THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

No precedential significance
Case No: 145/2008

MARIUS CHRISTO PRETORIUS AND ANOTHER **Appellants**

and

THE STATE **Respondent**

Neutral citation: **Pretorius v The State** (271/2008)[2008] ZASCA 132 (26 November 2008)

Coram: LEWIS JA and LEACH and MHLANTLA AJJA

Heard: 12 November 2008
Delivered: 26 November 2008

Summary: **Appeal against sentences of five years' imprisonment for 91 counts of fraud: no material misdirection: sentences regarded as appropriate: appeal dismissed.**

ORDER

On appeal from the Free State High Court (Malherbe RP and Kruger J, Van Zyl J dissenting, sitting as a court of appeal)

The appeal is dismissed.

JUDGMENT

LEWIS JA (Leach and Mhlantla AJJA concurring)

[1] The appellants, two brothers, who pleaded guilty to 91 counts of fraud in a regional court (P J Visser presiding), appeal to this court against the sentences of five years' imprisonment imposed on each by the regional court. Their appeal to a full court (Free State) failed, and the appeal against their sentences is before us with the leave of the full court.

[2] The regional court also ordered the appellants to pay compensation in the sum of R208 309 to the complainant, Mutual and Federal Insurance Co, in terms of s 300 of the Criminal Procedure Act 51 of 1977.

[3] The appellants had established a business in Bethlehem, Free State, fitting windscreens on motor vehicles. Most of their business came from Mutual and Federal, which instructed them to fit new windscreens of a particular quality, on insured vehicles. Their fraud lay in fitting windscreens of inferior quality but claiming for the more expensive product – thus dishonestly making for themselves over a period of more than a year a profit of some R122 309. The appellants had admitted to their fraud, and agreed to repay the amount in question plus the sum of R86 000, being the cost of the investigation into their conduct by Mutual and Federal on discovering that lesser quality windscreens were being fitted by the appellants – hence the trial court's order that the appellants pay the sum of R208 309 to Mutual and Federal in terms of s 300.

[4] The argument of the appellants both before the full court and this court is that the sentence of five years' imprisonment each is startlingly inappropriate, particularly given the compensation order to which insufficient regard was had by the trial court. It was conceded that since an order made in terms of s 300 of the Act is not penal – it amounts to a civil judgment – the magistrate had not imposed 'double' punishment. The crux of the appellant's argument was, however, that the burden of paying this amount, and the fact that the appellants had agreed to pay it even before the order was made, had not been given sufficient weight as a mitigating factor when determining sentence.

[5] The appellants argued also that the trial court had not given sufficient consideration to the imposition of correctional supervision under s 276(1)(h) of the Act, which had been recommended by a correctional official in respect of them both. The interest of the public, and the deterrent message the court considered necessary to send to the community, had been emphasised too heavily at the expense of the individual interests of the appellants, it was argued.

[6] Counsel for the appellant could not, however, point to any material misdirection on the part of the learned regional magistrate in imposing sentence. It is trite that a court on appeal cannot substitute a sentence that it considers more appropriate unless the trial court has materially misdirected itself, or the sentence induces a sense of shock.[1]

[7] In my view the regional court's approach to sentencing was exemplary. The appellants had no legal representation at the trial. They pleaded guilty, as I have said, to all 91 charges. The court asked of its own accord for reports from a correctional official on the propriety of imposing correctional supervision as a sentence. The regional magistrate then considered the reports carefully – reminding himself of his duty to consider all suitable sentencing options – before deciding that only direct imprisonment was appropriate as a sentence for the appellants. He discussed thoroughly the various mitigating factors that operated in favour of both appellants: both were first offenders, at the time of trial in their early thirties. Both were the principal

[1] See, for example, *S v Sadler* 2000 (1) SACR 331 (SCA) para 8, and *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

breadwinners in their respective families and had young children. They had pleaded guilty and had shown remorse. They had undertaken to repay Mutual and Federal the moneys claimed fraudulently and had co-operated in the investigation. Their families would be disrupted and severely affected by their imprisonment. Their ability to repay Mutual and Federal would be limited, if not rendered impossible.

[8] But the court was bound to have regard to the factors that aggravated the appellants' conduct. They had planned to deceive Mutual and Federal and had gone about it systematically over a period of 16 months. There was nothing to suggest that they would have stopped doing so but for being discovered. Most importantly, they had not only deceived Mutual and Federal, but had endangered people whose vehicle windscreens were inferior and constituted a hazard – as a witness for Mutual and Federal testified. The regional court correctly considered this to be morally reprehensible.

[9] In the light of these factors it cannot be said that the sentences imposed were startling or induced a sense of shock. On the contrary. Moreover, they are consistent with sentences recently confirmed or imposed by this court for fraud. In *De Sousa v The State*,[2] for example, this court imposed a sentence of four years' imprisonment for fraud against an employer even though the appellant had been lured unwittingly, originally, into a

[2] (626/2007) [2008] ZASCA 93 (12 September 2008). See also *Lawrence v S* (unreported judgment case 357/04 delivered on 15 September 2005) where this court confirmed a sentence of four years' imprisonment for fraud against an employer, committed over a long period. However, the sentence was made subject to s 276(i) of the Criminal Procedure Act 51 of 1977, allowing the Commissioner of Correctional Services a discretion to place the person sentenced under correctional supervision. In addition, 18 months of the sentence was suspended.

scheme to defraud the complainant.[3] She had benefited from the fraud, and had spent some of her gain on 'lavish items'.[4] She too had pleaded guilty, repaid the sum by which she had benefited, and shown remorse. But this court considered that direct imprisonment was the only appropriate sentence, given the 'corrosive impact' of white collar crimes.[5]

[10] It seems to me that the conduct of the appellants in this case, in devising a scheme to defraud Mutual and Federal, and which had as a consequence endangering people in vehicles with inferior windscreens installed by them, is particularly reprehensible. Imprisonment for a period of five years is in my view an entirely appropriate sentence.

[11] Accordingly the appeal is dismissed.

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C H Lewis

Judge of Appeal

[3] The regional court had imposed a sentence of seven and a half years' imprisonment – but was bound by the provisions of the Criminal Law Amendment Act 105 of 1997, which requires (absent substantial and compelling circumstances) the imposition of a minimum sentence of 15 years' imprisonment where the fraud involves an amount in excess of R500 000. This court reduced the sentence having regard to the substantial and compelling circumstances it considered required the imposition of a lesser sentence. The amount involved in *Da* Sousa was some R1m.

[4] Para 10. The extent of her personal gain was R90 000.

[5] Para 11.

Appearances:

For the Appellants:	N Snellenburg
Instructed by:	Du Plessis Bosch & Meyerwitz Bethlehem
	Honey Attorneys Bloemfontein
For the Respondent:	S Giorgi
Instructed by:	Director of Public Prosecutions Bloemfontein