

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 27/2006

THE STATE

v

HANS PETER ROTHEN

Neutral citation: *S v Rothen* (CC 27/2006) [2019] NAHCMD 60 (20 March 2019)

Coram: SHIVUTE, J

Heard: 23 July 2018, 11-12 February 2019

Delivered: 20 March 2019

Flynote: Criminal Procedure – Sentence- Fraud - Accused convicted of 10 counts of fraud – 1 count of theft – Accused committing a white collar crime – Courts viewing white collar crimes in a serious light – Crimes premeditated – Accused causing potential and actual loss to the close corporation and complainant – Accused an elderly first offender in poor health – Factors in his favour – Some counts taken together for purpose of sentencing.

SENTENCE

(a) Counts 1 - 8 Fraud of N\$1,103,490.32 taken together for purposes of sentencing:

A fine of forty thousand Namibia Dollar (N\$40, 000) or four (4) years' imprisonment.

(b) Count 9, Theft of N\$150,000:

A fine of fifteen thousand Namibia Dollar (N\$15,000) or eighteen (18) months' imprisonment.

(c) Count 10, Fraud by obtaining 50% member's interest in the CC:

A fine of five thousand Namibia Dollar (N\$5,000) or one (1) year imprisonment.

(d) Count 11, fraud by transferring N\$1, 093, 471.43:

A fine of forty thousand Namibia Dollar (N\$40,000) or four (4) years' imprisonment.

SENTENCE

SHIVUTE J:

[1] The accused is convicted on counts 1- 8 of fraud, count 9 of theft and counts 10-11 of fraud. In other words the accused is convicted on 10 counts of fraud and one count of theft. The accused testified in mitigation and called three witnesses.

[2] The accused's personal circumstances are that he is 73 years old. He is a Swiss national who has been residing in Namibia permanently since 1976. He is married with one son and two granddaughters. When the accused came to Namibia he worked for the Ministry of Nature Conservation and Tourism before he started his business of Sea Side Properties Estate agency in Swakopmund. His estate agency is now closed since

it was published in the media in relation to this case. The accused felt that his reputation was damaged and he had to close the Estate agency.

[3] The accused further testified that this case had ruined him financially because he spent more than N\$5 Million in the civil and criminal cases by paying legal fees. It was the accused's testimony that this case has caused him stress that had an impact on his general health and personal relationships. The case has caused the accused not to attend public events and it has an effect on his wife as well as his son. It is again the accused's testimony that he is not guilty because the case was not proven against him as the money was correctly recorded.

[4] The accused has health issues as he suffers from acute diabetes, high blood pressure and cholesterol. He is on insulin whereby he has to inject himself five times a day and measures his blood levels about five times a day as well. The accused also has dietary requirements in order to control his ailments. As a result of stress, the accused suffered from ulcers whereby he lost a lot of blood and it resulted in him receiving blood transfusion.

[5] The accused said he is in a position to pay a fine. He is on bail of N\$75 000 and he would add N\$ 25 000 to pay a fine. The accused said he was sorry for what he did because he was allegedly told by the court that he had made a technical mistake by depositing the cheques from one account to the other. It is worth mentioning that the accused's understanding is not a correct reflection of the court's finding in this respect.

[6] Dr Wolfgang Helmut Tietz, a family specialist physician testified that the accused has been his patient since 2007. The accused suffers from diabetes, a cholesterol disorder, body obesity, high blood pressure, ulcer and spinal problems. The accused uses two types of insulin controlling drugs to control the blood pressure. He is also on a lower dose for cholesterol. Furthermore, he is on medication for his ulcer disease to control his acids level. The doctor further testified that the accused needs medical and nutritional therapy which means the patient must have access to healthy food and there must be a correct balance between the carbohydrates, the proteins and the fat. It was again the doctor's testimony that if you have a combination of the above mentioned

ailments there is a high risk of stroke and blood circulation. He further said the metabolic syndrome that the accused suffers from cannot be controlled or managed in isolation. It needs a team approach that includes a physician or the doctor that looks after him and the dietician. He needs regular check-ups for his eyes and finally he needs his spouse to look after him.

[7] The accused's wife Mrs Monica Rothen gave evidence that they have been happily married for over 40 years. The accused was an outgoing person before he was arrested. He is no longer active. He became shy and embarrassed by the wide publicity given to this case. She further testified that the accused is diabetic and she was responsible for the preparation of his balance diet, three times a day and saw to it that his sugar level was in order. She again testified that the accused's finances are almost finished. However, should the accused be given a custodial sentence it would be a big problem to separate them after 40 years of marriage.

[8] Edwina Husselmann a clinical psychologist testified that she prepared a psychologist report in respect of the accused. According to her report the accused had undergone a significant change in his life from being a joyful, adventurous and outgoing person who had played a vital role in his community to a person who lives a reclusive life. The accused also suffers from depression, anxiety, confusion and frustration having lost his zest for life. She further testified that the accused's psychological deterioration if left untreated and the loss of his family support or his wife, will hasten the decline in his emotional, psychological and physical well-being. This may lead to much more serious consequences to his diabetes. Having evaluated the accused, he presented to her as an intelligent person, disciplined, co-operative, rule-conscious and dutiful. Therefore, in her opinion, it is unlikely he would repeat his crime.

