IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

Case No.: CA&R 233/2024

In the matter between:

VIOLET NONTSIKELELO SISHUBA Appellant

and

THE STATE Respondent

JUDGMENT

RUSI J

[1] The appellant, a 41-year-old female is the former employee of Nedbank in its Makhanda Branch (the Bank). Her employment was terminated in 2021 following the discovery of her fraudulent activities whereby she misappropriated the amount of more than R3 million from the Bank. She was subsequently arraigned in the Gqeberha Regional Court on 40 counts of fraud and 5 counts of money laundering. On 14 June 2024 and on the basis of her plea of guilty in terms of section 112 of the Criminal Procedure Act 51 of 1977, she was convicted of all 45 counts.

[2] In respect of count 37 the appellant misappropriated R127 000.00, and R 150 000.00 in respect of count 40. In misappropriating the amounts in counts 36 to 40, she acted in concert with her erstwhile co-accused, one Jenicquil Gavanic Nelson (Nelson). The fact that the individual amounts involved in counts 37 and 40 exceeded R100 000.00 and the appellant acted in the furtherance of common purpose with Nelson, brought the two counts within the ambit of the minimum sentences prescribed in section 51(2) of the Criminal Law Amendment Act 105 of 1997 (the CLAA).

[3] In terms of section 51(2) of the CLAA read with Part 2 of Schedule 2, the sentence prescribed for the offences in counts 37 and 40 is a minimum of 15 years' imprisonment for a first offender, 20 years for a second offender, and 25 years for a third and subsequent offender. These prescribed minimum sentences may be departed from where the court is satisfied that there exist compelling and substantial circumstances warranting a lesser sentence. This is in terms of section 51(3) of the CLAA.

[4] On 06 August 2024 and after finding that compelling and substantial circumstances existed which justified a deviation from the prescribed sentence of 15 years' imprisonment in respect of counts 37 and 40, the court a quo imposed 8 years' imprisonment in respect of count 37, and 10 years' imprisonment in respect of count 40. Furthermore, counts 1 to 36; and counts 38 and 39 were taken as one for the purposes of sentence and in their regard, the appellant was sentenced to 6 years' imprisonment. Likewise, counts 41 to 45 were taken as one for the purposes of sentence and the appellant was sentenced to 4 years' imprisonment.

[5] The learned Regional Magistrate further ordered that the sentences imposed in respect of counts 1 to 36; counts 38 and 39; and counts 41 to 45 shall run concurrently with the sentence imposed in respect of count 40. No

concurrency was ordered in respect of the sentences imposed on counts 37 and 40. This resulted in an effective sentence of 18 years' imprisonment.

[6] The appellant now appeals against the cumulative sentence of 18 years' imprisonment. The appeal is with the leave of this Court on petition. The respondent supports the cumulative sentence imposed on the appellant.

The factual background

[7] These are the facts on which the appellant was convicted based on her plea of guilty: the offences were committed between 30 July and 18 August 2021 at the Makhanda Branch of Nedbank. On diverse occasions, the appellant made false records of inter teller cash in and inter teller cash out transactions by means of which she misappropriated the amount of R3 846 497.17. These unlawful transactions were made within a period of 17 business days. In some instances, the unlawful transactions were made multiple times a day and substantial amounts were misappropriated. Regarding counts 36 to 40, she made similar inter teller transactions, but in those instances, she acted in concert with Nelson who was arraigned as the second accused in the court a quo, and who was not an employee of Nedbank when the offences were committed. The appellant transferred the amounts misappropriated in respect of counts 36 to 40 to Nelson. The arrangement between the two of them was that Nelson would in turn transfer the amounts to various accounts held by the appellant. Resulting from her complicity with Nelson in the commission of these offences in the manner described, she further pleaded guilty to 5 counts of money laundering as counts 41 to 45.

[8] It was submitted on behalf of the appellant in mitigation of sentence that she committed the offences whilst she was a participant in the Bitcoin Investment Scheme. She heard of a new investment opportunity from Nelson, and she accordingly joined. All money deposits within the scheme were done

electronically and communication was via a WhatsApp group that one of the persons behind the scheme controlled.

