FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No. : A114/2011

In the appeal between:

PAUL COSSIE	Appellant
and	
THE STATE	Respondent

CORAM: VAN DER MERWE, J *et* KUBUSHI, AJ

HEARD ON: 10 OCTOBER 2011

DELIVERED ON: 3 NOVEMBER 2011

KUBUSHI, AJ

[1] This is an appeal of the judgment of the Regional Magistrate, Bloemfontein. The appellant (accused number two in the trial court) and his co-accused were charged with three counts, namely, fraud, forgery and uttering. Both accused persons pleaded guilty to the charge of fraud and were convicted as such. The appellant was on the 13 October 2009 sentenced to five years imprisonment. He is now with the leave of the trial court, appealing against the sentence only.

[2] The appellant wanted to purchase a motor vehicle. He could not qualify for financing because he was blacklisted at the time. The appellant and his co-accused, who was his customary law wife, decided that the co-accused should apply for the financing. The co-accused approached Auto Supreme to purchase a motor vehicle, a 2002 Chrysler PT Cruiser LTD. A certain Ms Van Heerden, of Auto Supreme, assisted her in obtaining the finance from Wesbank. An amount of R108 620, 20 for financing the motor vehicle was as a result approved by Wesbank.

[3] In support of the application for the finance, the co-accused provided Ms Van Heerden with false documents, namely, a driver's licence, bank statements and salary advice. She was however caught out and as a result the appellant and the co-accused were arrested and charged with the three counts.

[4] At the hearing of the case, the appellant and the co-accused pleaded not guilty to all the charges and did not proffer any plea explanation. After the state had led the evidence of its first witness, the appellant and his co-accused changed their

plea to that of guilty on a charge of fraud. They made certain formal admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977. The state accepted their plea of guilty and the admissions on the charge of fraud.

[5] Having found them guilty of the charge of fraud the trial court in sentencing the appellant applied the provisions of section 51 (section 51 (2) (a) (i) thereof) of the Criminal Law Amendment Act, 105 of 1997 (the Act). In terms of the section the trial court was obliged to sentence the appellant to imprisonment for a period of not less than fifteen years unless it found that substantial and compelling circumstances which justified the imposition of a lesser sentence existed. The trial court found such circumstances to exist and sentenced the appellant to five years imprisonment instead.

[6] The appellant's counsel contended that the trial court erred in assuming that the amount involved in the fraud was R108 620, 20. According to him the fraud exposed the financing institution only to the potential that some of the monthly instalments may not have been paid. He based his

argument on the fact that the appellant and his co-accused admitted that 'there was potential prejudice because there was in that *(sic)* it may have happened that some of the instalments would not be paid'.

[7] The relevant parts of this admission relating to the amount involved in the fraud is quoted hereunder:

> "This was done with the intention to fraudulently move the bank to indeed give finance in the amount of R108 000, 00. Your worship, I say R108 000, 00 but there are R620, 20 . . . R108 620, 20. These actions were unlawful and with the intention to defraud. Your worship, as far as the prejudice is concerned, it is admitted that there was indeed potential prejudice. And lastly the bank statements of accused 2 was made available to the state from which it appears that the monthly average of accused 2 was more or less R40 000, 00. What it boils down to therefore is that they acted fraudulently and that the intention was merely to gain financing and that the monthly instalments would be paid by accused 2. Your worship, I just want to stress that this does not mean that they do not acknowledge the fact that there was potential prejudice because there was in that it may have happened that some of the instalments would not be paid. Let me say it could have happen *(sic)* but that was obviously not the

intention."

[8] My view is that the trial court was correct in accepting that the principal debt of R108 620, 20 was the triggering mechanism for the application of the minimum sentence. The amount Wesbank stood to loose was the R108 620, 20. To my mind, the fraud was occasioned by the misrepresentation by the appellant's co-accused in providing Wesbank with false documentation and thus inducing Wesbank to finance the motor vehicle she wanted to purchase. The amount that Wesbank intended to finance was the principal debt of R108 620, 20. The potential prejudice was therefore, in my view, occasioned by the fact that Wesbank would have given the appellant's co-accused finance for the motor vehicle which it would not otherwise have done. The potential prejudice occurred at the time Wesbank approved the loan and whether or not, as argued by his counsel, the appellant was going to be able to pay the instalments is irrelevant.

