07/12/12

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: A411/2011

(1) REPORTABLE: (YES) / ~~NO~~

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ (NO)

(3) REVISED.

2012.12.07 .....
DATE SIGNATURE

In the matter between:

ETHRESIA MARGARETHA PIATER Appellant

and

THE STATE Respondent

JUDGMENT

MAKGOKA, J:

[1] The appellant, a 41 year-old woman, stood trial in the regional court, Heidelberg (Gauteng). She pleaded guilty to, and was convicted of, 22 counts of fraud, 7 counts of forgery and uttering, and 1 count of theft. The total amount of the fraud and the theft is R444 689. She was sentenced to an effective 7 years' imprisonment. The appellant appeals against the sentence, with leave of the trial court.

[2] The appellant's bail was extended, pending the outcome of the appeal. One of the conditions of bail was that the appellant was required to be present during the hearing of the appeal, and that should judgment be reserved, also be present when judgment was delivered. When we reserved judgment, we relaxed this condition and ordered that her presence was not required when judgment is handed down.

Overview of the offences

[3] The appellant was employed as a senior administrative clerk at the magistrate court, Heidelberg (Gauteng). Her duties entailed the keeping of the deposit account. During the period November 2005 to June 2007 the appellant had on 22 occasions, made false representations to her employer that sums totalling R 389 253,57 had been paid to different social grant recipients. The last of such false representations occurred on 26 July 2007, during which she withdrew a sum of R60 462, 40 from her employer's bank account and misappropriated it. On 30 July 2007 she returned R12 400 of that sum to her place of employment and placed it in a safe. She became ill and was hospitalised. In her absence her seniors detected the shortage, and upon her return to work, she was confronted with the shortage. An investigation ensued. The appellant returned the R48 062.40 by handing it over to the investigating officer. On the 20 August 2007 the appellant forged deposit slips and caused them to be uttered on 21 August 2007 in an attempt to cover her fraud.

[4] For sentencing purposes, a Correctional Officer's report was received. The appellant also submitted a pre-sentencing evaluation report prepared on her behalf by a forensic criminologist, Dr. EF Sonnekus, who also testified in mitigation of sentence. The appellant did not testify. Dr. Sonnekus interviewed the appellant, her

husband, her daughter, her brother and her pastor, for the purpose of compiling his report. He set out the appellant's upbringing, which was largely uneventful (at least for the present purposes). After matric the appellant obtained a three-year Diploma in State Administration. She was thereafter employed by the then Receiver of Revenue (now South African Revenue Services (SARS)), and later by the Department of Justice and Constitutional Development (the DOJC), where she committed the offences and was discharged from duty, after her arrest. She had a total of 23 years as a civil servant.

[5] After her discharge form the DOJC she found employment on a part-time basis at her local NG Church of South Africa, on a monthly salary of R3000. She had been married for 19 years, from which marriage two minor children were born, a boy aged 15 and a girl aged 12. Her husband is employed at a transport company in Vereeniging. He earns a net income of R6 800. The couple was under debt administration at the time of sentence.

[6] After her fraud was discovered, she was suspended. She exhibited features of a mood disorder. She was admitted to a hospital, suffering major depression, which resulted in serious impact in social and occupational functionality. Medication was prescribed for her. She was again seen by a psychiatrist on 5 October 2007. She was still suspended and this time, there was an added stress factor, namely reports of possible molestation of her daughter by her father-in-law in September 2007 when her child was 10 yeas old. She and her husband laid a charge with the South African Police Services (SAPS). Later the couple withdrew the charge after a

"settlement" in terms of which the father-in-law agreed to pay for the child's counselling sessions.

[7] On behalf of the appellant, it was submitted that the sentence fell to be interfered with on the basis that it induced a sense of shock; that the trial court erred by its conclusion that direct imprisonment was the only suitable sentence, and not considering other forms of punishment such as correctional supervision or suspended sentence; that the trial court overemphasized the seriousness of the offences and the interests of society at the expense of the appellant's personal circumstances; that the trial court did not properly take into account the element of mercy; that the trial court over-emphasized the elements of retribution and deterrence; that he did not consider adequately the fact that the appellant is a first offender at the age of 41 and that she had shown remorse and that she was in a position to pay back an amount of R395 754. 61; and that the appellant had lost her job as a result of the offences. The State supports the sentence.

