 1998 until his conviction in 2006.

Much was said in the Court *a quo* and during argument on appeal about the appellant's so-called lack of remorse for the crimes committed. Reference was made to that fact by Chetty J in the Court *a quo* and in the majority judgment of this Court by Ebrahim J. It was correctly pointed out during argument on behalf of the appellant that he was throughout entitled to demand from the State to prove his guilt. The question was then posed why after conviction he did not confess to his guilt and showed remorse. Counsel's reply to that was that an admission of guilt after conviction in the Court *a quo* would, in the appellant's view, have affected his prospect of success on appeal. I have some sympathy for that subjective view of the appellant. He was fighting for his career and he was fighting for his liberty. In the **Vorster** case a similar situation occurred. In spite of the fact that **Vorster** pleaded guilty he, when he testified in mitigation, untruthfully tried to put blame on his bookkeeper and on his bank manager. In any event, in my view, the absence of remorse should never be taken into account as an aggravating feature. In my view, a Court considering sentence should never argue that because an accused did not show remorse a heavier sentence should be imposed on the accused. On the other hand, true remorse may be taken into account in mitigation of sentence.

The appellant repaid half of the monies that he fraudulently obtained. The fact that the appellant played a major role in his community cannot be

disregarded. In ***S v Du Toit*** 1979 (3) SA 846 (AD) at 857H-858A Rumpff CJ said the following:

> "Wanneer die aard van die misdaad en die belang van die gemeenskap oorweeg word, is die beskuldigde eintlik nog op die agtergrond, maar wanneer hy as strafwaardige mens vir oorweging aan die beurt kom, moet die volle soeklig op sy persoon as geheel, met al sy fasette, gewerp word. Sy ouderdom, sy geslag, sy agtergrond, sy geestestoestand toe hy die misdaad gepleeg het, sy motief, sy vatbaarheid vir beïnvloeding en alle relevante faktore moet ondersoek en geweeg word. En hy word nie met primitiewe wraaksug beskou nie, maar met menslikheid en dit is hierdie menslikheid wat in elke geval, hoe erg ook al, vereis dat versagtende omstandighede ondersoek moet word. Hierdie versagtende omstandighede, indien daar is, skep die genadefaktor waarna in hierdie Hof vantevore verwys is en wat dan na oorweging van alle ander relevante omstandighede, moet lei tot 'n gepaste vonnis."

If all these factors are taken into account I would not have sentenced the appellant, had I been sitting as a Court of first instance, to eight years imprisonment. I would have sentenced the appellant to imprisonment but in terms of section 276(1)(i). That was the sentence imposed in three of the matters referred to by counsel which are referred to *supra*. The appellant has

to go to prison for the crimes committed. He should, however, be given the opportunity to qualify for correctional supervision within the discretion of the Commissioner of Correctional Services.

In the result, I would have allowed the appeal and set the sentence imposed by the Court *a* quo aside. I would have sentenced the appellant to 5 years imprisonment in terms of section 276(1)(i) of Act No. 51 of 1977.

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J C H JANSEN

JUDGE OF THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSKEI DIVISION)

CASE NO: CA & R 122/07

DATE HEARD: 12/9/2008

DATE DELIVERED: 2/10/2008

REPORTABLE

In the matter between:

NTSIKANE ZIM MTHSABE Appellant

and

THE STATE Respondent

JUDGMENT

Y EBRAHIM *et* C PLASKET JJ:

[1] We have had the benefit of reading the comprehensive judgment of our colleague Jansen J. We are in respectful agreement with his well-reasoned finding that the learned trial Judge (Chetty J) did not misdirect himself in any of the respects alleged. We therefore share his view that the appellant's submissions to the contrary are devoid of merit. We are, however, in respectful disagreement with his conclusion that the sentence may nonetheless be interfered with on appeal. Our reasons follow.

