



REPUBLIC OF NAMIBIA

CASE NO. CC 62/2007

IN THE HIGH COURT OF NAMIBIA

In the matter between:

GERRY WILSON MUNYAMA

Applicant

and

THE STATE

Respondent

CORAM: VAN NIEKERK, J

Heard: 24 January 2011

Delivered: 14 February 2011

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK, J: [1] After a criminal trial I convicted and sentenced the applicant as follows: (a) Count 1 – Fraud: 10 years imprisonment of which 3 years are suspended for 5 years on condition (i) that the applicant is not convicted of fraud or theft committed within the period of suspension; and (ii) that the accused compensates the Namibian Broadcasting Corporation in the amount of N\$100 720.00 by 31 March 2011; and (b) Count 2 – Forgery: 3 years imprisonment which

shall run concurrently with the sentence imposed on count 1. I shall not set out the facts of the matter again, as these were fully dealt with in both the judgment on the merits and the judgment on sentence.

[2] The applicant is seeking leave to appeal against the sentence imposed on the first count only. The grounds set out in his written application (as amended during the hearing of the application) are as follows:

- “1. An effective term of imprisonment of 10 years is shockingly inappropriate in that it:
 - 1.1 induces a sense of shock when considered against sentences imposed for similar offences in the High Court;
 - 1.2 is out of proportion with the totality of the accepted facts during mitigation.
2. The Court erred in not imposing a shorter sentence coupled with community service plus a further suspended sentence.
3. The sentence imposed is so excessive that no reasonable man would have imposed it.
4. The Court erred in over-emphasizing the seriousness of the offence and the deterrent effect of the sentence and in so doing the court failed to individualize the sentencing of the applicant and in the process ignored the mitigating features of the applicant’s case.”

[3] It is trite that the test to be applied in applications of this nature is that the applicant must satisfy the Court that, if leave to appeal is

granted, he has a reasonable prospect of success on appeal (*S v Ngubane* 1945 AD 185 at 187).

[4] Mr *Hinda*, who appears on behalf of the applicant, conceded that it is “non-negotiable” that an effective period of imprisonment is the only appropriate sentence in relation to count 1. However, the gist of the applicant’s complaint against the sentence imposed is that the period of 10 years is too long and that the effective period of imprisonment should be shorter.

[5] Elaborating on the grounds of appeal, counsel referred to several cases in support of his submission that the sentence induces a sense of shock when considered against sentences imposed for similar sentences in this Court. The first case is that of *S v Ganes* 2005 NR 472 HC. In this case the Court convicted the accused on 13 counts of fraud and sentenced him to a fine of N\$100 000 or two years imprisonment. In addition, a sentence of eight years' imprisonment was imposed of which six years were suspended for five years on condition that the accused is not convicted of fraud, theft by false pretences, theft or a contravention of section 2(c) of Ord 2 of 1928, committed within the period of suspension. The facts of that case are that Ganes defrauded Telecom Namibia Ltd over a period of 9 months while in its employ as its procurement manager. The accused and three other persons conspired

and devised a scheme whereby they would benefit financially, whereas Telecom would suffer actual and potential prejudice. In short, the scheme involved, *inter alia*, the accused making out false invoices for the sale of scrap metal by Telecom to some of his co-accused, which lead thereto that they underpaid Telecom, thereby causing an actual loss of about N\$445 000. The accused benefited from this scheme by receiving a 25% share of the loss sustained by Telecom, i.e. about N\$111 000. He also benefited in a further amount of about N\$56 000 raised by way of unauthorised charging of Telecom for services rendered by some of his co-accused. This part of the scheme caused potential prejudice of about N\$705 000 to Telecom.

[6] Mr *Hinda* submitted that in several respects the facts of this case are comparable to the present case. The actual and potential prejudice was higher than in the instant case. Yet, he pointed out, *Ganes* received a much lighter sentence than the applicant. He further pointed to the fact that this Court sought to distinguish the *Ganes* matter from the present by comparing the degree of remorse displayed in each case (see judgment on sentence in this case at para. [21]) and submitted that the Court misdirected itself when it stated in the judgment on sentence in the instant case that it was common cause in the *Ganes* matter that the accused was “genuinely remorseful”. For this submission counsel relied on certain passages in the *Ganes* judgment (at 479D-G) in which the

Court put the issue of remorse in perspective by taking a balanced and nuanced approach. The Court there observed that the accused's remorse seemed to grow over time as it became evident that he would be extradited to Namibia to stand trial; that his remorse and offers of compensation and assistance to the complainant and prosecution were at first not unconditional, but arose in an attempt to secure benefits for himself. Nevertheless, the accepted facts in that case are that the accused pleaded guilty and testified in full. He exposed himself to cross examination and questions by the Court. He repeatedly and sincerely expressed remorse in the witness box and offered to make amends by assisting the State in the prosecution of his co-accused. By the time the trial started, he had already made restitution to the complainant of the full amount lost by means of the fraudulent scheme, not only the amounts from which he personally benefited; he had made full disclosure to the complainant and had testified at the disciplinary hearing of a colleague who was also allegedly involved. The accused frankly admitted that greed motivated his criminal conduct and did his best to explain his motives and state of mind. It was very clear that the accused was mindful of the devastating effect his conduct has had on his family. The prosecutor in that case was satisfied that the accused could not have done more than he did to display his remorse. In my view there is no misdirection in describing the remorse displayed at the time of Ganes' trial as genuine.

