**IN THE NORTH GAUTENG HIGH COURT, PRETORIA**

**(REPUBLIC OF SOUTH AFRICA)**

3/2/2012

CASE NUMBER: A410/11

Appeal Date: 12 September 2011

In the matter between:

**FRANCOIS JOHAN JOUBERT** Appellant

and

**THE STATE** Respondent

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.

3/02/12
DATE

SIGNATURE

**JUDGMENT**

**GOODEY AJ:**

[1] **INTRODUCTION:**

(1.1) The Appellant, was charged in the Regional Court for the Regional Division of Mpumalanga held at Nelspruit, with 20 counts of fraud and various alternatives.

(1.2) He pleaded not guilty.

(1.3) The Appellant was legally represented during the proceedings.

(1.4) The State presented evidence and at the close of the State's case, the Appellant **unsuccessfully** brought an application in terms of **section 174 of Act 51 of 1977** (the **"CPA"**).

(1.5) (He) Appellant then closed his case **without testifying**.

(1.6) The Appellant was convicted on 20 counts of fraud.

(1.7) He (Appellant) was sentenced to 7 years' imprisonment suspended for 5 years on condition that the Appellant not be convicted of fraud or theft during the period of suspension **and** that he **repay** the amount of R425,843.33 to the South African Revenue Services (herein after SARS) at the legislated per annum prime interest rate, on or before **30 September 2010**.

(1.8) An application for leave to appeal in the court *a quo* was unsuccessful and upon petitioning this Honourable Court, **leave to appeal against the conviction and sentence was granted** on 20 April 2009. (It should be mentioned that the Appellant petitioned the High Court for leave to appeal against his **conviction only**).

(1.9) On behalf of both parties comprehensive heads were prepared and the matter was extensively argued / debated – counsel on behalf of both parties deserve a word of gratitude in this regard.

**[2] BACKGROUND / RELEVANT FACTS:**

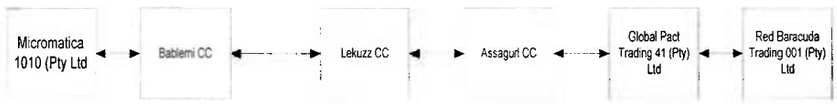
(2.1) As aforesaid, the Appellant was charged with 20 counts of fraud and various alternatives.

(2.2) He pleaded not guilty

(2.3) **Broadly summarized, it was the Respondent's case that the Appellant was the main protagonist in a scheme created for the purpose of defrauding SARS.**

(2.4) The scheme comprised of various legal entities which were instrumental in unlawfully inducing SARS into making various VAT refund payments to the legal entities.

(2.5) These entities were:




(2.6) The charges against the Appellant have neatly been summarised by the counsel on behalf of the Respondent in paragraaf 4.3 of her heads which reads as follows:

"4.3 **The charges against the Appellant can be summarised as follows:**

| Entity | Count No. | Charge | 1st Alternative | 2nd Alternative | Date of Commission and amount |
|---|---|---|---|---|---|
| Micromatica 1010 (Pty) Ltd | **Count 1** | **Fraud** | **Theft** | **Contravening Section 59 (1)(a) of Act 89 of 1991** | **20 September 2003 : R97,137.93** |
| | **Count 2** | **Fraud** | - | - | **14 November 2003 : R68,129.54** |
| | **Count 3** | **Fraud** | **Contravening Section 59 (1)(a) of Act 89 of 1991** | - | **22 January 2004 : R7,429.23** |
| Red Barracuda Trading 001 (Pty) Ltd | **Count 4** | **Fraud** | **Theft** | **Contravening Section 59 (1)(a) of Act 89 of 1991** | **5 September 2003 : R69,671.11** |
| | **Count 5** | **Fraud** | **Theft** | **Contravening Section 59 (1)(a) of Act 89 of 1991** | **22 September 2003 : R53,930.96** |
| | **Count 6** | **Fraud** | - | - | **14 November 2003 : R15,837.16** |
| | **Count 7** | **Fraud** | **Contravening Section 59 (1)(a) of Act 89 of 1991** | - | **2 January 2004 : R80,235.16** |
| | **Count 8** | **Fraud** | - | - | **1 March 2004 : R28,197.98** |

