

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No.: A183/2013

In the appeal between:

DANNY MEKGOE

Appellant

and

THE STATE

Respondent

CORAM:

DAFFUE, J *et* NAIDOO, J

JUDGMENT BY:

DAFFUE, J

HEARD ON:

3 MARCH 2014

DELIVERED ON:

13 MARCH 2014

INTRODUCTION

- [1] This is an appeal with leave of this court, per Ebrahim J and Thamage AJ, against the appellant's conviction on a count of fraud and his sentence of 15 years' imprisonment by the regional court sitting at Bothaville.
- [2] Although leave was granted to appeal against both conviction and sentence, Mr Nel on behalf of appellant made it clear in his heads of argument and his introductory remarks when he addressed us in open court that appellant did not seek leave to appeal against sentence, that the aforesaid judges granted such leave erroneously and that appellant wishes to appeal his conviction only. Consequently he refrained from addressing any arguments to the court *a quo* and to us to the effect that the prescribed minimum sentence of 15 years' imprisonment was

an inappropriate sentence. I shall therefore consider the merits of the appeal pertaining to the conviction only.

THE COURT A QUO'S CONCLUSIONS

[3] I shall tabulate the material facts *infra* but for purposes of an understanding of this judgment it is appropriate to mention the following:

- (i) On 27 November 2008 a cheque of the Nala Municipality ("the municipality") in Bothaville in the amount of R665 293.12 was deposited into the account of Mekgoe Transport CC held with First National Bank (FNB) in Bothaville. Upon queries raised by a bank official, payment of this cheque was stopped eventually. Mekgoe Transport CC did not deliver any services to the municipality and was not a creditor of the municipality at any stage. Fortunately and as a result of payment of the cheque having been stopped, the municipality did not suffer any damages. Appellant was the sole member of Mekgoe Transport CC at that stage. The court *a quo* considered the evidence, mainly circumstantial evidence on behalf of the State, as well appellant's version, and convicted appellant after concluding that it was totally improbable that senior members of the municipality such as the municipal manager and chief financial officer would be involved in a conspiracy to discredit appellant and in the process causing a cheque of the municipality to be deposited into the cheque account of appellant's close corporation.

THE GROUNDS OF APPEAL

[4] Appellant relied on several grounds of appeal which will merely be tabulated in this paragraph, but considered in detail *infra*. The grounds of appeal contained in the petition and further elaborated upon in the heads of argument and in oral argument are the following:

- 4.1 It is alleged that the court *a quo* misdirected itself in not assessing the evidence in its totality and that it erred in finding that the proven facts support only one reasonable inference, namely that appellant actively assisted in defrauding the municipality.
- 4.2 The court *a quo* failed to draw a negative inference against the State for failing to call the municipality's chief financial officer, Mr Shongwe, as a witness.
- 4.3 The court *a quo* erred in rejecting the evidence of the appellant and erred in reasoning that it was improbable that a person (or persons) would attempt to discredit the appellant by ensuring that money is deposited in the bank account of his close corporation.
- 4.4 The trial court erred in not considering the municipal manager's possible involvement in the conspiracy to discredit appellant.
- 4.5 The court *a quo* erred in finding that the essential elements as set out in the charge sheet had been proven by the State and/or that the offence of fraud had been proven.

THE MATERIAL FACTS

[5] Several material facts were not in dispute and thus common cause. The following facts are tabulated:

- (i) Appellant was in the employ of the municipality, and in particular the finance department thereof, as a creditor's clerk during the relevant period.
- (ii) Appellant holds a B Com accounting degree from the Free State University and was fully acquainted with the JD Edwards

program used by the municipality until August 2008 in terms whereof cheques were generated by computer.

