Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA& R 67/2022
Heard on: 02/10/2023
Delivered on: 08/12/2023

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS NORTHERN CAPE **APPELLANT**

and

LEBOGANG JEREMIA TOSA **FIRST RESPONDENT**
OSCAR NCEBE BONGELA **SECOND RESPONDENT**

Coram: Mamosebo J et Olivier AJ

JUDGMENT: APPEAL ON SENTENCE

MAMOSEBO J

[1] This is an appeal by the Director of Public Prosecutions (DPP) with the leave of this Court directed only against sentence imposed by the

Regional Magistrate, LC Mdoda. In terms of s 310A of the Criminal Procedure Act, 51 of 1977(CPA), the DPP can appeal against the sentence of a lower court.[1]

[2] The respondents were both traffic officers in Upington, Northern Cape. Consequent upon a charge of contravening the provisions of s 4(1)(a) r/w sections 1(2), 4(2)(f), 21, 24 and 26(1)(a)(ii) of the Prevention and Combatting of Corrupt Activities Act, 12 of 2004 (Corrupt Activities Relating to Public Officers), they were convicted as charged on 30 September 2020 and sentenced on the same day as follows*:*

'Fined R10 000 or in default of payment of a fine to undergo two years imprisonment and in addition, each accused is sentenced to undergo three years imprisonment which is wholly suspended for a period of five years on condition that each accused is not convicted of contravening section 4(1)(a) or section 3(a)(1)(aa) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004. And also, corruption or theft committed during suspension period'.

The respondents were ordered to pay their deferred fine as follows: R1,000.00 (One Thousand Rand) on or before 15 October 2020 and

[1]"(1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.
(2) (a) A written notice of such an application shall be lodged with the registrar of the provincial or local division concerned by the attorney-general, within a period of 30 days of the passing of sentence or within such extended period as may on application on good cause be allowed.
(b) The notice shall state briefly the grounds for the application.
(3) The attorney-general shall, at least 14 days before the day appointed for the hearing of the application, cause to be served by the deputy sheriff upon the accused in person a copy of the notice, together with a written statement of the rights of the accused in terms of subsection (4): Provided that if the deputy sheriff is not able so to serve a copy of the notice, it may be served in any other manner that may on application be allowed.
(4) An accused may, within a period of 10 days of the serving of such a notice upon him, lodge a written submission with the registrar concerned, and the registrar shall submit it to the judge who is to hear the application, and shall send a copy thereof to the attorney-general.
(5) Subject to the provisions of this section, section 309 shall apply mutatis mutandis with reference to an appeal in terms of this section.
(6) Upon an application for leave to appeal referred to in subsection (1) or an appeal in terms of this section, the judge or the court, as the case may be, may order that the State pay the accused concerned the whole or any part of the costs to which the accused may have been put in opposing the application or appeal, taxed according to the scale in civil cases of the provincial or local division concerned."

thereafter One Thousand Rand (R1,000.00) on or before the 15th of each succeeding month until the fine has been fully liquidated.

[3] The DPP postulates that the trial court misdirected itself and predicated the appeal on the following grounds:

3.1 That the trial court understated the nature and seriousness of the offence, given the fact that it was committed by public officers soliciting a bribe from a person that acted *prima facie* out of necessity;

3.2 That the trial court understated the interests of the community;

3.3 That the imposed sentences under the circumstances are shockingly inappropriately light (lenient); and

3.4 That the trial court misdirected itself and erred by not imposing a period of direct imprisonment as part of the sentence, notwithstanding being guided to do so by precedent; alternatively, by not giving proper consideration and weight to current case law where direct imprisonment was imposed in similar circumstances.

[4] Since the appeal was filed out of time, the notice was accompanied by a condonation application. The DPP advanced the following explanation for the late filing of the appeal, more than 30 days since the passing of sentence. The accused were sentenced on 30 September 2020. The DPP was informed of the sentence on 05 October 2020 and requested the record to be transcribed on the same day. The Senior Public Prosecutor (SPP) Upington made enquiries pertaining to the record on 11 and

24 November 2020 and was told that the system was offline. On 08 December 2020 the SPP was told the transcribers were still busy. The record was only made available on 14 December 2020. There would be no prejudice suffered by either party if condonation is granted and it would also be in the interests of justice to grant the condonation. The Department of Justice must, however, ensure that the transcribing of the records do not unduly delay the smooth running of the courts and the dispensing of justice. Condonation is accordingly granted.

