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REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: A86/2016

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|-----|---|
| (1) | <u>REPORTABLE: NO</u> |
| (2) | <u>OF INTEREST TO OTHER JUDGES: NO</u> |
| (3) | <u>REVISED. YES</u> |

.....
DATE

.....
SIGNATURE

In the matter between:

BRANCO CARLA CHRISTINA PESTANA

Appellant

and

THE STATE

Respondent

J U D G M E N T

SKIBI AJ

[1] The appeal is against conviction only by leave of the regional court sitting at

Protea. That court convicted the appellant on one count of fraud and sentenced her to five years' imprisonment which was wholly suspended on condition that she compensates Mutual & Federal insurance Company in terms of section 300, of the Criminal Procedure Act¹ in the mount of R66,565.00

[2] The appeal was noted on the following grounds:

[2.1] The inference drawn by the Court a quo does not exclude the reasonable inference that the theft of the motor vehicle could have been planned...[indistinct] committed:

[2.1.1] By the construction workers on the appellant's premises at the time;

[2.1.2] By the other people residing in the house at the time who had access and could change the car keys with set of similar keys; or

[2.1.3] That the original key could have been used to steal the BMW motor vehicle.

[2.2] That the evidence tendered by the State in respect of the key that was given by the appellant to Mutual and Federal Insurance Company, did not establish that it was the same key that was provided by Esterhuizen...

[2.3] The learned magistrate failed not to draw a negative inference from the State's failure to call Claude Schoeman or Hussein, in order to give evidence as to how they came in possession of the

¹ 51 of 1977

motor vehicle, and what the applicant's role was in the crime in the circumstances where:

[2.3. 1] The aforementioned persons were arrested for the crime;

[2.3.2] They were in possession of the aforesaid information;

[2.3.3] They were not prosecuted and thus available to testify on behalf of the State;

[2.3.4] There was a total failure by the State to give an explanation as to why they were not called having regard to the extensive evidence provided by the State.

[3] Before dealing with the grounds of appeal the facts in brief are as follows. The appellant's vehicle, a white BMW with registration numbers L[...]GP was insured with Mutual & Federal Insurance Company (the insurer) against theft or hijacking in that in the event of loss of her vehicle through theft or hijacking she would be entitled to claim compensation to the amount of R110, 000.00. On 5 March 2009 the appellant reported to the Alberton Police Station that her vehicle in question was stolen. After opening a case of theft she informed her insurance company, Mutual & Federal. A claim for compensation of her loss was submitted to the insurer. Subsequently to the appellant having submitted the claim forms, she sent by courier to the insurer the key of her stolen vehicle. Mutual & Federal processed the

appellant's claim and she was paid the full amount insured on 19 March 2009. After the payment of the settlement amount to the appellant there was a suspicion that she might have submitted a fraudulent claim in respect of the vehicle was allegedly stolen. In essence the case against the appellant is that she misrepresented the material fact that her BMW was stolen when in fact it was not and that resulted to the insurer suffering financial loss.

- [4] Mr Elias Oupa Khumalo (a member of the South African Police Service) was involved in the undercover operation called Project Cobra where he was working as an agent. Mr Khumalo used to buy stolen and hijacked motor vehicles. On 6 March 2009 Mr Khumalo was contacted by one Claude Schoeman also known as Clavas, a member of a crime syndicate. Clavas offered to sell a white BMW to Mr Khumalo. Mr Khumalo informed his commander, Captain Maleka about the said transaction. Mr Khumalo was informed to enquire as to how much Clavas was selling the vehicle. After having been informed by Clavas that the vehicle will be sold by R10, 000.00. Captain Maleka arranged with one inspector Van Dyk who was to accompany Mr Khumalo and they agreed to meet at Shell Garage at Protea Gardens Mall. A technical equipment was installed by inspector Vay Dyk, surveillance camera and a recording equipment in the vehicle Mr Khumalo & Inspector Van Wyk were travelling. They met with Captain Maleka who reminded Mr Khumalo about the safeguards pursuant to the provisions of section 252A of the Criminal Procedure Act 51 of 1977. Mr Khumalo

and inspector Van Wyk were searched and given the cash as agreed with the 'target' was to be given to him. Mr Khumalo was directed by Clavas that one Desmond will deliver the vehicle and he will have to give him cash. The direction led Mr Khumalo to the other crime syndicate member, Hussein who also informed that one Desmond is bringing the vehicle. He ultimately met with the target and the transaction for sale of a white BMW with registration numbers L[...]GP was negotiated. Mr Khumalo testified further that the target agreed to sell the vehicle by R10, 000.00. After buying this vehicle he drove the vehicle to his handler, warrant officer Leopod Roestorff and handed the key to him.