[9] Mr Botes counsel for the accused argued that the accused's wrongful acts were motivated by his desire to bring the Palm Gardens project to a successful conclusion to the benefit of the owners of the units, that is the complainant and the accused who invested and had an interest in the successful completion of the project. In pursuing this goal, the accused made mistakes along the way. Counsel further argued that one should not lose sight of the complainant's wrong-doing and irregularity when he

disposed off his member's interest to Ms De Melo as part of a tainted transaction. These circumstances diminish the moral blameworthiness of the accused which should be considered by the court when imposing sentence.

[10] Again, counsel argued that there is a specific context to the accused's actions when he committed the offence in respect of the 11th count. The transfer of funds was initiated in reaction to the complainant's conduct whose insistence caused First National Bank to correct the unlawful deposits of the VAT refunds. Due to diligence, hard work and determination by the accused the development project was successfully completed.

[11] Counsel contended further that 'the effect or consequence of the accused's theft by unlawfully making the credit entry referred to in the 9th count was without any direct monetary loss to the close corporation or the complainant. Therefore, when sentencing the accused on this count, it should be viewed differently from a matter where an accused had caused actual monetary damages through an act of theft' (sic). Furthermore, the accused's actions in dealing with the member's interest in the close corporation forming the basis of his conviction on the 10th count of fraud, must be viewed against the factual background of the complainant's own unlawful conduct. The accused would not have found himself in the predicament brought about by the 10th and 11th counts, if it was not for the dishonest motives and conduct of the complainant.

[12] In respect of the accused, counsel argued that the accused is a first offender and lived a crime free life for 57 years, as such the accused is an elderly person which is a mitigating factor. The accused is of poor health and if sent to prison it is more probable that he would not have a good quality of life. Therefore, he needs physical and emotional support of his wife.

[13] The accused spent a large amount of money for the combined costs of civil and criminal litigation which is about N\$5 million. Now he is worried how he would be able to support himself and his wife during their old age.

[14] With regard to the interests of society, counsel argued that although the interest of society is an important factor the circumstances of this matter do not require the accused to be broken by the imposition of a direct custodial sentence. The accused is

not a danger to society. A non-custodial sentence would suit and satisfy all the relevant principles of sentencing. In support of his proposition, counsel referred me to several decided cases, which I have considered.

[15] On the other hand, counsel for the State, Ms Jacobs, argued that the accused committed a white collar crime. The important element of fraud is that it involves dishonesty. Although the accused is an old man who is a first offender, the offence he committed is a serious one. Again, the accused did not show true remorse. Counsel further argued that apart from the accused's advanced age, his personal circumstances are not different from those of other offenders who had appeared before this court. Ms Jacobs contended that it would be a slap on the wrist if the court were to impose fines instead of custodial sentences coupled with suspended sentences on counts 1-8. Counsel further submitted that in respect of counts 9-11, the accused should be given an option of a fine and in default of payment, a custodial sentence. Ms Jacobs also referred me to several decided cases, which I have had the privilege of considering.

Legal principles on sentencing

[16] In deciding what a proper sentence should be, I will consider a triad of factors namely; the offender, the crime and the interest of society. At the same time regard must be had to the objectives of punishment which are prevention, deterrence, rehabilitation and retribution. Although the court must endeavour to strike a balance between these factors the circumstances of a case must dictate that one or more of the factors must be emphasised at the expense of the other. (*S v Van Wyk* 1993 NR 426 at 448).

The Offender

[17] The accused did not show any remorse because even after he was convicted he was still insisting that he is not guilty. However, mitigating factors in his favour are that he is a first offender, of ill health and an elderly gentleman. Although the accused's personal circumstances are as indicated earlier, I cannot ignore that the accused committed 'white collar crimes' which involve dishonesty. Courts generally view white

collar crimes in a serious light. The court will also consider the circumstances in which these offences were committed.

The Crime

[18] The offence of fraud is very serious. It is also rampant in Namibia. The accused caused actual and potential prejudice to the close corporation (the CC) as well as to the other member of the CC. The accused also committed theft of credit. Theft of credit is not a lesser offence as opposed to theft of the actual cash as counsel for the accused appears to imply in his argument. The accused by making an entry in the book of accounting representing a credit right amounted to an act of appropriation. Furthermore, these offences are premeditated.

Interest of society

[19] It is the expectation of society that people who commit crimes should be dealt with accordingly. Society expects that sentences which fit the crimes should be meted out. However, in imposing an appropriate sentence, I must weigh the interests as stated above in an endeavour to achieve a delicate balance that must be struck.

[20] Having heard all the factors placed before me in mitigation as well as both counsel's arguments, I am of the view that each case should be treated on its own merits. The offences committed by the accused are closely connected in time, place and circumstances. Although it is desirable that each count should be sentenced separately this is an exceptional case and I am of the view that it is in the interest of justice if some of these counts are taken together for purposes of sentence given the cumulative effect of individual sentences. Even though counsel for the State has recommended an imposition of a direct custodial sentence on counts 1 - 8, I consider that given accused's advanced age, his state of health and the circumstances of the case generally, a custodial sentence will be inappropriate.

[21] In the result the following sentence is imposed.

(a) Counts 1-8 Fraud of N\$1,103,490.32 taken together for purposes of sentencing:

A fine of forty thousand Namibia Dollar (N\$40, 000) or four (4) years' imprisonment.

(b) Count 9, Theft of N\$150,000:

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N N Shivute
Judge

APPEARANCES:

STATE:

Ms Jacobs

Office of the Prosecutor-General, Windhoek

ACCUSED:

Adv. Botes

Instructed by Engling, Stritter & Partners

(c/o Kinghorn Associates: Swakopmund)