

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO. A351/2014

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
24/04/2015 <i>ELM busi</i>	

29/4/2015

In the matter between:

ELVIS LERATO MOSELE

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

HEARD ON: 16 APRIL 2015

JUDGMENT ON: 29 APRIL 2015

TSATSI, AJ

INTRODUCTION

1. These were appeal proceedings. The appellant was tried in the Magistrate Court of Bethal, on a charge contravening the provisions of section 1(1) (a) read with sections 1 (1) A, 1(2) and 2 of the Trespass Act 6 of 1959 ("the Act"), read with section 250 (1) (d) of the Criminal Procedure Act No 51 of 1977. The appellant pleaded not guilty but was found guilty as charged. He was given a fine of R2000.00 (Two Thousand Rand) or two years imprisonment, R1000.00 (One Thousand Rand) thereof was suspended for a period of three years. The appeal against the conviction and sentence are with leave of the court *a quo*. The respondent supported the conviction and sentence.
2. The grounds of appeal on behalf of the appellant were as follows:

As regards conviction:

- 2.1 The court *a quo* erred in giving more emphasis on the evidence of the state witness who could not prove that he was duly appointed to be the person in charge of the test ground.
- 2.2 The court *a quo* erred in disregarding the evidence of the appellant who testified that on the day in question he did have permission of Mr Mtshali, the person in control of the license department and that he was not training his students but he was there for the purpose of testing his students.
- 2.3 The court *a quo* erred in not considering the document produced by the appellant as Exhibit "B" which contained the names of the students.

As regards sentence:

- 2.4 The court *a quo* erred in giving the appellant a fine of R 2000.00 (Two Thousand Rand), R 1000.00 (One Thousand Rand) thereof suspended for three years on condition that the appellant does not commit such an

offence within the said period. The submission made on behalf of the appellant was that the sentence evoked a sense of shock, considering the personal circumstances of the appellant that he is a first offender and that his previous conviction of assault of 1994 should have been disregarded by the court.

3. The events giving rise to the charges upon which the appellant was convicted and sentenced are summarized thus: Mr Hendrick Johannes Olivier ("Mr Olivier") testified as follows: On 28 November 2013 he was working as a Senior Station Manager at the Govan Mbeki Fire Brigade. His duties involved supervising the Fire Brigade Station and the testing grounds of Govan Mbeki Municipality. The appellant's private driving school called Rise and Shine used the premises to train his trainees for driver's license. According to him the appellant contravened the Circulars from the Director – General of the Department of Transport of Mpumalanga, which provides for the prohibition of the use of the testing grounds by driving schools. There were circulars placed at the front door of the licensing office prohibiting the use of the testing grounds by the driving schools and private persons for own use.
4. Mr Olivier further told the court that Mr Mtshali did not have authority to give permission to the appellant's driving school to practice on the premises. Under cross examination Mr Olivier told the court that Mr Mtshali was the first to be employed at the testing ground which means Mr Olivier was employed after Mr Mtshali. He further told the court that Mr Mtshali was the one who was in charge of the testing ground. Mr Olivier was asked by the appellant's legal representative what time was it when he found the appellant's car parked at the premises. His answer was that it was 7h30. He further told the court that Mr Mtshali starts work at 8h00. The legal representative for the appellant challenged Mr Olivier and asked him how many trainees were on the premises and being trained by the appellant. Mr Olivier's response was that he saw only one trainee in the truck. At the time the appellant was talking to Mr Mtshali. The appellant's legal representative wanted to know why did Mr Olivier not obtain the name of the trainee that he saw in the appellant's truck. His answer was that it was not the trainee that was being charged it was the owner of the driving school. The appellant's legal representative contended that the appellant was allowed to enter the premises for the purpose of testing his trainees.

