

IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGH COURT, KIMBERLEY

CASE NO: KAP 217/2007

HEARD: 12/09/2011

DELIVERED: 13 /04/2012

In the matter between:

JOSEPH THAMILESEGOSEBUSI

1ST APPELLANT

KELEBOGILE VIOLA SEBUSI

2ND APPELLANT

and

THE STATE

RESPONDENT

CORAM: PAKATI, AJ *et* HUGHES-MADONDO, AJ

JUDGMENT

HUGHES-MADONDO, AJ

1] The appellants, Joseph Thami Lesego Sebusi and Kelebogile Viola Sebusi, were charged with one count of fraud. On 01 August 2007 and in the Regional court of Kimberley they were convicted. On 05 November 2007 they were each sentenced to a fine of six thousand rand or twelve months imprisonment and a further twelve months imprisonment wholly suspended for a period of five years. Leave to appeal against their conviction was granted by the court below.

2] The fraud charge preferred was that on 04 October 2004 the appellants submitted false claims to Evette Theron of ABSA Brokers that a break-in occurred at 42 Heerengracht, a Guest House, being the property of the appellants. The State intended to prove that there had been no break-in at 42 Heerengracht. In fact the break-in had occurred at Unit C Mulke Close, 66 Gerrit Schoutenlaan, Royldene, the residence of the appellants, on 02 October 2004. Therefore the appellants were not entitled to claim and receive the sum of R82 989.30 from the insurance.

3] The State in their heads of argument aptly summarise the appellants grounds of appeal along these lines:

- a) *The appellants had insured the premises Mulke Close C, Gerrit Schoutenlaan under Outsurance Insurance*

Company, at the time the housebreaking was committed on the 2nd October 2004. They therefore had no reason to misrepresent the insurance company S A Eagle by saying that the housebreaking was actually committed at number 42 Heerengracht Street.

- b) That the first appellant handed suspects of the said housebreaking to the police and in so doing, he was running the risk of the said suspects revealing the address where the housebreaking was actually committed. This clearly showed that the appellants had no intention to defraud the insurance company.*
- c) That a negative inference should have been drawn from the State's failure to call Constable Berries, one of the police officers, who went to the scene.*
- d) That the evidence of the fingerprint expert, Inspector Scheepers was unsatisfactory and contradicted that of Constable Segami.*
- e) That Mr Young, the insurance assessor, had a personal grudge against the second appellant. Furthermore that Mr Young went overboard in his investigations which involved taking statements from the police officers.*
- f) That the appellants were prejudiced in their defence by the State's failure to furnish them with contents of the case docket(Cas 1300/2004) and were further*

prejudiced when the first appellant was cross-examined with regard to the statements that came from the said docket.

4] I intend to deal with what I consider to be the most crucial ground, that is (f) above. This ground highlights one of the fundamental rights in the Constitution of South Africa, that is, the right to a fair trial. If it is found that indeed, the appellants did not have a fair trial and this had a causal impact on the verdict pronounced, then the entire proceedings would have been tainted. The appellants would be entitled to their acquittal.

5] During cross-examination of the first appellant, the State produced the docket the contents of which had not been presented to the appellants nor their representatives before the trial commenced. The docket, Cas 1300/2004, related to a break-in that had occurred at the appellants' neighbour's premises, Unit D, Mulke Close, 66 Gerrit Schoutenlaan.

6] Inspector Scheepers, a witness for the State, testified that his initial encounter with the appellants was when he came to uplift fingerprints, at the appellants' home in Mulke Close, after the break-in had taken place on 03 October 2004. However, the appellants' evidence differed from

Scheepers's. The first appellant said he had met Scheepers in December 2004, when he attended Mulke Close, 66 Gerrit Schoutenlaan. This was in relation to the break-in that had occurred at the appellants' neighbour's premises. The presentation of the docket then came to the fore.

7] The encounter is recorded at page 167 lines 11 to 19 of the record:

"Aanklaer: *So U se Inspecteur Scheepers, as hy se dat hy die 3de dag van Oktober 2004 by Gerrit Schoutenlaan 66 was, vir u en u vrou daar gekry het, se u hy praat'n leuendaaroor?*

Sebusi: *Ja, hy vertel n leuen.*

Aanklaer: *Wat sal rede wees waarom hy 'n leuendaaroor vertel?*

Sebusi: *Ek weet nie. Ek weet nie.*

Aanklaer: *U ken hom van geen kant af nie?*

Sebusi: *Ek weet nie, maar hy is 'n polisie wat ook paar van die mense wat by die Wetgewer werk, wat probeer het om my daar uit te haal en hulle vriende is ook polisie. En hulle is baie groot in die polisie."*

8] The State's attitude toward the aforesaid evidence was that the first appellant was "just making up stories". The first appellant was adamant that Scheepers was lying to the

court. He goes on to say that when he first encountered Scheepers he was requested to sign a blank card, which he did. He did so because Scheepers said this would alleviate him from the task of looking for the first appellant later on in the investigations.

9] In the face of the preceding scenario and the strenuous objection by the appellants' representative to the presentation of the docket, the court below ruled that the State could question the first appellant on the content thereof.

