



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT ON SENTENCE**

Case no: CC 07/2018

In the matter between:

THE STATE

v

MAMSY MWENENI HILMA NUUYOMA	1ST ACCUSED
LUKAU NESTOR	2ND ACCUSED
BENVINDO MOMAFUBA	3RD ACCUSED
PEMBELE ZIMUTU	4TH ACCUSED
PAULO KIALA	5TH ACCUSED
JOAQUIM PEDRO ESPANHOL	6TH ACCUSED
JOAO MANUEL DO SANTOS	7TH ACCUSED
TATIANA LUQUENA MUCHADU GONGA	8TH ACCUSED
CARLOS VICTOR ELISEU	9TH ACCUSED
ISAAC CATIVA CUPESSALA	10TH ACCUSED
PAQUETE AMERICO KAPAYOLA JOSE	11TH ACCUSED
EUGENIO PIO DO AMARAL GOURGEL	12TH ACCUSED
MALAKIAS TOMAS RUFINE	13TH ACCUSED

PAULINO MANUEL NATAL	14TH ACCUSED
CARLOS FELECIANO TCHINDUKU	15TH ACCUSED
MIAPA AURELIO NELSO	16TH ACCUSED
LUCIO JOSE CAZEMBE	17TH ACCUSED
NOAH BOYKIE NAUKOSHO	18TH ACCUSED

Neutral citation: *S v Nuuyoma* (CC 07/2018) [2018] NAHCMD 297 (21 September 2018)

Coram: USIKU, J

Heard on: 16 August 2018

Delivered: 21 September 2018

Flynote: Criminal Procedure – Sentence –Plea of guilty a consideration at sentencing – Sincere remorse expressed – Fraud a serious offence– Contravention of sections of Anti-Corruption Act 8 of 2003 a serious offence – Detailed explanation of how offences were committed – Accused did not actually benefit from the delinquent conduct.

Summary: Accused 12 and 14 were convicted on their pleas of guilty and now stand to be sentenced. Accused 12 was convicted of one count of fraud, whereas Accused 14 was convicted on two counts of contravention of section 35(3) read with sections 32, 46, 49 and 51.

Held: Accused 12: i) fined an amount of N\$ 30 000 or 6 months imprisonment and ii) in addition, a sentence of 2 years imprisonment is imposed which is wholly suspended for 5 years on condition that the Accused is not convicted of fraud committed during the period of suspension.

Held: Accused 14 (both counts are taken together for the purpose of sentence i) fined an amount of N\$ 50 000 or 12 months imprisonment; and ii) in addition, a sentence of 4 years imprisonment is imposed, of which 3 years are suspended for 5 years on

condition that Accused is not convicted of the offence of contravention of s 35(3)(a) of the Anti-Corruption Act (No. 8 of 2003), committed during the period of suspension.

ORDER

In the result, the Accused are sentences as follows:

a) Accused 12:

- i) is fined an amount of N\$ 30 000 or 6 months imprisonment;
- ii) in addition, a sentence of 2 years imprisonment is imposed which is wholly suspended for 5 years on condition that the Accused is not convicted of fraud committed during the period of suspension.

b) Accused 14 (both counts are taken together for the purpose of sentence):

- i) is fined an amount of N\$ 50 000 or 12 months imprisonment;
- ii) in addition, a sentence of 4 years imprisonment is imposed, of which 3 years are suspended for 5 years on condition that Accused is not convicted of the offence of contravention of s 35(3)(a) of the Anti-Corruption Act (No. 8 of 2003), committed during the period of suspension.

SENTENCE

USIKU, J:

Introduction

[1] The two Accused persons presently before court were initially charged with sixteen other co-Accused, but as the two Accused pleaded guilty to the charges against them, the trials were separated.

[2] Accused 12, Eugenio Pio Do Amaral Gourgel, pleaded guilty and was convicted on one count of fraud. The particulars of the charge were that, upon or about 29 September 2015 at or near Windhoek, he wrongfully, falsely and with the intent to defraud, gave out and pretended to the Aveshe Consultancy (Pty) Ltd and/ or the Ministry of Finance, that he purchased goods on dates indicated on the respective invoices and exported such goods to Angola. He represented that he was charged and paid Value Added Tax (VAT) of N\$ 27 524.74 on the said dates and was entitled to a refund in the amount N\$ 27 524.74, whereas in truth he did not purchase in Namibia or export to Angola goods on the dates in the respective invoices. As a result of such misrepresentation, the Ministry of Finance suffered potential financial prejudice in the amount of N\$ 27 524.74.

