

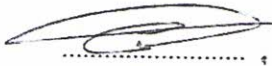
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: RC2/79/17

APPEAL NO: A388/2019

(1)	REPORTABLE: YES <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES <u>NO</u>
(3)	REVISED: <u>YES</u> NO
22 February 2021	
	

In the matter between:

ASHLEY NAICKER

Appellant

and

THE STATE

Respondent

JUDGMENT

WANLESS AJ (KHWINANA AJ concurring)

Introduction

[1] In this matter one ASHLEY NAICKER (*“the Appellant”*), an adult male, was charged in the Regional Court for the Regional Division of Gauteng (held at Springs) on one count of Fraud and one count of Defeating the Administration of Justice. The Appellant was found guilty of both counts and sentenced to an effective term of seven (7) years’ imprisonment.

[2] An application for leave to appeal in respect of his convictions and sentences was dismissed by the court *a quo*. Thereafter, the Appellant was granted leave by this Court to appeal against both his convictions and sentences.

Ad Convictions

[3] In respect of the count of Fraud the State (*“the Respondent”*) alleged that the Appellant unlawfully, falsely and with the intent to defraud and to the prejudice or potential prejudice of Hollard Insurance (*“the insurer”*) gave out and pretended to the insurer that on the 19th of October 2016 he had been robbed of his motor vehicle insured with the insurer whereas he had in fact caused the said motor vehicle to be set alight.

[4] With regard to the count of Defeating the Administration of Justice, it was alleged by the Respondent that the Appellant unlawfully and with intent to defeat or obstruct the course of justice, instituted a false charge of robbery, alleging that he had been robbed of his motor vehicle whereas he had not.

- [5] The Respondent placed the *viva voce* evidence of six (6) witnesses before the court *a quo*, namely SIBUSISO SYDNEY NKOSI (“Nkosi”); MKHULULEKO RIVONIA KALI (“Kali”); WARRANT OFFICER PATRICK MPOFU (“Mpofu”); ERIC KOPANSKI (“Kopanski”); MARIA PRETORIUS (“Pretorius”) and SERGEANT KGOTSO MATTHEWS KEKANA (“Kekana”). The Appellant testified in his defence and called one (1) witness, namely JOSHUA NXUMALO (“Nxumalo”). This judgment will not be burdened unnecessarily by setting out the evidence of these witnesses in detail. Rather, same will be referred to , where applicable, later in this judgment.

Common cause facts

- [6] The following facts were common cause at the trial, namely:-
- 6.1 the Appellant and Nkosi worked together. In this regard the Appellant was Nkosi’s supervisor whilst Nkosi was contracted to the Municipality.
 - 6.2 Nkosi was employed by Gohitile Projects who terminated his services due to an invoice dispute;
 - 6.3 the Appellant facilitated a meeting with the owner of Gohitile Projects, one MSOMI (“Msomi”) to discuss the possible reappointment of Nkosi. However, this was not successful;
 - 6.4 the Appellant did not support Nkosi’s reappointment by Gohitile Projects and Nkosi was aware of this;

- 6.5 during the period January 2017 to April 2018, Nkosi was then employed by Yande Engineering. The Appellant was tasked, by the Municipality (his employer) to investigate Yande Engineering who were, as a result thereof, suspended as a service provider of the Municipality;
- 6.6 the aforesaid suspension of Yande Engineering had a further negative impact on Nkosi's personal finances;
- 6.7 the Appellant was the owner of a Volvo V40 motor vehicle bearing registration letter and numbers FB 98 GP (*"the motor vehicle"*) which was insured by the insurer. As a result of the loss of the motor vehicle he was paid out by the insurer;
- 6.8 an incident occurred on the 19th of October 2016 which gave rise to the loss of the motor vehicle and the Appellant receiving the aforementioned payment from the insurer;
- 6.9 the movement of the motor vehicle on the 19th of October 2016 is correctly recorded and reflected in the tracking report which was admitted into evidence (*Exhibit "B"*);
- 6.10 on the 19th of October 2016, after having allegedly been robbed of his motor vehicle, the Appellant was assisted and given a lift by Nxumalo;
- 6.11 the Appellant reported the alleged robbery at Brakpan Police Station;
- 6.12 the Appellant and Nkosi were known to each other prior to the 19th of October 2016 as they shared a professional relationship which was impacted by certain work-related disputes;
- 6.13 Nkosi and Kali were, as at 19 October 2016, friends and at the time of the trial remained friends; and
- 6.14 the burnt motor vehicle was found at Withok Estates, Brakpan.

