



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case no: CC 14/2008

In the matter between:

**THE STATE**

and

**SIMON NAMA GOABAB  
ABRAHAM JOHN GEORGE**

**FIRST ACCUSED  
SECOND ACCUSED**

**Neutral citation:** *The State v Goabab* (CC 14/2008) [2013] NAHCMD 122 (10 May 2013)

**Coram:** TOMMASI J  
**Heard:** 22 April 2013  
**Delivered:** 10 May 2013

**Flynote:** Sentence — Contravening s 43(1) of the Anti-Corruption Act 8 of 2003 – Crimes of corruption should be visited with vigorous punishment – Court however of the view that a wholly suspended sentence would be appropriate *in casu*.

**Summary:** The accused had been convicted of having contravened s 43(1) of the Anti-Corruption Act 8 of 2003, ie being public officers who had used their respective positions corruptly to effect payment from State Revenue for a private debt of accused 1. The accused betrayed a position of trust being employed in senior government positions. Accused 1 however had disclosed the fact that the payment was for a private debt to subordinates and had repaid the full amount involved which fact was found to have lessened his moral blameworthiness. Both accused are first offenders. The role accused 2 played warranted differential treatment. The court was of the view that a wholly suspended sentence would be appropriate.

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### ORDER

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1. Accused 1 is sentenced to three (3) years imprisonment, wholly suspended for five (5) years on condition that the accused is not convicted of contravening s 43(1) of the Anti-Corruption Act 8 of 2003 committed during the period of suspension;
2. Accused 2 is sentenced to one (1) year imprisonment, wholly suspended for a period of five (5) years on condition that the accused is not convicted of contravening s 43(1) of the Anti-Corruption Act 8 of 2003 committed during the period of suspension;

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### JUDGMENT

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TOMMASI J:

[1] The accused were convicted of having contravening s 43 (1) of the Anti-Corruption Act, 2003 (Act 8 of 2003) (hereinafter referred to as the 'Act'). The court is now called upon to impose an appropriated sentence.

[2] Accused 1 during March and April 2007 and whilst employed as the Secretary of the National Assembly, used his position to effect payment from State Revenue for a private debt. Accused 2, also an employee of the National Assembly formed common purpose with accused 1 and assisted him to effect the payment in the sum of N\$ 18 497.20.

[3] Section 49 of the Act provides for a penalty of a fine not exceeding N\$500 000 or to imprisonment for a term not exceeding 25 years, or to both such fine and such imprisonment. The nature of the penalty as correctly pointed out by counsel for the State is indicative of the fact that the legislature considered this to be a serious offence. The penalty provision however covers a wide range of offences each varying in degree of seriousness from one another. It is the same penalty for, inter alia, bribery, which is generally dealt with more severely by the courts.

[4] The nature of the offence, the personal circumstances of an accused and the interest of society would be important considerations which would in the final analysis determine where, within the wide range, the court has to peg what is termed an appropriate sentence. This is no easy task and as stated by Ackerman J in *S v Dzakukda*<sup>1</sup>:

' . . . this calls for the exercise of a normative judgment, almost invariably referred to as a 'discretion for which no precise formula exists'.

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<sup>1</sup>2000(2) SACR (CC) at para 35.

What further complicates sentencing herein is the fact that the court is confronted with a relatively new offence.

[5] From the facts availed to the court it has to discern what would be relevant to this stage of the proceedings. The offence committed speaks of a breach of trust by a senior officers entrusted with accounting for State Revenue. Accused 1 relied on the assistance of his subordinates. While it did not exonerate accused 2 who was a subordinate of accused 1 from liability, it cannot be ignored that accused 1's position of authority played a considerable role in persuading accused 2 to render the assistance requested by accused 1. The moral blameworthiness of accused 1 therefore is more than that of accused 2. This breach of trust is exactly what the legislature intended to criminalize and penalized. It erodes the confidence which ordinary citizens place in government and its organs to administer funds for the benefit of all.

[6] It is the same public interest that demands that proper a sanction be imposed for public officers who abuse the trust placed in them. This does not necessarily mean that the court is guided by the opinion of the public but rather that society's interest be considered. It is in the interest of society that all offenders who makes themselves guilty of a betrayal of such trust, be dealt with firmly but fairly.

[7] Although there has been a breach in the standard procedure which accused 1 had to adopt, he from the outset, made it known to his subordinates that the payment was for a liability he had incurred and that he intended to refund the amount expended. He did so shortly after his arrest. It is to the credit of accused 1 that he did so and this considerably lessen his moral blameworthiness. The prejudice suffered was thus considerably reduced. It was furthermore a singular incident which was not per se pre-meditated. Sight however must not be lost that both the accused betrayed the trust of their employer and stakeholders which is an aggravating factor.