[3] Accused 14, Paulino Manuel Natal, pleaded guilty to, and was convicted on two counts of contravening s 35(3) of the Anti-Corruption Act (No. 8 of 2003). The particulars of the charges are that, on or about September 2015 to October 2015, in the district of Windhoek, he wrongfully, unlawfully gave to Aveshe Consultancy (Pty) Ltd a VAT refund form in respect of which the agent's principal (the Ministry Of Finance) has an interest, which VAT refund form contained false information. The false information contained in the VAT refund form was to the effect that Accused 14 had purchased goods from Namibia and exported them to Angola and was accordingly entitled to a refund in the amount of N\$ 104 025 (count 342) and N\$ 126 819 (count 344), respectively. As a result of such representation, the Ministry of Finance suffered potential prejudice in the total amount of N\$ 230 844.

[4] Each of the two Accused persons handed in a written plea explanation, in which each Accused set out the essential elements and facts to which they admitted. Each Accused also set out in writing, explanatory information covering circumstances in which the respective offences were committed. Each Accused testified in mitigation of

sentence. In general, it appears that the circumstances in which the offences were committed are common cause between the Accused persons and the State.

Circumstances in which the offences were committed

[5] Accused 12 related that during year 2014, he purchased certain goods from Solar Age Namibia which he took to Angola. However, he did not claim VAT in respect of these goods.

[6] During year 2015, while at the offices of Customs and Excise at Oshikango, he noticed invoices bearing his name in respect of those goods purchased in year 2014. Accused 12 contacted Accused 1 (who was then working at the offices of Aveshe Consultancy (Pty) Ltd in Windhoek) to enquire whether he could claim VAT refund in respect of goods purchased in Namibia in 2014. According to Accused 12, Accused 1 advised him that he could claim VAT refund provided that he contacts Solar Age Namibia and request that they change the actual date on the invoice to reflect a later date.

[7] Accused 12 called Solar Age Namibia and spoke to a certain Anna, who upon request agreed to change the date on the invoice in question. Accused 12 emailed a copy of the invoice to Anna, whereafter Anna emailed back a copy of an invoice reflecting a later date.

[8] Accused 12 took the invoice bearing the new date to the offices of Customs and Excise at Oshikango, and had the invoice date stamped with a Customs and Excise office stamp. He then took the invoice to Accused 1 and put in a claim for VAT refund. Accused 1 told Accused 12 that Accused 12 would be informed once the cheque is ready for collection. Then Accused 12 left for Angola.

[9] On 30 November 2015, Accused 12 returned to Namibia. On 1st December 2015 he went to the offices of Aveshe Consultancy (Pty) Ltd to enquire on the progress of his VAT refund claim. Accused 1 told him to wait for Accused 1's boss to bring him the

cheque. Some minutes later, police officers arrived and Accused 12, together other co-Accused, were arrested at the offices of Aveshe Consultancy (Pty) Ltd. As a result of the arrest, Accused 12 did not receive the VAT refund cheque. However, Accused 12 admits he had no lawful right to receive payment in respect of the VAT refund based on the falsified invoice. He further acknowledges that the Ministry of Finance had suffered potential prejudice in the amount of N\$ 27 524.74.

[10] As regards Accused 14, he related that he with the help of one Paquete Americo Kapayola Jose (Accused 11 in this matter), obtained certain invoices and filled in VAT refund forms. Those invoices and VAT refund forms contained false information in that they indicated that Accused 14 purchased certain goods in Namibia and exported them to Angola. Accused 14 submitted the false VAT refund claims at the offices of Aveshe Consultancy (Pty) Ltd.

[11] On 1st December 2015, Accused 14 went to collect his VAT refund cheque and there he was arrested together with his co-Accused by the police. Accused 14 admits that he was not entitled to receive the VAT refund in question and acknowledges that the Ministry of Finance suffered potential prejudice in the total amount of N\$ 230 844.

Evidence in mitigation or aggravation of sentence

[12] In mitigation of sentence, Accused 12 testified that he is 36 years old, male and that he is an Angolan national. He is unmarried, but has two children that he maintains. He also looks after his 65 years old mother. He attended school up to university level, but only did his first year at university. By occupation, he is a businessman and provides hospital and solar equipment to the State hospital in Angola. He has no previous convictions and is currently out on bail of N\$ 10 000, in respect of the present charge. He further indicated that he could pay a fine higher than N\$ 10 000. He further testified that he was remorseful of his deeds and indicated that he cooperated with the police from the date of his arrest. On the aspect of cooperation, the investigating officer in this matter who testified on behalf of the State, confirmed that Accused 12 had been cooperating with the police from the outset.

