IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

Case No. CA &R 390/12
Date Heard: 18/9/13
Date Delivered: 27/9/13
Reportable

In the matter between:

THE STATE **Appellant**

and

ANDRE RIEKERT BOSHOFF **Respondent**

Appeal against sentence by the State in terms of s 310A of the Criminal Procedure Act 51 of 1977 – Respondent, a lieutenant-colonel in the South Africa Police Service (the SAPS) sentenced to an effective term of seven years' imprisonment in respect of four counts of fraud, one of corruption, one of defeating or obstructing the course of justice, one of incitement to commit an offence and one of theft (of three firearms) – Failure of trial court to apply minimum prescribed sentences in respect of three of the fraud convictions a misdirection entitling court of appeal to set aside sentence and impose sentence afresh – factors relevant to sentence set out – sentence increased to an effective 15 years' imprisonment.

JUDGMENT

PLASKET, J:

[1] This is an appeal against sentence brought by the State in terms of s 310A(1) of the Criminal Procedure Act 51 of 1977. This section allows the State to appeal to the High Court against a sentence imposed by a lower court 'provided that an

application for leave to appeal has been granted by a judge in chambers'. The matter is before us with the leave of Goosen J.

The facts

[2] The respondent (Boshoff) was at the time that he committed the offences of which he was convicted, and which are set out below, a lieutenant-colonel in the South African Police Services (the SAPS). He had been a member of the SAPS for 24 years. At the time the offences were committed he was attached to the detective branch of the SAPS stationed in Alice.

[3] He was charged with, pleaded guilty to and was convicted of eight offences in the Specialised Commercial Crimes Court, Port Elizabeth. Those offences were: four counts of fraud; a contravention of s 4(1)(a)(i)(aa) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (which I shall refer to below as the offence of corruption);[1] defeating or obstructing the course of justice;[2] a contravention of s 18(2)(b) of the Riotous Assemblies Act 17 of 1956 (which I shall refer to below as incitement to commit a crime);[3] and theft.

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[1] This section reads:
'(1) Any-
(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; . .
(b) . . .
in order to act, personally or by influencing another person so to act, in a manner-
(i) that amounts to the-
(aa) illegal, dishonest, unauthorised, incomplete, or biased; . . .
. . .
exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation
. . .
is guilty of the offence of corrupt activities relating to public officers.'

[2] This common law crime is defined as follows by J R L Milton *South African Criminal Law and Procedure* (Vol II: *Common Law Crimes*) (3 ed) at 102: 'Defeating or obstructing the course of justice consists in unlawfully doing an act which is intended to defeat or obstruct and which does defeat or obstruct the due administration of justice.'

[3] This section reads:
'Any person who-
(a) . . .
(b) incites, instigates, commands, or procures any other person to commit,
any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

[4] The charges against Boshoff arose from a dishonest scheme that he had designed. He registered a person as an informer, stole firearms from the SAPS and had them planted in or near the homes of innocent people. He then claimed to have received information from the informer as to the whereabouts of the firearms. Once the firearms had been recovered, Boshoff made a claim for a reward to be paid to the informer. He would, however, require the informer to pay him the lion's share of the reward. So, for instance, in respect of a reward of R20 000.00 in counts 1 and 2, the informer's share was R5 000.00 while Boshoff's was R15 000.00; in respect of a reward of R15 000.00 in count 3, the informer's share was R2 500.00 while Boshoff's was R12 500.00; and in respect of a reward of R10 000.00 in count 4, the informer's share was also R2 500.00 while Boshoff's was R7 500.00.

[5] This conduct together constituted the various offences with which Boshoff was charged and of which he was convicted. In respect of the four counts of fraud, Boshoff, in his statement in terms of s 112(2) of the Criminal Procedure Act, admitted that the payments made to the informer 'were made after fraudulent misrepresentations were made to the SAPS by myself in motivating the payment of the said rewards'. He also admitted that he, 'a public officer', had 'accepted or agreed to accept gratifications, in the form of money,' from his informer to 'institute fraudulent claims on the informer's behalf . . .' He admitted too that the acceptance of the money amounted to the offence of corruption; that by placing firearms where he had 'in such a manner which could lead to the arrest of any person and/or lead to the implication of persons in criminal case dockets' he had committed the offence of defeating or obstructing the course of justice; that by inciting, instigating, commanding or procuring the informer to commit fraud, defeating or obstructing the course of justice or committing the offence of corruption, he had committed the offence of incitement to commit an offence; and that he had committed theft by stealing three firearms from the SAPS.