[9] In **S v HUIJZERS** 1988 (2) SA 503 (A) it was held that:

> "Fraud is committed where the complainant is induced to make a loan to the accused by reason of a false representation made by the latter as to the purpose for which the loan is required. <u>By reason of the misrepresentation the complainant is induced to exchange his existing right of ownership in his money for a right to reclaim such and it is this alteration in his position which constitutes the element of prejudice.</u>" (my emphasis)

And at 511C – E the learned judge went on to say the following:

> "In haar betoog het mej De Swardt klem gele op onweerspreekte getuienis deur die appellant dat hy altyd bedoel het om die klaers terug te betaal, en gemeen het dat hy in staat sou wees om dit te doen. Myns insiens kan hierdie gesindheid van hom, selfs al sou 'n mens aanvaar dat dit bestaan het, geen verskil aan sy skuldigbevinding maak nie. Indien soos ek bevind het, die klaers benadeel was deur riskante vorderinsregte te bekom en geruil vir geld, kan myns insiens nie verskil maak as die appellant geweet het dat die risiko's bestaan maar geglo het dat hulle nooit werklikhede sou word nie. <u>Die benadeling het reeds ingetree toe die geld oorhandig is, en die blote feit dat die appellant geglo het dat die klaers uiteindelik hul geld sou terugkry, kan nie hieraan afdoen nie.</u>" (my emphasis)

[10] I find this case to be apposite in this instance. By reason of the misrepresentation by the appellant's co-accused Wesbank was induced to finance her. The amount involved in the fraud, which caused the potential prejudice, is thus the amount with which Wesbank was induced to finance her. If Wesbank had known in advance that the appellant's co-accused does not have the required documents it would not have approved the finance. As was said by the learned judge in the **<u>HUIJZERS</u>** case above at 510A:

> "Ook in die onderhawige geval het die wanvoorstelling gegaan oor die gebruik wat die appellant van die geld wou maak. <u>As hy nie die wanvoorstelling gemaak het nie, sou die klaers geen geld hoegenaamd aan hom oorbetaal het nie.</u> Die resultaat van die wanvoorstelling was dus dat die klaers, metafories gesproke, nie meer hul geld in hul sake gehad het nie, maar in plaas daarvan skuldeisers van die appellant geword het." (my emphasis)

[11] The appellant's counsel contended also that the Act must be interpreted restrictively in terms of the Constitution.

According to him, in terms of this interpretation the trigger for minimum sentences must be understood to mean the gravity of the offence which has been concretized by monetary thresholds.

[12] The relevant provisions of Section 51 (2) (a) (i) reads:

> “(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or High Court shall sentence a person who has been convicted of an offence referred to in –
>
> a) Part II of Schedule 2, in the case of –
>
> (i) a first offender, to imprisonment for a period not less than 15 years; . . . “

The relevant portions of Schedule 2, Part II reads:

> “ . . .
>
> Any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, . . . –
>
> a) involving amounts of more than R500 000, 00;
>
> b) involving amounts of R100 000, 00, if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in

> the execution or furtherance of a common purpose or conspiracy; . . . "

[I3] I am of the view that the language used in this section is clear and unambiguous and must therefore be interpreted to give it its grammatical and ordinary meaning. And, to my mind, its ordinary meaning is that a person must have been convicted of an offence relating to fraud involving amounts of R100 000, 00. In this instance the appellant was convicted of the offence of fraud and the amount involved was R108 620, 20.

[14] The fraud, in this instance, is one of the offences mentioned in Schedule 2 of Part II referred to in section 51 (2) (a) (i) of the Act and its gravity is concretized by the monetary value of R100 000, 00. The trial court had therefore acquired an enhanced penalty jurisdiction and was obliged to apply the provisions of section 51 of the Act. See **S v LEGOA** 2003 (1) SACR 13 (SCA) at 21f – g.

[15] Secondly, the appellant's counsel argued that the trial court misdirected itself by making a finding that the appellant was

clearly the mastermind of the scheme who imperilled his wife and used her to carry out the scheme. Counsel argued that there was no such proof before the trial court for the trial court to have come to such a conclusion.

[16] It was, in my view, a material overstatement on the part of the trial court to find that the appellant was clearly the mastermind behind the scheme who imperilled his wife and used her to carry out the scheme. There was no such evidence before the trial court and by making such findings the trial court misdirected itself. For all we know the co-accused could in fact have masterminded the scheme to obtain the motor vehicle for use by herself. This to my mind is a material misdirection by the trial court which vitiated its exercise of its discretion, and entitles us to consider the question of sentence afresh.

[17] As regards the imposition of the sentence, the appellant's counsel argued that, firstly, the trial court erred in finding that the imposition of a direct imprisonment sentence was appropriate in this instance. According to the counsel direct imprisonment for five years was inappropriate because: the

co-accused was given a fine and suspended sentence; the trial court failed to take into account that firstly, its primary care considerations of the non-custodial sentence for the co-accused will not to be realistically achieved if the breadwinner is to be incarcerated for 5 years; secondly, direct imprisonment will be the end of appellant's income and the family will suffer; thirdly, the previous conviction should have been differentiated from the current conviction as there was only potential prejudice; and lastly that the appellant was financially able to pay a fine.

