



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

6/2/2015
CASE NO: A 248/2014

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

06 February 2015

In the matter between

MALLOCK-BROWN, DAVID (YORK TIMBER (Pty) LTD APPELLANT

And

THE STATE RESPONDENT

J U D G M E N T

MUDAU AJ:

[1] The Appellant appeared in the regional Court for the Regional Division of Mpumalanga for contravening 24(1) read with section 24F (1) and (2) of the National Environmental Management Act (NEMA),¹ further read with Government Notice R386 dated 21 April 2006 under item 15 . He was convicted on his plea of guilty in terms of s112 (2) of the Criminal Procedure Act 51 of 1977. The

¹ 107 of 1998

appellant was sentenced to pay a fine of R180 000.00. The matter is before this court on appeal against sentence only with leave of the trial court.

- [2] The relevant facts are briefly as follows: the appellant is a registered company with limited liability registered as such under the laws of the Republic of South Africa and is a corporate entity within the meaning of s332 of the CPA. During the trial the appellant was represented by its director Mr David Mallock- Brown. The appellant owns and operates a sawmill and plywood plant at Sabie in the Mpumalanga Province .The appellant is a wholly owned subsidiary of York Timber Holdings Ltd (“York”),commonly referred to as “the Sabie Sawmill”. It is the biggest private sector employer in Sabie.
- [3] The charge in respect of which the appellant pleaded guilty relates to the commencement of a listed activity identified in terms of s 24 of NEMA in particular, *“the construction of a road that is wider than 4 meters or that has a reserve wider than 6 meters, roads that fall within the ambit of another listed activity or which are access roads of less than 30 meters long”*.
- [4] A stretch of an existing forestry road which was about 800 m in length was widened with a road grader in late 2007, but without the requisite environmental authorisation, preparatory to the construction of a proposed new road. The road in question as well as the proposed new road is on “York” owned land. However, since the existing ramp road is close to a residential area in Sabie and it was used by trucks, which resulted in noise and air pollution .In order to mitigate the impact of the road on the nearby Sabie residents it was proposed to reroute the ramp westwards over the horizon and out of sight of Sabie town .The immediate spur to the construction of the proposed new road resulted in the catastrophic forest fires of 2007. Thousands of hectares of plantations were burned. As a result, it became necessary to harvest the burned timber and to transport it to the sawmill before it dried up. Inevitably, this led to a substantial increase of activities relating to the transportation of timber along the existing ramp which required the trucks to operate day and night. With a view to mitigate the environmental impact

of the road on local residents, York decided to move the road further away from Sabie.

[5] The forester responsible for the maintenance of forest roads, whose task was to survey and mark the route of the proposed new road, instructed a roads contractor to begin clearing the area adjacent to the existing forest road with the road scraper without the necessary permission from the authorities as prescribed by law. The contractor was immediately directed to stop the activity as soon as York's then environmental manager became aware of the illegal activity. However no stream, nor wetland nor any natural forest was damaged by the widening of the road. In essence, the widening of the road had no significant environmental impact.

[6] Section 24F of NEMA deals with prohibitions relating to commencement or continuation of listed activities. It provides that:

(1) Notwithstanding any other Act, no person may-

(a) Commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for mineral resources, as the case may be, has granted an environmental authorisation for the activity; or

(b) Commence and continue an activity listed in terms of section 24(2) (d) unless it is done in terms of an applicable norm or standard.

As the appellant in this case commenced with the construction of a road wider than 4 metres without prior environmental authorisation issued by the competent authority he thereby contravened the above section and thus committed an offence.

Section 49A of the Act deals with relevant offences. It provides that:

(1) A person is guilty of an offence if that person-

(a) Commences with an activity in contravention of section 24F (1).....

Section 49A of the Act deals with the penalties. It provides that:

(1) *A person convicted of an offence in terms of section 49A(1)(a)..... is liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine or such imprisonment....*

[7] It has been contended on behalf of the appellant that since the respondent accepted the facts upon which the appellant tendered a plea of guilty i.e. that there was no adverse impact on the environment the sentence imposed by the trial court ought to be interfered with. In addition, the appellant contends that the trial court misdirected itself when it found the following:

“this kind of offence is prevalent in our country wherein big companies disregard the laws of this country, especially those that has to do with environment and get away with murder”. Further that the trial court also misdirected itself in finding that: *“when this offence was committed, the accused did not take into consideration the interests of society and also the environment”.* It is common cause in this matter that the respondent did not lead any evidence in aggravation of sentence. Counsel for the respondent was constrained to concede this aspect. This is against the background that on the admitted statement of plea the appellant asserts that environmental conservation and the sustainable management of its forestry operations are central to the appellant’s corporate responsibility.

[8] In addition, it has been contended on behalf of the appellant that the relevant Government Notice R366 has, in the meanwhile, been replaced by government notice R 544, which was published in the government Gazette of 18 June 2010. Item 47 of government notice R544 provides that an environmental authorisation is required where *“... an existing road is widened by more than 6 meters, or is lengthened by more than 1 kilometre, where the existing reserve is wider than 13, 5 metres; or, where no reserve exists, where the existing road is wider than 8 meters and excluding widening or lengthening or occurring inside urban areas”.*

It was further contended that had the widening by 3 meters been deferred until now, this would not have constituted an offence.

