

FREE STATE DIVISION, BLOEMFONTEIN

Case No: A216/2015

In the matter between:-

BAFANA SIPHO MBUYISA
DAVID FONO SAMOSAMO

1st Appellant
2nd Appellant

And

THE STATE

Respondent

CORAM: VAN DER MERWE, J *et* CHESIWE, AJ

JUDGMENT BY: THE COURT

HEARD ON: 22 FEBRUARY 2016

DELIVERED ON: 7 APRIL 2016

- [1] The two appellants were each convicted in the regional court, Bloemfontein, on 10 counts of fraud. In addition, the first appellant was convicted of contravention of section 3(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (count 11, acceptance of a gratification) and the second appellant was convicted of contravention of section 3(b) of Act 12 of 2004 (count 12, giving a gratification). The ten counts of fraud were taken together for purposes of sentence. On 26 August 2010 the first appellant was sentenced to 5 years imprisonment on counts 1 to 10 and to 3 years imprisonment on count 11, to be served concurrently with the sentence on counts 1 to 10. On the same date the second

appellant was sentenced to 3 years imprisonment on counts 1 to 10 and to 2 years imprisonment on count 12, to be served concurrently with the sentence on counts 1 to 10. The appellants appeal only against the sentences, with the leave of the trial court. The appellants were released on bail pending the appeal.

- [2] The material circumstances of the commission of the crimes in question are as follows. The first appellant was employed by Eskom. A part of his official duties was to appoint contractors to do technical drawings for Eskom. The second appellant is an electrical engineer. He is a director of Dihlase Consulting (Pty) Ltd (Dihlase). A fraudulent scheme devised by the first appellant for his benefit, was agreed upon by the appellants. In terms of the scheme the first appellant's wife would supply invoices to Dihlase for drawings purportedly done by her as subcontractor for Dihlase. Based on these invoices, the second appellant would cause Dihlase to invoice Eskom for these drawings purportedly done by Dihlase for Eskom. Upon payment of the invoices by Eskom to Dihlase, Dihlase would channel part of the funds to the first appellant via his wife. At all relevant times the first appellant represented to the second appellant that he would actually do the work for Eskom. Although the second appellant misrepresented to Eskom that Dihlase did the work, he was under the impression that the work was in fact done by the first appellant. In truth, however, the first appellant did not do any of the invoiced work.
- [3] In execution of the scheme, the total amount of R293 350,50 was paid by Eskom to Dihlase on ten occasions during the period from

11 August 2004 to 5 April 2005. An amount of R180 000,00 was channelled to the first appellant whilst the amount of R113 350,50 was retained by Dihlase. After the scheme was uncovered, the first appellant paid the amount R140 000,00 to Dihlase. The second appellant paid an amount of R40 000,00 to Dihlase out of his own pocket. Dihlase, in turn, repaid the full amount of R293 350,50 to Eskom.

- [4] Both appellants pleaded guilty on all the counts against them. Pre-sentence reports in respect of both appellants were placed before the court *a quo* by agreement between the prosecution and the defence. In terms of these reports a sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977 was recommended in respect of the first appellant and a suspended term of imprisonment in respect of the second appellant. The public prosecutor proposed that sentences of correctional supervision be imposed in respect of both the appellants.
- [5] It is trite that sentencing lies in the discretion of the trial court. A court of appeal may only interfere with a sentence if the discretion was not exercised judicially. That would be the case if the sentence was affected by a material misdirection or was disturbingly inappropriate, in other words, could not reasonably have been imposed in the particular circumstances.
- [6] As we have said, at the time the first appellant brought the second appellant under the impression that he had in fact done the invoiced

work for the benefit of Eskom. In the view of the second appellant he only assisted the first appellant to do private work by misrepresenting to Eskom that Dihlase had done the work. The trial court failed to take this important element of the moral blameworthiness of the second appellant into account. It wrongly found that it appeared that the second appellant acted out of greed or ambition (“gierigheid of eersug”). The trial court therefore misdirected itself and for this reason alone, this court must consider the sentence of the second appellant afresh.

- [7] We now turn to the question whether the sentence of the first appellant was disturbingly inappropriate. There is no doubt that serious crimes were committed. The crimes were carefully planned and executed over a period of time. The first appellant breached his duty of trust towards his employer. Fraud and corruption in the public and private sectors are rife and the sentences of the courts should convey the message that this cannot be tolerated.
- [8] On the other hand, there were weighty considerations favouring a non-custodial sentence for the first appellant. He was 39 years of age at the time of sentencing. He is married and has two minor children. He has strong family ties. He pleaded guilty and took real responsibility for his crimes. He co-operated with the investigation of the crimes. He did not destroy the documentary evidence of the crimes in his possession, but made them available to the investigators. He is a first offender. He was forced resign from his employment as a result of the crimes. He now works from home, managing a guest house for his wife and doing drawings on free-

lance basis. He paid his full pension benefit of R140 000,00 to Dihlase in order to help make good Eskom's loss. Eskom eventually did not suffer any financial loss. The main motivation for the crimes was the serious illness of both the brother and aunt of the first appellant and the resultant pressure on him to assist them financially. The first appellant eventually also gained nothing from the crimes. An experienced social worker, who is a correctional official, recommended a sentence of correctional supervision in a well-motivated report. The recommendation was supported by an experienced prosecutor. It has often been said that a sentence of correctional supervision on appropriate conditions, can be a heavy sentence. Especially the elements of house detention and community service are not child's play and at the same time publicly convey the message that crime does not pay.

- [9] In the circumstances we are persuaded that the first appellant's effective sentence of five years imprisonment was unreasonably harsh. A sentence of correctional supervision was particularly appropriate and should have been imposed.
- [10] The second appellant was 41 years of age at the time. He is married with one minor child. He also pleaded guilty and co-operated with the investigation. He is a first offender. He qualified as an electrical engineer despite a challenging childhood. He is no doubt capable of making a valuable contribution to society. His moral blameworthiness is markedly less than that of the first appellant. He did not initiate the crimes. Not only did he not derive any direct benefit from the crimes, but is out of pocket in the amount

of R40 000,00 that he paid to ensure a full refund to Eskom . This should be kept in mind when sentence is imposed afresh. Nevertheless a suspended sentence would in our judgment not sufficiently reflect the seriousness of the crimes.

[11] Both the appellants should therefore be sentenced to correctional supervision. Counsel were agreed that in the event of this finding, the matter should be referred back to the trial court. After hearing the parties and such evidence as may be appropriate, the trial court must determine the terms and conditions of the sentences of correctional supervision and impose such sentences.

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

1. The appeals of the first appellant and the second appellant are upheld and their sentences are set aside.
2. The matter is referred back to the trial court for imposition of sentences of correctional supervision in respect of both appellants in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977.

C. H. G. VAN DER MERWE, J

S. CHESIWE, AJ

On behalf of the appellants: Adv. W. J. Edeling
Instructed by:
Lovius Block
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On behalf of the respondent: Adv. M. Strauss
Instructed by:
The Director: Public Prosecutions
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