REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

19/02/2019
DATE SIGNATURE

CASE NO. A21/2018

In the matter between:

MACKENNA MICHELLE Appellant

and

THE STATE Respondent

JUDGMENT

INGRID OPPERMAN J

[1] The appellant was convicted in the Regional Court, Randburg, on 436 counts of fraud. On 18 November 2014, she was sentenced to 10 years direct

imprisonment. The Court *a quo* granted leave to appeal the sentence so imposed.

[2] The appellant was charged with her husband. They both pleaded not guilty and, after the close of the state's case, he was discharged in terms of section 174 of the Criminal Procedure Act 51 of 1977, as amended ('the CPA').

[3] After the evidence of the first state witness had been concluded, the appellant made section 220 admissions whereafter the state closed its case and the appellant elected not to testify. She was acquitted of 4 of the 440 charges brought against her.

[4] A brief synopsis of the facts underpinning the conviction follows:

4.1. The appellant was a director and 50% shareholder of Circa Recruitment (Pty) Ltd ('Circa'). Circa is a temporary employment service provider, which includes the payroll administration of salaries and wages to all its employees and contractors which services are enlisted at various sites and offices of their clients. The salaries and wages for the employees and the contractors are managed and administered by the payroll division within Circa where the appellant performed duties as a payroll administrator.

4.2. In 3 years, the appellant transferred the amount of R1 240 986.29 into two different banking accounts to which she had access representing to Circa that the amounts so paid out were paid out to employees as wages and salaries.

[5] The appellant, who was represented, requested a Correctional Services report. Despite the state expressly advising the appellant's representative, and such communication being placed on record, that the state did not accept the

conclusions drawn nor the recommendation made, the Correctional Services Officer who was present at court, was not called to testify. We do not have before us the report and only have sight of what was read into the record.

[6] The following relevant facts were placed before the court (I confine this summary to the uncontested evidence, the conditions proposed for consideration in the correctional supervision sentence, do not form part of this summary):

6.1. The appellant was staying in rented accommodation, leased on a month-to-month basis.

6.2. She was staying with her husband and 4 children aged 20, 12, 11 and 6 years of age.

6.3. At the date of sentencing on 18 November 2014, she was 48 years of age.

6.4. She had no previous convictions.

6.5. She had expressed her remorse and was willing to participate in rehabilitative programs.

[7] In sentencing the appellant, the court *a quo* had regard to the aforegoing facts as well as the following:

7.1. The appellant was not formally employed but was working as an independent contractor.

7.2. She has no assets.

7.3. Her income was uncertain as she was paid after the completion of a project.

[8] The principles underpinning the power of a court on appeal to interfere with the sentence imposed by the trial court are well established in our law,

see *S v Romer* 2011 (2) SACR 153 (SCA) at paras [22] and [23] where they were discussed.

[9] The misdirection on which the appellant relies in this appeal is an alleged failure on the part of the magistrate to have furnished substantive grounds when rejecting the correctional supervision recommendation. Coupled to this, is the criticism that the court *a quo* failed to have interrogated the ability of the correctional services department to monitor the appellant, having regard to the fact that she is residing in rented accommodation. It was argued that the monitoring mechanisms by the relevant correctional services authorities were arbitrarily undermined and that the duty was on the court *a quo* to call the author of the correctional supervision report to elaborate on how the appellant would be monitored. This court was urged to remit the matter back to the court *a quo* to receive the relevant evidence and to reconsider the appropriate sentence alternatively for this court to impose a sentence it considers appropriate.

[10] In our view, the magistrate did not merely reject the correctional supervision recommendation because he held the view that the appellant could not be monitored, he dismissed it because he found that correctional supervision was inappropriate having regard to all the factors in this case, both aggravating and mitigatory.

[11] It is patent that the magistrate took pains to consider all of the principles relevant to sentencing the appellant and applied these to the facts of the case before him. He did not overlook the appellant's personal circumstances. He weighed these against the list of aggravating factors that he found to be relevant. It cannot be said that he misdirected himself in identifying these as

aggravating factors, or in the manner in which he sought to balance these against factors favourable to the appellant.

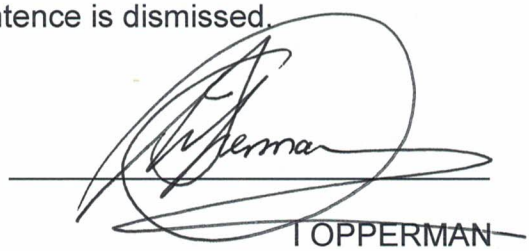
[12] What should not be overlooked is that there was no viva voce evidence placed before the court *a quo* in respect of correctional supervision as a sentencing option. Had the correctional supervision officer testified and had he motivated the recommendation properly, the position might have been different. It should be remembered that the state expressly stated that it did not accept the recommendation. In the face of this, and particularly as the probation officer was present, the failure to call him as an expert is perplexing. Despite this shortcoming, the learned magistrate considered the correctional supervision option and quite rightly, in our view, rejected it.

[13] The appellant was not only placed in a position of trust as an employee, but she was also a director which brought with it added obligations and duties towards Circa. The magistrate did not over emphasize the fact that these offences were committed over a period of 3 years during which time the appellant had ample time to reflect on her wrongdoing but did not curb her ways. The trial, as high lighted by the magistrate, ran over many years. During this time the appellant did not express her remorse until the writing was on the wall when she finally made the section 220 admissions. The magistrate relied on *S v Sadler*, 2000 (1) SACR 331 (SCA) in which it was emphasized that imprisonment is an appropriate sentence for fraud, commonly referred to as a white-collar crime. The magistrate had due regard to the substantial loss caused by the conduct of the appellant. To that should be added that, from the record, it would appear that the crimes were committed for self-enrichment. We can not fault the magistrate's reasoning. That the sentence is perhaps on

the high side, may be so but that in and of itself would not constitute grounds for intervention on appeal.

[14] The court accordingly makes the following order:

14.1. The appeal against sentence is dismissed.



T OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

I Agree

T SIWENDU
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 05 February 2019
Judgment delivered:
Appearances:
For Appellant: Adv T.D. Tshishonga
Instructed by: Legal Aid South Africa
For Respondent: Adv D. Van Wyk
Instructed by: Director of Public Prosecutions