

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

SENTENCE

Case No.: CC 7/2017

THE STATE

v

MARK WAYNE VAN WYK

ACCUSED

Neutral citation: *S v Van Wyk* (CC 7/2017) [2018] NAHCMD 11 (31 January 2018)

Coram: SHIVUTE J

Heard: 16-17 January 2018

Delivered: 31 January 2018

Flynote: Criminal Procedure – Sentence – Fraud – Accused pleaded guilty to 288 counts of fraud – Complainant suffered actual loss of N\$ 1 557 172 24 – Accused committed a white – collar crime – Accused breached trust bestowed upon him - Courts view white collar crimes in a serious light – Accused committed crimes over a lengthy period of time – Crimes premeditated - Deterrent Sentence called for – Accused showing genuine remorse – Plea of guilty and genuine remorse – may lead to a reduction in sentence.

Summary: The accused pleaded guilty to 288 counts of fraud and convicted accordingly. The amount involved is N\$ 1 604 217 60 but the complainant suffered

the actual loss of N\$ 1 557 172 24. The accused was employed as a team leader by the complainant. Accused committed fraud by using passwords and user IDS of his colleagues and transferred money into his own accounts and that of his friends, relatives and acquaintances. He later withdrew the money for his own benefit. The accused took advantage of his position of trust bestowed upon him and engaged in fraudulent activities over a period of two years and seven months. Offences are premeditated. These are aggravating factors against the accused. Accused's plea of guilty coupled with genuine remorse factors that weigh heavily in his favour and may lead to a reduction in sentence. White collar crimes are seen in a serious light by the Courts and call for deterrent sentences.

ORDER

Counts: 1 to 288 taken together for purposes of sentence: The accused is sentenced to 8 years' imprisonment of which 2 years are suspended for 5 years on condition that the accused is not convicted of fraud committed during the period of suspension.

SENTENCE

SHIVUTE, J

[1] The accused person stands convicted of 288 counts of fraud in the amount of N\$ 1 604 217 60 (one million six hundred four thousand and two hundred seventeen Namibia Dollar and sixty cents) following a plea of guilty.

[2] The accused was employed by Standard Bank Namibia Ltd as an Accounts Support Consultant/ Asset Custodian. He was a team leader mandated to oversee the transactions on the bank's Internal Revenue Interest Account and do the treasury balancing in respect of the said account. The accused had access to his colleagues' passwords and user IDS since he was in a supervisory position. He initiated a fraudulent scheme wherein he obtained banking accounts from his friends, relatives

and acquaintances and fraudulently manipulated the bank's Internal Revenue Interest Account and transferred the money into his personal account and into the accounts of his friends, relatives and acquaintances. He would contact the persons in whose accounts the money was transferred to withdraw the money and hand it over to the accused. Sometimes he would ask those persons to give him their debit cards to make POS purchases at different POS points.

[3] The accused gave evidence in mitigation of sentence. He is 29 years old, born in Windhoek, Namibia. He attended Dr Lemmer High School where he matriculated in 2006. He was employed by the complainant since 9 November 2009. He started as a Communication Officer and in 2015 he was promoted to Asset Custodian and Account Support Officer. He was a team leader. His employment was terminated after his fraudulent activities were discovered in August 2015. At the time his service was terminated he was earning N\$ 13 000 (thirteen thousand Namibia Dollar as a gross salary per month). At the time he was relieved of his duties he had accumulated N\$ 135 413 20 (one hundred thirty five thousand and four hundred thirteen Namibia Dollar and twenty cents) as his pension benefit that is in an undisclosed pension fund. He has no objection to the court making an order for the payment of his pension money and accrued interest to Standard Bank Ltd Namibia as he had already signed an acknowledgment of debt.

[4] The accused is unmarried. He has no children. He has one sibling who is younger than him. At the time of the commission of the offences the accused's young brother was not employed. His brother has a six year old daughter. Accused's father passed away when he was a baby. His mother passed on during December 2017. The accused was raised by his mother and his grandparents. The accused was responsible for looking after his mother, grandparents, brother and his brother's daughter. His mother was suffering from cancer and she had no medical aid. He used the money that he stole for his mother's treatment, entertaining friends and supporting his family. He also used N\$ 60 000 (sixty thousand Namibia Dollar) to pay a deposit for a car that was later involved in an accident. When he saw that the amount he defrauded the bank was becoming higher he indulged in gambling with the hope that he would win a lottery and pay back the money in case he is caught.

The accused testified that he was tempted to steal because of laxity in the security system at his work-place.

