



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

Reportable / Not reportable

Case no: **A57/2022**

Regional Court Case Number: **17/41/2014**

In the matter between:

THE STATE

Applicant

And

NTHAPELENG DAVID SERAME

1st Respondent

ICEBERG TRADING 542 CC

2nd Respondent

SNOWLINE TRADING 582 CC

3rd Respondent

KA RONA TRADING 536 CC

4th Respondent

SEVENTH AVENUE TRADING 560 CC

5th Respondent

SENTHATI TRADING CC

6th Respondent

Neutral citation: *The State v Nthapeleng David Serame and five others (A57/2022)*

Coram: **Daniso J**

Heard: This application was determined in chambers as provided for in section 310 (A) (1) of the Criminal Procedure Act 51 of 1977.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 12h00 on 03 October 2024.

ORDER

1. The late filing of first the respondent's written submissions as contemplated in section 310 (A) (4) of the Criminal Procedure Act 51 of 1977 is condoned.
2. Leave to appeal against the sentences imposed by the Regional Magistrate Nekosie against the first respondent on 26 April 2022 in respect of counts 1 to 330, 353 to 356 and 372 to 404 is granted.

JUDGMENT

Daniso, J

- [1] The State seeks leave to appeal sentences imposed by the Regional Magistrate Nekosie against the first respondent on 26 April 2022 pursuant to a conviction on 406 counts involving:
- 1.1. Fraud (counts 1 to 339) together with second alternative counts;
 - 1.2. Contravening the provisions of Section 235 (1) (a) of the Tax Administration Act 28 of 2011 (counts 340 to 352);
 - 1.3. Contravening the provisions of Section 58C of the Value Added Tax Act 89 of 1991 (counts 353 to 356);
 - 1.4. Contravening Section 58F of the Value Added Tax Act 89 of 1991 (counts 357 to 361);
 - 1.5. Contravening Section 75 (1)(f) of the Income Tax Act (counts 362 to 366);
 - 1.6. Contravening Section 234(e) read with Sections 29 and 30 of the Tax Administration Act 28 of 2011 (counts 367 to 371);

- 1.7. Contravening Section 58 (d) read with Sections 14, 28 (1) of the Value Added Tax 89 Act 1991 (counts 372 to 404);
- 1.8. Contravening Section 4 read with Sections 1 and 8 of the Prevention of Organized Crime Act 121 of 1998 (count 405); and
- 1.9. Contravening Section 3 (b) read with Sections 1,2,24,26 of the Prevention of Corrupt Activities 12 of 2004 (count 406).

[2] The conviction arose after the first respondent, as the sole member and representative of the second to sixth respondents, pleaded guilty to the counts relating to Tax evasion, and not guilty to the remaining charges. The second to sixth respondents were respectively sentenced to fines ranging from R100 000.00 to R1 million, wholly suspended for five years with conditions. The first respondent was sentenced as follows:

- 2.1. Counts 1 to 339 were taken together for the purposes of sentence with the result that he was sentenced to seven years' imprisonment, wholly suspended for a period of five years with conditions. He was also sentenced 36 months' correctional supervision as envisaged in section 276 (1) (h) of the Criminal Procedure Act 51 of 1977 (the Act).
- 2.2. The second alternative counts 340 to 352 were also taken together for the purposes of the sentence. The first respondent was sentenced to five years' imprisonment, wholly suspended for a period of five years with conditions which included a payment of an amount of R2 284 047.39 to SARS before 20 April 2027;
- 2.3. Counts 353 to 356, were taken together for the purpose of sentence. He was sentenced to three years' imprisonment wholly suspended for a period of five years with conditions;
- 2.4. Counts 357 to 361, were taken together for the purpose of sentence, he

was sentenced to two years' imprisonment wholly suspended for a period of five years with conditions;

- 2.5. Counts 362 to 366, were taken together for the purpose of sentence, he was sentenced to two years' imprisonment wholly suspended for a period of five years with conditions;
- 2.6. Counts 367 to 371, were taken together for the purpose of sentence, he sentenced to one-year imprisonment wholly suspended for a period of five years with conditions;
- 2.7. Counts 372 to 404, were taken together for the purpose of sentence. He was sentenced to three years' imprisonment wholly suspended for a period of five years with conditions which include a payment of an amount of R628 095.38 to SARS before 20 April 2027;
- 2.8. In respect of count 405, he was sentenced to seven years' imprisonment wholly suspended for a period of five years with conditions; and
- 2.9. As for count 406, the first respondent was sentenced to ten years' imprisonment wholly suspended for five years with conditions.
- 2.10 In terms of section 18 of the Prevention of Organized Crime Act No, 121 of 1998, the respondents were found to have benefited from the proceeds of the unlawful activities relating to the offences they were convicted of, in the amount of R9 678 617. 71. A confiscation order in terms of which the respondents were ordered pay the said amount to the State was also made.

