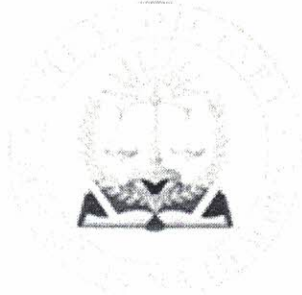


✓✓ 26/01/2018

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A18/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
26/01/18	
DATE	SIGNATURE

In the matter between:

WILLEM ANTONIE COMBRINK

Appellant

and

THE STATE

Respondent

J U D G M E N T

TEFFO, J:

[1] The appellant was convicted on his plea of guilty in the regional court, Evander, on four counts of fraud.

[2] Before he pleaded to the charges the prosecutor informed the local court that the appellant was represented, he intended pleading guilty to all the

counts and that his legal representative had prepared a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (*"the Act"*).

[3] Subsequent thereto the appellant pleaded guilty to all the counts. His legal representative then handed in the s 112(2) written statement and sought leave of the trial court to read its contents into the record.

[4] The charges were not read with the provisions of s 51(2) of the Criminal Law Amendment Act of 1997 (*"CLLA"*).

[5] The appellant's written statement was read into the record. In the statement the appellant admitted all the material elements of the various offences as well as the underlying facts and the amounts involved.

[6] The prosecutor accepted the plea and the trial court, after satisfying itself that the appellant had correctly pleaded to the elements of fraud in all the four counts, convicted him as charged.

[7] At the conclusion of the evidence led in mitigation of sentence and after both the defence and the State had addressed the trial court in mitigation and aggravation of sentence, the trial court called a witness, Mr Daniel Petrus Bredenkamp. After his evidence was heard and after the trial court had set out the principles relevant to sentence, it took all counts for purposes of sentence and sentenced the appellant to a term of 8 years' imprisonment.

[8] This is an appeal against sentence only. The appellant appeals against his sentence with leave having been granted on petition by this Court.

[9] The issues raised in the appeal mainly revolve around the application of the provisions of s 186 of the Act, allegations that there were material misdirections committed by the trial court, that the trial court did not adequately consider the importance of the probation officer's report, and did not give reasons or gave insufficient reasons for not following the recommendations contained in the report of the probation officer. Further issues were that the trial court overemphasised the seriousness of the offence and underemphasised the mitigating circumstances, it failed to give any or due consideration to the mitigating factors, it did not give any consideration to the fact that the offences were committed 9 to 13 years ago, the case laid dormant for approximately 5 years, during which time the appellant became a productive member of society and rehabilitated himself, causing imprisonment to be meaningless and focussing on retribution and deterrence rather than restorative justice and rehabilitation.

[10] It is not necessary to repeat the evidence presented during the sentencing stage in detail. It suffices to briefly set out the salient facts. The appellant who was 51 years old at the time of his trial, was a senior Engineer and a Project Manager, employed by Sasol Synfuel (Pty) Ltd (Sasol). At some stage while in the employment of Sasol, Sasol sent him to Germany to study the options of manufacturing bonds of stainless steel to put around chimneystacks and how to perform the restoration of a chimney. The

appellant shared his knowledge with Mr Kuhn (the deceased) and T & A Construction and taught them how to manage their operations, how to plan and calculate the material necessary for the project. He and Mr Kuhn were friends. Mr Kuhn also worked for Sasol as an x-ray technician. One day the appellant told Mr Kuhn that the company that was contracted to Sasol to do work for it, had become insolvent and that Sasol will be appointing another contractor. Mr Kuhn's company, T & A Construction applied to Sasol to render the services and it was appointed.

[11] The appellant and Mr Kuhn agreed that, because Sasol took the appellant to Germany to do the work, through his guidance and training, they will do the job.

[12] As they were busy with the project, they decided to claim even though the work was not done. A year passed, there was a shutdown and they did the same. The appellant supervised the construction and did the repairs of the chimneystacks and after the completion of the project, the appellant would finalise the required documentation and sign the contract off. He then recommended the payment as per the invoice of the contractors. Payment was scheduled after the appellant shall have given his final recommendation and signed the contract.