[5] The first respondent, Jeremia Lebogang Tosa, (Tosa) is deceased. This appeal proceeded only against the second respondent, Oscar Ncebe Bongela (Bongela). The appeal was set down for 02 October 2023. The DPP caused to be served on the second respondent the notice of set down by the deputy sheriff, Upington, on 30 August 2023 at 15:40 on his daughter, Yonele Bongela, at his residence. The Act requires personal service on an accused. The notice was therefore later served personally on Bongela on 01 September 2023 at 08:26 at the Provincial Traffic Department. It notified him of the date of hearing of this appeal as contemplated in s 310A(3) of the CPA. He did not present any written submissions with the Registrar. The office of the DPP was further informed that the legal representative who appeared for him during trial would not appear for him in the appeal. The appeal, therefore, went ahead unopposed.

[6] A brief background to the case is sketched. The second respondent, Bongela, was senior in rank to the first respondent, Tosa. Both public officers were posted at or near Olifantshoek/Upington main road on 14 March 2014. In contravention of s 4(1)(a) read with sections 1, 2, 4(2), 24, 25, 26(1)(a) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 they solicited and accepted a bribe of

R1,000.00 (one thousand rand in cash) as *quid pro quo* for not effecting the arrest of Mr Robert Doncaster. Doncaster was rushing his wife who was in labour to hospital and drove his vehicle at a high speed on a public road. He exceeded the permissible speed limit, in contravention of the National Road Traffic Act.

[7] Doncaster drove into town claiming to go and withdraw the required money but approached the police who set an entrapment in terms of s 252A of the CPA for purposes of arresting the two officials when receiving the payment. The police gave him marked money as part of the operation to pay the bribe with. He was also strapped with a recording device and the police remained in close proximity but not visible. The R1,000.00 was paid to Tosa who retained an amount of R700.00 for himself and gave Bongela R300.00. Bongela took the R300.00 and hid it in the glove compartment below the steering wheel of the State vehicle. Doncaster gave a signal to the police consequent upon which they pounced on the two officers. The entire amount of R1,000.00 was retrieved. When questioned by the police regarding the money Bongela's explanation was that Tosa owed him an amount of R300 and had settled his debt.

[8] Bongela saw and heard when the R1,000.00 was counted before being handed over to Tosa. He even heard Tosa instructing Doncaster to wait for a vehicle to pass first before handing over the money to him. It was plain that the two officers had acted in concert and that Bongela had associated himself with what Tosa was doing. He was the senior of the two officers. They were both arrested, charged, convicted and sentenced. Bongela is still employed by the traffic department which is mystifying.

[9] The Correct approach in such matters is articulated in *S v Shapiro* 1994 (1) SACR 112 (A) at 119j – 120c where Nicholas AJA said:

"It may well be that this Court would have imposed on the accused a heavier sentence than that imposed by the trial Judge. But even if that be assumed to be the fact, that would not in itself justify interference with the sentence. The principle is clear: it is encapsulated in the statement by Holmes JA in S v Rabie 1975 (4) SA 855 (A) at 857D-F:

'1. In every appeal against sentence, whether imposed by a magistrate or a Judge, the Court hearing the appeal -

(a) should be guided by the principle that punishment is "pre-eminently a matter for the discretion of the trial Court"; and

(b) should be careful not to erode such discretion: hence the further principle that the sentence should only be altered if the discretion has not been "judicially and properly exercised".

2. The test under (b) is whether the sentence is vitiated by irregularity or misdirection or is disturbingly inappropriate.'"