- [5] Warrant Officer Meshack Ndlela, a member of the South African Police Service station at the Organised Crime Unit, in the West Rand, Soweto, was assigned as the investigating officer of the fraud case against the appellant. He confirmed the evidence of the agent, Mr Khumalo and the work which was done by Project Cobra in discovering the BMW vehicle which was allegedly stolen. He testified that Project Cobra started in 2008 and was terminated on 10 January 2010. On 26 February 2010, he went to the appellant's place of residence where he took an affidavit from the appellant. He asked her where she had parked her vehicle which was allegedly stolen on the day in question. He was told that it was parked outside the gate. He was informed by the appellant her vehicle had one key and that the said key was subsequently sent to Mutual and Federal after she submitted her claim. The appellant informed warrant officer Ndlela the name of the person who was

handling her claim at Mutual and Federal and Leon Esterhuizen whom he interviewed in order to get hold of the key. The key which was found from the insurer could not operate the vehicle but the key which came with the vehicle when it was sold by the syndicate was working, could open the doors, boot and could turn on the ignition.

- [6] Mr Leon Esterhuizen, testified in the court a quo. He was employed as a specialist investigator at Mutual & Federal insurance company. He was asked to bring the key which was posted by the appellant after her vehicle was reportedly stolen. He testified that on 1 December 2008 the appellant took a comprehensive cover at Mutual and Federal insurance company for her white BMW vehicle with registration number L[...]GP with the cover amount of R110,000.00 which includes loss due to theft, robbery or hijacking or accident. On 6 March 2009 the appellant submitted a claim which was processed and paid on 19 March 2009. According to Mr Esterhuizen the vehicle owner had submitted the key of the vehicle. As soon the insurer received the key and claim documents form with the insured details were clearly marked, filed with the registration documents and locked away. He personally tested the key which was in possession of Mutual and Federal which had been delivered at the insurer by the appellant after the vehicle was allegedly stolen but could not operate the BMW. His view was that there was representation made to Mutual and Federal that the vehicle was reportedly stolen whereas it was not and a claim for loss was submitted and paid which prejudiced the insurer and the public.

- [7] Miss Yolandi Beukes also testified during the trial. She was employed as a service adviser at the Distribution Central at BMW South Africa in Rosslyn and also operated the BMW computer system. She testified that on 14 July 2011 warrant officer Ndlela arrived with two sets of keys. She was asked to test the two sets of keys to ascertain if both sets of keys are for the same BMW. The keys were tested in a reader machine which operated by a microchip device. The result of the testing established that the key that came with the agent is the one belonging to the BMW with registration number L[...]GP, the appellant's vehicle. The key which was delivered to the insurer after the theft was reported was for a vehicle with registration number ND[...] and a VIN [...]99. According to the evidence of Yolandi Beukes one BMW cannot share the same VIN number because the microchip is for a specific vehicle.
- [8] Miss Lucy Dolo who was employed as administrative officer at the department of Roads and Transport is another witness whose evidence was led in the court a quo. She testified that amongst her duties she was doing auditing and an administration mark for stolen vehicles. She testified that she was approached by Mr Ndlela to assist him in his investigation of a fraud case. She used the computer system programme called E-Natis and through which she managed to detect the current and the previous registered owners of the vehicle in question. Miss Dolo testified that the vehicle with registration number L[...]GP was registered in the name of the appellant on 7 October 2008

as owner and title holder. Before then Mr MucCullum was the registered owner as on 4 April 2008. Before Mr MucCullum owned the vehicle it was owned by BMW Finance Midrand.

[9] Mr Charles Walter Norman testified in the court a quo. He testified that he operated a business under the name Charles and Company. He knew the appellant through his cousin George Arthur Main. His evidence was that he exchanged vehicles. On 1 December 2007 he exchanged his BMW M3 with George whom he gave him a BMW registration L[...]GP and he also gave cash to the amount of R5,000.00. Mr Norman said that the vehicle was registered in the name of Mathew MucCullum. Mr MucCullum resold this vehicle back to Mr Norman after a short while. The vehicle was bought by the appellant for the second time. Mr Norman said that when he resold this vehicle it had only one key. He said that when he resold it the vehicle was not tempered with.