[6] Boshoff was convicted in the court below on the basis of his plea. After hearing evidence in mitigation and aggravation of sentence, the magistrate sentenced him to five years' imprisonment in respect of the four counts of fraud, taken together for purposes of sentence; five years' imprisonment in respect of the offence of corruption; three years' imprisonment in respect of each of the offences of

defeating or obstructing the course of justice and incitement to commit a crime; and five years' imprisonment in respect of the theft of the firearms.

[7] The magistrate then moderated the cumulative effect of these sentences by ordering that the sentence in respect of the corruption and theft convictions would run concurrently with the sentences in respect of the fraud convictions, and that two years of each of the sentences in respect of defeating or obstructing the course of justice and incitement would run concurrently with the effective five year sentence. That meant that Boshoff was sentenced to an effective term of seven years' imprisonment.

Appeals against sentence

[8] The principles applicable to appeals against sentence are well known. Because the imposition of sentence involves the exercise of a discretion by the sentencing court, an appeal court is not free to interfere with the exercise of that discretion unless it is tainted by a material misdirection or, where no specific misdirection can be pointed to, where the sentence is so disproportionate to the crime, the personal circumstances of the offender and the interests of society that it induces a sense of shock.[4]

[9] A sentence may induce a sense of shock either because of its severity or because of its leniency. As was stated by Thring J in *S v Sonday & another*[5] a 'sentence which is shockingly or strikingly or disturbingly too light is as much a miscarriage of justice as one which is shockingly or strikingly or disturbingly too heavy'.

[10] When statutorily prescribed minimum sentences apply, a trial court is not at liberty to impose whatever sentence it considers appropriate upon 'a clean slate': its starting point has to be the prescribed minimum sentence, because that is the sentence that should ordinarily be imposed unless substantial and compelling

[4] *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.
[5] *S v Sonday & another* 1994 (2) SACR 810 (C) at 820d-e.

circumstances are present that justify a deviation from it.[6] It follows that if a trial court does not approach the imposition of sentence in this way, it will commit a misdirection which may entitle an appeal court to set aside the trial court's sentence and impose a sentence that it considers to be an appropriate sentence.

Did the trial magistrate commit a misdirection?

[11] In terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997, read with Part II of Schedule 2, a minimum sentence of 15 years' imprisonment applies when the offence, inter alia, of fraud is committed by a law enforcement officer and the amount involved exceeds R10 000 (as is the case in respect of the first three fraud counts in this matter).

[12] In the charge sheet, Boshoff's attention was drawn to the fact that prescribed minimum sentences applied to the fraud charges, although the specific provision relied upon was not detailed. In his s 112(2) statement, Boshoff acknowledged that prescribed minimum sentences applied when he pleaded guilty to the fraud charges, although once again he did not refer to the specific provision in the Criminal Law Amendment Act.

[13] He was, at all times, legally represented and must be taken to have been aware of the provision concerned. In the light of the charges against him and the facts specified in the charge sheet, all of which he admitted, the only prescribed minimum sentence that could have applied was the 15 year sentence for a law enforcement officer found guilty of an offence involving more than R10 000.00.

[14] In his judgment on sentence, the magistrate found, having considered only the prescribed minimum sentence of 15 years' imprisonment when a person has been convicted, inter alia, of theft or fraud involving an amount in excess of R500 000.00 or, if he or she is acting in furtherance of a common purpose, an amount in excess of R100 000.00, that no prescribed minimum sentence applied. He made no mention of the prescribed minimum sentence that applies to law

[6] *S v Malgas* (note 4) para 8; *S v Matyityi* 2011 (1) SACR 40 (SCA) para 18.

enforcement officers guilty of an offence involving an amount of more than R10 000.00.

