IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.

SIGNATURE DATE: 27 October 2022

CASE NUMBER: SS36/2019

In the matter between:

THE STATE

and

ALBERT AVHURENGWI SOLLY NDOU	First Accused
MULALO KENNETH MUNYAI	Second Accused
TSHILILO FREEMAN CHAUKE	Third Accused
COLLEN LESIBA MULEYA	Fourth Accused
MASHUDU STEVEN CHIRUNDU	Fifth Accused
SIMON SAKALA	Sixth Accused
BRIAN MULEYA	Seventh Accused
LUCKY SHONGWE	Eighth Accused

SENTENCE

WILSON AJ:

1 On 15 August 2022, I convicted the first accused person, Mr. Ndou, of five counts of theft, four counts of causing malicious injury to property, one count of attempted theft, one count of corruption, contrary to section 3 (b) (i) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004, and one count of possession of housebreaking implements without a satisfactory reason, contrary to section 82 of the General Law Third Amendment Act 129 of 1993. I also convicted him of five counts of causing damage to essential infrastructure, contrary to section 3 (1) of the Criminal Matters Amendment Act 18 of 2015.

2 I convicted the seventh accused person, Mr. Muleya, of one count of theft, one count of malicious injury to property and one count of causing damage to essential infrastructure.

3 It is now necessary for me to determine the appropriate sentences for each of these offences.

The offences

4 The offences were committed as part of a spree of break-ins, thefts or attempted thefts at six cell phone towers across three provinces. Mr. Ndou was involved all these incidents. Mr. Muleya was only involved on one of them.

5 There is no doubt in my mind that Mr. Ndou was centrally involved in a scheme to steal cell phone batteries and sell them off, and that each of the offences for which I convicted him were committed in the furtherance of that

scheme. Although the State did not lead the evidence necessary to determine whether that scheme amounted to an “enterprise” engaged in a “pattern of racketeering activity” for the purposes of section 1 of the Prevention of Organised Crime Act 121 of 1998, I am satisfied that there was a high degree of planning and persistence in the commission of these offences. I need go no further in support of this conclusion than to observe that Mr. Ndou was arrested in the act of attempting to gain entry to, or removing batteries from, three of the cell phone towers before he was denied bail and his offending was halted.

6 These offences, though not involving violence against the person, were nonetheless offences of some seriousness, because they interfered with the capacity and integrity of South Africa’s telecommunications network. When pitched at that level of abstraction, the offences can seem quite banal. But these offences were not banal. They meant, or could have meant, that vital telephone conversations between family, friends, work colleagues or businesses were delayed or prevented. They may also have prevented phone calls to emergency services from going through.

7 Historically, South Africa has had a highly mobile population. The need to travel far from home to earn money, and consequent alienation from familial and other affective networks, is a burden that falls disproportionately on the poor and the vulnerable in our society. Access to cheap mobile telecommunications has ameliorated that alienation in the two decades or so in which it has been available to most South Africans. So when someone interferes unlawfully with telecommunications for their own profit, they are

doing more than damaging infrastructure, or stealing equipment. They are disrupting lines of communication that are vital to sustaining critical human relationships. That sort of consequence cannot but be aggravating.

8 This is recognised in Part 2 of Schedule II of the Criminal Law Amendment Act 105 of 1997, which, read with section 51 (2) (a) of the Act, prescribes a minimum sentence of 15 years for intentionally causing damage to essential infrastructure, including telecommunications infrastructure, unless substantial and compelling circumstances justify a lesser sentence.

9 Mr. Ndou having been convicted of five counts attracting this minimum sentence, and Mr. Muleya having been convicted on one such count, the central question before me is whether there are substantial and compelling circumstances justifying a departure from that fifteen-year term in either man's case. A secondary question concerns the penalties to be imposed on the other counts of which Mr. Ndou and Mr. Muleya have been convicted, and whether those terms should run concurrently with each other, and with the sentences to be imposed on the infrastructure offences.

