REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case number: A/620/10

Division: 7th Division

Date: 12 August 2011

In the matter between:

BONGIWE NINIZA VICTORIA JAGNE Appellant

and

THE STATE Respondent

JUDGMENT: 8 SEPTEMBER 2011

Schippers AJ:

[1] This is an appeal against sentence. The appellant, a clinical psychologist, was charged in Bellville Magistrate's Court with five counts of fraud. The State alleged that she misrepresented to the complainant, a director of Capcon Finance (Pty) Ltd (*"Capcon"*), an entity which provides bridging finance to persons and companies, that she would be receiving funds from the United Kingdom (UK) pursuant to a sale

of property which she owned there, and defrauded Capcon out of R720 000. The appellant pleaded not guilty to all the charges. She was convicted on all five counts of fraud, which were taken together for the purpose of sentence. She was sentenced to eight years' imprisonment of which three years were suspended for five years on condition that she is not again convicted of fraud or theft committed during the period of suspension.

[2] The appellant sought leave to appeal against both the conviction and sentence. Leave to appeal against sentence only, was granted. She was released on bail pending finalisation of the appeal.

[3] The grounds of appeal are that the court erred in not granting the appellant an opportunity to place a correctional supervision report in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 (*"the Act"*) before it; that it failed to adequately consider alternative sentence options other than direct imprisonment; that it over-emphasised the seriousness of the offence and the interests of the community and did not attach sufficient weight to the appellant's personal circumstances; and that it imposed a sentence which induces a sense of shock.

[4] It is settled law that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial court. In the exercise of this function, the trial court has a wide discretion in deciding which factors it should in its opinion allow to influence it

in determining an appropriate sentence.[1] A court of appeal can interfere only where that discretion was not exercised properly or judicially.[2]

[5] The essential enquiry in an appeal against sentence 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 entitle a court of appeal to interfere with a sentence: it must be of such a nature, degree or seriousness that it shows that the trial court did not exercise its discretion at all or exercised it improperly or unreasonably.[3] This approach has been affirmed by the Constitutional Court.[4]

[6] I turn now to consider the first ground of appeal, namely whether the Magistrate erred in failing to have regard to correctional supervision. Pursuant to the conviction the defence requested a postponement of the case to obtain a correctional supervision report. The Magistrate indicated that he would have to be convinced that the report was appropriate in the circumstances. The accused then gave evidence in mitigation of sentence. Thereafter the Magistrate refused the application for a postponement to obtain a correctional supervision report. The complainant's evidence was then presented after which the Magistrate imposed sentence.

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1 *S v Fazzie and Others* 1964 (4) SA 673 (A) at 684A-C; *S v Rabie* 1975 (4) SA 855 (A) at 857D-F; *S v Pillay* 1977 (4) SA 531(A) at 534H - 535D.

2 *S v Pillay* n 1 at 535E-G; *S v Peters* 1987 (3) SA 717 (A) at 727F-H and 728B-C; *S v Blank* 1995 (1) SACR 62 (A) at 65h; *S v Matlala* 2003 (1) SACR 80 (SCA) at 83e.

3 *S v Pillay* n 1 at 535F.

4 *S v Shaik and Others* 2008 (2) SA 208 (CC) para 72.

[7] In my view, this was not a misdirection for two reasons.

[7.1] First, correctional supervision under section 276(1)(h) of the Act can be imposed only for a fixed period of not more than three years;[5] and it cannot be said that a custodial sentence in excess of three years is inappropriate in the circumstances of this case. There is precedent for the imposition of a custodial sentence on a first offender for fraud. In *Sinden*,[6] the appellant, a 26 year old married woman with two young children and a first offender, pleaded guilty to and was convicted of 43 counts of fraud involving R138 000. After considering a correctional supervision report, she was sentenced by a regional magistrate to six years' imprisonment, of which two were conditionally suspended for four years. The Appellate Division confirmed the sentence, holding that the magistrate could not be faulted in finding that the interests of society outweighed the accused's personal circumstances because of the seriousness of the offence.[7] Likewise, in *De Sousa*,[8] the Supreme Court of Appeal (SCA) imposed a sentence of 4½ years' imprisonment on a first offender on 13 counts of fraud involving some R1 million, in circumstances where the appellant had shown remorse and repaid in full the benefit she received under the fraudulent scheme.[9]

[7.2] Secondly, the sentence imposed reflects a balanced approach to the factors which the Magistrate was required to take into account in the imposition of

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5 Section 276A(1)(b) of the Act.
6 *S v Sinden* 1995 (2) SACR 704 (A).
7 *Sinden* n 6 at 708a-709a.
8 *De Sousa v The State* [2009] 1 All SA 26 (SCA).
9 *De Sousa* n 8 paras 7 and 13.