[15] As it is clear that this prescribed minimum sentence applies in respect of the first three of the four fraud convictions, the amounts involved being R20 000.00, R20 000.00 and R15 000.00, the magistrate erred in holding that he was free to impose whatever sentences he felt appropriate in respect of counts 1, 2 and 3. In so doing, he committed a material irregularity that vitiates the sentences he imposed and renders this court free to impose the sentences it considers appropriate, within the constraints imposed by the minimum sentence regime contained in the Criminal Law Amendment Act.

Imposing sentence afresh

[16] The approach of the courts to the imposition of sentence when a minimum sentence applies is now well developed. In the leading case of *S v Malgas*[7] it was stressed that when a court sentences for crimes specified in the Criminal Law Amendment Act, it is required to 'approach that question conscious of the fact that the legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed . . .'. This was because, as a result of the 'alarming burgeoning in the commission of crimes of the kind specified' in the Act, the legislature decided that it was 'no longer to be "business as usual" when sentencing for the commission of the specified crimes';[8] and that what was required was 'a severe, standardised, and consistent response from the courts to the commission' of those crimes.[9] Even though the Act has placed emphasis on 'the objective gravity of the type of crime and the public's need for effective sanctions against it' discretion to deviate from the prescribed sentence was granted to courts 'in recognition of the easily foreseeable injustices which would result from obliging them to pass the specified sentences come what may'.[10]

[7] Note 4 para 8.
[8] Note 4 para 7.
[9] Note 4 para 8.
[10] Note 4 para 8

[17] In dealing with what constitutes substantial and compelling circumstances, the court in *Malgas* held that it is impermissible to deviate from a prescribed sentence 'lightly and for flimsy reasons which could not withstand scrutiny' but, this apart, all factors relevant to determining sentence remain relevant when the Act applies, and a sentencing court must look to the 'ultimate cumulative impact' of all of these factors in order to determine whether a departure from the prescribed minimum sentence is justified.[11]

[18] In *Malgas* the court held that when a court is convinced that the imposition of the prescribed minimum sentence would be unjust or 'disproportionate to the crime, the criminal and the legitimate needs of society' that in itself constitutes substantial and compelling circumstances.[12] The position was captured thus in *S v Vilakazi*:[13]

'It is clear from the terms in which the test was framed in *Malgas* and endorsed in *Dodo* that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. . . If a court is indeed satisfied that a lesser sentence is called for in a particular case, thus justifying a departure from the prescribed sentence, then it hardly needs saying that the court is bound to impose that lesser sentence.'

[19] In the imposition of sentence, even when a prescribed minimum sentence applies, a court is required to weigh and balance a variety of factors to determine a measure of the moral, as opposed to legal, blameworthiness of an accused – and thus to determine a sentence that is proportionate. This is achieved by a consideration of, and an appropriate balancing of, what the well-known case of *S v Zinn*[14] described as a 'triad consisting of the crime, the offender and the interests of society'.

[20] In determining an appropriate sentence, starting from the point that in respect of the first three counts of fraud, a sentence of 15 years' imprisonment is the sentence that should ordinarily be imposed, I shall consider Boshoff's personal

[11] Note 4 para 9. See too *S v Blignaut* 2008 (1) SACR 78 (SCA) para 3.
[12] Note 4 para 22. See too *S v Fatyi* 2001 (1) SACR 485 (SCA) para 5.
[13] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 15.
[14] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H.

circumstances, the nature of his crimes and the interests of society in order to determine whether substantial and compelling circumstances exist to justify a departure from the prescribed minimum sentence and whether it is proportional.

Boshoff's personal circumstances

[21] Boshoff was 49 years old when the committed the offences. There is no doubt that he was a highly skilled, efficient and effective policeman. He was widely recognised as such and held in high regard. Until these offences were committed, he appears to have performed his duties with dedication and integrity. He was often transferred to police stations and units that were dysfunctional with the brief to fix the problem. He appears to have been particularly effective in this regard.