Albert Ndou

10 Albert Ndou is a man of intelligence and enterprise. He started his working life in 2007, when he could have been no more than sixteen years old, herding livestock for just R700 per month. Through his undoubted ingenuity and hard work, he acquired a series of technical qualifications, first working as a labourer on construction sites and then graduating to work as a rigger, which entails ensuring that heavy loads can safely be moved by pulley, crane or winch around building sites. He then trained in the techniques

necessary to allow people to work at heights while secured by ropes and other safety equipment. Finally he specialised as a radio technician. By the time he was working in that capacity, he was earning R26 000 per month. In other words, through sheer hard work, he increased his earning capacity almost forty-fold in a little over ten years.

11 Mr. Ndou has five children, and obviously loves and cares for each of them. He is close to his mother, who looks after two of his children. He is admired and respected by his family, who are proud of his achievements. He appears to me to be a thoughtful and sensitive individual, with many admirable qualities. He has no previous convictions.

12 That said, it seems to me that none of these circumstances would allow me to depart from the discretionary minimum sentence applicable to the five infrastructure offences Mr. Ndou has committed. As the Supreme Court of Appeal held in *State v Vilakazi* (2009 (1) SACR 552 (SCA), at paragraph 58), in cases of serious crime, to which minimum sentencing legislation applies, “the personal circumstances of the offender, by themselves, will necessarily recede into the background”. Mr. Ndou’s circumstances do not, at any rate, strike me as so unusual as to justify a departure from the ordinary statutory penalty.

13 Indeed, it seems to me that, in rejecting what looks like a promising upward trajectory in his career in favour of involvement in the offences of which he has been convicted, Mr. Ndou is deserving of censure, rather than leniency.

14 Be that as it may, there is one feature of Mr. Ndou’s case that, in my view, calls for a departure from the discretionary minimum sentence. That is the

amount of time Mr. Ndou has spent in pre-trial incarceration. Mr. Ndou was arrested on 8 April 2018 and has been held without bail since. That amounts to just over four and-a-half years spent awaiting trial.

15 In *S v Radebe* (2013 (2) SACR 165 (SCA) at paragraph 14), the Supreme Court of Appeal held that a period of pre-trial incarceration is substantial and compelling enough to depart from a minimum sentence where the failure to take it into account, and to credit the offender for it, would result in a disproportionate sentence. I have held elsewhere that this principle does not easily apply to indeterminate discretionary minimum sentences, such as life imprisonment (see *S v Makgopa* [2022] ZAGPJHC 470 (18 July 2022) at paragraph 35).

16 However, where the prescribed statutory penalty is a determinate period of imprisonment, the principle in *Radebe* must be applied. Were I to ignore the four-and-a-half years that Mr. Ndou has spent awaiting trial, I would be sending him to prison for a minimum period of just under twenty years. Serious though his offending has been, I cannot accept that it warrants a sentence of that severity. Twenty years in prison for break-ins, thefts or attempted thefts from six cell phone towers would be wholly disproportionate, especially given that, in the incidents in which Mr. Ndou's involvement has been proved, the stolen batteries never left the relevant sites, or were soon recovered. I have already said that Mr. Ndou's crimes did not involve violence against the person. For that reason, too, an effective twenty years in prison would be wholly disproportionate.

17 Mr. Ngodwana urged me not to take into account the period Mr. Ndou has spent in pre-trial incarceration, because at least some of the pre-trial delays that have marked this case were caused by Mr. Ndou's decision to change his legal representation. That case has not been made out in any detail, but even if it had, any delay caused by Mr. Ndou has been more than matched by the delays in bringing this matter to trial for which the State has been responsible. I provided an overview of those delays in my judgment convicting Mr. Ndou. I need not repeat my conclusions here.

18 I must accordingly depart from the minimum sentence applicable to each of the infrastructure offences in order to ensure that I impose a proportionate sentence on Mr. Ndou overall.