[10] In *S v Sadler* 2000 (1) SACR 331 (SCA) at 334 para 8 Marais JA made these instructive remarks:

"[8] The traditional formulation of the approach to appeals against sentence on the ground of excessive severity or excessive lenience where there has been no misdirection on the part of the court which imposed the sentence is easy enough to state. It is less easy to apply. Account must be taken of the admonition that the imposition of sentence is the prerogative of the trial court and that the exercise of its discretion in that regard is not to be interfered with merely because an appellate Court would have imposed a heavier or lighter sentence. At the same time it has to be recognised that the admonition cannot be taken too literally and requires substantial qualification. If it were taken too literally, it would deprive an appeal against sentence of much of the social utility it is intended to have. So it is said that where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate

Court would have imposed, interference is justified. In such situations the trial court's discretion is regarded (fictionally, some might cynically say) as having been unreasonably exercised."

The learned Judge continued at para 10:

"[10] However, even in the latter class of case, it is important to emphasise that for interference to be justified, it is not enough to conclude that one's own choice of penalty would have been an appropriate penalty. Something more is required; one must conclude that one's own choice of penalty is the appropriate penalty and that the penalty chosen by the trial court is not. Sentencing appropriately is one of the more difficult tasks which faces courts and it is not surprising that honest differences of opinion will frequently exist. ***However, the hierarchical structure of our courts is such that where such differences exist it is the view of the appellate Court which must prevail."*** (Own emphasis)

[11] The following are the personal circumstances of Bongela considered by the trial court:

He was 53 years old and had been employed by the Department of Transport and Liaising in the traffic department as a senior traffic officer for the past 17 years. Prior to that, he worked for the Municipality in the logistics department as a storeman for a period of 10 years. He has been a resident of Upington since his childhood. He matriculated at Pabalello High School in Upington. He is married and his wife has been a school teacher for the past 25 years. He has two adult children, 24 and 21 years old and a grandson. His 21-year old daughter is in tertiary. He is a first offender. He suffers from diabetes and high blood pressure for which he receives treatment and medication. He asked for a sentence with an option of a fine payable in monthly instalments of R750.00 or a wholly suspended sentence on conditions specified by the Court. His monthly gross remuneration is R23,000.00.

[12] The State, in aggravation of sentence, made the following submissions: The State asked the court to regard the R1,000.00 as a benefit received from Doncaster as a bribe and not a gift. He emphasised the perception that corruption is normally seen as a victimless crime because, although in the eyes of people they can see no victim; the crime itself involves people being deceived and that affects the moral fibre of society. The respondents received their salaries on the same day they solicited the bribe, which meant that it was not committed out of a financial need but out of greed. The State asked for a term of direct imprisonment recounting the circumstances under which the bribe was solicited. Notwithstanding the address by the State, the Magistrate imposed the sentence set out in para 2 (above).

[13] In *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) SA 883 (CC) at para 4 where Chaskalson P said the following:

> *"[4] Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State. There can be no quarrel with the purpose sought to be achieved by the Act or the importance of that purpose. That purpose must, however, be pursued in accordance with the provisions of the Constitution. The appeal in the present case depends upon whether this has been done."*

[14] Counsel for the DPP, Mr Ricardo Jacobs, submitted that the trial court misdirected itself by imposing a non-custodial sentence thereby over-emphasizing the personal circumstances of the respondent and failing to

strike a balance pronounced in the triad. Counsel argued that the trial Magistrate amplified the element of mercy and downplayed the seriousness of the offence when he said:

"they have favourable circumstances that they could easily be rehabilitated if they are given a second chance and they are productive members of society."

[15] It is settled that not all cases are the same and precedents merely serve as a guide when considering an appropriate sentence. It is also accepted that courts determine an appropriate sentence on a case-by-case basis.

[16] The following cases serve as a yardstick for purposes of an appropriate sentence. In *Sadler,* the case involved a senior manager in a bank, who was convicted of corruption, forgery and fraud related to loans granted by the bank. Despite receiving a benefit of more than R300,000.00 following his crimes, he received what the State regarded as a lenient sentence which resulted in an appeal by the DPP. In respect of counts 1, 3 and 4 of corruption he was sentenced to two years' imprisonment wholly suspended for five years on condition that he performed 1000 hours of community service. In respect of counts 5, 7, 9, 10, 11, 12 and 13 for corruption, the sentence was R500,000.00 or five years' imprisonment and in respect of count 16 for forgery and uttering and counts 23, 24 and 27 to 29 for fraud, he was sentenced to five years' imprisonment wholly suspended for five years.

