THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 743/13

In the matter between:

ETHRESIA MARGARETHA PIATER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Piater v S* (743/13) [2014] ZASCA 134 (25 September 2014)

Coram: Shongwe, Theron and Zondi JJA

Heard: **12 September 2014**

Delivered: **25 September 2014**

Summary: Criminal Procedure – appeal against sentence of 4 years' imprisonment on 22 counts of fraud – 7 counts of forgery and uttering and one of theft – approach on appeal – sufficient information must be placed before court regarding the accused person – the circumstances of the offence – failure to testify by accused in mitigation – statement from the bar may be accepted – failure to place sufficient evidence before court cannot in turn benefit the accused person – no material misdirection found – appeal dismissed.

ORDER

On appeal from: The North Gauteng High Court (Pretoria) (Makgoka J, Bosman AJ, sitting as court of appeal):

The appeal is dismissed.

JUDGMENT

Shongwe JA (Theron and Zondi JJA concurring)

[1] This appeal is against sentence only. On 28 September 2009, and pursuant to a plea of guilty, the appellant was convicted of 22 counts of fraud, 7 counts of forgery and uttering and one count of theft in the regional court, Heidelberg. On 16 April 2010 she was sentenced to an effective period of 7 years' imprisonment, some counts having been taken as one for purposes of sentence. On 7 December 2012 she successfully appealed to the Pretoria high court, (Makgoka J, Bosman AJ concurring) which reduced the sentence to 4 years' imprisonment. (See *S v Piater* 2013 (2) SACR 254 (GNP)). This appeal is with the leave of the high court.

[2] It is necessary to deal with the factual background leading to the conviction and sentence. The appellant was employed at the magistrates court, Heidelberg, as a senior administrative clerk. She was responsible for the deposit account which held sums of money for the benefit of social grant pay-outs. During the period of November 2005 up and until June 2007 she falsely and with the intention to defraud represented to officials of the department of justice that she had paid out certain sums of money to the beneficiaries – whereas in truth she knew that such moneys had not been paid out to the lawful

beneficiaries but to herself. These moneys amounted in total to R389 253.57. On 26 July 2007 she withdraw a sum of R60 462.40 from her employer's bank account and misappropriated it – however she returned part of the aforesaid amount by placing R12 400 in the safe and handing the balance of R48 062.40 over to the investigating officer. This amount had been kept in her safe at home and she pretended that it was misplaced somewhere in the house.

[3] On 21 August 2007 she forged deposit slips and presented them to her employer in an attempt to cover up her fraud. This happened on the day she was arrested.

[4] The appellant challenges the sentence imposed on the basis that the high court did not give adequate weight to the submission that she was contrite. It was submitted that she was prepared to recompense the loss and that indeed, she did pay back all the money. The appellant contended further that the trial, as well as the high court, did not accept that she was genuinely remorseful because she did not testify in mitigation of sentence.

[5] It was further argued by the appellant that despite the finding of the high court that there was little likelihood that she would reoffend and also the finding that the prospects of her rehabilitation were good, the high court concluded that a custodial sentence was the only suitable sentence. It was contended in this Court that a non-custodial sentence was the appropriate sentence and that the high court had overemphasised the seriousness of the offences and the interests of society.

[6] The respondent contended that the high court was lenient, considering that the appellant was in a position of trust and plotted these offences over a period of time (about 24 months). Further that the appellant did not take the courts into her confidence by failing to testify in mitigation, her failure to disclose what she did with the money indicated she was not genuinely remorseful and that she did not make full disclosure.

[7] In the present case the appellant availed herself to the correctional centre, for consideration of correctional supervision as an alternative sentence – after the trial court referred her. She was also interviewed by a forensic criminologist (Dr Sonnekus) who prepared a pre-sentencing evaluation report. This was to enable the trial court to have all the necessary information at its disposal to assist it in the determination of an appropriate sentence. Unfortunately the information provided was insufficient and remains so.

[8] In considering an appropriate sentence on appeal the court must exercise caution not to erode the discretionary powers of the trial court. (See *S v Pillay* 1977 (4) SA 531 (A) at 535E-F) An appeal court must find a material misdirection by the high court before it can interfere with the sentence imposed. It is trite that the power of an appeal court to interfere with a sentence is limited. Marais JA in *S v Malgas* 2001 (1) SACR 469 (SCA) para 12D-H observed that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an

appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate". It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[9] The court a quo gave a well-reasoned judgment and, in my view, dealt with all the issues necessary in the circumstances. It juxtaposed many earlier decisions with this case. I cannot find any justifiable criticism. Mr Myburgh, for the appellant, attempted to punch holes in the judgment of the court a quo by urging us to find that it misdirected itself by committing the same error it pointed out against the trial court, which is when the court a quo said:

'[40] The fact that the appellant pleaded guilty, is not of itself an indication of remorse. Due consideration should be accorded to the facts of each particular case. In the present case, the State had a very strong case against the appellant that a plea of guilty was unavoidable. It is in that light that her plea should be considered. The other factor militating against a conclusion that the appellant has shown genuine remorse, is obviously her decision not to testify in mitigating of sentence. Her evidence would have, once and for all, demonstrated her candour, by subjecting her statements of being needy, to the scrutiny of cross examination.'