[22] He is a first offender. He has apologised personally to some of his former colleagues for bringing the SAPS into disrepute. He apologised, through his legal representative, to Ms Ntombi Tiba who spent four nights in jail as a result of his actions. He stated that he was unable to apologise to her personally because his bail conditions forbade him from having contact with any state witnesses. It must be stated, however, that when this apology is considered in its context, it appeared to be something of an afterthought and it came very late in the day. He contributed R2 000.00 towards the cost of therapy for her. When he testified, he expressed remorse and accepted responsibility for his actions. That expression of remorse appears to me to have been genuine.[15] As against that, however, he took active steps to ensure that he would not be caught by ensuring that no one else would see the appropriate dockets while, he said, he was experiencing feelings of remorse prior to his arrest

[23] In his heads of argument, much was made by Mr Price, who appeared for Boshoff, of the difficulties that Boshoff had experienced as a child, his marital problems (and subsequent reconciliation with his wife), his financial problems, the post-traumatic stress from which he suffered (as a direct result of his work as a policeman) and the way in which he was treated by his superiors in the SAPS,

[15] See *S v Matyityi* (note 6) para XX on remorse as mitigation.

particularly in the face of his personal and emotional crises. These issues have little relevance to the case because neither of the expert witnesses called to testify on Boshoff's behalf nor Boshoff himself established a nexus between any of them and the commission of the offences. The only relevance of some of this evidence, it seems to me, is that some of it gives an insight into the type of person that Boshoff is.

The offences

[24] In S *v Sadler*[16] the point was made forcefully that so-called white collar crimes like fraud are serious in and of themselves. Marais JA held in this regard:[17]

'[11] I am satisfied that the circumstances of this case call for the imposition of a period of direct imprisonment and that the interests of justice will not be adequately served by leaving the sentence imposed by Squires J undisturbed. So called "white-collar" crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of "white-collar' crimes as non-violent crime and its perpetrators (where they are first offenders) as not truly being "criminals" or "prison material" by reason of their often ostensibly respectable histories and background. Empty generalisations of that kind are of no help in assessing appropriate sentences for "white-collar" crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from "respectable" backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

[12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.

[13] It is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration. . . '

[16] *S v Sadler* 2000 (1) SACR 331 (SCA).
[17] Paras 11-13.

[25] The first factor that makes this case more serious than the run-of-the-mill white-collar crime is Boshoff's cynical disregard for the dire consequences of his scheme on innocent people. This is plastered on top of the layer of dishonesty represented by the theft of the firearms with the ultimate goal of defrauding money from the public purse. The irony is great: he defrauded the State of money intended for the combatting of crime.

[26] It was central to the successful implementation of Boshoff's plan that firearms would be planted in or near the homes of innocent people who, once the firearms were 'discovered', would then face the real possibility of incarceration as awaiting trial prisoners, as was the case with Tiba. They also faced, potentially at least, the possibility of being charged and convicted for the unlawful possession of firearms – and a prison sentence thereafter. This is certainly what Boshoff had in mind when he spoke to the informer about planting firearms inside the homes of people he considered to be criminals.

[27] I venture to suggest that in the majority of cases in which firearms are found in a person's home and he or she denies all knowledge of them, or says that they must have been planted by the police, the court trying that person would reject his or her version as not being reasonably possibly true. Why, the court would ask, would the police plant firearms in the home of an innocent person? How, it would ask, could the person living in the home not have known of the firearms? How else, it would reason, other than through the agency of the accused, could those firearms have been hidden where they were? The damage that conduct like Boshoff's does to the administration of justice is difficult to over-state.

[28] These extremely serious consequences were obvious. Boshoff did not even try to avoid them. For instance, he was unable to explain why he did not take steps to ensure that Tiba would not be arrested. The truth of the matter is that, for the scheme to work properly, innocent people had to be arrested. The anxiety and fear that Boshoff's victims must have experienced is not difficult to imagine.

[29] Boshoff's callous indifference to Tiba is clear from a passage from the record during his cross-examination. It also established that Tiba's arrest led to a bigger

reward being paid to the informer, and hence a bigger share of the reward for Boshoff. The passage reads as follows:

'Ons gaan verder gaan, u het subjektief geweet in u verstand geweet dat hierdie vrou is onskuldig. – Dit is korrek.

Want u het gesorg dat daardie vuurwapen geplant gaan word. – Dit is korrek Edelagbare.

Sou die regte ding nie gewees het om vir die mense te sê manne ons het nie eintlik genoeg hier nie om hierdie vrou te arresteer nie, kom ons laat die aanklaer besluit, kom ons maak ons ondersoek klaar en laat ons die aanklaer besluit dat hy dan nou maar beslissing maak op hierdie dossier as om hierdie dame te arresteer. – Dis korrek Edelagbare.

