/LVS

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

DATE: 25 September 2014
CASE NO: A397/2009

(1) Reportable: YES
(2) Of interest to other Judges: NO
(3) REVISED

…… ……

DATE SIGNATURE

In the matter between:

HERBERT HACK **APPELLANT**

vs

THE STATE **RESPONDENT**

JUDGMENT

RANCHOD J:

[1] This is an appeal against conviction and sentence of the appellant in the Magistrate's Court, (Regional Court, Johannesburg).

[2] The appellant was charged with 51 counts of fraud, allegedly committed during the period 1993 to 1995. Although the matter had been on the roll of the Regional Court since 7 October, 1996 the appellant eventually pleaded to the charges only on 22 January 2001, some four and a half years after his arrest. He pleaded not guilty but was eventually convicted on all counts on 30 May 2005 – nearly a decade later. It took almost another three years before sentence was eventually imposed on 8 February 2008 when the appellant was sentenced to five years' imprisonment. An application for leave to appeal

was filed on 25 February 2008. Appellant was admitted to bail on the same day that sentence was imposed, i.e. 8 February 2008.

[3] State counsel explained in the heads of argument that the reasons for the delay in finalising the trial was primarily due to the conduct of the appellant. The matter was postponed on three occasions for the appellant to apply for further particulars, two further occasions for the appellant to apply for tax amnesty, on three occasions because his legal representative was unavailable and on no less than twelve occasions the appellant was absent. The trial was also postponed on the 5th July 2001, during the evidence of the second State witness (Denise Richardson), for a review application that appellant launched in the High Court and the trial only continued on the 5th of November 2002. The review application was subsequently withdrawn by the appellant and nothing further needs to be said about it for purposes of this appeal.

[4] Appellant's counsel submitted in their heads of argument dated 30 April 2014 that the record was materially defective in that some eighty pages were missing including three consecutive pages of the judgment of the court *a quo* on the merits and the entire judgment on sentence. It is to be noted that the appeal was scheduled to be heard on 30 May 2014 and it was only a month before the hearing that the issue of a defective record was raised by appellant's counsel, Mr Vermeulen SC. Mr Vermeulen correctly states that both the State and the appellant have a duty to try and reconstruct the record from secondary sources, and if it is impossible to do so and the missing portion contains evidence that is of material importance in the adjudication of an appeal, the appeal ought to succeed and the conviction and sentence set aside. (S v Collier 1976(2) SA 378 (c); S v Marais 1966(2) SA 514 (T) at 517 A-B). It was submitted that if it was found that the record was materially defective (it was submitted that it was) then the appellant was entitled to an acquittal.

[5] It is the duty of an appellant to ensure that a proper record is timeously filed for the hearing of the appeal. In this matter appellant's attorneys filed an

affidavit on 28 May 2014 (two days before the hearing) attempting to explain why a proper record had not been filed earlier and sought condonation “to the extent necessary” for the non-compliance with the Rules by the appellant. It was explained that appellant’s attorneys commenced seeking the record of the proceedings in the trial court for purposes of pursuing the present appeal only on 7 March 2014. My colleague Maluleke J and I received the defective copy of the record and it was only a few days before the hearing that we inexplicably received a complete record save for the judgment on sentence. This caused a considerable degree of inconvenience to us. The explanation for furnishing a defective record in the affidavit by a candidate attorney of the appellant’s attorneys was, in my view, not adequate. Firstly, it was not attached to a properly prepared application for condonation on motion. Secondly, from the affidavit it appears that appellant’s attorneys attempted to contact Ms Coetzee of the Director of Public Prosecutions (‘the DPP’) only on 22 May 2014 to determine if the DPP had a full copy of the record. On 26 May 2014 a comparison of the State’s copy of the record with that of the appellant showed that Ms Coetzee had a complete record save for the judgment on sentence. The belated approach to the State seems to have taken place only after Maluleke J made it clear to the appellant’s attorneys that we were of the view that we were able to deal with the appeal with the incomplete or defective record as it stood.

[6] The appellant’s attorney’s lengthy explanation of the efforts they made to trace a complete record is in my view not adequate. They could have approached the DPP much earlier, given that the State was the other party in the trial. As I said, we were considerably inconvenienced in receiving the complete record (but for the sentencing judgment) a mere few days before the appeal hearing in a matter comprising almost 1500 pages of the record. The distinct impression one has is that the appellant was in no hurry to prosecute the appeal. He has been on bail since 8 February 2008 pending the appeal hearing.

[7] Condonation for the late filing of the complete record (save the sentence judgment) was granted at the hearing as we were of the view that in spite of

the inadequate reasons furnished the appeal had already been delayed considerably and finality had to be brought to it.