[10] Mr Myburgh argued that the above statement demonstrates that the court a quo still took issue with the appellant's failure to testify which, to him meant that the court was of the view that she did not display a complete penitence. It will be remembered that Makgoka J had said that the trial court was obliged to

accept ex parte statements of the appellant's counsel. I do not agree with Mr Myburgh's criticism because, the court a quo concluded that the trial court had insufficient evidence before it just as the high court was also faced with insufficient information, and nevertheless it reduced the sentence. Even before this court, as stated earlier, there was insufficient evidence which fact Mr Myburgh conceded. This court still does not know what she did with the money.

[11] The appellant was represented by erudite lawyers from the beginning of her trial. She pleaded guilty, as indicated earlier, and was duty bound to place evidence before the court in her favour or otherwise. She cannot be heard to want to benefit from her failure to place such information before the court. I agree that the appellant should not be criticised for failing to testify but may be criticised for failing to place sufficient information before court – (see *S v Ferreira & others* 2004 (2) SACR 454 (SCA) at 465 para 32). Sufficient evidence must be placed before the court to enable it to determine an appropriate sentence. The evidence of Dr Sonnekus on behalf of the appellant did not advance her case any further because Dr Sonnekus interviewed her telephonically and did not question her fully on why she stole the money and what she did with it. The report says the appellant became emotional. That left a lacuna – in that insufficient evidence was placed before court.

[12] The approach of this court to sentencing in so-called 'white collar' crimes is well established. (See *S v Sadler* 2000 (1) SACR 331 (SCA) paras 11 – 13; *S v Barnard* 2004 (1) SACR 191 (SCA) para 15; *S v Michele* 2010 (1) SACR 131 (SCA) para 10 and *S v Olivier* 2010 (2) SACR 178 (SCA) para 24.) In *Olivier*, it was observed that 'direct imprisonment is not uncommon', even for first offenders. Care must be taken that previous similar cases are generally to be

used as a guide not as presenting a hard and fast rule which must be followed. It is trite law that each case must be adjudicated on its own merits.

[13] In the present case the appellant was 41 years old, at the time of her sentence by the regional court – She is married with two minor children aged 15 years (boy) and 12 years (girl), respectively. It is common cause that the appellant was not the sole primary caregiver. Her husband was unemployed at some stage, but was employed at the time of her sentence. She did repay the full amount that she stole – which counts in her favour.

[14] What is aggravating is the fact that she stole from her employer. She was in a position of trust where she was handling money to be paid to the needy. It was submitted on behalf of the appellant that in committing these crimes she had been motivated by need and not by greed. I do not agree with this submission. Her socio-economic situation did not necessitate her involvement in criminality. It would appear that she was stealing an average of R20 000 monthly, while she and her husband were earning a salary. Logically she did not need so much money for her family's basic needs. She must have used the rest of the money for personal and/or luxurious items. A morally unacceptable motive is aggravating, especially where the fraud or theft is motivated by greed or no explanation at all. (*S v Tyers* 1997 (1) SACR 261 (NC) at 267g-h.)

[15] I am in agreement with the court a quo that a non-custodial sentence would undermine the purposes of punishment, which are the deterrence, rehabilitation and retribution. It was conceded by Mr Myburgh that the offences are serious, and were carefully planned over a lengthy period and involved a

substantial amount of money. I am unable to conclude that 4 years' imprisonment is disproportionate and unbalanced to the gravity of the offences taken together with the appellant's personal circumstances. (See *Pienaar v S* (564/11) [2012] ZASCA 60 (2 April 2012) para 9) In *Pienaar's* case the court found a misdirection by the trial court whereas in the present case no such misdirection exists.

[16] For the above reasons, the appeal must fail.

[17] The following order is made:

The appeal is dismissed.

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J B Z SHONGWE
JUDGE OF APPEAL

Appearances

For the Appellant:	J P Myburgh Instructed by: Petro De Witt Attorneys, Heidelberg; Honey Attorneys, Bloemfontein.
For the Respondent:	M S Mogoshi Instructed by: The Director of Public Prosecutions, Pretoria; The Director of Public Prosecutions, Bloemfontein.