[17] The SCA in *Sadler* found that the conduct of the respondent was premeditated and persistent. He occupied a senior position of trust. The losses sustained by the bank were substantial. The crimes of corruption, forgery and uttering and fraud are serious crimes, the corrosive impact of which is too obvious upon society to require elaboration. Regard being had to the fact that he has already paid the fine and performed the

1000 hours of community service, and he was a first offender, the Court still found that the imposed sentence was not appropriate and upheld the appeal. The Court remarked that one cannot allow one's sympathy for the respondents to deter one from imposing the kind of sentence dictated by the interests of justice and society. The Court substituted the sentence, taking all counts as one for purposes of sentence and sentenced the respondent to four years' imprisonment.

[18] *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) was an appeal by the State against the leniency of the sentences imposed on the four respondents, members of a right-wing white political organization known as the Afrikaner Weerstandsbeweging (AWB) which had committed the offences on black people. They killed a frail black hunchbacked person, assaulted others with intent to do grievous bodily harm, and maliciously damaged the deceased's vehicle. This all happened shortly before the 1994 democratic elections. They were convicted of murder with *dolus eventualis* as the form of intent, assault GBH and malicious damage to property. In mitigation, the Court considered the view of the forensic criminologist that it would serve no purpose to mete out a sentence of direct imprisonment as their actions were influenced by a culture of racism within their families. Resultantly, the Court sentenced the respondents to wholly suspended periods of imprisonment and correctional supervision without serving any direct imprisonment. On appeal, Mahomed CJ, found that the trial Judge had over-emphasised the personal circumstances of the respondents without balancing them properly against the seriousness of the crime committed, the aggravating factors and the actual or potentially serious consequences for others and the interests and legitimate expectations of the South African community in a constitutional democratic state. The SCA set aside the sentences and

substituted them with an effective term of 12 years direct imprisonment, two years of which were suspended on specified conditions.

[19] *S v Phillips* 2017 (1) SACR 373 (SCA) also involves an appeal against sentence where the appellant, a constable in the South African Police Service, solicited and accepted a R900.00 bribe. He was convicted in the regional court and sentenced to seven years' imprisonment, two years of which were suspended for five years on specified conditions. The SCA upheld the appeal by the DPP and set aside the sentence imposed by the trial court substituting it with a sentence of four years' direct imprisonment which was antedated to a specified date.

[20] And lastly, in *S v Setlholo* 2017 (1) SACR 544 (NCK) an appeal that came before Tlaletsi J and Phatshoane J, then, under Case No CA& R 60/14. The appellant was a 27-year-old police constable with 10 years' service. He was arrested after an operation conducted by the Bloemfontein and Kimberley Diamond and Gold Units for corruption and fraud. He was sentenced to 10 years' imprisonment. It was argued on his behalf that the 10 years' imprisonment for a youthful offender was shockingly inappropriate. The appeal court dismissed his appeal and confirmed his sentence.

[21] Section 4(1)(a)(i)(aa) in Chapter 2, Part 2 of the Prevention of Combatting of Corrupt Activities Act, 12 of 2004 deals with offences in respect of corrupt activities. It provides:

'(1) Any —

(a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person,

whether for the benefit of himself or herself or for the benefit of another person; or

(b) …

in order to act, personally or by influencing another person so to act, in a manner —

(i) that amounts to the —

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

…

is guilty of the offence of corrupt activities relating to public officers.'

