

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

NOT REPORTABLE

Case No: A166/08

Date heard: 02/04/2009

Date of judgment: 03/04/2009

In the matter between:

ELIAS TLHALEFO MASANGO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

DU PLESSIS J:

The appellant appeared in the regional court on a charge of fraud to which he pleaded guilty. He was duly convicted and sentenced to five years

imprisonment of which three years were suspended on appropriate conditions. With the leave of the trial court, the appellant now appeals against the sentence.

On behalf of the State, Ms Mahomed filed an application for the sentence of the appellant to be increased. The basis of the application was that the offence of which the appellant was convicted resorts under section 51(2)(a) read with Part II of Schedule A to the **Criminal Law Amendment Act, 105 of 1997** ("the Act") and therefore is subject to a minimum prescribed sentence. In her judgment on sentence, having heard full argument on the question, the learned magistrate made a pertinent finding that the Act does not apply. The State did not appeal against that finding. In the circumstances Ms Mahomed conceded, correctly in my view, that the applicability of the Act is *res judicata* and that we must approach the appeal on the footing that the magistrate correctly held that the Act does not apply. Apart from the initial contention that the Act applies, the State did not on any other ground contend that the sentence must be increased.

When he committed the crime the appellant was employed by the National Department of Forestry and Water Affairs as an administrative clerk. It was his function to prepare the necessary documentation in order for the department to make payment of moneys owing to deceased ex-employees of the department. The appellant fraudulently used a friend's banking details and by that means

procured that approximately R103 000 owing to deceased ex-employees was paid into the friend's banking account. This the appellant did in collaboration with the friend, their common purpose having been to misappropriate the money. Of the R103 000 all but an amount of approximately R17 000 was recovered. Of the R17 000 the appellant appropriated approximately R9000. It is not in issue that he did not use that for himself, but mainly financially to support his extended family and to pay for a family funeral.

The appellant was 26 years old when he committed the crime and when he was convicted and sentenced. He is a first offender. While he was working, the appellant supported members of his extended family, his minor child and the latter's mother, with whom he lived although they were not married. The mother of the child also worked. The evidence shows that the appellant will almost definitely lose his employment as a result of the offence. When his employment is terminated, his pension contributions will be paid out to him.

I have pointed out that the appellant pleaded guilty. To that must be added that he instructed his lawyers from the outset that he wanted to plead guilty and to make a full disclosure. Having regard to the appellant's statement in terms of section 112(2) of the **Criminal Procedure Act, 51 of 1977** the latter is what the appellant did. The appellant also offered that the money that he

received out the fraud may be deducted from his pension when that is paid out to him.

At the request of the trial court, reports by a probation officer and by a correctional supervision officer were obtained. Both these reports recommended that a sentence of correctional supervision be imposed. From the report of the probation officer, it is apparent that the appellant did not have a particularly happy childhood. Despite financial difficulties, he managed to matriculate. He embarked on a tertiary education course, but had to abandon it for financial reasons. As a general proposition, the two reports show that, apart from the transgression under consideration, the appellant has led a stable life with his little family and has shouldered his family responsibilities.

For the appellant Mr Badenhorst submitted that the sentencing court did not have due regard to the paramount interests of the appellant's minor child as is required by section 28(2) of the **Constitution of the Republic of South Africa, 1996** (See in this regard **S v M (Centre for Child Law as *amicus curiae*) 2007 (2) SACR 539 (CC)**). I shall deal with this argument in the broader context of the appellant's and society's interests in a stable family.

For the appellant it was also submitted that the learned magistrate did not have due regard to the principles of restorative justice. Apart from the fact that that was not one of the grounds of appeal, the learned magistrate in my view did have due and proper regard to the question of repayment by the appellant of the money in question. The complainant being a government department, restoration in another form is not applicable and we were not referred to any such other form of restoration.

The sentence cannot be described as shockingly inappropriate. The appellant's counsel submitted, however, that the learned magistrate did not have due regard to the interaction between the short term imprisonment on the one hand and the destructive effect it will have on the appellant and his family.

The crime is doubtless serious and, looking at that alone, a custodial sentence is no doubt appropriate. The court must of course also have regard to the interests of the appellant and those of society. As to the latter, society has an interest in crime being properly and duly punished. Society, however, also has an interest in preserving, if possible and appropriate, a family unit with a child. Society further has an interest in rehabilitating, if possible, in stead of destroying one of its members.

In my view counsel correctly pointed out that in the case of this particular appellant, imprisonment will probably destroy him and his family. While the

deterrent and retributive effects of imprisonment, including short term imprisonment, cannot be under estimated, a court must always weigh that against the interests of an accused person and of society not to destroy an accused person who is showing signs of rehabilitation. I have made reference to the personal circumstances of the appellant. His actions since the charge had been brought against him evinces on his part an understanding of what he has done wrong and of remorse. In brief, the appellant has started on the way to rehabilitation. In addition he is caring for his family and even a short term of imprisonment will destroy the family. In this particular case the deterrent and retributive value of a short term sentence of imprisonment does not warrant the destruction of the appellant and his family.

The probation officer and the correctional supervision officer were of the view that the appellant is a suitable candidate for correctional supervision. Moreover, a properly structured correctional supervision regime will adequately punish the crime. In my view the learned magistrate erred in not imposing such a sentence in stead of short term imprisonment.

This court is not in a position to impose correctional supervision, especially as we do not have before the necessary information to structure a community service regime that we regard as essential.

In the result the following order is made:

1. The appeal succeeds.
2. The sentence is set aside.
3. The matter is remitted to the trial court for it, on evidence that the parties may place before it, to formulate and impose a sentence of correctional supervision.

B.R. du Plessis

Judge of the High Court

I agree,

S. Sapire

Acting Judge of the High Court

On behalf of appellant: Pretoria Justice Centre
6th Floor Van der Stel Building
179 Pretorius Street
Pretoria
0002
Adv. C.H. Badenhorst

On behalf of Respondent: Director of Public Prosecutions
Transvaal
28 Church Square
Pretoria
0001
Adv. S. Mahomed