



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT)**

Case No: A338/12

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

CAPE OF GOOD HOPE

Appellant

and

DENVOR PAUL FIELIES

Respondent

JUDGMENT delivered on 21 May 2013

BOQWANA AJ

Introduction

- [1] The respondent was charged with 39 counts of corruption in terms of section 4(1) of the Prevention and Combating of Corrupt Activities Act, Act No. 12 of 2004 ('the POCCA Act') . He pleaded guilty to all 39 charges in terms of Section 112 (2) of the Criminal Procedure Act, Act 51 of 1977 ('Criminal Procedure Act') and was on 25 October 2010 sentenced to a fine of R60 000,

payment whereof was deferred to 31 December 2010 in terms of section 297(5) of the Criminal Procedure Act, or two years imprisonment in default of payment. He was sentenced to a further twelve months imprisonment suspended for five years on condition that he was not convicted of fraud, theft or any contravention of the POCCA Act during the period of suspension.

- [2] The Director of Public Prosecutions ('the appellant') thereupon sought and obtained leave from this Court in terms of section 310A(1) of the Criminal Procedure Act to appeal against the sentence.

- [3] The brief facts of this case are that, during the period of July 2005 and August 2007, the respondent in his capacity as Head of Streets, Storm Water, Parks and Resorts at Hessequa Municipality ('the municipality') awarded tenders to one Paul Fischer ('Fischer') and/or his company amounting to R649 827.50 over a period of 2 years contrary to the municipality's procurement policy. He also assisted Fischer in drawing up the quotations to ensure that his company was the successful bidder. The respondent admitted that he was instrumental in the execution of this corrupt relationship between himself and Fischer. For awarding these irregular contracts the respondent received kickbacks amounting to R350 000.00.

- [4] The appellant's grounds for appeal are essentially that the magistrate misdirected himself by imposing such a lenient sentence. It is submitted on behalf of the appellant that the magistrate failed to consider the interests of the community, the gravity of the offence and personal circumstances in a balanced manner. The sentence he imposed according to the appellant was strikingly inappropriate and unduly lenient such that it induces a sense of shock. Counsel for the appellant submits further that the magistrate misdirected himself in how he calculated the fine that is payable.

- [5] The crime committed by the respondent falls under a category of white collar crimes. It is therefore important to look at how these types of crime are generally viewed by the Courts. In **S v Sadler 2000 (1) SACR 331 (SCA) at 335G - 336B**, Marais JA said the following:

“[11] So-called 'white-collar' crime has, I regret to have to say, often been visited in South African courts with penalties that are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of 'white-collar' crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being 'criminals' or 'prison material' by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for 'white-collar' crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from 'respectable' backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

[12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.

[13] It is unnecessary to repeat again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive effect of which upon society is too obvious to require elaboration...”

- [6] In the *Sadler* case the respondent was a senior manager in NBS Corporate Bank. In order to ensure that certain persons received advances from the bank he either deliberately concealed the true extent of the bank's exposure to those persons and falsely represented it to be less than what it was or placed false and misleading information before the bank. In one instance he forged a signature of one of the directors of the bank upon a document in order to induce others in the bank to sanction an advance which would otherwise not have been made. As *quid pro quo* he received luxury goods and a large loan worth R400 000.00 on favourable terms. The trial court imposed sentences in the range of two to five years wholly suspended a fine of R500 000.00 and 1000 hours worth of community service.

- [7] The Court there concluded that a case like that called for the imposition of a period of direct imprisonment and that the trial court's sentence could not be left undisturbed. Marais JA subsequently echoed these sentiments in **S v Makhudu 2003 (1) SACR 500 (SCA)** where he said (at paragraph 13):

'White collar crime had become notoriously prevalent and Courts of high authority had lamented a tendency on the part of some courts to impose sentences which were rightly generally regarded as being too lenient'

- [8] In **S v Shaik 2007 (1) SA 247 (SCA)** the SCA stated at paragraph 223 that:

'The seriousness of the offence of corruption cannot be overemphasised. . . . It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.'

