SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 20616/2014

Not Reportable

In the matter between:

JOHANNA ANDRIETTE GRUNDLING **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Grundling v The State* (20616/14) [2015] ZASCA 129 (28 September 2015).

Coram: Cachalia, Majiedt et Pillay JJA

Heard: 02 September 2015

Delivered: 28 September 2015

Summary: Sentence - imposition of - factors to be taken into account- importance of pre-sentencing report - 30 counts of contravention of s 59(1)*(a)* of Value-Added Tax Act 89 of 1991 - eight years' imprisonment imposed by the court below set aside and replaced with a three year prison sentence in terms of s 276(1)*(i)* of Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: Gauteng Division, Pretoria (Maumela J et Pillay AJ sitting as court of appeal)

1 The appeal is upheld and the order of the court below is set aside and replaced with the following:

'1 The appeal is upheld.

2 The sentence of the regional court is set aside and replaced with the following:

"The accused is sentenced to three years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 from which she may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board."'

JUDGMENT

Pillay JA (Cachalia and Majiedt JJA concurring)

[1] The appellant, Ms Johanna Andriette Grundling was charged in the Regional Magistrates Court, Pretoria, with 30 counts of fraud, alternatively 30 counts of theft of money and a second alternative of 30 counts of contravening s 59(1)(*a)* of the Value-Added Tax Act 89 of 1991 (VAT Act) involving an amount of R33 671375. She pleaded guilty to the second alternative and was sentenced to an effective period 10 years' imprisonment, the State having decided not to pursue the main counts of fraud and the first alternative counts of theft. She appealed to the Gauteng Division of the High Court, Pretoria against the sentence. The appeal was partially successful and the sentence was reduced to 8 years' imprisonment. With the leave of that court, she now comes on appeal to this court.

[2] The appellant and her late husband, Mr Johannes Lodewikus Grundling, were the

only members of ASERA Landbouprodukte CC and Africa South Earth Research Agricultural CC, which were registered Value Added Tax (VAT) vendors. In March 2010, they were arrested for submitting false VAT returns between April 2006 and July 2008. During the arrest, her husband shot and killed himself.

[3] Section 59(1)*(a)* of the VAT Act reads as follows:

'59. Offences and penalties in regard to tax evasion

(1) Any person who with intent to evade the payment of tax levied under this Act or to obtain any refund of tax under this Act to which such person is not entitled or with intent to assist any other person to evade the payment of tax payable by such other person under this Act or to obtain any refund of tax under this Act to which such other person is not entitled –

(a) makes or causes or allows to be made any false statement or entry in any return rendered in terms of this Act, or signs any statement or return so rendered without reasonable grounds for believing the same to be true; or

. . .

Shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 60 months.'

[4] A brief synopsis of her written plea in terms of s 112 of the Criminal Procedure Act 51 of 1977 (CPA), which brought her conduct within the provisions of s 59(1)*(a)* of the Act is the following:

During the period July 2006 to July 2008, the appellant and her husband were the only members of the two close corporations. He was responsible for all the operational activities while she helped with the administration of the business. During this period monthly VAT returns (VAT 201 forms) were completed by her late husband and he passed them on to her together with invoices and information for her to sign. She did so, even though she foresaw the possibility that the invoices and information were based on false figures, and had no reasonable grounds for believing such entries to be true. This rendered the VAT returns false as well. She nonetheless intentionally signed the returns after her husband had falsified the contents of the returns so that they would obtain refunds to which they were not entitled.

[5] The State accepted the plea whereupon the appellant was duly convicted. No previous convictions were proved against her. After convicting the appellant, the magistrate granted an order for her assets, to the value of R8 287 863 to be attached by the Asset Forfeiture Unit. The trial was then postponed for the purpose of obtaining a pre-sentencing report, and the attachment order duly executed.

[6] When the trial resumed, a pre-sentencing report by Dr Eon Frederik Sonnekus, a forensic criminologist, and a correctional supervision report in terms of s 276(1) of the CPA were handed in by the appellant's representative. The latter report was handed in without objection, but the report by Dr Sonnekus was not accepted by the State and this resulted in Dr Sonnekus testifying and being subjected to lengthy cross-examination.

[7] The report and evidence of Dr Sonnekus throws considerable light on the appellant's personality as well as the circumstances under which the offences were committed. It transpired that:

(a) The 65 year old former teacher was a first offender, and capable of rehabilitation;

(b) She married at the age of 23 and over the next 35 years became a submissive and obedient wife of a dominating and aggressive husband: this was his explanation for why she carried out her husband's wishes in merely signing the false documents;

(c) She had been a good person until the commission of these offences and had an untainted professional career;

(d) She showed remorse by pleading guilty and genuinely appeared to have the intention of not wanting to be in this situation (of transgressing the law) again.