[8] The facts leading to the charges against the appellant may briefly be set out as follows. There are two groups of charges. Counts 1 – 45 relate to submission of Value Added Tax (VAT) returns by or on behalf of a business entity called Allied Elevators (Pty) Ltd ("Allied Elevators"). Counts 46 – 51 relate to VAT returns of 66 Lymm Street Glenhazel CC.

[9] It appears to be common cause or not in dispute that the appellant had a 66% and a Mr Barry Bloch 34% member's interest respectively in Elite Bookkeeping CC which conducted its practice from the premises at 66 Lymm Street,Glenhazel that in turn belonged to the close corporation by the same name. From the record it appears that the appellant resided as well on the premises with his wife and children.

Re: COUNTS 1 – 45

[10] Mr Arthur Churchill Fischer was a 100% shareholder in and managing director of Allied Elevators. The company was engaged in the business of installing and maintaining elevators in South Africa. Its principal place of business was in Johannesburg and it was registered with the South African Revenue Services ('SARS') as a vendor for VAT purposes in terms of the Value Added Tax Act 89 of 1991 ('the VAT Act'). It had to submit regular VAT returns to SARS. Input and output figures were to be provided by a vendor in the VAT return. The difference between the two figures would result in either the vendor having to pay SARS VAT or claim a refund, as the case may be.

[11] In December 1995 Mr Fischer decided to terminate the services of Allied Elevators' then auditors as he perceived them to be incompetent. He engaged the services of, as he put it, "Hack & Bloch". It is not in dispute that "Hack" is the appellant and "Bloch" was Mr Barry Kevin Bloch, the other

member together with the appellant in Elite Bookkeeping CC. Mr Bloch initially was a co-accused with the appellant but later turned State witness.

[12] Fischer instructed – and paid - Elite Bookkeeping CC to submit 'amended' VAT returns for the period April 1993 to November 1995 on behalf of Allied Elevators. Fischer, together with his erstwhile auditors had uncovered that Allied Elevators' internal bookkeeper had rendered incorrect VAT returns which resulted in Allied Elevators having a substantial liability for VAT due to understating its VAT liability when the bookkeeper rendered the bi-monthly VAT returns. Fischer was of the view that his auditors should have discovered this problem earlier. As they did not, he terminated their mandate. But before that, on their advice, he went to SARS and made a clean breast of it. Mr Fischer then approached Elite Bookkeeping.

[13] The allegation against the appellant was that when preparing the so-called amended returns the appellant (and Mr Bloch) prepared false invoices ostensibly originating from a company called Zaigor South Africa, another called Economic Wholesalers and one called Anglo Swiss Watch Co. (Pty) Ltd. The invoices purported to show that Allied Elevators had paid VAT to these entities, the net effect of which would be to reduce its liability to SARS substantially. According to Ms Denise Richardson of SARS, who conducted an audit of Allied Elevators' books (as well as those of 66 Lymm Street Glenhazel CC) SARS was to have paid Allied Elevators the supposed refund that it claimed. The subsequent audit and a search and seizure operation conducted at the offices of Elite Bookkeeping led to the charges against the appellant and his subsequent conviction and sentence.

[14] The primary contention of the appellant on appeal is that the evidence adduced by the State did not establish the crime of fraud, for which the appellant was convicted and that the learned magistrate materially misdirected himself in this regard. It is contended that the misrepresentations as alleged in the charge sheet were not established. Further, that the evidence of Ms Richardson, which was accepted by the Magistrate, does not establish a misrepresentation as found by him. Counsel for appellant

emphasized that these submissions were made on the basis of an acceptance of the entire State case. During the appeal hearing Mr Vermeulen re-iterated that the appellant accepts all the evidence led by the State. The question was whether the State proved the charges and whether the evidence indicated the crime of fraud.

[15] The following facts are common cause:

15.1 The appellant was a 66% and Barry Bloch a 34% member of Elite Bookkeeping which traded from 66 Lymm Street, Glenhazel at all relevant times.

15.2 Mr Arthur Fischer was the sole shareholder of Allied Elevators (Pty) Ltd (Allied Elevators) which was registered for VAT at all relevant times.

15.3 Mr Fischer, the first State witness, instructed and paid Elite Bookkeeping to submit amended VAT returns for the period April 1993 to November 1995 on behalf of Allied Elevators to SARS.

15.4 Exhibit "B", and Exhibits "D" to "F" were working papers and source documents received by Ms Denise Richardson ('Richardson') in her capacity as an employee of SARS, from Elite Bookkeeping to do an audit of the VAT returns submitted on behalf of Allied Elevators.

15.5 Richardson commenced with an audit of the VAT returns of Allied Elevators (Pty) Ltd on the 10th of June 1996 at the premises of Elite Bookkeeping, namely 66 Lymm Street, Glenhazel.

