THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 564/11
Not reportable

In the matter between:

SUSANNA MAGDALENA PIENAAR **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Pienaar v S* (564/11) [2012] ZASCA 60 (2 April 2012)

Coram: **MTHIYANE DP, CLOETE, MHLANTLA, LEACH JJA and NDITA AJA**

Heard: **15 February 2012**

Delivered: **2 April 2012**

Summary: Sentence – fraud – lengthy custodial sentence imposed disturbingly inappropriate – misdirection – sentence reduced from five years to four months imprisonment.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Legodi J, Jooste AJ sitting as court of appeal):

1. The appeal against sentence succeeds.
2. The order of the court below is set aside and the following order is substituted:
   a) The appeal against sentence succeeds to the extent set out below.
   b) The sentence imposed by the magistrate is altered to read
   'four months' imprisonment on all counts taken together for the purposes of sentence.'
   c) In terms of s 282 of the Criminal Procedure Act, the sentence is antedated to 6 September 2006, being the date on which the magistrate imposed sentence.

JUDGMENT

CLOETE JA and NDITA AJA (MTHIYANE, MHLANTLA and LEACH JJA concurring)

[1] This appeal is against sentence only. The appellant pleaded guilty and was convicted of 42 counts of fraud by the Benoni regional court. She was sentenced as follows: counts 1 to 20, six months imprisonment on each count, and the sentences in count 11 to 20 were ordered to run concurrently with the sentences in counts 1 to 10; counts 21 to 42, one month imprisonment in respect of each count wholly suspended for a period of five years on certain conditions. Effectively the appellant was to serve a total of five years imprisonment. On appeal to the high court (Legodi J, Jooste AJ concurring), the appeal was dismissed. The appeal is before us with the leave of the court below.

[2] The crisp issue before us is whether in the circumstances of this case

the trial court misdirected itself in imposing a lengthy custodial sentence on a first offender who had pleaded guilty to fraud involving actual loss in the amount of R2900.

[3] The plea explanation given by the appellant and accepted by the State was to the following effect: The appellant was employed by Atlas Finance, a business that lends money to the public, as the manager of its Benoni branch. By virtue of this position, the appellant became fully conversant with the procedures for the granting of loans and recovery of money. During the aforementioned period of employment, the appellant uplifted names of the company's existing clients from the database and issued 42 fictitious loan accounts amounting to R115 000 against such clients. Subsequent to the creation of the loans, the appellant made entries in the computer system reflecting fictitious repayments by the clients in whose names the loans were recorded. No amounts of money left Atlas Finance and no amounts were repaid to it. The purpose of this exercise was to misrepresent to Atlas Finance that the appellant had reached her collection target for a given month so that she would be paid an incentive bonus. A sum total of R2900 was, as a result of the fraudulent conduct alluded to, paid out to the appellant. The actual prejudice suffered by the company is therefore limited to that amount.

[4] The State, in aggravation of sentence led the evidence of Mr Timothy Ray of Atlas Finance. Mr Ray gave a detailed account of the appellant's modus operandi in simulating the transactions referred to in the charge sheet. Significantly, the witness testified that the company suffered loss in the estimated amount of R110 000 as he alleged it had actually paid out the moneys for the fictitious loans. The magistrate sought clarity on this point and posed the following question:

"The accused, Ms Pienaar has pleaded guilty to 42 counts and let me basically tell you what she pleaded guilty to. Firstly that she in fact engage in a fictional transactions with existing clients, but her plea states that there were no monies that left nor came into the business. In other words once cheque vouchers were issued, this was then faxed to head office that no monies then left, that is how it balanced out, no monies left, payments came in. Payments in the sense of fictitious or fictitious

receipts were brought into the business. According to the plea she accepts that the clients had been prejudice because they were in all probability handed over sitting with judgments. And that she prejudiced Atlas Finance in so far as an amount of R 2900. 00 because that is what she would have collected in the period March 2003 to October 2004 as being the incentive bonus that she would have received. Now I hear from you that that is actually not the case as far as you are concerned monies did leave. --- Yes."

Mr Ray, in his evidence, mentioned that further investigations of each of the loans revealed that loss estimated at R300 000 was attributable to the appellant's modus operandi. In order to avoid detection of the fraud, the appellant, according to Mr Ray, changed the addresses of the purported loan applicants in the database. The effect of such alterations was that when the emoluments attachment orders were issued by the court, they were made out to the wrong companies. In addition, the appellant would endorse on the warrants of execution that they should not be sent to the sheriff ('NTS') as the debtors were untraceable.

[5] The aggravating evidence of Mr Ray referred to in the preceding paragraphs was contrary to the express terms of the appellant's plea and should not have been admitted: cf *S v Legoa* 2003 (1) SACR 13 (SCA) paras 26 and 27.

