REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 05/2018

In the matter between:

THE STATE

and

KATRINA HANSE-HIMARWA **ACCUSED**

Neutral citation: *S v Hanse-Himarwa* (CC 05/2018) [2019] NAHCMD 260 (31 July 2019)

Coram: LIEBENBERG J
Heard: 24 July 2019
Delivered: 31 July 2019

Flynote: Criminal Procedure – Sentence – Corruption – Serious in nature – Accused as Governor of Region was a public officer – Accused used office to benefit family members – Nature of corruption different from cases involving embezzlement – Objectives of punishment – Emphasis on

retribution and deterrence – Weight accorded depending on facts of each case.

Criminal Procedure – Sentence – Corruption – Public expectations – Public expectation not synonymous with public interest – Courts having duty to serve interests of society and not to blindly adhere to public expectation – To do so may amount to an unfair trial which is against the constitution.

Criminal Procedure – Sentence – Corruption – Penalty provision under the Anti-Corruption Act provides for fine – Direct imprisonment thus not only form of punishment – Accused first offender at age 52 years and personal circumstances showing accused as productive member of society – State asking for direct imprisonment – Sentencing objectives may be achieved by alternative punishment – Accused sentenced to a fine coupled with suspended sentence of imprisonment.

Summary: The accused was found guilty on one count for contravening section 43 (1) of the Anti-Corruption Act 8 of 2003 for corruptly using her office to benefit two of her family member(s) to acquire houses under the National Mass Housing Development Programme. Although corruption is a serious offence, the nature of the offence committed in this instance clearly distinguishable from other instances were the accused benefitted from embezzling large sums of money for personal gain. Though the court will follow the same approach, an appropriate sentence shall be determined by the nature and circumstances in which the offence was committed.

Held, that in sentencing in corruption matters the seriousness of the offence dictates that the interests of society to be given more emphasis. However, the weight accorded thereto will depend on the facts of each case.

Held, further that, the court in sentencing not to give in to public expectation. Public expectation is not synonymous with public interest and therefore courts have a duty to serve the interest of society and not blindly follow public expectations.

Held, further that, because the accused held a high office she should not be sacrificed on the proverbial altar of general deterrence for crimes not committed by her.

Held, further that, this is not an instance where direct imprisonment is imperative as the sentencing objectives of retribution and deterrence can be achieved by the imposition of a fine coupled with a suspended sentence of imprisonment as alternative punishment.

ORDER

The accused is sentenced to a fine of N$50 000 or in default of payment, to 24 (twenty four) months' imprisonment, plus a further 12 (twelve) months' imprisonment, which imprisonment is suspended for a period of 5 (five) years on condition that the accused is not convicted of a contravention of section 43(1) of the Anti-Corruption Act of 2003, committed during the period of suspension.

SENTENCE

LIEBENBERG J:

[1] Proceedings have reached the stage where the court has to pass sentence on the accused for having been convicted of the offence of corruption in contravention of s 43(1) of the Anti-Corruption Act 8 of 2003. It is

settled law that the process of sentencing requires a consideration of a *triad* of factors namely, the offender, the crime and the interests of society.[1]

[2] During this procedure regard should equally be had to the primary purposes of punishment (also referred to as the objectives of punishment) namely, prevention, deterrence (individual and general); reformation and retribution. It has been said that 'the difficulty arises, not so much from the general principles applicable, but from the complicated task of trying to harmonise and balance these principles and to apply them to the facts. The duty to harmonise and balance does not imply that equal weight or value must be given to the different factors. Situations can arise where it is necessary (indeed it is often unavoidable) to emphasise one at the expense of the other'.[2] In appropriate circumstances the sentencing court is also enjoined to consider the element of mercy.

[3] While due consideration must be given to the mitigating and aggravating factors relevant to sentence, the court must decide what sentence would be appropriate in the particular circumstances of the case. The sentence should be tailored in such a way that it fits the offender before court, reflects the severity of the crime, and, ultimately, is fair to society. This is generally referred to as the 'principle of individualisation'.