| | | | | | |
|---|---|---|---|---|---|
| Global Pact Trading 41 (Pty) Ltd | Count 9 | Fraud | Theft | Contravening Section 59 (1)(a) of Act 89 of 1991 | 24 January 2004: R50,083.07 |
| | Count 10 | Fraud | - | - | 1 March 2004 : R8,924.33 |
| | Count 11 | Fraud | Contravening Section 59 (1)(a) of Act 89 of 1991 | - | 1 April 2004 : R28,929.33 |
| Assagurl CC | Count 12 | Fraud | Theft | Contravening Section 59 (1)(a) of Act 89 of 1991 | 21 January 2003 : R75,600.00 |
| | Count 13 | Fraud | - | - | 14 November 2003 : R12,137.33 |
| Lekuzz CC | Count 14 | Fraud | Theft | Contravening Section 59 (1)(a) of Act 89 of 1991 | 12 May 2003 : R33,,852.20 |
| | Count 15 | Fraud | Theft | Contravening Section 59 (1)(a) of Act 89 of 1991 | 12 May 2003 : R39,726.22 |
| | Count 16 | Fraud | Theft | Contravening Section 59 (1)(a) of Act 89 of 1991 | 1 July 2003 : R27,000.11 |
| | Count 17 | Fraud | - | - | 5 September 2003 : R51,703.61 |
| | Count 18 | Fraud | - | - | 14 November 2003 : R14,788.14 |
| Bablemi CC | Count 19 | Fraud | - | - | 21 January 2003 : R3,561.40 |
| | Count 20 | Fraud | - | - | 21+ January 2003 : R20,958.21 |

[3] **ISSUES:**

(3.1) **The following issues were not / are not in dispute:**

3.1.1 That the frauds as listed in the charge sheet had in fact been committed and that SARS had suffered both actual and potential prejudice as a result of the frauds;

3.1.2 That the Appellant's identity number was 7602165033081;

3.1.3 That the **Appellant was connected** to Joubert and Vennote;

3.1.4 That the postal address was P. O. Box 2723 Nelspruit and the physical address was in fact No. 8 Dirkie Uys Street, Nelspruit being the addresses of the auditors/accountants Joubert & Vennote.

**(3.2) We had to decide the following issues which were in dispute:**

3.2.1 Whether a **nexus** had existed between the Appellant and the various charges levelled against him;

3.2.2 Whether the Respondent failed to prove that it was the Appellant who defrauded SARS;

[4] **AD: CONVICTION:**

**(4.1) General:**

4.1.1 The **gist** of the findings of the trial court is that the evidence presented, called for some response / explanation by the Appellant.

4.1.2 The Appellant submits that the trial court had misdirected itself in accepting the circumstantial evidence and drawing a negative inference as a result of the Appellant electing not to testify.

**(4.2) The law:**

4.2.1 It is trite law that a Court of appeal is not at liberty to depart from the trial Court's findings of fact and credibility, unless they are vitiated by irregularity, or

unless an examination of the record of evidence reveals that those findings are patently wrong.

4.2.2 Thus, a court of appeal will be hesitant to interfere with the factual findings and evaluation of the evidence by a trial court [see *R v Dhlumayo and Another* 1948 (2) SA 677 (A)], and will only interfere where the trial court materially misdirects itself insofar as its factual and credibility findings are concerned. In ***S v Francis* 1991 (1) SACR 198 (A) at 198*j*-199*a*** the approach of an appeal court to findings of fact by a trial court was crisply summarized as follows:

*"The powers of a* ***Court of appeal*** *to interfere with the findings of fact of a trial Court* ***are limited.*** *In the absence of any misdirection the trial Court's conclusion, including its acceptance of a witness' evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the Court of appeal on adequate grounds that the trial Court was wrong in accepting the witness' evidence - a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial*

*Court has of seeing, hearing and appraising a witness, it is only in* ***exceptional cases*** *that the Court of appeal will be entitled to interfere with a trial Court's evaluation of oral testimony"* (my emphasis). The Trial Court, after all, had the advantage of seeing and hearing the witnesses and its findings of fact and credibility are presumed to be correct.