[7] Contrasting these facts with the facts of the present case, the differences become glaringly obvious. The applicant pleaded not guilty. Only later during the trial he made a series of formal and material admissions which relieved the State of some of its burden in proving the charges against him. However, these admissions did not include an admission that he mismanaged or misappropriated any funds. He declined to testify at the close of the State case and during the sentence proceedings. Expressions of remorse were done to a third party, Dr Marx. The Court leaned over backwards to take this into consideration in his favour. The offer of restitution of the money misappropriated was only made during counsel for applicant's address on sentence. In my view the present case is clearly distinguishable from the *Ganes* matter on the issue of remorse. I am satisfied that there is no reasonable prospect of success on appeal on the basis of the submissions made in this connection.

[8] Apart from the issue of remorse, there is another feature of the case which is also distinguishable from the *Ganes* matter. *Ganes* was a senior employee, who acted under the influence of a more senior colleague, whereas the applicant was the NBC's most senior employee, the Director General. As such he was the person who had to, most of all, set an example to others at the Corporation and also to the community

at large. It is evident from criminal review and appeal cases that regularly come to this Court's attention that even the lowest employees who abuse their positions of trust by defrauding or stealing from their employers are generally given more severe sentences in all courts across the country. In my view it is no use to impose such sentences if top executives committing similar or more serious crimes are not dealt with even more strictly, although a balanced approach must always be followed.

[9] Mr *Hinda* also referred to the case of *S v Carl Brune* (Case CC 01/2003 – unreported judgment of this Court delivered on 19/5/2004) in which the accused embarked on a fraudulent scheme with a co-perpetrator and employee of Standard Bank to defraud the latter over a period of about 1 and a half years. The accused and his partner in crime each benefited in the amount of about N\$180 000-00. The Court found that, although the accused was not in the employ of Standard Bank, he also caused prejudice to his own employer, whose reputation had suffered as a result of the fraud. It was therefore an aggravating circumstance that the accused had acted fraudulently while being in a position of trust. The sentence imposed was one of 6 years imprisonment, 3 of which were suspended for five years on condition of good behaviour.

[10] As I understand counsel for applicant, the submission is that the sentence in this case should have been more in line with the *Brune* case. I do not agree. It is clear from the judgment that SILUNGWE J felt himself constrained to impose a sentence which was consistent with the one imposed on the accused's co-perpetrator by another court. SILUNGWE J was clearly of the view that the sentence was too lenient and the clear implication to be derived from his remarks is that he would have imposed a more severe sentence if he had been the first to pass sentence. I find myself in respectful agreement with the views expressed by the learned Judge.

[11] The last matter on which Mr *Hinda* relied is *S v Boesak* 2003 (3) SA 381 (SCA). Ordinarily it is not very useful to refer to cases from other jurisdictions on the length of sentences imposed. The cited case is not from this jurisdiction and does not serve the purpose of the first ground of appeal relied on, which is concerned with sentences passed by this Court. In any event, in my respectful view the sentence imposed in the cited case appears to be too light.

[12] In regard to the second ground of appeal, which is not framed very clearly, counsel explained that the complaint is that the Court should have imposed a shorter period of imprisonment partly suspended on condition that the accused performs community service. As far as I can

recall the issue of the accused performing community service was not argued before me during the trial and no specific offer containing any details was made. The issue of a suspended sentence was argued in the context of a fine being imposed, coupled with a condition that the applicant compensates the NBC. In fact, the argument was that the applicant should not serve an effective period of imprisonment at all. Be that as it may, in my view it was incumbent upon the Court in the circumstances of this case to impose an effective period of imprisonment. In this respect, applicant's counsel in this application, agrees. The Court came to the assistance of the applicant by suspending part of it. The Court further took up his offer of compensation by incorporating it as a condition of suspension to take care of the State's concern that he might not honour the offer and yet receive a lighter sentence. In my view the sentence is onerous enough and should not also include a period of community service.

[13] Mr *Maronedze* for the respondent opposes the application and submitted that there are no prospects of success. He submitted that the sentence was imposed in a balanced manner properly taking into consideration all material aspects of the matter, including the applicant's personal circumstances and the mitigatory factors. He emphasised the principle that sentence is pre-eminently in the discretion of the trial Court and submitted that there is no misdirection on which another

Court may reasonably interfere with the exercise of the trial Court's discretion. He further submitted that the gravity of the offences committed; the position occupied by the applicant; and the fact that he committed the offences over some period of time while the NBC was in dire financial circumstances are factors which properly call for a severe sentence.

[14] I am in agreement with State counsel's submissions. In my view the applicant has not pointed to any aspect of the sentence which is reasonably likely to be successful on appeal. The application is accordingly refused.

VAN NIEKERK, J

Appearance for the parties

For the applicant:

Adv G Hinda

Instr. by Isaacks & Benz Inc

For the respondent:

Adv E Marondedze

Office of the Prosecutor-General