

## REPUBLIC OF NAMIBIA



## HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 8/2018

THE STATE

v

DIAZ SHIPANDEKA

**Neutral citation:** *S v Shipandeka* (CC 8/2018) [2020] NAHCMD 26 (30 January 2020)

**Coram:** USIKU, J

**Heard:** 17 January 2020; 21 January 2020; 23 – 24 January 2020

**Delivered:** 30 January 2020

**Flynote:** Criminal Procedure – Sentence – Theft by false pretences – Accused having pleaded guilty to the charge and convicted on five counts of theft by false pretences as well as on a count of money laundering – Both offences considered to be of serious nature and on the increase – The fact that the money was recovered to be considered as mitigating factor in accused's favour – The crimes, though committed once off, were premeditated – Counts one to five taken together for the purpose of sentencing – Count six ordered to run concurrently with the sentence on the first to fifth count.

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**ORDER**

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(a) Count One to Five: Taken together, Six (6) years imprisonment, of which a period of two (2) years is suspended for five (5) years on condition that accused is not convicted of an offence of which dishonesty is an element, committed during the period of suspension.

(b) Count Six: Three (3) Years imprisonment, the sentence on the 6<sup>th</sup> count is ordered to run concurrently with the sentence on the first to fifth counts.

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## SENTENCE

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### **USIKU J:**

[1] The accused pleaded guilty and was convicted on five counts of theft by false pretences. The sixth count was in respect of a statutory offence of money laundering in contravention of s 4(b)(i) read with s 1, 8 and 11 of the Prevention of Organised Crime Act, 29 of 2004 as amended.

[2] The theft by false pretences and money laundering to which the accused pleaded guilty and on which he was convicted, were perpetrated during the period extending from the 28<sup>th</sup> of March 2012 to the month of April 2012.

[3] I now have the task of considering what in the circumstances of the case should be an appropriate sentence. In approaching this very important task, I must have regard to the nature of the offences of which the accused has been convicted of, his personal circumstances and the interest of society.<sup>1</sup>

[4] As regards the theft by false pretences, I agree with both the prosecution and the defence in their submissions that the seriousness of the offence of theft by false pretences from an employer speaks for itself. Though the offences were not committed over a long period of time, the accused deliberately planned to commit

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<sup>1</sup>(Zinn 1969 SA 537 (A) 540 G-H).

the crimes. He had ample time for reflection and a change of heart after he claim to have been sold an idea by a certain Paulina Nampweya to engage in the creation of fictitious clients with the name of Curbelo-Siete-Islas SL, on the Ebizframe system as the bank account number of the alleged client but that turned out to be the bank account number belonging to the accused person's girlfriend, one Marietta Susana Blom.

[5] I also agree that the seriousness of the offences are considerably aggravated by the fact that at the time of the commission of the offences, the accused was in a position of trust, having been employed as an Information Communication Technology help desk technician, from 1 August 2011, barely seven months after his employment with the Road Fund Administration (RFA) commenced.

[6] Having been so employed in a position of trust, he was expected to exercise absolute honesty and to protect the interest of the employer. Such that when he fell short of this standard, he must expect the full rigor of a severe sentence to be visited upon him, both as a punishment and also to serve as a deterrent to others.

[7] It has been submitted that the accused is a first offender, however, courts must not lose sight of the fact that the Namibian society has been plunged by cases of dishonesty, such as theft by false pretences and that there is currently an alarming increase in those crimes which calls for concerted efforts to stamp out that evil, both in public as well as in the private sectors.

[8] This conclusion is fortified by the large numbers of cases coming before both the lower courts and this court. It is against this background that this court must take judicial notice of the increasing prevalence of cases involving dishonesty which leads to money laundering committed in the work place in this jurisdiction.

[9] As alluded to, the offences were premeditated whereby the accused worked out a method to steal from his employer. It was by sheer luck that the crimes were detected early enough, otherwise they could have had detrimental effects on the complainant as a business entity.