4.2.3 It is important to keep in mind that **the evidence is not looked at in isolation.** In this regard the following extracts are to the point:

*"In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court* ***does not look at the evidence implicating the accused in isolation*** *in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true." – See: S v Van der Meyden 1999(1) SACR 447(W) at 448j (My emphasis) In* ***S v Hadebe and Others 1998 (1) SACR 422 (SCA) at***

***426e-h**, this Court, citing with approval from **Moshephi and Others v R (1980 - 84) LAC 57 at 59F-H**, held:*

> *'The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, **one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof**.* (My emphasis)

4.2.4 **As to a *prima facie* case which calls for an answer / explanation, the following can be referred to**: In regards to ***the evidentiary burden to adduce evidence in rebuttal*:**

*"(i) If one assumes that the testimony of the state witnesses is not patently unacceptable and that it does not give any indication that the accused had acted in self-defence – would have **dire consequences for the accused**. The court would have no evidence before it other than that of a violent attack on the deceased. The accused will, if one must use the language of a juridical semantic morass, **have failed to discharge the duty to adduce evidence** on the issue. Here it is*

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*appropriate to say that **prima facie** **proof has become proof positive**."*

***See: South African Law of Evidence, formerly Hoffmann and Zeffertt – Second Edition at p130***

(ii) *This meaning of "prima facie" was applicable to a crucial issue in **S v Boesak** [2000 (3) SA 381 SCA]. On appeal before the Supreme Court of Appeal, the state relied heavily on a letter that had allegedly been written by the accused. At his trial the **accused had elected to remain silent about the matter**. Although there was **no direct evidence** that the letter had been signed by the accused, or that he had authorised it, the court, in circumstances where the **accused's link with the letter** had neither been challenged in cross-examination nor **rebutted by evidence, concluded that it had been proved beyond a reasonable doubt that he was responsible for it.**"*

***See: South African Law of Evidence (supra) p131***

***Pertaining to the failure to rebut or explain:***

(i) *This may take the form of failure to give evidence, or the giving of false evidence, or failure to call witnesses or to produce a document or exhibit, or the late **disclosure of an explanation** or an alibi."*

***See: South African Law of Evidence (supra) at p130***

(iii) *The mere fact that the accused has been prosecuted, or shown to have behaved*

*suspiciously, does not make it necessary for him to elect to deny the charge under oath and his failure to testify cannot be treated as an independent item of evidence capable of curing a deficiency in the prosecution's case. Furthermore,* ***in considering what weight may be given to the accused's failure to explain, it is important to consider whether an explanation could reasonably have been expected****."*

***See: South African Law of Evidence (supra) at p130***

**(4.3)** ***Conclusion*:**

4.3.1 From the judgment of the Magistrate in the section 174 application and in the judgment as to conviction, it is clear that he carefully analyzed the evidence, carefully observed the witnesses and carefully applied the law.

4.3.2 The Magistrate makes it clear that he had found (in the **section 174 proceedings)** that the state made out a ***prima facie*** case which called for an answer and that he is still (at the close of the case for the defence) so convinced, but since the accused failed to testify, the ***prima facie*** case has now become **conclusive. In this regard the Magistrate cannot be faulted.**

4.3.3 I also agree with the Magistrate that it is clear from the record that the evidence for the prosecution and **exhibits presented are undisputed.**

4.3.4 It is also clear from the record that the **version of the accused (Appellant) was not put to the witnesses. (Thus, their versions were undisputed).**

4.3.5 The Magistrate (correctly to my mind) emphasises (with reference to the relevant law) that the **cumulative effect** of all the factors (motive, behaviour, etc.) must be taken into account and which confirmed the guilt of the Appellant who chose not to testify. **Consequently, having done so, the inference as to the guilt of the Appellant, is justifiable.**

4.3.6 It is clear that the way in which the Appellant prepared the reports etc., points to **careful planning** of a **scheme to defraud.**

4.3.7 It should be noted that the State entered into evidence various company founding documents in terms of

section 212(3) of the CPA as well as various bank statements in terms of section 236(1) and (2) of the CPA. **These documents were not disputed and have not been raised as an issue of contention on the grounds of Appeal noted by the Appellant.**

4.3.8 During argument **counsel on behalf of the Appellant also conceded** that the evidence presented by the Respondent (the State) **called for an answer** from the Appellant.

