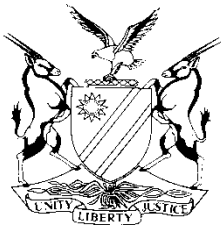

REPUBLIC OF NAMIBIA

CASE NO.: CC

62/07

IN THE HIGH COURT OF NAMIBIA

In the matter between:

THE STATE

versus

GERRY WILSON MUNYAMA **ACCUSED**

***CORAM*: VAN NIEKERK, J**

Heard: 11 August 2010; 13, 23 September 2010

Delivered: 30 September 2010

SENTENCE

VAN NIEKERK, J: [1] On 11 August 2010 the Court convicted the accused of forgery and fraud. The State proved no previous convictions against the accused. The State presented no evidence with regard to sentence. The accused did not testify in mitigation of sentence, but his wife testified. The defence also presented the evidence and report of a psychiatrist.

[2] Before I deal with the evidence presented I wish to quote what the learned author A Kruger states in the authoritative work Hiemstra's Criminal Procedure (Service Issue 3 of May 2010 at 28-5) with regard to the sentencing process. He contrasts this with the approach during the prior phase of the trial dealing with the merits and the conviction, which he characterises as "a fully fledged accusatorial process which results in a finding." He then continues:

> "At the sentencing phase other considerations apply. Now it is the judicial officer's difficult task to determine fairly the accused's fate. While it is still part of the trial and consequently subject to the general provisions thereanent, the process of sentencing is of a different nature:
>
> (a) it is not a clinical exercise as is that of determining the merits;

(b) there are no demarcated points in dispute and formal satisfaction of burdens of proof;

(c) impressions are central, not facts;

(d) it is possible to have regard to considerations which were irrelevant to the merits (such as, for instance, motive);

(e) the person of the accused is specifically considered, including his or her character and general conduct in life, not only the act in question; and

(f) it is mainly a probe into the future, while in respect of the merits the court considered past conduct;

(g) a complex value-judgment must be made in which the four aims of punishment must be considered in conjunction with each other and with regard to the *Zinn*-triad. [The reference is to the well known case of *S v Zinn* 1969 (2) SA 537 (A) in which RUMPFF JA expressed the following *dictum*, which has become trite: "What has to be considered is the triad consisting of the crime, the offence and the interests of society.]"

It is also inherent in the assessment of sentence that some factors will be relatively minor whereas others may be decisive. Also, some factors are uncontentious or difficult to rebut and others not." [The insertions are mine]

In my view these observations are generally in accordance with the approach taken by Namibian courts on sentence.

[3] I now deal with the evidence presented. According to Mrs Munyama she had been married to the accused in community of property for 16 years. They have 4 children who are aged 15, 13, 11 and 5 years respectively, of which 3 are at school. There is another child aged 21

years of which the accused is not the biological father. He is working and paying for his studies by correspondence. The 13 year old is attending a private school for which the fees are being paid by her uncle at his insistence. The family are currently staying in a 2 bedroom flat in someone's back yard. The rent is N$4000 per month. The Munyamas own a large 4 bedroom house which they have been renting out since September 2008 because they can no longer afford to pay the mortgage payments of $14 000 per month. Mrs Munyama is serving as a private secretary in the Ministry of Foreign Affairs. She earns N$6300 per month after deductions. The accused does consultancy work at the International University of Management and earns N$6000 per month.

[4] During December 2005 Mrs Munyama was posted abroad to serve in the Namibian Embassy in Sweden until December 2009. She took all the children with her. It was established during cross-examination that she already made arrangements to take the children with her during September 2005. They departed shortly after the accused was arrested on 29 November 2005 for the offences which he committed. During the four years that the children were overseas they did not come home for any holidays as the family could not afford to pay for their travelling. During that time the accused did not send any money, only some jerseys and T-shirts. The prolonged absence has, understandably, had an effect on the relationship between the children and the accused. Mrs Munyama testified that the children are trying to re-connect with their father. She

says that he assists in the household chores and transports the children to and from school. Her evidence is to the effect that she relies on the support and assistance of the accused, especially now that she is studying part time and after hours for a degree in Business Administration. She is in her final year. They are paying for her studies. She also suffers from high blood pressure.