[2] It is trite that sentence is a matter for the discretion of the trial court and that a Court of Appeal may only interfere if the sentence is vitiated by misdirection or is startlingly inappropriate or if there is a striking disparity between the sentence imposed and the sentence the Court of Appeal would have imposed.[1]

[3] We respectfully also agree, as pertinently observed by Jansen J, that each case should be dealt with on its own facts in relation to the crime and the criminal, and that decided cases on sentence serve merely as guidelines for the determination of an appropriate sentence. This *caveat* needs to be

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[1] *S v Kgosimore* 1999 (2) SACR 238 (SCA) at para [10].

borne in mind as, given the individual nature of sentencing, one will seldom find cases that are identical and call for the same sentence to be imposed.

[4] However, where we are constrained to disagree with Jansen J is that this Court may interfere on the basis that, had this Court been sitting as a Court of first instance, it would have imposed a sentence strikingly different from that imposed by the trial Court. We regret that we are not persuaded that the reasons advanced by Jansen J justify interference by this Court.

[5] In the view of Jansen J, the fraud perpetrated by the appellant over a period of four months amounting to R458 406,75 (in respect of 15 statements of account in which false amounts were claimed for legal services supposedly rendered) was not as serious in comparison to crimes committed in certain other cases. Jansen J has referred, in particular, to the case of *S v Vorster*[2] in which the accused was convicted on 47 counts of theft of trust money totalling R1,6 million, committed over a period of 18 months, and sentenced to imprisonment for eight years. On appeal against sentence, with the leave of the Supreme Court of Appeal, the sentence was confirmed by the full bench of the Eastern Cape Division.[3]

[6] There are similarities in the two cases yet distinct differences. Both involve the dishonesty of an attorney and substantial amounts. However,

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[2] 2007 (2) SACR 283 (E).
[3] *Vorster v S* [2008] JOL 21944 (E).

the accused in *Vorster* reported the theft to the Law Society and, when he was tried, pleaded guilty. The appellant, on the other hand, when his wrong-doing began to surface, insisted he had done nothing wrong and, far from owning up, fought tooth and nail to keep his ill-gotten gains. It is true that he paid back about half of what he had taken but that was only when he had been pushed into a corner and had no choice. Subsequently, and without just reason, he ceased payments. Vorster's clients were reimbursed for their loss by the Attorneys Fidelity Fund ('the Fund') but he did not reimburse the Fund. The reason for that appeared to be that, unlike the appellant who continued to practice as an attorney, Vorster was struck off the roll of attorneys and, again, unlike the appellant whose businesses continued to flourish, Vorster's estate was sequestrated. Vorster, at the time of his trial, was still an unrehabilitated insolvent. (It would appear that Vorster's income, after he was struck off the roll, was modest.)

[7] Both were first offenders and family men intimately involved in church affairs and in other civic activities. In both there was also a long delay between the commission of the offences and sentence. When the different circumstances of each case are considered – those that mitigated and those that aggravated each offence – it appears to us that not much separates these cases in respect of their seriousness. While, for instance, Vorster stole more money over a longer period than the appellant had misappropriated in this case, these facts are, to an extent 'evened out' by Vorster having reported himself to the Law Society and pleaded guilty,

while the appellant denied his guilt and falsely laid the blame on his candidate attorney – a fledgling practitioner whose training in the profession, and guidance, had been entrusted to him.

[8] It would appear too that, to an extent at least, Vorster's crime was the result of his finding himself in financial difficulty. A judgment of R500 000,00 was taken against him and the expected profits from a crop of maize did not materialize. The appellant, on the other hand, was not in financial difficulties and was motivated by nothing but greed. Both Vorster and the appellant tried to a greater or lesser extent to shift the blame from themselves to others: to the bank manager and book-keeper in Vorster's case, and to his candidate attorney in the appellant's case. In Vorster's case, this happened at the mitigation stage, as he had pleaded guilty, but in the case of the appellant his defence was that he was not to blame, except to the extent that he did not properly supervise his staff, and his candidate attorney was entirely to blame. Then, as Chetty J pointed out in his judgment, the period over which the appellant's fraud was committed afforded him ample opportunity to reflect on what he was doing.