- (iii) Appellant had knowledge of computers and often assisted other employees in the finance department in the absence of the IT manager. He had access to the computer on which the particular cheque (and at least two other cheques irrelevant for purposes hereof) had been generated. These cheques were generated on the JD Edwards system which was not in use anymore during November/December 2008.
- (iv) On 13 November 2008 the appellant caused Mekgoe Transport CC ("the CC") to be registered with the Companies and Intellectual Properties Commission. He was the sole member of the CC at the relevant time between 13 November 2008 and 4 December 2008.
- (v) A day after 13 November, on 14 November 2008, appellant applied to the First National Bank ("the FNB"), Bothaville for the opening of a cheque account in the name of the CC. He was the sole signatory on the account according to the relevant official documents handed in as exhibits.
- (vi) In the event of service delivery contracts to a value in excess of R200 000.00 the municipality had to make use of tender processes and in such cases the procedure to obtain payment can be described as follows:
Once a service provider has done services in respect of an approved tender, it will provide the municipality with a request for payment together with the approved order in respect of the services to be delivered, as well as the service provider's invoice. These documents are referred to the budget officer who shall indicate that funds are available whereupon the documentation is referred to the chief financial officer, as well as

the municipal manager who have to approve payment. From there the documents with payment approval are referred back to the creditors' division in the finance department whereupon a cheque is processed in favour of the service provider. The cheque together with the request for payment and all supporting documentation is then referred to two of the four employees at the municipality who were entitled to sign cheques on behalf of the municipality.

- (vii) The four signatories were Mr Thithi, the municipal manager, Mr Shongwe, the chief financial officer, Mr Nxumalo, the director of technical services and Ms Dreyer, the assistant town treasurer. Once the cheque is signed by any two of these four employees, it is made available to the service provider.
- (viii) As stated Ms Dreyer was the assistant town treasurer. At that time she had been in the employ of the municipality for 26 years and was still so employed when she testified. The other three employees have left the municipality's services in the meantime.
- (ix) Neither the CC, nor appellant contracted with the municipality for any service delivery at any stage and no amount was ever payable by the municipality to either, save in respect of appellant's normal monthly salary as a junior employee.
- (x) On 27 November 2008 the municipality's cheque dated 26 November 2008 in the amount of R665 293.12 in favour of Mekgoe Transport CC and was deposited into the aforesaid cheque account of the CC held at FNB. This was done a mere 13 days after the account of the CC was opened and *ex facie* the bank statement filed as an exhibit no other deposits were made prior to or after this deposit during the period 13 November to 31 December 2008.

- (xi) Ms MacKenzie, a teller at FNB, accepted the above deposit on behalf of the bank. Although an attempt was made to show that she could positively confirm that appellant personally made the deposit, it is apparent that she could not do so and the court *a quo* correctly did not find as such.
- (xii) Ms Barendse, a relationship analyst at FNB, testified that FNB had an internal system in place in terms whereof big deposits with the bank are investigated. As part of her duties she contacted the municipality in respect of the deposit of the aforesaid cheque. Firstly, she spoke to Ms Dreyer of the municipality, who indicated that she was not aware of the cheque and had to investigate whether there were any supporting documents in respect of the cheque, but who also advised that Ms Barendse should phone Mr Shongwe, the chief financial officer. He was not helpful at all. Later that day she contacted Ms Dreyer again who indicated that she had to stop the cheque. As the bank could not rely on telephonic instructions, she was requested to prepare a letter with instructions to that effect from the municipality. However the next day a letter was found which had been pushed underneath the door of her manager by an unknown person, it being on a letterhead of the municipality ostensibly signed by the municipal manager indicating that the cheque should be paid out. She phoned Ms Dreyer again upon receipt of this letter whereupon Ms Dreyer delivered by hand the first of two written instructions with two signatures of her and Mr Nxumalo, requesting the bank to stop payment of the cheque.
- (xiii) The first written instruction from the municipality was not accepted by the bank, who insisted on an improved written instruction. Ms Dreyer had contact with Mr Shongwe who instructed again that payment of the cheque be stopped,

whereupon a new letter, again containing the signatures of Mr Nxumalo and Ms Dreyer, was delivered to the bank.