[5] At one stage the Munyama couple owned two vehicles. The one was the vehicle the accused bought while he was employed at the NBC. This vehicle was repossessed by the bank when the accused could no longer pay the instalments. The other vehicle was sold in execution, as I understand it, to cover the accused's bank overdraft debt. While Mrs Munyama was overseas she purchased a 2004 model Mercedes Benz vehicle which she brought back to Namibia. The couple still use that vehicle, the value of which she estimates at N$30 000.

[6] According to Mrs Munyama the pending case against the accused has drained him psychologically. She described her husband as a hardworking person by nature, but she has noticed that he has lost his powers of concentration. He has also lost weight and is taking medication for depression.

[7] Mrs Munyama implored the court to have mercy on the accused and to give him a second chance. She stated that she was never aware that the accused had laid his hands on some of the NBC's money. She only heard of these allegations from the media some time after the accused

had been arrested. The accused never informed her of it and she never noticed that he had extra money to spend. She acknowledged that if the full amount misappropriated, namely N$100720 had been used for her and the children, she would have noticed it. State counsel sought to rely on this acknowledgement as proof that the accused had not been honest with his wife and that he had spent the money on frolics of his own. It is so that the accused did not testify in mitigation, nor did he testify during the main case, and therefore avoided having to explain what he did with the money. Even if I take this aspect into consideration, this does not necessarily mean that the accused used the money as counsel suggested. It is common cause that the accused earned about N$17 000 per month after deductions while he was employed at the NBC.

[8] Dr G Marx, a local psychiatrist, testified that the accused's legal representatives requested him to assess the accused and to provide a report on (i) the emotional effect that the current case has or had on the accuse; (ii) whether the accused shows any signs of remorse for his actions; and (iii) what will be the emotional effect on the accused should he be sent to prison.

[9] Dr Marx based the report chiefly on a 1 hour assessment which he had of the accused on 30 July 2010. He then drafted the report over a period of about 5 days. The date of 27 July 2010 on the report, which was handed in as exhibit "X", is a mistake. He had follow-up sessions with the accused on 3 August and 17 September 2010. While he was drafting the

report he took the follow-up session on 3 August into consideration. Although the report had already been compiled by 17 September, he gave consideration to whether the report still reflects his impressions and the information at his disposal. He testified that he was satisfied that it did.

[10] Dr Marx stated clearly in his report that he did not have access to any documents about the case itself, nor did he obtain any collateral information from any family members or ex-colleagues. He also did not have access to any medical records of the accused. He acknowledged in the report itself that the opinion he is able to provide is “limited as a result of the one dimensional nature of the information to which I had access.”

[11] He described the accused as having a “very robust psychological profile” by which he means that the accused has managed to overcome many challenges such as growing up in relative poverty; facing regular physical abuse as a child from a violent male figure in authority; doing his schooling during the years of apartheid driven racial discrimination; leaving his home country in 1977 to live overseas during the liberation struggle with no support; and studying in several countries abroad and far away from home. Other more recent challenges during, what the doctor described as “extremely stressful times” since his arrest, are the following: the fact that his wife and children left for Sweden for 4 years shortly after his arrest when he needed their support most; the fact that he had to deal with “the narcissistic injury” of not being able to care for his family, which has been extremely difficult given his traditional male

value set surrounding such issues; he had to deal with the public shame of his case being publicised in the media; he endured the loss of friends who withdrew their contact and support and the shame of people actively avoiding association with him at public events; he has suffered a major loss of status; he has had to move from his large home to a small flat with his family; he has lost two vehicles to cover his debts; his pension has been blocked by the NBC; he has had to forego saving for his children's future education and other policies.