[9] She used her savings to participate in the scheme and borrowed monies from her family and friends. She was informed that she would be eligible for a return of 10 000 US dollars. When the time came for her to withdraw her returns, she was informed by those operating the scheme via WhatsApp messages that she needed to pay a fee of R18 000.00 in order to 'activate the payment of her returns.' She had by then exhausted all her financial resources. It was at that point that she misappropriated monies from the Bank as aforementioned and agreed with Nelson that the monies she misappropriated would be deposited into various accounts held in her name.

[10] It was further submitted on the appellant's behalf that her criminal conduct was actuated by the need to provide for her two minor children one of whom was her 9-year-old daughter. At the time, the appellant's sister was the child's primary care giver. Further, that the appellant was a victim of a scam, and she had no previous convictions. She expressed remorse by confessing her criminal conduct to her employer, pleading guilty promptly; and by offering her pension benefit of pension benefit of R205 742.80 to make good the Bank's loss.

[11] In aggravation of sentence, the prosecutor emphasized that the appellant did not volunteer the information of her wrongdoing to her employer but confessed to her supervisor after the crimes were discovered through an investigation by the Bank. Her last transaction which was on 18 August 2021. The prosecutor further placed emphasis on the loss suffered by the Bank and the fact that the appellant's pension benefit of R205 742.80, which was her only means of repaying the misappropriated monies, covered a fraction of what the Bank lost. It was the prosecutor's submission, further, that, the offence was motivated by the appellant's greed since she earned a salary of R10 000.00 a

month as the Bank's employee. It was further submitted that the appellant's supervisor lost her employment resulting from her unlawful conduct.

The grounds of appeal

[12] The appellant challenges the sentence imposed on her on two grounds. Firstly, she contends that the sentence imposed on counts 37 and 40 is severely excessive, disproportionate to the crimes she was convicted of, her personal circumstances and the interests of society, and it induces a sense of shock. Secondly, that the court a quo failed to consider the cumulative effect of the sentences imposed on counts 37 and 40.

The findings of the court a quo

[13] In imposing the sentence now appealed against, the learned Regional Magistrate reasoned, that, the fact that the appellant committed the offences out of greed; her breach of the position of trust and misuse of her expertise and skill in banking to defraud the Bank stood as aggravating factors. She further considered the fact that the appellant used her knowledge of the Bank's system to manipulate it. Even though the sentence of correctional supervision was recommended, she reasoned that it was inadequate as a sentencing option and lacked the appropriate punitive impact demanded by the gravity of the offences; and it did not carry the requisite deterrent effect. From the court a quo's judgment on sentence, nothing is said regarding the amelioration of the cumulative effect of the sentences imposed on counts 37 and 40.

Counsel's submissions on appeal

[14] Mr *Sojada* submitted that while it cannot be denied that the offences of which the appellant was convicted are serious and warranted a substantial term of imprisonment, the court a quo ought to have imposed lesser sentences in respect of counts 37 and 40 and further have regard to the cumulative effect of the sentences it imposed on each of these two counts. In this regard, he

submitted that a part of the cumulative sentence of 18 years' imprisonment ought to have been suspended, or the court should have ordered further concurrency between the two sentences. Mr *Sojada* was constrained to acknowledge that the appellant did not admit guilt upfront, and that her criminal conduct was uncovered by an investigation that the Bank conducted. He however urged us to consider the fact that the appellant was a victim of a scam.

[15] Ms *De Klerk* submitted that the sentences imposed on counts 37 and 40 are proportionate to the seriousness of the offences in those counts. Further, that the court a quo properly exercised its discretion in not ordering further concurrency in respect of these two counts, and therefore, there is no reason to interfere with the sentences imposed. It was Ms *De Klerk*'s submission further, that, not all the amount that the appellant misappropriated was recovered and that regard must be had to the fact that she did not volunteer the information regarding her criminal conduct, but it was discovered following an investigation by the Bank. Ms *De Klerk* took the view that a cumulative sentence of 10 years' imprisonment would not be appropriate for the totality of the appellant's criminal conduct.