[3] The application is directed at the sentences imposed in respect of counts 1 to 330,

353 to 356 and 372 to 404. On the facts germane to this matter, the offences were perpetrated against the Mangaung Local Municipality (the Municipality) and the South African Revenue of Services (SARS). In counts 1 to 339 the first respondent was accused of having fraudulently issued invoices to the Municipality claiming for services or goods rendered whereas no such services or goods were rendered. Counts 353 to 356 relate to the first respondent's failure to register his enterprises as vendors for Value Added Tax whilst counts 372 to 404 pertain to failing to submit vendor tax returns and to pay the taxes due in that regard to SARS.

[4] Section 310A of the Criminal Procedure Act 51 of 1977 (The CPA) reads as follows:

- "(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.*

- (2) (a) A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.*

- (b) The notice shall state briefly the grounds for the application.*

- (3) The attorney-general shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.*

- (4) An accused may, within a period of 10 days of the serving of such a notice upon him, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the attorney-general.*

- (5) Subject to the provisions of this section, section 309 shall apply mutatis mutandis with reference to an appeal in terms of this section.*

- (6) Upon an application for leave to appeal referred to in subsection (1) or an appeal in terms of this section, the judge or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the provincial or local division concerned."*

[5] It is the State's case that the sentence imposed by the magistrate in counts 1 to

339 is inappropriate and lenient to the extent that induces a sense of shock. In sentencing the first respondent, the trial court erred in not taking into account the gravity of the offences and the real loss of the amount of R9 678 617.71 sustained by the Municipality as a result of the first respondent's fraudulent actions. The first respondent also did not plead guilty in respect of these offences, he was convicted after trial. Furthermore, he did not offer or even show an ability to compensate the Municipality for this loss. The trial court merely paid lip service to the interests of society, but such interests were not considered at all. The suspended sentences imposed send out a message that it pays financially to commit crimes of this nature.

- [6] In respect of counts 353 to 356 and 372 to 404, the State submits that the trial court misdirected itself by taking all the counts together as one for the purpose of sentencing and thereafter imposed a sentence of 3 years' imprisonment with conditions despite the fact that the offences that the first respondent was convicted of have their own penal limit which prescribes a fine or imprisonment not exceeding 24 months per count.
- [7] The application is opposed by the first respondent. His written submissions incorporate a request for condonation as they were delivered extremely out of time. According to the return of service, the first respondent received the notice of the application on 16 May 2022. His written submissions were only delivered on 16 July 2024, approximately two years late from the 10 days' period prescribed by section 310A (4) of the CPA.
- [8] Despite the substantial ineptitude, the first respondent has simply fleetingly explained that the delay is attributable to having had to seek alternative legal representation after his erstwhile legal representative was suspended from practicing. There are no specifics in terms of the dates on which he discovered that his erstwhile legal representative was suspended and when he subsequently embarked on his quest to secure an alternative legal representative. There are also no averments pertaining to the prospects of success on the merits of the application if any, including the importance of the subject matter. A party who

seeks an indulgence of the court to condone its ineptitude must show sufficient cause entitling it to the court's indulgence by giving a full explanation for the non-compliance with the court rules. The Constitutional Court in ***Grootboom v National Prosecuting Authority and Another***¹ long-established that all these factors are of relevant consideration in condonation applications. This condonation application dismally falls short of the requirements contemplated in *Grootboom* however, having regard to the age of the matter (the first respondent was sentenced on 26 April 2022), and that no prejudice has been indicated by the State as a result of the late written submissions, I hold the view that it will be in the interests of justice, including that of the State, that this matter progresses. Condonation is accordingly granted.

- [9] Turning to the merits of the application, it is a well-established principle that that punishment is pre-eminently a matter for the discretion of the trial court. The court of appeal *should be careful not to erode such discretion* and tamper with the sentence *unless it is vitiated by irregularity or misdirection or is disturbingly inappropriate*.²
- [10] According to the first respondent, there is no basis for the State's contention that the sentence imposed in counts 1 to 339 is inappropriate. It is argued that, in arriving at the sentence, the trial court duly undertook the balancing exercise of the basic triads of sentencing by taking into consideration the first respondent's personal circumstances, the nature and seriousness of the offences and their effect on the community at large. The trial court also considered the aims of punishment namely, retribution and restoration, and having regard to the correctional supervision report, it concluded that a wholly suspended sentence together with correctional supervision which includes three years of house arrest was appropriate. It will serve the purpose of rehabilitating the first respondent as opposed to direct imprisonment which will be costly to the government and in any event there is a likelihood of the first respondent being released on parole if he were to be sentenced to a lengthy prison sentence.