[8] It is trite that sentencing is generally a matter that falls within the discretion of a trial court. The appeal court's power to interfere with a sentence is limited to instances where the sentence is vitiated by an irregularity; misdirection; or where the sentence is shockingly disproportionate or where there is a striking disparity between the sentence and that which the appeal court would have imposed, had it sat as the trial court. See generally: *S v Snyder* 1982 (2) SA 694 (A); *S v Petkar* 1988 (3) SA 571 (A) and *S v Sadler* 2000 (1) SACR 331 (SCA).

[9] As to the nature of the misdirection referred to above, the following was stated in *S v Pillay* 1977 (4) SA 531 (A) at 535E-F:

> "Now the word "misdirection" in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitled the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that is shows, directly or inferential, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence" (emphasis added).

[10] The position was neatly summarized in *S v Malgas*[1] where Marais JA held that:

> "A court exercising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substituted the sentence arrived at by it simply because it prefers it. To do so would be up to usurp the sentencing discretion of the trial court. . . . however even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that is can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

[11] Two crisp issues fall to be decided in this appeal, namely:

(a) whether the regional court misdirected itself in disregarding the mitigating factors placed on record by the appellant's counsel from the Bar; and

(b) whether the regional court had due regard to the best interests of the appellant's two minor children during sentencing.

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[1] 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) para12.

[12] I consider the issues in turn.

Ex parte mitigatory factors from the Bar

[13] What happened in this regard is this. The appellant did not testify in mitigation of sentence. The only witness called on her behalf was Dr. Sonnekus. During Dr. Sonnekus' evidence the court pertinently asked him whether the appellant had told him the reason why she committed the offences and what she did with the stolen money. Dr. Sonnekus's response was that the appellant did not inform him about either of the two issues. Neither did he enquire from appellant about these because of the emotional state of the appellant and her family at that stage.

[14] During the address in mitigation of sentence, the appellant's counsel, conveyed to the court that the appellant had instructed him as follows: she misappropriated the monies out of need and not for luxuries. The appellant's husband was retrenched in 2004 where he was earning R10 000 per month. He then worked as an estate agent on a commission basis. He was not successful in that regard as he only managed to sell only three houses in two years. The combined family income was therefore not sufficient to meet the expenditure – she was effectively the breadwinner. The husband found a job in January 2007, earning R3000 per month, which was not of much help to the dire financial situation. In October 2007 the husband became employed in his present job, where he earns R6 800 per month. The couple did not have a vehicle "in their own name" and that the family house was dilapidated.

[15] During the course of his address on sentence, the prosecutor did not challenge the veracity of the *ex parte* submissions of the appellant's counsel. On the contrary, he seemed to accept them. The prosecutor said:

> "... (Y)our worship, it is indeed so that as Mr. Van der Merwe (appellant's counsel) mentioned, that sometimes in the year 2007 then the husband started working."

The prosecutor then emphasised that the offences were committed over a period of time, during which among others, the appellant stole a single amount of R60 000.

[16] In his judgment on sentence, the regional magistrate lamented the fact that neither the appellant or her husband testified as to the reasons for the theft and how the money was used. The learned regional magistrate expressed his dissatisfaction as follows:

> "Tydens mnr Van der Merwe se betoog op vonnis is die Hof vir die eerste keer meegedeel dat u die misdrywe vanweë geldnood gepleeg het. Andermaal moet die Hof beklemtoon dat daar geen getuienis voorgelê was om dit te bevestig sodat dit aan toetsing onderwerp kon word nie. 'n Eenvouige berekening beteken dat u gemiddleld R21, 000.00 per maand gesteel het oor die tydperk van 21 maande heen. Daarbenewens het u self gedurende daardie tydperk 'n bestendige salaries ontvang as meer die wisselvallige verdienste van u eggenoot.
>
> Wat die aard van die beweerde geldnood was en veral die omvang daavan is nog nie aan die Hof geopenbaar nie. Die vraag bly dus steeds, "wat het van die sowat R400,000.00 geword in die bestek van 21 maande terwyl daar tog inkomste in die huis was?" U versuim om te getuig ter strafversagting ten aansien van 'n ernstige misdryf is 'n faktor was die Hof in ag mag neem ten aansien van vonnisoplegging. Sien in hierdie verband *S v Martin* 1996 (1) SACR 172 (W), 'n uitspraak van sy Edele, adjunk-regterpresident Flemming.