15.6 The premises at 66 Lymm Street Glenhazel were owned by 66 Lymm Street Glenhazel CC of which Mr Bloch was the sole member.

15.7 Denise Richardson and other SARS officials searched the offices of Elite Bookkeeping situated at 66 Lymm Street, Glenhazel on Tuesday, the 23rd of July 1996 and seized certain documents, *inter alia,* the original invoices where the labels of "Unipaper CC" were stuck on.

15.8 The VAT payments falsely portrayed in Exhibits "B", "D", "E" and "F" decreased the VAT liability of Allied Elevators to SARS substantially or would have resulted in a refund.

15.9 The VAT claims submitted by 66 Lymm Street CC resulted in a VAT refund of R137 969.58 from SARS.

[16] The charge sheet stated in respect of counts 1- 45 that the appellant was guilty of the crime of fraud in that during the period (the exact dates of the invoices are listed in Schedule 1 to Annexure "A" of the charge sheet) April 1993 to Nov, 1995 he (and his co-accused at the time – Mr Barry Bloch who later turned State witness):

"Unlawfully, falsely, with the intent to defraud and to the prejudice or potential prejudice of the South African Revenue Services and/or Denise Richardson, pretend to Denise Richardson and/or the South African Revenue Services that:…"

by means of the falsified invoices listed in Schedule 1 to the charge sheet it was sought to fraudulently represent that the invoices represented goods delivered to Allied Elevators and/or that Allied Elevators effected payments to the entities referred to in the invoices and/or such payments included payment of VAT and/or that Allied Elevators was entitled to a refund from SARS of the amounts stated in Schedule 1 when in fact such representations were not true.

[17] The charge in respect of counts 46 – 51 is couched in similar terms save that the schedule (schedule 2) refers to another set of falsified invoices in respect of a claim for refund of VAT by 66 Lymm Street Glenhazel CC.

[18] Appellant's contention is, *inter alia*, that Richardson joined SARS only in 1996 hence the representations could not have been made to her in the period 1993 to 1995. The Magistrate, however, found that the representation was made to Richardson.

The learned Magistrate says in his judgment:

"It is clear from the evidence that this misrepresentation was in fact made by documents that were handed to Denise Richardson when these documents were handed to her by Dick Moloto in the presence of the accused."

Mr Dick Moloto was an employee of Elite Bookkeeping. From the record it is apparent that the documents were handed over to Richardson by Moloto on 10 June 1996 when she was conducting the audit.[1]

[19] Appellant says this a different date than those alleged in the charge sheet, namely 1993 to 1995. Furthermore, says appellant, the court *a quo* refers to a single representation to Richardson whereas the charge sheet alleges multiple representations. That is why, said counsel, appellant did not testify because he felt he had no charge to answer to. I am not persuaded by that submission. The appellant could not have known during the proceedings what the magistrate's findings would be at the end of the trial.

[20] Counsel for the State, Ms Coetzee, conceded in her heads of argument that the dates in counts 1-45 are incorrect and should have been 10 June 1996 which is when exhibits "B", "D", "E" and "F" were submitted to Richardson by Moloto for an audit of the VAT returns submitted on behalf of Allied Elevators. Ms Coetzee contends that this is not a fatal mistake and can be cured by the evidence. We were referred to S v Nixon 2000(2) SACR 79 (W) where it was held:

"The Court, on appeal or review, can rectify a defective charge sheet as long as the amendment will not prejudice the accused in his defence".

In S v Hugo 1976(4) 536(A) at 540 it was held:

"An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet and this is especially true of an indictment in which fraud by misrepresentation is alleged."

[21] We were also referred to S v Coetzer & Another 1976(2) SA 769(A):

"First appellant had been convicted on a charge of dealing in dagga, to wit 16,75 grams of dagga, in contravention of section 2(a) of Act 41 of 1971, and the compulsory sentence of five years' imprisonment had been imposed on him. His appeal to the South-West Africa Provincial Division failed. In a further appeal it appeared that he had been convicted of dealing in dagga in that he had performed

[1] Transcribed record page 841 line 23 to page 842 line 1.

acts in connection with the delivery of two dagga cigarettes, the weight whereof had not been included in the alleged 16,75 grams.
Held, as in the circumstances the first appellant had not been misled into conducting his case in any other way than he would have done if the charge had been absolutely correctly worded, that there had been no prejudice and the invocation by the magistrate and the Supreme Court of section 156(4) or Ordinance 34 of 1963 (S.W.A.) had been fully justified."