Matters in dispute

[7] At the trial the court *a quo* was called upon to decide:

- 7.1 whether the Appellant committed fraud;
- 7.2 whether the Appellant committed an act of defeating the administration of justice;
- 7.3 whether Nkosi and Kali (who testified on behalf of the Respondent) burnt the motor vehicle on the Appellant's instructions;
- 7.4 whether Nkosi and Kali falsely implicated the Appellant (as alleged by the Appellant); and
- 7.5 whether the Appellant was robbed as he alleged.

The law

[8] It is trite that in order for the court *a quo* to find the Appellant guilty, it must be satisfied that the Respondent has discharged the onus incumbent upon it to prove, beyond reasonable doubt, the guilt of the Appellant.

[9] It is also trite that there was no obligation upon the Appellant to convince the lower court that he was innocent. If his version was reasonably possibly true, he was entitled to an acquittal even though his explanation may be improbable. The court *a quo* was not entitled to convict unless it was satisfied that not only was the explanation improbable but that it was false beyond all reasonable doubt (*R v Difford* 1937 AD 370).

The merits

[10] In summary, it was the Respondent's case that the Appellant had elicited the assistance of Nkosi and Kali to burn the motor vehicle in order that he could institute a fraudulent claim with the insurer. In his defence the Appellant alleged that he was robbed of the motor vehicle and therefore his claim with the insurer was a legitimate one. As part of his defence, it was alleged by the Appellant that Nkosi and Kali (both state witnesses) had joined forces to conspire against him.

[11] During the course of argument before this court, Counsel for the Respondent conceded (correctly) that the contradictions in the evidence of Nkosi and Kali and the contradictions between the evidence of those witnesses when compared to one another, as relied upon by the Appellant's Counsel and as set out in the Appellant's Heads of Argument, were correct. In the premises, this court may accept that the contradictions in the evidence, as set out in this judgment, were indeed contradictions which arose in the court *a quo* and which are reflected in the record of the proceedings which took place before the trial court.

Contradictions in the evidence of Nkosi

- [12] During cross-examination Nkosi testified that the Appellant contacted him for the first time regarding this matter during the second week of September 2016 at about 12h00. This witness conceded that in his affidavit he had stated that the Appellant contacted him in the third week of September 2016 at 14h00.
- [13] Nkosi testified that Kali would be paid R500.00 by the Appellant to torch the motor vehicle and would receive a further R3 000.00 upon the insurer paying out. He further testified that he (Nkosi) would receive an amount of R5 000.00 from the Appellant for his efforts in ensuring that the motor vehicle was burnt. However, in his affidavit, Nkosi made no mention of the R500.00 allegedly payable to Kali or the R300.00 allegedly given to him on the 19th of October 2016. In his affidavit he stated that R100.00 was allegedly given to him. This witness was unable to provide a plausible explanation pertaining to the said contradictions or why a portion of the evidence he testified to in the court *a quo* was not included in the affidavit which he deposed to more than a year before he testified at the trial. In this regard, it is clear that the details of the matter would have been easier to recollect when he deposed to the affidavit.
- [14] This witness further testified in the court *a quo* that the Appellant had called him to his office on Wednesday the 19th of October 2016 to advise him that the motor vehicle would be burnt that day. This is different to what he stated in his affidavit where he said that the Appellant had met with him

prior to the 19th of October 2016. A further contradiction arose when he testified that the Appellant had in fact met with him on the Monday and told him that the fake hijacking and burning of the motor vehicle would take place the following Wednesday (a week after the 19th of October 2016). In the premises, there were material contradictions in respect of his evidence in chief; his testimony when he was cross-examined and the contents of his affidavit. In addition thereto, he also testified at one stage that the Appellant informed him on a Tuesday that the incident would take place on the Wednesday.

