

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: A244/2013

In the matter between:

DONALD MUGOTA

Appellant

and

THE STATE

Respondent

CORAM:

JORDAAN, J *et* MOLOI, J

HEARD ON:

10 MARCH 2014

DELIVERED ON:

13 MARCH 2014

MOLOI, J

- [1] The appellant pleaded guilty to trespassing on the mine property in Welkom, being an illegal immigrant in contravention of section 49(1)(a) of Act 13 of 2002 and attempted theft of gold bearing substance and was duly convicted. He was sentenced to R 20 000.00 or two (2) years imprisonment, R 300.00 or 30 days imprisonment and R 1000.00 or four (4) months imprisonment, respectively. With the leave of the trial court, he came before on appeal against the sentences imposed.

- [2] The major argument before us was that the sentence imposed in respect of the trespassing charge, viz the R 20 000.00 or two years imprisonment was shockingly high and inappropriate as the fine was higher than what he could afford, viz R 3000.00. The Trespass Act No. 6 of 1959 provides for sentence of a fine not exceeding R 2000.00 or imprisonment not exceeding two (2) years. Taking into account the provisions of the Adjustment of Fines Act No. 101 of 1991 the trial court would be within its rights to impose a fine of R 20 000.00 despite the provisions of section 2(1) of Act 6 of 1959 (Trespass Act).
- [3] From the onset Mr Nel, for the appellant, conceded that the trial court referred in its assessment of appropriate sentence to the fact that the appellant was the first offender, that he pleaded guilty right at the outset and that he was the only breadwinner for his family. It was submitted that the appellant was married with three (3) minor children and that his wife was unemployed. It was also submitted that the appellant has completed school, (whatever that meant) and that he has been in South Africa since 2008 after fleeing his country, Zimbabwe, as an asylum seeker. The appellant is also an asthma sufferer and could only stay underground at the mine for only five hours and could not even steal the gold substance because of his health condition.
- [4] The trial court also considered the seriousness and the prevalence of the crime committed by illegal miners in the Free State goldfields in particular and in the country in general. The incidents of these illegal mining activities have

assumed serious proportions and have, in some instances, resulted in death and by the illegal miners amongst themselves. That the economy of the country suffers great losses from these illegal activities goes without saying. The courts can safely take judicial notice of the fact that these illegal activities are orchestrated and are syndicated with the foot soldiers doing the dirty work for the faceless bosses.

- [5] The submissions advanced on behalf of the appellant cannot and do not entitle this court to interfere with the exercise of the sentencing discretion by the trial court: **S v Anderson** 1964(3) SA 494 (A) and **S v Kibido** 1998(2) SACR 213 (SCA). There is no law that says a first offender should not be punished with sufficiently harsh sentence. There is equally no law that says a fine that is imposed should not exceed the amount an accused person has. That would lead to absurdities and lead to the accused dictating to the courts what fines must be imposed. The appellant's plea of guilty was inevitable having being caught red handed. The co-operation given to authorities cannot be to his credit as stated in **S v Sebata** 1994 (2) SACR 319 (C) at 325F. The submission that he is a breadwinner for his family raises eyebrows as to how does he make money to provide for his family as there is no mention of his employment at all. It is also inconceivable how he is an asylum seeker since 2008 and after six years there is no finality reached about his asylum. There was, in fact, nothing to point out that there was asylum sought and what the outcome was save what he says. His asthmatic condition and his five hour stay underground cannot be supported with tangible evidence

except what he says. Equally it is surprising to note that the charge sheet notes the appellants address as unknown and one wonders where his family lives. The court can safely accept that he could not give his address to the authorities.

[6] It is common knowledge that the majority of the illegal miners in this country are foreigners that are illegally in the Republic. There is no law regulating the illegal mining activities. The most the State can charge the illegal miners with is Trespass and Theft or Attempted Theft as in our case. It is hoped that the legislature can enact a law that will have harsh punishment for these illegal activities which are assuming horrendous proportions.

[7] In my view the trial court took all the relevant considerations into account and balanced them properly as required by **S v Rabie** 1975 (4) SA 855 (A) at 862 A. This court has no reason to interfere with the sentencing discretion by the trial court. The court was provided with a number of cases in which lesser sentence was imposed. All those cases were of course, review cases where the circumstances are totally different from an appeal case.

ORDER:

The appeal is consequently dismissed.

K. J. MOLOI, J

I concur.

A. F. JORDAAN, J

On behalf of the Appellant: **Adv. P.W NEL**
Instructed by:
Bloemfontein Justice Centre
BLOEMFONTEIN

On behalf of Respondent: **Adv B.G CLAASSENS**
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN