



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

Not reportable

Case no: A57/2022

Regional Court Case no: 17/41/2014

In the matter between:

THE STATE

APPELLANT

and

NTHAPELENG DAVID SERAME

RESPONDENT

Neutral citation: *State v Serame* (A57/2022) [2025] ZAFSHC 110 (20 March 2026)

Coram: DAFFUE *et* NAIDOO JJ

Heard: 10 November 2025

Delivered: This judgment was handed down in Court and released to SAFLII. The date and time for hand-down is deemed to be 16h30 on 20 March 2026. The judgment was also delivered in open Court as communicated to the parties.

Summary: Appeal by the State in respect of sentences imposed by the Regional Court with leave of the High Court in accordance with s 310A of the Criminal Procedure Act 51 of 1977 – the respondent (accused 1 in the court *a quo*) was convicted of defrauding a municipality in an amount in excess of R9.6 million over a period of 2 years – held that the court *a quo* committed material misdirections in sentencing the respondent on 339 counts of fraud – also that the sentence imposed upon the respondent was shockingly lenient and disproportionate to the seriousness of the

offences – the suspended sentence of imprisonment imposed by the court *a quo* set aside and direct long term imprisonment imposed.

ORDER

1 The State's appeal against the sentences imposed by the court *a quo* succeeds in part.

2 The suspended sentence of imprisonment imposed in respect of counts 1 to 339 is set aside and substituted with the following:

'Counts 1 to 339 are taken together for purpose of sentence, and the accused is sentenced to 7 years' direct imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977'.

3. The sentences imposed in respect of counts 353 to 356 and 372 to 404 are confirmed.

JUDGMENT

Daffue J (Naidoo J concurring)

Introduction

[1] The State appeals against some of the sentences imposed by the regional court (the court *a quo*) upon the respondent and former accused 1 in that court, Mr Nthapeleng David Serame (Serame). On 3 October 2024, Daniso J granted leave to appeal in accordance with s 310A of the Criminal Procedure Act 51 of 1977 (the CPA), stating *inter alia* the following in paragraph 16 of her judgment:¹

'In my view, the above sums up the issue regarding the nature and the gravity of the offences the first respondent was convicted of. An offence which undermines not only the interests of the

¹ *S v Serame and Others* [2024] ZAFSHC 309.

community but the constitutional commitment to human dignity ought to be visited with a sentence which speaks to the plight of the community. The offender's personal circumstances must recede to the background.'

[2] Serame is the sole member of five close corporations, which were charged with him as accused 2 to 6, respectively. The close corporations were convicted on some counts. Although they do not feature in this appeal it necessary to identify them and record their dates of incorporation. I shall deal herein later with the way in which Serame has utilised these entities to commit fraud. These entities are:

- (a) Iceburg Trading 542 CC (accused 2) registered on 1 October 2007;
- (b) Snow Line Trading 582 CC (accused 3) registered on 28 May 2008;
- (c) Ka Rona Trading 536 CC (accused 4) registered on 20 July 2007;
- (d) Seventh Avenue Trading 560 CC (accused 5) registered on 5 May 2008; and
- (e) Senthathi Trading CC (accused 6) registered on 10 May 2007.

The proceedings in the court a quo

[3] A total of 406 counts, some counts with alternatives, were put to Serame. Several of these counts were also put to the five close corporations. Serame and his co-accused pleaded not guilty to most of the counts. To enlighten the reader, I briefly summarise these counts.

[4] Counts 1 to 339 relate to fraud in that Serame and his close corporations, over a period of two years from 4 October 2007 to 8 June 2009 unlawfully, falsely, and with the intent to defraud, pretended to the municipality that they had delivered goods and/or services to the Mangaung Metropolitan Municipality (the municipality), were entitled to be paid and indeed received payment in the total amount of R9 678 617.71. No goods and/or services were delivered. Serame was convicted as charged.

[5] Serame pleaded guilty to the second alternative to counts 340 to 352 (13 counts), these being in respect of contravention of s 235(1)(a) of the Tax Administration

Act 28 of 2011 pertaining to the evasion of income tax and was duly convicted. The admitted prejudice to the South African Revenue Service (SARS) amounted to R2 284 047.39.

[6] Serame was convicted of four counts, being counts 353 to 356 pertaining to the contravention of s 58C read with s 23(1) of the Value Added Tax Act 89 of 1991 in that he unlawfully failed to register for Value Added Tax.

