



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: A200/2018

In the matter between:-

JACOBUS SAMUEL GOUWS

Appellant

and

THE STATE

Respondent

CORAM: MUSI, JP *et* MOLITSOANE, J

HEARD: 30 SEPTEMBER 2019

JUDGMENT BY MOLITSOANE, J

DELIVERED: 12 DECEMBER 2019

- [1] The appellant was convicted on two counts of fraud in the Regional Court: Bloemfontein. He was sentenced to 30 months imprisonment on each count. The court ordered the two sentences to run concurrently. He appealed his conviction on both counts. He was partially successful in the appeal. In the order I recorded that the conviction on

count, fraud, was upheld and set aside the said conviction; I substituted same with a conviction on theft. I dismissed the appeal on count 2. In view of the alteration of the conviction to theft we were urged to reconsider the sentence imposed by the trial court. The record before us did not contain the sentencing proceedings and I ordered same to be provided. These proceedings are thus for the reconsideration of sentence.

[2] The reference to the counts in the previous order I made was erroneous. The judgment on the merits clearly indicate that I intended to dismiss the appeal on count 1 and uphold it on count 2. In my view the appellant also understood my order as such because in his heads of argument and the submissions before us, he confines himself to the reconsideration of the sentence in respect of count 2. The order made should thus be amended to reflect the true intended position.

[3] The appellant, an attorney, was convicted on a charge of theft of trust monies. The evidence prove that he misappropriated an amount of R38 000 from the complainant. This money was for the purchase of the house by the complainant.

[4] It was submitted in this court on behalf of the appellant that in the absence of a fraudulent misrepresentation and intent, the conviction on a charge of theft is to some degree less serious. It was further submitted that the appropriate

sentence in this case would be one in terms of s276 (1) (i) of the Criminal Procedure Act 51 of 1977(the CPA).

[5] It is settled that sentencing lies in the discretion of the trial court. The appeal court will interfere with the discretion of the trial court in circumstances where that court did not exercise its discretion properly or where the sentence is shockingly inappropriate.¹The court must also seek to achieve a balance between the personal circumstances of the accused and the interest of society. In *S v Rabie*²the court said the following:

“Punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances.”

[6] The appellant is 46 years old. He is married with two children aged 14 and 11 years old. He was an admitted attorney. He is no longer in practise as he was struck off the roll of practising attorneys .He is currently a manager of a guest house. He earns an amount of R10 000.00 per month. His wife is employed and earns an amount of R13 000 per month as a data management officer.

[7] It was submitted before us that theft is a less serious offence than fraud. I am unable to agree with this submission in the circumstances of the case before us. It has to be borne in mind that fraud may be real or potential. In circumstances where fraud is real, the victim suffers

¹ *S v Pillay* 1977(4) SA 531 at 535 E-G; *S v Malgas* 2001(1) SACR 469 (SCA) at par[13]

² 1975(4) SA 855 (AD) at 862 G-H

actual financial or proprietary loss. However, where the loss is potential, the victim need not suffer financial or proprietary prejudice. On the other hand, in the case of theft the victim mostly suffers either financial or proprietary prejudice. In the case before us the complainant suffered financially. It would not have mattered if it was fraud or theft as in both instances the loss is or would have been actual. The distinction between the two crimes does not take away the actual loss the victim sustained. At the heart of both crimes is an element of dishonesty. There is in my view no merit in their differentiation when it comes to sentencing. The submission by the appellant that theft is less serious than fraud in this case stands to be rejected.

- [8] It was argued on behalf of the appellant that the appropriate sentence in the circumstances of this case is one of imprisonment in terms of s276 (1)(i) of the CPA. Much reliance was placed on the previous judgment of this court, **Macheke v S**³. As a starting point it must be acknowledged that courts may have regard to past sentencing patterns when imposing sentences. This was also recognised in **Malgas v S**⁴ although the court dealt with the issue of prescribed minimum sentences. The sentiments expressed in that case are in my view equally applicable to this case. The court said the following:

“It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting

³ [2019] JOL 45822(FB).