The legal principles

[16] The imposition of sentence is the prerogative of the trial court. An appellate court may not interfere with this discretion merely because it would have imposed a different sentence. It must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing sentence. The trial court's discretion is regarded as having been unreasonably exercised where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that

which the appellate court would have imposed. This is trite law.[1] As the Court observed in, *Mokela v S,*[2] this salutary principle implies that the appeal court does not enjoy unlimited powers to interfere with the terms and conditions imposed by a sentencing court on how or when the sentence is to be served.[3]

Discussion

[17] The incidence of white-collar crime in South Africa continues unabated with all its adverse effects on the country's economy. In the context of financial institutions, it has damaging effects on the trust and stability on which these institutions are built. Apart from the immediate financial loss, the reputational damage it brings about erodes the public trust in the affected institutions.

[18] There can be no controversy regarding the particularly vulnerable position that the Bank was in relation to the appellant. The appellant had been in the position of trust in relation to the Bank and was entrusted with an important function which entailed the balancing of the amounts received from and withdrawn by the Bank's clients in the course of the business day. She misappropriated substantial amounts of money, and the discovery of her unlawful conduct did not come about through her voluntary disclosure or admission. All this underscores the seriousness of the crimes that the appellant committed.

[19] It is not without significance that in respect of counts 36 to 40, the appellant was determined to maximize her chances of success in her unlawful enterprise by making common purpose with Nelson. Her criminal conduct affected not only the Bank, but her supervisor lost her employment upon the imputation to her, of a failure in her oversight role in relation to the appellant.

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[1] *S v Hewitt* 2017 (1) SACR 309 (SCA) at para 8; see also *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A); 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) (19 March 2001) (*Malgas*), para 12; *S v Sadler* 2000 (1) SACR 331 (SCA) para 8.

[2] *Mokela v S* (135/11) [2011] ZASCA 166; 2012 (1) SACR 431 (SCA) (29 September 2011).

[3] Id, para 9.

[20] The learned Regional Magistrate must be commended for her careful analysis of the facts placed before her and her coherent application of the sentencing principles in general and in the context of the commercial crimes under consideration in this appeal. Her finding that there were compelling and substantial circumstances that justified the imposition of a lesser sentence than that prescribed in respect of counts 37 and 40 was correctly made. It bears emphasis, however, that once the learned Regional Magistrate made this finding, she was no longer bound by the strictures of the prescribed minimum sentences. It was incumbent upon her to consider the traditional triad of sentencing. This entailed the balancing of the nature of the offence, the personal circumstances of the appellant, and the interests of the society, in determining what sentence would then be appropriate.

[21] It is indeed so, that even where compelling and substantial circumstances are found to exist, the right balance must be attained between the crime, the offender and the circumstances of the case. The result is that too lenient sentences or severely harsh sentences would result in an injustice, and this would be a ground for interference on appeal. The sentencing court is still required to make a value judgment regarding what a just sentence would be on the totality of the facts of each case. This principle was enunciated in *S v Samuels*[4] as follows:

'An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well known triad of the crime, the offender and the interests of society. 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

[4] 2011 (1) SACR 9 (SCA).

crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.'[5]

[22] The record indicates that the learned Regional Magistrate painstakingly considered previous decisions in an attempt to achieve consistency in her sentencing.[6] While this indicates that the learned Magistrate was acutely alive to the need to achieve the right balance between the crimes committed, the personal circumstances of the offender and the interests of society, sight must not be lost of the fact that uniformity is subservient to the sentencing court's discretion. To my mind, this accords well with the principle that sentences are to be individualized while preserving the interplay between consistency and discretion.

[23] It is by now trite that the fact that an offence is punishable by the prescribed minimum sentence of 15 years does not in and of itself mean that the court should by rote impose severely long sentences. With that said, we accept that standing alone, counts 37 and 40 are serious in nature for the same reason that in committing them, the appellant acted in concert with another, and the amounts misappropriated exceeded R100 000.00. Nelson also benefited from the appellant's criminal conduct.