- [15] Nkosi testified that on the day in question he received R300.00 from the Appellant but in his affidavit he stated he had received R100.00. Where a person had agreed to be part of a serious crime, it is improbable that such person would not remember precisely the amount of money he was paid as a reward for his participation.
- [16] When he testified before the court *a quo*, Nkosi stated that he had provided the Appellant with a description of the clothing that Kali would be wearing in order that the Appellant could identify Kali. No mention was made, at all, of this important fact when he deposed to his affidavit.
- [17] In his testimony, Nkosi stated that the Appellant drove past Kali; stopped and reversed; then reversed again before picking Kali up. Whilst this was important enough to form part of his testimony, no mention of this sequence of events was made in his affidavit.

[18] Importantly, Nkosi testified that he never contacted the Appellant on the Appellant's cellular telephone regarding the matter. However, when cross-examined, he stated that he had called the Appellant's cellular telephone to alert the Appellant of the arrival of himself and Kali.

[19] In addition to the foregoing contradictions, Nkosi contradicted the objective evidence of the tracking report. This objective and common cause evidence is in stark contradiction to both the *viva voce* testimony of Nkosi in the court *a quo* and the contents of his affidavit. Nkosi testified that he saw the Appellant driving along Plantation Road in Springs. According to this state witness the Appellant stopped the motor vehicle; reversed and picked up Kali. In contrast thereto the tracking report indicates that the Appellant drove along Plantation Road, turned left into Main Avenue, then right into Broad Avenue, before turning right again into Main Avenue. It is also important to note, at this stage, that not only do the contents of the tracking report materially contradict the testimony of both Nkosi and Kali but corroborate the version of the Appellant as placed before the court *a quo*.

Contradictions in the evidence of Kali

[20] Whilst Kali testified that he would be paid R3 000.00 by the Appellant after the alleged incident, no mention whatsoever is made of this important fact in his affidavit.

[21] When he testified in the court *a quo*, Kali stated that he had been approached by Nkosi in respect of the matter during September 2016. However, in his affidavit, Kali states that this approach took place in October 2016.

[22] In his testimony Kali told the court *a quo* that he had been approached by Nkosi on two separate occasions. In his affidavit he stated that he had been approached by Nkosi only once.

[23] Kali originally testified that the Appellant came from Main Avenue. However, he then changed his evidence and testified that he had not seen where the Appellant had come from.

[24] Kali testified that he had never met the Appellant before the 19th of September 2016. However, he later testified that when the motor vehicle stopped he saw it was the Appellant.

[25] Importantly, when this witness testified he stated he had dropped the Appellant off on Heidelberg Road. However, in his affidavit he stated he had dropped the Appellant off in Geluksdal.

Contradictions between the evidence of Kali and Nkosi

[26] Kali testified that he met Nkosi on the gravel road leading to the plot of land where the motor vehicle had been burnt. Nkosi testified that he had waited for Kali and when Kali did not arrive, he had driven to the plot by himself.

[27] Kali testified that he and Nkosi had agreed to meet at the gravel road. Nkosi testified that they had agreed to meet at an exact location.

[28] Nkosi testified that he had approached Kali and asked him if he knew someone who could assist. He further testified that Kali could not find anyone. Kali however testified that Nkosi had approached him during September 2016 and asked him whether he wanted to make some money on the side. Kali never testified at all about being asked by Nkosi to recruit a person to assist.

[29] Importantly, Kali testified that no arrangement had been made as to the clothing he had to wear. In direct contrast thereto, Nkosi told the court *a quo* that he had arranged with Kali that Kali was to wear a black hoody.

[30] Nkosi testified that on the Monday he and Kali went to look for a spot to burn the motor vehicle. Later however, he testified that during his second visit to Kali in respect of the plan, they had agreed to go and search for a spot to burn the motor vehicle the next day, which was a Saturday. Kali testified that the day they went searching for a spot to burn the motor vehicle was the day prior to the incident. This would have been a Tuesday. In the premises, not only did Nkosi contradict his own evidence but there was also a material contradiction between the evidence of Nkosi and Kali in respect of when the two witnesses went to search for a spot to burn the motor vehicle.