[22] It was submitted that the appellant will not be prejudiced in his defence by the amendment at the appeal stage – of the date of the offence as the appellant's defence has not changed on appeal. It was argued that the incorrect dates are not relevant. As I understand Ms Coetzee's submission, the inaccuracies with regard to the date on which the misrepresentations were made are minor. We were referred to Botha v S [2009] ZASCA (29 September, 2009) where it was held that minor inaccuracies in the charge were not sufficient to find that the accused did not know what case he had to meet.

[23] The question before us is whether a reference in the charge sheet to incorrect dates on which the misrepresentation were made by reference to the dates on the false invoices when in fact it should have been the date on which the false invoices were handed to Denise Richardson can be regarded as minor and therefore irrelevant. The corollary to this is whether an amendment to the charge sheet should in any event be granted during this appeal.

[24] The appellant knew that erroneous VAT returns had been submitted by Allied Elevators' erstwhile internal bookkeeper. He was provided with numerous documents by Fischer in order to rectify the problem as he (Fischer) had already approached SARS and admitted that Allied Elevators' VAT and PAYE returns were not correct. It is then that he sought the assistance of the appellant and Bloch. Bloch testified that he played a role in the creation of false invoices by the appellant in order to support the so-called amended VAT returns.

[25] It would be apposite at this stage to explain the reference to the "so-called" amended VAT returns. A form VAT 201 is completed by a vendor when submitting the VAT return. Ms Richardson explained that when an amendment to the original VAT 201 is sought to be made after submission it is not done by submitting another VAT 201 form. Rather, it is done by way of supplying (supporting) documentation to SARS to show what the correct position is.

[26] In the present case it is not in dispute that the original VAT 201 returns were incorrect. The appellant sought to provide amended particulars relating to those returns. For this purpose he prepared false invoices and asked Fischer to agree to their submission. Fischer did not react i.e. he neither agreed nor disagreed. He said he was taken aback at the suggestion. In the interim the VAT audit by Ms Richardson commenced at the offices of Elite Bookkeeping. In the course of the audit the false invoices were handed to her by Mr Moloto. When the appellant was charged he could have been under no illusion as to the precise nature of the charges in that even if the dates were incorrect in the charge sheet, the schedule to the charge sheet clearly referred to the very same false invoices and that the dates on the invoices were false. Counsel for the appellant referred us to the fair trial provisions of Section 35(3) of the Constitution of the Republic of South Africa 1996 which provides, inter alia:

"Every accused person has the right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer it…".

It is to be noted that the subsection provides that "sufficient detail" be provided not all or every single detail. Here, as I said, the amendment is sought at the appeal stage. The question is whether the appellant is prejudiced thereby. In my view, in the circumstances of this matter an amendment of the charge sheet at the appeal stage cannot be prejudicial to the appellant. I would grant the amendment sought by the State.

[27] A further contention of the appellant is that the learned magistrate referred to a single mispresentation not mispresentations (plural) which, says appellant, is correct because he should not have been convicted on individual

counts or charges. The submission is without merit. Nowhere in the magistrate's judgment does he say that the representation was a single misrepresentation and that for that reasons it was wrong of the State to frame individual counts in respect of the invoices. Each false invoice is a separate misrepresentation.

[28] It was also appellant's submission that the false invoices had not yet been submitted to SARS. They had been seized by Richardson hence, at that stage there was no prejudice to SARS. This too is without merit. The documents were handed over to Richardson by Moloto during the course of an audit. It is not only actual prejudice that must take place; potential prejudice suffices.

[29] Finally, it was submitted that the misrepresentation was made to Ms Richardson and not SARS. During the evidence-in-chief of Mr Bloch the following transpired:[2]

"Can you identify these exhibits? – Yes I can.

Can you tell the Court how these exhibits came about, where are they from? How did they come, in what manner do you identify them in other words? – These are invoices that we prepared in order to justify each different VAT period for Allied Elevators Company.

To who did you want to justify the VAT periods? – To the VAT department.

Of the South African … (intervenes) – Of the Receiver of Revenue.

If you say that these are invoices we prepared, who do you refer to when you refer to we? – Myself and Mr Hack.

And how did you prepare these? – We had blank invoice books and we filled them in.

Where did the blank invoice books come from? -- They were given to Mr Hack by a friend of his.

Do you know who the friend was? – His name was Michael Shenker.

And do you know under what circumstances or for what reason they were given to Mr Hack? – No, I do not.

And you say that these invoices were filled in to justify the VAT period for Allied Elevators. So was that VAT returns, refunds? – No they were not refunds. They were returns prepared and, with certain amounts on them and we needed to prepare schedules for an audit and these were part of the different periods for the audit.

[2] Record: vol 9 page 718 line 12 to page 719 line 16.

Audit by SARS? – Yes.