[24] In *S v Rawat*,[7] the appellant, also an employee of the Bank, who had been convicted of misappropriating R402 000.00 from it, was sentenced by the court a quo to 7 years' imprisonment for that single count of fraud. In refusing his appeal against the court a quo's refusal of bail pending appeal against this

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[5] Id, para 9.
[6] The learned Regional Magistrate referred to *S v De Sousa* [2009] 1 All SA 26 (SCA), where the appellant had been convicted of 13 counts of fraud involving a total amount of R1 000 228.94. All counts having been taken as one for the purposes of sentence, the appellant was sentenced to a term of imprisonment for a period of 7½ years. On appeal, this sentence was reduced to 4 years' imprisonment. In *S v Pretorius and Another* [2009] 1 All SA 567 (SCA), the Court confirmed the sentence of 5 years' imprisonment imposed on each of the appellants, who had been convicted of 91 counts of fraud by the regional court on their plea of guilty. The appellants had defrauded the complainant, an insurance company for which they fitted windscreens. They made a profit of R122 309.00 over a year by fitting windscreens of poor quality, yet they claimed a fee for the expensive product.
[7] 1999 (2) SACR 398 (W).

sentence, the appellate court took into consideration the fact that the appellant in that case had breached the position of trust he held towards the Bank and acted dishonestly.

[25] In *Burgess*,[8] this Court reduced the sentence of 15 years' imprisonment imposed on the appellant for 972 counts of fraud, which was committed over a number of years where more R13 million was misappropriated from the employer to 10 years' imprisonment.

[26] The appellant in the matter before us committed multiple acts of dishonesty over a period of 17 business days, which saw the Bank suffer loss in the amount already stated. On some occasions, multiple unlawful transactions were made in a single day. Her deliberateness in manipulating the Bank's system and in planning ways to maximize the success prospects of her illicit venture by enlisting the help of Nelson in counts 37 and 40, apart from the substantial amount she misappropriated, indeed aggravated the offences in these two counts. For this reason, we have no reason to fault the individual sentences that the court a quo imposed on the appellants in respect of counts 37 and 40.

[27] That being the case, as held in *Johaar and Another v S*,[9] where there is a multiplicity of crimes, the court has a duty to consider the totality of the criminal conduct in question and ask itself what the appropriate sentence is for all the crimes combined.[10] This is to prevent unjustifiably servere sentences. The source of the court's discretion in ordering the concurrency of sentences it

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[8] *Burgess v S* (CA&R58/2022) [2023] ZAECMKHC 83; 2023 (2) SACR 558 (ECMk) (8 August 2023). In that case, the appellant, 65 years old, was convicted on her plea of guilty of 972 counts of fraud which she committed while she was an employee of the Eastern Cape Training Centre, where she was employed as a creditor's clerk. She defrauded the Training Centre an amount in excess of R13 million. The offence was committed over a number of years from 2004. After her unlawful activities were uncovered, she dishonestly disclosed a lesser amount of R2.6 million and signed an acknowledgment of debt for this lesser amount.

[9] *Johaar and Another v S* (652/08) [2009] ZASCA 46; 2010 (1) SACR 23 (SCA); [2009] 3 All SA 520 (SCA) (21 May 2009).

[10] Id, para 14 and 16; see also *Dlamini v S* 2012 (2) SACR 1 (SCA) para 33; *S v Whitehead* 1970 (4) SA 44 (A) at 438F - 440; *S v Mthethwa* 2015 (1) SACR 302 (GP) para 21.

has imposed, or which have previously been imposed is section 280(2) of the CPA which provides that:

> '(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.'

[28] The discretion given to the sentencing court by section 280(2) still requires a balancing of the crime, the offender and the interests of society. The starting point is that every offence justifies its own punishment. Hence, in the exercise of its discretion, the court is bound to ensure that the cumulative sentence is not too severe, and that concurrency does not undermine the seriousness of the offence and the legitimate expectations of society in how the law punishes offenders.