⁴ *Malgas v S* (*supra*) at par [21]

point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere existence of *some* discrepancy between them cannot be the sole criterion and that something more than that is needed to justify departure, no great harm will be done.”

[9] In taking into account past sentencing patterns caution must not be lost that the court seized with a matter retains its judicial discretion. Bearing this in mind sight should also not be lost of the fact that the court must ‘guard against imposing uniform sentences that do not distinguish between the facts of cases and the personal circumstances of offenders⁵’

[10] The facts of the case of **Macheka** are distinguishable from the facts of this case. In that case, the appellant, an attorney, 50 years of age was convicted of theft of money entrusted to him in the amount of R49 702.45. He had previously signed an acknowledgment of debt with the complainant but failed to perform in terms of the undertaking. The complainant was reimbursed by the Attorneys Fidelity Fund.

⁵ S v Ndlovu 2007(1) SACR 535(SCA) at 538.

- [11] In the case before us the appellant did not acknowledge his indebtedness to the complainant. While he acknowledges that he received the money he persists that he did not benefit from it. This argument is difficult to fathom. He did not pay the money over to the seller. He also did not pay it back to the complainant upon demand. If indeed it was so that the appellant did not benefit from the money he could have easily paid it back upon request. The appellant kept on giving the complainant every possible excuse sending her from pillar to post. The complainant in the **Macheka** case was reimbursed by the AFF while the complainant in this case remains without her money.
- [12] The appellant was convicted of a serious crime. The fact that this crime was committed by an attorney regarding the monies entrusted to him in good faith aggravates the offence. The position of an attorney demands that legal practitioners should uphold high ethical standards and be of incorruptible integrity. They should be accountable to their clients. Conduct as demonstrated by the appellant is unacceptable and tends to project and paint honest legal practitioners as dishonest.
- [13] It has to be borne in mind that the courts are obliged to impose sentences which are implementable. The appellant has not appealed his sentences on both counts. The *de facto* position is that seeing that his conviction on count 1 was dismissed, he must serve his imprisonment term on that count. Adv. Pieterse on a question as to how the

appellant would serve a sentence in terms of s276 (1)(i) together with direct imprisonment indicated that the appellant would consider appealing the dismissed ruling of this court to the Supreme court of Appeal and concomitantly apply for bail pending appeal.

[14] The fact is that there is no appeal pending in respect of count 1 at the time of the reconsideration of this sentence almost a year later after the said appeal was dismissed. I will however hasten to admit that the appellant may have thought it prudent to await the decision in this case in order to lodge his appeal to the Supreme Court of Appeal. In that way, the appeals in both counts would not be brought piece meal. Imprisonment in terms of s276 (1) (i) presupposes that an accused serve part of a sentence and be released at the discretion of the Commissioner of Correctional Services. It would in my view be difficult to implement such a sentence should the order of the dismissal on the merits remain as is.

[14] Having regard to the personal circumstances of the appellant, the seriousness of this offence and the interest of the community I am of the considered view that the sentence imposed for fraud by the court a quo would still be appropriate in this case even though the appellant was convicted of theft. I would make the following order as amended:

ORDER

1. The appeal against the conviction on count 1 is dismissed.
2. The appeal against the conviction on Count 2 is upheld and the order of the trial Court with regard thereto is set aside and substituted with the following:
 - 2.1 The appellant is guilty of theft.
 - 2.2 The appellant is sentenced to 30(thirty) months imprisonment.
 - 2.3 The sentences in count 1 and 2 to run concurrently.
 - 2.4 An order in terms of s103 of the Firearms Control Act is confirmed

P.E. MOLITSOANE, J

I concur and it is so ordered.

C.J. MUSI,JP

On behalf of appellant: Adv C Pieterse
Instructed by:
Steenkamp and Jansen
BLOEMFONTEIN

On behalf of the respondent: Adv M. Ponye
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