[12] Despite the accused's strong psychological profile, he has concluded that the accused has been overwhelmed by all these events over a prolonged period and that the accused presented with a first major depressive episode, which is a mental illness characterised by the following symptoms: constant low mood; loss of pleasure; decreased sleep, energy, concentration, appetite and libido; weight loss (8kg over 5 years); feelings of worthlessness, guilt, helplessness and hopelessness; inner tension and agitation, pessimistic thoughts and so on. Dr Marx assessed the degree to which these symptoms are manifesting in relation to the accused as moderate, which he explained would result in a moderate difficulty in social and occupational functioning. As a result he prescribed anti-depressant medication which the accused is regularly taking, as he remains motivated to overcome his illness.

[13] Mr *Marondedze* submitted that the psychiatric report should not be taken seriously. Firstly, he had reservations about the doctor's

experience. The doctor stated that he had 11 years experience of working fulltime in psychiatry. Counsel questioned this during argument as it seemed that at least part of this time was spent in training and therefore the witness could not have the experience he says he has. I understood the doctor to have been working fulltime for 11 years in psychiatry since 1999 until the present and that 7 of these years comprised his further training in psychiatry. Based on these facts I do not see any reason to question his experience. Besides, if I recall correctly, the State did not raise this issue with the witness to give him opportunity to respond to the reservations expressed.

[14] Furthermore, counsel criticized the fact that the report was specifically prepared with the current case and the three questions which the doctor was required to answer, in mind. As I understand counsels' argument, these facts, together with the fact that Dr Marx did not collect collateral information, but relied only on the accused's say so, meant that the report lacked any value. Counsel further submitted that the doctor could not have concluded that the accused had experienced concentration loss because he did not conduct a certain test, which counsel regarded as necessary. However, Dr Marx in my view adequately explained the reason for not conducting this test, which he said is for mentally ill persons who suffer from, say, dementia. As the accused did not suffer from this kind of illness the test was not appropriate to be used in his case. Nevertheless, the doctor testified, he had been trained to observe and judge the clinical

signs available to conclude that the accused has experienced a loss in concentration and other symptoms leading to a proper diagnosis of Major Depressive Episode. In my view the defence has successfully established the expertise of the witness in his field and I accept his diagnosis.

[15] Mr *Marondedze* submitted that, in order for the doctor to have made an informed decision, he should have observed the accused for at least 30 days as is done when an accused is referred for mental examination in terms of section 77 or 78 of the Criminal Procedure Act. I do not agree with this submission. Such referrals are completely different from the enquiry contemplated by the referral to Dr Marx. A referral under section 77 occurs if it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence. A referral under section 78 occurs it is alleged at criminal proceedings that the accused is by reason of mental illness or mental defect not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible.

As can be seen from the provisions of sections 77 and 78 the consequences of such mental observation can have far reaching and grave consequences for both the prosecution and the accused. For instance, an accused may be acquitted of a very serious crime should he be found, on account of a mental illness, to be incapable of understanding

the proceedings so as to conduct a proper defence. He may be placed in a mental hospital for the rest of his life as a President's patient. It would therefore be necessary that a very thorough examination of the accused's mental condition be made in order to report back to the court. The same thoroughness would not be required to draw up the kind of report presented by the defence.

[16] Although he would have been better informed if he did have collateral information and interviews (as Dr Marx readily acknowledged), I do not think that for the limited purposes for which the report was compiled, his methodology is faulty to the extent that the report as a whole must be given little weight.

[17] Having said this, I think I should express a word of caution. Although I bear in mind that the essential nature of sentence proceedings may require a less formal approach to matters of evidence, in general evidence by an expert should not be tendered on aspects which the Court is equipped to decide itself. Furthermore, the expert should not be called to present hearsay evidence of facts not within the expert's personal knowledge and based on information given by the accused where the accused does not also testify about such statements, for example, where an accused does not testify about his personal circumstances, an expert should not be called to confirm hearsay statements in the expert report. (Cf. *S v Ngomane* 2007 (2) SACR 535 (W))

[18] This brings me to the three questions on which Dr Marx was required to prepare his report. I think that the first and the third question were proper matters to be the subject of expert examination and feedback. I am not so sure about the second question, which required him to report on whether the accused shows any signs of remorse for his actions. This request emanated from accused's instructions via his legal practitioners. I can hardly think that the accused would fail in these circumstances to display signs of remorse! Be that as it may, Dr Marx did not say that the presence of signs of remorse was detected by doing any tests or diagnostic examinations requiring expert skills. According to his report and testimony he based his assessment on the accused's statements. It seems to me in these circumstances that Dr Marx is in no better position than the Court to assess whether there are signs of remorse and I do not think that his opinion that the accused is deeply remorseful is admissible or helpful.