[10] It was submitted by Mr Botes that the accused is a productive citizen and at the time of the offence was only 29 years old. That accused is a highly qualified individual in the IT world as seen from his credentials submitted before court. He has six minor children and a mother who are all depended on him. Furthermore that the accused employed six people in his close corporation whom, as well as their families, are depended on him. That accused is therefore a good human material who, unfortunately at one stage in his life, faltered and succumbed to temptation.

[11] It is this court's view however that the accused person's actions were blatant and greedy. The picture the accused wanted to paint was that he committed the offences because of a third party which as per the facts is not the case. He was not a victim of circumstances. Further, he had full control of his conduct at all relevant times. After all, the alleged accomplice was his junior at work.

[12] The grave consequences of the theft includes a massive N\$2.4 million potential loss to the complainant. As rightly pointed out by counsel for the State, the complainant had to wait for several years to receive the short fall of N\$280,900-37, which the accused kept and was only able to repay it on the 22 January 2020 after the trial had started. It could have been different had the accused immediately made good in repaying the money after he was arrested. Why he took so long to repay the complainant have not been fairly explained to date.

[13] As indicated earlier, I take judicial notice of the fact that crimes of dishonesty are not only prevalent but also on the increase in Namibia. In dealing with a similar matter *Cloete J*, concluded:

'In view of these facts, I feel fully justified in imposing a sentence which will deter not only the accused and other stockbrokers from committing crimes similar to those of which the accused has been convicted but also others involved in the business who may be tempted to indulge in large scale crimes of dishonesty. The time has already arrived when the severity of the punishment imposed for this sort of crime while of course taking the personal circumstances of a particular accused into account, should proclaim that society has had enough and that courts, who are the mouthpiece of society, will not tolerate such crimes and will punish offenders'.<sup>2</sup>

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<sup>2</sup> *S v Blank* (23/93) [1994] ZASCA 115 (15 September 1994).

[14] Mr Botes, on behalf of the accused, implored the court to impose a sentence in a form of a fine coupled with a term of imprisonment. He referred to the court to a recent judgment of *S v Hanse-Himarwa*<sup>3</sup> delivered on the 8<sup>th</sup> July 2019. I have perused the judgment. In my view, that case is quite distinguishable from the present case and finds no application to the present facts. The accused herein stole from his employer.

[15] Both crimes are very serious. It is common cause that when sentences for serious crimes are too lenient, the administration of justice may fall in disrepute. I do consider the factors in mitigation in this case and shall endeavour to indicate to what extent such factors are so. Accused pleaded guilty and as such he demonstrated his penitence and remorse. 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 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.

[16] Though accused had admitted to his crimes, in the same vain he appear to blame his crimes on another person, other than himself. The fact that accused pleaded guilty thereby saving valuable time that would otherwise have been taken up with the trial, is also a factor that must be accorded some considerable weight, regard being had to the fact that it is not only the court's time that he did not waste but he spared thereby many people that were needed at court in attendance to give evidence. Many of these people are busy professionals who would otherwise have been inconvenienced considerably. That too add weight to his expression of remorse.

[17] Both counsels have suggested ways of dealing with the various counts in sentencing. Mr Botes has strongly argued that imprisonment would be totally counterproductive and advanced reasons as follows:

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<sup>3</sup> *S v Hanse-Himarwa* (CC 05/2018) [2019] NAHCMD 229 (08 July 2019).

*That the accused who pleaded guilty to the charges has already repaid the capital loss suffered by the complainant and is in a position to pay a substantial fine. He is a first offender and a productive citizen on whose income, not only his dependants, but also the families of his employees are depended upon. Further, that the accused have minor children some of who are at private schools. He is responsible for their school fees. He is a first offender. He has repaid the complainant. State counsel on the other hand submitted that being a first offender does not preclude a sentence of direct imprisonment. Counsel referred this Court to several case law on that point.*

[18] In the assessment of an appropriate sentence, regard must be had *inter alia* to the main purposes of punishment which are deterrence, preventive, reformation and retributive. Deterrence has been described as the “essential”, all important, paramount and universally admitted object of punishment.

