REPUBLIC OF SOUTH AFRICA

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

CASE NO: A731/2014

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES:NO
(3) REVISED

5 February 2015
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In the matter between

RAUTENBACH, PEARL **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU AJ:

[1] The appellant, Mrs.Pearl Rautenbach, pleaded guilty on 194 counts of fraud that involved a total amount of R1 339 560-00 before the regional court, Benoni. She

was duly convicted on the basis of her plea statement accepted by the State. Consequently, she was sentenced to an effective term of 15 years imprisonment after all the counts were taken together for the purposes of sentence. Aggrieved with the sentence, she now appeals to this court with leave of the court below. The issue in this appeal is whether the trial court took into consideration all the relevant factors in imposing sentence. Secondly, whether the sentence imposed was not influenced by the trial court taking into consideration that the appellant had at the time of sentencing a pending charge of fraud.

[2] The facts and circumstances relating to the conviction can be gleaned from the appellant's written plea explanation in terms of s 112 of the Criminal procedure act 51 of 1977 as amended. For convenience, the said statement reads as follows:

"*I, the undersigned Pearl Rautenbach, am the accused in this matter and I wish to confirm that I plead guilty to the charges against me of fraud. Furthermore, that I do so freely, voluntarily and without any undue influence and in my sound and sober senses.*

I admit that I was employed at the company Enclosure Solutions as a bookkeeper and the company is based in Brentwood Park which is in this court area of jurisdiction.

I also admit that the charges against me stems from incidents that occurred at this company totalled 194 in total. I admit that during the period of July 2009 and October 2011 and whilst in the employ of the company as explained above, I transferred numerous amounts from the company's account into my personal bank accounts as well as the bank account of my son Mr André Blignaut.

I admit that I also transferred money from the business into a municipal account which was payment for my late husband's property at Rust De Venter 33 in Lakefield.

I admit that personal bank account details were FNB platinum cheque account […..] referred to as account as account A *per the charge sheet and the annexure thereto.*

Furthermore, I admit that the other accounts that money was paid into are as per the charge sheet and referred to as account B, my son's account with account number being an FNB Smart account 6[…]; account C my other personal bank account being an ABSA account with number 9[…]; account D my other personal bank account also FNB 62[…].

Lastly, the account details of the municipal account as explained, the account number and the reference 3[…]. I admit that 32 Alston as appearing was not the correct recipient details.

I admit that I was mandated to pay account of the company's clients by way of transferring money from the company's business accounts over to the clients' respective accounts.

I admit that I unlawfully and with intent whilst in the performance of my official duties, transferred monies into the above account by pretending to the company or its directors Paul Jenade or Kathleen Jenade that all transactions done were the legitimate payments of the company and for the company's clients whereas in truth and in fact I knew that this was not the case and that I was not authorised to make the payments as is shown on the annexure to the charge sheet.

I admit that I defrauded the company by false pretences and induced the company and the Jenade family to the prejudice as explained above in the amount totalling R1, 339 560.97. I have no defence in law and I know that my conduct is punishable by law, I will submit to the court the reason for taking the money prior to sentencing".

[3] The appellant admitted to a record of a previous conviction of theft committed on 3 September 2011 in respect of which three months imprisonment wholly suspended for a period of four years on customary conditions, had been imposed.

[4] The appellant was at the time of sentencing 49 years of age, a widow and mother to 3 adult children aged 30, 28 and 22 years respectively. She passed matric and in addition had bookkeeping and secretarial diploma. She was unemployed.

[5] The argument advanced on behalf of the appellant is that the degree of disparity between the sentence imposed and that which this court would have imposed is such that interference is competent and required. As Marais JA put it in *S v Sadler* **2000 (1) SACR 331** (SCA) para 8,

'*The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and* *requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a "striking" or "startling" or "disturbing" disparity between the trial court's sentence and that which the appellate Court would have imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised*."

[6] Although the state had relied on the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 (as amended), the court in imposing the sentence, did not rely on the minimum sentencing provisions, but rather on its penal jurisdiction of up to 15 years imprisonment (in terms of section 92(1) (a) of the Magistrates' Court Act 32 of 1944).