[10] Mr Mathews MucCullum also testified and confirmed that the white BMW with registration L[...]GP used to be his vehicle. He confirmed that he bought it from Charles and company and he resold it back to him. His evidence was that he only owned it for less than a year and when he resold it its doors, windows and ignition were not to tempered with. His evidence was also that this vehicle had one key.

[11] On 12 April 2012 the prosecutor applied for inspection *in loco* to be conducted at Lenasia police station where the vehicle was parked. Although the application was opposed the presiding officer granted an order that the said inspection *in loco* was to take place. The Court on its composition form ie in the presence of the appellant and her attorney, the prosecutor as well as the court attended the inspection *in loco*.

[12] The Minutes of the inspection *in loco* are recorded as follows:

"Court proceeded to Lenasia SAP13. It was the Court, counsel for the State and counsel for the defence and others who were unknown to the Court. When we arrived there counsel for the State Adv. Maharaj produced a sealed bag, plastic bag, broke it and he took out a key for the BMW. That key was then inserted into the keyhole of the driver's door by Oupa Khumalo. It could not turn. It was again used to unlock the boot of the same motor vehicle that is the white BMW registration L[...]GP. Still the boot could not open by that key. From there Exhibit I the second key; the first key was the one which was given to the insurance company by the accused before Court as it was said by Mr Esterhuizen. Exhibit I was then used also to open the same door, passenger door. In fact I need to say that when we arrived there door, the driver's door was not locked. A certain gentlemen wearing a white shirt opened it and he then closed it. It was then that Mr Oupa Khumalo inserted the key in that keyhole. That key then locked the door. He proceeded back to the boot of that motor vehicle and locked the boot also by the same key. Same key he also inserted into the ignition it also turned. As a result of that even the steering itself turned. That was the essence of this inspection in loco." The state added that there was an inspection made of the licence disc and such licence disc had the registration L[...]GP. The defence added that the expired date of the licence disc was 31 March 2009.

[13] The appellant testified in her defence. She denied that she defrauded Mutual & Federal insurance. She denied that her vehicle was not stolen. In essence, she says her claim for loss of her vehicle, was a valid claim. The appellant repeated her version she told the police on 5 March 2009. In her first statement admitted in court as Exhibit "G" she said the following...

3.

"On Thursday 2008-03-05 at about 11:10 I was at my home busy taking a bath when I finished I got dressed then grab my hand bag and keys and my child proceeded to the door so I could return to my work. When I opened my front door I noticed my m/vehicle was no longer parked where I left. I then sent my fiancé a please call me then he phoned I told him what happened then he came to the house and picked me up and brought me straight to Alberton SAPS.

4.

Then my m/vehicle is insured to the value of hundred and ten thousand rand and the make of the insurance company is Mutual & Federal.

5.

I did not give permission to anyone to take my m/vehicle and I desire the further investigation..."

[14] The magistrate analysed the evidence led and reached a conclusion that the state witnesses were credible and where there were contradictions they were not of a material nature. The presiding magistrate found that ...*"where appellant's evidence differed with that of the state version hers lacked conviction and simply did not have a ring of truth about it.*

- [15] It is important that the court deals with the grounds of appeal as outline above in order to determine if this court may be justify in interfering with the findings of fact by the court *a quo*.
- [16] During the oral argument in this court the legal representative did not pursue the submission that the appellant's vehicle might have been stolen by the construction workers. In her evidence she testified that the construction workers told her that they saw the vehicle being driven away. Yet no attempt was made to alert her to this fact. She could not provide an explanation during cross-examination as to why she did not call the police to the crime scene to question the construction workers where it could have taken not more than five minutes before the police arrived at her house. Her excuse was that her cell phone did not have airtime. This version is highly improbably for one whose evidence was that she was a CEO in her company.
- [17] When she was asked why not dial a free call emergency number she claimed a lack of knowledge of such a an emergency number. She was unable to explain why she did not ask her fiancé to call the police to the crime scene after he arrived at home. It could have been more reasonably for her to get the assistance of the police to come to the scene and interrogate the construction workers in trying to find out who drove away the appellant's vehicle without her permission. Her anxiousness of going to the police station with the insurance claim forms as it transpired during her cross-examination is an indication as

how fast she want to claim money from the insurer instead of focusing in getting the thieves of her vehicle caught. There was no suggestion whatsoever, during the argument that the construction workers might have stolen her vehicle.