- (xiv) Mr Thithi instructed Mr Shongwe to ensure that payment of the cheque is stopped and insisted that, if required, the municipality's attorneys should be instructed to inform the bank that it would be held liable if the instructions to stop payment of the cheque were not adhered to. A letter was in any event written by the attorneys and delivered to FNB. This was handed in as an exhibit as well.
- (xv) On 2 December 2008 appellant handed in his written resignation to the municipality in the absence of Mr Thithi who received it the next day and accepted the resignation.
- (xvi) On 4 December 2008 appellant obtained a statement from FNB indicating that the cheque of R665 293.12 has been deposited into his bank account, but that the credit entry was reversed on 2 December 2008. On his version he contacted Mr Shongwe on 4 December 2008 about this, who indicated to him that a mistake had been made and that it would be rectified.

LEGAL PRINCIPLES

- [6] Where an appeal is lodged against a trial court's findings of fact, the court of appeal must take into account that the court *a quo* was in a more favourable position than itself to form a judgment. When inferences from proven facts are in issue, the court *a quo* may also be in a more favourable position than the court of appeal, because it is better able to judge what is probable or improbable in the light of its observations of witnesses who have appeared before it. Therefore, where there has been no misdirections on fact a court of appeal assumes that the court *a quo*'s findings are correct and will accept these findings unless it is convinced that it is wrong. See **R v Dhlumayo and Another** 1948 (2) SA 677 (AD) at 705 - 6.

- [7] Therefore, in order to interfere with the court *a quo*'s judgment it has to be established that there were misdirections of fact, either where reasons on their face are unsatisfactory, or where the record shows them to be such. See also **S v Monyane and Others** 2008 (1) SACR 543 (SCA) at para [15] where the Supreme Court of Appeal stated that it is only in exceptional cases that that Court will be entitled to interfere with the trial court's evaluation of oral evidence. There may also be misdirections, though the reasons were satisfactory, if it has been shown that the court *a quo* had overlooked other facts or probabilities.
- [8] The State's case was largely based upon circumstantial evidence. In **R v De Villiers** 1944 AD 493 at 508 - 9 the Appeal Court referred to the well-known *dictum* in **R v Blom** 1939 AD 188 at 202 pertaining to the test to be applied when reliance is placed on circumstantial evidence and pointed out that it is not each proved fact that must exclude all other inferences, but the facts as a whole must do so, and continued as follows:

“The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way: the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.”

See also **S v Ntsele** 1998 (2) SACR 178 (SCA) at 182b - f cited with approval in **S v Boesak** 2000 (1) SACR 633 (SCA), para [13] at 638f

and **S v Reddy and Others** 1996 (2) SACR 1 (A) at 8c – g and especially the following *dictum*:

“A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. . . . Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone. . . .”

As mentioned in these three judgments the ambit of the concept of reasonable doubt does not go so far that the State must prove the guilt of the accused “bo elke sweempie van twyfel”, or put otherwise, “beyond a shadow of a doubt.”

- [9] It is acceptable in evaluating the evidence in its totality to consider the inherent probabilities. Heher AJA (as he then was) dealt with this aspect as follows in **S v Chabalala** 2003 (1) SACR 134 (SCA) at para [15]:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

- [10] Although it is permissible to test the accused’s version against the inherent probabilities, it cannot be rejected merely because it is improbable. It can only be rejected on the basis of the inherent probabilities if it can be said to be so improbable that it cannot

reasonably possibly be true. See: **S v Shackell** 2001 (2) SACR 185 SCA, para 30 at 194h.

