<u>IN THE HIGH COURT OF SOUTH AFRICA</u>
(NORTH GAUTENG HIGH COURT, PRETORIA)

Date: 2010-03-23

Case Number: A472/09

In the matter between:

DITHATE SILAS MOEKETSANE Appellant

and

THE STATE Respondent

JUDGMENT

SOUTHWOOD J

[1] On 23 April 2007 the appellant was found guilty on 17 counts of theft in the Pretoria regional court and on 14 August 2008 the appellant was sentenced to 10 years imprisonment, all the counts being taken together for the purpose of sentence. With the leave of the court *a quo* the appellant appeals against both the convictions and the sentence imposed.

[2] The charge sheet alleged that the appellant and his two co-accused, Kalla Patrick Mamabolo (2^{nd} accused) and Jonathan Fana Moyo (3^{rd} accused) were guilty of fraud in that they submitted 19 false motor vehicle accident (MVA) claims to the Road Accident Fund (RAF) which the RAF accepted and paid into the appellant's bank accounts from where the funds were distributed to the appellant and his co-accused, alternatively, that the appellant and his co-accused stole from the RAF the amounts set out in the annexure to the charge sheet. The amounts involved in the theft are the same amounts involved in the fraud charges. At the commencement of the trial the state withdrew all charges against Mamabolo (the 2^{nd} accused) and at the close of the state case, Moyo (the 3^{rd} accused) successfully applied for his discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977.

[3] On appeal the appellant's counsel contends –

(1) With reference to ***S v Wannenburg* 2007 (1) SACR 27 (C)** that the appellant was wrongly convicted as the charge sheet did not apprise him of the case against him; and

(2) That the evidence does not support a conviction of theft: the state failed to prove directly or inferentially that the appellant was guilty of theft.

[4] The case against the accused was that he and his co-accused and/or others not known to the state, stole the 17 amounts from the RAF, during the period December 1998 to June 2000, by submitting false MVA claims to the RAF which the RAF accepted and paid into four bank accounts controlled by the appellant and in respect of which the appellant alone had signing powers.

[5] Throughout the relevant period the appellant practised as an attorney specialising in MVA claims. It was not disputed that during the relevant period 17 false claims were submitted to the RAF, that the RAF accepted liability for the claims, that the RAF paid the amounts into the appellant's bank account and that the appellant did not repay these amounts to the RAF. The appellant pleaded not guilty to all the charges but did not tender an explanation for his plea. The appellant also did not give evidence and it is striking that at no stage during the trial did his counsel proffer an (innocent) explanation for the appellant's receipt of the 17 amounts. It is also significant that his own witness, a very experienced forensic accountant, was not provided with all the relevant documents and information so that he could explain what the appellant did with the 17 amounts he received and accordingly was not able to give the court an innocent explanation for the appellant's receipt of the funds.

[6] The appellant's reliance on ***S v Wannenburg*** **2007 (1) SACR 27 (C)** is misplaced. In that case the charge sheet alleged that the accused had

made fraudulent misrepresentations and it was not suggested that he was guilty only of assisting another person in committing the fraud. Eventually the accused was found guilty as an accomplice. In the present case it was alleged that the appellant and others stole the amount involved: i.e. the appellant was charged as a perpetrator. This did not change during the trial and the court *a quo* found the appellant guilty as a perpetrator. It is clear that, if involved, the appellant acted together with one or more persons to commit the crimes and is guilty by virtue of the principles relating to common purpose. The appellant's counsel concedes that if the appellant was involved in the scheme to steal the money from the RAF the appellant was properly convicted but contends that the state's evidence did not prove this. She also contends that the fact that the appellant received the 17 amounts stolen from the RAF did not establish a *prima facie* case which called for an answer from the appellant.

[7] Accordingly, the issue is whether the state's evidence justifies the inference drawn by the court *a quo* that the appellant together with others stole the 17 amounts from the RAF.