[18] At the hearing of the appeal the appellant did not contend that there is a possibility that her vehicle might have been stolen by someone staying in the house. The submission on this ground stands to be rejected. This contention is improbably if one has regard with the proved facts and those that are common cause. There is no evidence that there were other people inside her house (save for construction workers who were outside) other than the appellant who came in at about 11:10 am and went to her bathroom took a bath. The only evidence from the appellant is that it was herself with her two years old child at that time.

[19] Mr Mzamo for the appellant contended that based on the evidence of Miss Beukes that when the BMW sell a vehicle it is sold with two keys a possibility exist that the appellant might have been followed and a thief could have used the second key to drive away the vehicle after she parked it outside the gate of her house. This is not supported by evidence. The appellant at her first reasonable opportunity when she went to report to the police she never revealed that it could be a possibility. In her evidence she had a key with her and it was the only one she had. The previous owner Mr Norman & Mr MucCullum who

sold the vehicle to her gave her with one key. There was no suggestion that the vehicle could have been stolen by either of them.

[20] It was submitted on behalf of the appellant that the fact that Mr Esterhuizen was unable to indicate as to who received the key at the Mutual and Federal insurance company and that there was a large volume of claims at the time the possibility exist that an incorrect key was tested by Mr Esterhuizen in the vehicle that is why the said key could not operate in the vehicle of the appellant. This contention is not supported by the evidence. Mr Esterhuizen stated clearly that the key was secured with the claim documents marked with the name of the claimant. It stands to be rejected out of hand. The appellant when she was asked by warrant officer Ndlela could have easily said she posted the correct key the insurer but the insurer gave the police an incorrect key but when she was asked about the non-functioning of her key in the vehicle she was unable to provide a version save to say she did not know.

[21] The appellant's contention that the key exchanged many hands it might have been swapped along the way has no merit. Upon receipt of the key by the insurer it was not simply thrown in the mix of other keys it was given a reference number with the particulars of the appellant, that is the evidence Mr Esterhuizen. The independent witness by the name of Mr Charles Walter Norman says that when he resold the vehicle in question it had one key the badge was missing. The appellant on her

own version said that when the vehicle was stolen its key was in her house and she delivered the key to the insurer.

[22] During the oral arguments Mr Mzamo further referred us to a page on the record with Ext “F”, a policy document submitted to Mutual & Federal insurance company and he pointed to the tick box of what was received by the insurer and contended that of critical important on the tick box where it should have been ticked that a key was submitted it was not marked or not ticking to indicate that the key was received. There is no merit on this suggestion. The appellant in her own version stated that she sent the key to the insurer. The document referred to it has all the particulars of the appellant, ie the registration no of the vehicle is there; names of the appellant there etc.

[23] It is the appellant's further contention that magistrate failed not to draw a negative inference from the State's failure to call Claude Schoeman or Hussein, in order to give evidence as to how they came in possession of the motor vehicle, and what the applicant's role was. It was contended on behalf of the appellant the state should have charged the members of the crime syndicate with her or they should have been called to testify. However, he conceded that the conviction of the appellant was not depended on whether the crime syndicate were charged or not but the evidence against her. The charge and conviction of the appellant is not theft but is fraud. The Court a quo during the trial made a ruling on what was said in the recording and

ruled such evidence was inadmissible. The court made a guilty finding based on inferential reasoning which is allowed in law. *R v Blom*²

[24] Miss De Klerk, counsel for the respondent submitted that when considering the evidence led holistically the findings on fact by the magistrate cannot be faulted. The respondent argues further that the magistrate correctly found that the contradictions in evidence of its witnesses were not material and a reference to the decision by the Appeal Court, *S v Mafaladiso and others*³. The respondent contends that the trial court correctly rejected appellant's version that it was improbable that her vehicle had been stolen without the use of a key.

