



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 21/2016

In the matter between:

THE STATE

and

PETER TYRAN KOHLER

ACCUSED

Neutral citation: *S v Kohler* (CC 21/2016) [2017] NAHCMD 60 (07 March 2017)

Coram: LIEBENBERG J

Heard: 20 – 21 February 2017

Delivered: 07 March 2017

Flynote: Criminal procedure – Sentence – Fraud – Accused pleaded guilty to 218 counts – Prejudice suffered by complainant amounts to N\$5.8 million – Court restating principles applicable to sentencing – Accused suffers from a sleep disorder, high blood pressure and cholesterol and seemed to have had a slight heart attack following his arrest – Accused's health condition has stabilised and is manageable – Accused's condition does not require a different approach to sentencing – In matters of so-called 'white-collar crime' deterrence as objective of punishment emphasised – Direct imprisonment

unavoidable – Accused showing genuine remorse – Plea of guilty coupled with contrition a mitigating factor leading to significant reduction in sentence.

Summary: The accused, aged 45 years, pleaded guilty and was accordingly convicted on 218 counts of fraud involving more than N\$5.8 million. The accused worked as accountant and store manager for two companies selling building material and by way of manipulating the companies' financial system, credited his own bank accounts with funds appropriated from the companies' bank accounts. In some instances creditors of the accused were directly paid with company funds. The accused admitted that the crimes were not borne out by need but was driven by greed (want). In sentencing the court considered the triad of factors and principles applicable thereto.

Held, that the accused's position of trust bestowed on him in the company, the enormity of fraudulent transactions over a period of five years, the amount involved and the accused's inability to make full restitution, constitute aggravating circumstances.

Held, further that the accused's plea of guilty, coupled with a genuine show of remorse, is a mitigating factor weighing heavily with the court which should lead to a significant reduction in sentence.

Held, further that so-called 'white-collar crime' has become prevalent in this jurisdiction and the court is entitled to take judicial notice thereof and impose deterrent sentences to deal with this scourge.

ORDER

Counts 1 to 218 taken together for purposes of sentence: The accused is sentenced to 15 years' imprisonment of which 5 years is suspended for 5

years on condition that the accused is not convicted of the offence of fraud, committed during the period of suspension.

SENTENCE

LIEBENBERG J:

[1] The accused stands convicted after having pleaded guilty to 218 counts of fraud totalling N\$5 856 075.90, for which the court must decide what punishment, in the circumstances of the case, will be just and fair to the accused as well as to society. Those principles applicable to sentence will be considered namely, the personal circumstances of the accused, the nature of the crimes committed and the interests of society. At the same time regard will be had to the objectives of punishment being prevention, deterrence, rehabilitation and retribution. The court will endeavour to effect a balance between the interests of the person before the court, the interests of society in relation to the crimes committed, and in relation to the objectives or purposes of punishment.

[2] The accused is 45 years of age and a first offender. He is married with three children, the eldest being a girl aged 13 born from his first marriage and who lives in Cape Town with her mother. Two children, a boy aged 8 years and a girl of 4 were born from his second marriage and had been living with the accused until shortly before his arrest on 10 September 2015. Accused said he had sent his family back to South Africa in August 2015 and only upon his arrest did he inform the family as to what he had done. The family returned to Cape Town where they currently reside with his wife's parents who ever since provide in their financial needs. Since his incarceration 18 months ago, the accused's family had not been able to pay him any visit due to financial constraints.

[3] The accused during his testimony elaborated on the hardship his incarceration has brought upon his family who, until his arrest, were financially dependent on him and completely unaware of the accused's misdemeanours committed over a period of five years. Being unable to make any further contribution towards maintenance for his oldest child, she could no longer attend private school and had to change schools. Besides his own family currently being dependent on his in-laws for their subsistence in all respects, the financial support he had previously given to his elderly mother was also terminated. Though the accused submitted that his family are innocent and had been no party to any of his misdemeanours, he is mindful that he is solely responsible for the hardship and suffering they have to endure and takes full responsibility for what he is putting them through.

