'*Not Reportable'*

CASE NO.: CC 4/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE **APPLICANT**

and

SYLVIA CONDENTIA VAN WYK **RESPONDENT**

CORAM:	**PARKER J**
Heard on:	2011 August 16
Delivered on:	2011 August 16 (*Ex tempore*)
Delivered on:	2011 August 19 (Reasons)

JUDGMENT (Leave to Appeal)

PARKER J:

[1] This is an application for leave to appeal. After hearing the application I dismissed the application, with the rider that my reasons would follow in due course. These are my reasons.

[2] It is well settled in our law that in an application for leave to appeal the applicant must satisfy the court that he or she has reasonable prospect of success on appeal (*S v Nowaseb* 2007 (2) NR 640). There, at 640H-J, the full Court pointed out that –

> ... in the exercise of his or her power, the trial Judge (or, as in the present case, the appellate judge) must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view.

S v Nowaseb concerned leave to appeal by the accused, and I do not see any good reason why the principle enunciated there should not apply with equal force to leave to appeal by the State. Additionally, it is well settled that –

> ... the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal (*Nowaseb* supra at 641A).

Furthermore, it must be remembered that in considering an application for leave to the appeal, the court determining the application is not sitting as an appeal court: what the court is seized with is an application for leave to appeal to an appeal court and not with an appeal. And, so therefore, naturally and logically different considerations are perforce at play. In that event the considerations set out in the above-quoted passages from *S v Nowaseb* supra and the passage from S *v Sikosana* 1980 (4) SA 559 (A) which was approved in *S v Nowaseb* at 642B-C are then relevant. The full Court in *S v Nowaseb* at 642B-C accepted the principle of law enunciated by the high authority of Diemont JA in *S v Sikosana* 1980 (4) SA 559 (A) at 562H-563A that –

> If he (the Judge) decides to refuse the application he must give his reasons ... It may be that his reasons for his refusal will appear from the reasons for convicting (*R v White* 1952 (2) SA 538 (A) at 540) but where he decides to grant the application his reasons for so doing are less likely to be found in his judgment.

[3] My reasons for imposing the particular sentence are discussed *fully* in the judgment delivered on 5 June 2009 ('the judgment'). (Italicized for emphasis)

[4] In the present proceedings Mr Marondedze, counsel for the applicant, submits that this Court ought to have imposed a sentence, having regard to sentences imposed by this Court in similar offences. With the greatest deference to Mr Marondedze, I note that he has not said anything new that he did not say during the sentencing of the respondent. His submission on the point in these proceedings has not made me any wiser: it is labour lost. This Court dealt with that submission on the selfsame point *in extenso* in, *inter alia*, paras16, 17 and 18 of the judgment, with reasoning and conclusions.

[5] Be that as it may, Mr Marondedze is correct in his submission, but only to some point; that is to say, in imposing an appropriate sentence, the sentencing court ought '*to be guided mainly* by ... sentences imposed by this Court in similar cases, of course, *due regard being had to factual differences* (*S v Simon* 2007 (2) NR 500 at 518C-D).' (Italicized and underlined for emphasis) It goes without saying that, as I said at para 17 of the judgment, no court can prescribe to another what sentence the last mentioned court should impose, bar sentences prescribed by statute. The sentences imposed by the Court in other cases are *guides* not prescriptions; and there is the additional caveat, which is that '*due regard being had to factual differences*.' (Italicized for emphasis) And so it is not simply that, for example, in

Case No. X, N$14,000.00 was lost by B through C's fraud or theft and the Court there imposed a sentence of imprisonment of five years on C without the option of a fine or any part thereof being suspended, and so since in the instant case the amount involved is close to N$1,300,000.00 and so, therefore, this Court must imposed a sentence of at least five years without the option of a fine or any part thereof being suspended. In sentencing, the Court does not indulge mechanically in exercise of mathematics without more.

[6] I opined in *The State v Daniel Joao Paulo and Josue Manuel Antonio* Case No. CC/2009 (Unreported) at para [11] thus:

> Many a time this Court is confronted with such comparisons without due regard to the incongruous facts and circumstances at play. Granted, while imposing an appropriate sentence in a matter a court ought to take into account sentences imposed in similar matters; but to follow this judicial precept mechanically and with religious fervour without due regard to the particular circumstances and facts of a particular case will throw the whole aspect of sentencing into laughable straightjackets of precedents, robbing the Court of one of its most important and efficacious tools found in judicial decision-making, namely, the exercise of judicial discretion.

And for good reason, as will become apparent shortly, I repeat what this Court said at para [17] of the judgment:

> [17] Mr Marondedze referred me to the cases to also support his contention that in all the cases 'custodial punishment is inevitable'. This wide statement has no basis in law outside statute law. In my view, I do not think a court can prescribe to another court that imprisonment out to be imposed in certain class of offences, without more: that would be a simplification, I would say, oversimplification, of a complex problem which itself would be misdirection. (See *Van Rooyen* supra *loc cit*.) What is more, such prescription would run counter to the age-old, well-tested principle that

> sentencing is pre-eminently the function of the sentencing court. Such prescription would, therefore, divest the sentencing court of its discretion; and that would be unjust, unreasonable and unsatisfactory.

