**FREE STATE HIGH COURT, BLOEMFONTEIN**
**REPUBLIC OF SOUTH AFRICA**

Appeal Number : A33/2015

In the appeal between:-

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| **MOHAPI ESAU DUNJANE** | Appellant |
| and | |
| **THE STATE** | Respondent |

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| **CORAM:** | VAN ZYL, J *et* WILLIAMS, AJ |
| **JUDGMENT BY:** | VAN ZYL, J |
| **DELIVERED ON:** | 24 NOVEMBER 2015 |

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[1] The accused was charged with one count of fraud. He pleaded guilty to the said charge and was subsequently convicted. The accused was sentenced to 5 years' imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act, 51 of 1977 ("the Act"). The appellant applied to the court *a quo* for leave to appeal against the sentence, which was refused. He subsequently petitioned the High Court, whereupon leave to appeal against the sentence was granted.

[2] The following relevant background circumstances appear

from the appellant's statement in terms of section 112 of the Act:

> "3.1 In January 2011 I was in a relationship with my former co-accused. We have been talking about buying a car but were struggling because although I could afford to pay a car, we could not obtain a loan as we were not employed formally and were unable to then supply the banks with the papers they wanted.
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> 3.2 In January I was in Bloemfontein where I saw an Audi 1.8. It was a beautiful car and I left and told my girlfriend about it. We discussed the matter. She also went to have a look at the car with me.
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> 3.3 We were told what documents were needed and we knew that we were not going to be able to produce such documentation. I was very disappointed and told a friend about this. He then told me that he knew someone that could supply us with false documents. I discussed this again with my girlfriend and we agreed that she will use her name on the documents. We then went back after obtaining the documents and handed it in at Nissan Central Motors where a loan was granted by Wesbank for an amount of R258 577,92. This was the amount of all costs for the purchasing of the car.
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> 3.4 It was always the intention to keep up with the servicing of the loan from Wesbank until the car was paid off.
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> 3.5 The bank later discovered that the payslip used was false and the car was then found with me. The car was also taken back and we were both arrested. This happened a little more than a month after I received the car."

[3] Mr Van der Merwe, on behalf of the appellant, submitted that

the court *a quo* erred by overemphasising the premeditation element of the offence. He contended that premeditation is inherently part of the nature of fraud, as fraud is almost never committed on the spur of the moment. Mr Van der Merwe furthermore submitted that the court *a quo* overemphasised the gravity of the offence and the interests of society at the expense of the personal circumstances of the appellant. It was also his submission that it is apparent from the record that the court *a quo* disregarded the correctional supervision report on the basis that the appellant has a relevant previous conviction for fraud and that he can therefore not be considered to be an appropriate candidate for correctional supervision. Mr Van der Merwe submitted that the court *a quo* erred in this regard in view of the fact that the conviction was more than 10 years ago. Mr Van der Merwe consequently argued that in view of the totality of the circumstances, the imposed sentence is shockingly inappropriate. Although he initially contended that an appropriate sentence would be one of 5 years' imprisonment in terms of section 176(1)(h) of the Act, he conceded during his oral argument that a sentence in terms of section 276(1)(i) of the Act could also be an appropriate sentence.

[4] Mr Botha, on behalf of the state, submitted that the moral blameworthiness of the appellant is very high in the particular circumstances of this case. In this regard he referred to the degree of premeditation involved and the fact that the appellant involved third parties as accomplices. He conceded that the previous conviction of the appellant should

not be taken into consideration as such, but he submitted that it still is indicative of the appellant`s propensity to commit fraud. Mr Botha submitted that a sentence in terms of section 276(1)(i) of the Act will not be appropriate in that it will send the wrong message to potential criminals as it would have no deterrence value. Although conceding that the court *a quo* proverbially got a bit carried away in her judgment, Mr Botha submitted that she did not misdirect herself to the extent that it justifies interference.