AN EVALUATION OF THE COURT A QUO'S FINDINGS, THE EVIDENCE AND THE SUBMISSIONS BY COUNSEL

[11] In his plea explanation Mr Nel on behalf of appellant stated in the court *a quo* that all allegations in the charge sheet were denied and that appellant “was the victim of individuals employed by the Nala Municipality, to be discredited”. This extremely vague statement remained as vague throughout the State’s case. In cross-examination of Ms Dreyer Mr Nel tried to establish whether she was aware of any conspiracy to discredit the accused, but she was not of any assistance. He referred to aspects such as jealousy amongst politicians such as political office bearers and municipal officials, but she could not be of any assistance as she was unaware of anything untoward. Fact of the matter is that it was never put to her that either the municipal manager, Mr Thithi, or Mr Shongwe, the chief financial officer, or Mr Nxumalo, the director technical services, and/or anybody else in the municipality, or all of them, had a grudge against the appellant to the extent that they would go to the extreme of discrediting him in the manner suggested by Mr Nel in argument before the trial court and before us. What is amazing is that Mr Nel confronted Ms Dreyer with vague questions in respect of possible jealousy amongst political office bearers and municipal employees without considering that in the municipal sphere political office bearers are the mayor, speaker and councillors. No statement has been made that any politicians were involved in a conspiracy.

[12] It was never put to Ms Ndonga (Kalake), Mr Nxumalo or Mr Thithi, all three being employees of the municipality and colleagues of appellant and Ms Dreyer at the time, that either and/or all of them and/or Mr Shongwe were part of a conspiracy to discredit appellant.

[13] Mr Nel submitted that Mr Shongwe should have been called as a witness by the State. The failure to do so warranted a negative inference to be drawn. He submitted that the State failed to contradict the allegations that:

- (i) it was Mr Shongwe who intended to discredit the appellant; and
- (ii) that Mr Shongwe told the appellant that they made a mistake and that it would be rectified.

These submissions are without any merit as these two allegations were never put to any of the State witnesses or referred to in the plea explanation. It was only during the appellant's evidence that he belatedly came up with this version. When I confronted him in this regard Mr Nel argued as an afterthought that there was a duty on the State to ask the court to re-open the State's case after the appellant's evidence was led or alternatively to request the court to call Mr Shongwe as a witness. This argument does not hold any water. If the defence believed that Mr Shongwe's evidence could advance its case, Mr Nel was free to call him. Mr Shongwe's evidence could not advance the State's case. Insofar as hearsay evidence was led in respect of his instructions to stop payment of the cheque, there was no objection thereto by appellant's experienced counsel and Mr Thithi eventually also confirmed his instruction to Mr Shongwe in this regard which has not been contested and is thus common cause. Even when Mr Thithi testified, no statements were made to him that he was part of a conspiracy against appellant, but when appellant testified he suggested that Mr Thithi was involved in the conspiracy.

[14] Mr Nel relied on **S v Ramroop** 1991 (1) SACR 555 (N) at 559e – f and **Olivier v Minister of Safety and Security and Another** 2008 (2) SACR 387 (WLD) at 393c – e in support of his submission that a negative inference should be drawn against the prosecution for failing to call Mr Shongwe as a witness. These two judgments do not support

his argument and it would probably be more apposite to refer to the often quoted judgment of **S v Teixeira** 1980 (3) SA 755 (A) and the *dicta* of Wessels JA at 763G – 765C. The appeal in that matter succeeded on the basis that the State elected to rely on the evidence of a single witness where the accused relied on self-defence, whilst an available State witness who might have corroborated the evidence of the single witness was not called to testify. The Appeal Court found that the State's failure to call the further witness justified the inference that in counsel for the State's opinion his evidence might possibly give rise to contradictions which could reflect adversely on the credibility and reliability of the single witness.

- [15] *In casu* there is in my view nothing that Mr Shongwe's evidence could contribute to a proper adjudication of the dispute. Appellant's legal representatives were in possession of his witness statement and if they believed that anything contained therein could be used to the advantage of the appellant, they would be free to call him to testify on behalf of appellant. Both Ms Dreyer and Mr Thithi testified about the steps taken to arrange the stop payment of the cheque and their versions were not seriously contested. It is so that it appears from the evidence of Ms Barendse and to an extent that of Ms Dreyer that Mr Shongwe was showing a certain amount of apathy when informed about the cheque, but he surely was responsible, together with Mr Thithi, for giving instructions that payment of the cheque be stopped. This was never contested. Mr Nel referred to him as a very important "cog in the wheel" and that his evidence was of material importance. I disagree based on the uncontested evidence that he gave instructions that payment of the cheque be stopped which was indeed done. In any event, it was never stated or even suggested that he issued instructions that the cheque be issued and/or that he signed the cheque and/or that he completed the deposit slip and/or deposited the cheque into the CC's bank account and/or that he was in cahoots with others to act accordingly.

