IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

11/8/15

CASE NO: A650/2014

In the matter between:

LIZETTE STASSEN Appellant

and

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

06/08/15
DATE

SIGNATURE

THE STATE Respondent

JUDGMENT

Tuchten J:

1 The appellant, a female first offender aged 43, was convicted on a plea of guilty in a regional court of 138 counts of fraud and 72 counts of theft. The thefts were committed over the period 5 November 2007 to 31 October 2010, ie just short of three years. The amount involved was R1 829 778.

2 The appellant was sentenced to imprisonment for 7 years, three of which were suspended. With the leave of the court below, she appeals against the sentence imposed.

3 At the time the offences were committed, the appellant was employed by a concern described in the record as OUT Organisation, a non-profit making organisation which depends on donor funds and assists the gay and lesbian community of South Africa. The appellant was in a position of trust with OUT and had easy access to the funds of the organisation because of her position there.

4 The personal situation of the appellant at the time she was sentenced was that she was divorced from her husband, with whom she had a daughter, then aged 18 and living with the appellant's former husband, the child's father. Indeed, the daughter lived with the appellant until she reached the age of 16. This was in 2011, a year or so after the appellant had begun a same sex relationship. The daughter's relationship with her father was described by the appellant as "fantastic". According to the appellant, the daughter did not always agree with her mother's lifestyle but understood her mother's sexual orientation.

5 The appellant led the evidence of a community correction officer, an independent criminologist and the appellant herself in mitigation of sentence. The state adduced the evidence of a director of OUT, Mr Cameron-Ellis, in aggravation. The community correction officer recommended correctional supervision as an appropriate sentence. Central to the recommendation of this officer was the submission that the appellant

> ... does not pose any danger to the society and therefore cannot be taken away from the community.

6 The criminologist described the appellant as a kind-hearted person who used the money to enhance her status in the eyes of other people, to help other people and to enable her to enjoy a lifestyle she could not afford on her salary from OUT of R22 000 per month. The criminologist drew attention to the inadequate financial controls at OUT which made it easy for the appellant to commit the crimes. She submitted that this form of punishment should only be considered if the need for removing the offender from society justifies the cost to society of maintaining the offender in prison. She submitted that the appellant should not be considered a hardened criminal and had excellent potential for reform. She pointed to the shortcomings of prisons in our country at present. I take judicial notice of the fact that our prisons are overcrowded and often badly run and that criminals

who enter the prison environment often leave more hardened criminals than when they entered.

7 In her evidence, the appellant said that she used the money to help others and to maintain a standard of living. The submission was made on behalf of the appellant that she herself reported the crime to OUT. This is true but the appellant made it plain in her evidence that she did so just before an annual audit in was due to be performed in 2010 and

> ... I realised, that possibility of that it should be discovered was quite good and I resigned basically.

8 She then approached a director of OUT, Mr Cameron-Ellis and confessed to him. The inference is irresistible that she went on stealing from and defrauding OUT until she realised that she would probably be caught. After that the appellant cooperated with the financial investigation to determine the scope of her criminal conduct. She said she realised she had made a mistake which she wanted to rectify. She apologised in an email to Mr Cameron-Ellis.

9 The appellant obtained employment with an insurance company in 2012 where she does not handle finances. She offered R10 000 per month to OUT in restitution. She had made one payment of R10 000 to OUT by the time she gave evidence at her trial in 2013. At the

hearing before us, it was stated by counsel to be common cause that by this stage, the appellant had paid back a total of R100 000. She described herself as remorseful for what she had done. If she were to sentenced to imprisonment for longer than 10 months, she said, her employment with the insurance company would be terminated.

10 Mr Cameron-Ellis described the financial position of OUT as a result of the appellant's conduct. It had been rendered insolvent and had lost the support of two of its major donors. OUT had nevertheless managed to continue its operations and secure the support of new donors. From the outward manifestations of the appellant's conduct towards OUT, Mr Cameron-Ellis concluded that the apology tendered by the appellant was too little too late. The board of OUT was not convinced that there was true remorse. He pointed out that a repayment of R10 000 per month would not even cover the interest on the amount misappropriated by the appellant. He said that given the small amount offered in repayment and the large amount misappropriated, the board of OUT would rather the appellant go to prison.