[5] When considering this appeal, the following trite principle should be applied:

> "[5] It is trite that the imposition of sentence is pre-eminently a matter for the discretion of the trial court and the court on appeal will not interfere with the exercise of such discretion unless it can be said that the sentencing court did not exercise its discretion judicially by reason of an irregularity or material misdirection or that the sentence imposed is so shockingly inappropriate that it is clear that the trial court acted unreasonably."

See **S v Grobler** 2015 (2) SACR 210 (SCA) at 212G-H.

[6] In coming to her conclusion regarding an appropriate sentence, the court *a quo*, in my view, committed certain misdirections. In this regard I refer to the following:

1. The court *a quo* found as follows in her judgment on the sentence:

> "It was not just that you presented a false documentation to them and you were unable to pay for this vehicle, you full well knew that you could not afford this vehicle …" (*sic*)

This finding is contradictory to the contents of the accepted section 112 statement in which the following was stated in paragraph 3.1 thereof:

> "… although I could afford to pay a car we could not obtain a loan as we were not employed formally and were unable to supply the bank with the papers they wanted."

The findings by the court *a quo* that the appellant was unable to pay for the vehicle and that he could not afford the vehicle, are therefore unfounded.

2. The court *a quo* relied on the judgment of **S v Sadler** 2000 (1) SACR 331 (SCA) and quoted from the headnote:

> "White-collar crime – Accused, a senior manager in bank, convicted of corruption, forgery and fraud relating to loans granted by the bank – Accused having received benefit of more than R300 000,00 as a result of his crimes – Sentence of fine and wholly suspended imprisonment replaced on appeal by sentence of 4 years' imprisonment."

In an attempt to marry the facts of the current matter to those of the **Sadler**-matter, the court *a quo* found as follows in her judgment on sentence:

> "What is relevant in this particular case is that the accused there benefited for some, in the amount of some R300 000,00 from his actions and in your particular case the value of the vehicle that you took from the complainant was to the value of R358 577.92, which is very close to the sum of R300 000.00. So you may not have benefited that amount in cash, but you benefited it in terms of the vehicle that you fraudulently was able to obtain."

However, the said is incorrect. From the section 112 statement it is evident that the loan granted by Wesbank was for an amount of R258 577,92. In addition the court *a quo* failed to take into account that although the vehicle had been damaged when it was recovered after 2 months, it was still sold for R95 000.00. The loss suffered by Wesbank was therefore an amount of R163 577.92.

In addition the court *a quo* also misdirected herself in relying on the aforesaid judgment without recognising that it is distinguishable in so far as the appellant in that matter was convicted of multiple crimes, whilst he was in a position of trust and it extended over a period of time.

3. Nowhere in her judgment did the court *a quo* take into consideration, in favour of the appellant, that in terms of the section 112 statement it was his intention to keep up with the servicing of the loan from Wesbank until the loan would have been paid in full.

4. The court *a quo* also relied on the judgment in **S v Blank** 1995 (1) SACR 62 (A), more specifically pages 75 and 76 thereof, referring to that court's reasoning as to why correctional supervision was not appropriate in that case, which, according to the court *a quo*, was also an offence involving fraud. Although the court a quo referred to the fact that in that matter the fraud "was on a massive scale", she still used that *dicta* "to highlight the inappropriateness of correctional supervision when it comes to such serious offences as in this case presently before the court". The court *a quo* then concluded as follows:

> "Now obviously the court can see that the amount involved there is far greater and the magnitude of that offence is far greater than what you have been convicted of here, but the principle of the deceit on how you went about committing your crime, being planned and pre-meditated, is the same and that is what the court needs to sentence you for."

In my view the court *a quo* misdirected herself in her attempt to consider these two matters to be on par, considering that in the **Blank**-matter the appellant was convicted of 48 counts of fraud involving an amount of R9,75 million, which stretched over a period of 17 months.