[19] While one must keep in mind that it is a wrong approach to sentencing to overemphasise one aspect as against other aspects, and guard against an approach that will sacrifice the particular accused on the alter of deterrence. It is trite that deterrence, as an object of punishment, is aimed at both the particular accused and other would be offenders, particularly in cases where the crime is prevalent, premeditated and affects society at large, in which case lesser weight is placed on the personal circumstances of an accused. In the matter of *S v Brand and various other cases*,<sup>4</sup> this court enunciated the following principle at 357 A:

‘The reasons for punishing convicted persons is to deter them and others from committing similar crimes and if they are capable of being reformed, of reforming them. Society also expects that people who have done wrong will be punished, that is the retributive purpose in punishment is important.’

I respectfully agree with those sentiments.

[20] In this case, the accused stole from a public entity and as conceded to by both counsels, the crimes were premeditated and are prevalent. Those who commit crimes in their work place must understand that theft from an employer attracts usually a direct term of imprisonment in this jurisdiction. In approaching my task in

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<sup>4</sup> 1991 NR 356.

considering what sentence would be appropriate in this case, I have been guided by the approach adopted by Cloete J, in the matter of *S v Blank supra*, as regards the theft by false pretences counts. I take them all as one for the sentence and balancing the accused's interests and those of society, I have come to the conclusion that the interests of society far outweigh accused's personal interests, considering the seriousness of the offences and its prevalence in this jurisdiction, and that the only punishment to give proper effect to the aims of retribution, prevention, deterrence and reformation or rehabilitation, would be a period of direct imprisonment of which a portion will be suspended on the condition that accused does not during the period of suspension again commit any offence of which dishonesty is an element.

[21] With regard to the statutory offence of money laundering, the accused had indicated that he is in a position to pay a fine. The penalty clause provided under s 11 of the Prevention of Organised Crime states:

'Any person convicted of an offence contemplated in section 4, 5, and 6 is liable to a fine not exceeding 100million or to imprisonment for a period not exceeding 30 years.'

[22] As rightly pointed out by counsel for the State, the penalty clause s 11 of the Prevention of Organised Crime Act underscores the seriousness of the offence of money laundering as per the Legislature. The sentences to be imposed must therefore fit the crime as well as the society but should be blended with a measure of mercy according to the circumstances. It cannot be said with certainty in this case that the accused did not gain any profit from his crimes, when regard is had to the fact that he kept the N\$280,000-00 in his bank account, which he was only able to repay on the 22 January 2020 after he appeared before court for his trial.

[23] It is unfortunate that the accused's dependants have to seriously suffer as a result of the consequences of his crime. However, that is usually a consequence where an accused has been convicted of a serious crime which will result in a substantial custodial sentence. Having carefully considered all the accused person's personal circumstances, his mitigating factors as well as the aggravating factors

placed before Court, I have reached a conclusion that a custodial is unavoidable under the circumstances.

[24] Consequently the accused is sentenced as follows:

- (a) Count One to Five: Taken together, Six (6) years imprisonment, of which a period of two (2) years is suspended for five (5) years on condition that accused is not convicted of an offence of which dishonesty is an element, committed during the period of suspension.
- (b) Count Six: Three (3) Years imprisonment, the sentence on the 6<sup>th</sup> count is ordered to run concurrently with the sentence on the first to fifth counts.

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D N USIKU  
Judge

## **APPEARANCES**

STATE : Ms Moyo  
Office of the Prosecutor-General

ACCUSED : L C Botes SC  
(Instructed by Kadhila Amoomo Legal Practitioners, Windhoek)