- [9] Returning to this case. The magistrate in his reasoning towards sentencing clearly mentioned the seriousness of the offence committed by the respondent and how the conduct of the respondent being a person who held a position of trust impacted on the community and the country. In deciding on a sentence to be imposed he however did not appropriately balance all the factors taken together. In my view he overemphasised the respondent's personal circumstances, the fact that he was a first offender and the fact that he pleaded guilty to all the charges. The magistrate concluded that the respondent had a young family to support and a term of direct imprisonment was not the only appropriate sentence that could be imposed. The court considered that a fine with a suspended sentence would be appropriate having, *inter alia*, considered that the appellant had paid back the amount he received as kickbacks to the municipality.

- [10] In **S v Swart 2004 (2) SACR 370 (SCA)** at paragraph 12 the court held as follows:

'What appears from those cases is that in our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role.'

[11] The appellant referred us to a number of decisions dealing with similar offences, where the perpetrators were subjected to direct imprisonment. Although this Court is not bound by those decisions, they serve as a guide on how our courts have treated cases of corruption having regard to the prevalence of white collar crime in society. Perpetrators would in many instances be people who are not destitute but who are earning decent salaries or enjoying decent lifestyles. They may be able to avoid terms of imprisonment by simply paying back the money owed to the complainant and fines imposed by the court. Such an approach in sentencing lacks a deterrent element and could send a wrong message to society as it provides no disincentive to the perpetrators of these crimes. In this regard see **R v Mochebelele and another 2010 (1) SACR 577 (LesA)**. This is not to downplay the other factors that have been taken into account in the respondent's favour that I have already referred to.

[12] Counsel for the respondent submitted that interference with sentence in this case would result in disparity of sentences imposed in respect of two accused who participated in the same offence. In his view, this Court is enjoined to have regard to the sentence imposed by the same magistrate in a separate trial involving Fischer, the respondent's co-accused, where Fischer was also given a non-custodial sentence. The approach advanced by Mr Swartz is not correct in my view for a number of reasons. Firstly, the fact that Fischer received a non-custodial sentence cannot bar this Court from interfering with the sentence imposed on the respondent which the Court

views to be disturbingly inappropriate. In **S v Giannoulis 1975 (4) 867 AD** at 871A, the court stated as follows:

‘The mere fact that accused A may have been fortunate in getting off lightly, will not necessarily mean that appellant B was unduly punished’

[13] Secondly, the personal factors of the two individuals and their level of participation in the committal of the crime is not the same. The respondent held a position of a public officer who abused his position of trust and authority. He admitted to being the initiator of this corrupt relationship and the executor of these unlawful actions. The level of participation between the respondent and Fischer and the positions they held were clearly not the same. Thirdly, their personal circumstances were different. The respondent was 37 years old at the time of sentencing, younger than Fischer who was 69 years old which is a factor that could also justify imposition of a different sentence in respect of Fischer. For these reasons the respondent's submission in relation to the disparity of sentences is rejected.

[14] In light of these factors my view is that the sentencing magistrate erred by not imposing an effective term of imprisonment in these circumstances. The sentence he imposed was too lenient and not in keeping with the general sentencing approach followed by the courts in white collar crimes. My view is that the sentence is disturbingly inappropriate warranting this Court's interference by substituting an unsuspended period of imprisonment for the sentence imposed by the magistrate. The fine that was imposed could be repaid to the respondent.

[15] In the circumstances I propose an order in the following terms:

The appeal is upheld and the sentence imposed by the magistrate is set aside and replaced with the following:

The accused is sentenced to 5 (five) years imprisonment of which 2 (two) years is suspended for a period of 5 years on condition that he is not convicted of fraud, theft or any contravention of the Prevention and Combating of Corrupt Activities Act, Act No. 12 of 2004 committed during

the period of suspension, all such counts being taken together for purposes of sentence.

N P BOQWANA

Acting Judge of the High Court

I agree, and it is so ordered

B M GRIESEL

Judge of the High Court

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State Advocate

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(no instructing attorneys)

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Dates of hearing:

12 April 2013

Date of judgment:

21 May 2013