[22] Section 26 of the same Act deals with penalties. In relevant part s 26(1) stipulates:

'(1) Any person who is convicted of an offence referred to in —

(a) Part 1, 2, 3 or 4, or section 18 of Chapter 2, is liable —

(i) …

(ii) in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years; or …'

[23] What may have thrown the trial court *in casu* off course was the argument that a trial court's sentencing discretion is limited and that the Court must consider first imposing a fine rather than direct imprisonment. The SCA in *Phillips* at para 9 made these illuminating remarks:

"[9] The question is whether s 26(1)(a)(ii) has the effect contended for by the appellant. That question turns on a proper

> *interpretation of the relevant section of the Act. The interpretative exercise must be conducted in accordance with the established approach set out in Natal Joint Municipal Pension Fund v Endumeni Municipality [2012 (4) SA 593 (SCA)] para 18. This exercise involves ascertaining the proper meaning and effect of the statutory language used, viewed in context and with reference to the apparent purpose to which it is directed, and having regard to the material known to the lawmaker."*

[24] The Regional Magistrate ought to have considered the relevant case law and engaged in the interpretative exercise of the statutory legislation. His exercising discretion is not limited to a fine. Corruption, as expressed by so many courts, is a cancer that must be dealt with harshly. It erodes the moral fibre of our constitutional democracy. The Regional Magistrate has indeed overemphasised the respondent's personal circumstances, thereby downplaying the seriousness of the offence and the consequences and impact on society. It was inconsiderate and even callous of the respondents to demand a bribe from a person who was clearly acting out of necessity caused by his child's impending birth. I am satisfied that the circumstances of this case call for the imposition of a harsher sentence and that the interests of justice demand that the sentence of the Regional Magistrate should not be left undisturbed.

[25] A sentence of a fine coupled with a term of imprisonment is not an incompetent form of punishment. In this case a fine of R10,000.00 (Ten Thousand Rand) or two years' imprisonment imposed by the Regional Magistrate is laughable because it means paying only R5,000.00 for each year. The monetary aspect of the sentence is so disproportionate as to render the discretion exercised fatally flawed and not judicial, in any way.

[26] Bongela has already paid a portion of the fine of R10,000 (Ten Thousand Rand) because the deferred fine took effect on 15 October 2020. This circumstance does not debar the Court from imposing direct imprisonment because it is feasible for the State to refund him what he has already disbursed in compliance with the Court Order. However, it is a factor that can be taken into account.

[27] I am of the view that the monetary aspect of the punishment should be increased steeply to signify the turpitude of the offence committed and to increase the imprisonment aspect commensurately. In this regard I have also had regard to the fact that Bongela has retained his remunerative employment throughout. It is therefore up to him to devise some means to pay the fine, in default whereof he must serve the time. The Magistrate was too generous with the deferred fine.

[28] **I wish to issue this serious warning.** This sentencing approach must in no way serve as a precedent. Direct imprisonment ought to be the norm.

[29] In the result I make the following order:

1. The application for condonation by the Director of Public Prosecutions, Northern Cape, for the late filing of the leave to appeal against the sentence is granted.

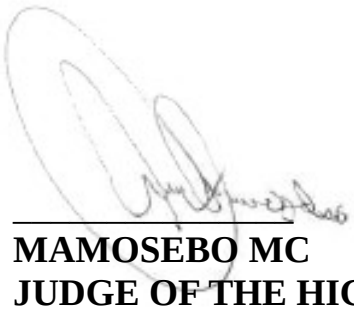
2. The appeal by the DPP against sentence is upheld.

3. The sentence imposed by the Regional Magistrate is set aside and substituted with the following:

   "The accused Oscar Ncebe Bongela is sentenced to pay a fine of R60,000.00 (Sixty Thousand Rand) or in default of payment to

serve three (3) years imprisonment. In addition, the accused is sentenced to three years imprisonment which is wholly suspended for a period of five years on condition that the accused is not convicted of contravening section 4(1)(a) or section 3(a)(1)(aa) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 or corruption or theft committed during the period of suspension."

4. Payment of the full balance of the fine of R60,000.00 (Sixty Thousand Rand) is deferred to 31 January 2024.



MAMOSEBO MC
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

I concur

OLIVIER AD
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

For the appellant: Adv RE Jacobs
Instructed by: Director of Public Prosecutions

For the second respondent: No appearance