[9] Prior to criminal proceedings being instituted, the appellant was confronted with compelling evidence of his fraudulent conduct. He then refuted the fact that he had submitted accounts with vastly inflated fees and maintained that he had not acted improperly. To compound matters, as we have stated, he sought to exculpate himself of any wrongdoing and blamed his candidate attorney for what he considered were errors in the accounts submitted for payment. Even at his trial, when confronted with

overwhelming evidence of his fraudulent conduct and the fact that he, and not anyone else, was responsible for drafting the false statements of account, the appellant refused to accept he was guilty of any wrongdoing and persisted in placing the blame on someone else.

[10]The trial Court found that an attorney (since deceased) who was in the employ of the State Attorney had aided and abetted the appellant by certifying that the inflated amounts claimed were valid. This does not, however, detract from the fact that the appellant acted with premeditation and was the author of the devious scheme to defraud the State. The appellant actively controlled and implemented the scheme over a period of four months. The fact that the appellant restricted his criminal activity to a relatively brief period hardly diminishes the seriousness of the crime.

[11]Mr Notshe who, with Mr Zilwa, appeared for the appellant presented argument on two matters that were not raised in the heads of argument. The submissions entailed firstly, that the appellant should have been convicted of a lesser quantum for fraud and, secondly, that the trial Judge had not applied the principles of restorative justice. In relation to both these issues, Mr Notshe informed the Court that it was not contended that there was any misdirection by the trial Judge.

[12]In relation to the question of quantum, the crisp answer is that this was never placed in issue at the trial, nor was it raised as a ground of appeal either when seeking leave to appeal from the trial Judge or when the Supreme Court of Appeal was petitioned for such leave nor was it even

raised as a ground of appeal in the present proceedings. In any event, in the absence of an appeal against conviction this Court cannot now interfere with the conclusions of fact arrived at by the trial Court when pronouncing on the guilt of the accused. We find no merit in this submission.

[13]On the question of the application of restorative justice, it was conceded by Mr Notshe that Chetty J was never addressed on this issue in the trial. (It should be noted that it is also not a specific ground of appeal.) On our understanding of the concept, it involves a shift in emphasis in appropriate cases from retribution and rehabilitation to reparation and involves the bringing together of the offender and the victim 'to acknowledge and redress the harm done, and to restore victim-offender relationships through measures other than retributive or rehabilitative'.[4] Bertelsmann J, in *S v Maluleke*,[5] described it as a new approach to sentencing that emphasises the 'need for reparation, healing and rehabilitation rather than harsher sentences …'. This passage was cited with approval by Pickering J in *S v Saayman*[6] but the learned judge added that, 'if restorative justice is indeed to make a significant contribution to sentencing options then it must be applied only in appropriate circumstances and must be developed in a constitutionally acceptable manner'.[7] It was not suggested how, from a practical perspective, the principles of restorative justice were to be applied in the present case and what a sentence properly influenced by

[4] Van Der Spuy, Parmentier and Dissel 'Editorial Preface' 2007 *Acta Juridica* vii, vii.
[5] 2008 (1) SACR 49 (T), para 26.
[6] 2008 (1) SACR 393 (E), 402a-b.
[7] At 402i-403a.

these principles would be. That notwithstanding, it appears to us that this is not an appropriate case for restorative justice to be applied. We say this for three reasons. First, for restorative justice to apply, the appellant would have to play his part and acknowledge his wrong-doing as the first step in redressing the harm that he has done. He steadfastly refuses to accept that he is guilty of anything more than negligence in the supervision of his staff – despite the weight of evidence against him and Chetty J's findings. Second, to whom would he apologise, what relationship would he seek to repair and how? He defrauded the fiscus, not an individual, and it seems to us that in such circumstances the principles of restorative justice – aimed as they are at healing the relationship between victim and offender – have limited application. Third, the seriousness of the conduct involved in this matter is such that the principles of restorative justice, useful and important as they may be in the abstract, have no application to the facts before us.