[8] Accused 1 holds a Masters degree in Economics and has worked with both private financial institutions and held senior positions in Government. He is married and has two children. He testified that he actively participated in political activism, served in church structures and did part time lecturing whilst abroad. At the age of 56 he no doubt acquired a wealth of knowledge and skills which he continues to use constructively. This is the first time he is convicted of an offence.

[9] He expressed his opinion in respect of the conviction and confessed having difficulty in understanding how he could have been convicted when he made it clear from the outset what his intention was. I am unable to conclude that this demonstrates a lack of remorse. Accused 1 maintains his view that his actions constitute a mere transgression and not a criminal offence. He has every right to express his opinion. The accused admitted most of the facts in the matter and the trial centered mostly on the issue of whether his acts constituted an offence. This was strenuously contested and evoked much debate not only before this court but also in the Supreme Court. Given the nature of this case the court considers the stance he adopts as a neutral factor.

[10] He informed the court that he expended in excess of N\$1 million in legal fees and felt himself perpetually in the dock given the fact that the case took seven years to be finalized. His reputation suffered a severe blow and he experienced some withdrawal from friends, family and associates. The personal hardship he had to endure is a factor which deserves consideration.

[11] Accused 2 is 52 years old, married and the father of four children. He retained his employment although he does not do the same work as he used to do before the incident. He started working after school and has succeeded in steadily improving his position over a period of 23 years. He improved his qualifications by obtaining a Diploma in Advance Accounting in 2011. He informed the court that if he knew then

what he knows now he would not have acted in the manner he did. He expressed sincere regret for the role he played. He testified that his arrest and conviction caused harm to his relationship with his family and friends. This was also the first time he offended.

[12] It is trite that law that the court has to determine what would be a just sentence based on the well established principles of considering the offender, the nature of the offence and the interest of society whilst harmonizing and balancing the aims and objectives of punishment. In *S v Munyama*<sup>2</sup> Mainga AJ stated the following:

'It is unnecessary to repeat yet again what the Court below had said about crimes like fraud and corruption. It is sufficient to say that that Court was on point. They are serious crimes, the deleterious impact of which upon societies is too obvious to require elaboration. Dishonesty of the kind perpetuated by appellant for no other reason than self-enrichment, and entailed gross breaches of trust should be visited with vigorous punishment where necessary'.

[13] This should be the guiding principle: the aim being to deter like minded offenders from thinking that "the game seems worth the candle."<sup>3</sup> The accused were both senior public officers entrusted with administering State Revenue and who abused their respective positions to effect payment for a personal debt of accused 1. The court should however not lose sight of the fact that the transaction was not concealed; the amount involved was repaid, it was an isolated incidence which was not premeditated; they are both productive members of the community; they have suffered considerable personal hardship resulting from a lengthy trial; and more importantly are first offenders. In *S v Brand and Various Other Cases*<sup>4</sup> it was held that not all offences warrant a sentence of imprisonment and a first offender should not be sent to gaol if there is some

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<sup>2</sup>An unreported judgment of the Supreme delivered on 9 December 2011, at para 19.

<sup>3</sup>*S v Sadler* 2000 (1) SACR 331

<sup>4</sup>1991 NR 356 (HC).

other adequate punishment. This however is not a rigid rule. The facts of each case will determine whether custodial sentence is warranted.

[14] Having weighed factors in mitigation and aggravation, I am of the view that justice would be best served if this court imposes a suspended sentence with the appropriate conditions attached thereto. Sufficient cause exists for the court to differentiate between the sentences of the accused given the role each played in the commission of the offence.

[16] In the result the accused are sentenced as follow:

1. Accused 1 is sentenced (3) years imprisonment wholly suspended for five (5) years on condition that the accused is not convicted of contravening s 43(1) of the Anti-Corruption Act 8 of 2003 committed during the period of suspension;
2. Accused 2 is sentenced one (1) year imprisonment wholly suspended for a period of five (5) years on condition that the accused is not convicted of contravening s 43(1) of the Anti-Corruption Act 8 of 2003 committed during the period of suspension;

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M A Tommasi

APPEARANCE

STATE

DF SMALL

Of

OFFICE OF THE PROSECUTOR-GENERAL,  
Windhoek

FIRST ACCUSED

LH MURORUA

Of

MURORUA & ASSOCIATES, Windhoek

SECOND ACCUSED

ZJ GLOBLER

Of

GROBLER & CO, Windhoek