5. The court *a quo* found that correctional supervision is not an appropriate sentencing option, but failed to consider the possible appropriateness of correctional supervision combined with a suspended sentence of

imprisonment; nor did the court *a quo* consider the possible appropriateness of a sentence in terms of section 276(1)(i) of the Act.

6. Although the court *a quo* considered the plea of guilty of the appellant to be a mitigating factor, the manner in which she found the plea of guilty to not necessarily be a sign of remorse, is non-sensical. In this regard she found as follows:

> "But that does not necessarily mean it is a sign of remorse, because surely from the way you planned this offence you had no remorse right from the start. Your actions were well planned and pre-meditated."

The said finding is in any event in contradiction to the accepted contents of the section 112 statement, wherein the following was stated:

> "I have no defence in law against the charge levied against me and accept full responsibility for my actions in this regard. I am very sorry what I did and accept guilt fully in this matter."

7. The court *a quo* also made the following finding:

> "Nonetheless it is also an aggravating factor that you have a previous conviction as well, according to Exhibit "B", which is of the year 2002 and it was also of fraud…"

In my view the court *a quo* erred in considering the said conviction to be a previous conviction and by taking it into consideration as such as an aggravating factor. The conviction is dated 18 February 2002 and therefore older than 10 years; wherefore it should not have been considered as a previous conviction.

[7] In view of the aforesaid, we, sitting as a court of appeal, are at liberty to consider an appropriate sentence afresh.

[8] It is indeed so that the Supreme Court of Appeal is urging that a stand should be made against white-collar crime. See **S v Sadler**, *supra.* Also see **Pretorius v The State** (271/2008) [2008] ZASCA 132 (26 November 2008). However, every matter should still be considered in view of the particular facts and circumstances of that matter. This is evident from the fact that the Supreme Court of Appeal itself supported a non-custodial sentence even in a matter where 11 counts of fraud to an approximate amount of R1,5 million were involved. See **S v Grobler**, *supra*.

[9] A pre-sentence/suitability report for correctional supervision was obtained before sentencing. It was concluded in the said report that the appellant is a suitable candidate for correctional supervision in terms of section 276(1)(h) of the Act and that such a sentence can be considered as an appropriate sentencing option.

[10] The following personal circumstances of the appellant were evident from the record. The appellant was born on 1

November 1982 and was therefore 30 years of age at the time of sentencing. The appellant has 2 children with different mothers and at the time of his sentencing he was staying together with his fiancé. The appellant passed Grade 10 at school. At the time of his arrest the appellant owned his own construction company from which he earned an average monthly income of R12 000,00 per month. He and his fiancé are also running a small business from their premises where they buy and sell second hand clothing and conduct a tuck-shop, from which they earn an income of approximately R4 500,00 per month. With regards to the appellant's so-called previous conviction for fraud, dated 18 February 2002, for which he was sentenced to 12 months correctional supervision and community service for a period of 16 hours per month in terms of section 276(1)(h) of the Act, I have already found that in my view the court *a quo* erred by considering the said conviction as a previous conviction. I am also of the view that it cannot even be considered to be indicative of a tendency by the appellant to conduct fraud. It was only one conviction of fraud and it is evident that the appellant has since withheld himself from committing any further crimes for a period of 11 years up until the current conviction. In my view the appellant should therefore be considered to be a first offender.

[11] The fact that the appellant pleaded guilty to the offence is a further mitigating factor in favour of the appellant. I also accept that by means of the said plea, the appellant is accepting responsibility for his conduct and thus also

showing remorse.

[12] It cannot be argued that this particular offence of fraud is not serious. It is indeed serious. Mr Van der Merwe`s contention that the planning and premeditation which formed part of this crime should be considered to be a neutral factor, can, in my view, not be upheld. The degree of planning and pre-meditation in this particular instance has to be taken into consideration as an aggravating factor. However, having said that, I am in agreement with Mr Van der Merwe's further submission that the court *a quo* overemphasised this factor in her consideration of an appropriate sentence. She referred to this factor multiple times in her judgment and the impression is created that it was taken into consideration as an aggravating factor in more than one way.