¹ **2014 (2) SA 68** (CC) para 50.

² *S v Rabie* **1975 (4) SA 855** (A) at 857D-F; *S v Kgosimore* **1999 (2) SACR 238** SCA.

- [11] It is contended on behalf of the first respondent that there is no merit to the State's criticism of the first respondent for not pleading guilty because he did plead to the other offences and when he took the stand pursuant to the not guilty plea "he did not materially dispute certain allegations against him" therefore it cannot be said that he wasted the court's time.
- [12] Regarding not compensating the Municipality, it is argued that the State fails to take into account that the court issued a confiscation order against the first respondent for R9 678 617.71, and that the trial court was entitled to combine all the counts in relation to counts 353 to 356 and 372 to 404 into a single sentence as the offences are closely connected in time, place and circumstances and all fall within the same statutory structure to tamper with the cumulative effect of sentencing the accused on each count in terms of the penal provision. Accordingly, the State has failed to show that there has been an irregularity in the sentencing that results in the failure of justice. There are no reasonable prospects of appeal succeeding, the application must be dismissed and the State must be ordered to pay the costs of the application as provided for in section 310A (6). I disagree.
- [13] The nature and seriousness of the offences the first respondent has been convicted of is indisputable. With regard to counts 1 to 339, the first respondent received a seven years wholly suspended sentence with conditions and a sentence of 36 months' correctional supervision.
- [14] As correctly pointed by the State in aggravation of sentence, paginated page 2956 of the record of the proceedings, line 17 onwards:

"PROSECUTOR: ...if you look at the money of the Municipality one can say it is an institutionalized institution, they steal much more money but the problem I am having with that type of argument and because that is the argument that you will get from people, if you ask people from the street. It starts of and it has a cumulative effect. If you can think of all the people that could have benefited from this R9million. I do not need to try and convince you of all the roads. You can go outside here in this very road up the road there are how many potholes that we drive though. How many times a vehicle go through it. I do not want to imagine thinks but I think it is not farfetched to tell you that some or other time

people are going to get killed. How many manholes are open that people will get injured? Because people like the accused are permitted to or not permitted but they are contravening these kinds of offences..."

[15] It has also been pointed out in *South African Association of Personal Injury Lawyers v Heath and Others*³ that:

"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 freedoms. 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. There can be no quarrel with the purpose sought to be achieved by the Act or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done."

[16] In my view, the above sums up the issue regarding the nature and the gravity of the offences the first respondent was convicted of. An offence which undermines not only the interests of the community but the constitutional commitment to human dignity ought to be visited with a sentence which speaks to the plight of the community. The offender's personal circumstances must recede to the background.

[17] A confiscation order is intended to deprive a "defendant" of the benefits of criminal activities, 'it is not itself a punishment but an order made in addition to any punishment the court may impose'.⁴

[18] As regards counts 353 to 356 and 372 to 404, all thirty- seven counts were taken together as one for the purpose of sentencing resulting in the imposition of a globular sentence of three years' imprisonment wholly suspended conditions

³ [2000] ZACC 22; 2001 (1) SA 883 (CC) para 4.

⁴ Albert Kruger *'Organised Crime and Proceeds of Crime Law in South Africa'* 3rd ed, at 104 para 5.3.1.

whereas the provisions of section 58(1) and (2) of the Value Added Tax Act 89 of 1991 prescribe a penalty of a fine or 24 months' imprisonment per count. That aside, it has been found to be undesirable to group together all the counts for the purpose of sentencing where the counts are not part of a single transaction or the elements of the crime to be proven by the State by are not closely related, except of course in exceptional circumstances.⁵

- [19] Having regard to the facts of this matter, I am persuaded that there is a reasonable possibility that another court may come to a different conclusion regarding the appropriate sentences. The State has reasonable prospects of success on appeal for that reason, the application succeeds.

ORDER:

- [20] In the result, the following order is made:

1. The late filing of first the respondent's written submissions as contemplated in section 310 (A) (4) of the Criminal Procedure Act 51 of 1977 is condoned.
2. Leave to appeal against the sentences imposed by the Regional Magistrate Nekosie against the first respondent on 26 April 2022 in respect of counts 1 to 330, 353 to 356 and 372 to 404 is granted.

The Honourable Justice

 NS DANISO, J

⁵ *S v Young* **1977 (1) SA 605** (AD) at 610E; *S v Mofokeng* **1977 (2) SA 447** (O) at 448H; *S v Swart* **2000 (2) SACR 566** (SCA) para 19 at 574.

On behalf of the Applicant:
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On behalf of the first Respondent:
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