Hoekom het u dit nie gedoen nie? – Ek kan nie verklaar hoekom ek dit nie gedoen het nie.

Ek kan verklaar, want is dit so dat by 'n arrestasie waar u kan motiveer, 'n motivering kan skryf as beriggewer se geld uitbetaal moet word, dan kan hierdie beriggewer 'n hoër bedrag kry wanner daar 'n arrestasie uitgevoer is. – Dis korrek Edelagbare.

En dit is wat hier gebeur het. – Dis korrek Edelagbare.

U was gewetenloos gewees. – Dis korrek Edelagbare.'

[30] Boshoff opened the SAPS to damages claims: if Tiba had sued the SAPS for unlawful arrest and detention the SAPS would have had no defence: even though Boshoff committed the crimes for private gain, he did so while purporting to exercise the powers of a policeman and so the Minister of Police would be vicariously liable for his unlawful conduct.[18] Tiba's damages for having spent four nights in prison would probably have been substantial.

[31] Boshoff's senior rank makes his offences all the more egregious. He wielded considerable power and influence as a result and the breach of trust of which he made himself guilty was rendered all the more serious thereby. The idea of a senior policeman using his knowledge of the system, his experience and his expertise to frame innocent citizens for his own pecuniary gain should send shudders down the spines of all right thinking people. The powerlessness of his victims in the face of the State's might, brought to bear on them maliciously, conjures up frightening images of

[18] See *F v Minister of Safety and Security & others* 2012 (1) SA 536 (CC).

arbitrary and capricious power reminiscent of Franz Kafka's *The Trial*.[19] People are entitled to believe that the police can be trusted.

[32] The offences were carefully planned and were committed over a period of about ten months. Boshoff had ample time for reflection but he proceeded with his plans nonetheless. His motivation for committing the crimes was simply greed.

[33] It was central to the corrupt scheme that Boshoff devised that firearms had to be stolen and that they had to be stolen from the SAPS. Any offence relating to firearms is, by its very nature, serious and the fact that they were stolen from the SAPS is further aggravation. The scheme also appears to have fed off the closed and confidential nature of the system of informers and their payment, which makes the system vulnerable to unlawful schemes like this. Boshoff used this weakness to his advantage.

The interests of society

[34] I turn now to the interests of society, the final side of the *Zinn* triad. In *Cabinet of the Interim Government of South West Africa v Bessinger & others*[20] Levy J, in dealing with the exercise of powers by the police in terms of the security legislation then in force, said the following which, it seems to me, is a particularly apposite starting point in this case:

'The very essence of society is the compliance with law and order. All persons, whether they are acting on behalf of the State or not, whether they wear uniforms or not, are required to recognise and to comply with the laws of the State.'

This is, in fact, nothing more than a statement that the rule of law applies to everyone, no matter what office they may hold and no matter how powerful they may be, and that no one is above the law.[21] Our democratic constitutional order is, of course, based on the rule of law.[22]

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[19] Franz Kafka *The Trial* (first published 1925). The book is described as follows: 'The terrifying tale of Joseph K, a respectable functionary in a bank, who is suddenly arrested and must defend his innocence against a charge about which he can get no information.'

[20] *Cabinet of the Interim Government of South West Africa v Bessinger & others* 1989 (1) SA 618 (SWA) at 621C-D.

[21] A V Dicey *An Introduction to the Law of the Constitution* (10 ed) at 193.

[22] Constitution, s 1(c).

[35] In *South African Association of Personal Injury Lawyers v Heath & others*[23] Chaskalson P spoke of the tension between corruption and the rule of law in South Africa. He said:

'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

[36] It was, I am sure, with sentiments such as these in mind that the Legislature saw fit to introduce a prescribed minimum sentencing regime in respect of certain of the offences of which Boshoff has been convicted, even where the amounts involved are relatively small.

[37] The serious light in which the Legislature views offences involving dishonesty committed by law enforcement officers stems too from the fact that such conduct is antithetical to the objects of the SAPS as set out in s 205(3) of the Constitution namely, 'to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law'.[24]

[38] These are all indications of the serious light in which society views corruption, particularly when it involves prejudice to the public purse, and corrupt activities of policemen who occupy a special position of trust, given the nature and extent of the powers that they wield.