[8] Dr Sonnekus concluded that she would benefit immensely from a program of rehabilitation. He recommended that the court consider a non-custodial sentence as punishment.

[9] The correctional services report confirmed that the appellant was regarded as a suitable candidate for a sentence of correctional supervision in terms of s 276(1)*(h)* of the CPA. The correctional officer who did the assessment recommended that in imposing such a sentence on the appellant, she should be exempted from house arrest and community service.

[10] That concluded the evidence that was led on behalf of the appellant. For its part, the State submitted, by consent, an affidavit deposed to Ms Mantwese Fay Smith who is a criminal investigator in the employ of SARS. She stated that she had investigated these offences. She found that these offences were committed over a period of two years. She explained that as a result of third party cross-referencing she discovered that the invoices relied upon by the late Mr Grundling and the appellant, in order to obtain refunds were fictitious and related to non-existent transactions. Furthermore, in certain respects the false information contained therein were in respect of items not offered by suppliers during that period. On a number of occasions, the only amounts paid into the bank accounts of the closed corporations were the VAT refunds. She further explained that of the R33 371 375 claimed as refunds, R27 068 197 was in fact paid to the appellant and her husband. However the claims for the balance amounting to R6 603 177,49 were withheld since by then, the scheme had been uncovered.

[11] The magistrate, in exercising his discretion in respect of sentence, took into account that the appellant was 65 years old, pleaded guilty and that she was a first offender. However, he appears to have attached no weight to the pre-sentencing report of Dr Sonnekus. While he said he took into consideration what Dr Sonnekus had said in his evidence, he did not specifically discuss any aspect thereof. Nor did he consider the correctional services report and recommendations. He made no mention of it.

[12] However, he had regard to a number of decisions in which sentences of direct imprisonment were imposed for theft of money and for fraud respectively. He also took all the counts together for purposes of sentence, and proceeded to impose a

period of ten years' imprisonment, which in my view was shockingly inappropriate given the mitigating circumstances alluded to by Dr Sonnekus and the fact that the statutory prescribed maximum sentence is only 60 months for a contravention of s 59(1)*(a)* of the Act. These, in my view, constitute misdirections of sufficient weight to justify interference on appeal.

[13] On appeal, the court below considered the effective period of ten years' imprisonment too harsh and sentenced the appellant to 48 months' imprisonment on each count before ordering counts 3 to 30 to run concurrently with the sentences imposed on counts 1 and 2, resulting in an effective 8 year term of imprisonment. The court below also seems to have disregarded the pre-sentencing report as well as the correctional services report. In my view, the effective sentence of 8 years' imprisonment was a mere minor adjustment of the punishment imposed by the magistrate. The court below did not accord sufficient weight to the appellant's mitigating circumstances and the sentence it imposed was shockingly out of kilter with the nature of the offences.

[14] Before us, it was contended on behalf of the appellant, that a term of imprisonment for a person who is currently 68 years old and a first offender is too harsh. It was submitted that the magistrate and the court below did not place sufficient weight on the pre-sentencing report. It was further submitted that she was a productive member of society, being a former teacher until her late husband persuaded her to resign and join his business. It was thus argued that a non-custodial sentence would be appropriate in the circumstances, specifically a sentence in terms of s 276(1)*(h)* of the CPA.

[15] Counsel for the State, supported the sentence imposed by the court below. She pointed out that much of the money that was lost through the scheme was not recovered by the fiscus and that the appellant had not disclosed what had happened to it or where the missing money was. She further argued that the appellant benefitted substantially from their scheme and this was borne out by paragraph 7 of her written plea which reads as follows:

'Ek erken dus dat ek die BTW 201 A opgawes vir die tydperk soos vermeld in kolom 1 van

Aanhangsel A en te Pretoria in die streekafdeling Gauteng, geteken het sonder dat ek redelike gronde gehad het om te glo dat die inhoud daarvan waar is, ten einde terugbelating van belasting ingevolge Wet 89 van 1991 te verkry, waarop ek en Johannes Lodewikus Grundling nie op geregtig was nie.'

She contended that all this constituted aggravating circumstances which justified the sentence imposed by the court below.