[4] Having carefully listened to the brute honesty of the accused's submissions in mitigation of sentence, there can be no doubt that he, probably for the rest of his life, will have to live with a constant sense of guilt for subjecting those near and dear to him to the disruption of their family life and hardship they have to endure during his absence. One can but only hope that somewhere in the future he will have the opportunity to make up to them. Regrettably, this is one of the consequences of crime and one cannot allow one's sympathy for the family to deter one from imposing the kind of sentence dictated by the interests of justice and society. Neither is it a mitigating factor for purposes of sentence.

[5] The accused also testified on his health status which he described as being not good. Subsequent to his arrest he had what the doctor believed to have been a slight heart attack. He had no similar attacks thereafter. He suffers from high blood pressure and cholesterol for which he takes medicine. What impacts more directly on his health is a sleep and breathing disorder he suffers from. This makes him dependent on a type of ventilator to assist with

his breathing at night. Though he currently uses his own equipment, he is concerned about its lifespan and future availability.

[6] From the accused's testimony it is evident that, since his detention at the Windhoek Correctional Facility, his health condition has stabilised and is manageable. I am accordingly satisfied that the accused's health status is within normal limits and does not require any exceptional or different approach in sentencing.

[7] As regards remorse, the accused said he was profoundly sorry for the money he embezzled from his employer and begged his forgiveness, also from his family, the court and society in general. He explained that it started off with something that he wanted to buy, for which he did not have sufficient funds. Although he at first considered it a loan, it soon spiralled out of control. He admits that the reason for taking the money was not borne out by need, but rather a matter of want and therefore driven by greed. According to the evidence of his employer, Mr Gunnar Jensen, the accused earned about N\$50 000 per month. He elaborated on financial assistance given to the accused by the company which included selling him a house but which, as a result of his misdemeanour, was forfeited. Sadly, according to the accused much of the stolen money was invested in the house before giving it up.

[8] What is evident from the accused's testimony is that he fully appreciates his wrongdoing and from the outset wanted to come clean. This he considers to be the first step to rehabilitation. He had sent his family back to South Africa and stayed behind to face the consequences, despite having had the opportunity to try and evade justice. Before the nature and extent of the fraud became known, he was actively involved in the identification and listing of all fraudulent transactions which he handed over to the incoming accountant. Though Mr Jensen gave evidence to the contrary claiming that the accused

was of no real assistance in that regard, the court is inclined to rather accept the accused's version on this score as Mr Jensen, on his own evidence, not only relied extensively on the accused's knowledge of the work, but he was not personally involved in the investigation that ultimately revealed the fraudulent transactions. At some stage during the financial inquiry, the accused approached Mr Jensen and confessed his wrongdoing. The extent thereof was however such that Mr Jensen could not give any further assistance to the accused, where after he resigned. He was soon thereafter arrested.

[9] Throughout his evidence the accused expressed his desire and commitment to make good to the complainant and to compensate the complainant companies for the money he misappropriated. This he intends doing once he has taken up employment in the future and earns an income. To this end he handed into evidence a letter of an offer for employment from a company based in Cape Town. Taking into account the seriousness and magnitude of the crimes committed, considered together with the punishment these offences usually attract, it seems to me quite unrealistic to expect of the accused to be working and earning an income in the near future. Therefore, as noble and genuine as the accused's intentions may be, it is simply not achievable. However, it does reflect positively on the character of the person before the court, who seems bent on correcting the injustices of the past he had caused his former employer.

[10] There can in my view be no doubt that the accused's expression of remorse is genuine and, from the onset, he accepted full responsibility for the crimes committed which manifested itself in the 218 pleas of guilty tendered at the beginning of the trial. By pleading guilty the accused undoubtedly saved the State substantial costs on witness fees and related expenses, not to mention the time it saved the prosecution to have proved the commission of 218 counts of fraud preferred against the accused. It was submitted by the

prosecutor that not too much should be read into the guilty pleas of the accused as the State had a very strong case against him. This may be the case, but the advantages of a guilty plea for the State is too obvious and I am not persuaded that this is an instance, as the court in *S v Landau*¹ referred to, where 'the writing is on the wall' and where the accused had no viable defence which produced the guilty pleas. The State cannot have its bread buttered on both sides and in the absence of evidence to the contrary, I am of the view that the accused chose to plead guilty because he is genuinely remorseful for his wrongdoing.