[13] The appellant and Mr Kuhn agreed that the appellant would administer projects with fictitious documents. Mr Kuhn received money for the false claimed projects and in return paid the appellant kickbacks out of them.

[14] Mr Bredenkamp investigated the chimneystacks and confronted Mr Kuhn. He also requested T & A Construction's financial statements. This led to the commission of suicide by Mr Kuhn on 19 February 2007.

[15] At some stage Sasol obtained a restraining order against the appellant. Shortly thereafter several meetings were held between the appellant, his attorney and the representatives of Sasol. The appellant explained to them how the offences of fraud were committed. He also gave a comprehensive list of his assets and agreed to transfer or sell them in order to pay the proceeds of sale to the account of Sasol. His pension was also attached. The appellant's assets were sold and the sum of R4 700 000, 00 in total was paid to Sasol.

[16] He left Sasol and found employment overseas after being unemployed for six months and carried on with his life.

[17] In October 2012 while he was on leave and visiting his wife in South Africa, the appellant was contacted by Constable Maredi who informed him that Sasol had laid charges against him. He was arrested, brought before court and granted bail. He was subsequently granted permission to carry on with his duties in Nigeria. He returned to South Africa in 2013 after being employed by Kentz Engineering and Construction as a contractor.

[18] The defence led the evidence of the appellant, a private probation officer, Ms Catharina Johanna Wolmarans and a correctional officer, Mr Bheki

Madoa in mitigation of sentence. In essence Ms Wolmarans's evidence related to the pre-sentence report that she compiled. She recommended that the appellant should be granted a non-custodial sentence given the fact that he has been remorseful and paid back the money that Sasol had lost. The crux of Mr Madoa's evidence also related to the pre-sentence report that he had compiled which dealt with the suitability of the appellant to serve a sentence of correctional supervision. He recommended a sentence of correctional supervision in terms of section 276(1)(h) of the Act.

MITIGATING FACTORS

[19] The appellant pleaded guilty. He was still willing to repay the difference between the amount he pleaded guilty to and the amount he already paid back. The complainant refused the offer because it had recovered substantially more than the loss. The appellant paid back the amount of R4, 7 million. The insurance also paid the complainant the sum of R8 million. The complainant recovered more than the amount of R6, 5 million mentioned in the charge-sheet. After the appellant had repaid the money to the complainant, he was told to go on with his life. Several years later in 2012 he was arrested for the offences. The offences were committed nine (9) years prior to him being arrested for them. Sasol did not suffer any loss as it was paid back a total amount of R10, 7 million by the Insurance company and the appellant. Mr Kuhn's estate was not pursued together with that of his father and the appellant's wife, all of whom also benefitted from the fraudulent activities.

[20] The appellant was remorseful. He cooperated and explained how and why the offences were committed. He has lost everything. He did not have any previous convictions.

[21] The appellant was born on 23 February 1963. He divorced and remarried. He is the fourth born child in his family. His father and brother were killed in a road accident. He has a degree in civil engineering. He is a father of two children of his own as well as a stepfather to two children, a son and daughter of his current wife. His daughter is working for Sasol in Secunda and was studying part-time with Unisa at the time. She was 23 years old at the time and he was paying tuition fees and her day-to-day expenses. His son was employed by his mother. The appellant was also paying for the day-to-day expenses, viz, medicines, the flat and living costs of his stepdaughter who was diagnosed with narcolepsy. He was of good health but suffers from stress, tension and short memory loss because the case against him was still pending. His current wife was not permanently employed. She earned a salary of R2 000, 00 per month at the time. She could not afford the rental of the place where they resided at the time, the car and everything.

[22] The appellant suffers from a feeling of guilt because Mr Kuhn committed suicide after he was confronted by the personnel of Sasol. He was blamed for Mr Kuhn's death by members of his family and he was not permitted to attend his funeral. He believes he has damaged his image and that of his family as a result of his wrongdoing. He cannot forgive himself for what he did. He has to come to terms with himself for being involved in the

criminal activities. He cannot overcome his weakness that he lost control over himself and got himself in a situation where greed overruled his life and his common sense.