[8] The state called a number of witnesses whose evidence was not disputed by any evidence by the appellant. The appellant's counsel put a number of propositions to these witnesses but called no witness to support these propositions. There were therefore no factual disputes before the court *a quo* which correctly accepted the evidence

given by the witnesses. In addition, the state relied on formal admissions made by the appellant in terms of section 220 of Act 51 of 1977. A number of these admissions are contained in exhibit 'A' and a number were formally placed on record by the appellant's counsel (see p338).

[9] The evidence establishes the following:

(1) During the period June 1998 to June 2000 the appellant practised as an attorney in partnership with one Gadeja Abba under the name Abba Moeketsane Attorneys. The appellant specialised in MVA claims and Abba did primarily criminal work as well as a few civil cases, but no MVA claims;

(2) Before they entered into the partnership Abba had a Standard Bank trust and a Standard Bank cheque account. After she and the appellant entered into the partnership they used the Standard Bank trust account as a partnership trust account but it was now designated Abba Moeketsane. In addition they had a trust account with Absa Bank which the appellant used for MVA matters. The RAF paid money into that account for the appellant's clients;

(3) During the period June 1998 to June 2000 the appellant conducted the following additional bank accounts which were

not known to Abba and in respect of which she had no signing powers:

(i) a Standard Bank trust account number 030927676 designated attorney D.S. Moeketsane, from May 1998 to March 1999. (This account will be referred to as 'AF');

(ii) a Standard Bank current account number 231028806 designated D.S. Moeketsane Attorneys, from January 1999 to September 1999. (This account will be referred to as 'AG');

(iii) a Standard Bank current account number 231029845 designated Dithate Moeketsane until February 1999 and thereafter Abba & Moeketsane Inc Attorney, from June 1998 to September 2000. (This account will be referred to as 'AH').

(4) During the period March 1999 to April 2001 the appellant (and possibly the partnership) conducted an Absa trust account number 4049252397 designated Abba and Moeketsane Trust Attorneys. (This account will be referred to as 'AJ'.);

(5) The RAF was established to compensate persons who suffer damage as a result of death or bodily injuries caused by motor

vehicle collisions. During the relevant period the RAF conducted its activities at offices throughout South Africa, with its head office in Pretoria. The RAF Randburg office processed and authorised all the amounts paid to the appellant which form the subject of the counts. The RAF had 120 days in which to consider whether to pay or reject a claim. It was very unusual for a claim to be paid within 30 days of it being received. It was unheard of for a claim to be paid the day after it was received. The 17 payments were discovered during an audit of all claims paid within 30 days of receipt;

(6) MVA claims were presented to the RAF in a prescribed form. Claims submitted to the Randburg RAF office were first registered on computer and then manually in a register (by a member of the staff Ms. Motchichi) and then distributed to the claims handlers for assessment. Each claims handler had an assistant whose function was to attend to the administration and obtain all the necessary documentation for the purpose of assessing the claim. In assessing the claim the claims handler was required to confirm that there had been a collision; that the claimant or the deceased was injured or killed in the collision; that the RAF was liable because of the negligence of the driver concerned and determine the amount of the damages payable. A claims handler had authority to pay claims up to R25 000. For claims in excess of that figure a senior claims handler was

required to authorise payment. After a claimant accepted the RAF's offer, it was necessary for an Expenditure Authorisation to be completed before payment would be effected. An expenditure authorisation had to be signed by the assistant claims handler, the claims handler and the senior claims handler. When the three signatures had been obtained the Randburg RAF office would compile a report for expenditure authorisation (a 'batch report') containing all the relevant details of the claim and the amount to be paid to the claimant and would send it to the Pretoria head office which would effect payment to the claimants' attorneys. Before signing the Expenditure Authorisation the claims handler would have to be satisfied that the claim was legitimate and was supported by all the relevant documents.