[17] In both written and oral submissions before us, Mr. *Myburgh*, counsel for the appellant, argued, quite forcefully, that the learned regional magistrate ought to have indicated to the appellant that he did not accept the submissions made by counsel and that he required admissible evidence on why the offences were committed and

on what the ill-gotten gains were spent. His failure to do so, counsel submitted, had unfairly prejudiced the appellant, constituting a misdirection entitling this court to interfere.

[18] The general approach is this. Statements from the Bar by a practitioner are normally no more than argument. If they are to receive greater weight, they must be admitted by the representative of the State, or accepted as facts by the court. If such ex parte statements by a defending attorney or counsel or the court, they acquire for purposes of sentencing the weight of facts proved in evidence; and the court is bound to consider them as though they had been proved in evidence. They cannot simply be ignored by the court. Failure to take such statements or mitigating factors implicit in such statements, will in an appropriate case, lead to an interference by a court of appeal or review. *S v Mabala* 1974 (2) SA 413 (C) at 422E-G; and *S v Caleni* 1990 (1) SACR 178 at 181f-g. See however, *S v Olivier* 2012 (2) SACR 178 (SCA), where the practice was deprecated.

[19] Where a presiding officer is not prepared to accept facts stated on behalf of an accused in mitigation of sentence, he/she should require the attorney or counsel to lead evidence to establish his or her statements. It is desirable that facts in mitigation should be proved in the ordinary manner so that the State should be in a position to cross-examine, if necessary. See *R v Shuba* 1958 (3) SA (C) 844 at 845A.

[20] From the authorities it is clear that under the circumstances, the learned regional magistrate was obliged to accept the *ex parte* statements of the appellant's

counsel. Failure in this regard amounted to a misdirection. No doubt that such non-acceptance had a direct influence as to how he approached the sentence. Had he accepted those statements, the approach to sentence, or at least the period of imprisonment, would necessarily have been different. It is therefore the type of misdirection which justifies interference by this court. We are therefore at large to consider sentence afresh and impose what we consider to be an appropriate sentence under the circumstances. That sentence has to have regard to the interests of the appellant's two minor children, the aspect I now turn to.

The best interests of the minor children

[21] In *S v M (Centre for Child Law as Amicus Curiae)*[2], the majority of the Constitutional Court set out the duties of a court sentencing a primary caregiver of minor children. At para 28, the court defined a primary caregiver as 'the person with whom the child lives and who performs everyday tasks like ensuring that the child is fed and looked after and that the child attends school regularly'. The court held that focused and informed attention needed to be given to the interests of the children at appropriate moments in sentencing process. What is expected of the sentencing court is to give sufficient independent and informed attention as required by s 28 (2) and s 28(1)(b) of the Constitution[3], to the impact on the children, of sending their primary caregiver to prison. The objective is to ensure that the sentencing court was in a position adequately, to balance all the varied interests involved, including those of the children placed at risk. The form of punishment imposed should be the one

[2] 2007 (2) SACR 539 (CC)

[3] Constitution of the Republic of South Africa Act 108 of 1996

that least damages the interests of the children, given the legitimate range of choices available to the sentencing court.

[22] The court developed the following guidelines in applying the principles set out above: Firstly, a sentencing court should determine whether an accused is a primary caregiver, wherever there were indications that this might be so. Secondly, the court should ascertain the effect on the children of a custodial sentence if such a sentence was being considered. Thirdly, if on the '*Zinn* triad' approach (which requires the court to consider the crime, the offender and the interests of society) the appropriate sentence was clearly custodial and the accused was a primary caregiver, the court must apply its mind to the question of whether it was necessary to take steps to ensure that the children would be adequately cared for while the caregiver was incarcerated. Fourthly, where the appropriate sentence was clearly non-custodial, it must be determined bearing in mind the interests of the children. Fifthly, if there was a range of appropriate sentences, the court must use the paramountcy principle as an important guide in deciding which sentence to impose.

