



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable
Case no: A197/2024

In the matter between:

MIKE SSEMBULE

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Ssembule v The State* (A197/2024) [2025] ZAFSHC 34 (29 January 2026)

Coram: Molitsoane J et Majosi AJ

Heard: 3 November 2025

Delivered: 29 January 2026

Summary: Appeal – sentence – the approach to sentencing – whether the trial court correctly sentenced the appellant – whether the sentence imposed is just and in accordance with the law.

ORDER

- 1 The appeal against the sentence is upheld.
 - 2 The sentence of the court *a quo* is set aside and replaced with the following:
'The accused is sentenced to ten years' imprisonment,'
 - 3 The sentence is ante-dated to 28 February 2022.
-

JUDGMENT

Molitsoane J (Majosi J concurring)

[1] This is an appeal against the sentence. The appellant, Mr Ssembule, was convicted in the Regional Court Free State Division seating in Odendaalsrus, on one count of fraud. This charge of fraud was read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA). In sentencing the appellant, the court *a quo* did not invoke the provisions of the CLAA but imposed the sentence of 13 years' imprisonment. He is aggrieved by the sentence and is before us with leave from the court *a quo*.

[2] The appellant was a traditional healer. He practised his calling from his shop known as Ali Bi's where he also sold muti. The complainant at one stage went to his shop to buy muti. He met two ladies who were apparently working for the appellant. One of the said ladies, who is the erstwhile co-accused of the appellant informed him that the appellant could assist him with his life problems at a cost of R100. He left and later returned and met the appellant who informed him that if he believed in the power of prayer and ancestors, he could help him. He was instructed to buy beer and milk, which he did, and gave it to the appellant. The appellant instructed him to drink the beer and milk and also to spit some into a pot the appellant provided. According to him, the pot into which he spat was empty.

[3] The appellant took the pot, placed it on the stove and covered it with a lid on which he placed seashells. When the contents of the pot boiled, the appellant removed the pot from the stove and opened its lid. The appellant looked into the pot and observed R100 notes totalling about R700. He also saw a wrapped packet containing a letter. The appellant took the R100 note, handed it to the appellant to verify that it was real money.

The appellant then requested the complainant to read the letter. The contents of the letter were to the effect that the appellant was blessed although some people were jealous of him and blocked his luck. The letter also instructed the complainant to buy two goats and further inform the appellant about the contents of the letter. This was the beginning of a series of acts of deception by the appellant to falsely induce the complainant to part with his money. As a result of these acts of the appellant, the complainant testified that he was given a piece of paper by the appellant to write thereon all which his heart desired. On the said piece of paper, he asked God and the ancestors to grant him prosperity in life.

[4] After this, the appellant caused the complainant to venture into acts which led him to losing money for the benefit of the appellant. The complainant was made to approach the bank and loaned an amount of R30 000.00 which he gave to the appellant with a promise of increasing it to R3 million. The R30 000 was deceptively given to the appellant but the return of R3 million remained a pipe dream.

[5] Following the loan, the appellant instructed the complainant to resign from his employment at the mine. The complainant duly resigned and applied for the benefits from his provident fund. Before the benefits were paid, the appellant informed him not to withdraw any amount whatsoever without first talking to him. The complainant complied. When the benefits were paid, the appellant instructed the complainant to make a series of withdrawals which were paid over to him. The complainant was, ultimately, falsely induced to part with an amount of R161 500 in total which he never got back.

[6] In essence, the judgment of the court a quo is assailed on the basis that it was shockingly inappropriate and excessive in the circumstances. During the hearing, counsel for the appellant submitted that the court a quo had erred in imposing the effective term of imprisonment of 13 years. He submitted that although the court did not invoke the provisions of the CLLA in sentencing the appellant, it was apparent that it had that Act in its mind. He illustrated by pointing out that the prescribed sentence in a case of this nature where the minimum sentence was applicable, is 15 years' imprisonment. He argued that the court in this case imposed such a sentence and only deviated on the basis that the appellant had already spent two years in custody. The respondent, however, supports this sentence.

