REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG (PRETORIA)

3|2|15

CASE NO: A586/2014

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED

3 February 2015 ....

In the matter between

LUBBE, ANTHONY **1ST APPELLANT**

CHETTY, CLARENCE **2ND APPELLANT**

JOY FINANCE CONSULTANTS **3RD APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MUDAU AJ:

[1] This is an appeal against the conviction and sentence. The three appellants appeared before the regional court magistrate, "Specialised Commercial Crime Court", Pretoria. They were charged with six counts of fraud, alternatively, contravening s41 (2) (a) (iii) read with s 54 (1) of the Auditing Profession Act No 26

of 2005. All three were convicted of six counts. Consequently, the first and the second appellants were fined R30, 000-00 or to undergo five years imprisonment's. The third appellant however, was fined R30, 000-00 which was wholly suspended for five years on customary conditions. This court is called upon to make a determination whether the guilty verdict is supported by the evidence and the applicable law. With regard to the question of sentence, whether a wholly suspended sentence would under the circumstances, not be adequate.

[2] The facts giving rise to the conviction of the appellants are not materially in issue and were not seriously challenged at the trial. It is therefore not necessary to traverse the entire body of evidence. The salient features of the matter are as follows: the third appellant was at all relevant times a company registered in terms of the laws of the Republic, which amongst others, rendered book- keeping services. The first and the second appellants were its director and head of the book-keeping department respectively. During the trial, the first and the second appellants appeared in their respective personal capacity whereas the third appellant, a legal entity, was represented by the first appellant (Lubbe, as intended in terms of s 332 of the Criminal Procedure Act, No 51 of 1977).

[3] The third appellant was appointed by firms of attorneys (namely C D Tereblanche Inc., N Xenophontos Attorneys and C J Botha attorneys) to manage their accounting records. However none of the appellants were at the time, registered auditors and accordingly, not entitled to perform audits in compliance with relevant statutes or laws.

[4] For the audit period 2006 and 2007 accountants' reports were submitted on behalf of the legal firms under the auspices of Alan Levitan & Associates Registered Accountants and Auditors purportedly in compliance with Rule 70 read with other relevant rules of the Law Society of the Northern Provinces (LSNP). It is indeed common practice that without these reports, the Law Society is unlikely to issue a Fidelity Fund certificate to the affected attorney.

[5] In this matter, the LSNP picked up errors on at least four (initially and later an additional two) of the audited statements or reports compiled by the third appellant albeit under the name of Mr Levitan. In his evidence Mr Levitan denied that the relevant reports were compiled and or submitted by himself or by any member of his staff. Upon being confronted by Mr Levitan, the first appellant admitted submitting the reports to the LSNP. It is Levitan's testimony that he never authorised or gave the appellants permission to use his letterheads for the reports in issue. It is further his version that he was not prepared to jeopardise his name and reputation by authorising someone else to sign on his behalf.

[6] From the written heads of argument on behalf of the first appellant it is admitted that all three appellants *"completed"* the relevant "*Rule70 reports*". Further that they attached a signed letterhead of Levitan to the reports and also that, "they inserted the details of Levitan in the spaces provided in the reports".

[7] However, it is the second appellant's version that he was only concerned with the bookkeeping functions of the law firms in question. In addition that he did not play any part in typing or signing of the necessary covering letters on the Levitan letterheads. He was authorised by the first appellant to use Levitan's letterhead in the submissions of the reports .He honestly believed that there was an association between the first appellant and Levitan. He was not a director at the time the reports were submitted but was the head of the bookkeeping department. During cross-examination, he admitted however that he was the one who wrote in the details of the auditing firm (in this case, Levitan).

