THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 433/13

Reportable

In the matter between:

MARTIN GROBLER **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Grobler v The State* (433/13) [2014] ZASCA 147 (26 September 2014)

Coram: PONNAN, SALDULKER JJA and DAMBUZA AJA

Heard: 12 September 2014

Delivered 26 September 2014

Summary: Sentence – fraud – accused convicted on 11 counts of fraud involving approximately R1,5 million – regional court imposing three years' correctional supervision under s 276(1)(*h*) of the Criminal Procedure Act 51 of 1977, plus five years' imprisonment wholly suspended on certain conditions, including the reimbursement of the complainants – high court *mero motu* increasing sentence to five years' direct imprisonment – whether it erred in doing so.

ORDER

On appeal from: Western Cape High Court, Cape Town (Blignaut and Davis JJ sitting as court of appeal):

1 The appeal against sentence succeeds.

2 The order of the high court is set aside and substituted with the following:

'a The appeal is dismissed.

b The conviction and sentence imposed by the court a quo is confirmed.'

JUDGMENT

SALDULKER JA (Ponnan JA and Dambuza AJA Concurring):

[1] This is an appeal against sentence. The appellant, Mr Martin Grobler, was charged in the regional court, Knysna with 13 counts of fraud, alternatively theft, committed between 31 March 1999 and 24 January 2000. On 29 July 2010 he was convicted on 11 counts of fraud, all of which were taken together for purposes of sentencing. On 28 March 2011, he was sentenced to three years' correctional supervision in terms of s 276(1)(*h*) of the Criminal Procedure Act 51 of 1977 (the Act). In addition he was sentenced to five years' imprisonment wholly suspended for five years on certain conditions, which included the reimbursement of the complainants of the full extent of their financial loss being approximately R1,5 million together with interest, calculated from the date of conviction.

[2] The appellant appealed to the Western Cape High Court solely against his conviction. His legal representative was given notice by the high court that in the

event of the appeal against the conviction failing, he had to be prepared to address it on the suitability of the sentence. On 9 November 2012 Blignaut J (with Davis J concurring) confirmed the conviction and set aside the sentence of the regional court and replaced it with one of five years' direct imprisonment. He now appeals against that sentence with the leave of this court.

[3] The appellant, together with Mr GCJ Naude (Naude), was a founding member of Money Wise Holdings Ltd (Money Wise), a company that conducted a micro-lending business. On 2 December 1998 and after Money Wise was listed on the Johannesburg Stock Exchange, the appellant became an employee of the group and was appointed as a marketing manager. According to the complainants, he conducted himself as if he were a director of Money Wise. The appellant's *modus operandi* was to approach potential investors (in this instance the complainants) with a view to them investing in Money Wise. Handsome rates of interest were offered and indeed paid monthly to them. Over time, however, the interest payments stopped and the complainants were unable to thereafter secure the return of their investments. All of them subsequently learnt that they had been misled by the appellant into believing that they were investing in Money Wise, when in fact the appellant had misappropriated those moneys for himself.

[4] In substituting a sentence of direct imprisonment for that imposed by the trial court, the high court stated:

'Die probleem met die huidige vonnis is dat die gevangenisstraf opgeskort word op voorwaarde dat appellant die bedrae wat die klaers verloor het, aan hulle moet terugbetaal. Die vonnis bevat besonderhede van verskillende bedrae wat op verskillende datums terugbetaal moet word. Afgesien van praktiese probleem soos allerlei geskille en onbepaalbare uitstelle, is 'n boete van hierdie aard na my mening nie 'n genoegsame bestraffing van appellant se misdade nie. Daar is 'n brief as bewysstuk ingehanding van 'n persoon wat skynbaar bereid was om die betrokke bedrae namens appellant te betaal. Indien dit sou gebeur en appellant daarna vir 'n tweede keer gesekwesreer word, wat nie onwaarskynlik is nie, sal hy stokvry wegstap.'

[5] It is trite that the imposition of sentence is pre–eminently a matter for the discretion of the trial court and a court on appeal will not interfere with the exercise of such discretion unless it can be said that the sentencing court did not exercise its discretion judicially by reason of an irregularity or material misdirection or that the sentence imposed is so shockingly inappropriate that it is clear that the trial court acted unreasonably. (See *S v Pieters* 1987 (3) SA 717 (A) at 727F-H: *S v Malgas* 2001 (1) SACR 469 (SCA) para 12; *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para 11; and *S v Le Roux & others* 2010 (2) SACR 11 (SCA) para 35).