[7] Serame was convicted on five counts (counts 357 to 361) for contravention of s 58F read with s 55 of the Value Added Tax Act 89 of 1991 in that he unlawfully failed to keep summaries and other documents as prescribed by s 55 of the Act from 2007 to September 2012.

[8] Serame pleaded guilty to five counts (counts 362 to 366) in contravention of s 75(1)(f) read with s 73A of the Income Tax Act 58 of 1962, in that during the period 2007 until 30 September 2012, he unlawfully, without just cause, failed to keep records as prescribed by 73A of the Act. He was convicted based on his plea.

[9] Serame was convicted of five counts (counts 367 to 371), being contravention of s 234(e) read with s 29 and 30 of the Tax Administration Act, 28 of 2011, in that in the period 1 October 2012 until 13 April 2013, he wilfully and without just cause failed or neglected to retain records as required under the Act. He pleaded guilty to the charges.

[10] He was convicted of 33 counts (count 372 to 404) in respect of contravention of s 58D read with s 14, 28(1) of the Value Added Tax Act 89 of 1991 resulting in a loss of R628 095.38, representing value added tax not paid and a loss to SARS.

[11] Serame was also convicted of transgression of s 4 read with s 1 and 8 of the Prevention of Organised Crime Act 121 of 1998 (POCA) (count 405) as well as s 3(b) read with ss 1, 2, 24, 25, 26 of POCA (count 406)

[12] Although the five close corporations were dormant at all relevant times, they respectively received various payments from the municipality in respect of invoices delivered. Consequently, they were liable to declare income to SARS through Serame as their representative which was not done. As mentioned, SARS suffered losses of R2 284 047.39 and R628 095.38 which were admitted.

[13] The evidence revealed that Serame colluded with at least three employees of the municipality to embark upon their enterprise to defraud the municipality over the aforesaid period. He knew that the municipality would consider quotations for goods and services if the quoted amounts were less than R30 000 and that in such case the lowest of three quotations would be accepted. Therefore, in respect of all 339 transactions (counts 1 to 339), the amounts fraudulently quoted and invoiced for which payment was received were always just less than R30 000. The State was aware of the identity of the municipal employees that colluded with Serame but apparently decided to withdraw the criminal cases against them for lack of evidence.

[14] Although the offences pertaining to fraud were committed during the two-year period from 4 October 2007 to 8 June 2009, Serame and his co-accused were only called upon to plead on 13 February 2020. They were eventually convicted – two years later – on 14 January 2022 and sentenced on 26 April 2022. I shall return to the sentence proceedings in a moment. Prior to the finalisation of the criminal proceedings in the court *a quo*, the National Director of Public Prosecutions (the NDPP) applied for a confiscation order in terms of s 18 of POCA. The court *a quo* made an order as requested. In terms thereof, Serame and his five close corporations were ordered, jointly and severally, to pay the total amount of R9 678 617.71, being the loss suffered by the municipality, within 24 months. The confiscation order is akin to a civil judgment. No evidence was placed before us in respect of compliance. Having said this, we are not at liberty to consider facts transpiring after sentence, save in exceptional circumstances.

[15] As mentioned, after sentencing, the State applied for leave to appeal against some of the sentences imposed. These are the following:

- (a) the sentence in respect of counts 1 to 339, taken together for purpose of sentence in terms whereof Serame was sentenced to seven years' imprisonment, wholly suspended for a period of five years on condition that he is not convicted of fraud or theft, committed during the period of suspension, and furthermore, he was also sentenced in terms of s 276(1)(h) of the CPA to 36 months' correctional supervision;
- (b) counts 353 to 356, taken together for purpose of sentence in terms whereof Serame was sentenced to three years' imprisonment, wholly suspended on certain conditions; and
- (c) counts 372 to 404, taken together for purpose of sentence, in terms whereof Serame was sentenced to three years' imprisonment, wholly suspended on certain conditions, including that he shall pay SARS the amount of R628 095.38 on/or before 20 April 2027.

[16] The State filed its notice of appeal following upon leave being granted, relying on two issues only:

- (a) the material misdirections committed by the court *a quo* in respect of the sentence imposed pertaining to counts 1 to 339 an/or that the sentence is strikingly inappropriate and so lenient that it induces a sense of shock; and
- (b) that the court *a quo* misdirected itself in taking counts 353 to 356 and counts 372 to 404 together for purpose of sentence and sentenced Serame to three years' imprisonment (wholly suspended) whilst the penal limit is 24 months per count.

