IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A641/2010

DATE: 26 NOVEMBER 2010

In the matter between:

GRAHAM MADDOCK Appellant

and

THE STATE Respondent

JUDGMENT

TRAVERSO, DJP:

The appellant, Graham Maddock, is appealing the decision of the Bellville Regional Court, refusing to reconsider the sentence imposed on Mr Maddock by the magistrate, Mr Shabalal.

The application was brought in terms of section 276A(3)(a) of Act 51 of 1977 ("the Act"). The appellant applied for leave to appeal against this decision, but it was refused. Leave was subsequently granted to the appellant on petition to the Judge

President.

The background of this matter is the following. The appellant and his company, Maddock Incorporated, were the auditors and accountants for most of the companies in the notorious Fidentia Group. He was charged with theft and fraud and it was alleged that he aided and abetted the ring leaders of the criminal venture, of which the Fidentia related companies were the main players.

A plea and sentence agreement in terms of section 105(A) of the Act was entered into. In terms of the plea agreement, the appellant pleaded guilty to all the counts save for one. He pleaded guilty to the crimes of fraud, theft, money laundering and contravention of section 4 of the Prevention of Organised Crime Act 121 of 1998, recklessly or fraudulently conducting the business of a company in contravention with section 423 read with 421 and 441D of the Companies Act of 1973. Pursuant to the plea and sentence agreement, the appellant was convicted of the charges and sentenced to an effective term of imprisonment of seven years. This sentence was imposed on 1 February 2008.

Ex facie the plea agreement, it became apparent that the State accepted that the appellant was not one of the main players of

the fraud committed by the Fidentia Group of Companies. He did not personally benefit from the monies received, except that his salary was paid out of the funds. At the time when the salary payments were made, the appellant was aware that the money was not earmarked for the payment of salaries and should not have been used for that purpose. Despite this, he instructed the transfer of the money for that very purpose.

Although it is clear that the appellant was not the principal player in the fraud, he actively participated in perpetuating the fraud and that he acted in such a manner as to facilitate the fraud perpetrated by his erstwhile co-accused, Brown and Goodwin. In terms of the plea agreement, the appellant expressed his deep remorse and indicated that he would testify for the State against his co-perpetrators and the main perpetrator of the offences in any further prosecution in respect of the Fidentia investigation. The parties accepted, for purposes of the plea agreement, that there were substantial and compelling circumstances in terms of section 51(3) of the Act for the imposition of a sentence less than the prescribed minimum sentence.

These circumstances were the following. At the time the appellant was 53 years old. He was married with two children. He had agreed to repay the benefits which had accrued to him

in the amount of R6.3 million. Further there is the consequential hardship to his family pursuant to him being committed to prison, as well as the financial hardships as a result of these crimes.

It is common cause that at the time the application for the conversion of sentence was made to the Regional Court in terms of section 276A(3)(a) of the Act, the appellant had one and a half years of his sentence left to serve. His release date, as determined by the prison's parole board, is 31 July 2011, and accordingly the appellant, presently, still has to serve approximately seven months of his sentence. In the application the department recommended that the remaining sentence be converted into house arrest in terms of section 276(1)(h) of the Act.

I turn now to the statutory provisions. Section 276A(3)(a) provides:

> "Where a person has been sentenced by a Court to imprisonment for a period:
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> (i) not exceeding for five years, or
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> (ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act 8 of 1959 and the regulations

made thereunder, is not more than five years in the future, and such a person has already been admitted to prison, the commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the Clerk or Registrar of the Court, as the case may be, to have that person appear before the court *a quo* in order to reconsider the sentence."

The magistrate's reasoning with reference to the application can best be dealt by quoting fairly extensively from his judgment. I proceed to do so:

"It is common cause that in this matter the conviction of the accused arose of section 105A proceedings and section 105A proceedings are proceedings where the State and the defence reach a agreement as to a plea and a sentence to be imposed. The trial court is then required to consider the proposed sentence after the accused person has pleaded in accordance with the agreement and the role of the Court, in those proceedings in terms of 105A, is to either accept that the proposed sentence is fair and just, in which

case the Court convicts the accused and sentences him accordingly, or finds that such sentence is not just and then rejects the proposed sentence and the plea.