5. The appellant took the stand and told the court that it was correct that he parked at the premises on the day in question. He told the court that Mr Mtshali was the person in charge of the premises and testified that Mr Mtshali gave permission for his truck to be on the premises. According to the appellant one of his learner drivers was booked for the test the same morning his truck was parked on the premises. He was not practising at the test ground, he was there for the purpose of a test for his learner driver. The appellant's version was that he did not see the circulars preventing the use of testing grounds when the truck was booked for a test. He told the court that he told Mr Olivier that he was not practising at the test ground. He further told Mr Olivier that he was there for the purpose of a test for his learner drivers.
6. Under cross examination the appellant told the court that the license office opens at 7h00. The prosecutor disagreed with the appellant and told the court that the licence office opens at 8h00. The appellant further told the court that he could not read English. He said that he was good in Zulu but not in English. This was the reason why he did not see the notices that prohibited practicing on the premises. The prosecutor challenged the appellant and asked him how he ran his driving school business if he could not read English. The appellant answered by saying that he had people who assisted him in running the business. The prosecutor confronted the appellant and told him that Mr Olivier did explain the contents of the notices to him in previous occasions and explained why the appellant was not permitted to practice on the premises. The appellant insisted that he was not good in English but in Zulu.
7. At the end of the states' case the appellant applied in terms of Section 174 of the Criminal Procedure Act 51 of 1977 for the discharge which the court refused.
8. The issue in this matter was whether or not the appellant committed an offense of trespassing in terms of section 1 (1) of the Act read with section 250 (1) (d) of the Criminal Procedure Act 51 of 1977. The other issue was whether or not the sentence handed down against the appellant was appropriate.
9. The legal representative for the appellant submitted that the person in charge of the testing section for the driver's licence was Mr Mtshali not Mr Olivier. This was based on the fact that Mr Mtshali was employed as the Chief Testing Officer. In addition the appellant has been in possession of the driving school business permit and he was

allowed to let his students be tested for either a learner's or driver's licences. His further submission was that the appellant was dealing with Mr Mtshali on a daily basis. Even though Mr Mtshali was an important witness the state failed to call him as a witness to testify against the appellant. According to the appellant's legal representative this was an indication that the appellant was entitled to an acquittal.

10. Counsel for the respondent echoed the words of the appellant's legal representative that although Mr Mtshali was a vital witness he was not called by either the state or the defence. He submitted that there was overwhelming evidence against the appellant. He further submitted that the appellant failed to discharge the reverse onus of proving that he does have permission to be on the premises

11. Section 1(1) of the Trespass Act 6 of 1959 ("the Act") provides that:

"(1) Any person who without the permission-
(a) of the lawful occupier of any land or any building or part of a building; or
(b) of the owner or person in charge of any land or any building or part of a building
that is not lawfully occupied by any person, enters or is upon such land or enters or is in
such building or part of a building, shall be guilty of an offence unless he has lawful
reason to enter or be upon such land or enter or be in such building or part of a
building".

12. Section 250 (1) (d) of the Criminal Procedure Act provides that :

"(1) If a person would commit an offence if he-..... (d) was present at or entered any
place, without being the holder of a licence, permit, permission or other authority or
qualification (in this section referred to as the 'necessary authority'), an accused
shall, at criminal proceedings upon a charge that he committed such an offence, be
deemed not to have been the holder of the necessary authority, unless the contrary is
proved".

13. The phrase "unless the contrary is proved" means that the presumption may be rebutted by proof on a balance of probabilities.¹ Absent such proof the court may be obliged to convict the accused person despite the existence of reasonable doubt. The presumption falls within the provision of "reverse onus", which had been held to be

¹ See R v Olivier 1959 (4) SA 145 (D) at 145H.

unconstitutional by the Constitutional Court.

