

SOUTH AFRICA / JUDGMENT

Mofome and Another v S (CA53/2015)

[2017] ZANWHC 19 (19 May 2017)

[2017] ZANWHC 19**COURT**

North West High Court, Mafikeng

BEFORE

R D Hendricks, T J Djaje

CASE / FILE NUMBER

CA53/2015

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Magistrates:	YES / NO IN THE NORTH WEST HIGH COURT, MAHIKENG CASE NO: CA 53/2015 In
the matter between:	MPHO MOFOMME 1st Appellant SEBI MOTLATSI MOCHE 2nd Appellant and THE STATE Respondent HENDRICKS

J & DJAJE AJ
DATE
OF HEARING
:
12 MAY 2017
DATE
OF JUDGMENT
:
19 MAY 2017
COUNSEL
FOR 1ST
APPELLANT
:
ADV. DE KLERK SC
COUNSEL
FOR 2ND
APPELLANT
:
ADV.
BALOYI
COUNSEL
FOR THE RESPONDENT
:
ADV. MANENZHE

JUDGMENT

HENDRICKS J

Introduction

- [1] The First Appellant Mr. Mpho Mofomme, an attorney by profession, is married in community of property to Mrs. Mirriam Marilyn Mofomme on 27 April 1992. The First Appellant and Mrs. Mofomme encountered some turbulence in their marriage. As a result of the turbulent marriage relationship, the First Appellant instituted divorce proceedings against Mrs. Mofomme during November 2010. The summons and particulars of claim were delivered to the Sheriff by the First Appellant for service on Mrs. Mofomme on 27 January
2011. Attached to the summons was a letter which contained the instruction that the summons must be received or collected by the defendant. A cellular phone number alleging to be that of Mrs. Mofomme was also provided so that the Sheriff could contact Mrs. Mofomme to collect or receive the summons. Evidence proves that this cellular phone number belongs to the Second Appellant. The First Appellant made some enquiries from the Sheriff about progress being made with the service of the summons.
- [2] When the cellular phone number provided was called, the phone call was answered by a woman, stating that she is Mrs. Mofomme.

Arrangements were made in order for her to attend at the offices of the Sheriff so that the summons and particulars of claim can be served personally on her as requested by the First Appellant and required in terms of the Rules of Court. A woman claiming to be Mrs. Mofomme, did attend on two occasions at the Sheriff's offices. The first visit was briefly for approximately 10 minutes and the second visit lasted for about 35 minutes. During the second visit on 03 February 2011 the person alleged to be Mrs. Mofomme produced an identity document bearing the names of Mirriam Marilyn Mofomme but containing the photograph of this person. The summons and the particulars of claim was then served upon her.

[3] Some months later Mrs. Mofomme discovered that she was infact divorced from the First Appellant without her knowledge. This

prompted her to make certain enquiries as to how did it happen. It was discovered that the summons and particulars of claim alleged to have been served on her as the defendant, was instead served on the Second Appellant, Mrs. Sebi Motlatsi Moche, who pretended to be Mrs. Mofomme. The Second Appellant is the live-in partner of the First Appellant. Criminal charges were preferred against both Appellants and they were tried in the Regional Court on charges of fraud, alternatively defeating the ends of justice. They were both convicted on the main count of fraud and were each sentenced to an effective term of imprisonment of eight (8) years. They unsuccessfully instituted appeal proceedings against their conviction in the High Court, the Supreme Court of Appeal and the Constitutional Court. Leave to appeal their sentence was granted to both Appellants by the trial court. This appeal is therefore only against the sentence imposed upon them.

[4] Sentence is pre-emptly within the discretion of the trial court and a court of appeal will not lightly interfere with the exercise of the sentencing discretion by the trial court. A court of appeal will only interfere in certain limited instances for example when a gross irregularity is committed; and/or when the sentence is shockingly severe and excessive or totally out of proportion with the crime committed.

[5] In S v Romer 2011

(2) SACR 153 (SCA) the following is stated in paragraph [22]:

"[22] It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposed by the trial court only if one or more of the recognised grounds justifying interference on appeal have been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is —

'(a) disturbingly inappropriate;

(b) so totally out of proportion to the magnitude of the offence;

(c) sufficiently disparate;

- (d) vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and
- (e) is otherwise such that no reasonable court would have imposed it.'