[6] In *S v R* 1993 (1) SACR 209 (A) Kriegler J said that by introducing correctional supervision, the Legislature had provided a method of imposing finely tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community. At 220 G-H he observed that:

‘Ons straftoemeting het egter nou 'n heel nuwe fase betree. Korrektiewe toesig is weliswaar 'n as nog-onbeproefde vonnisopsie maar dit blyk reeds uit die magtigende wetgewing dat dit groot potensiaal inhou. Wat veral tref, is die veelsoortigheid daarvan. By nadere ondersoek word dit duidelik dat die benaming ‘'korrektiewe toesig’' nie soseer 'n vonnis beskryf nie maar 'n versamelnaam is vir 'n wye verskeidenheid maatreëls waarvan die enkele gemeenskaplike kenmerk is dat hulle buite die gevangenis toegepas word.

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[7] In *S v Samuels* 2011(1) SACR 9 (SCA) para 9-10, Ponnan JA pointed out that:

‘An enlightened and just penal policy requires consideration of a broad range of sentencing options from which an appropriate option can be selected that best fits the unique circumstances of the case before the court. It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of

the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.
It was urged upon us that correctional supervision would have been an appropriate sentence for the appellant. Sentencing courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences . . .'

[8] There is no indication in the judgment of the high court why it saw fit to interfere with the sentence imposed by the regional court. In arriving at what it thought was an appropriate sentence, the regional court was aided by a comprehensive correctional supervision report with a strict correctional supervision regime entailing, inter alia, community service, monitoring by the commissioner, including rehabilitative programmes and that the appellant remain under house arrest (outside of his working hours) for three years.

[9] The trial court took into account the personal circumstances of the appellant as set out in the correctional supervision report, namely that he was: (a) a first offender; (b) an educated man – he had a tertiary qualification; and (c) married with three dependant children and had strong family ties. It also took into account that there was a long delay between the time the original charges were laid against the appellant in the year 2000 and his eventual conviction in 2010 and the emotional and mental suffering that the appellant had to endure during this period. The seriousness and the reprehensibility of the appellant's conduct in betraying the trust of the complainants was also taken into account by the regional court as an aggravating factor.

[10] Furthermore, the regional court gave serious consideration to whether a custodial or non-custodial sentence would be appropriate, and decided that a custodial sentence did not commend itself in the circumstances of this case. It weighed heavily with the regional court that each of the complainants would be

reimbursed for their loss, which would have only been feasible if the appellant was economically productive.

[11] In contrast, the high court in a short judgment stated that it had taken into account the relevant facts and considerations, including the unfortunate long delay in the finalisation of the case against the appellant and considered that a sentence of five years' imprisonment was appropriate. It is difficult to understand how the high court came to the conclusion that direct imprisonment was suitable in the light of the carefully reasoned judgment of the trial court. In justifying the increased sentence, Blignaut J reasoned that the problem with the regional court's sentence was that imprisonment was suspended on condition that the appellant reimburse the complainants for their losses. In his view, reimbursement was the equivalent of a fine, the practical aspects of which could lead to a variety of disputes and incalculable delays and that the appellant would in all probability be sequestrated for a second time and that, because another person was making the payments on the appellant's behalf, he would then go 'scot-free'. This reasoning is flawed. The sentence of the regional court places the appellant under house arrest for three years combined with five years' imprisonment wholly suspended, which is subject to certain conditions, including the onerous burden of paying back large sums of money totalling almost R1,5 million to the complainants. Should the appellant fail to make any payment, he would be in breach of the conditions imposed and the sentence of five years' direct imprisonment would then come into operation. Furthermore, there was no evidence before the high court to suggest that he would not have to repay his benefactor. The conclusion that the appellant will in fact go 'scot-free' is thus devoid of any factual foundation.

[12] Pragmatically, it would be unreasonable to incarcerate the appellant who has been an economically active member of society for the past 13 years since he was charged, and who has not committed any other offences during this period. It is also a relevant consideration that after that lengthy passage of time the high court sought to impose a custodial sentence. As pointed out by Kriegler J in *S v R,* the introduction of correctional supervision ushered in a new phase in our criminal justice

system, clearly distinguishing between those offenders who ought to be removed from society by being incarcerated and those who, even though deserving of punishment, should not be removed. The appellant's circumstances provide a compelling case for a non-custodial sentence. The regional court clearly did not misdirect itself when it imposed what is described by Kriegler J in *S v R* as a 'finely–tuned sentence' without resorting to imprisonment.

[13] Counsel for the State was constrained to concede that in the circumstances of this case interference by the high court was not warranted. And further that as the State had not itself seen fit to appeal against the sentence imposed by the trial court, it had difficulty defending the approach of the high court.

[14] In the result the appeal must succeed. The following order is made:

1 The appeal against sentence succeeds.

2 The order of the high court is set aside and substituted with the following:

'a The appeal is dismissed.

b The conviction and sentence imposed by the court a quo is confirmed.'

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H SALDULKER

JUDGE OF APPEAL

APPEARANCES:

Appellant(s):	Mr F. Van Zyl SC
	Instructed by:
	Bornman & Associates, Bellville
	Symington & De Kock, Bloemfontein
Respondent(s)	Ms Du Toit - Smit
	Instructed by:
	Director of Public Prosecutions
	Cape Town