[23] The appellant suffered emotionally and lost his permanent employment.

AGGRAVATING FACTORS

[24] Ms Wolmarans' report states that Sasol suffered a loss in the sum of R6 476 747,66 as a result of the appellant's activities. The appellant was trusted by the management of Sasol at the time. He was appointed as the Manager of the Project and he mismanaged the funds allocated for the project. He misused the trust that was placed upon him. He continued with his criminal behaviour over a period of five years. He planned the fraudulent transactions with the intention to defraud Sasol and to enrich himself, Mr Kuhn and T & A Construction. He benefitted an amount R2 200 000, 00 from the fraudulent transactions.

[25] It was submitted on behalf of the State at the trial court that fraud committed against companies leads to job losses as companies close down. The appellant pleaded guilty of fraud that involved a substantial amount of money to the tune of R6, 4 million. Whether the amount was paid or not, it was the appellant's conduct that led to the commission of the offence. Even though the appellant testified that he stopped with the criminal activities on his

own, the period during which offences were committed indicates that he would not have stopped. He should have thought of the consequences of his actions before he committed the offences. Sasol had to pay an excess amount of over R5 million to succeed with its claim with the insurance company for the loss it had suffered as a result of the fraudulent transactions.

[26] Sentencing is a matter pre-eminently within the discretion of the trial court and a court of appeal will interfere with the exercise of such discretion only on limited grounds (*S v Sadler* 2000 (1) SACR 331 (SCA); *S v Rabie* 1975 (4) SA 455 (A)).

[27] A court exercising appellate jurisdiction cannot in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where the material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of a material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "*shocking*", "*startling*" or

“disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kinds I have mentioned (*S v Malgas* 2001 (1) SACR 469 (SCA)).

APPLICATION OF S 186 OF THE ACT

[26] Section 186 of the Act provides that the court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed if the evidence of such witness appears to the court essential to the just decision of the case.

[27] The learned magistrate was criticised for calling Mr Bredenkamp as a witness after the appellant had closed his case and both parties had addressed the court in mitigation and aggravation of sentence. It was submitted that the learned magistrate did not use her discretion judicially. She used the evidence of Mr Bredenkamp to the prejudice of the appellant. She indicated to Mr Bredenkamp that *“Ek roep jou om sekere goed op te klaar.”* The intention of s 186 is not to clear up certain things.

[28] It was pointed out that the learned magistrate misquoted and misunderstood the decision reached in *S v Dlamini* 2000 (2) SACR 266 (T). It was argued that it was never decided that the magistrate is under a duty to call witnesses to give a proper sentence. What was decided is that a judicial officer is obliged to *inter alia*, call witnesses to establish whether compelling circumstances existed, before it imposes a minimum sentence.

[29] It was submitted that the learned magistrate was not alive to the fact that she might be taking over the prosecution. The State wanted to call the witness but abandoned him and that the witness might have been coached before testifying. The magistrate elicited evidence beyond the amount that the appellant pleaded guilty to. There was no misunderstanding as to the amount that the appellant pleaded guilty to and for which he accepted responsibility. Further to the above, it was argued that the trial court made an incorrect finding that it was conceded that the amount the appellant had been prosecuted for was more and he pleaded guilty to a lesser amount.

[30] Mr Daniel Petrus Bredenkamp's evidence was briefly as follows: The loss suffered by Sasol as a result of the commission of the offence was in excess of R6, 4 million. Sasol claimed a higher amount from the insurance company. Sasol was requested to pay an excess amount of R5 638 684, 00 and only received a pay out of an amount of R8 113 550, 48. The pension money of the appellant was also attached. He was not part of the discussions between Sasol, the appellant and both parties' legal representatives. Sasol has a policy that where an employee has been found guilty of fraud, his

pension money is taken to compensate for the loss it has suffered. The appellant was not taken to a disciplinary hearing. He agreed with his legal representatives that his pension money should be used to pay for part of the loss Sasol suffered as a result of the offence.

[31] The investigation started on 20 July 2006. The appellant was not immediately confronted directly but other employees were interviewed internally. Sasol was not fully compensated for the loss.