11 In sentencing the appellant, the regional magistrate pointed to the seriousness of the offence and the inadequacy of the offer of repayment in relation to the amount misappropriated. Of central importance for present purposes, the regional magistrate did not believe that the appellant was remorseful; he found that the appellant merely regretted that she had been caught. The regional magistrate accepted that the facilities in prison left much to be desired from the perspective of rehabilitation but laid emphasis on the incentive not to return to prison that incarceration would promote. The court below discounted the lack of financial controls in OUT in a mitigating factor and pointed out that a position of trust required those in that position to respect the property of the employer.

12 On appeal before us, counsel for the appellant laid emphasis on three factors which it was submitted constituted misdirections by the court below. The first was the rejection as lacking in value the appellant's offer of repayment at R10 000 per month.

13 The appellant's offer would never repay any of the capital amount stolen if the loss were, as it surely must in law, attract interest even at the current reduced *mora* interest rate of 9% per annum. The court below pointed to the fact that any threat of a suspended sentence's being brought into operation if the appellant defaulted would lapse

after five years, the maximum period for which any sentence could be suspended. It found the offer wholly inadequate in the present context. I do not think that this conclusion was incorrect as such, subject to what follows.

14 I think that the court below was correct in concluding that the appellant was not moved by remorse to *report* her crimes to Mr Cameron-Ellis but I differ from the regional magistrate in relation to what followed.

15 Remorse was authoritatively described in *S v Matyityi* 2011 1 SACR 40 SCA para 11:

> There is ... a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one"s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely

> remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.

16 Like other manifestations of mind relevant in a legal context, the only person who can testify at first hand to an accused person's remorse is the accused herself. The rest of us, and in particular, judicial officers, have to judge on, apart from the say so of the accused, the outward manifestations of the accused's mind. In the present case, the appellant herself testified that what prompted her to confess - and to stop stealing - was the fear that the imminent audit would reveal her criminal conduct. In effect, she decided to get in first.

17 But thereafter she assisted the investigators where she could and made an offer to repay when she could. She conveyed a formal apology, perhaps at a relatively late stage. She offered to make restitution to the extent that she was able. I cannot think what more she could have done. The appellant did not persuade Mr Cameron-Ellis that she was genuinely remorseful. But I shall bear in mind that this was a difficult time for the appellant and that everybody is not able readily to convey their innermost feelings to others. The absence of remorse when the issue of remorse is raised, like all other issues in a criminal trial except (as the law presently stands) the sanity of the

accused when raised as a defence, must be established by the state beyond a reasonable doubt. I do not think that the state has discharged that onus. I therefore find that there is a reasonable possibility that by the time of her trial, the appellant felt remorse for the wrong she had done.

18 The third submitted misdirection is the characterisation by the regional magistrate of correctional supervision as being like a slap on the wrist. What the regional magistrate said was this:

> [Dit is] vir die hof duidelik dat die [aanbevole] straf wat die proefbeampte [aanbeveel], dit is totaal onvanpas, totaal. Want dit sal soos 'n klap op die hand wees. Die hof het verwysingssake, waar sekere vonnisse vir hierdie tipe misdrywe opgelê is en die hof kan 10 keer meer aanhaal ... in gevangenisstraf gaan [wees], vir minder ... .

19 Counsel for the appellant correctly submitted, with reference to authority, that correctional supervision is a punishment in its own right which should be utilised in appropriate cases and which can in an appropriate case create a greater chance for rehabilitation than our overcrowded prisons. Counsel also submitted that the judgment of the court below asserted that appellant's personal circumstances should carry little weight. I think what the regional magistrate was saying in effect was that it was his view these factors carried little weight in the

final outcome when viewed against the seriousness of the offence and its prevalence and the harm done to OUT. I do not think that in this regard there was a misdirection.

20 Be that all as it may, I agree with counsel for the appellant that this court should consider an appropriate sentence untrammelled by the exercise of the discretion of the court below.

21 In undertaking this task, I take into account as requested by counsel for the appellant that the appellant is a first offender, was 43 at the time of her trial, is divorced with one child and is employed by an insurance company at a salary of about R22 000 a month. I take into account too that the appellant ultimately felt remorse[1] and that a lengthy term of imprisonment will cause the appellant to lose her job.