[39] All right-thinking members of society are, I am sure, sick and tired of the widespread corruption on the part of state functionaries that has become endemic in this country. They expect, and legitimately so, that courts when dealing with cases of this kind take stern action against those who have abused their trust.

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[23] *South African Association of Personal Injury Lawyers v Heath & others* 2001 (1) SA 883 (CC) para 4.

[24] See too the preamble to the South African Police Service Act 68 of 1995.

Conclusion

[40] In order to determine whether to depart from the prescribed minimum sentence in respect of counts 1 to 3, all of the factors that I have mentioned above must be taken into account and be 'measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained'.[25] Consideration must also be given to whether the imposition of the prescribed minimum sentence would be unjust on account of it being 'disproportionate to the crime, the criminal and the needs of society'.[26]

[41] I do not lose sight of the fact that Boshoff's personal circumstances are generally favourable. The fact remains that the offences of which he was convicted are particularly serious given their planned and callous nature, their impact, particularly on Tiba, the enormity of Boshoff's abuse of power and the undermining of the trust that the public is entitled to have in every policeman.

[42] In my view, in the circumstances of this case, Boshoff's favourable personal circumstances must pale in the face of the overwhelming aggravation that is present. Accordingly, when I consider the cumulative impact of all of the circumstances of the case – both mitigatory and aggravating – Boshoff's personal circumstances do not qualify as substantial and compelling circumstances that justify a departure from the prescribed minimum sentence of 15 years' imprisonment in respect of counts 1 to 3. I take the view that these sentences are not disproportionate to the crime, the offender and the interests of society.

[43] I can see no reason to impose a different sentence in respect of count 4. If the amount defrauded had been one cent more, the prescribed minimum sentence would have applied. I have found that sentences of 15 years' imprisonment in respect of counts 1 to 3 are just and are not disproportional to the various interests of relevance. There is no difference in respect of Boshoff's moral blameworthiness that

[25] *S v Malgas* (note 4) para 25G.
[26] *S v Malgas* (note 4) para 25I.

can distinguish count 4 from counts 1 to 3, and I consider the difference in amounts to be of little relevance. The disparity between the sentence that the court below imposed and what I consider an appropriate sentence to be is substantial. The leniency of the sentence induces a sense of shock. This court is thus entitled to interfere and to increase it to 15 years' imprisonment.

[44] As far as the remaining sentences are concerned, I can find no misdirection on the part of the court below and the State did not contend that it had misdirected itself. They must however be set aside because of the part they play in the structuring of the effective sentence imposed by the magistrate.

[45] All that now remains is for me to ameliorate the harshness of the cumulative effect of the sentences and determine a just effective sentence that Boshoff must serve. I consider an effective sentence of 15 years' imprisonment to be appropriate. That means that the 15 year sentences in respect of counts 1 to 4 must all run concurrently with each other. Furthermore, because the offences reflected in counts 5 to 8 are, in fact, part and parcel of Boshoff's fraudulent scheme, all of the sentences imposed in respect of these counts will be ordered to run concurrently with each other and counts 1 to 4. In order to achieve this it will be necessary to set aside, and re-impose, all of the sentences imposed by the trial court. They will also be ante-dated to the date that Boshoff was sentenced by the magistrate.

[46] The following order is made:

(a) The appeal succeeds and the sentences imposed by the trial court are set aside.

(b) The respondent is sentenced to:

(i) 15 years' imprisonment in respect of each of counts 1, 2, 3 and 4;

(ii) five years' imprisonment in respect of count 5;

(iii) three years' imprisonment in respect of count 6;

(iv) three years' imprisonment in respect of count 7; and

(v) five years' imprisonment in respect of count 8.

(c) All of the above sentences shall run concurrently with each other so that the respondent's effective sentence is 15 years' imprisonment.

(d) The sentences imposed on the respondent are ante-dated to 31 August 2012.

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C Plasket

Judge of the High Court

I agree.

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J Eksteen

Judge of the High Court

APPEARANCES

Appellant: T van Zyl of the office of the Director of Public Prosecutions, Port Elizabeth

Respondent: T N Price instructed by Nettelton's, Grahamstown