[31] Nkosi testified that he had waited for Kali at a certain corner of the intersection at Geluksdal Road. After a while he drove to the agreed point. Kali testified that he found Nkosi at a certain point. Nkosi flicked his lights that Kali should follow him which he did to the “spot”

[32] Nkosi testified that he had poured the petrol into the motor vehicle. Kali testified that both he and Nkosi poured the petrol into the motor vehicle. Furthermore, when Nkosi gave evidence he told the court *a quo* that when he set the motor vehicle alight Kali was in the bakkie. In stark contrast thereto, Kali testified that he was the one who set the motor vehicle alight.

[33] Nkosi testified that the police first found Kali and then came to him. Upon approaching Nkosi, Kali was already in the vehicle. Kali's evidence was contrary to that of Nkosi in this regard.

[34] Like Nkosi the evidence of Kali materially contradicted the objective evidence of the tracking report. Kali testified that he drove along Cemetery Road to an intersection or a four way stop. He then turned left into the gravel road where Nkosi was waiting for him. The inspection *in loco* held during the trial revealed that no gravel road exists at that point, only a tarred road.

[35] Kali's evidence with regard to the route that was followed and the place where the motor vehicle was allegedly burnt, materially contradicted his earlier evidence; the tracking report and his affidavit. Not only did he describe different places in his testimony and his affidavit but it transpired that these places were in fact a distance apart.

[36] Further, Kali's evidence contradicted that of Nkosi in respect of both the route that was followed and the point where the motor vehicle was allegedly burnt.

[37] Kali also testified that he dropped off the Appellant just after the Geluksdal robot. This is in direct contrast to the tracking report.

[38] Both Nkosi and Kali testified that the motor vehicle was burnt before 19h00 whilst the tracking report reflected that the motor vehicle was still moving at 19h20.

The evidence of Mpofu

[39] This police officer became involved in the investigations pertaining to this matter upon certain information being provided to him by an informer. This alleged informer never testified at the trial and his identity was never disclosed to the court *a quo*. Mpofu testified that his investigations led him to Nkosi who advised him that the Appellant had never been robbed, at gunpoint, of his motor vehicle. This witness gave evidence that Nkosi implicated Kali. He took their statements. In addition thereto he gathered information from the insurer as well as the tracking company.

The evidence of Kopanski, Pretorius and Kekana

[40] The evidence of these three (3) state witnesses was of a formalistic nature. As such, this evidence will only be referred to in this judgment if necessary.

The evidence of the Appellant

- [41] At the commencement of the trial the Appellant placed on record a fairly lengthy and detailed explanation of his defence in support of his pleas of not guilty in terms of section 115 of the Criminal Procedure Act 51 of 1977 (*“the Criminal Procedure Act”*). Little purpose would be served by setting out the foregoing. In summary, the defence of the Appellant was that on the evening of the 19th of October 2016, at approximately 18h20, he was robbed of his motor vehicle by an armed assailant. The Appellant’s statement in terms of section 115 also provided details as to his working relationship with Nkosi; the fact that the Appellant had shared the contents of the tracker report with Nkosi and the fact that details of what had occurred on the 19th of October 2016 was common knowledge amongst the people the Appellant worked with, including Nkosi.
- [42] The solitary witness called to testify by the Appellant, namely Nxumalo, confirmed the fact that some two (2) hours after the robbery Nxumalo picked up the Appellant who was walking in the direction of Brakpan from where he had been dropped off by the robber.
- [43] The Appellant’s defence to the Respondent’s case that he had paid Nkosi and Kali to set fire to his motor vehicle in order that he could submit a claim to the insurer, was that Nkosi, in light of the bad feelings he had towards the Appellant arising from their working relationship, conspired (with the assistance of Kali) to have the Appellant found guilty of the crimes of fraud and defeating the administration of justice.