[23] To summaries. S 28(2) read with s 28(1)(b) impose four responsibilities on a sentencing court when a custodial sentence for a primary caregiver is in issue, namely:

(a) to establish whether there will be an impact on a child;

(b) to consider independently the child's best interests. In other words, the child's best interest should not be considered as an appendage to the primary caregiver's personal circumstances;

(c) to attach appropriate weight to the child's best interests; and

(d) to ensure that the child will be taken care of if the primary caregiver is sent to prison.

[24] In *State v Howells* 1999 (1) SACR 664 (C) it was observed that the 'best interests of the child' principle, which forms part of our common law as developed by our courts, is given international legal significance by the ratification by South Africa, on 16 June 1995, of the United Nations Convention on the Rights of the Child (UNCRC) (1989), art 3(1), which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a 'primary consideration'.

[25] In the present case, the minor children's circumstances are more favourable as to how they stand to be affected by direct imprisonment than those in *S v M*, where the appellant was a single mother, who was almost totally responsible for the care and upbringing of her sons. The appellant is not the children's sole caregiver. She is not 'almost totally responsible' for their care. Her husband is their co-resident parent. He should be able to take care of them during her incarceration. Although he works long hours, there is nothing to indicate that he will not be able to engage the child-care resources needed to ensure that the children are well looked after during his absence at work. In my view custodial sentence will not inappropriately compromise the children's interests. No doubt the imprisonment of the appellant would have a negative impact on her minor children, especially the girl-child, who at her age, would need a maternal figure. However, as would appear later, the appropriate sentence in this matter is clearly custodial.

[26] *S v M* has clearly revolutionised sentencing in cases where the person convicted is the primary caregiver of young children. It has reasserted the central role of the interests of young children as an independent consideration in the sentencing process: *MS v S* 2011 (2) SACR 88 para 62; *S v Pillay* 2011 (2) SA 409 (SCA) para 24. However, in *MS v S, above,* the Constitutional Court, in dismissing the appeal, warned against applying *S v M* to cases that lie beyond the ambit of the court's decision in that case. In my view, the present appeal is one such case. I therefore conclude that the learned regional magistrate correctly gave focused attention to the interests of the appellants' minor children and balanced them with other considerations.

[27] Having established the proper jurisprudential basis on which sentence in cases like the present is to be considered, I proceed to consider what sentence would be appropriate for the appellant. In *S v Prinsloo* 1998 (2) SACR 669 (W) Leveson J expressed strong views on sentencing accused convicted of theft from employers. The head-note of the case reads as follows:

> '... I(n) the world of commerce employers were compelled to place trust in their employees. It was not possible for the employers to conduct the business of their concerns themselves. No alternative remained to them but to repose confidence in their employees, and when an employee breached that trust his conduct had to be heavily penalised. The employer was entitled to expect unswerving honesty from the employee in return for the wages he paid and the benefits he gave him. Nothing but implicit acceptance of that obligation by the employee would keep the wheels of commerce turning smoothly. It was the duty of the courts, whenever this sort of misdemeanour was detected, to send out the message that such conduct would be severely punished'.

The above remarks have often been cited as authority for the proposition that in all cases of theft from an employer, a prison sentence is called for. See however, *S v Kunene* 2001 (1) SACR 199 (W), where the effect of *Prinsloo* is explored and explained.

[28] Although the imposition of sentence remains discretionary, it is bound by judicial precedent and authority: *S v Juta* 1988 (4) SA 926 (TK) 927 D-F. It is in that context that I consider sentences imposed by our courts, especially the Supreme Court of Appeal (the SCA) and its predecessor, in comparable cases.