[19] However, I think I can take some notice of the statements that the accused made to Dr Marx, just as I could take notice of statements made from the bar on the instructions of the accused where an accused does not testify. Dr Marx states in this regard:

> "He stated in no uncertain terms that he regrets the actions which he pleaded guilty to. He went as far as saying that he would do anything to refund what is perceived that he mismanaged."

[20] In this regard it must be noted that the accused did not plead guilty to anything, but only made some admissions. Those admissions never included any admission that the accused "mismanaged" any funds. The Court had to make the inference that the accused misappropriated funds in the absence of any reasonable explanation to the contrary. The words "what is perceived that he mismanaged" in the last sentence of the doctor's conclusion above indicates that the accused is still not willing to admit that he fraudulently appropriated the funds for his own purposes.

[21] The most important aspect about the issue of remorse in this case is, though, that the accused has not seen fit to take the Court into his confidence either by testifying under oath or by offering a full explanation via his lawyer so that the State could consider whether it should be contested. In the context of this case such an explanation to my mind should include stating why he committed the offences and what he did with the funds. Mr *Isaacks* is correct in his submission that the accused does have a right to silence during sentencing proceedings, but that right is not exercised in a vacuum. Sometimes, depending on the other evidence or facts already before the Court, an accused runs certain risks of not coming across as genuinely remorseful should he elect to remain silent. In this regard I refer to the similar matter of *S v Ganes* 2005 NR 472 HC where it was common cause that the accused was genuinely remorseful, which factor weighed heavily with the Court. I need say no more than that this is also reflected in the sentence imposed in that case.

[22] However, having said all this, I have decided to adopt an approach inclined to some leniency by accepting that the accused has expressed some regret about his conduct, although it is difficult to give it much weight. I also bear in mind that after some evidence had been led, the accused made several material admissions which eased the State's burden in proving its case against him. I further take note in his favour of his willingness to use his NBC pension money to compensate the NBC for the losses it has suffered and shall afford the accused the opportunity to do so. I regard the fact that he is a first offender at the age of 54 as an important mitigating factor.

[23] I now turn to a consideration of the crimes committed. As was fully set out in the main judgment, the accused committed the offence in count 2 first. He forged a document purporting to be an extract of the 99th meeting of the NBC Board held on 15 March 2005. The resolution falsely authorised him as the Director-General to open a bank account in the name of the NBC with any financial institution chosen by him. Using this false resolution, the accused set into motion the series of acts which constituted the basis of the first count of fraud on which he was convicted. He opened a bank account at Standard Bank into which he caused the deposit of funds which belonged to the NBC. These were made up by cheques for N$25 000 donated by the FNB Foundation and N$320 995.99 consisting of the proceeds of the sale of Old Mutual shares. The total amount that was deposited was N$345 995.99, in respect of which I found

that there was potential prejudice to the NBC and/or Standard Bank. He also made several withdrawals by drawing cash cheques on the account. Some of the funds were deposited into his private bank account held at the same branch. As I said before, he gave no explanation for these withdrawals and I concluded that he misappropriated these funds. The actual loss sustained by the NBC was found to be N$100 720.00.

[24] There are several aggravating factors in this case. The first is that the accused held high office as the complainant's most senior manager, the Director-General. As such he was supposed to act in a manner in line with the objectives of the Corporation, which are set out in section 3 of the Namibian Broadcasting Act, 9 of 1991. These are –

> "to carry on a broadcasting service in order to-
>
> (a) inform and entertain the public of Namibia;
>
> (b) to contribute to the education and unity of the nation, and to peace in Namibia;
>
> (c) to provide and disseminate information relevant to the socio-economic development of Namibia;
>
> (d) to promote the use and understanding of the English language."