By filling in these invoices, and I refer at this stage to EXHIBIT D, Zaigor, what did you want to portray to the Receiver of Revenue? – We wanted to justify the VAT returns that were handed in, that the figures would agree.

What did you want them to believe? – That the schedules that we had prepared and the VAT returns were correct. These were supporting documentation."

[30] Ms Richardson testified[3]:

"Okay – Received Value Added Tax figures from Thompson Spiers for Allied Elevator Company for a period of April 1993 to November 1995 with the outstanding VAT assessment of 82, R820 006.64 liability to SARS.

And you are now referring to EXHIBIT A? – That is right.

Thompson Spiers, ja? – Due to the figures that we received here, the outstanding amount, Mr Fisher was contacted for the collection of this amount and he actually referred us to Elite Bookkeeping Services, specifically to Mr Herbert Hack because according to Mr Fisher Mr Hack has actually explained to him the figures supplied by Thompson Spiers were the incorrect figures.

Did you contact Mr Hack as referred to by Mr Fisher? – Yes, I did.

You have testified about that. – That is right.

If you look at EXHIBIT B, where did you receive EXHIBIT B and what do they portray to be? – After numerous cancellations of my appointment to do the VAT audit, due to the fact that they have told me that the figures are not the correct figures supplied by Thompson Spiers these …(intervenes).

Who told you? – Mr Hack told me the figures were not correct.

[Inaudible] – And they had the proof that it is not correct. Then on 10 June they actually, when, finally when I got the audit they supplied me with EXHIBITS B which are the working papers because once you have got figures you do not have to submit a revised return. You just can give us the working papers according to which we then revise the figures.

Further:

Why did you go to the premises on 10 June? – Because all the, all the working papers and the source documents were kept at Elite Bookkeeping Services at 66 Lymm Street.

For the VAT input of Allied Elevators? -- For all the input as well as the output for Allied Elevator company.

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[3] Record page 494 lines 2-23; page 495 lines 16 – page 496 line 5.

Did you have an appointment or did you just turn up? – No, no, I had an appointment which was cancelled on numerous occasions and on the 10th I actually managed to do this, to start this audit.
With whom did you have this appointment? – I had it with Mr Hack and Mr Bloch who were present at that day and … (intervenes).
Were they present at Elite Bookkeeping? – At Elite Bookkeeping Services at 66 Lymm Street as well as Mrs Hack as well as Dick Moloto.
And the source documents? – Mr Dick Moloto in the presence of Mr Hack, Mr Bloch and Sharon Hack."

[31] I turn then to counts 46-51. These charges relate to submission of incorrect VAT 201 forms supported by false invoices in order to claim a VAT refund. Ms Richardson testified that during her investigation of Elite Bookkeeping, she accessed the VAT returns of 66 Lymm Street Glenhazel CC, trading as Tax Manager and Accountant, since this was also the business address of Elite Bookkeeping. Mr Barry Bloch was the only member of 66 Lymm Street Glenhazel CC and Mr Herbert Hack's personal bank details were initially supplied to SARS for the value-added tax refund. Mr Bloch confirmed the above evidence. The forged copies of supporting documents (invoices) accompanied the VAT return on behalf of 66 Lymm Street, Glenhazel CC whose bookkeepers were Elite Bookkeeping. The return reflected that, *inter alia,* certain entities, namely, Unipaper CC, J&L Carpeting and Tiling and William Louw & Son supplied goods to 66 Lymm Street Glenhazel CC resulting in a refund from SARS of R137 969.58 to the latter.

[32] Richardson and other officials from SARS conducted a search and seizure operation on 23 July 1996 at 66 Lymm Street, Glenhazel and seized the originals of the service documents (invoices) that were faxed to SARS to motivate the VAT claim submitted on behalf of 66 Lymm Street Glenhazel CC.

[33] Appellant's counsel's submissions in this regard were not so much that the invoices were not false. The thrust of counsel's arguments was that the State relied solely on the evidence of Richardson and Bloch. Neither witness, it was argued, could link the appellant to these charges except Bloch's

evidence regarding the falsified Unipaper invoice to the effect that he (Bloch) had falsified this invoice on instructions by the appellant.

[34] Mr Bloch testified that 66 Lymm Street Glenhazel CC was a property owning close corporation in which he held a 100% member's interest. The corporation owned the property situated at 66 Lymm street, Glenhazel. VAT returns and schedules of VAT payments for March and April, 1996 were submitted to SARS. Invoices were also submitted to support the VAT claim. He testified that the invoices of William Louw & Son were altered, namely R6 600.00 to R16 600.00; R1 458.50 to R9 458.50; R3 087.40 to R13 087.40 and R4 160.00 to R14 160.00. He did not know who altered the figures. Richardson corroborated Bloch's evidence. He testified further that it was the appellant who completed the VAT 201 returns for Unipaper CC and J&L Carpentry and Tiling indicating in the returns that these entities had no income for the period covered by the VAT returns. Bloch testified that the appellant had instructed him to manufacture the Unipaper CC invoices.