4.3.9 I am satisfied that the Respondent proved a **nexus** between the Appellant and the various charges leveled against him and that it was he who, through **careful planning,** defrauded SARS.

4.3.10 In view of the aforesaid, I am of the opinion that the respondent proved the charges against the Appellant beyond reasonable doubt and that the convictions are justified and should be confirmed.

[5] **AD: SENTENCE:**

**(5.1) General:**

5.1.1 As set out in paragraph (1.7) above, the Appellant was sentenced to 7 years imprisonment suspended for 5 years on condition that the Appellant not be convicted of fraud or theft during the period of suspension and that he repay the amount of R425 843,33 to the South African Revenue Services herein after SARS at the legislated per annum prime interest rate on or before 30 September 2010.

5.1.2 I have also referred to the fact that the Appellant applied for leave to appeal against his conviction only, but leave was granted as to his conviction and sentence. However, the aforesaid does not limit the power of the Court to interfere with sentence. In this regard **Du Toit *et al* in Commentary on the Criminal Procedure Act** says the following:

*"The power of a court of appeal to increase the sentence is not limited to appeals against a sentence which was imposed by the trial court.* ***The court of appeal may also interfere with the sentence where only the conviction was***

***appealed against*** *(S v F[1983(1) SA 747 (O)] 753 G-H)."*

(My emphasis)

5.1.3 *In casu* the Respondent asks for the sentence of the Appellant to be increased.

5.1.4 Although the Respondent followed the incorrect procedure, there was no prejudice to the Appellant and he in fact filed an affidavit why it should not be done.

5.1.5 Furthermore, counsel on behalf of the Appellant confirmed that there was no prejudice and that the necessary opportunity was granted to the Appellant to oppose and make submissions why the sentence should not be increased.

**(5.2) The Law**

5.2.1 It is trite law that a Court of appeal will not easily interfere with a sentence imposed by the Trial Court unless there was a miscarriage of justice or the sentence is shockingly inappropriate.

5.2.2 The theories and principles in this regard are well established – **see for instance PRINCIPLES OF CRIMINAL LAW (3rd edition)** by **Burchell and Milton at Chapter 4.**

5.2.3 However, if the sentence is contrary to the interest of justice, a court of appeal can and should interfere.

5.2.4 I am mindful of the well established principle which is *inter alia* clear from the headnote of ***S v Anderson 1964(3) SA 494 AD*** (Confirmed in ***S v Shaik and Others 2008(2) SA 208 CC).***

> ***"A Court of appeal will not alter a sentence, the determination whereof has been arrived at by the exercise of a discretionary power, merely because it would have exercised that discretion differently. There must be more than that.*** *Such Court, after careful consideration of all the relevant circumstances as to the nature of the offence committed and the person of the accused, will determine what it thinks the proper sentence ought to be, and if the difference*

*between that sentence and the sentence actually imposed is so great that the inference can be made that the trial court acted unreasonably, and therefore improperly, the Court of appeal will alter the sentence. If there is not that degree of difference the sentence will not be interfered with."*

(My emphasis)

5.2.5 Also in this regard, the following is stated by **Du Toit *et al*** at page 30-39.

***"INCREASE IN SENTENCE***

*In **S v Salzwedel & others [1999(2) SACR586(SCA)** the Supreme Court of Appeal increased a sentence where the trial judge had overestimated the personal circumstances of the accused and underestimated the gravity of an offence committed under the influence of racism **(S v Salzwedel & others supra on 591h-i).** Again in **S v Sadler 2000 (1) SACR 331 (SCA)** the Supreme Court of Appeal substituted a suspended sentence of imprisonment with one of direct imprisonment where, in the circumstances, a suspended **sentence of imprisonment was***

***held to be inappropriate and contrary to the interest of justice***. *In the case before the Supreme Court of Appeal the Respondent committed a so-called* ***'white-collar'*** *crimes.* ***The notion that white-collar crimes were non-violent and their perpetrators not 'true criminals' or 'prison material' because of their often respectable histories and backgrounds were rejected as empty generalisations. Corruption, forgery and uttering and fraud*** *were serious crimes with a corrosive impact on society. The fact that the respondent deliberately sidestepped the very controls he had been employed to devise and in so doing put his employer at risk for his own personal gain necessitated a sentence of* ***direct as opposed to suspended*** *imprisonment (335g – 336g).* *In* ***S v Mngoma 2009 (1) SACR 435 (E)*** *the sentence imposed by the trial judge was significantly increased because it displayed a fatal lack of proportionality. The sentence was inappropriately lenient..."*