(7) During the period December 1998 to June 2000 17 false claims were processed by the staff at the Randburg RAF office; expenditure authorisations were signed by the assistant claims handlers, claims handlers and senior claims handlers, and payments were effected by the Pretoria head office into the appellant's bank accounts (i.e. 'AF', 'AG', 'AH' and 'AJ'). The claims were false because the claimant or the deceased did not exist and the claimant or the deceased was not involved in the collision. The staff at the Randburg RAF registered the details of each claim on the computer but the details were not found in

the register kept by Ms. Motchichi. Whatever documents there were were dealt with by the assistant claims handler, claims handler and senior claims handler. It was the duty of the assistant claims handler to prepare each expenditure authorisation which reflected the claim registration number, the name of the claimant, the name of the attorney to whom payment was to be effected (i.e. the appellant) and the particulars of the bank account into which payment was to be made. The police investigators could not find any files pertaining to the claims in the Randburg RAF office.

(8) The processing of the claims involved in each count, the payment of the funds to the appellant and the movement on the relevant account after payment was as follows (the letters and numbers in parenthesis refer to the relevant exhibit and the page in the record) –

(i) Count 1 (Radebe). The claim was registered on 10 December 1998. The expenditure authorisation for R49 950 was signed on 18 December 1998 ('N' 628). Payment was to be effected to the appellant, account number 030927676 ('AF'). The batch report was prepared ('B' 583) and on 21 December 1998 R49 950 was paid into the appellant's account ('AF' 655). On 18 December 1998 the account balance was R24 043,73.

After receipt of the payment the account balance was R73 993,57. On 22, 23, 24, 28 and 30 December 1998 cheques numbers 569, 570, 572, 573, 574, 575, 576 and 577, totalling approximately R45 000 were paid by the bank;

(ii) Count 2 (Msiza). The claim was registered on 28 July 1999. The expenditure authorisation for R48 362 was signed on 13 August 1999 ('P' 629). Payment was to be effected to the appellant (designated Abba & Moeketsane), account number 231029845 ('AH'). The batch report was prepared ('D' 591) and on 16 August 1999 R48 362 was paid into the appellant's account ('AH' 786). On 14 August 1999 the account balance was R12 001,86. After receipt of the payment the account balance was R60 343,80. On 20 August 1999 a cheque for R48 000 and a cheque for R14 000 were paid by the bank leaving a balance of R2 785,48;

(iii) Count 3 (Khumalo). The claim was registered on 8 January 1999. The expenditure authorisation for R47 650,30 was signed on 8 January 1999 ('O' 627). Payment was to be effected to the appellant, account number 231028806 ('AG'). The batch report was prepared ('C' 586) and on 11 January 1999 R47 650,30 was paid into the appellant's account ('AG' 670). On 9 January 1999, immediately before the payment was received, the account balance was R22 922,48. After receipt of the payment the account balance was R78 572,78. On 12 January 1999 the bank paid cheques of R7 000, R300, R36 000 and R6 300 (total R49 600) leaving a balance of R28 976,78 on 12 January 1999;

(iv) Count 4 (Ngidi). The claim was registered on 12 February 1999. The expenditure authorisation for R48 544 was signed on 12 February 1999 ('R' 630). Payment was to be effected to the appellant, account number 231028806 ('AG'). The batch report was prepared ('E' 595) and on 15 February 1999 R48 544 was paid into the appellant's account ('AG' 675). On 10 February 1999, immediately before the payment was received, the account was overdrawn in the amount of R2 044,29. After receipt of the payment the balance was R46 499,71. On 16 February 1999 the bank paid a cheque for R38 000 leaving a balance of R13 499,71;

(v) Count 5 (Nogwaza). The claim was registered on 21 May 1999. The expenditure authorisation for R126 400 was signed on 21 May 1999 ('T' 632). Payment was to be effected to the appellant, account number 231028806