[16] Whilst it can be accepted that the appellant benefitted with her late husband from claiming VAT refunds to which they were not entitled, it does not necessarily follow that she benefitted equally. There is simply no evidence to indicate to what extent she benefitted personally nor does paragraph 7 of her plea clarify that aspect. In regard to the submission that the appellant has not disclosed what had happened to the unaccounted money, I accept that her failure to take the court into her confidence is an aggravating factor that must have a bearing on the sentence that must be imposed.

[17] There is however no evidence that she had concealed assets that may have been acquired with the VAT funds. The assets of her estate, derived from the common estate, have been attached. She has been left with almost nothing and earns a living by selling pickles and jars of jam. The profits derived from these sales supplement her pension of R5 000 per month. She is therefore not likely to be in a position to commit these offences again and as she said, she has no intention to do so.

[18] This does not mean that a wholly non-custodial sentence is appropriate. The imposition of an appropriate sentence, should be approached with a 'humane and compassionate understanding for human frailties and the pressure' that contributed to the commission of the crimes.[1] The offender's moral blameworthiness is a factor that must also be considered. In considering her actual role in the commission of the offences and the circumstances in which she did so, she should not be made to bear the brunt of the punishment in the absence of the primary perpetrator. There is certainly no justification to do so in this case. It

[1] *S v Rabie* 1975 (4) SA 855 A at 866 B-C; [1975] 4 ALL SA 723 (A).

is probable that she would not have committed these offences but for the pressures which was brought to bear on her to do so by her late husband. On the other hand she nonetheless played a crucial role in the commission of these crimes through which the fiscus suffered a huge loss.

[19] The court in *S v R*[2] alluded to the fact that by introducing the sentencing option of correctional supervision, the legislature clearly distinguished between two types of offenders, those who ought to be removed from society by means of imprisonment and those who should not, but should nonetheless be punished. (*S v D*[3] *and S v Ingram*[4]; *S v Samuels* [5] and *S v Grobler* [6]. This does not mean that even if an accused is regarded as a suitable candidate for correctional supervision, a non-custodial sentence must be imposed. As pointed out by Nienaber JA in *S v Lister*[7] 'to focus on the well-being of the accused at the expense of the other aims of sentencing and the interests of the community was to distort the process and to produce, in all likelihood, a warped sentence.'[8]

[20] It is clear that the appellant does not fall into the category of offenders who are a danger to the community and she is not in a position to pose a threat to society. It also seems she is not in a position to pay a suitable fine. I do not think that this is an instance where a sentence of long term direct imprisonment is justified. At the same time though, the sentence should also reflect an appropriate measure of rebuke for her conduct.

[21] In considering all the factors mentioned above, to impose a non-custodial sentence would in my view dilute the seriousness of the offences and indeed disregard the impact of the actual loss of R 18 780 334 to the fiscus.[9] A sterner sentence other than a completely non-custodial sentence is called for and this

[2] S v R 1993 (1) SA 476 (A) at 488G; [1993] 1 ALL SA 326 (A).
[3] S v D 1995 (1) SACR 259 (A) at 266 c-d; [1995] 3 ALL SA 373 (C).
[4] *S v Ingram* 1995 (1) SACR 1(A) at 9e; [1995] 3 ALL SA 121 (A).
[5] *S v Samuels* 2011 (1) SACR 9 (SCA);(262/03) [2010] ZASCA 113.
[6] *S v Grobler* 2015 (2) SACR 210 (SCA); (433/13) [2014] ZASCA 147 at para 6.
[7] *S v Lister* 1993 (2) SACR 228 (A); [1993] 4 ALL SA 669 (A).
[8] At 232 g-h.
[9] The R33 671 375 less R6 603 177,49 in respect of unpaid claims and less a further less R8 287 863.

would reflect the seriousness of the crimes committed. In the circumstances I would propose a sentence of 3 years' imprisonment in terms of s 276(1)*(i)* so that while the mitigating factors have been taken into account the other objectives of sentence are indeed also reflected.

[22] In the result the following order is made:

1 The appeal is upheld and the order of the court below is set aside and replaced with the following:

'1 The appeal is upheld.

2 The sentence of the regional court is set aside and replaced with the following:

"The accused is sentenced to three years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 from which she may be placed under correctional supervision in the discretion of the Commissioner of Correctional Services or a parole board."'

R PILLAY

JUDGE OF APPEAL

Appearances:

For Appellant:	H F Klein
	Instructed by:
	Rianie Strijdom Attorneys, Pretoria
	Symington & De Kok Attorneys , Bloemfontein
For Respondent:	C Wolmarans
	Instructed by:
	The Director of Public Prosecutions, Pretoria
	The Director of Public Prosecutions, Bloemfontein