[4] In the present instance no evidence was presented either in mitigation or aggravation of sentence, with only submissions made from the bar.

Personal circumstances of the accused

[5] The accused is currently 52 years of age and holds a Basic Education Teachers Diploma and a Baccalaureus Degree in Education Management Technology. She joined the public service as a teacher in 1987 and progressed to the position of School Principal. In the political arena in the

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[1] *S v Tjiho,* 1991 NR 361 (HC).

[2] *S v Van Wyk,* 1993 NR 426 (HC) at 448D-E.

Hardap Region, she was first elected as a Councillor of the Local Authority, then as Regional Councillor and ultimately as Governor of the region. In 2015 the accused was appointed as Minister of Education, Arts and Culture, a position she held until 09 July 2019 when she resigned consequential to her conviction on a charge of corruption. As a politician, she had an illustrious career over three decades and is a member of the SWAPO Central Committee and Politburo.

[6] The accused is married with three children, their ages ranging between 29 and 18 years, all of whom being financially dependent on their parents. She is furthermore the sole caregiver of her elderly mother who, as her husband, is in poor health and physically and financially dependent on her support. Two of the minor grandchildren are also living in with the family. It was submitted that because these family members are heavily dependent on her financially, the liability has become even more burdensome since her resignation as Minister in that her current income as Member of Parliament has dropped to just above N$690 000 per annum, opposed to the salary of over one million dollar per annum she used to receive as Minister. In addition, she has lost various remunerative benefits consequential upon her position as Member of Cabinet.

[7] Also brought to the court's attention is the amount in excess of N$1,4 million incurred for legal costs of which just over N$581 000 having been paid and the balance due at the end of August 2019. Mr *Namandje* submitted that this in itself brought about additional pain and suffering arising out of the offence committed.

[8] Besides the monetary implications that came to bear as a result of her conviction, it was submitted that the court should also recognise the impact of the accused's recent fall from grace being degrading and punishment in itself, moreover from a political perspective.

[9] Mr *Marondedze*, for the state, argued to the contrary, saying that the accused was not honest with the court when referring to her salary as the only

source of income because there is evidence before court that she and Mr Nghiwilepo, the Chief Executive Officer at Mariental Municipality, are partners in two fishing companies, from which it could be deduced that there is an additional source of income. I agree. For the court to take the accused's financial means into consideration as a compelling factor in sentencing, the court should have been provided with all the relevant facts and information concerning her actual income, not a distorted picture of the accused being without sufficient means.

[10] Without knowing the true income generated from the partnership and also that of her husband's farming activities, this court is in no position to conclusively find that the accused's financial position is such that it should have some bearing on the sentence imposed. It was further pointed out that the accused herself during an interview with a journalist from the Namibian newspaper published on 23 July 2019 was quoted as saying that financially she is standing for her own case and that she has 'deep enough pockets'. In view of the authenticity of the report not having been disputed, it seems to convey that she is financially strong and in a position to pay her own legal costs; at least, she is not relying on help from outside. Although in my view not too much should be read into the report itself, it tends to cast doubt on the accused's true financial position as portrayed in court. This, in turn, raises the question as to what weight should be accorded thereto in sentencing. The only person who could have clarified this uncertainty is the accused herself, however, she elected to remain silent and did not give evidence in mitigation.

[11] Although the reduction in salary is indeed a factor to be taken into account, the effect thereof and alleged suffering caused thereby as punitive consequence of the crime, cannot be determined in the absence of the true facts. Therefore, as a mitigating factor, little weight should be accorded thereto.