[17] It is appropriate to mention that Serame was ordered to pay R2 284 047.30 to SARS on/or before 20 April 2027, it being one of the suspensive conditions applicable to the sentence of three years' imprisonment imposed on him in respect of his conviction on the second alternative counts to counts 340 to 352. This is an aspect vehemently relied upon by his counsel during argument to convince us not to impose

direct imprisonment as it would undermine the court *a quo*'s order and would be to the prejudice of the *fiscus*.

Principles pertaining to sentencing in general

[18] An accused person's personal circumstances, the nature of the offence and the interests of the community must be taken into consideration during the sentencing process. All sentences must be proportionate to the seriousness of the offence. The determination of a proper sentence for a convicted person falls primarily within the discretion of the trial court. A court of appeal shall not interfere with the exercise of such a discretion merely because it would have exercised that discretion differently if it had been sitting as the court of first instance. In *S v Salzwedel and Others*² the Supreme Court of Appeal (the SCA) accepted this principle but mentioned the following:

'An Appeal Court is entitled to interfere with a sentence imposed by a trial court in a case where the sentence is "disturbingly inappropriate", or totally out of proportion to the gravity or magnitude of the offence, or sufficiently disparate, or vitiated by misdirections of a nature which shows that the trial court did not exercise its discretion reasonably.'

[19] The principle was explained as follows in *Grobler v S*³ (*Grobler*), relying on several judgments of that court:

'It is trite that the imposition of sentence is pre-eminently a matter for the discretion of the trial court and a 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.'

[20] In *Bogaards v S*⁴ (*Bogaards*), the Constitutional Court summarised the appellate court's power to interfere with an imposed sentence as follows:

² *S v Salzwedel and Others* [1999] ZASCA 93; [2000] 1 All SA 229 (A); 2000 (1) SA 786 (SCA); 1999 (2) SACR 586 (SCA) para 10.

³ *Grobler v S* [2014] ZASCA 147; 2015 (2) SACR 210 (SCA) para 5.

⁴ *Bogaards v S* [2012] ZACC 23; 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC).

‘Ordinarily, sentencing is within the discretion of the trial court. An appellate court's power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another.’⁵

[21] In footnote 40 relied upon in the aforesaid paragraph of *Bogaards*, the court quoted the following:

‘This standard has been articulated differently in several cases, including whether the sentence was “startlingly” or “disturbingly” inappropriate or whether it “creates a sense of shock”. Ultimately, however, the question at which all of these formulations are aimed is whether the court could reasonably have imposed the sentence that it did. See for example *S v Sadler* 2000 (1) SACR 331 (SCA) at para 8 and *S v Bolus and Another* 1966 (4) SA 575 (AD) at 581E-G.’

[22] It is trite that in the case of serious offences, the elements of retribution and deterrence should come to the fore and the rehabilitation of the accused should be accorded a smaller role, or put otherwise, their personal circumstances must bow to the interests of society, an aspect emphasised in *Kekana v S*⁶ (*Kekana*) and *S v Vilakazi*⁷ (*Vilakazi*).

[23] With regard to the effects of corruption and maladministration (the so-called ‘white-collar’ crimes) and the purpose of the Special Investigating Units and Special Tribunals Act 74 of 1996, the Constitutional Court reiterated the following in *South African Association of Personal Injury Lawyers v Heath and Others*:⁸

⁵ Ibid para 41.

⁶ *Kekana v S* [2018] ZASCA 148; 2019 (1) SACR 1 (SCA); [2019] 1 All SA 67 (SCA).

⁷ *S v Vilakazi* [2008] ZASCA 87; [2008] 4 All SA 396 (SCA); 2009 (1) SACR 552 (SCA); 2012 (6) SA 353 (SCA).

⁸ *South African Association of Personal Injury Lawyers v Heath and Others* [2000] ZACC 22; 2001 (1) SA 883; 2001 (1) BCLR 77 para 4.

‘Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state. There can be no quarrel with the purpose sought to be achieved by the Act, or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done.’

[24] Although white-collar offences were not considered in *Kekana* and *Vilakazi*, the principles enunciated in these decisions should, in my opinion, be just as relevant in imposing sentences in respect of white-collar crimes. Persons committing white-collar crimes should not be heard to say that correctional centres are only for hardened criminals committing violent crimes. There is in principle no reason why a person who sabotages the economy, whether by defrauding the State or a private entity, should be entitled to rely on serving non-custodial sentences.