19 I will address Mr. Muleya's circumstances, and the needs of society, before I determine that sentence.

Brian Muleya

20 Mr Muleya is a businessman of some substance. He has constructed a large accommodation establishment in Diepsloot, and lets it out for a living. His sister currently runs that establishment on his behalf, while he is detained awaiting trial on a charge of theft of batteries from cell phone towers in the Eastern Cape. I do not consider that pending matter as relevant to my task in determining Mr. Muleya's sentence in this case. I mention it only to explain why, despite being on bail in relation to the charges on which he was indicted before me, Mr. Muleya is nonetheless still in custody and unable to run his business.

21 Mr. Muleya has two children. He is, like Mr. Ndou, a valued, respected and much-loved member of his family and community. However, for the reasons I have already given, none of these facts constitute the kind of circumstances that would allow me to depart from the minimum sentence applicable to the infrastructure charge of which I have convicted Mr. Muleya.

22 There is nonetheless Mr. Muleya's degree of participation in the offences of which he has been convicted to consider. Mr. Muleya was convicted of participating in the theft of batteries from the Lochner Road site. His defence was that he was Mr. Ndou's unwitting instrument. He supplied the bakkie with which Mr. Ndou hoped to carry off the batteries from the Lochner Road site. He thought Mr. Ndou was a *bona fide* contractor. He did not know that he was involved in theft and causing unlawful damage to essential infrastructure.

23 For the reasons I gave in my judgment convicting Mr. Muleya, I rejected that defence as not reasonably possibly true. On the common cause facts, Mr. Muleya must have known that something was amiss when he saw Mr. Ndou break in to the Lochner Road tower. He must have known, at that point, that he was participating in the offences of which I have convicted him. Yet, he persisted. It is, of course, possible – perhaps likely – that Mr. Muleya was in it from the start, and went to Lochner Road with the intent to break in and steal the batteries.

24 However, what matters is not what is likely, but what was proved beyond reasonable doubt. What the State proved to that standard was that Mr.

Muleya's participation in the Lochner Road incident became criminal at the point he arrived at the scene and gained entry to the tower.

25 That degree of participation – though not *de minimis* as Mr. Masuku submitted – is rather small. The question that naturally arises is whether it can justify a fifteen-year prison sentence.

26 I do not think that it can. The principle set out in *Radebe*, to which I have already referred, was no more than an interpretation and application of a broader principle first stated in *S v Dodo* (2001 (1) SACR 594 (CC), at paragraph 40), that a discretionary minimum sentence can only be imposed where it would be proportionate overall. It follows that any feature of a case that would render a prescribed sentence disproportionate is in itself a circumstance substantial and compelling enough to depart from that sentence.

27 In this case, it would be wholly disproportionate to impose a fifteen-year sentence in circumstances where the degree of Mr. Muleya's participation actually proven by the State was as small as it turned out to be.

28 For that reason, I will depart from the minimum sentence in Mr. Muleya's case too.

The needs of society

29 The State led evidence in aggravation of sentence to underscore the damage done by offences of this nature. That evidence was elicited from Michael Muller, a forensics investigator who sought to elaborate on the cost to the telecommunications industry of break-ins at cell phone towers.

30 While this evidence had its interest, it did not add much to the facts that had already been proven at trial. It stands to reason that society demands a retributive response when offenses of this nature are committed. What matters more than the obvious financial costs to the telecommunications industry Mr. Muller outlined – significant though these are – is the social harm caused by interference with telecommunications infrastructure. I have already characterised that harm, and I have taken it into account.

The sentences to be imposed

31 The question of the appropriate sentences remains. I shall address Mr. Ndou's offences first.

32 In ensuring that Mr. Ndou receives a proportionate sentence, it is necessary to regard each of the six incidents in which he participated as one sequence of acts with a single objective: the theft of cell phone batteries from the relevant tower. Although there is no duplication of convictions in this case, as each conviction I returned related to a separate act committed at each of the towers, it would be wrong to lengthen the sentence to be served in respect of each incident beyond the bounds of proportionality by making the sentences imposed for each discrete act run consecutively.