('AG'). The batch report was prepared ('F' 601) and on 24 May 1999 R126 400 was paid into the appellant's account ('AG' 689). On 19 May 1999, just before this amount and the amount of R126 500 (the subject of count 6) were paid into the account the account balance was R23 629,40 ('AG' 689). After payment of the two amounts the balance was R276 529,40. On 24, 25, 26 and 27 May 1999 the bank paid cheques for R2 000, R28 000, R4 000, R350, R508,17, R60 000, R60 000, R70 000 and R1 500 (total R226 358,17);

(vi) Count 6 (Banda). The claim was registered on 21 May 1999. The expenditure authorisation for R126 500 was signed on 21 May 1999 ('T' 631). Payment was to be effected to the appellant, account number 231028806 ('AG'). The batch report was prepared ('F' 601) and on 24 May 1999 R126 500 was paid into the appellant's account together with the R126 400 (the subject of count 5). The same comments relating to count 5 apply to the appellant's account;

(vii) Count 7 (Mdlandlana). The claim was registered on 23 November 1999. The expenditure authorisation for R49 300 was signed on 1 December 1999 ('X' 637). Payment was to be effected to the appellant, account number

4049252397 ('AJ'). The batch report was prepared ('H' 607) and on 2 December 1999 R49 300 was paid into the appellant's account ('AJ' 932) together with R45 482,27 (the subject of count 9) and R43 182,93 (the subject of count 8). On 2 December 1999, immediately before these payments were received, the account balance was R284 344,92. On 2 December 1999, immediately after these payments were received, the account balance was R422 310,12. On 4 December 1999 the bank paid a cheque for R94 782,27. This is the total of R45 482,27 (involved in count 9) and R49 300 (involved in count 7);

(viii) Count 8 (Ndhlela). The claim was registered on 23 November 1999. The expenditure authorisation for R43 182,93 was signed on 2 December 1999 ('X' 636). Payment was to be effected to the appellant, account number 4049252397 ('AJ'). The batch report was prepared ('H' 607) and on 2 December 1999 R43 182,93 was paid into the appellant's account ('AJ' 932) together with the amounts which are the subject of Counts 7 and 9;

(ix) Count 9 (Rula). The claim was registered on 23 November 1999. The expenditure authorisation for R45 482,27 was signed on 1 December 1999 ('W' 635).

Payment was to be effected to the appellant, account number 4049252397 ('AJ'). The batch report was prepared ('H' 607) and on 2 December 1999 R45 482,27 was paid into the appellant's account ('AJ' 932) together with the amounts which are the subject of Counts 7 and 8;

(x) Count 10 (Lene). The claim was registered on 4 May 1999. The expenditure authorisation for R51 600 was prepared but not signed ('V' 634). The failure to sign is not explained. Payment was to be effected to the appellant, account number 231028806 ('AG'). The batch report was prepared ('G' 604) and on 6 May 1999 R51 600 was paid into the appellant's account ('AG' 688) together with the R51 800 (the subject of count 11). On 4 May 1999, immediately before the receipt of these two amounts, the account was overdrawn in the amount of R8 908,20. After receipt of the two amounts the account balance was R94 491,80. On 7 May 1999 the bank paid a cheque (it was cashed) for R70 000;

(xi) Count 11 (Matthews). The claim was registered on 4 May 1999. The expenditure authorisation for R51 800 was prepared but not signed ('U' 633). The failure to sign is not explained. Payment was to be effected to the appellant, account number 231028806 ('AG'). The batch report was prepared ('G' 604) and on 6 May 1999 R51 800 was paid into the appellant's account ('AG' 688) together with R51 600 (the subject of count 10). The same comments regarding the account before and after payment as were made in respect of count 10, apply;

(xii) Count 12 (Mulder). The claim was registered on 10 June 1999. The expenditure authorisation for R98 500 was signed on 21 June 1999 ('Z' 638). Payment was to be effected to the appellant, account number 4049252397 ('AJ'). The batch report was prepared ('J' 610) and on 22 June 1999 R98 500 was paid into the appellant's account ('AJ' 906) together with R211 000 (the subject of count 13). On 22 June 1999, immediately before these payments were received, the account balance was R242 839,22. Immediately after the payments were received the account balance was R552 339,22. On 22, 23, 24, 25, 26, 27 and 28 June 1999 the bank paid cheques to the value of approximately R270 000, including a cheque for R90 000, on 26 June 1999, and a cheque for R120 000, on 28 June 1999;