[32] When the appellant resigned, investigations were already on. He could not have known about them as they first interviewed other people internally who knew the appellant.

[33] Sasol was compensated for the loss taking into account that the insurance claim was also paid.

[34] Before Mr Bredenkamp was called by the trial court as a witness, the learned magistrate explained that she was calling him in order to be able to justly adjudicate the case to give a proper sentence.

[35] At page 280 of the record line 10 the trial court stated the following:

"In any event it was conceded that the amount that you would have been prosecuted for was more and that you pleaded guilty to a lesser amount that is what the court considered. The court is not looking at the higher amount. The court is only sentencing you and considering you on the amount of approximately R6.4 million."

[36] The issue raised that the magistrate elicited evidence from Mr Bredenkamp regarding an amount in excess of the one the appellant pleaded guilty to is, in my view, not material in that the trial court was clear that it was only considering fraud in the amount of R6.4 million for the purposes of sentence. This amount was what the appellant was charged for and to which he had pleaded guilty. The sum of R6.4 million is the total amount of the fraud that was perpetrated in respect of the four counts.

[37] As regards the issue relating to the contention that the learned magistrate misquoted and misunderstood the decision in *S v Dlamini*, the issue was extensively dealt with on record from line 17 on page 280. It is important to note that the provisions of s 186 are divided into two parts, viz, the "may" and the "shall" part. The "may" part is discretionary and the discretion is wide but has to be exercised judicially and in a limited manner (*R v Ganie* 1958 (1) SA 102 (A)). The second part places a duty on the court to call the witness once it deems the evidence essential to the just adjudication of the case. It is the judicial officer's responsibility to assess whether the evidence is essential.

[38] In this matter the only evidence before the court was that of the appellant. The court had to get a full picture of exactly what loss did Sasol suffer and how the insurance dealt with the claim and ended up paying the amount of more than R8 million.

[39] The provisions of s 186 of the Act permits the judicial officer to call any witness at any stage of the proceedings if he/she deems the witness's evidence essential to the just adjudication of the case. The learned magistrate clearly stated that she was calling Mr Bredenkamp in order to justly adjudicate the case to give a proper sentence.

[40] Issues were raised that because the prosecution initially wanted to call Mr Bredenkamp, the learned magistrate was not alive to the fact that she might be taking over the prosecution and that the witness might have been coached before testifying.

[41] In my view I cannot fault the learned magistrate for the route that she took. She needed to satisfy herself on the facts which were before the court only from the appellant's side in order to arrive at a just decision. I also cannot find any prejudice or any intention to prejudice the appellant from the evidence of Mr Bredenkamp. There was also no evidence that the learned magistrate took over the prosecution and that Mr Bredenkamp was coached to give evidence. In fact his evidence corroborated the appellant's evidence.

MISDIRECTIONS

[42] Allegations were made that the learned magistrate misdirected herself on the element of mercy, remorse, etc. and that she misinterpreted the evidence. The fact that the learned magistrate speculated about the knowledge of the appellant regarding the investigation whereas the

undisputed evidence was that he did not know about the investigation. The fact that the appellant never testified that he was a childhood friend or that they were ex-colleagues and that Mr Madoa testified that the appellant is staying in a 5- bedroomed flat and not a 5-roomed flat. It was argued that incorrect evaluation of the evidence leads to an incorrect decision to the detriment of the appellant.

[43] Although I agree that an incorrect evaluation of the evidence leads to an incorrect decision, it cannot be argued that the same applied in this matter. The appellant on his own testified that although he was not aware of the investigations when he resigned, he resigned after he was told that Mr Kuhn committed suicide. Mr Kuhn called him a week prior to committing suicide and informed him that he was being questioned about the fraudulent transactions. There cannot be any doubt that even though the appellant was not yet confronted at the time, he was not aware that something in relation thereto was imminent. It is indeed correct that Mr Bredenkamp corroborated the appellant's evidence to the effect that when he resigned he was not yet confronted directly. The fact of the matter is that Sasol had already begun with its investigations as early as 20 July 2006. Immediately after Mr Kuhn had told the appellant that he was questioned, and after his sudden death, the appellant decided to resign. He knew the consequences of his actions. Allegations that the appellant stayed in a five bedroomed flat and not a five roomed flat and that he was a childhood friend of Mr Kuhn although incorrect, are of no consequence.

