

**NOT REPORTABLE**



**CASE NO.: CA 04/2010**

**IN THE HIGH COURT OF NAMIBIA  
HELD AT OSHAKATI**

In the matter between:

**MENINGIVI TJINANA**

**APPELLANT**

**and**

**THE STATE**

**RESPONDENT**

***CORAM:*                                   LIEBENBERG J & TOMMASI J**

Heard on:                   26/04/2011

Delivered on:

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**APPEAL JUDGEMENT**

**TOMMASI J:**    [1]   This is an appeal against sentence. The appellant was convicted in the magistrate's court of theft read with provisions of section 11(1)(a) 1, 14 and 17 of the Stock Theft Act<sup>1</sup>, as amended<sup>2</sup>. The appellant was committed for sentence in the regional court and appeared in

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<sup>1</sup> Act 12 of 1990

<sup>2</sup>Stock Theft Amendment Act 19 of 2004

that court for the first time on 21 September 2007. He was sentenced to twenty (20) years imprisonment whereof five (5) years were suspended for a period of five years on condition that the appellant is not convicted of the same offence committed during the period of suspension.

[2] The appellant appealed to this Court against the sentence imposed. This Court set the sentence aside; remitted the matter to the regional court to consider sentence afresh; ordered the magistrate to question the appellant in order to get sufficient information; and thereafter consider whether there were substantial and compelling circumstances. The regional court was reminded to take into account the period the appellant had already served in prison when considering the sentence afresh.

[3] The appellant appeared in the regional court on 31 March 2009 for the magistrate to comply with the order of this Court. The appellant was sentenced to twenty (20) years imprisonment of which ten (10) years were suspended for a period of five (5) years on condition that the appellant is not convicted of stock theft read with Stock Theft Act, as amended. It is against this sentence that the appellant now appeals.

[4] The appellant initially noted an appeal out of time and filed an affidavit explaining the delay. He was not assisted by a legal representative when drafting the notice of appeal and the affidavit. The explanation tendered by

the appellant was that he has never been to school and that he is illiterate. He further averred that he was informed by the magistrate to appeal to the High Court that he failed to inform him of the period within which he had to note an appeal. It is apparent from the record that the appellant was informed that he should note his appeal within 14 days from date of sentence. Mr Wamambo appearing for the respondent argued that the appellant was not new to the appeal procedures, having appealed once before.

[5] Ms Mugaviri, appearing on behalf of the appellant filed an application for condonation supported by her affidavit, explaining why the amended notice was filed out of time. Counsel should note that the correct procedure for obtaining condonation for the extension of time limits is by way of application supported by an affidavit made by the appellant. If the appellant wishes to rely on facts which falls outside his personal knowledge, he should attach the necessary supporting affidavits. (See *S v Kashire 1978 (4) SA 166 SWA* at page 167h-i).

[6] Counsel for the appellant further submitted in her affidavit that the amended notice should be filed within 14 days after the notice of appeal is filed with the clerk of the court. This is an incorrect interpretation of the rule 67(5) of the Magistrate's Court Rules which makes provision for the appellant to amend his/her notice of appeal 14 days after having been informed that

the statement of the magistrate in terms of rule 67(3) had been furnished. There was no indication on the record that the clerk of court had informed the appellant. The Court, under these circumstances must then infer that the appellant became aware of the fact that the magistrate had furnished his statement at the time his counsel perused the full record. The amended notice of appeal was submitted to the clerk of court well within 14 days after counsel for appellant perused the record.

[7] This Court would not hesitate to reject the poor explanation of the appellant for non compliance with the rules if there are no reasonable prospects of success. The grounds raised herein against sentence are however very arguable as conceded by counsel for the respondent.

[8] The grounds raised by the appellant in his amended notice of appeal were in short that the sentence was excessive; that the magistrate failed to adequately take into consideration the personal circumstances of the appellant; and failed to assist the appellant to elicit sufficient information to establish whether there were substantial and compelling circumstances.