[29] In *S v Lister* 1993 (2) SACR 228 (A), a 34 year old bookkeeper's sentence of 4 years' imprisonment was confirmed by the SCA, after she had been convicted of theft of R95 700 from her employer, which she stole over a period of 11 months

[30] In *Howells,* above, the appellant had been convicted in the regional court of having defrauded her employer of R100 000 over a period of two years. She had been sentenced by the regional court to 4 years' imprisonment in terms of s 276(1)(i) of the CPA. The appellant was divorced and had three dependent children. On appeal, the High Court considered the interests of her minor children but held that there was no misdirection by the regional court in sentencing the appellant to direct imprisonment. The court however, altered the period of suspension from 2 years to 1 year. The altered sentence by the High Court was confirmed on further appeal by the SCA. See *Howells v S* [2000] JOL 6577 (SCA).

[31] In *S v Sinden* 1995 (2) SACR 704 (A), the Appellate Division (as it then was) confirmed an effective sentence of 4 years' imprisonment on the appellant, a first offender, for stealing approximately R138 000 from her employer. The amount had been stolen over a period of 14 months. The appellant was married and had three minor children.

[32] In *S v Kearns* 1999 (2) SACR 660 (SCA) a 28-year old unmarried woman had been convicted in the regional court of theft of R67 000 from her employer over a period of three months. She was sentenced to an effective 3 years' imprisonment. Her appeal to a provincial division having failed, she appealed further to the SCA. It was contended that the trial court had erred in not imposing a sentence of correctional supervision and had placed insufficient emphasis on the seriousness of the offence. The appellant also had a poor socio-economic background. The SCA confirmed the sentence on appeal to it.

[33] In *S v Sadler* (above) the appellant was a senior manager in a bank. He was convicted in the High Court of numerous counts, including corruption, fraud, forgery and uttering. He was sentenced to terms of imprisonment which were suspended in their entirety, and to a fine. The Attorney-General (the predecessor of the National Director of Public Prosecutions) noted an appeal against the sentence. The SCA upheld the appeal and set aside the sentence and substituted for it a sentence of 4 years' imprisonment, all counts taken together for purpose of sentence.

[34] In *Ramdeo v Director of Public Prosecutions* [2007] SCA 65 (RSA) the appellant and another accused had been convicted of four counts of fraud in that

they had issued false roadworthy certificates. At the time of his conviction, the appellant was 45 years old, married, with three children, and a first offender. He was also gainfully employed. The magistrate took the offences together for purposes of sentence and sentenced him to 5 years' imprisonment that was conditionally suspended for 5 years. One of the conditions of suspension in each case was that the sum of R5 000 be paid to SARS. The Director of Public Prosecutions appealed to the High Court against that sentence. The High Court increased the sentence to 5 years' imprisonment. The appellant appealed against the order of the High Court to the SCA. The SCA remarked that the offences that were committed by the appellant were undoubtedly serious and demanded a custodial sentence. The SCA upheld the appeal and substituted the sentence with that of 3 years' imprisonment.

[35] In *De Sousa v The State* [2008] ZASCA 93 (12 September 2008*)* the appellant had pleaded guilty to 13 counts of fraud. She had been part of a fraudulent scheme involving a total amount of R1 000 228.94. She had benefitted only R90 0000 for her participation in the scheme. She was 32 years old and a first offender. She had pleaded guilty and shown genuine remorse and contrition. She had also signed an acknowledgement of indebtedness in favour of the complainant in the sum of R90 000, being the extent of her benefit from the fraudulent scheme, and thereafter paid the debt in full. She had utilized some of the money to assist her mother, who was in financial difficulty, and her sister (whose husband was in rehabilitation) to pay school fees. All counts having been taken as one for the purposes of sentence, the appellant was sentenced to 7½ years' imprisonment, which was confirmed by the High Court. She appealed further to the SCA, which set aside the sentence and imposed 4 years' imprisonment.

[36] In *Pretorius v The State* [2008] ZASCA 132 (26 November 2008), the appellants, two brothers, had pleaded guilty to 91 counts of fraud in the regional court amounting to R122 309, committed over a period of more than a year. They had shown remorse. They had admitted to their fraud, and agreed to repay the amount in question plus the costs of investigation into their conduct. Both were first offenders, and principal breadwinners in their respective families, with young children. Their families would be disrupted and severely affected by their imprisonment. The court sentenced them to 5 years' imprisonment, and ordered them to repay the ill-gotten gains, plus the costs of investigation into their fraudulent conduct. Both the High Court and the SCA dismissed their appeal and confirmed the sentences.