22 Against that I weigh the gravity of the offence. The appellant must have known that OUT was a non-profit organisation dependent on donations for the performance of the good works which it undertook. I weigh too in this context that the appellant continued to misappropriate funds over a lengthy period and was moved to confess her crimes in the first instance by the fear of apprehension rather than a change of heart in relation to the wickedness of her conduct.

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[1] More correctly, that the absence of remorse had not been proved beyond a reasonable doubt

23 After careful consideration, I have decided that a sentence of correctional supervision, coupled with a suspended sentence of imprisonment, is best suited to the present case. I do not do so with any sense of enthusiasm. I think that the appellant *deserves* to go to prison for what she did. I do so because the present state of our prisons does not make them adequate environments for the rehabilitation of the appellant, a first offender who has not been found guilty of acts of violence and who does not present a danger to society. Correctional supervision with house arrest will in the present case carry the advantage that the appellant will not lose her job and become an unproductive member of society and, perhaps, act as an incentive to the appellant to repay what she has misappropriated from OUT. I shall make clear that the order of this court is not to be read as prejudicing OUT in any civil proceedings which it is advised to take against the appellant.

24 We are indebted to counsel who submitted a draft order reflecting our decision to impose a sentence of correctional supervision.

25 I make the following order:

1 The convictions are confirmed but the appeal against sentence succeeds. The sentence imposed by the court below is substituted by what follows.

2 The accused is sentenced to seven years imprisonment, all of which is suspended for a period of five [5] years on condition that:

2.1 the accused is not convicted of theft or fraud committed during period of suspension and for which the accused is sentenced to direct imprisonment; and

2.2 the accused submits herself to correctional supervision for a period of 3 years and, in that regard, subjects herself to reasonable monitoring by the Commissioner and complies with all reasonable directives issued by the Commissioner in relation to the execution and administration of this sentence;

2.3 the accused pays compensation to the amount of R600 000 to the complainant, OUT Organisation, in monthly instalments of R10 000.00;

2.4 the first payment of the compensation ordered above is made on or before 30 August 2015 and payments as ordered are made thereafter on or before the seventh of each succeeding month;

2.5 the accused provides the Commissioner of Correctional Services ("the Commissioner) on request with proof of payment of the compensation to the complainant;.

2.6 the accused resides at a fixed address, presently 386 Riverside Country Estate, Rif Avenue Kameeldrift and does not change that address without prior notice in writing to the Commissioner;

2.7 the accused refrains from using alcohol or drugs other than as prescribed by a medical practitioner;

2.8 the accused does not leave the magisterial districts in which she is residing and in employment except with the prior permission of the Supervision Committee appointed to supervise her case.

3 The accused must report with a certified copy of this order:

3.1 in the first instance within one week of the date of this order at Pretoria to the correctional court official who gave a report in her case, Ms Matshediso Suzan August, or failing Ms August, the head of Pretoria Community Correction; and

3.2 thereafter to the Supervision Committee notified to the accused by the head of Pretoria Community Correction at the places and times and on the dates communicated to her by that body.

4 The accused is, in addition to the above, in terms of s 276(1)(h) of Act 51 of 1977, sentenced to three years correctional supervision. The correctional supervision shall comprise the following measures:

4.1 HOUSE ARREST at her home at 386 Riverside Country Estate, Rif Avenue Kameeldrift (or such other address notified as set out above) from 18h00 to 05h00 on working days and on non-working days from 18h00 the previous day to 05h00 on the first working day following the non-working day or days; provided that the house arrest shall not operate during the periods reasonably required for the following activities:

4.1.1 Community service;

4.1.2 Church or other religious services;

4.1.3 Attendance of programs;

4.1.4 Recreation during the period determined by the Supervision Committee;

4.1.5 Acquisitions of household goods during the periods determined by the Supervision Committee.

4.2 COMMUNITY SERVICE for a period of sixteen hours per month for a total period of 36 months, which shall comprise services as determined by the correctional officer appointed to the case of the accused and which

community service shall be performed on weekends between the hours 08h00 and 16h00 at the place determined by the Supervision Committee.

4.3 PARTICIPATION in the programs determined by the Supervision Committee as determined by the Supervision Committee from time to time, under the supervision of the Supervision Committee.

5 This order shall operate in addition and without prejudice to any order made in any civil proceedings against the accused and in favour of OUT Organisation or its successor in title.

NB Tuchten
Judge of the High Court
6 August 2015

MA Makume
Judge of the High Court
6 August 2015