[25] In *S v Sadler*⁹ (*Sadler*) the SCA made the point that white-collar criminals cannot as of right, demand to remain outside correctional centres. Numerous judgments, particularly relating to POCA also emphasise this principle. I quote from *Sadler*:

‘[10] However, even in the latter class of case, it is important to emphasise that for interference to be justified, it is not enough to conclude that one’s own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one’s own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate court which must prevail.’

⁹ *S v Sadler* [2000] ZASCA 13; [2000] 2 All SA 121 (A); 2000 (1) SACR 331 (SCA).

[11] I am satisfied that the circumstances of this case call for the imposition of a period of direct imprisonment and that the interests of justice will not be adequately served by leaving the sentence imposed by Squires J undisturbed. 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. Justifications often advanced for such inadequate penalties are the classification of “white-collar” crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being “criminals” or “prison material” by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for “white-collar” crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from “respectable” backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

[12] 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.

[13] It is unnecessary to repeat yet again what this court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration.’¹⁰

[26] In *S v Blank*¹¹ the SCA held on appeal that the trial court was entitled to take notice of the increasing prevalence of white-collar crime and to have regard to it in imposing sentence. It also held that the trial court duly considered correctional supervision as a sentencing option but correctly decided against imposing such a sentence.

[27] The SCA authoritatively stated in *National Director of Public Prosecutions v Gardener and Another*¹² that confiscation orders and sentence shall be treated

¹⁰ Ibid paras 10-13.

¹¹ *S v Blank* 1995 (1) SACR 62 (A) 77h- 79g.

¹² *National Director of Public Prosecutions v Gardener and Another* (582/09) [2011] ZASCA 25; 2011 (1) SACR 612 (SCA); 2011 (4) SA 102 (SCA) para 23.

separately. It reasoned that the purpose of sentencing is to punish the offender while the main purpose of a confiscation order is to deprive offenders of deriving any benefit from their ill-gotten gains. Therefore, the severity of the sentence generally ought not to have any bearing on the trial court's discretion whether to make a confiscation order.

[28] Jafta J stated the following in his minority judgment in *National Director of Public Prosecutions v Elran*¹³ (*Elran*):

'At the outset we must remind ourselves of the nature of the legislation we are concerned with. POCA was enacted in pursuit of legitimate and important government purposes of combating serious organised crime and preventing criminals from benefiting from the proceeds of their crimes. Among the arsenal of tools employed to achieve these objectives is the authorisation of seizure of property and restraint orders. These orders authorise state officials to seize property suspected to be the proceeds of crime or an instrumentality of an offence.'

[29] Cameron J, writing for the majority in *Elran*, endorsed Jafta J's approach and stated the following:

'[66] To start with approach. The Prevention of Organised Crime Act (POCA) has been described as draconian. It is necessarily and rightly far-reaching and robust. Two principal reasons have impelled modern democratic states to enact asset forfeiture legislation like POCA. The first is that, given the fantastically rich spoils the international economy offers, the deterrent effects of even long prison sentences fade. Hence the need for civil recovery mechanisms under which the state can seize property obtained through unlawful activities without having to secure a conviction in a criminal court. Crime must be tackled independently of the criminal justice system, and at source – by inhibiting its rewards.

[67] The second reason POCA-like legislation is indispensable is the intricacy and complexity of modern law-breaking. No longer is economic crime committed only through romantically imaginable methods like piracy, highway robbery and smuggled contraband. All that, if not past, is now of comparatively lesser importance. Most modern crime is committed through infinitely

¹³ *National Director of Public Prosecutions v Elran* [2013] ZACC 2; 2013 (1) SACR 429 (CC); 2013 (4) BCLR 379 (CC) para 22.

more sophisticated means – indirect and electronic. More importantly even, it is then concealed through those same means. The internet, electronic communication and the arcane recesses of the international banking system have enabled criminals to outsmart even the smartest of law enforcement systems.

[68] Hence, here and elsewhere, the indispensable response has been asset forfeiture legislation. Follow the money. Seize the profits. Target the spoils of criminality. This is what POCA does. As in other democracies, it creates broad, new categories of offences. These include offences relating to racketeering activity, dealing in the proceeds of unlawful activities (money laundering, assisting another to benefit from the proceeds of unlawful activities and acquisition, possession or use of proceeds of unlawful activities) and criminal gang-related activities. It targets the proceeds of unlawful activities by enabling confiscation of their proceeds upon a criminal conviction, as well as restraint orders and realisation of property after a confiscation order has been made. In addition, civil recovery of property is made possible through preservation and forfeiture orders.¹⁴ (Emphasis added).