[25] The Board and the Corporation and, indeed, the public and Namibian nation, for whose benefit the corporation was established by section 2, read with section 3, were entitled to expect nothing but the highest standards of good corporate governance and integrity from the accused. The accused failed miserably in his duty and abused the trust placed in

him by conducting himself in the manner he did. It was abundantly clear to the accused that the NBC had been in dire financial circumstances before and during his term of office. He well knew details of the huge bank overdraft held by the Corporation and that the latter was benefiting from a massive Cabinet approved bailout plan to attempt to rescue the Corporation. He was also well aware that at times suppliers of the NBC were not being paid for services duly rendered. Yet he created the unauthorised bank account and took a large sum of the NBC's money for his own purposes. It was like stealing from the poor or the bankrupt.

[26] Mr *Marondedze* submitted the matter is particularly aggravating as the misappropriated funds consisted of public moneys, *inter alia* because the NBC is a parastatal and because its income is derived from taxpayers' money and licence fees levied on the public. I note that section 17(1)(a) of the Namibian Broadcasting Act, 9 of 1991, stipulates that the Corporation shall maintain a general fund into which shall be paid all moneys appropriated by law for the benefit of the Corporation and all other moneys received by the Corporation. It seems to me that Mr *Isaacks* is correct in his contrary submission that the moneys received from the FNB Foundation and the sale of the shares do not constitute public funds because they are not derived from moneys appropriated by law or from moneys obtained from the public, although these moneys were supposed to be deposited into the general fund contemplated in section 17(1)(a).

[27] The manner in which the accused went about planning and committing the offences to my mind shows deliberate planning and cunning, because he went to great lengths to keep his fraudulent scheme from detection. This can be deducted from the terms of the forged resolution, which made him the sole signatory to the bank account and ensured that the communication channels between the Bank and the NBC were directed exclusively at the accused. When he opened the false account he provided his residential address as the registered address of the NBC and a private postal address, instead of that of the NBC. I further find that the accused, by virtue of his high position, was more likely to succeed in persuading the bank officials that all was above board as it is not inherently unlikely that the Board could have given him the authorisation that he claimed to have under the false resolution. The accused must have realized this when he planned the fraud.

[28] As State counsel submitted, there was ample time for the accused to reconsider his plan and to stop his fraudulent course of conduct. Yet he persisted until all the funds were depleted, with the exception of the two cheques he made out to Khomas Engineering CC, which could not be proved beyond a reasonable doubt to have been fraudulently made. Mr *Isaacks* submitted that the time period over which the accused persisted in this conduct was not that long and that there is no proof of the stage at which the accused started planning the scheme. He pointed to the fact that initially in March 2005 the accused commenced with the process of

claiming the Old Mutual shares in accordance with the Board's instructions by asking that the proceeds be paid into a legitimate account of the NBC. I think defence counsel is correct in this respect. He also emphasised the evidence that the accused could not have known that the FNB Foundation would be making the donation in the form of a cheque as the initial indication on 3 May 2005 by way of a letter was that the money would be paid directly into an NBC account. I note, however, that in the letter by Mr Moetie on behalf of the FNB Foundation he requests the accused to provide the bank details for the deposit. In my view the accused could have contemplated providing the details of a false account shortly after receipt of this letter, because he forged the resolution on 16 May 2005 and opened the bank account on 17 May 2005. The only reasonable conclusion on all the facts is that he did so in anticipation of funds to be deposited. However, it is not necessary to come to a finding on precisely when he formulated the plan. Even on the assumption that he only did so from about mid-May, the false scheme continued until 15 November 2005 when he closed the account. This is quite a long period of 6 months, although the bulk of the activity on the account took place between from May to August, a period of about 3 months. On any of these periods the accused had time to reconsider and to step back from continuing with the scheme.