[11] In circumstances where the court is satisfied that the accused's contrition is sincere and had manifested itself in pleas of guilty, it should have a significant impact on the sentence to be imposed. To this end this court stated in *State v Majiedt*² at p 17 par 32 the following:

'This court in the past opined that in circumstances, as the present, where a plea of guilty is tendered and is fortified by sincere contrition and repentance, the accused should gain some benefit from doing so when it comes to sentencing. It should therefore serve as incentive to an accused, knowing he or she is indeed guilty of the offence charged, to take the court fully into his or her confidence by pleading guilty from the onset and repent, rather than taking the chance of the matter going to trial and only when convicted, then try to persuade the court during sentence of being genuinely remorseful. In the latter instance the court is likely to accord less weight thereto as a mitigating factor, if at all.'

[12] The accused in the present instance took the court fully into his confidence and wanted to come clean. This he did which, in my view, constitutes a factor that weighs heavily in his favour and which will significantly bear on the sentence to be imposed.

[13] During the period 23 March 2009 until 07 February 2013 the accused was appointed by Pennypinchers Timbercity Windhoek as store accountant, where after he took up the position of manager at Ongwediva Pennypinchers

¹ 2000 (2) SACR 673 (WLD) at 678a-c.

² (CC 11/2013) [2015] NAHCMD 289 (01 December 2015).

Timbercity until his arrest. The new store accountant for the Windhoek branch was only appointed at the end of September 2013 and the accused, until then, continued to perform his duties as store accountant at the Windhoek branch from Ongwediva. The accused's financial responsibilities inter alia required of him the capturing and authorisation of bona fide company expense payments and the capturing and reporting thereof to the company. The accused during the period 09 October 2009 to 09 July 2015 unlawfully transferred, via the bank's electronic banking system, the amount of N\$5 856 076.01 to either one of his two personal bank accounts, or transferred directly into bank accounts of personal creditors of his. The extent at which the accused embezzled company money is apparent from the individual incidents listed in the indictment which shows that in December 2009, two months since the first incident, the accused appropriated more than N\$124 000 in a single month. That is more than double his monthly salary. According to Mr Jensen, the reason why the fraudulent transactions were not picked up by the auditors over a period of five years is because they were hidden in the VAT account, making their detection extremely difficult. It was only after the new accountant took over from the accused that the fraudulent transactions surfaced.

[14] That the accused stood in a position of trust towards the companies and its owners is evident from the fact that he was the accountant, with the accompanying authority to manage the financial side of the businesses which included the unimpeded transfer of funds from its bank accounts. Because of his position within the company the accused was able to manipulate the accounting system in the execution of a carefully devised scheme to subterfuge. An amount in excess of N\$5.8 million is, by any measure, a very substantial sum of money and over a period of five years the crime of fraud was perpetrated on no less than 218 occasions. Prior to the commission of each of these crimes the accused had ample time to reflect and come to his senses. That much the accused now appreciates, but said the situation soon spiralled out of control until it reached the point where he never realised the magnitude of the amounts involved. Also acknowledged by the accused is that he need not have stolen from his employer, but was driven by the desire of want. This desire was satisfied by buying things that at most complimented

a lavish lifestyle far beyond his means. The accused surrendered all his personal moveable assets and full pension to the company. Although the accused estimated the value of his moveable assets at N\$1.6 million, those items sold out of hand only raised the amount of N\$369 590, with the estimated value of items not sold, to be a further N\$27 400. The total amount of these assets is just short of N\$400 000, a far cry from the accused's estimated value. Accused's pension amounted to N\$347 900.35. The company, according to the accused, was insured against theft and its claim of N\$350 000 was paid out. When these figures are brought into consideration, the total loss suffered by the complainant companies still constitutes the substantial amount of N\$4.7 million.