[29] It was argued that the fact that the learned Regional Magistrate did not give her reasons for not ordering concurrency between the sentences in counts 37 and 40 does not mean that she did not consider it.[11] While this is the correct position of the law, this argument cannot be in the context of the present appeal. For it must still appear from the record that this aspect was given consideration and that the court exercised its discretion reasonably.

[30] The undisputed fact that all the 45 counts were committed within a short period of time in a matter of a day or two in between each unlawful transfer, ought to have been taken into consideration in determining the appropriateness of the cumulative sentence imposed in respect of counts 37 and 40. The prosecution accepted the fact that the appellant had fallen victim to a scam. But as Ms *De Klerk* correctly argued, this must be balanced with the appellant's own greed. That greed is indeed evident from the fact that the appellant misappropriated the Bank's funds over a number of days, and at times she

[11] *S v L* 1998 (1) SACR 643 (A) 468c-d.

unashamedly made several unlawful transactions in a day. With that being said, the amounts in counts 37 and 40 are only a fraction of the total amount misappropriated by the appellant acting alone and in respect of which the multiple sentences were taken as one for the purposes of sentence, resulting in the sentence of 6 years' imprisonment for counts 1 to 36; and counts 38 and 39.

[31] When regard is had to these factors, it becomes difficult to make the finding that the learned Regional Magistrate exercised her sentencing discretion reasonably in failing to reduce the effective sentence of 18 years' imprisonment on counts 37 and 40. She fell short in applying herself to the question whether this cumulative sentence was appropriate in the circumstances of the present case.

[32] In *Moswathupa v S*[12] Theron JA (as she then was) cautioned that when dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe, and that wrongdoers must not be visited with punishments to the point of being broken.

[33] Notwithstanding the fact that counts 37 and 40 attracted 15 years' imprisonment each as the minimum term of imprisonment that could be imposed in terms of the CLAA, when the totality of the appellant's criminal conduct is considered, the cumulative period of 18 years' imprisonment for the two counts is unjustifiably excessive. This aspect of the sentence imposed by the court a quo must accordingly be interfered with.

[34] There are at least two ways in which the court a quo should have prevented the unjustified accumulation of the sentences in counts 37 and 40 – to order that the lesser term of imprisonment run concurrently with the longer term, or to suspend a portion of the sentence on appropriate conditions. The former method commends itself to us for the reasons I set forth below

[12] *Moswathupa v S* (168/11) [2011] ZASCA 172; 2012 (1) SACR 259 (SCA) (29 September 2011), at para 8-9.

[35] When the appellant committed the offences forming the subject of this appeal, she had already been a participant in an investment scheme unrelated to the investment scam that she fell victim of. She suffered loss of her own resulting from her criminal conduct. She lost her employment and had to relinquish her pension savings to pay off a portion of the mount that she misappropriated from Bank. Moreover, the substantial period of imprisonment has removed the appellant from her family which includes her two minor children. The term of 10 years' imprisonment is still adequate as form of retribution and deterrence which, in the context of the present case, ought to be at the forefront due to the seriousness of the offences.

[36] For all the foregoing reasons, I would make the following order:

1. The appeal succeeds to the extent that the sentence imposed on the appellant in respect of counts 37 and 40, is varied as set out below:

   '*(a)* The sentence of 8 years' imprisonment imposed in respect of count 37 shall run concurrently with the sentence of 10 years' imprisonment imposed on count 40.

   (b) The effective sentence to be served by the accused is a period of 10 years' imprisonment.'

2. The variation in paragraph 1. above is antedated to 06 August 2024.

L. RUSI

JUDGE OF THE HIGH COURT

MTSHABE AJ:

I agree.

NR MTSHABE

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Counsel for the appellant : *VM Sojada*
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Counsel for the respondent : *U L De Klerk*
Office of the Director of Public
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Date heard: 15 October 2025

Date delivered: 10 March 2026