[6] There are several misdirections that appear from the judgment of the trial court on sentence. First, it relied on the evidence of Mr Ray that the appellant utilised her knowledge and authority as a manager when she endorsed on execution warrants the acronym NTS, signifying that such should not be sent to the sheriff as the debtors were untraceable. Secondly, the prejudice suffered by the persons in whose names the loans were created in the form of listing in credit bureaus, is pure conjecture as no such evidence was tendered during the proceedings. In the same vein, the State did not tender any evidence to the effect that were it not for the appellant's persistent and fraudulent cover, the criminal act may have been detected and halted much earlier. Again, this is speculation. Thirdly, there is not a shred of evidence that the appellant forged the signatures of the purported applicants'

as stated in the judgment of the trial court. It is furthermore disturbing that the trial court further speculated that 'it may happen' that the appellant experimented with ways and means in order to avoid detection, and when it appeared that her scheme was not uncovered, she continued with it. Similarly, no admissible evidence was led with regards to the negative impact of the fraud on the complainant's business. In the result the following statement by the magistrate constitutes a gross misdirection:

'Such conduct would have spread within the community with vulpine affidity [sic] this invariably creates mistrust from the part of society towards Atlas Finance thereby affecting the continuance and prosperity of his business. Human nature is such that society will distrust this business and steer away from it although the perpetrator have been brought to book.'

In fact the judgment on sentence is replete with speculative utterances ranging from the manner in which the offence was committed to its impact on the complainant and community.

[7] It is therefore quite extraordinary that the high court concluded that:

'The trial court in its judgment fully justified regarding jail term as against any form of sentence. As I said the judgment is well motivated and I can find no basis for interference based on misdirection.'

[8] Counsel for the appellant, in a nutshell, contended that the sentence was disturbingly inappropriate and shocking when regard is had to all the circumstances in this case. Counsel for the State had correctly conceded when the appeal was heard before the high court that the sentence proceedings were vitiated by irregularities and that the sentence was disturbingly inappropriate and ought to be set aside. This concession was brushed aside by the court below, which said (after the passage quoted in para 7 above):

'Whilst on this point, counsel for the respondent felt that the jail term of five years was according to her sense of justice shocking. She however could not specifically state the grounds which render the sentence shocking.'

[9] The trial court, in our view, over-emphasized the seriousness of the offence. Although it was entitled to take notice of the prevalence and increase of white-collar crime and have regard to it when imposing sentence, we agree

that the sentence imposed by it is disturbingly inappropriate and unbalanced. Whilst the offences committed by the appellant involve dishonesty, it should be borne in mind that the loss to which she pleaded guilty is R2900 the total of the amounts she received as performance bonuses.

[10] The magistrate in justifying the imposition of a lengthy term of imprisonment referred to *S v Blank* 1995 (1) SACR 62 SCA, wherein this court confirmed a sentence of eight years' direct imprisonment in respect of a conviction for 48 counts of fraud. Whilst it must be acknowledged that a succession of punishments imposed for a particular type of crime is a useful guide to a court dealing with such a crime, each case should dealt upon its own facts.[1] The reliance on the *Blank* case is clearly misguided as there are substantial differences between the present case and the facts of the former. In the *Blank* matter the amount involved was R9,75 million and the stockbroking fraud scheme was on a very large scale.

[11] We now consider what sentence would be appropriate in this case. The appellant was at the time of sentence on 15 August 2006, 45 years old. She is a first offender. The appellant has three major children, two of whom are self-supporting. One of the major children is staying with her and suffers from a medical condition known as biolapsy, which renders him/her aggressive and in need of constant attention. However, despite the medical challenge, the child is employed by a dentist on a part-time basis. After leaving Atlas Finance, the appellant found employment at Platinum Document Solution as a sales executive. She is engaged to be married and lives with her fiancé.

[12] On the other hand, there are aggravating factors. The frauds were committed by the appellant against her employer, and she was a senior employee in a position of trust. The frauds were also committed over a period of some eighteen months. The appellant expressed no remorse and there has been no offer to repay her employer.

[13] Taking all the relevant factors into account, we would have imposed a

1 R v Karg 1961 (1) SA 231 (A) at 236G-H

non-custodial sentence on the appellant. The appellant had, throughout the proceedings until conviction, been on bail. Her bail was revoked after conviction on 15 August 2006. She was sentenced on 6 September 2006. In an appeal to the high court, bail was granted on 19 January 2007. All in all, she has been in custody for five months and approximately two weeks. We are of the view that the sentence this court should impose on the appellant should not be more than the period she has already been in custody. In terms of s 282 of Criminal Procedure Act, a sentence of imprisonment substituted on appeal can only be backdated to the date on which the sentence was originally imposed. That means to avoid the appellant having to return to jail, the sentence should be altered to one of four months' imprisonment. We again emphasize that but for the fact that the appellant has already served that sentence, we would have substituted it with a non-custodial sentence.

[14] In the result, the following order is made:

1. The appeal against sentence succeeds.
2. The order of the court below is set aside and the following order is substituted:
   a) The appeal against sentence succeeds to the extent set out below.
   b) The sentence imposed by the magistrate is altered to read
      'four months imprisonment on all counts taken together for the purposes of sentence.'
   c) In terms of s 282 of the Criminal Procedure Act, the sentence is antedated to 6 September 2006, being the date that the magistrate imposed sentence.

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T D C CLOETE
JUDGE OF APPEAL

_____
T NDITA
ACTING JUDGE OF APPEAL

APPEARANCES:

FOR APPELLANT:	H L Alberts
Instructed by:	Justice Centre, Pretoria;
	Justice Centre, Bloemfontein.
FOR RESPONDENT:	E O Mnguni
Instructed by:	Director of Public Prosecutions, Pretoria;
	Director of Public Prosecutions, Bloemfontein.