[7] In the imposition of sentence the court a quo took into account that the appellant was 29 years old, unmarried and had no previous convictions as well as the fact that he was a traditional healer; his income was around R10 000 per month. He had three children which he maintained. His mother, who is sickly and his two other siblings were also taken care of by him. Two of his children did not stay with him as he resided in this country while they were resident in another. Only one of the children born out of the relationship between him and this erstwhile co-accused, stayed with him. His family was solely dependent on him as the only breadwinner. He had been in custody for two years awaiting trial. Section 9(1)(a) of the Magistrate Court Act 32 of 1944 gives the regional court the jurisdiction to impose a sentence not exceeding 15 years for certain convictions like the one before us. I am unable to agree with the submission by the defence that in imposing the sentence, the court a quo had in mind the provisions of the CLAA. The sentence imposed was well within the jurisdiction of the trial court. The court a quo, however, only took into account time spent in imposing sentence. It thus cannot be concluded that the court a quo only deviated as contemplated in s 51(3) of the CLAA.

[8] The court a quo considered the seriousness of the offence. In particular, it considered that the appellant took advantage of the vulnerability of the complainant; he recognised that the complainant was in desperate need of money and would do anything to get his hands on money. The court also considered that it was through the deception of the appellant that the complainant lost his employment. He was also forced to relocate to Lesotho without means to support his family or to pay for the education of his children. The money was also not recovered.

[9] It is settled law that a court exercising appellate jurisdiction may only interfere with the sentence imposed by a lower court where there has been an irregularity that results in a failure of justice or the sentence is so disproportionate or shocking that no reasonable court would have imposed it. It is thus settled that in the imposition of sentence, the trial court exercises a discretion. The court in *S v Malgas*¹ (*Malgas*) held that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it was a trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would usurp the sentencing discretion of the

¹ *S v Malgas* 2001 (2) SA 1222 (SCA) (*Malgas*).

trial court.²

[10] It is trite that in sentencing, the court should take into account the objectives of punishment, namely, retribution, prevention, deterrence and reformation of the offender. In *S v Zinn*³ the court held that in sentencing an accused, the court must take into account and balance the personal circumstances of the accused, the nature and severity of the crime as well as the interests of society. In my view, the court a quo erred in overemphasising the seriousness of the offence over the other factors. This court is thus free to impose a sentence it considers appropriate. In imposing an appropriate sentence, the court must observe that mercy is an integral factor which must also be considered. It guides the court to avoid the imposition of a disturbingly inappropriate sentence. In dealing with this concept of mercy, the court in *S v Rabie*⁴ said summed it up as follows:

- '(i) It is a balanced and humane state of thought.
- (ii) It tempers one's approach to the factors to be considered in arriving at an appropriate sentence.
- (iii) It has nothing in common with maudlin sympathy for the accused.
- (iv) It recognizes that fair punishment may sometimes have to be robust.
- (v) It eschews insensitive censoriousness in sentencing a fellow mortal, and so avoids severity in anger.
- (vi) The measure of the scope of mercy depends upon the circumstances of each case.'⁵

[11] In *S v SMM*⁶ the court said:

'I hasten to add that it trite that each case must be decided on its own merits. It is also self-evident that sentence must always be individualized, for punishment must always fit the crime, the criminal and the circumstances of the case. It is equally important to remind ourselves that sentencing should always be considered and passed dispassionately, objectively and upon a careful consideration of all relevant factors. Public sentiment cannot be ignored, but it can never be permitted to displace the careful judgment and fine balancing that are involved in arriving at an appropriate sentence. Courts must therefore always strive to arrive at a sentence which is just and fair to both the victim and the perpetrator, has regard to the nature of the crime and takes account of the interests of society. Sentencing involves a very high degree of responsibility which should be carried out with equanimity, as Corbett JA put it in *S Rabie*:

² Ibid at 1232A-B.

³ *S v Zinn* 1969 (2) SA 537 (A).

⁴ *S v Rabie* [1975] 4 All SA 723 (A).

⁵ Ibid at 729.

⁶ *Mudau v S* [2012] ZASCA 56; 2013 (2) SACR 292.

"[a] judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality."⁷

[12] On the issue of mercy, the court said to the appellant:

' . . . today you are coming to this court and saying please have mercy on me. I am sorry Mr Ssembule there is no mercy for you in this court at least not today. With regards to the interests of society I am sure everyone who may have heard the facts of this case would be sitting there and saying we expect of this court to truly act against people like Mr Ssembulei who prey on the vulnerability and gullibility of certain members of our community.'