[35] In my view, the only reasonable inference to be drawn from the evidence of Richardson and Bloch is that the invoices allegedly issued by Unipaper CC, J&L Carpentry and Tiling and William Louw & Son were manufactured with the full knowledge of the appellant to obtain a VAT refund that would have benefitted the appellant personally. Appellant had furnished his personal bank account details to SARS instead of that of 66 Lymm Street Glenhazel CC for the purposes of receiving any refund. The invoices had been submitted to SARS on behalf of 66 Lymm Street Glenhazel CC by Elite Bookkeeping to substantiate the VAT 201 return.

[36] In my view the State proved beyond reasonable doubt that the appellant made a misrepresentation or pretended to Richardson and SARS that the amounts on the invoices allegedly paid to the three entities represented the value of the goods delivered to 66 Lymm Street Glenhazel CC for which the latter paid VAT. This false representation caused SARS to refund 66 Lymm Street the amount of R137 969.58 to the prejudice of SARS.

[37] I would dismiss the appeal in respect of counts 46-51 as well.

Sentence

[38] I turn then to the sentence of five years' imprisonment imposed by the trial court. As I said, the judgment on sentence cannot be traced. Hence we do not have the reasons for the sentence that the court *a quo* imposed. Without the magistrate's reasons for sentence it is difficult to evaluate it on appeal. Mr Vermeulen stressed that in the circumstances this court was at large to consider sentence afresh. I agree with counsel's submissions in this regard but bearing in mind the facts and circumstances as they were when appellant was sentenced in 2008.

[39] The appellant stood as a first offender when he was sentenced. A pre-sentence report was compiled by criminologist Dr Irma Labuschagne at the behest of the defence. She was called to testify on the salient parts of her report.

[40] The personal circumstances of the appellant were recounted by Dr Labuschagne when she testified. The appellant was married and had four children, the oldest 23 years and the youngest 10 years old. The eldest was still studying at university. All the children, it was said, were financially dependent on the appellant.

[41] Dr Labuschagne was tasked specifically to see whether the appellant was a suitable candidate for an alternative to direct imprisonment. She testified that she would not have looked at an alternative to imprisonment if she believed that the motive behind the crime was pure greed or due to inherent evil. She opined that the appellant was a suitable candidate for punishment within the community rather than direct imprisonment. If he was imprisoned he would lose his job and seven employees would lose their jobs. Dr Labuschagne was also concerned, she said, that the interests of the community would also be affected because the appellant ran a "sizeable synagogue" and fed many destitute families from his own pocket. She did not

elaborate further. She did not find “an inherent greed” in his personality. It was also submitted that a substantial fine was also a good alternative to imprisonment. That was in examination-in-chief.

[42] Under cross-examination Dr Labuschagne conceded that a large part of her report was concerned with motive but in the wider sense. She did not find appellant’s motive evil but negligent. Dr Labuschagne was (I am told she has since passed away) a well-known criminologist with an impressive list of qualifications as an expert. Yet she saw the appellant’s conduct as negligent knowing full well that he had been convicted on numerous counts of fraud, which is the intentional rather than negligent commission of an offence. Dr Labuschagne went on to say that she did not know what appellant’s motive was but nevertheless felt it was not evil. She said she did not pertinently ask him what his motive was for committing the offences because she would distrust the answer she would get. One would have thought she would first elicit an answer to the question and then evaluate it together with the rest of the information before deciding whether the answer is to be distrusted. Under further cross-examination she testified again that she did not see a real greed in the appellant’s case which, she said, is often the underlying motive for a so-called white collar crime. She drew this conclusion despite not having enquired about his motive.

[43] Dr Labuschagne conceded that the appellant did not admit guilt. He gave her the impression that it was the people who he had appointed to do work for him that were the culprits, not him. The appellant did not tell her that it was he who had instructed some of his employees and partner or co-member of Elite Bookkeeping, Mr Bloch, to manufacture the false invoices. She was also of the view that the appellant was not in need of rehabilitation.