[8] In argument before us it is contended on behalf of all three appellants that they lacked the necessary guilty state of mind and therefore had no intention to commit the relevant offences under consideration. It is further contended that the state failed to prove the appellants' guilt beyond a reasonable doubt. It has also been contended that intention in the form of *dolus eventualis* is in this case, insufficient to sustain a conviction for fraud charges. Snyman (Criminal *Law* 5ed (2008)) describes fraud in the following terms: '*Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.*" It is trite that the unlawful and intentional making of a misrepresentation does not have to cause actual loss for it to constitute fraud. The definition of *dolus eventualis* in CR Snyman *Criminal Law* 5ed (2008) at 184 is defined as follows:

'A person acts with intention in the form of dolus eventualis if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but:

(a) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and

(b) he reconciles himself to this possibility.'

[9] The learned author goes on to say the following:

'Another way of describing component (b) is to say that X was reckless as to whether the act may be committed or the result may ensue. However, it does not matter whether component (b) is described in terms of "reconciliation with the possibility" or in terms of "recklessness".'

Snyman gives an example of where a person might be held to have dolus eventualis at 185:

'If X has dolus eventualis, it is possible that he may in the eyes of the law have the intention to bring about a result even though he does not wish the result to follow. In fact, dolus eventualis may be present even though X hopes that the prohibited result will not follow. In this form of intention the voluntative element consists in the fact that X directs his will towards event A, and decides to bring it about even though he realises that a secondary result (event B) may flow from his act.'

[10] The learned author points out that there are two requirements for the existence of *dolus eventualis*: 6 '*The first is that X should foresee the possibility of the result, and the second is that he should reconcile himself to this possibility. The first may be*

described as the cognitive part of the test and the second as the conative (or volitional) part of the test.'

[11] In S v Brown 2015 (1) SA 211 (SCA) where this aspect is discussed , it is said at para [120] with reference to Mr Brown that : *although the absence of dolus directus may well count in his favour it is but one of the totality of factors to be taken into account".* Mr Brown was convicted of fraud on the basis of dolus eventualis after pleading guilty, which the SCA confirmed (at para 101). It stands to reason that the argument that conviction for fraud can only follow if intent in the form of dolus directus has been established is clearly without any merit.

[12] The State's contention is that Levitan was a truthful witness. He was frank and consistent throughout his testimony and not shaken in cross-examination. His evidence was satisfactory in every material respect and he answered all questions spontaneously. He testified convincingly that he worked extremely hard to build up his practice and that he was not going to jeopardise his name and reputation by giving someone else the right to sign on his behalf. The State's submission is that Levitan's conduct is definitely not that of an accomplice. When he was contacted by Patterson from the LSNP, he immediately denied having signed the relevant reports. He could easily have covered up the situation if he was indeed involved, as the first appellant alleges.

[13] I have read the court's judgment carefully. The court a quo found that the first appellant was an unsatisfactory witness. The court found that he was a poor witness. He did not answer questions directly and was extremely evasive. He was asked during cross-examination when he informed his advocate that he did not know that it was necessary to be a registered auditor to sign off a rule 70 report. He still has not answered that question up to today. He further still has not answered the question under cross-examination why his version that he did not know that it was necessary for a registered auditor to sign off a rule 70 report, did not form part of his explanation/affidavit in the review application which was directed to the National

Director of Public Prosecutions. It is clear that Levitan never benefited out of the audit done by the third appellant, although payments were in fact made by inter alia Mr Botha, the complainant on counts 1, 2, 5 and 6 for the services rendered. Mr Botha was never refunded although he paid for these false reports and eventually received a fine from the Law Society. Eventually Mr Botha had to pay for new reports after obtaining the services of a new auditor. The first appellant conceded that he never refunded Mr Botha and his excuse is that Mr Botha never asked him to be refunded. According to the First Appellant's version, he and Mr Levitan then came to a so-called arrangement that obviously Mr Levitan cannot be seen to be receiving any money from Joy Finance and they then agreed according to the first appellant's version, that instead he, the first appellant, will then make certain donations on his behalf to charities of his choice. No proof of such donations was ever given to the court. The version given by the first appellant is so improbable that it can be rejected without hesitation. Knowing full-well that he was not entitled to receive any moneys after being informed by Mr Levitan and having received knowledge about the investigation of the Law Society, there was no reason for him to give the money to charities instead of Mr Botha. In effect, he did not return the money either to Mr Levitan or Mr Botha. In my view the court a quo correctly accepted the evidence of Mr Levitan. The court also correctly rejected the evidence of the first appellant as false. In my view the evidence of the first appellant is so farfetched that no value can be attached to it. I therefore accept that the court a quo correctly found that Mr Levitan never gave the third appellant a carte blanche to act under his name, neither did he hand them blank letterheads to be used for their own purposes as they deem fit.