So the fact that in this matter the accused pleaded and was convicted in terms of 105A, means that the Court was required to consider the proposed sentence and then to accept or reject it. The Court, having accepted the proposed sentence, it means that in fact it was so done at the time that the Court considered all of the relevant facts placed before the Court by way of section 105A agreement and from the perusal of the section 105A agreement, it is apparent that the following factors were taken into account in the process. The accused has shown remorse and that he was a first offender. He had co-operated with the State in their investigation, where he personally was involved, also where other entities were involved. The Court considered at the time that there had been agreement to make repayment in an amount of R6.3 million and the Court at the present time, has not been informed as to whether or not that R6.3 million has been recovered by the curators of the insolvent estate.

However, it is not crucial to the finding made by this Court today as to whether or not payment had in fact been made. It was due in October 2008. There as at the time, and the Court considered the offer to testify by the accused against the other entities who might in the future be charged with complicity at the same crime, the Court took into account that the accused, by pleading guilty, and that this resulted in a substantial saving, time and convenience to the State, the Court took into account the age, family, circumstances, professional status of the accused, and having done so, thus decided to accept that the proposed sentence was a just and equitable sentence in the circumstances. That for the benefits that the State would derive from the plea and sentence agreement, that in fact the accused was being offered a sentence that might at the time have been considered lenient, but that there were other spin offs for the State. So in those circumstances, the Court accepted the proposed sentence as fair and just.

Today, two years and one month down the line, the application is before the Court for conversion of the sentence from that of imprisonment to correctional

supervision and like the Court said earlier, there is a duty on the Court to see to it that the administration of justice is not brought into disrepute by the imposition of sentences that are startlingly inappropriate. If, at the conclusion of the section 105 agreement, the Court had been informed that the proposed sentence was one of two years imprisonment and a period of three years correctional supervision, there is little doubt that the sentence would not have been accepted by the Court as being fair and just and equitable. This Court accepted a term of seven years imprisonment for the reason that there was a trade off between the State and the defence and today, where the only circumstance that can be brought to the attention of the Court to change its mind from the original sentence, is that the accused has been a model prisoner. Someone, in the circumstances of the accused, an accountant, 55 years old, coming from a decent background, can hardly be expected, for the time that he is in custody, to be anything but a model prisoner. This Court does not consider that it is in the nature of exceptional circumstances that the accused stands before this Court and can be considered a model prisoner."

From the aforegoing it is clear that the court *a quo* was of the view that it was anticipated at the time of confirming the sentence in terms of the section 105 agreement, that the appellant would be a model prisoner and that, therefore, no circumstances were placed before the Court which would enable it to reconsider the sentence. This is a completely wrong approach. The Court is enjoined by the section to reconsider the sentence in view of all the facts, not only those facts that existed at the time of the trial. A literal application of the magistrate's attitude would amount to a situation that in no situation where a section 105A plea bargain had been entered into between the State and the accused, will a Court at a later stage be able to reconsider the sentence.

The application of section 276A(3) was considered lucidly and described in some detail by Satchwell, J in *ex parte* Department of Correctional Services in re S v Katisi 2002 (1) SACR 497 TPD. She points out at p 500g that subsection (3) envisages a two stage procedure. Firstly, an application for the original sentence to be "reconsidered"; and secondly, action by the Court upon such reconsideration:

> "It is the application by the commissioner, which precipitates such reconsideration. The result may

be no interference by the Court, in that the sentence of the court *a quo* is confirmed. Alternatively the Court may interfere and change the *status quo* in two ways, an order of correctional supervision or another sentence."

As I have stated earlier, the court *a quo* misdirected itself by having adopted the approach that the reconsideration of the sentence involves a consideration of whether or not the original sentence was an appropriate sentence in the circumstances. What the Court should do is to reconsider the sentence that it imposed in view of all the circumstances, including those facts and circumstances since the imprisonment of the person concerned and the circumstances that existed at the trial and which continued to have significance when the sentence is considered in terms of this section (See S v Elliott 1996 (2) SACR 531 (E) at 534A.)

The evidence of the commissioner which was placed before the court *a quo* was not simply that the appellant was a model prisoner, who had not committed any further offences. The Department put forward, in respect of the appellant, that he was an extraordinary person. That he was remarkable in his behaviour in prison. That he was respectful. That he had been an excellent, positive and outstanding prisoner, who is a

committed teacher and who had made a vast and positive impact, not only on the prisoners within the prison, but also on the wardens.