- [9] The powers of this court to interfere with the sentencing of the trial court are limited. This court may only interfere with the sentence imposed by the trial court when there has been demonstrable and material misdirection by such trial court in imposing such a sentence, or that court's discretion has not been exercised properly or judicially. In the absence of such proof, the appeal court has no right to interfere with the exercise of such discretion. (**S v Rabie**²)

In this regard the court in **S v Kekana**³ held that:

"it is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. No misdirection has been alluded to, nor can it be said that the sentence induces a sense of shock. It has been submitted on behalf of the appellant that the sentence is out of proportion to the gravity of the offence and that, in the circumstances of this case, a non-custodial sentence was appropriate. It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out clear message that behaviour of the kind encountered in this case cannot be countered."

- [10] In **S v Truyens**⁴, the court referred to **S v Whitehead**⁵ with approval that where there is no misdirection by the trial court, the remaining question is:

"whether there exists such a striking disparity between the sentences passed by the learned trial judge and the sentences which this court would have passed or, to pose the enquiry in the phraseology employed in other cases,

² 1975(4) SA 855 (A)

³ 2013(1) SACR 101 (SCA)

⁴ 2012(1) SACR 79 (SCA)

⁵ 1970(4) SA 424 (A)

whether the sentences appealed against appear to this Court to be so startlingly or disturbingly inappropriate-as to warrant interference with the exercise of the interference with the exercise of the learned judge's discretion regarding sentence."

- [11] It is trite that the state is bound by the facts upon which a s112 (2) statement is made by the appellant in circumstances where the state had indicated their acceptance of the contents thereof. In **S v Jansen**⁶ Davis J considered the situation where an accused pleads guilty and hands in a written statement in terms of s112(2) of the Criminal Procedure Act, 1977, setting out the facts upon which guilt is admitted, and the state accepts that plea. Davis J stated that in those circumstances the plea so accepted constituted the essential factual matrix on the basis of which a sentence must be imposed. The learned judge stated that the state may adduce evidence to fill in the framework which was set by the plea, but that the essential matrix could not be extended or altered by evidence given in mitigation of sentence.

- [12] Lopes J in **S v Khumalo**⁷ in para [11] also stated that:

"Although the judgment of Davis J provides that the essential factual matrix is set out in the plea accepted by the state and cannot be altered by evidence subsequently adduced, this does not prevent the leading of evidence which does not contradict the plea, but which may be relevant to the question of sentence. Even if contradictory evidence does emerge the conviction on the plea as accepted stands."

- [13] I have no difficulty in this matter in finding that the trial magistrate misdirected himself materially in his reasons referred in para [7] above regarding sentence. It is trite that in instances where the misdirection is of a serious nature, an appeal court can consider the question of sentence afresh.

- [14] It is trite that a court, when sentencing, should consider the triad, namely the interest of society, the seriousness of the offence and the circumstances of

⁶ 1999(2) SACR 368(C)

⁷ 2013(1) SACR 96 (KZP)

the appellant (See **S v Zinn**⁸). The court is bound to consider the recognized objectives of sentencing, namely punishment, deterrence and rehabilitation. The interests of the society in this matter are best encapsulated in s24 (b) of our Constitution by providing everyone the right:

(a)...

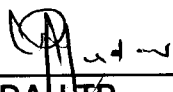
(b) *to have the environment protected, the benefit of present and future generations, through reasonable legislature and other measures that;*

- i) *prevent pollution and ecological degradation;*
- ii) *promote conservation; and*
- iii) *secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development”.*

[15] A wholly suspended sentence or a caution and discharged as suggested by counsel for the appellant will in my view, send a wrong message that courts do not take environmental offences seriously. The R10 000 000-00 penalty provided for in the relevant legislation is, however, quite clearly intended for cases where there has been violation of an extreme nature. In my view this is not such a case as there was no evidence in aggravation of sentence that was led by the respondent, but quite the contrary. It is my view that an effective sentence of a fine shall be adequate. Counsel for the respondent was constrained to concede that in the absence of evidence showing what the impact was (if any), as a result of the widening of the road within the plantation, the R180-000-00, fine imposed is excessive.

[16] Under the circumstances, regard being had to the totality of the facts in this matter, the following order is proposed:

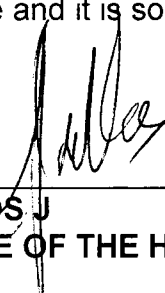
1. The sentence imposed by the court below is set aside and replaced by the following sentence: “the *accused is sentenced to a fine of R60 000, 00*”.



MUDAUP
ACTING JUDGE OF THE HIGH COURT

⁸ 1969 (2) SA 537 (A)

I agree and it is so ordered.



DE VOS J
JUDGE OF THE HIGH COURT

Date of hearing: 5 February 2015

Judgment on: 6 February 2015

APPEARANCES

On behalf of the appellant: Adv J Celliers (SC)

Instructed by Richard Spoor Attorneys

On behalf of the respondent: Adv A Coetzee

NPA