[14] I now return to the position of the second appellant. At the time when the offences were committed the second appellant was a bookkeeper of the third appellant. The court a quo found that the second appellant "falls around in his evidence". The second appellant conceded that he was aware of the existence and the provisions of rule 70 and that it requires the certificate of a qualified auditor. However, according to the second appellant's version, he conceded that he completed some of those forms and then left it on the desk of the first appellant and that it was the first appellant's obligation, according to what he was thinking, to sort it

out with Mr Levitan once he has checked this. In contrast thereto, the first appellant testified that he was relying on the second appellant to do this as he was in charge of that section. It is quite clear that the first and second appellants' are trying to put the blame on each other. In contrast thereto Mr Levitan was unaware that the third appellant, through its directors was using his letterhead to confirm that a proper audit was conducted. It is clear from Mr Levitan's evidence that there was no business relationship between his firm and that of the third appellant. The court a quo found that neither the first or second appellants proved their bona fides and acted under the belief that Mr Levitan would sign the necessary reports. The court a quo found that both the first and second appellants purported to certain people that they are allowed to do certain work, which they did, to the detriment of those people to act to a loss of themselves. In reaching this conclusion the court a quo took into account that both the first and second appellants have been involved in this type of business at Joy Finance for many years. They knew exactly what they were entitled to do and what was disallowed by law.

[15] The format of rule 70 reports that were completed and submitted to the LSNP by the appellants is structured and worded in such a way that it is totally improbable that the appellants did not know that only a registered auditor was allowed to sign off the reports. The second appellant knew that they were not auditors. Therefore they could not and were not allowed to conduct an audit on attorneys' firms or books in terms of rule 70 as auditors. At the time of the commission of the offence the second appellant, a BCom graduate with relevant work experience, was the head of the bookkeeping department of Joy Finance (third appellant) for about three to four years. According to the second appellant's evidence in chief, he confirmed that he indeed completed Exhibits A, C, and E respectively. The three exhibits relate to the audit reports of Xenophontos Attorneys, Terreblanche Incorporated, and Botha Attorneys respectively. The three reports are in fact the official reports on the official form to be completed by an independent auditor which is then after completion forwarded to the LSNP. The form starts off with the provisions of the Attorney's Act as well as the provisions of the rules applicable to audits as specified in the rules of the LSNP. There is a clear reference in the document that such audit was done in accordance with the statements of the South African Auditing Standard applicable to

special purpose audit engagements and the guide issued by the South African Institute of Chartered Accountants on "Guidance for Auditors: The Audit of Attorneys' Trust Accounts in terms of the Attorney's Act no. 53 of 1997 and the applicable rules of the provincial Law Societies". Taking into account that the second appellant made a concession that he completed these forms, one must have regard to the fact that during the State's case, no specific individual could be linked to the physical completion of the relevant reports and/or the covering letters until Mr Levitan was requested by the second appellant's legal representative during Mr Levitan's cross-examination, to fetch his office file to refresh his memory in connection with certain documentation. The matter then stood down and the court proceeded with the evidence of another witness. When Levitan returned to court he gave evidence of a business card with the second appellant's handwriting on it, which he coincidentally found in the file. He confirmed that, although he is not a handwriting expert, the handwriting which appeared on Exhibits A, C, and E was similar to that of the second appellant.