[44] As regards the issue of remorse the argument that the appellant could have pleaded guilty because the evidence was overwhelming against him cannot be ruled out. His explanation that on his last day at work when he was supposed to have met the personnel of Sasol, his access card did not longer work as he was busy moving his belongings and that he had decided to talk to his family first does not make sense. If he wanted to meet the personnel of Sasol at that time and come clean, he could have remained at the workplace and hear them first before he started moving his belongings. Alternatively, the minute he realised that he was denied access, he could have communicated with one of the personnel of Sasol and explained his situation. They could have allowed him access for the purpose of the meeting. His explanation clearly indicates that he did not want to meet them at the time but decided to first go and discuss the matter with his family members.

[45] It is clear from the report of Ms Wolmarans and the appellant's evidence that he definitely appreciated the consequences of his actions. He testified that after he had resigned, he thought about the fraudulent activities and realised that he was wrong. When he went to his legal representative, he told him that he intended pleading guilty.

[46] The plea of guilty must be put on its proper perspective. The reasons why the appellant pleaded guilty are on record. Before it imposes sentence, a court has to look at the triad, which consists of the nature of the offence, the accused's circumstances and the interest of society. I have considered the appellant's personal circumstances. Not only are they relevant, the nature of

the offences the appellant has been convicted of and the interest of society, are also factors to be considered when passing sentence. The appellant was convicted of very serious offences and the value involved is magnificent although he was able to pay back some of the amount. What counsel for the appellant loses sight of, is that it is not all about the appellant. It is about him, the nature of the offences he has been convicted of and the interests of society. All these factors should be equally balanced. None should be weighed above the other.

[47] The record reflects that there was extensive planning and the appellant knew what he was doing. He knew that what he was doing was wrong but persisted with it until it came too light. From his own evidence he stated that they succeeded with the first transaction and continued. It was clear that the offences were motivated by greed. He had a good salary at the time of the commission of the offences. He did not have any reason to steal from his employer, the mouth that fed him and entrusted him with a project worth of millions. He ended up mismanaging the funds allocated for the project. Sasol invested in him by taking him overseas to learn the job but he abused the position of trust it had on him and misused it.

[48] As regards to other issues relating to his dependants, his current wife and the children, the appellant already knew about the pending case against him. He was prepared to take the risk by marrying another wife after the divorce. It is also not clear for how long his wife's current salary will continue and whether there was a chance of her obtaining a permanent employment or

not. The appellant is not obliged to maintain his daughter from the first marriage. She is a major and already working. He is also not obliged to maintain his stepchildren.

[49] In my view the fact that Mr Kuhn with whom the appellant committed the offences, committed suicide, is more aggravating.

[50] The fact that Sasol never pursued the estate of Mr Kuhn, his father and the appellant's former wife, is neither here nor there. It is only the appellant who is before court.

[51] The issues raised in the appeal basically suit the appellant only. When one considers the principles of sentence and the triad, in particular, the sentence imposed must suit the offence, the offender and the interests of society.

[52] It is my view that when all factors, aggravating and mitigating are considered, there is no misdirection on the part of the trial court calling for this Court to interfere in the decision of the trial court. The learned magistrate in my view considered all the factors.

[53] I therefore do not agree that the sentence is shockingly harsh or inappropriate.

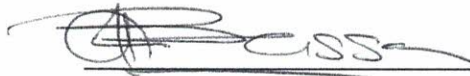
[54] Consequently I make the following order:

54.1 The appeal against the sentence of the appellant is dismissed.



M J TEFFO
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree:



A BASSON
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

APPEARANCES

For the appellant	P J Johnson
Instructed by	Vos, Viljoen & Becker Inc
For the respondent	C Pruis
Instructed by	The Director of Public Prosecutions
Date of judgment	26 January 2018