(xiii) Count 13 (Van Wyk). The claim was registered on 10 June 1999. The expenditure authorisation for R211 000 was signed on 21 June 1999 ('AA' 639). Payment was to be effected to the appellant, account number 4049252397 ('AJ'). The batch report was prepared ('J' 610) and on 22 June 1999 R211 000 was paid into the appellant's account ('AJ' 906) together with R98 500 (the subject of count 12). The same comments regarding the account before and after payment, as were made in respect of count 12, apply;

(xiv) Count 14 (Nqgolo). The claim was registered on 29 September 1999. The authorisation for R66 371,99 was signed on 4 October 1999 ('AC' 641). Payment was to be effected to the appellant, account number 231028806 (designated Abba & Moeketsane)('AG'). The batch report was prepared ('K' 613) and on 5 October 1999 R66 371,99 was paid into the appellant's account ('AG' 703) together with R57 831,24 (the subject of count 15). On 4 October 1999, immediately before the two amounts were received, the account was overdrawn in the sum of R16 645,44. Immediately after receipt of the payments the balance was R107 567,45. On 4, 7 and 8 October 1999 the bank paid cheques of R80 000, R7 000, R3 000 and R3 000 leaving a balance of R14 567,45;

(xv) Count 15 (Gunguluza). The claim was registered on 29 September 1999. The expenditure authority for R57 831,24 was signed on 4 October 1999 ('AB' 640). Payment was to be effected to the appellant, account number 231028806 (designated Abba & Moeketsane) ('AG'). The batch report was prepared ('K' 613) and on 5 October 1999 R57 831,24 was paid into the appellant's account ('AG' 703). The same comments regarding the account before and after payment, as were made in respect of count 14, apply;

(xvi) Count 18 (Makholwa). The claim was registered on 9 March 2000. The expenditure authorisation for R127 000 was signed on 17 March 2000 ('AD' 642). Payment was to be effected to the appellant, account number 231029845 (designated Abba & Moeketsane) ('AH'). The batch report was prepared ('L' 619) and on 22 March 2000 R127 000 was paid into the appellant's account ('AH' 809);

(xvii) Count 19 (Weduwedu). The claim was registered on 29 March 2000. The expenditure authorisation for R152 000 was signed on 12 June 2000 ('AE' 645). Payment was to be effected to the appellant, account number 4049252397 ('AJ'). The batch report was prepared ('M'

622) and on 13 June 2000 R152 000 was paid into the appellant's account ('AJ' 953). On 13 June 2000, immediately before the payment was received, the account balance was R110 709,17. After receipt of the payment the account balance was R262 709,17. From 14 June 2000 until 23 June 2000 the bank paid a number of cheques, including a cheque for R152 000 on 22 June 2000.

(9) The payments into the appellant's accounts took place without the knowledge of Abba who maintained that the appellant used these accounts to keep her in ignorance of the payments;

(10) The police unsuccessfully attempted to find the appellant's cashbook, journal and ledger to show how the appellant dealt with the 17 amounts he received. Not one of the bookkeepers/auditors who worked with the appellant's books of account was able to produce them for the investigators;

(11) The appellant did not furnish his expert witness, Mr. Deleeu Swart, with his cashbook, journal and ledger or the paid cheques drawn against the accounts to enable Mr. Swart to explain what happened to the funds which the appellant received;

(12) The appellant did not open an unknown deposits account for the payments he received;

(13) The appellant did not attempt to find out whose money he had received. He also made no enquiries from the RAF and he did not repay the money to the RAF;