[44] An officer in the employ of Correctional Services, Mr Nhlapo was called by the defence to testify in support of the view that appellant was a suitable candidate for correctional supervision as a sentence in terms of Section 276(1)(h) of the Criminal Procedure Act 51 of 1977. The learned Magistrate was singularly unimpressed with Mr Nhlapo’s report and he cross-examined Mr Nhlapo at length. It would appear that the Magistrate took umbrage at the

fact that Mr Nhlapo, who held no legal qualification, nor a social science degree, sought to place himself in the position of the Court. Defence counsel placed him at the disposal of the court after handing up his report but without leading any evidence from the witness. The State then proceeded to question Mr Nhlapo. In essence he conceded that his report was based on the facts as given to him by the appellant and his family only and not on the facts on which appellant was convicted. He said he had unsuccessfully tried on several occasions to get the version of SARS, but was unable to do so. It did not occur to him to contact the prosecutor to ascertain the facts or obtain the judgment regarding the appellant's conviction. He conceded that if those facts were substantially different from those furnished by the appellant and his family he would not have made the recommendations that he did.

[45] In answer to questions from the court, Mr Nhlapo said the appellant had presented himself to him as an innocent person. Mr Nhlapo then contradicted himself and said appellant did verbalise that he did something wrong. This no doubt raised the ire of the Magistrate further in view of the further questioning that followed of the hapless Nhlapo.

[46] I need not dwell any further on his report as it, like that of Dr Labuschagne is of little value to this court in considering a suitable sentence afresh. Neither appellant's counsel nor the State dealt with a NICRO (National Institute for Crime Prevention and the Re-Integration of Offenders) report (which was obtained at a later stage) when addressing us on sentence. It is accordingly not dealt with here.

[47] As I said, in determining an appropriate sentence some 11 years after the appellant's conviction, this court would have to deal with the facts as they were then.

[48] The appellant's personal circumstances as gleaned from Dr Labuschagne's report is that the appellant was 50 years old when he was convicted and 53 years old when he was sentenced. He was married and, as I said, had four children at the time. The eldest was at university while the

other three were presumably in school. Neither Dr Labuschagne's nor Mr Nhlapo's reports provide any further detail in this regard. The appellant is an accountant who ran a tax consultancy. He is a prominent member of his synagogue where he leads the services and speaks to congregants, about 100 in number, about religion and current affairs. The appellant's wife was a practising optometrist. The appellant was a first offender.

[49] In S v Sadler 2000(1) SACR 331 (SCA) at 335g-336a, Marais J said:

"So called 'white-collar' crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it."

[50] In the following cases a term of direct imprisonment was imposed. In S v M 1998(1) SACR 162 (WLD) the appellant, an attorney in his early fifties, was convicted on 33 counts of theft involving R2.5 million, being monies given to him by clients for investment purposes, and trust funds. He was married and had five children one of whom was an invalid. He was sentenced by the trial court to eight years' imprisonment which was confirmed on appeal. Du Plessis J said:

"The personal circumstances of the appellant do evoke considerable sympathy. One always has sympathy for a person who has led an exemplary life and then falls. However, one must bear in mind that that is true in many cases of so-called 'white

collar crime'. The perpetrators are in many such cases people who have risen in society."

Further:

"It is clear that there are cases in which the gravity of the offence is such that despite considerable personal factors indicating a community based sentence, imprisonment remains the only feasible option. The learned magistrate concluded that this is such a case. With that conclusion I find no fault."

Finally:

"It was submitted that every enlightened person who knows the personal circumstances of the appellant will not find a community-based sentence too lenient. I disagree. The sentence in question is *inter alia* aimed at warning members of the attorneys' profession that theft of trust money is and remains a serious offence, which will not be dealt with lightly. [I would say the same applies to the accounting profession]. Those people are enlightened members of the community no doubt. In most cases their personal circumstances will be similar to that of the appellant. It is important to send the message that such personal circumstances will not have the automatic effect that the courts do not adequately punish the offence. It is true that the plight of the appellant's one son is a feature peculiar to this case, but then in many cases there will be some peculiar feature. I might add that this judgment was reserved for the very reason that the personal circumstances of the appellant evoked considerable sympathy. I have come to the conclusion that the learned magistrate had due regard thereto and that this Court is not entitled to interfere on the basis submitted. In fact, this Court would fail in its duty if it does interfere on that ground."

[51] In S v Sinden 1995(2) SACR 704(A) the appellant, a first offender, was sentenced in the regional court to an effective term of four years' imprisonment for stealing approximately R138 000.00 from the employer over a period of 14 months. She was married and had minor children. The contention on appeal, that a sentence of correctional supervision was more appropriate, was rejected by the Appellate Division. The court noted that the accused had shown little remorse and was unwilling to pay back the money stolen from her employer. It was evident that she had stolen out of greed and not from need. The court held that although the interests of the accused and her family called out for a sentence of correctional supervision, the interests of society outweighed her own. The offence was serious and the sentence, as

such, did more than deal with the particular offender: it constituted a message to the society in which the offence occurred. The court then confirmed the sentence.