Restorative justice and correctional supervision

[30] I mentioned the general principles applicable in sentencing above. I shall now refer to restorative justice as an element to be considered and correctional supervision as a sentencing option. Insofar as the court *a quo* accepted that restorative justice had to be considered, the following needs to be said. I accept that there is a need to consider restorative justice when sentencing an accused. The idea is that the injustice caused by the accused should be restored, principally by the offenders themselves.

[31] In *S v R*,¹⁵ Kriegler AJ stated that the legislative purpose of correctional supervision as a sentencing option distinguishes between two types of offenders, *ie* those who should be isolated from the community and those who should not be removed. This judgment has been referred to as the *locus classicus* in considering correctional supervision as a sentencing option by *inter alia* by the acclaimed author,

¹⁴ Ibid paras 66-68; see also *Savoi and Others v National Director of Public Prosecutions and Another* [2014] ZACC 5; 2014 (5) BCLR 606 (CC); 2014 (5) SA 317 (CC) paras 1, 82-84.

¹⁵ *S v R* 1993 (1) SA 476 (A) at 488G.

Prof SS Terblanche (Terblanche).¹⁶ Much has been said and written by especially academics over the last few years in this regard as recorded by Terblanche.

[32] Although the accused in *DPP, North Gauteng v Thabethe*¹⁷ (*Thabethe*) was found guilty on a count of rape, the High Court, following restorative processes, decided to impose a suspended sentence, subject to various conditions. The SCA had little difficulty to find that such a suspended sentence was too lenient. I quote:

‘Although restorative justice received a somewhat lukewarm reception by the judiciary . . . it has in the last few years grown in its stature and impact that it has even received the approval of the Constitutional Court in *Dikoko v Mokhatla* 2006 (b) SA 235 (CC), *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC), *The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)* 2011 (4) SA 191 (CC). . . . Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some over-zealousness to lead them to impose restorative justice even in cases where it is patently unsuitable. It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public.’¹⁸ (Emphasis added).

[33] In *S v Thabethe and Others* the SCA held as follows:

‘It is not necessary to analyse the evidence on each of these counts in detail. Prima facie the evidence shows a carefully planned scheme, in which the respondents pursued a common purpose to defraud the Department and launder the proceeds.’¹⁹

¹⁶ SS Terblanche, *A Guide to Sentencing in South Africa*, 3rd ed pp 190 to 194.

¹⁷ *Director of Public Prosecutions v Thabethe* [2011] ZASCA 186; 2011 (2) SACR 567 (SCA).

¹⁸ *Ibid* para 20.

¹⁹ *S v Thabethe and Others* [2025] ZASCA 88; [2025] 3 All SA 333 (SCA); 2025 (2) SACR 335 (SCA) para 55.

It continued in paragraph 56 which I paraphrase:

‘There is accordingly direct prima facie evidence that . . . , Nulane (and its director, the fourth respondent) . . . are involved in the fraud on the Department . . . and that the proceeds, derived from that fraud, were laundered almost immediately after each payment by the Department to Nulane, in which Islandsite and Ms Ragavan played a central role. . . .’²⁰

[34] In *S v Volkwyn*,²¹ the SCA upheld an appeal and remitted the case to the regional court for consideration of correctional supervision as an appropriate sentence, a type of sentence not available to the trial court at the time of imposition of sentence. The appellant immediately admitted liability to his employer and pleaded guilty to counts of theft involving about R250 000. He played a minor role in the commission of the offences and even paid back some of the monies by the time he was sentenced. The facts in this case are distinguishable from those *in casu*.

[35] In *Grobler*²² the SCA allowed the appeal and restored the trial court’s sentence of three years correctional supervision and five years’ imprisonment wholly suspended on certain conditions including reimbursement of the complainants. In that case, *Grobler* was as a first offender convicted of 11 counts of fraud involving approximately R1.5 million. That case is clearly distinguishable on the facts. Saldulker JA pertinently pointed out that ‘there was no evidence before the high court to suggest that he [Grobler] would not have to repay his benefactor. The conclusion that the appellant will in fact go ‘scot-free’ is thus devoid of any factual foundation.’²³

[36] In *Raymond Daniel de Villiers v S*²⁴ (*De Villiers*) the complainant suffered a financial loss of R950 000, but De Villiers offered to settle this amount prior to sentence in the regional court and even thereafter. During sentencing proceedings in the regional court the complainant express a desire to be paid back the amounts stolen from her

²⁰ Ibid para 56.