[7] The trial magistrate had in his sentencing judgment remarked that he could not ignore the fact that appellant had a pending case of fraud involving an amount of R51, 000-00. This aspect had emanated from a presentencing report that was handed and admitted into evidence. For this, he was and justifiably so in my view, criticised by the appellant. Before us the appellant contended that the trial magistrate misdirected himself which resulted in an unfair trial in respect of sentence. It is trite that every accused person is in terms of the bill of rights presumed innocent until his or her guilt is established by a court of law. To this end therefore, the trial court misdirected itself by making reference in its judgment and sentence to the pending charge against the appellant. Despite the misdirection set out above, this matter can and ought to be disposed of by this court. It is not the end of the matter as every case has to be judged on its own peculiar facts regard being had to all the circumstances.

[8] White collar crime of late, has reached alarming proportions in this country. They are serious crimes, whose corrosive impact upon society is undoubtedly, all too obvious. In this matter, the appellant abused her position of trust. Very few companies can enjoy financial successes if their bookkeepers embezzle funds. Not

all of the losses of the complainants have yet been made good. The losses are substantial. In addition, the conduct complained of was premeditated and persistent over a period of two years. At least three of the fraudulent transactions in respect of counts 116,117 and 118 were committed after she had been sentenced to a suspended jail term referred to above. She participated in the criminal venture not just to benefit herself but also her family. It was not needed to satisfy any of the necessities of life. In this case her children are already adults. That she has not shown genuine remorse for what she has done is abundantly clear as the trial court also found. The fact that she had been awarded temporary custody of her grandchild cannot be viewed in isolation. It is a matter that can be properly addressed by their welfare authorities in view of the interest of the child that reigns supreme as section 28 (2) of our Constitution provides.

[9] The trial court was correct in considering that that a custodial sentence is the only appropriate sentence considering the circumstances of this particular matter. Deep sympathy for the appellant cannot and should not deter a court from imposing the kind of sentence dictated by justice and the interests of society as a whole. In S *v Sadler*, Marais JA held in this regard at para (11) that:

"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".

The learned JA continued at para 12 as follows:

"*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."*

[10] In this matter not only did the appellant, commits some of the transgressions after she had been convicted and sentenced for a related crime, but she also misled

the probation officer with regard to her place of residence. This is a clear manifestation that she had not learned from the incidents of crime.

[11] In the light of these factors it cannot be said that the sentence imposed is startling or induces a sense of shock. On the contrary, it is consistent with sentences recently confirmed or imposed by the SCA for fraud. **In S v Price and Another 2003 (2) SACR 551 (SCA)**, a 49 year old attorney and first offender was convicted of fraud involving R1.945 million. Not only was he married but had three dependent children. On appeal, a sentence of 15 years imprisonment was confirmed. In *S v Blank* 1995 (1) SACR 62 (A) at 73B-D the court, in dealing with fraudulent conduct of a stockbroker, said the following:

'*In view of all these facts, I feel fully justified in imposing a sentence which will deter not only the accused and other stockbrokers from committing crimes similar to those of which the accused has been convicted, but also others involved in business who may be tempted to indulge in larger-scale crimes of dishonesty. The time has already arrived when the severity of punishments imposed for this sort of crime while of course taking the personal circumstances of a particular accused into account, should proclaim that society has had enough and that the courts, who are the mouthpiece of society, will not tolerate such crimes and will severely punish offenders: cf S v Zinn 1969 (2) SA 837 (A) at 542D-E.'* (Also quoted recently in S v Brown **(681/2013) [2014] ZASCA 217 (1 December 2014)** SCA at para 122).

[12] In Brown the court also said at para 123 that:

"*What this court said about stockbrokers applies equally to asset managers who are in a fiduciary position in relation to investor assets.*"

The appellant in this matter also abused her position of trust. Under the circumstances therefore the following order is proposed:

1. The appeal against sentence is dismissed.

2. The order by this court must immediately be brought to the attention of the welfare authorities in this province regarding the appellant's grandchild.

MUDAU TP
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

DEVOS J
JUDGE OF THE HIGH COURT

Date of hearing: 5 February 2015

APPEARANCES

On behalf of the appellant: Ms M B Moloi

On behalf of the respondent: Adv A Coetzee

NPA