

SOUTH AFRICA / JUDGMENT

S v Brown (CC 50/2010) [2013] ZAWCHC 211 (15 May 2013)

[2013] ZAWCHC 211

COURT

Western Cape High Court, Cape Town

BEFORE

Veldhuizen

CASE / FILE NUMBER

CC 50/2010

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THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO: CC 50/2010

DATE: 15 MAY 2013

In the matter between:

THE STATE

And

JOSEPH ARTHUR WALTER BROWN

JUDGMENT: 15 MAY 2013

VELDHUIZEN,J:

- [1] Mr Brown you have been convicted of two crimes of fraud and it is now my duty to sentence you.
- [2] You are 43 years old. It is an important fact that you have no previous conviction of any kind. The evidence shows that you enjoyed a good upbringing. At an early age you lost your father when he died in an attempt to save the lives of others. A deed for which he, posthumously, received the Wolraad Woltemade gold class award. Your mother re-married and by all accounts your step-father is also a man of character who has set a good example. Your mother, who passed away shortly after your arrest some seven years ago, subscribed to the Christian values and set a good example to her children in her everyday life. You have two children and because your wife moved to Australia and because of your bail conditions you

have not seen them for the past five years which I accept is painful. I accept that you were scorned by your friends and the public at large, even by your church. You were incarcerated intermittently for a period of about 8 months. You have been through trauma and personal suffering for the past 7 years.

- [3] You testified that you were arrested on more than 190 charges. Before us you were initially indicted on all together nine charges. Four counts of fraud, two counts of theft, one count of contravening section 1(1)(a) of the Corruption Act, No. 94 of 1992, one count of contravening section 3(b)(ii)(aa) and/or (bb) and/or (cc) and/or 3(b)(iv) or the Prevention and Combating Corrupt Activities Act, No. 12 of 2004 and a contravention of section 4(a) and or 4(b) of the Prevention of Organised Crime Act, No. 121 of 1998. On the face of it these were extremely serious charges which carry heavy penalties.
- [4] Considering the publicity which your case has received in the media, I think it appropriate to make it clear what you have not been convicted of. You have not been convicted of having stolen money from investors or pensioners or that you defrauded them. You have not been convicted of having stolen money from Fidentia or its subsidiaries. Your conduct underlying your convictions can in no way be described as a pyramid scheme. I cannot overemphasize that the two counts of fraud that you have been convicted of are an extremely diluted version of the fraud that the indictment alleges. The second count of fraud relates only to fraud against the shareholders of MATCO, not against widows and orphans. These two counts of fraud pale when compared to the charges in the indictment. But it has been accepted by the prosecution that you never had the intention to cause actual prejudice or damage. You have only admitted and been found to have intended potential prejudice and your moral blameworthiness must accordingly be judged in the light thereof.
- [5] The state tendered the evidence of Mr Seedat from the Financial Services Board. He was responsible for the initial investigation into the affairs of Fidentia. He testified that there was amongst other things a shortfall of approximately R406M. His report was handed over to the Director of Public Prosecutions. If his findings are factually correct then I find it astounding that you have been brought to court on only the nine counts listed in the indictment. I find it even more astounding that the state saw fit to accept your pleas of guilty on the facts set out in the admissions you made in terms of section 220 of the Criminal Procedure Act, 51 of 1977. If the facts related by this witness are correct then something is sorely wrong and I can only think the prosecution case has been poorly handled.
- [6] Be that as it may the facts before me are clear and I cannot sentence you on any other basis. The State submits that section 51(2)(a) of Act 105 of 1997, often referred to as the Minimum Sentences Act, applies to the two counts of which you have been found guilty and pressed me to impose a stiff term of imprisonment. The relevant part of this section reads:

‘51(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or High Court shall sentence a person who has been convicted of an offence referred to in –

- (a) Part II of Schedule 2, in the case of –
- (i) a first offender to imprisonment for a period not less than 15 years;’

Amongst the offences listed in Part II of Schedule 2 is the crime of fraud ‘involving amounts of more than R500 000.’

- [7] On the fraud described in count 2 you admitted that monthly statements over a lengthy period were sent to TETA and that these statements, to your knowledge, did not reflect the true state of affairs. You admitted that the representations contained in the statement had the potential to cause prejudice and you reconciled yourself with that fact. As far as the fraud described in count 6 is concerned you admitted that you induced MATCO to enter into an agreement by representing that Fidentia had ready cash at hand to pay the shareholders. Although as stated by you Fidentia had sufficient assets which, if liquidated, would have been sufficient to meet the purchase price it in fact did not have sufficient liquid funds to do so. The minority shareholders were paid and through the handing over of control of MATCO, funds became available to pay the majority shareholder.
- [8] Those in essence are the facts which constitute the two crimes of which you have been convicted. These two crimes, as you admitted involve potential prejudice and not actual prejudice and certainly do not ‘involve amounts of more than R500 000. After you made the admissions which I mentioned and changed your plea the State simply closed its case. The State with regard to both counts accepted that your conduct entailed potential prejudice and not actual prejudice. After we convicted you the State lead evidence which, if it be accepted, constitute crimes which are far more serious. I cannot sentence you for crimes of which you have not been convicted. That would be wrong. I can only sentence you for that of which you have been convicted. It is accordingly my

judgment

that section 51 of Act 105 of 1997 does not apply. I, therefore, have an unfettered discretion to pass a sentence which is, in all the circumstances, just and fair.

- [9] It is clear that these crimes, when compared to the crimes with which you were originally charged, do not carry the same high degree of moral blameworthiness. I do not think that a sentence emphasising the rehabilitative purpose of sentencing is required. I must emphasize that the business world, like the rest of society, must be scrupulously honest and fair in their business dealings, and this sentence must serve to deter other likeminded persons and also serve as a punishment for you. At the end of the day society demands that a sentence be imposed which is fair and just, keeping in mind your crimes and your personal circumstances.

- [10] I have had the benefit of written heads of argument from your counsel as well as counsel for the state and I have given the matter much thought. If I have omitted to mention some facts in this judgment then it is not because they were not considered or not taken into account. In the end, having balanced your personal circumstances, the needs of society and the severity of the crimes of which you have been convicted, I have decided that the following sentences will meet all the purposes of sentencing.
- [11] On count 2 you are sentenced to pay a fine of R75 000 or serve 18 months imprisonment. A further 18 months imprisonment is imposed but suspended for a period of four (4) years on condition that you are not again convicted of the crime of fraud committed during the period of suspension.
- [12] On count 6 you are also sentenced to pay a fine of R75 000 or serve 18 months imprisonment. A further 18 months imprisonment is imposed but suspended for a period of four (4) years on condition that you are not again convicted of the crime of fraud committed during the period of suspension.

A.H. VELDHUIZEN, J

JUDGE OF THE HIGH COURT

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