

**FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA**

Appeal No. : A223/06

In the appeal between:-

MAPASEKA JEMINA NTAOPANE

Appellant

and

THE STATE

Respondent

CORAM:

EBRAHIM, J *et* JORDAAN, J

HEARD ON:

20 APRIL 2009

JUDGMENT BY:

EBRAHIM, J

DELIVERED ON:

30 APRIL 2009

- [1] The appellant was convicted of fraud in the Regional Court sitting at Bloemfontein pursuant to a misrepresentation she made in submitting a tender in response to an advertisement placed in the media by the Free State Department of Education calling for tenderers for the provisions of books and stationary to various public schools in the Free State.

[2] The misrepresentation consisted in her failure to disclose her marital relationship with a teacher in the employ of the said Department, well-knowing that she was expected to do so on the prescribed “Declaration of Interest” form. The appellant was sentenced to pay a fine of R 8 000,00 or to undergo one year’s imprisonment, half of which was conditionally suspended for three years.

[3] Paragraph 2 of the form specifically poses the following question:

“Are you or any person connected with the tenderer, employed by the Province”

to which the appellant responded in writing in the negative. The rationale underlying in the disclosure is stated in the preamble to the questionnaire as follows:

“Any legal person, including persons employed by the Province, or persons who act on behalf of the Province or persons having a kinship with persons employed by the Province, including a blood relationship may make an offer or offers in terms of this tender invitation. In view of possible allegations of favouritism,

should the resulting tender, or part thereof, be awarded to persons employed by the Province, it is required that the tenderer take an oath declaring his interest.”

It was common cause between the appellant and the respondent during the trial in the Court *a quo* that neither employees of the said Department nor their relatives were disqualified from applying for the tender, provided familial connections were disclosed.

- [4] With the leave of the trial court the appellant noted an appeal against her conviction and the sentence unopposed. It is not clear from the record before us whether there was any attempt at any stage by the appellant to abandon the appeal against the conviction. What is before us, are written Heads of Argument from the respondent entitled “Respondent’s Heads of Argument in the Appeal on Sentence”. No Heads of Argument have been filed by the appellant in support of the appeal on sentence. Before us also is an application by the respondent for an increase in the sentence imposed. No leave of this Court to withdraw the appeal on sentence was sought by Mr. Majola. It was agreed between the parties’

legal representatives Mr. Majola and Mr. Swanepoel on behalf of the State at the hearing, that the only issue which this Court has to concern itself with is the application for the increase in sentence. The merits of the appeal against the sentence imposed were not argued therefore. The parties proceeded to argue the merits of the application to increase the sentence directly.

- [5] The thrust of Mr. Swanepoel's submissions, on behalf of the respondent, was that the appellant had profited substantially in monetary terms from the tender which the State found untenable because of the adage coined by Mr. Swanepoel "Crime must not pay". He argued that in imposing what he termed was a light sentence on the appellant, the Court *a quo* had undermined the deterrent aspect of punishment, the nature seriousness and prevalence of the crime concerned and had underemphasized the moral reprehensibility of the participation by civil servants and their family members in such crimes upon the State and State owned institutions such as the Free State Department of Education.

[6] Mr. Majola, for the appellant, opposed the application for the increase on the basis that the sentence was fair and appropriate and that the appellant had provided the services she had undertaken to provide in terms of her successful tender.

[7] As authority for his submissions Mr. Swanepoel referred us to a decision of the Lesotho High Court, dealing with the common law crime of bribery, in **R v SOLE** 2004 (2) SACR 599 (LesHC) at p. 701 and suggested that this Court follow the example of the Supreme Court of Appeal in the unreported case 62/06 of **SHAIK v THE STATE** and the Constitutional Court in **SA ASSOCIATION OF PERSONAL INJURY LAWYERS v HEATH AND OTHERS** 2001 (1) BCLR 77 (CC). In both decisions the court cited **SOLE** with approval. In the latter case the Constitutional Court at 80 E – F stated:

“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 freedom. 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.”

- [8] Mr. Swanepoel conceded readily that the appellant’s conduct did not involve any bribery or corruption or attempts thereto. He also conceded the State had not shown that the appellant’s non-disclosure had contributed to any maladministration in the said Department of Education, nor had the tender process been tarnished in any way by her failure to make the necessary disclosure.
- [9] That the crime of fraud in the circumstances of its commission in the present case is very serious was not challenged by Mr. Majola. This Court, however, is unable to make any finding that the particular conduct complained of in this case (that is the non-disclosure in a tender application and process), is prevalent. No statistics were provided by the State in this regard, nor was relevant case authorities cited by Mr. Swanepoel. The highwatermark of his submission in support of his application for an increase in the

sentence was that, according to his mathematical calculations as set out in his Heads of Argument, the appellant had made a healthy profit from the award of the tender. He was unable to make out, in my view, a convincing argument when it was pointed out to him that the amount was not profit, but was monies legally earned by the appellant for the provision of books and stationary in terms of her contract with the Department of Education. He persisted in the argument that were it not for the non-disclosure, the appellant might not have been awarded the tender and accordingly the monies paid to her by the Department was profit fraudulently obtained.

[10] I am not persuaded by his submissions. In my view the appellant's fraudulent non-disclosure merely enabled her to be considered as one falling into a different category of persons tendering for the contract. There is no evidence on record before us and Mr. Swanepoel was unable to point to any such evidence, that had the appellant disclosed that she was married to any employee of the Department, she would not have been successful in her tender. That being the case I am unable to conclude that the monies paid to the appellant

by the Department can be regarded as monies fraudulently obtained by her.

[11] As with cases where a reduction of sentence is requested in appeals against a sentence imposed by a lower court, a Court of Appeal has wide powers to interfere on appeal where an increase in sentence is applied for but will only do so if it is shown by the State that the trial court committed a misdirection in its assessment of the relevant and material facts upon which it based the sentence it imposed and/or if it is shown that the trial court failed to act judicially. I have not been persuaded by Mr. Swanepoel that any of these two scenarios occurred in the appellant's case. This Court is therefore not at large to interfere with the sentence imposed.

- [12] 1. The appeal is accordingly dismissed.
2. The conviction and sentence are confirmed.

S. EBRAHIM, J

I concur.

A.F. JORDAAN, J

On behalf of appellant:

Mr. M. Majola
Instructed by:
Majola Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv. J.B.K. Swanepoel
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

/sp