[7] If the Court was minded to oversimplify the complex problem of sentencing and go by a mechanical route, it would not require Judges to exercise judicial discretion. It would be faster, easier and cheaper, if we were to go by Mr Marondedze's proposition, to, for example, ask the IT Division in the Ministry of Justice to design a Computer Programme containing all the sentences imposed by the Court for fraud or theft and the amount of money involved in each case, and ask a clerk in the Office of the Honourable Chief Registrar to install such Computer Programme in his or her PC. Then, whenever an accused person is convicted of theft or fraud involving money, the Clerk would just feed the information into the Computer Programme and prompt the Programme to generate a sentence. For example, in the instant case, the Clerk would feed into the Computer Programme an amount of c. N$1,300,000.00 and prompt the Computer Programme to generate a sentence for the Court. I, for one, do not wish to be a Computer, mechanical, brainless and unfeeling. Sentencing, as I have said previously, is not an exercise in mathematics; it is a complex problem, requiring careful consideration, thinking out and discernment.

[8] In any case and fortunately, our law has not transformed Judges into machines: our law expects a Judge to exercise judicial discretion in determining an appropriate sentence in the matter before the Judge, and not to do so mechanically, relying obsequiously and slavishly on straightjackets of precedents without due regard to the facts and circumstances of the particular case and 'factual differences'. The particular facts and circumstances of this case – which, I dare say, are unique – are set out clearly in paras 5, 6, 8 and 17 in the judgment. In any case, Mr

Marondedze did not point to the Court the facts and circumstances in the bevy of cases he referred to this Court that are similar to those mentioned in the aforementioned paragraphs in the judgment. The aforementioned particular facts and circumstances in the instant case are on any reasonable pan of scale incongruous to, and are different from, the facts and circumstances of that exist in those cases that Mr Marondedze referred to this Court. Accordingly, I did not, with the greatest deference to Mr Marondedze, find Mr Marondedze's submission on precedents respecting sentencing of any real assistance on the point under consideration, and I gave reasons for so concluding. Accordingly, I do not see by what legal imagination it can be said that the selfsame submission by Mr Marondedze can now have any merit in the present proceedings: the present submission, as I have said previously, is a mere rehearsal of his earlier submission during the sentencing proceedings. Then there is Mr Marondedze's submission respecting custodial sentences which reached its apogee in his bold and overbroad assertion that in all these cases 'custodial punishment is inevitable'. To that I would say that submission is *petitio principii*; and it adds no weight – none at all. *Pace* Mr. Marondedze, the Court imposed a custodial sentence on the respondent; hat is to say, a custodial sentence of six years: a half thereof alternative to paying a fine and the remaining half suspended.

[9] In this regard, Mr Marondedze's argument appears to be that since half of the six-year-term of imprisonment has been suspended, the respondent has not been punished – albeit *in totidem verbis non*. But that view, juxtaposed against the authorities relied on in paras 12, 13, 14 and 15, among others, of the judgment, is untenable. It cannot be seriously argued that the Court did not impose a custodial sentence on the respondent. A custodial sentence of six years was imposed, as aforesaid; and, *a fortiori*, the option of fine to imprisonment and suspended sentence

are not offensive of our law; and in this case they were evoked at the discretion of this Court and for reasons that were given, having considered the particular facts and circumstances of the present case. That, in my opinion, cannot by any legal imagination amount to irregularity or misdirection.

[10] Indeed, the authorities relied on in paras 12, 13, 14 and 15 of the judgment debunk Mr Marondedze's mistaken view that where a person is given a prison term and a part of it is suspended, that person has not been punished. The authorities relied on in the judgment say that suspended sentence has punitive effect. It is worth noting that Mr Marondedze did not cite any authority to counteract those authorities relied on by this Court in the judgment.

[11] For all the aforegoing, I find Mr Marondedze's submission on the point under consideration to be without merit.

[12] I now pass to deal with those grounds that appear to be of some substance in these proceedings. The grounds submitted in this regard concern the amounts of money involved in the crime; and it is to those that I now direct the enquiry. Ground (1): Mr Marondedze submits that the sentence imposed takes into account the fact that all the amounts involved in the fraud charged was recovered from the respondent, but, according to Mr Marondedze, that is not true; and for Mr Marondedze that constitutes misdirection. Ground (2): Mr Marondedze submits that the Court did not, when sentencing, take into account the fact that, according to Mr Marondedze, the respondent was not truthful because she did not say anything about an amount of N$250,000.00 which was also involved in the fraud but was not charged in the indictment. I now proceed to test Mr Marondedze's submission

against the undisputed and indisputable facts of the case. I now pass to consider ground (1) and ground (2).