[25] It is trite law that the state must prove its case beyond a reasonable doubt and if the accused's version is reasonably possible true he/she is entitled to his/her acquittal. However, the State does not have to prove its case beyond all doubt. In *S v Ntsele*⁴ it was held that ... "*the onus which rested upon the State in criminal case was to prove the guilt of the accused beyond reasonable doubt – not beyond all shadow of a doubt. Our law did not require a Court had to only upon absolute certainty, but merely upon justifiable and reasonable convictions- nothing more and nothing less*" See also *S Vas As*⁵

² 1939 AD 188 at 203-203

³ 2003 (1) SACR 583 (SCA) at 584G-585D

⁴ 1998 (2) SACR 178 (SCA) at 180D

⁵ 1991 (2) SACR 207 (A) at 82 D-J

[26] This court is not a trial court and its approach is different from the trial court. The case of *S v Gadibi*⁶ sets out in no uncertain terms the governing principles on appeal against the finding of fact as follows:

“Before considering these submissions it would be as well to recall yet again that there are well established principles governing the hearing of appeals against the finding of fact. In short in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this difference is shown by appellate Court to factual findings of the trial Court are so well known that the restatement is unsatisfactory.”

[27] In *Makate v Vodacom (Pty) Ltd 2016 (4) SA 121 (CC)* Jafta J said the following:

[37] ...Ordinarily appeal courts in our law are reluctant to interfere with factual findings made by trial courts, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.

[40] But even in the appeal, the deference afforded to a trial court’s credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In Bernert this Court affirmed:

“What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the

⁶ 1998 (1) SACR 422 (A) at 426a-b

*appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it reverse it."*⁷

[28] The sequence of events and the inference drawn by the magistrate is well founded on the proved and common cause facts. The magistrate dealt extensively with the contradictions in the state's case and made a determination that those were not material. He made reference to the case law to justify his conclusion. The appellant's argument that the magistrate erred to accept the evidence of Warrant officer Ndlela and Mr Esterhuizen has no merit. The presiding magistrate didn't make his finding on isolated evidence of those witnesses only but considered the evidence holistically.

[29] The appellant's argument in criticising the credibility of state witnesses who testified during the trial is without merit. In *R v Dhlumayo & another*⁸ held that ..."*the appellate court is very reluctant to upset the findings of the trial Judge. The mere fact that the trial judge has not commented on the demeanour of the witnesses can hardly ever place*

⁷ *Bernert v Absa Bank Ltd* [2010] ZACC 28; 2011 (3) SA 92 (CC); 2011 (4) BCLR 329 (CC) at para 106.

⁸ 1948 (2) SA 677 (A)

the appeal court in as good a position as he was. Even in drawing inferences the trial Judge may be in a better position than the appellate court, in that he may be able to estimate what is probable or improbable in relation to the particular people he has observed at the trial..."

[30] In law fraud is defined as *unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another*⁹. The magistrate in his judgment says the following:

"We all observed that the locks for the doors, ignition and boot were not tampered with, there were also no hanging and loose or cut wires as one would expect if the car was stolen without using the key, this denotes that the car was not stolen, otherwise what other explanation can there be? It is crystal clear that when the car reached Clavas it had the proper original key and could not have flown or developed legs to reach Clavas. The only logical conclusion is that the motor vehicle was not stolen as claimed by the accused".

[31] From the undisputed facts the evidence shows that the appellant submitted a claim to the insurer on the basis that her BMW vehicle had been stolen and the insurer settled the payment in the amount of R110,000.00 believing that was a genuine claim due to be paid to the appellant. Based on the finding by the trial court of which in my view was correctly made that the appellant's vehicle was never stolen. The Mutual & Federal Insurance Company suffered actual prejudice in the

⁹ CR Snyman: *Criminal law*, 5th Edition, page 531 published by LexiNexis

form of monetary loss. I find no legal basis to upset the finding of fact by the trial court that the state succeeded in proving guilt of the appellant beyond a reasonable doubt.

[32] In the result the appellant's appeal against conviction should fail.

[33] The following order is made:

[33.1] The appeal against conviction is dismissed.

N. SKIBI

Acting Judge of the High Court, Gauteng Local Division, Johannesburg

I agree

TP MUDAU

Judge of the High Court, Gauteng Local Division, Johannesburg

DATE OF HEARING:

10 OCTOBER 2019

DATE OF JUDGMENT:

OCTOBER 2019

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