[14]Mr Cilliers, who appeared for the state, cited various decisions in his heads of argument in support of the sentence the trial Judge had imposed. In his judgment, Jansen J has summarised the salient aspects thereof relating to sentence and commented, in addition, on two unreported decisions of the Eastern Cape Division. On the basis of the reasoning of the court in each of these cases it is clear that the sentence impose by the trial Court is appropriate.

[15]In the as yet unreported decision of the Supreme Court of Appeal in *De Sousa v The State*,[8] in which the appellant's sentence of seven and a half years for fraud was altered to four years imprisonment on appeal, although the amount involved was higher that that appropriated by the appellant, the mitigating factors relied on by the Court were most compelling. They included that the appellant had shown 'genuine remorse', had cooperated with the police throughout and admitted her role in the crimes, deposed to a witness statement and agreed to testify against the main perpetrator, signed an acknowledgement of debt, repaid the amount of her benefit from the crimes and pleaded guilty.[9] It was also taken into account that she had been drawn into the fraudulent enterprise by her boyfriend – the main perpetrator − 'with whom she evidently was besotted'[10] and who had 'preyed on the appellant's vulnerabilities'.[11] In spite of these and other mitigating factors, the Court, having pointed to the 'alarming proportions' of white collar crime in the country and its 'corrosive impact on society', concluded that, on account of the gravity of the offence, 'a custodial sentence will be the only appropriate sentence' and that 'sympathy cannot deter a court from imposing the kind of sentence dictated by justice and the interests of society'.[12] The Court, it is noted, did not make the sentence it imposed subject to s 276(1)(i) of the Criminal Procedure Act.[13]

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[8] (626 / 2007) [2008] ZASCA 93 (12 September 2008).
[9] Para 7.
[10] Para 8.
[11] Para 9.
[12] Para 13.
[13] Act 51 of 1977.

[16]The absence of remorse on the part of the appellant for his misdeeds was a factor that the trial Court was entitled to take into account in assessing an appropriate sentence. We do not suggest that lack of remorse should be considered an aggravating factor, justifying a harsher sentence. On the other hand, remorse is an important mitigatory factor but, 'in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'[14]

[17]We accept that the appellant had the right to plead not guilty to the charge of fraud and to present whatever defence he considered appropriate. It is trite that the State bore the onus of proving his guilt. However, after the appellant had been convicted and the Supreme Court of Appeal had refused leave to appeal against conviction, there was no question of the appellant's prospect of success on appeal being adversely affected. It is in this context that the absence of any contrition on the part of the appellant should be seen. In spite of being restricted to appealing against sentence only the appellant's heads of argument – drafted by him and not by counsel who subsequently appeared for him − reveal that he still refuses to recognise that he was found guilty of fraud. Instead, he has persisted with the story, which was rejected as untrue by the trial Court, that his candidate attorney was responsible for the errors that occurred in the accounts rendered for legal services. He has also persisted with his denial that the amounts were not inflated deliberately with the intention to defraud the State. We can only conclude that the appellant's continued

[14] *S v Seegers* 1970 (2) SA 506 (A), 511G-H.

attempt to blame another for his misdeeds demonstrates a refusal to acknowledge his blameworthy conduct.

[18]Jansen J has confirmed that the trial Judge was correct in regarding the fact that the appellant was a practising attorney as an aggravating factor and that this justified direct imprisonment being imposed. We can only but concur. Jansen J has stated very aptly that 'the position of an attorney demands *inter alia* an inflexible regard for the truth, a high sense of honour and incorruptible integrity [and that] [t]he appellant's conduct fell short of that'. We fully endorse his incisive observations.