²¹ *S v Volkwyn* 1995 (1) SACR 286 (A) at 289(D).

²² *Grobler v S* [2014] ZASCA 147; 2015 (2) SACR 210 (SCA).

²³ Ibid para 11.

²⁴ *Raymond Daniel de Villiers v S* [2023] ZASCA 83; 2023 (2) SACR 221 (SCA).

which De Villiers was in a position to do.²⁵ Clearly, this case is also distinguishable from the facts *in casu*.

[37] In *S v M* (Centre for Child Law, as *amicus curiae*),²⁶ (*S v M*) the Constitutional Court considered an appropriate sentence for fraud where the offender was the primary caregiver of three young children. Sachs J *inter alia* said the following:

‘Another advantage of correctional supervision is that it keeps open the option of restorative justice in a way that imprisonment cannot do. Central to the notion of restorative justice is the recognition of the community rather than the criminal-justice agencies as the prime site of crime control. Thus, our courts have observed that one of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and destruction of the family. It is geared to punish and rehabilitate the offender within the community leaving his or her work and domestic routines intact, and without the negative influences of prison.’

[38] Obviously, there is a difference between the facts in *S v M* and the facts *in casu*, as will be explained later herein. The facts in this case also differ from those in *S v Mphahlele*²⁷ (*Mphahlele*). In that case, a woman who murdered her 18 months-old child was sentenced to five years’ imprisonment in terms of section 276(1)(i) of the CPA, notwithstanding the prescribed minimum sentence of 15 years’ imprisonment. Again, bearing in mind the context in which the mother killed her child, that judgment cannot be regarded as authority *in casu*.

Evaluation of the evidence and the court a quo’s judgment on sentencing

[39] Insofar as the court *a quo*, *inter alia* sentenced Serame to a sentence of correctional supervision, it is required to consider this sentencing option having regard to relevant authority. Mr Moeng regarded *Grobler* as the landmark judgment in respect of the legitimacy of correctional supervision as a constitutionally recognised punishment. He submitted that the court *a quo*’s approach could not be faulted. I do not

²⁵ Ibid paras 1-3, 6 and 24-27.

²⁶ *S v M* (Centre for Child Law as *amicus curiae*) 2008 (3) SA 232 (CC) paras 59 and 62.

²⁷ *S v Mphahlele* [2023] ZAGPJHC 792.

agree for the reasons contained herein. Let it be said from the onset that the facts *in casu* are clearly distinguishable from those in *Volkwyn, Grobler* and *De Villiers*.²⁸

[40] Serame did not play open cards with the court *a quo* and/or the correctional officer. I start off with the correctional officer's report. He noted that the 'accused is self-employed and runs the family taxi business and has 13 people working for him. The accused is also involved with the ANC as organiser of their meetings.' He confirmed Serame's marriage, that he has two children of 23 and 16 years old and that they are still dependent on him. The correctional officer was informed that Serame had pleaded guilty which is only partially true. The correctional officer was not fully informed about the seriousness of the various crimes that had been committed. In fact, during his evaluation, he mentioned that Serame had been charged with a crime, whereafter the following appears from the report:

'The accused was convicted on a crime and he must experience punishment for that. It will be positive if the accused is not exposed to the horrid criminals inside prison. Correctional supervision as a sentence offers the opportunity of punishment within the community.'

[41] In arguing his case in mitigation, Serame's lawyer submitted that he 'earns a salary of about R20 000 per month' and that his children are dependent on him as their 'mother is unemployed, [and] they are on most occasions being kept by the accused.' Therefore, it was argued that Serame was the breadwinner and should be considered to be the primary caregiver of the children. Therefore, so the argument ensued, should he be sent 'to a custodial sentence, then there will not be any person to take care of the family.' I do not agree. No reasons were advanced why the taxi business could not be carried on in his temporary absence.