See *S v Giannoulis* 1975

- (4) SA 867 (A) at 873G – H; *S v Kibido* 1998
- (2) SACR 213 (SCA) at 216g – j; and *S v Salzwedel and Others* 1999
- (2) SACR 586 (SCA) (2000)
- (1) SA 786; [2000] 1 All SA 229) para 10 .”
- [6] Fraud is a serious offence. The fraud in this matter involved prior planning. The First Appellant as an experienced attorney knew very well that personal service of the summons and particulars of claim is a requirement in terms of the Rules of Court, seeing that the divorce action is a status matter. Through his knowledge and experience, he thought it fit to deceive the Sheriff. He caused the Second Appellant to pretend as though she is Mrs. Mirriam Mofomme. They acted in concert with one another in order to fraudulently pretend to the Sheriff that the Second Appellant is Mrs. Mirriam Mofomme knowing very well that she is not.
- [7] It is not difficult to comprehend why the Appellants embarked on this mission to defraud Mrs. Mofomme. The only plausible reason for doing so was to deprive Mrs. Mofomme of her rightful share of the joint estate, although malice, spite and ill-will are also not ruled out. However, the sentence of eight (8) years imprisonment is in my view shockingly severe and excessive and totally out of proportion to the crime committed. This misdirection by the court a quo places this Court at liberty to interfere with the sentence by setting it aside and to replace it with an appropriate sentence. In other words, to sentence the Appellants afresh.
- [8] In *Machongo v State* (20344/14 [2014] ZASCA 179 (21 November 2014) the following is stated:
“[11] Certainly it does not mean what the full court said in para 21 of its judgment referred to in para 7 above. I therefore agree with counsel for the respondent that the test applied was incorrect. Considering a sentence afresh must ineluctably mean, setting aside of the sentence of the trial court, inter alia, and conducting an inquiry on sentence as if it had not been considered before. In other words, the appeal court must disabuse itself of what the trial court said in respect of

sentence – it must interrogate and adjudicate afresh the triad in respect of sentence as stated in *S v Zinn* 1969

- (2) SA 537 (A) at 540G-H. Its task would be to impose a sentence which it thinks is suitable in the circumstances, without comparing it with the one imposed by the trial court. The full court erred in my view by stating that an appeal court 'will only interfere when the sentence imposed ... is vitiated by an irregularity ... or when the sentence is shockingly severe, disturbingly inappropriate and totally out of proportion ...'. What the full court did was not considering the sentence afresh but compared what it had in mind with what was imposed."
- [9] The following personal circumstances were placed on record. Insofar as the First Appellant is concerned, it was inter alia stated that he was 52 years of age at the time of the commission of this offence and he is now 58 years old. He is an attorney by profession. He stands to lose his status as an attorney as a result of the conviction. He is a first offender. He has children, one of whom is eight (8) years of age. These children and other family members are financially dependent on him. He had a good standing in the community. He was actively involved in a number of organizations relating to him being an attorney. In so far as the Second Appellant is concerned, it was inter alia stated that she was 41 years of age at the time that this offence was committed and she is now 48 years old. She is a qualified educator. She has family members who are dependent on her. She assisted the First Appellant in various community projects. She is also a first offender. She would also lose her employment if she is sent to prison.
- [10] The actual prejudice suffered by the complainant Mrs. Mirriam Mofomme, is that she was a divorcee for a period of almost six (6) months. There is also potential prejudice in that Mrs. Mofomme would have been wrestled out of her half share of the joint estate. The estate comprise of various valuable assets, a trust and a business. Although this offence must have been planned together by the Appellants, I cannot imagine that it was the brain-child of the Second Appellant. It must have been that of the First Appellant. As alluded to earlier on in this judgment, as an experience attorney, the First Appellant knew that personal service of the summons and particulars of claim is a prerequisite in terms of the Rules of Court, seeing that it involves a status matter. He knew very well that the joint estate should be divided equally. He must have foreseen that Mrs. Mofomme will defend this divorce action in order to protect her rights. To prevent this from happening, he deceived the Sheriff in the aforementioned manner.
- [11] The moral blameworthiness of the First Appellant is different from that of the Second Appellant. The Second Appellant is a lay person insofar as the law is concerned. She is definitely not a legal professional such as the First Appellant. She executed the plan which was the brain-child of the First Appellant. She pretended to be Mrs. Mofomme. She called at the office of the Sheriff on two occasions, as aforementioned. She presented a fake identity document of Mrs. Mofomme in order to deceive the Sheriff to serve the summons and particulars on her instead of Mrs. Mofomme. Counsel for the Second Appellant aptly put it that the reason why she did this was because she wanted a husband free of the bondage of marriage with another woman. In my view, the difference in the moral blameworthiness of the respective Appellants must be reflected in the different sentences that should be

imposed.