Failure to consider the concept of mercy deprived the court of achieving that delicate balance between the crime, the personal circumstances of the appellant and the interest of society. This court does not, for a moment, profess that the appellant should not be punished, but in sentencing him, punishment should not be to exact some form of vengeance.

[13] It is indeed the case that the offence was planned over a period of time. The complainant was forced into debt by borrowing money totalling R30 000. He surely has to pay dearly for its repayment as well as the interest to be compounded on the loan. He lost his employment and provident fund benefits in excess of over R160 000. Loss of employment when unemployment is so high, not only in this country but also in the country of origin of the complainant, Lesotho, will not only affect the complainant, but also his family. The pension money he lost, was the money which was meant to be used during his retirement.

[14] In imposing an appropriate sentence, the court may also take into account past sentencing patterns. Although the court in *Malgas* dealt with this issue in the context of prescribed minimum sentences, in my view, the remarks made are equally applicable even in circumstances where the prescribed sentences are not in issue. The court held that:

'It would be foolish, of course, to refuse to acknowledge that there is an abiding reality which cannot

⁷ Ibid para 13.

be wished away, namely an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence 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 circumstance 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.⁶

[15] In *S v Delport and Others*,⁹ the accused were convicted of 136 counts of Value-Added Tax fraud. The loss to the South African Revenue Service was more than R60m. One of the accused was a first offender and the other one had a traffic offence conviction. One of the accused was sentenced to five years' imprisonment which was suspended wholly on uncertain conditions while the other one was sentenced to 15 years' imprisonment.

[16] In *S v Evans*¹⁰, the accused were convicted of 60 counts of fraud totalling R1 489 644.96. They were sentenced to 15 years' imprisonment by the trial court. On appeal, the sentence was reduced to eight years' imprisonment of which five years were suspended for five years on certain conditions.

[17] In *Van Jaarsveld v S; Ras v S*¹¹ the accused were convicted of fraud. The court found that they falsely represented to the complainant that they were the lawful owners of a boat and had the authority to sell it. They defrauded the complainant of the amount of R200 000. The sentences of eight years' imprisonment imposed by the trial court were reduced on appeal to four years' imprisonment.

[18] The accused in this case was convicted of fraud of over R160 000. He is a first offender and although he is no longer a child, is still a youth. In *S v Nkomo*¹² the accused was 29 years old when he committed the offences. He was convicted of rape and kidnapping. The court held as follows on the question of rehabilitation:

⁶ *Malgas* fn 1 at 1234F-H.

⁹ *S v Delport and Others* [2019] ZAFSHC 243; 2020 (2) SACR 179 (FB).

¹⁰ *Evans v S* [2023] ZASCA 123; 2023 (2) SACR 541 (SCA).

¹¹ *Van Jaarsveld v S; Ras v S* [2025] ZASCA 92.

¹² *S v Nkomo* [2006] ZASCA 139; 2007 (2) SACR 198 (SCA).

'The factors that weigh in the appellant's favour are that he was relatively young at the time of the rapes, that he was employed, and that there may have been a chance of rehabilitation. No evidence was led to that effect, however.'¹³

[19] There are prospects that the appellant before us may be rehabilitated in future. In his practise of being a traditional healer, there is a likelihood that he may continue to practice his calling upon release from prison. The sentence imposed should act as a deterrence not only to him, but also to the general population so that acts of this nature will not be countenanced.

Order

[20] The appeal must accordingly succeed. I order as follows:

- 1 The appeal against the sentence is upheld.
- 2 The sentence of the court *a quo* is set aside and replaced with the following:
'The accused is sentenced to ten years' imprisonment.'
- 3 The sentence is ante-dated to 28 February 2022.



P E MOLITSOANE
JUDGE OF THE HIGH COURT

I concur and it is so ordered.



O MAJOSI
ACTING JUDGE OF THE HIGH COURT

¹³ Ibid para 13.

Appearances

For the appellant: Mr D Reyneke

Instructed by: Legal Aid South Africa, Bloemfontein

For the respondent: Advocate Strauss

Instructed by: The Director of Public Prosecutions, Bloemfontein.