[12] Speaking on behalf of his client, Mr *Namandje* informed the court that the accused respects the court ruling and expressed remorse and regret for what she did; seeking forgiveness from her constituency, the political cadre

and society at large. These sentiments were countered by Mr *Marondedze* arguing that it is not borne out by the accused's remark shortly after her conviction when, during an interview, being quoted as saying that she had a completely different view from what the court had found. Furthermore, that she and her lawyers will study the judgment but was certain that it was not the end. It is further reported that the accused remarked that she was not moved because this (the conviction) is nothing. In the prosecutor's opinion, this constituted contempt of court. Again, the authenticity of the content of the report has not been disputed.

[13] I believe these remarks must be seen in context, namely to be that of a person who had just been convicted of an offence that was likely to severely impact on her appointment as a Minister of Cabinet and her political career in general. It is further possible that after having studied the judgment, she and her legal team might have come to a different conclusion from her earlier views as regards her conviction, prompting her to now own up for her wrongdoing. However, by not testifying in mitigation of sentence, she relinquished the opportunity of explaining herself to the court and society openly and truthfully as to her change of heart and that she was truly remorseful for what she has done. In the absence of evidence to that effect, the court is faced with two conflicting and irreconcilable views expressed by the same person about her conviction; the court not knowing which to believe.

[14] With regards to the court's approach to determining contrition, the court as per Rumpff, JA in *S v Seegers*[3] at 511G-H remarked:

> 'Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the Court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined.'

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[3] 1970 (2) SA 506 (A).

[15] In the absence of such evidence, little weight can be given to counsel's bold assertion that the accused has remorse for what she has done. Whilst she opted not to make use of the opportunity afforded to take the court into her confidence and to testify about her inner feelings of contrition, the court was unable to determine the sincerity of penitence claimed to exist. Except for the mere say-so on her behalf by counsel, there is nothing to support the assertion. In my view, this falls significantly short of a demonstration of sincere and genuine remorse. Contrition by the accused as a mitigating factor, in my view, should therefore be accorded little weight, if any. Neither could the accused's resignation from Cabinet be construed as a sign of remorse. Although it was her decision, it would appear that she was left with no other option.

[16] It was further argued that the accused cannot be punished simply because she chose to defend the charge against her. This is correct because under Article 12(1)*(d)* of the Constitution, all persons charged with an offence shall be presumed innocent until proven guilty, according to the law. Genuine remorse is definitely not dependent on a plea of guilty. In the matter of *The State v Shaningua*[4] this court occasioned to say the following at para 10:

> 'The accused in this matter pleaded not guilty and required of the State to prove the allegations set out in the indictment. This the State did, and secured convictions on both counts. I do not believe that in all instances where an accused expresses remorse only after conviction can it be said that it is not sincere. Much will depend on the circumstances of the case and <u>I have no doubt that there could be circumstances in which the court would be able to find that remorse, albeit demonstrated only after conviction, is genuine and sincere</u>.'

(Emphasis provided)

[17] Though no adverse inference may be drawn from the fact that the accused in the present instance required of the prosecution to prove the allegations contained in the indictment, she, unlike in *Shaningua*, did not take

[4] (CC 09/2016) [2017] NAHCMD 247 (31 August 2017).

the Court fully into her confidence and testify in mitigation of sentence whereby the genuineness of contrition alleged to exist could be determined.

[18] With regards to the impact of her conviction, resignation and the public's indignation at the crime committed by a high ranking official, it was said that this in itself was punitive consequences in addition to the sentence to be handed down. This is what is generally described as moral retribution and adds to the total punishment the offender suffers. There are however instances where these considerations will be accorded little weight and a case in point is that of *S v Yengeni*[5] where the appellant argued that the fact that he had to resign from Parliament as a result of committing fraud, should be considered as a mitigating factor. The court in this regard stated thus:

> 'This argument is a fallacy. The removal of a corrupt or dishonest official or elected office-bearer from the position of trust occupied and abused by her or by him is not a punishment, and it is inappropriate to take such removal from office into account as a mitigating circumstance. The removal from an office of trust of a person who has, by dishonesty and greed, demonstrated that she or he is unfit to hold such office, is a natural consequence of such unfitness. The immediate and permanent removal from an office of trust should follow in every case of a crime involving an element of dishonesty as a matter of law and of public policy.'