[13] Accused 14 testified in mitigation that he is 35 years old, male and an Angolan national. He is married under traditional law and has four minor children which he use to maintain financially, before his incarceration. His wife is unemployed. He has been a trial awaiting prisoner since 1st December 2015. Accused 14 expressed remorse for his deeds and undertook not to commit similar conduct in future. He is a first offender. If given a fine, he indicated that he can pay a fine up to N\$ 10 000. In regard to his educational background, he stated that he only progressed up to grade 5.

[14] Counsel for Accused 12 submitted that the Accused readily admitted guilt from the outset and has been cooperative. He had lawfully purchased the goods in question, however he did not claim the relevant VAT refund within the prescribed period of three months. He stood to gain an amount of N\$ 27 524.74. He further submitted that, the circumstances in which the Accused committed the offence, do not justify a custodial sentence.

[15] Counsel for Accused 14, submitted that s 49 of the Anti- Corruption Act (No. 8 of 2003), provides a maximum penalty of a fine of N\$ 500 000 or imprisonment not exceeding 25 years or both such fine and imprisonment. Accused 14 was arrested on 1 December 2015 and has been in custody since. Counsel therefore submits that a fine be imposed on Accused 14, alternatively a custodial sentence appropriately suspended.

Analysis

[16] The offences that the Accused persons committed are serious offences. As regards Accused 12, fraud in general is a serious offence and in a majority of cases invites a custodial penalty. Equally, as regards Accused 14, the offence of contravention of s 35 (3) of the Anti -Corruption Act (No. 8 of 2003) is a serious offence. Indeed the provisions of s 49 of the Act providing for a maximum penalty of a fine of N\$ 500 000 or imprisonment not exceeding 25 years or both such fine and imprisonment, is indicative of the seriousness attached to an offence of the kind.

[17] Yet, a factor that weighs heavily with the court is the fact that both Accused persons readily pleaded guilty and have displayed remorse for their deeds. However,

the assessment of remorse has to be done in a balanced manner, taking into account the seriousness of the offences of fraud and corruption and the need to rid society of such misdeeds.

[18] The sentence that this court would impose should serve as deterrence, balanced against the mitigating factors as outlined above and as apparent from the evidence outlined earlier.

[19] In regard to Accused 12, I am of the view that a custodial sentence is unnecessary in the circumstances, given the fact that he had actually purchased the goods in question, had readily pleaded guilty and taking into account the amount involved. Based on these factors I am of the view that Accused 12 must be given an opportunity to atone for his crime by imposing a fine and a further wholly suspended sentence.

[20] In regard to Accused 14, a custodial sentence is unavoidable in the circumstances, given the nature and circumstances in which the offence was committed and the amount involved. His criminal behavior constituted a continuous conduct even though he was convicted on two counts. I consider it appropriate to take the two counts together for the purpose of this sentence. The fact that he pleaded guilty, that he is a first offender, had shown remorse and had been in custody since 1st December 2015 should also be taken into consideration. Based on those considerations, I am of the view that payment of a fine, failing which a term of imprisonment, plus a custodial sentence partially suspended, would be appropriate in the circumstances.

Conclusion

[21] In the result, the Accused are sentenced as follows:

a) Accused 12:

i) is fined an amount of N\$ 30 000 or 6 months imprisonment;

ii) in addition, a sentence of 2 years imprisonment is imposed which is wholly suspended for 5 years on condition that the Accused is not convicted of fraud committed during the period of suspension.

b) Accused 14 (both counts are taken together for the purpose of sentence):

i) is fined an amount of N\$ 50 000 or 12 months imprisonment;

ii) in addition, a sentence of 4 years imprisonment is imposed, of which 3 years are suspended for 5 years on condition that Accused is not convicted of the offence of contravention of s 35(3)(a) of the Anti-Corruption Act (No. 8 of 2003), committed during the period of suspension.

B Usiku

Judge

APPEARANCES:

FOR THE STATE: IO Husselman (with MH Muhongo)
Of Office of the Prosecutor General, Windhoek

FOR ACCUSED 12: BD Basson
BD Basson Inc, Windhoek

FOR ACCUSED 14: K Kamwi
Sibeya & Partners, Windhoek