[37] In *MS v S* (above) a 33 year old married mother of two young children pleaded guilty in the regional court to, and was convicted, of forgery, uttering and fraud with a potential loss of R42 000. The offences were committed during her course of employment at a firm of insurance brokers. She had a previous conviction for fraud, also committed in the course of her employment with her previous employer. The counts of forgery and uttering were taken together for the purposes of sentencing. She was sentenced to 2 years' imprisonment, conditionally suspended for five years. On the count of fraud she was sentenced to 5 years' imprisonment with the conditional correctional supervision in terms of s 276 (1)(i) of the CPA, which all of the High Court, the SCA and the Constitutional Court, upheld.

[38] In *Joubert v The State* [2012] ZAGPPHC 5 (3 February 2012), the appellant had been convicted of 20 counts of fraud totalling R425 843. 33. This arose from a scheme created for the purpose of defrauding SARS. The scheme comprised of various legal entities which were instrumental in unlawfully inducing SARS into making VAT refund payments to the legal entities. In the regional court he was sentenced to 7 years' imprisonment, wholly suspended for 5 years on standard conditions and that he repays the amount of R425 843.33 to SARS with interest. On appeal, this court set aside the sentence and imposed an effective 3 years' imprisonment, in addition to the appellant repaying the stolen amount with interest.

[39] Back to the present appeal. It was submitted to us that the appellant's plea of guilty in the trial court demonstrated her penitence and remorse. Remorse is obviously an important consideration in sentence. Genuine remorse must be distinguished from self-pity and an unavoidable acknowledgement of guilt (when the evidence is so overwhelming that admission of guilt is unavoidable). Before remorse could be a valid factor in the imposition of sentence, it has to be sincere, and the accused had to take the court completely into his or confidence. See *S v Gerber* 1998 (2) SACR 441 (NC) at 449h-i; S *v Seegers* 1970 (2) SA 506 (a) at 511G-H and *S v Matyityi* 2011 (1) SACR 40 (SCA) para 13.

[40] The fact that the appellant pleaded guilty, is not of itself an indication of remorse. Due consideration should be accorded to the facts of each particular case. In the present case, the State had a very strong case against the appellant that a plea of guilty was unavoidable. It is in that light that her plea should be considered. The other factor militating against a conclusion that the appellant has shown genuine

remorse, is obviously her decision not to testify in mitigation of sentence. Her evidence would have, once and for all, demonstrated her candour, by subjecting her statements of being needy, to the scrutiny of cross-examination.

[41] In mitigation, I take into account that the appellant's pension contributions had been lost, and that she has lost her secure employment of the past 23 years, in prevailing difficult economic circumstances. She currently only earns R 3 000 per month. The appellant has obviously had to suffer in many ways. The embarrassment occasioned to herself, her family and her church, is clear. To her credit, she disclosed her transgressions to her spiritual minister. Notwithstanding, she has since been in gainful employment since March 1993 as a secretary of her church. Not only was the church aware of the fact that criminal charges had been preferred against her, but they had deemed it fit to employ her. The trust that her church reposed in her under those circumstances, must undoubtedly count in her favour. There is little likelihood that she will repeat the offences or that she in future will constitute a risk to society. From her personal circumstances, she appears to be good human material. Her prospects for rehabilitation look good.

[42] On the other hand, there are obviously aggravating factors. The offences were committed while she was placed in a position of trust by her employer, concerning funds that were destined for the assistance of the public and the needy. The offences where committed over a period of time where she had an opportunity for proper reflection, and to stop. The fact that after the theft was discovered, and while a departmental investigation was underway, she tried to cover it up by falsifying the

bank deposit slips, constitutes in my view, the single most aggravating factor. There is nothing to suggest that she would have stopped stealing, but for being discovered.