[15] Relying as authority on *S v Scheepers*³ counsel for the accused submitted that imprisonment is not the only punishment which is appropriate for retributive and deterrent purposes, and if these objectives, in the light of the nature of the offence and the interest of the public could be attained by means of an alternative punishment to imprisonment, then preference should be given to such alternative. Also that imprisonment is only justified if the offender has to be removed from society for the protection of the public and if the objectives of punishment cannot be attained with any alternative punishment. It was further said that accused in the present instance, as such, is not a danger to society and that the accused should be afforded the opportunity to pay a fine.

[16] The *Scheepers* case concerns theft of one head of cattle and is clearly distinguishable from the present facts. Counsel was unable to refer the court to any authority where an offender who had been convicted of theft or fraud involving substantial amounts was sentenced to a fine; neither have I been able to trace any such case on my own. Besides the accused being in no financial position to pay a fine of any sort, the circumstances of this case are such that imprisonment is the only form of punishment to attain the objectives of sentencing namely, deterrence and retribution in cases of this nature. Though the accused has not resorted to crimes involving the element of

³ 1977(2) SA 154 (A).

violence, the corrosive impact of crimes of this nature on society should not be underestimated. It would therefore be wrong to contend that crimes of fraud are less serious. To this end I respectfully endorse the sentiments of Marais JA in *S v Sadler*⁴ at 335g-336a which reads:

‘...So called ‘white-collar’ crime has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of ‘white-collar’ crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being ‘criminals’ or ‘prison material’ by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for ‘white-collar’ crime. Their premise is that prison is only a place for those who commit crimes of violence and that it is not a place for people from ‘respectable’ backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

[12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.’

[17] The accused passionately testified that he is a reformed person and I have no doubt that during the time of his incarceration he has made good strides on the road to rehabilitation. In sentencing the accused the court must decide what it intends achieving with the punishment imposed, and one objective for consideration is reformation, especially where the accused has already on his own volition embarked upon the road to recovery. Sight should however not be lost of the interests of society. It is settled law that retribution and deterrence are proper purposes of punishment and must be accorded due weight when dealing with serious crimes, as the present, when rehabilitation would consequently become a lesser consideration. So-called ‘white-collar crime’ has become prevalent in this jurisdiction and the court is entitled to take judicial notice thereof and impose deterrent sentences to deal with this scourge.

⁴ 2000(1) SACR 331 (SCA).

[18] I have given due consideration to all the mitigating factors before me and, in particular, that the accused is a first offender who has shown genuine remorse for the wrong he has done and pleaded guilty; also that he has surrendered all his personal assets to minimise the complainant companies' loss. On the other hand there are staggering aggravating circumstances which will substantially impact on the sentence to be imposed. The crimes were not committed on the spur of the moment, but over a period of five years; the *modus operandi* was such that it could not be easily detected; appellant breached and abused the position of trust and confidence which the companies, as his employer, had placed in him; the loss suffered by the complainant companies is substantial; and lastly, the accused personally gained from the proceeds of these crimes.

[19] For the aforesaid reasons the inescapable conclusion reached, is that the interests of justice and society significantly outweighs the personal interests of the accused, and that the circumstances of the case dictate the imposition of a lengthy custodial sentence.

[20] The appellant has been in custody awaiting finalisation of the trial for the past 18 months, which period will also be taken into account in sentencing.

[21] In the result, it is ordered:

Counts 1 to 218 taken together for purposes of sentence: The accused is sentenced to 15 years' imprisonment of which 5 years is suspended for 5 years on condition that the accused is not convicted of the offence of fraud, committed during the period of suspension.

JC LIEBENBERG
JUDGE

APPEARANCES

STATE

I Husselmann
Of the Office of the Prosecutor-General,
Windhoek.

ACCUSED

M Tjituri
Tjituri Law Chambers, Windhoek.