[19] Though there can be no doubt that the accused has to live with a constant sense of guilt for having failed her family and those who had put their trust in her, one cannot allow feelings of sympathy for those affected, to deter one from imposing the kind of sentence dictated by the interests of justice and society.[6] Distress and hardship caused to the accused's family, the damage done to her public and political career and her fall from grace, unfortunately, are inevitable consequences of crime and therefore, in itself, cannot be regarded as a mitigating factor.

The crime

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[5] 2006 (1) SACR 405 (T) at para 74.
[6] *S v Sadler* 2000 (1) SACR 331 (SCA) at 337c-d.

[20] In this jurisdiction convictions under the Anti-Corruption Act of 2003 to date are few and far between, with barely any guidelines on sentencing laid down by our courts when it comes to offences of this nature. Even more unique in the present case is that the offence does not involve (as in the majority of cases) a large sum of money that has been misappropriated, but rather the abuse of office when the accused in 2014 wrongfully and unlawfully used her position as the Governor of the Hardap Region to bring about changes to the list of beneficiaries of new houses built under the Mass Housing Development Programme. Through her actions she ensured that her family member(s) benefitted under the programme by receiving houses without them having been vetted and selected by the nominated selection committee. The houses were not for free but merely subsidised by the government and aimed at assisting persons of lower income.

[21] The offence of corruption, by any standard, is serious. The nature thereof is such that it has penetrated every corner and sphere of society, be it political, economic or social and raised its ugly head where someone stood to gain at the expense of others, or society in general. In the present instance, it was committed at the expense of two persons more deserving of houses than those who benefitted from the accused's unacceptable and appalling conduct. Established by evidence, her actions were politically motivated, despite it having been explained to her more than once that it was a national programme and that political affiliation played no part in the selection of beneficiaries. In her position as Governor she should have had no difficulty in understanding that her duties were *inter alia* to represent *all* persons within the Hardap Region and certainly not along partisan lines. Her duty was first and foremost to have at heart the interests of society as a whole, whose interests she was appointed to serve, not to go about it selectively. Unfortunately she dismally failed them – no wonder the community took to the streets of Mariental to protest their dissatisfaction.

[22] It was argued on behalf of the accused that she was not alone to be blamed and that part of the blame had to be put on the selection committee and the manner in which the list of beneficiaries was compiled. Also that some

mitigation was to be found in the fact that she knew that those persons affected by her actions were to be given other houses. It was further said that this, to a certain extent, lessens her blameworthiness.

[23] I fail to see how the accused can find comfort in the argument advanced when she, in the end, had no qualms with the list once amended to her liking. Clearly, in 2014 her concerns with the list were laid to rest once she secured the inclusion of her family onto the list. Neither was she part of the decision to have other houses allocated to the affected persons; it was not of her doing but that of Mr Castro. I am therefore unable to see how this could possibly be a consideration in mitigation of sentence.

[24] In view of the present circumstances it seems apposite to refer to what the Constitutional Court of South Africa said on corruption in *South African Association of Personal Injury Lawyers v Heath and Others*[7] at 891D-E:

> 'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State. There can be no quarrel with the purpose sought to be achieved by the Act or the importance of that purpose.'

[25] As regards the seriousness of the offence and the role played by the courts in sentencing in matters involving corruption, I strongly associate myself with the sentiments of the Court in *S v Shaik and Others*[8] at 312D-F:

> 'The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve

[7] 2001 (1) SA 883 (CC) (2001 (1) BCLR 77).
[8] 2007 (1) SA240 (SCA).

democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.'