[13] An important factor in this case and, as already indicated earlier, which was not referred to in the judgment of the court *a quo*, is the fact that the appellant stated in his section 112 statement that he intended making the required monthly payments on the loan. This averment has to be accepted in the appellant's favour, as it formed part of the accepted contents of the section 112 statement and there was no evidence to the contrary and/or that he would not have been financially able to do so.

[14] When coming to the interests of society, it is important to be mindful of the following *dicta* set out in **S v Samuels** 2011 (1) SACR 9 (SCA) at paras [9] – [10]:

> "[9] After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.
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> [10] It was urged upon us that correctional supervision would have been an appropriate sentence for the appellant. Sentencing courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences."

[15] When all of the above factors and circumstances are taken into consideration, I am of the view that a sentence of correctional supervision in terms of section 276(1)(h) of the Act will indeed be too lenient considering the seriousness of the offence. Section 276(1)(i) of the Act, however, includes a period of incarceration in that it determines as follows:

> "Imprisonment from which such a person may be placed under correctional supervision in the discretion of the commissioner or a parole board."

In terms of section 73(7) of Act 111 of the 1998 a person sentenced in terms of section 276(1)(i) of the Act must serve at least one sixth of the sentence before he/she can be considered for correctional supervision.

[16] In **S v Scheepers** 2006 (1) SACR 72 (SCA) at paras [9] – [10], the following was stated regarding the useful purpose a sentence imposed in terms of section 276(1)(i) of the Act can serve:

> [9] Both courts' reasoning is in essence that, because neither another suspended sentence nor correctional supervision is appropriate, a three-year term of imprisonment is. This approach seems to me mistaken, for it fails to consider the midway. That is a term of imprisonment, but one mitigated by the provisions of s 276(1)*(i)*, which permits the discretionary conversion of the prison sentence into correctional supervision.
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> [10] The particular advantage of s 276(1)*(i)* should always be in the foreground when the sentencer considers that a custodial sentence is essential, but the nature of the offence suggests that an extended period of incarceration is inappropriate. In such cases, s 276(1)*(i)* achieves the object of a sentence unavoidably entailing imprisonment, but mitigates it substantially by creating the prospect of early release on appropriate conditions under a correctional supervision programme.

[17] In my view a sentence in terms of section 276(1)(i) of the Act is an appropriate sentence in the particular circumstances of this matter that will strike a balance between the three basic elements of sentencing and the purposes of punishment.

[18] Had I been the presiding officer on 25 October 2013, being the date on which the appellant was sentenced, I would have

imposed a sentence of 5 years' imprisonment in terms of section 276(1)(i) of the Act. However, the appellant has now been in prison for two years. Had he originally been sentenced in terms of section 276(1)(i) of the Act, he would only have had to serve one sixth of the five years' imprisonment term. In my view it would therefore be unjust towards the appellant to sentence him to a term of 5 years' imprisonment in terms of section 276(1)(i) of the Act at this stage. Therefore, in order to balance out the fact that he has already spent 2 years' in prison, I consider it just in all the circumstances that the appellant be sentenced to 30 months' imprisonment in terms of section 276(1)(i) of the Act.

[19] The following order is consequently made:

1. The appeal against the sentence is upheld, the sentence is set aside and substituted with the following:

> "Thirty (30) months' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977."

2. The aforesaid sentence should be considered to have been imposed on 25 October 2013.

**C. VAN ZYL, J**

I concur.

**A. WILLIAMS, AJ**

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| On behalf of the appellant: | Adv. P. L. van der Merwe<br>Instructed by:<br>Bloemfontein Justice Centre<br>BLOEMFONTEIN |
| On behalf of the respondent: | Adv. J. Du P. Botha<br>Instructed by:<br>Office of the Director of Public Prosecutions<br>BLOEMFONTEIN |

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