[42] It was stated on his behalf that Serame was paying R6 000 per month in respect of the outstanding tax liability. However, the lawyer could only record two payments of R6000, one on 30 June 2021 and the other on 12 January 2022. Clearly, SARS has

²⁸ Footnotes 21, 22 and 24 respectively.

placed a temporary suspension on payments due to Serame's alleged financial position as is apparent from the letter of 28 March 2022. During his further presentation to court, Serame's lawyer changed his version, after having taken instructions from his client in court, to the effect that the taxi business belonged to his wife. Directly thereafter, a very strange submission was made. It was then stated that the wife was unemployed, but that the taxi business' income was approximately R28 000 per month. Surely, it is ridiculous for a person to argue that someone is a businessperson with a money earning business, but that they are unemployed at the same time. Much was made of the fact that Serame made admissions and that in doing so, valuable court time was saved. The court *a quo* even mentioned that if the admissions were not made, it could have taken another two years to finalise the case. What was not mentioned is that the case took three years to finalise, bearing in mind that the plea proceedings started in 2019.

[43] The court *a quo* unnecessarily referred to *S v Thonga*²⁹ to warn itself not to sentence 'in a spirit of anger'. Serame had no previous convictions. The court *a quo* accepted that although Serame committed serious offences, and that these were committed 'by a group, the accused apparently from the available evidence was the only outsider to the commission of the offence.' The court *a quo* apparently tried to show that the other members of the criminal group were employees of the municipality.

[44] The court *a quo* committed a serious misdirection in trying to dilute Serame's involvement. He was the main actor. The criminal scheme was arranged by him, alternatively could not be commenced without Serame's groundwork. He formed his five close corporations that were utilised to issue false quotations and invoices whereupon they received payment. I recorded in paragraph 2 above when these close corporations were registered, the first two conveniently just before the first fraudulent transactions occurred and the other three soon thereafter. Obviously, Serame could not commit the crimes without the cooperation of municipal employees, but he was the one that made use of his five newly registered dormant close corporations in devising a scheme to

²⁹ *S v Thonga* 1993 (1) SACR 365 (V) at 370b-i.

defraud the municipality. Serame was not only a participant in this criminal enterprise, but he was the driving force behind it and the person that received the proceeds of the unlawful activities into bank accounts under his control, whereafter he distributed the funds to the other participants of the enterprise. In the process he also defrauded SARS.

[45] The court *a quo* correctly found that it 'would be a smack in the face of the community at large' if a fine only would be imposed upon Serame. Therefore, it considered correctional supervision and incarceration as sentencing options. To eliminate incarceration as a sentencing option, the court *a quo* referred to four instances where it sentenced people to long-term imprisonment, but within 18 months, they were walking free outside prison. Therefore, it continued to further misdirected itself yet again by ignoring incarceration and stated the following:

'I think it is time to have a new approach which still adhering to the traditional principles of sentencing and the purposes for which sentence should be made.'

[46] The court *a quo* then mentioned that there should be a dual purpose with sentencing, one of retribution and one of restoration, and as an afterthought, one of deterrence. It then incorrectly pointed out that Serame had the necessary ability to restore justice and making amends, at least insofar as SARS was concerned. The objective and common cause facts should have been sufficient to show to the court *a quo* that there was no reasonable possibility that Serame would ever be able to settle the SARS debt. He was not paying anything at that stage. The interest on the amount of R2 million is in excess of R9 412 per month.

[47] To boost its decision that incarceration was not a suitable option, the court *a quo* stated that the costs of incarceration of one person was R163 155 per year, whilst the entry level salary of a correctional officer was a mere R151 000 per year. Therefore, it argued that it was 'compelled to start with getting the state's revenue first and allowing the accused to go and get it, but if he fails he will still go to incarceration and this is why

in this particular circumstances, as I have stated, first I will start with restoration and if that fails then retribution kicks in. . .’ The court *a quo* did not even try to investigate how Serame would be able to settle his indebtedness to the municipality and SARS. To insist that Serame should stay out of prison ‘to go and get it [the money]’ was a material misdirection. The objective facts militate against any possibility that the element of restorative justice could be honoured. As said, the facts *in casu* are a far cry from those in *Volkwyn, Grobler and De Villiers*.³⁰

[48] Without being cynical, it appears as if Serame foreshadowed the s 18 confiscation application and therefore instructed his attorney during argument to submit that the taxi business belonged to his wife.

[49] The court *a quo* materially misdirected itself in failing to consider the valid arguments addressed on behalf of the State before sentence. The criminal enterprise conducted its business over a period of two years from 2007 to 2009. An astronomical amount of R9.678 million has been fraudulently obtained in the process. On Serame’s version, he collected R9 000 per transaction which, if multiplied by 339 transactions, equals R3 443 000. However, he has been convicted of defrauding the municipality for the total amount of R9.678 million.