[43] Counsel for the appellant urged us to impose a sentence of correctional supervision in terms of s 276(1)(h) of the CPA. In this regard, Dr. Sonnekus, in motivation for correctional supervision, stated that direct imprisonment would result in nobody taking care of the minor children, as her husband is employed and arrives home late. The appellant mother was going blind. The paternal grandparents were both sickly. Dr. Sonnekus concluded therefore that the appellant was the primary caregiver of the children. The learned regional magistrate took into account all these factors in his judgment. I have already found that no misdirection was committed in this regard.

[44] While a non-custodial sentence of correctional supervision in terms of s 276(1)(h) is appreciable, I conclude that such a sentence is inappropriate, in light of all the circumstances of the case. It would totally ignore several of other objects of sentencing, and not drive home the seriousness of the offences. The broader community has expectations that serious offences ought to be properly punished. Although the interests of the accused and her family called out for a sentence of correctional supervision, the interests of society outweighed her own. The offences are serious and the sentence, as such, does more than deal with her: it also constitutes a message to the society in which the offences occurred.

[45] Because of the gravity of the offences, the contention that the appellant does not deserve to be imprisoned, is untenable. The notion that the perpertrators of the

so-called white collar crimes do not deserve imprisonment, was rejected in *S v Sadler*, (above) where the following apposite remarks were made at para 11:

> 'So called 'white-collar' crime had, 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 sentence for 'white-collar' crime. Their premise is that prison is only a place for those who committed 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.'

A sentence in terms of s 276(1)(i) of the CPA?

[46] This type of sentence was described by Cameron J in *MS v S* (above) as 'the most flexibly lenient form of custodial sentence the Criminal Procedure Act offers'. In *S v Scheepers* 2006 (1) SACR 72 (SCA) para 10 it was pointed out that the usefulness of this provision should always come to the fore when the sentencing court considers that imprisonment is essential, but that the circumstances point away from an extended period. It entails imprisonment, but mitigates it substantially by creating the prospect of early release on a correctional supervision programme. In the present case, the gravity of the offences, coupled with the aggravating factors set out above, calls, in my view, for long term imprisonment. These, and the interests of society, far outweigh the appellant's interests and those of her family. I have given anxious consideration to this sentencing option, but after proper reflection, I have decided against it.

[47] To sum up. Upon a conspectus of all relevant factors, including the nature and seriousness of the offences, the personal circumstances of the appellant, the mitigating and aggravating factors, as well as the legitimate interests of society, I come to the conclusion that a custodial sentence is the only suitable one. Correctional supervision would be an inadequate punishment. So too, I think, would be a sentence in terms of s 276(1)(i) of the CPA. Taking everything into consideration, I am of the view that nothing less than direct imprisonment for a substantial period will properly meet the aims of punishment (being deterrence, retribution, prevention and rehabilitation); and balance the nature and seriousness of the offences, the personal circumstances of the appellant and the interests of society. I should also blend this with a measure of mercy. I consider a period of 4 years' imprisonment to be appropriate. To mitigate the possibility of the children enduring hardship during the appellant's incarceration, and simply as a cautionary measure, I intend to make an order along the lines made in *MS v S* (above) and *S v Howells (*above).

[48] In the result I make the following order:

1. The appeal succeeds to the extent that the sentence of seven (7) years' imprisonment imposed by the regional court is set aside and replaced with the following sentence:

   '1. The accused is sentenced to 4 years' imprisonment'.

   2. The National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department of Correctional Services visits the children of the appellant, Mrs EM Piater, at least once every month during the first three months of her incarceration, and submit

a report to the office of the National Commissioner as to whether the children of the appellant are in need of care and protection, as envisaged in s 150 of the Children's Act 38 of 2005 and, if so, to take reasonable steps required by that provision.

TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree

A J H BOSMAN
ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING : **26 MARCH 2012**

JUDGMENT DELIVERED : **7 DECEMBER 2012**

FOR THE APPELLANT : **ADV JP MYBURGH**

INSTRUCTED BY : **PETRO DE WITT ATTORNEYS, HEIDELBERG**

FOR THE RESPONDENT : **ADV MS MOGOSHI**

INSTRUCTED BY : **DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA.**