[12] The Regional Magistrate remarked as follows in his judgment on sentence:

“A non custodial sentence would be an over emphasis of your personal circumstances at the expense of the seriousness of the offence and it would not serve the public interest.

Two different probation officers compiled reports in respect of your personal circumstances. And despite your personal circumstances and the children and the family members that were also referred to they still recommended imprisonment.

And all things having considered the court agrees that imprisonment would be the only appropriate sentence.”

I am in full agreement with the Regional Magistrate that a custodial sentence would be the only appropriate sentence under the circumstances of this case for both Appellants.

[13] I do not agree with the Regional Magistrate where he stated:

“the personal circumstances does not differs to such an extent that the court should impose different sentences and also that the

participation in the commission of the offence although a different must be called [sic] equal weight”.

As already mentioned earlier on in this judgment, there must be differentiation between the sentence that should be imposed on the

respective Appellants in relation to their moral blameworthiness.

[14] A sentencing option with which the court a quo did not specifically deal with was that provided by Section 276 (1) (i) of the Criminal Procedure Act 51 of 1977. This provision empowers a court to sentence an offender to imprisonment from which the offender can be released on correctional supervision without further intervention from a court. The imposition of the sentence empowers the Commissioner of Correctional Services to order the release under correctional supervision for the remainder of the sentence. Under Section 276A (2) a sentence under Section 276 (1) (i) may only be imposed where the court is of the opinion that the offence justifies the imposing of imprisonment without the option of a fine for a period not exceeding five years. The view of the court a quo that the appropriate sentences exceeded five years no doubt disabled that court from considering this option.

[15] To reiterate, the sentences imposed by the court a quo are too severe. Insufficient weight was attached to the personal circumstances of the Appellants, particularly the relatively advanced

age of the First Appellant. He stands to loose his profession as an attorney.

- [16] The option provided by Section 276 (1) (i) of the Criminal Procedure Act 51 of 1977, is particularly suited to the Second Respondent and that a period of three (3) years will be appropriate. While the Second Appellant is in prison, the authorities can and of course will consider if she can be rehabilitated without serving a lengthy prison sentence and, if so, when is she a suitable candidate for correctional supervision.
- [17] Various caselaw were referred to by counsel for the Appellants and for the Respondent. Counsel for the Second Appellant referred this Court inter alia to the case of S v Mostert 2010 (2) SA 586 (SCA) where the Appellants were sentenced to a fine of R20 000.00 or 12 months imprisonment each, wholly suspended for four (4) years on condition that they are not convicted of fraud committed during the period of suspension and for which they are sentenced to imprisonment without the option of a fine. Counsel submitted that this case is on all-fours with the case at hand and that a similar sentence should have been imposed by the Regional Magistrate. I do not agree. The Mostert case is distinguishable from the present case on the merits and the circumstances as a whole. To reiterate, I am in full agreement with the Regional Magistrate that a custodial sentence is the only appropriate sentence under the circumstances of this case.
- [18] Having taken into account all the facts, factors and circumstances relevant for imposing a suitable sentence, I am of the view that the sentence imposed by the Regional Court must be set aside and be replaced with an appropriate sentence.

Order

- [19] Consequently, the following order is made:
- (1) The appeal against sentence is upheld.
- (2) The sentence of eight (8) years imprisonment imposed by the Regional Court is set aside and is substituted with the following sentence:

“Accused 1 (Mpho Mofomme) is sentenced to five (5) years imprisonment of which two (2) years imprisonment is suspended for a period of five (5) years on condition that he (accused 1) is not convicted of fraud or a crime of which dishonesty is an element committed during the period of suspension.”

“Accused 2 (Sebi Motlasi Moche) is sentenced to three (3) years imprisonment in terms of section 276

- (1) (i) of the Criminal Procedure Act, 51 of 1977.”

R D HENDRICKS

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

T J DJAJE

ACTING JUDGE OF THE HIGH COURT

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Prepared on 10 October 2026 · Esheria