[16] There is no doubt in my mind that the second appellant, being aware of the existence and the contents and provisions of rule 70, was fully aware of the fact that neither himself, the first nor the third appellants, were entitled or allowed to conduct an audit on the books of practicing attorneys. The act is abundantly clear. Only a registered and qualified auditor is allowed to do such an audit. The second appellant's so-called reliance on a working relationship between the first appellant and Levitan is of no consequence. None of them were entitled to do the work that they did. A working relationship to do an audit would be contra bones mores and therefore of no force and effect. According to the second appellant's version he never discussed with the first appellant the arrangement and/or process that should follow once the third appellant had completed the figures in the rule 70 report. He would just leave it on the desk of the first appellant. He must have known that no auditor would sign off an auditor's report taking personal responsibility for what he has signed if he has no knowledge of what took place during the audit. An auditor signing of such a report without having any knowledge would take personal responsibility for any shortcomings in the report if and when it is discovered. Common sense dictates that if the second appellant was responsible for the audit as

head of the bookkeeping department, he would have discussed his audit with the first appellant before the signing of the reports in order to complete the process. It is highly improbable that there could have been this big silence between the first appellant and the second appellant who was the head of the bookkeeping department. It is furthermore highly improbable that the second appellant believed that the signing off of the reports was being dealt with properly according to rule 70. No arrangements were made between him and the first appellant for the auditor who was going to sign off the reports (whether it was Levitan or another auditor) to liaise with him on some level or other in order to do spot-checks or examine on a test basis the accounting records of the attorneys before signing it off by the auditor. The improbabilities in the defence's version are supported by Mr Levitan's complete denial of any working relationship between himself and any of the appellants.

[17] To my mind the appellants knowingly made a false representationthat they were Alan Levitan and Associate Auditors whereas in truth, they were not. In addition they wilfully persisted in their operations. To my mind this operation constituted wilful deceit by them.

[18] Similarly the argument that the books were in order and therefore no real or potential prejudice was suffered is certainly without any merit. There was always a danger that had the books not been in order, the good name of Alan Levitan and Associate Auditors' might fall into disrepute. In this case however, the affected legal firms had to resubmit other audited statements by properly registered firms of auditors in compliance the law and the relevant statute. In this regard fees had to be paid. To this extent therefore, they suffered real prejudice. In addition, the fact that Fidelity Funds certificates could not be issued at that point in time caused them further prejudice. The conviction is in order.

[19] It remains to deal with the question of sentence. The principle of our law applicable in this regard is simple. The trial court retains discretion in imposing a sentence (or sentences) that is suitable given the peculiar circumstances of each case. In *S v Ingram* **1995 (1) SACR 1** (A) at 8i-9b, Smalberger JA said:

'It is trite that the determination of an appropriate sentence requires that proper regard be had to the triad of the crime, the criminal and the interests of society. A sentence must also, in fitting cases, be tempered with mercy.... Circumstances, however, vary and the punishment must ultimately fit the nature and seriousness of the crime. The interests of society are not best served by too harsh a sentence; but equally so they are not properly served by one that is too lenient. One must always strive for a proper balance. In doing so due regard must be had to the objects of punishment.'

[20] In mitigation it was placed on record that first appellant is 52 years of age, married and a father to three children one of whom was still a dependent minor. The second appellant was 43 years of age at the time, divorcee but a father to a minor child. None of them had previous convictions.

[21] I am not persuaded that the sentences imposed on the appellants, given the scale and circumstances under which these offences were committed, are shockingly inappropriate or that they induce any kind of shock. In the contrary, they border on the lenient side. It is clear from the evidence that this elaborate fraudulent scheme was well thought out and planned. The fraudulent conduct endured repeatedly and for a lengthy period of time.

[22] In the result I propose the following order:

1. The appeal against conviction and sentence by all three appellants on the 6 counts of fraud is dismissed.

MUDAU TP

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

DE VOS J

JUDGE OF THE HIGH COURT

Date of Hearing: 3 February 2015

Date of judgment: 3 February 2015

APPEARANCES:

For the appellants: Mr G H Ferrar
: Mr G Gioia

For the respondent : Adv L Koch
: NPA