[9] When the matter appeared in the regional court, the magistrate once again explained the meaning of substantial and compelling circumstances to the appellant. The appellant testified under oath and placed the following before the court:

*"I am staying at my father's house. I am married with dependants. I also have extended families to take care of. I am the only breadwinner. I did not know that I will be sent to prison for a long period. I am a first offender. I want the court to impose a sentence to warn the court to do it again. That's all."*

[10] The prosecutor posed a view questions to the appellant and it transpired further that he appellant is unemployed but does piece work here and there; and has three children aged 2, 3 and 4 respectively. The court *quo* recorded the following:

*"Court does not find any compelling circumstances present to impose a lesser sentence, but will however suspend portion (sic) of the sentence as accused put in prison (sic) for a long time"*

[11] In his statement in terms of Rule 67(3) of the Magistrate's Court Rules the magistrate advanced the following reasons for sentence:

*"As on the first occasion, as well as the second occasion...., the accused did not advance any factors for the court to deem it as compelling and substantial to impose a lesser sentence. However, as the accused spend in custody for a long time (sic), the court deemed it fit to suspend portion of the sentence. I am therefore of the opinion, that the court indeed considered the personal circumstances of the accused and therefore imposed a just sentence."*

[12] Despite the order given by this Court for the magistrate to question the appellant in order to obtain sufficient information, no single question was posed by the magistrate in an attempt to elicit any further information from the appellant. The proceedings on the second appearance are almost identical to the first appearance and it is therefore not surprising that the ultimate result remains the same i.e that a sentence of 20 years was imposed. I have to agree with counsel for the appellant's argument that the

magistrate remained unmoved by this Court's order to elicit more information from the appellant.

[13] The appellant had at the time of sentencing already served one year and 6 months of the initial sentence imposed by the regional court. The magistrate, took into consideration that the appellant had already served a "long" part of his sentence and still imposed a sentence of 20 years imprisonment.

[14] The misdirection here however is that the magistrate laboured under misconception that he imposed a more lenient sentence by suspending a large portion thereof. When imposing a suspended sentence, it is important to keep in mind the purpose of a suspended sentence namely to deter the offender from committing similar crimes and not to remove him from society in the event he, for whatever reason, should fall foul of the condition attached to the suspension. The sentencing court should not lose sight of the consequences of suspending a large portion of a sentence.

[15] When a court considers an appropriate sentence it should include the suspended part. The court should guard against imposing a lengthy suspended over and above what the court considers to be an appropriate sentence.<sup>3</sup> The court *a quo* effectively imposed a sentence of 21 years and 6 months imprisonment. Suspending 10 years thereof does not ameliorate the

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<sup>3</sup>See *S v ALLART* 1984 (2) SA 731 (T)

effect of the sentence imposed by the regional court and neither does it do justice to this Court's order that the sentencing court should have regard to the term of imprisonment the appellant had already served.

[16] An effective imprisonment of 20 years clearly did not sit comfortably with the court *a quo* and hence the suspension of 10 years thereof. The sole reason for this trend is the fact that the magistrate felt that a sentence of 20 years would be disproportionate to the crime, the criminal and the legitimate expectations of society.<sup>4</sup> The appellant stole a calf valued at N\$1300.00 from his father. The minimum prescribed penalty for theft of stock valued at less than N\$500.00 is two years. It would offend any reasonable person's innate sense of fairness that a difference of N\$800.00 should result in a sentence of twenty years imprisonment.

[17] The appellant was 23 years old and a first offender. He is therefore young enough to be rehabilitated. The appellant indicated that he now realises that he committed a serious offence and has undertaken not to repeat the offence. Appellant's father denied that hunger drove the appellant to steal. The appellant did not dispute his father's testimony that he would have given the appellant food if he had approached him. Counsel for the appellant submitted that the beast was recovered but this is not evident from the record of proceedings. Although the appellant stole from his father and not from another household, it remains a serious offence. The

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<sup>4</sup>See *S v Malgas* 2001 (1) SACR 429 (SCA) and *Erastus Munongo v The State* an unreported case No CA 104/2010)

legislature deemed it necessary to provide for lengthy minimum sentence to ensure a standardise response from the courts. The courts are however not entirely left without a discretion to impose a lesser sentence when compelling and substantial circumstances exist.

[18] It would serve no purpose to remit this matter to the court *a quo* given the history of this matter. The minimum sentence of 20 years prescribed by the Stock Theft Act, 12 of 1990 in this matter is disproportionate to the crime, the offender and to the legitimate needs of the society. This in itself is a substantial and compelling circumstance which compels this Court to impose a lesser sentence than the minimum sentence prescribed by the Stock Theft Act, 12 of 1990 as amended.

[19] In the premises the following order is made:

1. The application for condonation for the late noting of the appeal is granted;
2. The appeal against sentence is upheld and the sentence imposed by the regional court is hereby set aside and substituted with the following sentence:

Eight (8) years imprisonment of which 3 years are suspended for a period of 5 years on condition that the accused is not convicted of theft read with the provisions of the Stock Theft Act, 12 of 1990 as amended, committed during the period of suspension.



3. The sentence is antedated to 21 October 2007.

**TOMMASI J**

**I concur**

**LIEBENBERG J**