[26] Corruption moreover erodes the very fabric of our society and appears to be the scourge of modern democracies. It creates and nurtures feelings of lawlessness within society and generally evokes distrust in the government when committed by high ranking public officers as in this instance; ultimately it offends the rule of law, a fundamental principle of any democracy. From a sentencing court's perspective it then becomes even more compelling to send out a clear message to like-minded persons that these tendencies will not be condoned by the courts and that the risk is not worth the candle.

[27] When dealing with corruption in whatever form, the seriousness of the offence is such that, of the triad of factors relevant to sentence, the interests of society is deserving of more emphasis. The weight accorded thereto will however depend on and be determined by the facts of the case. It is the type of offence that calls for the deterrent and retributive aspects of punishment to be brought to bear. There should be no doubt in the mind of those corrupt individuals in our society that the courts will increase sentences in cases of this nature in an attempt to curtail this scourge and protect society against unscrupulous criminals in their midst.

[28] We have become accustomed to the belief that in most cases involving corruption in the past, acts of fraud or theft were committed in which vast amounts of money were appropriated for self-enrichment. These usually resulted in the imposition of long custodial sentences. Contrary thereto, the present circumstances are completely different in that the corrupt act is based on the accused having abused the power vested in her office as Governor of the Hardap Region. Though there can be no doubt that the accused made herself guilty of the offence of corruption, the court must still consider the circumstances under which it was committed and her moral blameworthiness.

[29] In the authoritative work of SS Terblanche: *Guide to Sentencing in South Africa* (2nd Edition), the learned author discusses the blameworthiness or culpability of the offender and states that according to the modern view the seriousness of the offence is affected by the extent to which the offender is accountable for the harm caused or risked by the crime. It goes on to say that it should also include those subjective factors which would normally lessen (or increase) the blame that can be attributed to the offender.[9] I respectfully share these sentiments.

[30] Against this background the state argued that by virtue of her holding a high office when making herself guilty of corruption, the accused's moral blameworthiness is rather on the high side and therefore constitutes an aggravating factor. The argument is not without merit, moreover where the evidence established that the accused knew she did not have the power to demand any changing of the list and, despite having been advised against her intended actions, persisted and had the changes made. She was the representative of the President and central government in the region and, as such, had the responsibility and duty to advance and protect the government's interests, one of which was to supervise the programme. Unfortunately the accused put her interests and that of her family first and plunged government's well intended project to assist the poor in society in controversy. The effect thereof is that society not only lost faith in the accused, but also in the government.

Interests of society

[31] I do not deem it necessary to deal in any detail with the arguments advanced by both sides on the status of corruption within Namibia as reported in an international recognised survey recently conducted among Namibians and the annual report for 2017 – 2018 of the Anti-Corruption Commission (ACC). What the exact number of cases involving corruption reported to the ACC was, or what the general perception of the public about corruption is, is of no consequence to the compelling need to eradicate this scourge from

[9] At p 150.

society, irrespective of its number. Suffice it to say that one instance of corruption in Namibia, is one too many.[10]

[32] Given the current levels of corruption involving theft of public money reported in the media on a daily basis, the general public have legitimate reason to consider themselves being victims of corruption, thence owning the right to voice their concerns and dissatisfaction publicly. Generally the nature and extent of public outcry is that persons making themselves guilty of crimes of corruption should not be shown any mercy by the courts and must be severely punished. Moreover when it concerns persons in high office of whom it is often said that they are deemed to be above the law and their misdemeanours being swept in under the carpet. Though the frustration of society may to some extent be justified, it is usually based on the subjective perceptions of some members and without a full appreciation of the facts and circumstances of the matter.