[50] The State counsel made a valid point. If restorative justice is to be considered, so he submitted, the aggrieved party should at least be placed in as close a position they would be prior to commission of the offences. As shown, this is impossible in *casu*.

[51] Notwithstanding the State counsel’s emphasis on Serame’s contradictory version pertaining to his wife’s unemployment and whoever was running the taxi business, the court *a quo* totally ignored this. There is no reason why the family taxi business cannot continue in the event of Serame’s incarceration.

³⁰ Footnotes 21, 22 and 24 respectively.

[52] The court *a quo* stated that the imposition of a fine would be a smack in the face of the community at large. In my view, if this appeal is to be dismissed, it would be a smack in the face of the community at large, including all tax-abiding citizens, particularly those residents of the municipality who regularly pay their dues but are often dissatisfied with the service delivery outcomes. I agree with the State that the imposed sentence creates a contradictory situation to the one the court *a quo* wanted to guard against. Serame is 'walking outside having the money that he took'. He neither spent a day in a correctional service centre, nor repaid a substantial portion of the fraud committed relating to millions of Rands. No evidence was placed before the court *a quo* that Serame would be able to repay a meaningful amount, not to speak of a substantial amount, of his debts from legitimate income.

[53] The appeal should succeed insofar as the court *a quo* misdirected itself materially in several aspects as referred to above. Furthermore, the sentence is so shockingly disproportionate with the seriousness of the crimes, in particular counts 1 to 339, that no reasonable court could have imposed it. The municipality incurred a real loss of close to R10 million. The crimes deprived the local government, the municipality, in respect of counts 1 to 339 and the national government, pertaining to the tax evasion from delivering essential services to our society, particularly the poorest and most needy. It is common cause that these types of crimes have increased tremendously over the last decades. No doubt, fraud is prevalent, not only in the private sector but particularly within our national, provincial and local governments. No one can turn a blind eye thereto.

[54] I accept that as a general proposition, when a custodial sentence is imposed as I intend to do in this appeal, the question of compensation ordered as part of suspension conditions in respect of the other offences becomes problematic as it is unrealistic to expect a person in custody to pay compensation. *In casu*, the compensation orders granted as part of the conditions of suspension in respect of the other counts should not prevent a custodial sentence in respect of counts 1 to 339. Should it become impossible for Serame to comply with his suspension conditions due to his inability to pay the

applicable amounts as a result of his incarceration, this will obviously be taken into consideration by the court in the event of the State applying that his sentences of imprisonment be put into operation.

[55] In conclusion, although correctional supervision as a sentencing option, especially when it is imposed together with orders compensating the victim or victims, is certainly an option to be duly considered, it cannot be disregarded that it remains, generally viewed, as an alternative sentence to imprisonment that may be imposed for less serious crimes. Serame's crimes and his obvious inability to reimburse the complainants did not make him an ideal candidate to escape direct imprisonment.

[56] I considered increasing the sentence in respect of counts 1 to 339 to ten years' direct imprisonment. However, insofar as Serame might have served the 36 months' correctional sentence imposed by the court *a quo* or a part thereof, I shall give him the benefit of the doubt and increase the sentence to 7 years' direct imprisonment.

[57] I do not agree with the State's submissions pertaining to the cumulative sentences imposed in respect of counts 353 to 356 and counts 372 to 404 respectively taken together for purpose of sentence. It was appropriate to take these counts together for purpose of sentence. The appeal in this regard shall be dismissed.

Orders

[58] Consequently, the following orders are issued:

1 The State's appeal against the sentences imposed by the court *a quo* succeeds in part.

2 The suspended sentence of imprisonment imposed in respect of counts 1 to 339 is set aside and substituted with the following:

‘Counts 1 to 339 are taken together for purpose of sentence, and the accused is sentenced to 7 years’ direct imprisonment in terms of section 276(1)(b) of the Criminal Procedure Act 51 of 1977’.

3. The sentences imposed in respect of counts 353 to 356 and 372 to 404 are confirmed.

J P DAFFUE
JUDGE OF THE HIGH COURT

I concur.

S NAIDOO
JUDGE OF THE HIGH COURT

Appearances

For the Appellant: V de Bruyn
Instructed by: The Director of Public Prosecutions
Bloemfontein

For the Respondent: L B J Moeng
Instructed by: Mopobole & Ismail Attorneys
Bloemfontein