[5] The accused is now unemployed. He has no source of income. His friends had left him. He is sorry for what he did and regrets his actions. He told the Court that he would accept any punishment the Court may impose for what he did. He is unable to pay back the money as he is still unemployed. Whilst the accused was employed by the bank he was doing part time studies in Business Management which he intends to finish in future. The accused has no previous conviction.

[6] Counsel for the accused argued that the accused was honest in informing the Court how he disposed of the money. Accused accepted his liability from the outset by stating that he was guilty, that what he did was wrong and he has to bear the consequence. The accused admitted everything and he is remorseful. He is also asking for mercy. The accused is unlikely to commit a similar offence. The accused is aware of the seriousness of the offence and that he cannot escape a direct imprisonment. Counsel urged the Court to impose a term of six years imprisonment of which two years are suspended on usual conditions as it would serve the interests of justice.

[7] On the other hand, counsel for the State argued that the accused is convicted of a serious offence and the amount involved is very high. The offence is prevalent and that the accused was placed in the position of trust. The offences were perpetrated against the employer. The offences were committed over a long period of time namely two years and seven months. The offences were premeditated and his actions were driven by greed. The complainant has suffered actual loss as the money was not recovered. Counsel further argued that the aggravating factors outweigh the mitigating factors and called for a stiffer sentence. Concerning the accused's remorse, counsel argued that it is not genuine because if he was truly remorseful he was not going to commit the offences over a long period of time. He could have stopped before his actions were discovered. Counsel urged the Court to impose a sentence of 10 years' imprisonment of which part should be suspended on usual conditions. Both counsel referred this Court to several authorities which I have considered.

[8] Factors that the accused is a first offender who pleaded guilty to all the 288 counts of fraud and saved the State the trouble to call witnesses and to go through a lengthy trial weigh heavily in his favour. There is no doubt that the accused had shown genuine remorse because he took the Court into his confidence and testified under oath expressing full responsibility for what he did. The accused said he was sorry for his actions and that he is ready to accept any punishment the Court may impose on him for his deeds. The accused had also offered to compensate his former employer the pension money due to him which is N\$ 135 413 20 (one hundred thirty five thousand and four hundred thirteen Namibia Dollar and twenty cents). This is a drop in the ocean comparing to the sum of money stolen which is in excess of N\$1 600 000 (one million six hundred thousand Namibia Dollar).

[9] Although the accused had shown genuine remorse by accepting full responsibility for his actions that may lead to reduction in sentence, this Court does not lose sight of the seriousness of the offence committed, the substantial amount involved and the prevalence of the offence. The Court has also taken into consideration that the complainant had suffered a loss as the money was not recovered. The accused committed a white collar crime. He committed the crimes while in a position of trust. He bore the responsibility of supervising other employees to ensure that they perform their functions with diligence and honesty. Yet he had the audacity to tell the court in its face that he was tempted to steal from his employer because of laxity in the security system at his work-place. This lame excuse is unacceptable and is adding insult to the reputational damage and financial harm the accused caused to his ex-employer. It deserves to be condemned in the strongest terms. The accused decided to breach the trust. The crimes committed by the accused were pre-meditated as they were committed over a lengthy period of time. The accused had ample time to reflect and come to his senses to stop his fraudulent actions before his actions were discovered but he opted to continue with his activities. All these are aggravating factors that weigh heavily against him. Although the State has made an application for the Court to invoke the provisions of s 297(7) of the Criminal Procedure Act 51 of 1977, I have received a document from the State indicating that an amount of N\$ 122 249 89 (One hundred twenty two thousand and two hundred forty nine Namibia Dollar and eight nine cents of the accused's pension benefit was already paid to the complainant. The complainant had suffered the

actual loss of N\$ 1 557 172 24 (One million five hundred fifty seven thousand and one hundred seventy two Namibia Dollar and twenty four cents).

[10] Although the accused has pleaded for mercy, this does not mean that the Court should impose lighter sentences or hesitate to impose deterrent sentences when it is called for by circumstances. Punishment must fit the crime, take into consideration the personal circumstances of the offender as well as the interests of society. Theft from an employer is viewed by our Courts in a serious light and it calls for a deterrent sentence.

[11] Having considered all the factors placed before me, it is undoubtedly so that there is no other option but to impose a custodial sentence part of which is suspended.

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

Counts: 1 to 288 taken together for purposes of sentence: The accused is sentenced to 8 years' imprisonment of which 2 years are suspended for 5 years on condition that the accused is not convicted of fraud committed during the period of suspension.

NN SHIVUTE
Judge

APPEARANCES:**THE STATE:**

Mr Kanyemba

Of Office of the Prosecutor-General, Windhoek

ACCUSED:

Mr Wessels

Instructed by Directorate of Legal Aid, Windhoek