[19]The appellant has tried to portray himself as an attorney without the necessary experience to avoid the pitfall of claiming incorrect fees. This picture is not borne out by the facts. He is a highly qualified individual with broad and varied experience and was a teacher prior to his admission as an attorney. The appellant holds an LLB degree, a BSc degree (with courses in mathematics, physics and psychology) and has completed some courses towards a BSc (Engineering) degree and a Masters in Business Leadership. After obtaining his LLB degree the appellant lectured in Commercial Law at the Walter Sisulu University School of Law, Mthatha, on a part-time basis. He also has extensive business interests. This is hardly indicative of a person who lacked the ability to determine, either legally or morally, what fees an attorney could claim legitimately and what constituted improper and unlawful overcharging.

[20]According to the appellant he had a very successful legal practice that provided him with substantial financial benefits. He was also involved in various outside business interests, namely a bed and breakfast establishment and a vehicle towing service. In addition, he owns immovable property in excess of R3,5 million in value. On his own admission the appellant is wealthy and possessed of substantial financial resources. The inescapable conclusion is that the appellant was motivated solely by greed and did not embark on this fraudulent scheme out of need.

[21]The appellant's corrupt conduct had a broader impact than the loss suffered by the fiscus. Conduct of this kind impacts on our society at large, as Chaskalson P held in *South African Association of Personal Injury Lawyers v Heath and Others:*[15]

> 'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

[22]In more general terms, dealing with so-called white collar crimes such as fraud, Marais JA, in S *v Sadler*,[16] made the point that such crimes are 'serious crimes the corrosive impact of which upon society is too obvious to require elaboration.'

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[15] 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC), para 4.
[16] 2000 (1) SACR 331 (SCA), para 13.

[23]Allied to this, is the evidence of Mr A.P. Prinsloo, who investigated and reported on corruption in the State Attorney's office in Mthatha at the time the appellant's offence was committed. He stated that he had found there to be a 'problem with the way the office was run' and reported to the Director-General and Minister of Justice that this 'caused private attorneys and advocates to exploit the situation and that irregular payments were therefore made'.

[24]Mr Prinsloo was of the view that if the manager of the Bank of Transkei had not reported his suspicions to the authorities, no one would have been any the wiser about the wide-scale corruption that was taking place in the State Attorney's office in Mthatha and which involved others besides the appellant. The difficulty of detection, he said, lay largely in the fact that a great measure of trust was reposed – and had to be reposed -- by the government in the professional integrity of the attorneys involved. The fact that this trust was abused so cynically by the appellant and others, in our view, is a further factor that renders the sentence imposed by the trial court appropriate. While the appellant should not be sacrificed on the alter of deterrence – and we do not believe that the trial court did that -- society has a very real interest in seeing that a clear message is sent out that, insofar as acts of corruption like that committed by the appellant are concerned, the game is not worth the candle.

[25]It should be borne in mind that the interests of society are to be given due consideration since, as stated in *S v Sinden*,[17] '[a] sentence does more than deal with a particular offender in respect of the offence of which he has been convicted: it constitutes a message to the society in which the offence occurred'.

[26]It is clear from the trial Judge's thorough and well reasoned judgment that he took into account that the appellant continued to practise from June 1998 until his conviction in 2006 without committing any further crimes, repaid an amount of R235 000 of his fraudulently gotten gains and played a major role in his community. These factors received due consideration with those of an aggravating nature. The sympathy one may have for the family of the appellant who must now contend with changed circumstances due to his conviction, does not lessen the moral blameworthiness of the appellant.

[27]In the appellant's heads of argument the submission has been made in the final paragraph that '[t]he appellant is also willing to pay the balance of the money upon taxation as per agreement between the parties (State)'. This conditional tender to pay is certainly not indicative of someone who has reconciled himself to his conviction for fraud. The fact that the appellant has still not repaid the outstanding balance reinforces the conclusion that he does not recognise he has, indeed, defrauded the State. The appellant quite obviously has the necessary financial

[17] 1995 (2) SACR 704 (A), 709b.

resources to repay the outstanding balance but is reluctant to do so. This does not redound to his credit.