[29] In the *Ganes* case *(supra)* I had occasion to say (at 481F-482C):

"In my view, the series of crimes committed by the accused in the execution of the scheme is very serious. Fraud and corruption of the nature perpetrated by the accused appear to be raising its ugly head everywhere in our society. In this regard I wish to refer to what my Brother Silungwe J said in the case of *S v Carl Brune* (an unreported judgment of this Court dated 19 May 2004) and I quote from page 7 of that judgment where he said:

> 'The so-called ''white-collar'' crime of fraud in the workplace is not only on the increase in this country, but more significantly it is assuming epidemic proportions. It is thus opportune that this type of crime should normally be visited in our courts with such deterrent penalties as are calculated to make any potential perpetrator thereof to think twice about indulgence in such crime. Fraud on a scale such as *in casu* occasions great injury to our commercial life and, as such, it is inimical to the interests of society.'

I agree with the sentiments expressed in this passage. In my view deterrence is an important factor when deciding on an appropriate punishment, not only for the accused, but also for others. There are countless persons in positions of trust who are perhaps daily exposed to all sorts of temptations in dealing with their employers' affairs. Many of them choose to give in to those temptations; hopefully the majority choose not to. There are also countless people in this country who rather diligently save or pay off over long periods for what they want or need. Others simply do without. In my view the sentence of this Court should not only serve as deterrence but also, in a certain sense, as validation of those who choose to be honest and trustworthy. The sentence of this Court should underscore the value placed by the community on integrity and self-control in the workplace ..... Employees and the community at large, as well as prospective offenders, must know that it is not worth their while to commit serious offences like the ones in this case." [The omissions are mine]

[30] I think these remarks are also apposite in the matter currently before me. Indeed, for the reasons already mentioned above, I regard the

offences in this case as particularly serious. In this regard I also wish to emphasise that The FNB Foundation made a donation towards the costs of training staff at the NBC in response to a proposal by the accused. Even though there is no evidence that the accused already then intended to misappropriate the money, the fact that he eventually did, would tend to place a damper upon the generosity, benevolence and goodwill of organisations, persons and institutions in general when they are approached for similar donations in future. Prevalence of fraudulent actions like those of the accused places burdens on society in general, including on those who are honest, because it generates a general view of distrust requiring increasingly cumbersome measures in all walks of life to combat and prevent fraud.

[31] Defence counsel submitted that a fine would be sufficient punishment on the facts of this case. I do not agree. In the view of all I have said above about the offences and the circumstances under which they were committed, the accused cannot avoid a custodial sentence. I say this well taking into consideration the grave effect it may have on his family, who no doubt have suffered much already. I also take into consideration that it will no doubt have a serious effect on the accused. I further take into consideration that I am enjoined by law not to impose a sentence which is calculated to break the accused and that I should include a measure of mercy in the sentence that I do impose.

[32] The State asked me to impose a sentence of 8-10 years imprisonment of which part is suspended, while taking the two convictions together for purposes of sentence. I prefer rather to sentence the two convictions separately, as the matter may perhaps go on appeal and it will place the Appeal Court in a position to adjudicate more carefully on the matter. I do however propose to take into consideration the cumulative effect of the two convictions imposed separately because they are closely connected in time and purpose.

[33] To the accused I wish to say that it is clear, and I accept, from the report of Dr Marx that he is particularly resilient psychologically. Even at this age of 54 years a period of incarceration must be borne with fortitude. He is well educated and I trust that he will be able to put his education to good use while he is serving a period in prison. I also bear in mind that the fact that he is going to serve a period in prison will make it difficult for him, when he exists from there, to find employment in future, but I trust that his education and the fact that his wife appears to be supporting him and is also bettering herself may lead thereto that in future they may take up their lives again and secure a future for themselves and their family. I trust that the accused will be able to draw on his psychological resources to pull him through the time ahead.

[34] The sentence I have decided to impose is as follows:

> Count 1- Fraud: 10 (ten) years imprisonment of which 3 (three) years are suspended for 5 (five) years on condition (i) that the

accused 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 (One hundred thousand seven hundred and twenty Namibian Dollars) by 31 March 2011.

Count 2 – Forgery: 3 (three) years imprisonment, which shall run concurrently with the sentence imposed on count 1.

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VAN NIEKERK, J

Appearance for the parties:

For the State: Mr E Marondedze

Office of the Prosecutor-General

For the accused: Mr B Isaacks

Isaacks & Benz

(Instructed by Directorate of Legal Aid)