- [44] It was never argued, on behalf of the Respondent at the hearing of this appeal, that the evidence of the Appellant should have been rejected by the court *a quo* in light of the Appellant being a bad witness and/or his evidence containing material contradictions and/or his version of events being improbable. This court agrees that none of the foregoing is applicable with regard to the evidence placed before the court *a quo* by the Appellant. In the premises, the finding of the learned Magistrate in the court *a quo* that the Appellant's version should be rejected, must be held to be a misdirection by the lower court. As submitted before this court by the Respondent's Counsel, when considering the totality of the evidence in deciding whether the Respondent has discharged the onus incumbent upon it, it is largely (if not solely) the evidence of Nkosi and Kali upon which the case for the Respondent rests.
- [45] In this regard, it is imperative to note that both Nkosi and Kali testified pursuant to the provisions of section 204 of the Criminal Procedure Act. As such, both had strong motives to impress the court *a quo* as credible witnesses in order to be discharged from the crimes of fraud and defeating the administration of justice. It is trite that the evidence of a witness testifying in terms of the said section must be treated, by the court considering that evidence, with caution.
- [46] As noted earlier in this judgment, it is common cause that the contradictions inherent in the evidence of Nkosi and Kali; the contradictions between the evidence of these State witnesses when compared to one another, together with the contradictions between their evidence and the objective or neutral

evidence of the tracking report, are as submitted by the Appellant's Counsel at the hearing of this appeal and as set out in this judgment. These contradictions are clearly material. If not, the number of those contradictions, even if not material when viewed in isolation, is illustrative of the blatant disparity between the evidence of the Respondent's two (2) principal witnesses. When the evidence of both of these state witnesses is (as it must be) viewed with caution, it is clear that the court *a quo* misdirected itself in accepting their evidence.

Conclusion

[47] Considering the totality of the evidence and applying the correct legal principles thereto, it is clear that the court *a quo* was wrong in finding the Appellant guilty of fraud and defeating the administration of justice. The material contradictions in the evidence of the two (2) principal state witnesses results in the Respondent failing to prove, beyond reasonable doubt, the guilt of the Appellant. Moreover, there is nothing improbable about the version of the Appellant which, on the evidence placed before the court *a quo*, is reasonably possibly true. It could never be said that the Appellant's version was false beyond all reasonable doubt.

[48] In passing, it is necessary to make some very brief and cursory remarks in respect of the evidence of Mpofu. Regarding this state witness, it became apparent at the trial that he may have been involved, with Nkosi and Kali, in the conspiracy to have the Appellant found guilty of the charges brought against the Appellant in the court *a quo*. Indeed, there is much to support

such a view. The evidence of this witness was less than satisfactory. In addition, his involvement in this matter and the circumstances pertaining thereto, lend support for this contention. However, in light of, *inter alia*, the fact that the Respondent's case rests squarely upon the evidence of Nkosi and Kali, it is unnecessary for this court to either set out Mpofu's evidence in any detail or to come to any conclusive finding in respect thereof.

- [49] Likewise, it is not necessary for this court to make a finding on whether or not Nkosi and Kali conspired against the Appellant to have him face trial in the Regional Court. Such a conspiracy, as alleged by the Appellant, is only relevant insofar as it provides a reason as to why the testimony of Nkosi and Kali is false. It forms part of the evidence to be weighed up in its totality and should not be elevated to more than that when determining whether the Respondent discharged the onus incumbent upon it and whether the version of the Appellant is reasonably possibly true.
- [50] It must follow that this appeal should be upheld and the conviction of the Appellant by the court *a quo* in respect of the charges of Fraud and Defeating the Administration of Justice, set aside.

Order

[51] This court makes the following order:

51.1 The appeal is upheld;

51.2 The convictions of the Appellant (ASHLEY NAICKER) by the Regional Court for Gauteng (sitting at Springs), under case number RC2/79/17, on the charges of Fraud and Defeating the Administration of Justice, are set aside.

BC WANLESS

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on: 24 November 2020

For the Appellant : Adv R Gissing

Instructed by: ZAF Attorneys

For the Respondent : Adv AP Wilsenach

Instructed by: Director of Public Prosecutions (Gauteng)

Date of Judgment: 22 February 2021