[28]The appellant has indicated that he would earn a living as a lecturer 'if he is struck from the roll of attorneys'. The failure to appreciate that he will inevitably be struck from the roll of attorneys reflects a disturbing lack of insight into the seriousness of his offences and the consequences thereof. The appellant, it appears, still harbours the belief that he may be allowed to continue to practise as an attorney. It also displays an inability to accept that his own actions have destroyed his professional integrity. Insofar as the university authorities are concerned we trust that they recognise the need to retain their own integrity and not permit an unrepentant attorney convicted of fraud to lecture to young (and most probably impressionable) students.

[29]It has been submitted that a custodial sentence would militate against rehabilitation but a wholly suspended sentence would enable the appellant to rehabilitate himself. Even if a custodial sentence may not be as conducive for the rehabilitation of an offender as a non-custodial one it is by no means the only factor that a court considers when determining an appropriate sentence. Moreover, as is the case here, the need for the sentence to serve as a deterrent outweighs considerations of rehabilitation.

[30]In relation to correctional supervision[18] the comments of Grosskopf JA in *S v Blank*[19] are instructive:

> 'The Legislature set limits of three and five years respectively in the case of sentences under paras *(h)* and *(i)*. These cut-off points are significant. They give an idea of the seriousness of the crimes for which these sentencing options would be appropriate. But in the same way as the Appellate Division emphasised in *Van Vuuren's* case [[1992] (1) SACR 127 (A)] that the options constituted by those paragraphs should be used in appropriate cases, so a court should not be seduced by the availability of these new options to impose a sentence which would be unbalanced and inappropriate when proper regard is had to the (often competing) purposes of judicial punishment. In serious crimes, including crimes of the nature considered in *Van Vuuren's* case [theft of money], imprisonment also falls to be considered as an option and the more serious the crimes, the greater the possibility that imprisonment will be the only suitable sentence.'

[31]Equally informative are the observations of Scott JA in *S v Ningi and another*:[20]

> 'The question is, therefore, whether in all the circumstances a sentence of correctional supervision would be appropriate. It is unnecessary to repeat what has been said before of the advantages of correctional supervision. They are well known. What I think must be acknowledged, however, is that insofar as a first offender in particular is concerned and leaving aside for the moment the practicalities of administering a non-custodial sentence, whether correctional supervision as opposed to direct imprisonment is to be imposed must depend ultimately on the seriousness of the offence and the particular circumstances in which it was committed. This is so because, whatever its advantages, correctional supervision remains a lighter

[18] See fn 13 above − ss 276(1)(h) and (i).
[19] 1995 (1) SACR 62 (A), 76d-e.
[20] 2000 (2) SACR 515 (SCA), para 8.

sentence than direct imprisonment. Any contention to the contrary I think would be unrealistic.'

[32]In relation to the instant case, in the determination of an appropriate sentence, it is relevant that: acts of corruption in which the public purse is plundered are pervasive in our society, an attorney breached the high standards of trust required of him by his profession; far from owning up to his wrong-doing, he compounded it by breaching the trust he owed to his candidate attorney by blaming her; and shows himself still to lack any insight into his criminal conduct. In these circumstances, we are of the view that the sentence imposed by Chetty J is not startlingly inappropriate.

[33]Accordingly, we are not persuaded that this Court would be justified in interfering in the sentence imposed by the trial Court, let alone substitute it with a sentence of five years imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act.[21] In our view, such a sentence would not be commensurate with the seriousness of the crime or in the interests of society.

[34]In the result, the appeal against the sentence imposed by the Court *a quo* is dismissed.

Y EBRAHIM	**C PLASKET**
JUDGE OF THE HIGH COURT	**JUDGE OF THE HIGH COURT**

[21] See fn 13 above.

23 SEPTEMBER 2008

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