The lead prosecutor in the overall Fidentia matter, commented as follows. He stated that the appellant was not somebody who could be rehabilitated in prison as he did not have a criminal mind. The appellant further developed a business course for the inmates. He lectured the inmates. He was a study leader and he started a number of programmes aimed at rehabilitating offenders, and he not only assisted prisoners, but also, as I have said, wardens on various instances. In making his finding, the magistrate, in my view, did not have sufficient regard to the methodology followed in matters of this kind and he ignored the true motivation and the evidence which support an application for the revaluation of the sentence. There has been a considerable delay in finalising this matter due to the magistrate's refusal to grant leave to appeal. And in the circumstances it would, in my view, serve no purpose to refer the matter back tot the magistrate with a direction that he convert the sentence, as in my view, this Court is in as good a position to do so.

The State, represented by Mr Jonas, did not, in my view quite correctly, oppose this application. The Department of

Correctional Services, however, adopted a rather strange and ambivalent attitude. Initially they were not a party to this appeal at all. Their interests, I assume, were taken care of by the State's representative, Mr Jonas. However, during the course of last week, Mr N Arendse SC and Mr G Papier approached me in chambers to state that they had received instructions from the Department of Correctional Services to oppose the appeal, but that Mr Arendse would not be available today to argue the matter and that, therefore, the appeal might possibly have to be postponed.

I indicated my reluctance to postpone the appeal and after some discussion, Mr Arendse undertook to take further instructions from his client and to revert to me by not later than Monday 22 November 2010. He did not revert to me and neither did his junior. Accordingly my office attempted to contact him on Tuesday 23 November 2010. Having left several messages with his secretary (who informed my secretary that it would not assist her to call him on his mobile, because he does not answer calls if he does not recognise the number), he could not be raised and did not return any calls. I, accordingly, enquired from his junior, Mr Papier, what the situation was and whether the appeal would be able to proceed today. I was informed that his client would abide the decision of this Court and would merely be present in court to observe

the proceedings.

Yesterday afternoon, 25 November 2010, just before 16:00, heads of argument, in terms of which the Department of Correctional Services is actively opposing this appeal, was unceremoniously handed to my secretary. No explanation for this change of heart was given, neither was the Court, as a matter of courtesy, asked to accept these heads of argument or to condone the late filing thereof. In court, Mr Papier verbally stated that in essence he is abiding the decision of the Court. When it was pointed out to him that *ex facie* the heads of argument, filed on behalf of his client, his client actively opposed the matter, he had no satisfactory explanation. He simply informed the Court that despite his oral advices that his client would abide, his heads of argument would stand. No further oral argument was presented.

It must be borne in mind that the Department of Correctional Services, in terms of the provisions of the Act, was the *pro forma* applicant for the reconsideration of the appellant's sentence. A Court should at all times be able to rely on counsel for assistance in coming to a correct, fair and just decision. Unfortunately, the attitude of the Department of Correctional Services sketched above, was of scant assistance. It is regrettable that legal costs, at the taxpayers'

expense, gets run up in this manner.

Be that as it may, in considering the facts relevant to this case, I conclude that this application is successful. The operation of the remaining portion of the appellant's imprisonment is converted to 12 months correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977. The sentence shall comprise the following programmes and measures:

(a) House arrest at a place, and during the times determined by the commissioner of Correctional Services, for the full duration of the correctional supervision, provided that the commissioner has the power to suspend or extend any period of house arrest on such conditions as it deems fit, or thereafter for as long an on such conditions as it deems fit, reintroduce such house arrest.

(b) Community service for a total period of 16 hours per month. The nature of the community service, the place where and the times during which such services could be performed, will be determined by the commissioner of Correctional Services, provided that the commissioner is empowered to add additional community service in order to promote the fulfilment of the sentence if merited, to

suspend a part of the period of community service, on such conditions as he deems fit or thereafter for as long and under such conditions as he deems fit to reintroduce such community service.

(c) Submission to treatment programmes, rehabilitation programmes, placement under supervision of a probation officer with, *inter alia*, the following programme content, in order to realise the objectives of correctional supervision: the location, times, duration, content of such programmes will be determined by the commissioner of Correctional Services. Any costs involved in such programme supervision, may be recovered from the appellant.

(d) Submission to monitoring by the commissioner of Correctional Services in order to realise the objectives of his sentence.

(e) The appellant may not leave the magisterial district in which he resides without the permission of the correctional office official.

(f) The appellant shall, during the full duration of his sentence, refrain from using alcohol or the abuse of drugs, other than those prescribed by a medical

practitioner, comply with any original instructions given by the commissioner of Correctional Services regarding the administration and compliance with the sentence, and notify the commissioner of Correctional Services forthwith in writing of any change of residential or work address.

STEYN, J: I agree.

STEYN, J

TRAVERSO, DJP: It is so ordered.

TRAVERSO, DJP