[33] The danger for a sentencing court when (inevitably) being exposed to such rhetoric is to give in to public expectation. That would be wrong. Though one might have empathy with those in society who harbour strong feelings of resentment towards the accused and want to see her locked up and removed from society for a long period, this court is mindful of the fact that public expectation is not synonymous with public interest (*S v Makwanyana and Another*).[11] The courts have the duty to serve the interests of society and though it should not be insensitive for or ignorant of public feelings and expectations, it may not blindly adhere thereto. The court does not sentence in a vacuum, but the offender with his or her own unique circumstances. To follow a blanket approach and send all those guilty of the offence of corruption to prison without exception and irrespective of the facts and circumstances under which the offence was committed, would result in distorted and unjustified sentences being imposed. This would clearly not afford the accused a fair trial and likely to render the proceedings unconstitutional. These principles clearly negate state counsel's submission that if direct

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[10] See remarks made in *S v Goabab and Another* 2013 (3) NR 603 (SC) at 611.
[11] 1995 (3) SA 391 (CC) at 431C-D).

imprisonment is not imposed on the accused today, society will lose faith in the judiciary. Submissions like this made by an officer of the court cannot be condoned and should be avoided as it is clearly intended to unduly influence the court in exercising its discretion properly. Not only are these remarks unsubstantiated, but equally inconsistent with the applicable principles of law and therefore of no assistance to the court.

[34] The view taken by the courts when considering sentence in relation to the persistence in committing serious offences, is to impose heavier sentences, the *ratio* being deterrence and aimed at deterring other potential offenders.[12]

[35] The court must however guard against making the offender the scapegoat of all those making themselves guilty of committing similar or relevant crimes. In this instance the accused should therefore not be sacrificed on the proverbial altar of deterrence for crimes not committed by her. She must be punished for her own wrongdoing and not that of others. The circumstances under which the offence was committed must therefore be considered for purposes of sentencing and cannot be ignored. Though the objective of punishment in the present instance would *inter alia* be to impose a deterrent sentence, this factor should not be overemphasised at the expense of the accused's personal interests.

[36] Mr *Marondedze* argued that this is a good case to set an example to others in positions of trust, by imposing direct imprisonment; the term of imprisonment falling within the discretion of the court. It was said that the court should guard against imposing a fine as it is likely to trivialise the offence and bring the administration of justice in disrepute. In his view the seriousness of the offence warranted direct imprisonment, urging the court to adhere to the approach laid down by this court in the unreported case of

[12] *S v Gaus,* 1980 (3) SA 770 (SWA); *S v Maseko,* 1982 (1) SA 99 (A).

Likando v The State.[13] In that case the court said that although the penalty provision in the Act provides for a fine, it does not mean that it must be imposed in all instances as it is trite that where a serious offence has been committed, it has become the norm to resort to custodial punishment, even on a first offender. The court further said that to impose a fine in the circumstances of that case might create the wrong impression: that the offence was not serious, making it financially worth taking a chance.

[37] Though the *Likando* case also involved corruption, it is distinguishable from the present case for two reasons: Firstly, the matter came on appeal and as far as it concerns the powers of a court of appeal to interfere with the sentencing discretion of the trial court, it is settled law that those powers are limited. This the court acknowledged in its judgment when stating at para 31 that while the sentence of four years' imprisonment of which half suspended was rather on the harsh side, it was not found to be startlingly inappropriate or induces a sense of shock. There was accordingly no basis in law for the court to interfere with that sentence. As pointed out to counsel during argument, the approach to sentence by a court of appeal is different from that of the trial court. Secondly, as stated in the judgment, it involved a police officer on duty at a roadblock who extorted cash money in the amount of N$500 from a member of public by threatening to put him under arrest and lock him up unless he paid over the money. Dealing with similar cases the court remarked that these cases clearly showed that corruption committed by police officers is treated as serious by the courts and that the norm was not to impose fines, but imprisonment. It is for that reason that the court on appeal said that 'It would be wrong for this court to ignore the guidelines on sentences and the general thread apparent from sentences in cases decided in recent years in regard to a particular offence.'

[38] For these reasons I am of the view that in those instances where direct imprisonment was imposed on the first offender, the circumstances under which the offence of corruption were committed are distinguishable and more aggravating than what is encountered in the present matter. The state in this

[13] (CA 70/2016) [2016] NAHCMD 379 (02 December 2016).

instance relies on the very same cases as authority when arguing that a custodial sentence is warranted.