[13] As respects ground (1); nowhere in the judgment does the Court say that all the amounts involved in the crime were recovered from the respondent; Mr Marondedze, with respect, misreads the judgment; that is quite unfortunate and sad. The Court took into account the fact that from the very mouth of Mr Penderis, who at all material times was the Managing Director and shareholder of 51% shares of the company, the victim of the crime, through the cooperation of the respondent, all the amounts involved were recovered, with interest thereon as the icing on the cake. The following exchange between the Bench and Mr Penderis during his cross-examination- evidence is apropos:

> COURT: But what is important is that eight hundred and fifty thousand Namibian dollars (N$850,000.00), twenty two thousand one hundred and eighty seven Namibian dollars (22,187) have been recovered.
> J A PENDERIS: Correct and I might add that my client and our company discussed that and we are happy that, that was recovered. We then end (earned) interest of (on) the money. So we got very close to nine hundred thousand Namibian dollars (N$900,000) in terms of interest...

And what the Court concluded *a priori* is this; at para 18 of the judgment:

> [18]... (1) all the amounts involved in the crime have been recovered by the complainant.

[14] Moreover, the Court also took into account the fact that after recovering all the amounts of money, as aforesaid, which technically belonged to the clients of the

company, the company succeeded in retaining its clients. The following appears in the record of proceedings respecting Mr Penderis's cross-examination-evidence:

> Mr Marondedze: Yes, did you manage to retain your clients Nutri Foods and...?
> J A Penderis: Yes.

[15] And as respects ground (2); Mr Murorua submitted that Mr Marondedze has got it all wrong. I respectfully accept Mr Murorua's submission. Contrary to Mr Marondedze's view, the Company knew about the amount in question at the time the Company decided to withdraw the criminal case against the respondent. Mr Marondedze appears to have missed that, which is unfortunate, seeing that it forms part of Mr Penderis's cross-examination-evidence. It is as follows:

> Penderis: I think you find that the amount you are talking about, there is an amount of and I cannot really recall, really is. But I think it is an amount of two hundred and fifty eight thousand which we only discovered after we had proceeded against her. In other words, we knew about it the day we withdrew the case. But it was not in the original documents that we put legal action against her on.
> Mr Marondedze: So there is additional two hundred and fifty eight thousand Namibian dollars (N$258,000)? ---
> Mr Penderis: No that is the total you got there. Out of that, the figure that, I am just saying in terms of us writing off as you put it, we were not writing off the figures that size initially. Although it was agreed that we would not recover from Mrs Van Wyk any further or Mr Louw.

[16] It follows reasonably and inexorably that Mr Marondedze's submission respecting ground (1) and ground (2) have no basis – in fact and, *a priori*, in law; and so those grounds, too, are accordingly rejected.

[17] The next and final relevant ground I now consider was put forth by Mr Marondedze in the following terms. Mr Marondedze says that the Court over-emphasized the personal circumstances of the respondent at the expense of the other factors; and for him that is misdirection. As I understand the law; in sentencing, the Court ought to take into account the well-known triadic *Zinn* factors (in *S v Zinn* 1969 (2) SA 537 (A)), being the crime, the offender and the interests of society, and the fourth factor is the *Khumalo* factor (in *S v Khumalo* 1973 (3) SA 697 (A)), which is mercy. The judgment on sentencing of the respondent is replete with passages which go to show any careful reader thereof that, as Mr Murorua submitted, all these factors were considered. And what is more; in this regard, it was held by the high authority of Ackerman AJA in the Supreme Court case of *S v Van Wyk* 1993 NR 426 that –

> ... the trial Court has a discretion in the balancing of the various sentencing considerations and in deciding what value or weight has to be given to the different considerations in any particular case.

Mr Marondedze has not proved the existence of misdirection or irregularity on that score. Additionally, the judgment takes into account the mitigating and aggravating elements in the case and strikes a balance, which the Court is entitled to do.

[18] The aforegoing buries Mr Marondedze's submission respecting the ground under consideration.

[19] In all this, I was mindful of the principle that judicial punishment should not aim at breaking the wrongdoer (*The State v Daniel Joao Paulo and Josue Manuel Antonio* Case No. CC 10/2009 (Unreported)). Additionally, in my opinion, the

Court's is not vengeance but justice (*The State v Johannes Kandjengo* Case No CC15/2010 (Unreported). I have given considerable thought objectively to the application. Having done that and for the aforegoing reasoning and conclusions, I am of the view that a court of appeal, looking at the sentence imposed through lenses of justice and not lenses of vengeance and keeping in view that judicial punishment is not aimed at breaking the wrongdoer, may not take a different view as to the appropriateness of the sentence that has been imposed. Thus, disabusing my mind – as far as humanly possible – of the fact that I have not one iota of doubt in my mind that, on the facts and circumstances of the case, the sentence imposed meets the justice of the case, I am not at all satisfied that the Supreme Court may take a different view about the appropriateness of the sentence that has been imposed. It follows inevitably that in my judgement the applicant has failed to show that the applicant has a reasonable prospect of success on appeal. The application is singularly lacking in merits. In the result, the application for leave to appeal was dismissed.

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PARKER J

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Instructed by:	The Prosecutor- General
COUNSEL ON BEHALF OF RESPONDENT	Mr L Murorua
Instructed by:	The Director Directorate: Legal Aid