4.2.7 There are various further authorities, but only a few are referred to, namely:

(a) ***S v EB 2010(2) SACR 524 (SCA)***;

(b) ***S v Oliver* 2010(2) SACR 178 (SCA)** the appellant had pleaded guilty to 6 counts of fraud and the trial court's sentence of 7 years' imprisonment of which 3 years were conditionally suspended, was confirmed on appeal;

(c) ***S v Sadler* 2000(1) SACR 331 (SCA)** the wholly suspended term of imprisonment coupled with a fine imposed by the trial court was replaced on appeal with a sentence of four years' imprisonment. In Sadler the appellant had received the benefit of R300 000 as a result of his crimes which is similar in relation to actual prejudice *in casu*. The court considered the qualitative aspects of sentence in relation to the imposition of a custodial versus a non-custodial sentence. **MARIAS JA at paragraphs 11 - 12** state as follows:

***"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.***"

(My emphasis)

**(5.3)** ***In casu***

5.3.1 I agree with the Respondent that the sentence imposed by the trial court *in casu* is excessively lenient.

5.3.2 The sentence imposed in effect boils down to the following:

*(a) The Appellant helped himself to a "loan" of almost R500 000,00 at prime interest rate;*

*(b) He does not have to go to prison, neither has he to pay a fine;*

*(c) He only has to repay the "loan" at prime interest rate;*

*(d) The only punishment is a "sword" of a possible term (if he does not repay the "loan") of 7 years imprisonment.*

5.3.3 Our society, where fraud and corruption are rife, expects harsher treatment in cases like the one *in casu.*

5.3.4 The Appellant was connected to a firm of auditors / accountants.

5.3.5 He himself is also an accountant, in a position of trust of whom society expects to behave a such.

5.3.6 The scheme organized by the Appellant took careful planning and execution. This scheme required active sourcing of persons able to contribute to setting up the scheme and the later execution and management by the Appellant was, but for the monitoring systems in SARS, quite impressive.

5.3.7 Not only did the Appellant have to supervise the generation and submission of false invoices and VAT returns, he also had to plan and execute the registration of the various companies using false information.

5.3.8 The offences of which he was charged with, display a single intent, to defraud the South African Revenue

Services but perpetrated on a **sustained a continuous basis**.

5.3.9 It does not seem clear that the trial Court did not give sufficient weight to the number of times the modus operandi was applied in achieving its goal of defrauding the SARS, nor did the trial Court take into account the evidence in aggravation.

**6. CONCLUSION:**

(6.1) In view of the applicable law and the factors referred to above, I am of the view that a custodial sentence is reasonable in the circumstances and that this Court should impose such sentence.

(6.2) In the premises, I would make the following order:

1. The convictions are confirmed;

2. The sentence imposed by the Magistrate is set aside and replaced by the following:

*"The accused is sentenced to 7 years imprisonment of which 4 years are suspended for five years on condition that during the period of suspension:*

*2.1 the Appellant is not convicted of fraud or theft; and*

*2.2 he repays the amount of R425,843.33 to the South African Revenue Services (hereinafter SARS) at the legislated per annum prime interest rate (calculated from the 14th March 2008) on or before 30 September 2014."*

GOODEY AJ

I agree

ZONDO J

**Date heard:** **12 September 2011**

**Date of Judgment:** 3/02/2012

**On behalf of the Appellant:**

ADVOCATE DE NECKER – NELSPRUIT

BARNARD-LOURENS ING.
P/A PIERRE KRYNAUW PROKUREUR
NEDBANK GEBOU
NO. 332, 3RD FLOOR
NO. 200 PRETORIUS STREET
PRETORIA
REF: MR KRYNAUW/WN/KB0422

**On behalf of the Respondent:**

ADVOCATE LA FRIESTER-SAMSON – PRETORIA

THE STATE ATTORNEY
PRETORIA