(14) In terms of section 78(1) of the Attorneys Act 57 of 1997 every practising attorney is obliged to open and keep a separate trust banking account at a banking institution in the Republic and must deposit therein the money held or received by him on account of any person. The attorney is not entitled to the money in the trust account. The attorney may only pay himself from the trust account if there are fees due to him. Every three months an attorney is obliged to reconcile his trust account by comparing the total of the trust creditors' claims against him with the amount available in the trust account;

(15) If an attorney receives funds into his trust account from an unknown source he must open an 'unknown deposits account' for these funds and establish where they come from. Until he has done so the funds must remain in the unknown deposits account;

(16) Every trust account operated by an attorney must be audited once in a year in compliance with Rule 70 of the Law Society.

(17) If the attorney keeps proper records he will be able to account for all money he receives. The records would provide a full explanation for what happened to the money. This would be the best and easiest way of explaining what had happened and that the money had been paid to him by mistake.

(18) An attorney would scrutinise his bank statements regularly to ensure that he can attend to clients whose money it is. Money received from the RAF is easy to identify because of the information which appears on the bank statement.

[10] The admissions in exhibit 'A' and the other formal admissions clearly establish that persons within the RAF fabricated claims to justify payments. It is not disputed that this was theft. The question is whether the established facts justify the inference that the appellant acted in common purpose with these persons to steal the funds.

[11] Where there is clearly a carefully thought out scheme to steal from the RAF which requires that there be an attorney's bank account to receive the stolen funds, the receipt of the stolen funds by an attorney on its own creates a *prima facie* case requiring an answer. The improbability of the guilty parties arranging for payment to be made to an innocent

attorney is so great that the possibility of a mistake can be ignored. The movement on the accounts after the funds were received also indicates that the appellant had knowledge of the payments and was taking steps to remove the funds from the accounts under his control. It is clear that the appellant had the means of proving that he innocently received the payments. He could have shown how he dealt with the funds as an innocent attorney would: by opening an unknown deposits account, reflecting the payments in the cashbook as unknown deposits and obviously by making the necessary enquiries. The appellant chose to remain silent.

[12] In ***S v Boesak*** **2001 (1) SA 912 (CC)** in para 24 the court said:

> 'The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage where an accused has the right to be presumed innocent, to remain silent and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in

Osman and Another v Attorney-General, Transvaal **(1998 (4) SA 1224 (CC))** when he said the following:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a *prima facie* case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."'

[13] In my view there was a very strong *prima facie* case against the appellant and his silence justifies the conclusion that he was a party to the scheme and guilty of theft. The appeal against the convictions therefore cannot be upheld.

[14] With regard to sentence it is not contended that the sentence is vitiated by irregularity or misdirection. It is contended that the sentence imposed is startlingly inappropriate – see ***S v Pillay*** **1977 (4) SA 531 (A)** at 535E-G; ***S v Kibido*** **1998 (2) SACR 213 (SCA)** at 216g-j; ***S v Rabie*** **1975 (1) SA 855 (A)** at 857D-F. I do not agree. As pointed out by counsel for the respondent there are a number of very aggravating features in the case. The appellant was an attorney; he dealt exclusively with claims against the RAF; more than R1,4 million is involved in the thefts; the thefts were committed over a lengthy period, 18 months; the appellant frustrated the investigation of the case by consistently refusing to provide the documentation which would

demonstrate his guilt or innocence and there is no sign of remorse on the part of the appellant. In my view the sentence imposed was appropriate and this court cannot interfere with it on appeal.

Order

[14] The appellant's appeal against the convictions and sentence is dismissed.

B.R. SOUTHWOOD
JUDGE OF THE HIGH COURT

I agree

P. EBERSOHN
ACTING JUDGE OF THE HIGH COURT

CASE NO: A472/09

HEARD ON: 15 March 2010

FOR THE APPELLANT: ADV. E. KILIAN

INSTRUCTED BY: Mr. W. Clark of Shaban Clark Coetz

FOR THE RESPONDENT: ADV. R.S. DU TOIT

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 23 March 2010