[52] In S v Botha 1998(2) SACR 228 (A) the appellant was convicted in a regional court on 12 counts of theft, 10 counts of forgery and four counts of fraud. The offences were committed over a period of six months, and the complainants were all persons who reposed trust in the appellant (her employer, business associates, or friends). The total amounts involved in the theft charges were R4 814.04, stolen from her employer, and R5 511.23, stolen from a business associate. The forgery charges related to cheques which she had drawn on the bank account of her business associate. The fourth fraud charge related to a further amount of R20 000, which was not, however, paid over to the appellant, because her misdeeds came to light before the payment could be effected. The fraud evidenced great ingenuity, and were well planned and thought out. The appeal was dismissed.

[53] In the present appeal the appellant had steadfastly refused at the sentencing stage to acknowledge that he had done anything wrong. He lays the blame on others. Mr Nhlapo says: "The accused regrets ever committing the offence in question stating that he finds it difficulty (sic) in accepting that his so trusted friend could let (sic) him to such trouble."

I have earlier referred to this aspect, and the appellant's attitude, when dealing with Dr Labuschagne's testimony in mitigation of sentence. The appellant seemed to lack insight in, or would not acknowledge his own role in the perpetration of fraud on SARS (the fiscus). He shows no remorse. In S v Matyityi 2011(1) SACR 40 (SCA) (a case subsequent to the sentencing of the appellant in this appeal before us but the learned Judge's description of remorse is instructive) it was said at 47a-d:

"There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at having been caught, is a factual question. It is to

the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."

[54] In the matter of S v Malgas and Others 2013 (2) SACR 343 SCA (para 20) the appellants were sentenced to prison terms of between 8 and 10 years on 06 March 2003 and the appeal against sentence was heard 10 years later on 22 May 2013. It was contended that this lengthy period is, in itself, an exceptional circumstance that should be taken into account in the evaluation of their sentence by the appeal court. Willis AJA pertinently observed at paragraphs 20-22:

"[20] There can be no automatic alleviation of sentence merely because of the long interval of time between the imposition of sentence and the hearing of the appeal for those persons fortunate enough to have been granted bail, pending appeal. The phenomenon whereby inertia descends upon appeal, like a cloud from the heavens, once bail has been granted to an accused after conviction and sentence, has been recurring with increasing frequency, especially in certain parts of the land.

[21] The appellants have adopted a supine attitude to the hearing of their appeal. Their attitude to this case throughout has been to adopt the attitude of a nightjar in the veld; do as little as possible, hope that nobody will notice and expect that the problem will go away. Fortunately for the administration of justice, the appellants do not enjoy a nightjar's camouflage. They may have hidden, but they have not been invisible.

[22] It will be hard on the appellants and their families that, 10 years after their sentencing by the magistrate, they should now have to report to jail to commence serving their sentences. We have anxiously reflected upon the needs of justice in this case, including the requirement that this court should show mercy to and compassion for our fellow human beings. Having done so, the conclusion remains

inescapable that, if this court were to regard this case as yet another 'exception', it would undermine the administration of justice. The appellants are to blame for the long delay in bringing this matter to finality. The predicament in which the appellants find themselves is largely of their own making."

[55] The situation in the present appeal is typical. The appellant had been on bail awaiting trial from 7 October 1996 and from 8 February 2008 he has been on bail pending appeal which is altogether 18 years. The delay in the prosecution of the appeal has largely been due to the "supine attitude of the hearing of [his] appeal" (Malgas *supra*) although the State is not entirely blameless. The attitude can be gleaned from the way in which it was sought to have a further postponement (or even an acquittal) by the appellant on the basis that the record was incomplete and which I have referred to earlier.

[56] Again, to borrow from Malgas (*supra*), the predicament in which the appellant finds himself is largely due to his own making.

[57] In my view taking all factors into account, a sentence of five years' imprisonment as imposed by the learned Magistrate was an appropriate one. I would impose the same sentence if I were to impose sentence afresh. I would dismiss the appeal on sentence.

[58] The appellant has been on bail since sentence was imposed by the court a quo. It should be revoked.

[58] In the result the following order shall ensue:

58.1 The appeal on conviction and sentence is dismissed.

58.2 The appellant is to present himself to the Registrar of the High Court, Gauteng Local Division, Johannesburg within 72 hours of the making of this order to commence serving his sentence.

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N. RANCHOD

JUDGE OF THE HIGH COURT

I agree,

_____

G.S.S MALULEKE

JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Appellant	: Adv Vermeulen SC
	Adv Eia
Instructed by	: Werksmans Attorneys
	(Mr Burger)
Counsel on behalf of Respondent	: Adv Coetzee
Instructed by	: State Attorney
Dates heard	: 30 May 2014; 6 June 2014
Date delivered	: 10 October 2014