33 It is also necessary, in imposing sentence, to consider the six incidents in which Mr. Ndou participated as a pattern of offending behaviour to which the effective sentence ought, overall, to be proportionate. It, is in other words, necessary to take a step back and consider the appropriate sentence for the whole pattern of offending behaviour, and to arrange the sentences for each of the discrete offences accordingly.

34 I also should point out that I have considered the possibility of imposing a fine on some of the offences charged. However, although it was suggested that Mr. Ndou is willing to pay a fine, it was not seriously disputed that he lacks the means to pay one of any significance. In any event, the principal purpose of imposing a fine would be to avoid sending Mr. Ndou to prison. I do not think, given the nature of the offences, and Mr. Ndou's degree of participation in them, that a non-custodial sentence is a realistic option.

35 Finally, the sentence I impose ought to reflect the seriousness of the offences while at the same time discouraging Mr. Ndou's clear tendency to re-offend. It is not only in society's best interests that Mr. Ndou be discouraged from re-offending. Mr. Ndou, too, would benefit from a clear incentive, on his release, to direct his obvious talents toward lawful endeavour. That purpose can be served by suspending part of the sentence I will impose on the infrastructure offences in terms of section 297 (4) of the Criminal Procedure Act 51 of 1977.

36 With these considerations in mind, I sentence Mr. Ndou as follows –

36.1 On each count of causing damage to essential infrastructure, I sentence Mr. Ndou to ten-and-a-half years' imprisonment, four-and-a-half years of which is suspended, provided that Mr. Ndou is not again found guilty of any offence under section 3 of the Criminal Matters Amendment Act 18 of 2015, committed during the five years following his release from custody.

36.2 On each count of theft, I sentence Mr. Ndou to two years' imprisonment.

36.3 On each count of malicious injury to property, I sentence Mr. Ndou to one year's imprisonment.

36.4 On the count of possession of housebreaking equipment without a satisfactory explanation, I sentence Mr. Ndou to six months' imprisonment.

36.5 On the count of attempted theft, I sentence Mr. Ndou to six months' imprisonment.

36.6 On the count of corruption by attempted bribery, I sentence Mr. Ndou to six months' imprisonment.

37 Each of these sentences will run concurrently with the others. The effective sentence I impose on Mr. Ndou is accordingly one of TEN YEARS AND SIX MONTHS' IMPRISONMENT, FOUR YEARS AND SIX MONTHS OF WHICH IS SUSPENDED, PROVIDED THAT HE IS NOT FOUND GUILTY OF AN OFFENCE DEFINED IN SECTION 3 OF THE CRIMINAL MATTERS AMENDMENT ACT 18 OF 2005 COMMITTED DURING THE FIVE YEARS FOLLOWING HIS RELEASE FROM CUSTODY.

38 The same background considerations apply to Mr. Muleya, save that I am satisfied that he could have afforded a fine. For the reasons I gave in respect of Mr. Ndou, I do not think that a fine would be an appropriate response to any of the offences on which it could be imposed.

39 For these reasons –

39.1 On the count of causing damage to essential infrastructure, I sentence Mr. Muleya to two years' imprisonment.

39.2 On the count of theft, I sentence Mr. Muleya to one year's imprisonment.

39.3 On the count of causing malicious injury to property, I sentence Mr. Muleya to six months' imprisonment.

40 Each of these sentences will run concurrently with the others. The effective sentence I impose on Mr. Muleya is accordingly one of TWO YEARS' IMPRISONMENT.

S D J WILSON
Acting Judge of the High Court

HEARD ON:	17 and 19 October 2022
DECIDED ON:	27 October 2022
For the State:	L Ngodwana Instructed by National Prosecuting Authority
For the First Accused:	Mr. Simane Instructed by Legal Aid SA
For the Seventh Accused:	Mr. Masuku Instructed by Legal Aid SA