[18] The appellant's counsel prayed for the imposition of a sentence of a stiff fine of between R20 000, 00 and R40 000, 00 coupled with community service in a hospital and an additional term of imprisonment to be suspended with conditions as an appropriate sentence in this instance.

[19] In terms of the Zinn triad an appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration of all the mitigating and aggravating factors surrounding the person of the offender and should also have

regard to or serve the interests of society. In addition the purposes of sentencing, namely, retribution, prevention, deterrence and rehabilitation, must also be taken into account when considering sentence. See **S v ZINN** 1969 (2) SA 537 (A) at 540G.

[20] In this instance, the offence of which the appellant has been convicted is a serious offence which, as stated by the trial court, is becoming more and more prevalent. The prevalence thereof is shown by the alarming increase of this type of offence, as experienced in this court and other courts and also as reported in the media. It has also been held that sentencing officers must take cognizance of the times in which sentencing takes place so that where offences have become prevalent, as is the case in this instance, sentences that will have a deterrent effect should be imposed. It must also be noted that this offence has been singled out by the Legislature as one of the serious offences that warrants a minimum sentence of imprisonment (section 51 of the Act). See **S v RABIE** 1975 (4) SA 855 (SCA) at 862H and **S v SADLER** 2000 (1) SACR 331 (AD) at 336 B.

[21] In the face of such grievous offences the interests of society must come first. Courts are expected, as was the case in this instance, to take into account the fact that businesses and financial institutions place a high premium on honesty and that fraud and corruption are nowadays the cause of losses of millions of Rands. The community in general, businesses and financial institutions in particular must be protected against people like the appellant. A sentence to be meted must serve as a protection to the community against people like him. It must also serve as a deterrent to the appellant so that he may not repeat this offence as well as a deterrent to other would-be offenders. See **S v HOLDER** 1979(2) SA 70 (A) at 81B.

[22] My view is that the personal circumstances of the appellant in mitigation of sentence are overshadowed by the aggravating circumstances herein. I found the following circumstances to have aggravated the sentence, namely: the fact that the offence was planned and carried out with persistence; the possibility that more offences could have been committed, more particularly that of having corrupted other people to forge the documents; the amount Wesbank

may have lost was high, R108 620, 20, even though such loss was potential. The trial court made a finding that the appellant was remorseful because after the state had led the evidence of its first witness, he changed his plea to that of guilty. I do not agree with this finding. In my view, this was not genuine remorse on the part of the appellant. He had no option but to change his plea because the evidence of that witness directly implicated his co-accused in the commission of the offence.

[23] More than anything, I was swayed by the appellant's previous conviction. He was convicted of a similar offence and on the 20 April 2004 sentenced to R30 000, 00 or three (3) years imprisonment and a further two (2) years imprisonment suspended for four (4) years with conditions. The offence presently in question was committed during July 2007. He had the benefit of a fine and a suspended sentence for that conviction, but he committed a similar offence, worst still, during the period of suspension. The previous sentence failed to rehabilitate him and/or deter him from repeating this offence and I do not see what good another similar sentence as prayed for by his counsel, would

do.

[24] It must to be noted that any serious offence of whatever nature, can lead to imprisonment and frequently imprisonment is the only appropriate sentence which ought to be imposed. The approach set out in the Appellate Division case of **S v HOLDER** *supra* at 77H – 78A is that imprisonment ought not to be lightly imposed, especially if the object of the punishment can be met by another form of punishment, eg. a fine with or without a suspended imprisonment. In this instance, however, my view is that the circumstances of the case are such that the imposition of direct imprisonment is the only sentence that will be appropriate, particularly in the light of the previous sentence that did not serve to rehabilitate and/or deter the appellant. In **S v BLANK** *supra* at 76a it was stated that:

> "The justification for the severity of sentences such as these is seen in the prevalence of the offences and the deterrent effect which the severe sentences are supposed to have."

[25] My view is that the personal circumstances of the appellant

as raised by his counsel in argument must yield to the requirements of deterrence. The suspended sentence may be put into operation. I consider, therefore, that a sentence of three (3) years imprisonment will be appropriate and just in the circumstances. Accordingly I would make the following order:

25.1 The appeal against the sentence succeeds.

25.2 The sentence imposed by the trial court is set aside and replaced by the following:
"Three (3) years imprisonment antedated to the 27 October 2009".

E.M. KUBUSHI, AJ

I concur.

C. H. G.VAN DER MERWE, J

On behalf of the appellant: Adv. K.J. Kemp SC
Instructed by:
Honey Attorneys

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On behalf of the respondent: Adv. V. de Bruyn
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