14. The constitutionality of the onus placed on an accused person was discussed in the case of: **S v Singo [2002] ZACC 10; 2002 (2) SACR 160 (CC)**. The court found that the reverse onus was inconsistent with the right to be presumed innocent. It is penal in nature and offends against the constitutional right of an accused to a fair trial (sections 35(3) of the Constitution of the Republic of South Africa Act, 108 of 1996 [the Constitution]). The section 36 limitation of rights clause of the Constitution does not save it.
15. The Constitutional Court held in **S v Zuma 1995(2) SA 642 (CC); 1995(4) BCLR 401 (CC)** at para 33, that the presumption of innocence is not new to our legal system. In that case the court was concerned with the constitutionality of section 217(1)(b) (ii) of the Criminal Procedure Act, 51 of 1977 which also contained a reverse onus provision. In interpreting section 25(3)(c) of the Constitution, Kentridge AJ, found the Canadian cases to be of particular assistance since the Canadian Charter of Rights and Freedoms is similarly structured to chapter 3 of our Constitution. Section 11 (d) of the Canadian Charter of Rights and freedoms provides that the accused person : *"to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal"*
16. The Canadian Supreme Court has on numerous occasions held that section 11(d) will be breached where a presumption has the effect that an accused person may be convicted while a reasonable doubt exists as to his or her guilt.²
17. In **Nkhopane 1962 (4) SA 279 (O) 280 C**, the court held that the state bears the onus of proof beyond a reasonable doubt in such cases of trespass and section 35 (3) (h) of the Constitution protects the appellant because his right to remain silent will be violated (We were referred to this case by the appellant's legal representative).
18. The principle adopted in the case of **Badenhorst 1960 (3) SA 563 (A) 566 and Brown 1978 (1) SA 305 (NC) 308 C**, was that for the accused to be charged with the crime of trespassing he must have entered the premises unlawfully and remained

² See R v Oakes 26 DLR (4th) 200 (1986) at 222; S v Bhulwana; S v Gwadiiso (CCT 12/95;CCT11/95 [1995] ZACC).

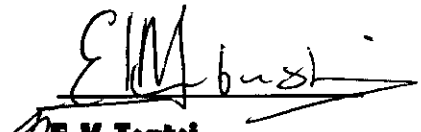
therein without the consent or the permission of the lawful occupier or the owner (we were referred to this case by the appellant's legal representative).

19. In interpreting and applying the provisions of s. 1 of the Act the court in ***R v Venter* 1961 (1) SA 363 (T)**, held that a charge of trespass under the Act cannot succeed unless there is *mens rea*. The form of culpability required for the crime is intention. *In casu* the appellant told the court that he was given permission by Mr Mtshali to park his truck on the premises. He also told the court that he could not read English therefore he could not understand the contents of the circulars prohibiting practising on the premises. However, at the material time the circular prohibiting practicing did not affect him as he was not practising on the premises.
20. A reverse onus clause is a provision within a statute that shifts the burden of proof on the individual specified to disprove an element of a definition of a crime. As stated above the reverse onus is unconstitutional and should not have been relied on by the court *a quo*. My view is that there was merit in the appeal against the conviction. There was as a result a need for this court to interfere with the conviction.
21. Having considered the totality of the evidence, I am of the view that the appellant's version is reasonably possibly true. The appellant has shown that he had no intention to contravene the provisions of the Act. Therefore the court *a quo* should have concluded that the necessary *mens rea* was absent on the part of the appellant. The appellant was there to have one of his trainees to undergo a test. As a result the appellant should have been acquitted of all the charges.
22. Since the conviction could not stand, the appeal against the sentence should succeed.
23. In the result the appeal against the conviction and sentence should succeed.

ORDER

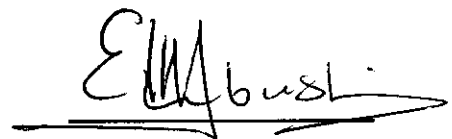
24. I would therefore propose the following order:

24.1 The conviction and sentence in respect of the charge of trespassing imposed by the Court *a quo* are set aside.


E.K. Tsatsi

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered,


E.M. Kubushi

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:

MR T.P MOLOTO

Instructed by:

T.P MOLOTO COMPANY INC. ATTORNEYS

Pretoria

On behalf of the respondent:

Adv E.V SIHLANGU

Instructed by:

DIRECTOR OF PUBLIC PROSECUTIONS

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