- [16] It was never put to Messrs Nxumalo and Thithi or Ms Dreyer that the CC registered as service provider with the municipality and/or that bank account details and other information of the CC were made available to the municipality or any of these witnesses and/or Mr Shongwe to be utilised by anyone or more of them to discredit appellant by causing the cheque to be issued and deposited into the CC's bank account. Appellant came up with this version for the first time in his evidence in chief in order to support an allegation that it would be possible to frame him.
- [17] Appellant's version varied as time went by. His speculation became assertions when he testified. Then for the first time, he nominated certain individuals as alleged culprits. This he refrained from doing when his counsel was required and duty bound him to put his version to the State witnesses.
- [18] Appellant was fully aware of the JD Edwards pay system and the manner in which cheques were generated by the municipality until August 2008, which is about three months prior to the depositing of the relevant cheque *in casu*. He is computer literate and used to assist other employees with their computers in the absence of the IT manager. There is in my view no doubt that he was in a position to generate cheques by using the defunct system and there is no evidence that this system was invalidated and/or removed from the computers prior to allowing appellant an opportunity to generate the cheque *in casu* and also two further cheques dated 3 and 8 December 2008 respectively. The cheque numbers followed each other in numerical order. The system could be manipulated as it lacked data integrity as testified by Mr Mtwequ. Appellant had full access to the JD Edwards system. He had the opportunity to either on his own, or with the support and co-operation of a co-employee, generate the cheque *in casu* as well as the other two cheques and insert the name of the payee, the amounts and the dates thereon to his liking.

[19] It is not correct that the court *a quo* did not properly evaluate the testimony of appellant and found that because of vague aspects thereof, or even contradictions, his whole version should be rejected as false. The court *a quo* considered his version against the backdrop of the totality of the evidence with regard to the probabilities and improbabilities as well as the merits and demerits of both versions. What is extremely improbable of appellant's version is the fact that he, an employee in a small finance department of a small municipality, alleged in his evidence to be totally oblivious of the circumstances pertaining to the issue and deposit of a cheque in excess of a half a million Rand into his CC's account, the queries by FNB and the communication about the instructions to stop payment, the attempts to have payment of the cheque stopped and that someone even dared to request the bank manager in writing to pay out the cheque notwithstanding instructions to stop payment. Even Mr Nel, during his oral argument, initially indicated that appellant was aware of these events prior to the 4th of December 2008, but when he was alerted to the fact that his client's evidence does not support such submission, he submitted that appellant on all probabilities should have been aware of the controversy and that he in essence lied when he informed the court that he heard for the first time about this after his resignation on the 4th of December 2008.

[20] Another strange aspect is the fact that appellant obtained a statement from his bank on 4 December 2008 indicating the deposit of the cheque and the reversal thereof on 2 December 2008, i.e. two days earlier. It is unthinkable that he deemed it necessary to go back to the municipality two days after he has resigned and approach Mr Shongwe, who was the cause or reason for him to resign and to confront him about this aspect. It is also improbable that Mr Shongwe would have told him that they had made a mistake and that it would be rectified. It should have been evident to everybody concerned that a reversal had already taken place and there was nothing to rectify.