sentence, namely the seriousness of the crimes, the interests of society and the appellant's personal circumstances.[10]

[8] As regards the nature and seriousness of the crimes, the Magistrate, rightly in my view, found that fraud is a serious crime which is highly prevalent in our society; and that the crimes were not committed on impulse, but calculated and well-planned. The appellant carefully devised a scheme in terms of which she fraudulently induced Capcon to advance her a total sum of R720 000. On 5 February 2008 she signed a cession of the proceeds of the sale of property in Constantia, which she was going to renovate and sell, in favour of Capcon. As consideration for the cession, the appellant received R200 000 on signature thereof. The deed of cession records that upon receipt of the proceeds of the sale of the Constantia property, Capcon would pay the appellant the proceeds of the sale, less the sum of R200 000 and certain other amounts. The deed also states that it was subject to proof of funds of R900 000 to be received from the UK.

[9] The appellant never provided Capcon with proof that the funds would be received from the UK. She knew that this was a deception at the time of signing the deed of cession. In furtherance of the deception, she forged a letter, purportedly drafted by Ferguson Bricknell, solicitors in Oxford in the UK, and forwarded it to the complainant. In evidence the appellant conceded that the letter is a forgery. The letter, addressed to the appellant, has a completion statement attached, purportedly showing that the appellant is entitled to the proceeds of the sale of a property in

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10 *S v Holder* 1979 (2) SA 17 (A) at 75A.

Oxford in the sum of about £90 000. As a result of the deception Capcon advanced R200 000 to the appellant.

[10] The appellant also admitted during her evidence that she had forged another letter dated 4 April 2008, purportedly sent by Ferguson Bricknell. This letter ostensibly encloses a revised completion statement and states that the attorneys have arranged for their bankers to transfer some £90 000 into the appellant's account at Investec Bank. On the strength of this letter, Capcon advanced a further sum of R250 000 to the appellant. Mr. C. M. Wallworth, a partner of Ferguson Bricknell, testified that the letters, supposedly emanating from that firm, were indeed forgeries.

[11] As to the interests of society, the Magistrate held that fraud is highly prevalent and that the appellant did not commit the crimes on impulse. She had falsified more than one document and the fact that she was a professional was an aggravating factor. In addition, she forced the State to present the evidence of Mr. Wallworth, who had to travel from London to testify (these expenses were paid by the complainant), despite the fact that the appellant throughout knew that the letters were fake and that she had crafted them. Even then, she was not frank in admitting that the forgery was to obtain further funds. Instead, she testified that she forged a letter because she wanted the complainant, as she put it, *"to be comfortable"* and *"to give him assurance"* regarding her business dealings with him. The appellant did not commit the crimes out of need. She earned a substantial income – R45 000 per month. Her husband's income is R38 000 per month. Despite this, she somehow obtained legal aid.

[12] Moreover, the amount involved is substantial and was not repaid to the complainant. The Magistrate considered that the objectives of punishment and deterrence had to take precedence. In this regard, he referred to *Sadler*,[11] in which the SCA held that the notion that prison is reserved for those who commit crimes of violence and that it is not a place for people with respectable backgrounds even if their dishonesty caused substantial loss, is groundless. This dictum, the Magistrate found, was particularly apposite because it was a recurrent theme throughout the trial that the appellant is not a criminal in the true sense of the word and therefore should not be committed to prison. The Magistrate concluded that imprisonment was the only appropriate sentence. This finding cannot be faulted. Recently, the SCA has reiterated that there is a need to impose appropriate sentences with a deterrent effect, particularly in the case of fraud which is endemic in our society.[12]

[13] The record also shows that the Magistrate had proper regard to the appellant's personal circumstances. More specifically, she was a first offender, married with three children aged 27, 19 and 18 respectively, of whom the eldest is self-supporting and the remaining two at university in the UK; and she had offered to repay the complainant at the rate of R20 000 per month.

[14] It follows that the remaining grounds of appeal cannot be sustained. To return to the central enquiry - whether the trial court could reasonably have imposed the sentence that it did. I am unable to say that the sentence imposed is shocking or disturbingly inappropriate, nor that it is unreasonable.

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11 *S v Sadler* 2000 (1) SACR 331 (SCA) paras 11 and 12.

12 *Engelbrecht v The State* (446/10) [2011] ZASCA 068 (17 May 2011); 2011 JDR 0490 (SCA) para 31.

[15] I would make the following order:

"The appeal is dismissed."

SCHIPPERS AJ

I agree. It is so ordered.

BINNS-WARD J