[39] What must be determined is what sentence, in the circumstances of this case, will do justice to society as well as the accused. This exercise requires that the profile and interests of the offender be considered together with the interests of society, whilst at the same time taking into account the seriousness of the offence committed. This will ultimately result in a balanced sentence.

[40] The seriousness of the offence must be reviewed in context with the circumstances where the accused exerted the power vested in her office to bring about change to the list of beneficiaries. Personally she did not benefit from her actions. Those who benefitted were family members already listed on the master list and due to receive houses at a later stage. Due to her intervention, the accused further ensured that they received houses without their applications being subjected to the vetting process. Though her actions are reprehensible and to be condemned in the strongest of terms, it was not aimed at self-enrichment, but rather an error of judgment when abusing the powers vested in her office to achieve gratification for her family.

[41] What remains to be determined is whether direct imprisonment, as proposed by the state, is the only suitable sentence that could satisfy the objectives of punishment, namely, retribution and deterrence.

[42] The crime falls under Chapter 4 of the Act and s 49 sets out the penalties that may be imposed, to wit, a fine not exceeding N$500 000 or to imprisonment for a term not exceeding 25 years, or to both such fine and imprisonment. Whereas a fine may be imposed, imprisonment is thus not the only option as with other serious offences such as stock theft and rape under the Combating of Rape Act 8 of 2000.

[43] Though it should as far as possible be avoided to send a first offender to prison, this is not always an option as the seriousness of the crime may be such that there is no other appropriate sentence available. Neither should families be torn apart if that could be prevented. It is not in society's interest if an offender with fixed employment and a steady income loses his or her position as a result of the sentence imposed in circumstances where another sentence would equally have been appropriate.

[44] A factor that should weigh heavily with this court is that the accused at the age of 52 years has no criminal record and has proved herself to be a productive member of society. She has served the government at different levels with success and transgressed on this one occasion when abusing the powers vested in her office. It is a general rule of law that the court should as far as it is possible avoid sending a first time offender to prison, moreover, when the same sentencing objectives could be achieved by the imposition of another adequate form of punishment. As per Maritz JA in the unreported case of *Harry de Klerk v The State,*[14] the ratio behind this approach is that accused persons falling within this category of offenders do not have a demonstrated record of criminal inclinations and are more likely to be rehabilitated by an appropriate sentence than hardened criminals. Also that it is likely the only offence they would commit during their lifetimes and that there is no real risk of them becoming repeat offenders.

[45] When applying these principles to the present facts, I am satisfied that the accused falls within this category of offenders who should be afforded a second chance in life. To adhere to the state's request to impose direct imprisonment, in my view, would be to over-emphasise the seriousness of the offence and the interests of society, whilst giving no or little weight to the accused's personal circumstances. Moreover where the sentencing objective of deterrence, individually and in general, could be achieved by the imposition

[14] Case No SA 18/2003 dated 08 December 2006.

of alternative punishment. I am mindful that as a Member of Parliament the accused is still in a position of authority and might in future be tempted to bring her influence to bear unlawfully. To avoid such possibility a suspended sentence hanging over her head is likely to have the necessary deterrent effect.

Conclusion

[46] Having duly considered all factors and circumstances relevant in deciding what sentence in the present circumstances would be appropriate, I have come to the conclusion that the following sentence is just and proper.

[47] In the result, the accused is sentenced to a fine of N$50 000 or in default of payment, to 24 (twenty four) months' imprisonment, plus a further 12 (twelve) months' imprisonment, which imprisonment is suspended for a period of 5 (five) years on condition that the accused is not convicted of a contravention of section 43(1) of the Anti-Corruption Act of 2003, committed during the period of suspension.

JC LIEBENBERG

JUDGE

APPEARANCES

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