- [21] The appellant's problems with Mr Shongwe started on his evidence several months earlier and in May 2008 it turned sour. The feud culminated to such an extent that he received a written warning for not carrying out instructions. It is improbable that he would have resigned on 2 December with immediate effect due to his alleged differences with Mr Shongwe and thereby forfeiting a salary for December when most people are in need of extra cash during the festive season. The probabilities are overwhelming that he became aware that his scheme had flopped when the reversal was effected on 2 December 2008, or even a day or two earlier, and that he would have to face the music in a disciplinary hearing. The easy way out was to resign immediately in the hope that his resignation would be accepted which materialised. In the process the two further cheques which were generated on all probabilities simultaneously with the cheque *in casu* and thus at the stage when he was still employed, became useless as he was properly caught out.
- [22] The probabilities are also overwhelming as the court *a quo* correctly found that the municipal manager and the chief financial officer would be well aware of their statutory responsibilities. If they were to be involved in a conspiracy to arrange for the cheque to be issued in favour of and deposited into the CC's account without it being a service provider and entitled to monies from the municipality, they as accounting officer and the person in charge of the municipality's finances respectively, would be the first to take the blame and be held accountable. On all probabilities they would not take such risk. It is accepted that the municipality's systems lacked security and data integrity, especially relating to the JD Edwards payment system and this presented an opportunity to commit fraud.
- [23] Although the signatures on the letter to the bank requesting that the cheque be paid out and the deposit slip resemble that of Mr Thithi, he disavowed that these documents contain his signature. However this resemblance possibly led to Mr Thithi being regarded as a suspect at

some stage, although no criminal action was taken against him *ex facie* the record. I must say that both his and appellant's signatures are good examples of scribbles, although the one signature tends to lean over to the left and the other to the right, but to a certain extent they look not too dissimilar. Mr Nxumalo gave three different versions as to whether the one signature on the cheque was his or not. It is so that the signature on the cheque looks similar to his, but obviously it would be incorrect as a non-expert to say that that signature was in fact his, where he himself is uncertain.

[24] Mr Nel has admitted that when a person deposits a cheque into his or his company's bank account or causes such a cheque to be deposited by someone on his instructions, he pretends to the bank that the cheque would be paid and that it is otherwise in order. It is common cause that neither appellant, nor his CC was entitled to receive payment from the municipality as no services had been rendered to the municipality and in any event, it is also common cause that there was no supporting documents to substantiate that payment of the amount was due to the CC. In my view Mr Swanepoel on behalf of the State submitted correctly that the misrepresentation was to the effect that the impression of legitimacy was created, that the correct procedures were followed and that the cheque should be met with payment by the bank. The court *a quo* correctly found by way of inference that the appellant's conduct met all the requirements to sustain a conviction. In the circumstances I do not believe, as Mr Nel urged us to find, that it was necessary for the State to prove that the signatures on the cheque were indeed forged.

[25] The fact that there was indeed no direct evidence that appellant knew that the cheque was issued and deposited into his CC's bank account does not present an insurmountable hurdle which, if the State cannot overcome it, the appeal should succeed. The applicable test pertaining to circumstantial evidence must be considered. Bearing in mind the totality of the evidence, the proved facts are such that the only

reasonable deduction to be made from them is that appellant either, on his own, or with the co-operation of a co-employee or co-employees defrauded the municipality by generating the cheque in favour of his CC and arranging for the deposit thereof in the CC's bank account. Mr Nel's final submission that "it is therefore reasonably possible that someone used such details and deposited the cheque without the knowledge or approval of the appellant" is so far-fetched and absolutely improbable that it must be rejected as false.

CONCLUSION

[26] No arguments have been advanced to persuade me that the trial court committed any misdirections regarding the test to be applied in evaluating the evidence or the evaluation as such. The State has proved its case beyond reasonable doubt, or put otherwise, the appellant's version was correctly found to be not reasonably possibly true and thus rejected. In the premises the court *a quo*'s finding cannot be faulted and therefore the conviction should stand.

ORDER

[27] Wherefore the following order is made:

1. The appeal against conviction is dismissed.

J. P. DAFFUE, J

I concur.

S. NAIDOO, J

On behalf of appellant:

Adv. J Nel

Instructed by:
Jacobs Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv. JBK Swanepoel
Instructed by:
Director of Public Prosecutions
BLOEMFONTEIN

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