10] What was elicited through cross-examination from the contents of the docket is that the fingerprint cards of this docket were not signed by the first appellant, but rather by S Cronje Junior. In addition, the officer who was responsible for the correlation of the fingerprints was not Scheepers but rather an Inspector Mbatha. Mbatha was never called to verify the documents in this docket, neither was S Cronje Junior.

11] In essence the entire exercise was to discredit the first appellant as regards him having signed a fingerprint card with Scheepers in relation to his neighbour's break-in. To this end reference is made to page 21 of the record, lines 12 to 15: "**Aanklaer**:... Ek se vir u- ek stel dit aan u, by 58D,

Gerrit Schoutenlaan, Mulke Close C, waar daar ingebreeek was op die 26ste Desember 2004 by u buurmense, u het nie geteken vir die vingerafdrukke nie."

Sebusi: *Edelbare, ek dra kennis dat ek slegdokumentegeteken het wat niks gehad het nie en ek het dit ook aan die Hof meegedeel gister...."* (Sebusi's found at page 212 of record, lines 19 to 21).

12] In the analysis of the evidence, it is noted that the magistrate relied on the credibility of the witnesses as a major factor in reaching his decision and in weighing up the State's case against the appellants'. I refer to page 285 of the record, lines 18 of the judgment:

"Die Hof kyk ook na Getuies se houding en optrede in getuiebank."

And lines 23 and 24, further on page 286 lines 1 and 2:

"En ek haal aan, 'the effect of ...in assessing credibility is a matter of judgment and common sense. But it must be remembered that truthfulness of a witness can rarely be determined by demeanour alone without regard of other factors.'"

13] The magistrate goes on to mention that he was impressed by the State witnesses and the evidence they adduced. In

contrast, he was not impressed by the appellants' evidence, especially that of the first appellant. He states that the first appellant's evidence was "not good" and he illustrates his displeasure as follows:

"Sommige verduidelikings van Beskuldigde 1 om die minste te se was absurd. Hy teken volgens hom self vorms sonder dat hy weet wat aangaan omdat die Polisie hom versoek het om vinnig te teken."

14] Ironically, the evidence that the magistrate voices his displeasure in respect of is the same evidence which he had allowed the first appellant to be cross-examined on. Even in light of the fact that the appellants did not have sight of the docket nor had they had the opportunity to adequately prepare with their counsel concerning the contents thereof.

15] At the hearing of this case, counsel for the appellants argued that, by the magistrate allowing the presentation of this evidence in the manner in which it was done, constituted a gross irregularity which amounts to appellants not having had a fair trial.

16] The State on the other hand, submitted that the magistrate was correct when he ruled that the first appellant could be cross-examined on the contents of docket as this was not

prejudicial to the appellants.

17]The State further, submitted that the documents in question were only used to discredit the first appellant's version that Inspector Scheepers attended the house break-in case of the appellants' neighbour in December 2004. The State argued that the documents were made available, during the lunch recess, to the defence whilst appellant was already under cross-examination. Lastly, that the documents "do not touch the core aspect of the fraud" being the charge preferred.

18]It is trite that section 35 (3) of the Constitution of South Africa dictates that the appellants are entitled to a fair trial. This section reads as follows:

"Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." It stands to reason that a criminal trial should be conducted in accordance with the notions of basic fairness and justice. See **S v ZUMA AND OTHERS 1995 (1) SACR 568 (CC)** at 579h, paragraph 16.

19]The presentation of evidence to the first appellant for the first time during cross-examination, to my mind, amounts to

a trial by ambush and as such violates the appellants' right to a fair trial. This amounts to a gross irregularity *per se*. Even so, the crucial issue is whether that irregularity was fundamental and had an adverse impact on the trial and influenced the verdict reached.

20] In **S v SHIKUNGA 1997 (2) SACR 470 (NmSC) at 484B-D, Mahomad CJ** said that:

*"It would appear to me that the test that is proposed by our common law is adequate in relation to both constitutional and non-constitutional errors. Where the irregularity is so fundamental that it can be said that in effect there was no trial at all, the conviction should be set aside. Where one is dealing with an irregularity of a less severe nature then, depending on the impact of the irregularity on the verdict, the conviction should either stand or be substituted with an acquittal on the merits. Essentially the question that one is asking in respect of constitutional and non-constitutional irregularities is **whether the verdict has been tainted by such irregularity.**"* My emphasis.

21] I am of the view that, as the magistrate took into account the credibility of the witnesses in his analysis of the evidence and the fact that this consideration eventually led to the

conclusion reached, as to whose version to accept and who's to reject. It is evident that the irregularity was such that it had a causal impact on the verdict to the prejudice of the appellants.

22]The argument by the State that the evidence did not form part of the core aspect to prove the offence of fraud is not the enquiry that has to be conducted. The enquiry is not whether the irregularity has an effect on proving the charge preferred but, rather, whether that irregular evidence has influenced or had a causal impact on the verdict reached.

23]Having said that it is imperative to cite Heher AJA in **S v CHABALALA 2003 (1) SACR 134 (SCA)** at 139 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. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was*

decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear.”

24]Now if one excludes or omits the said irregular evidence would the magistrate still have reached the verdict that he did. This is the next enquiry to be made. See **S v MAPUTLE AND ANOTHER 2003 (2) SACR 15(SCA)** paragraph [15].

[25]The evidence used to discredit the appellants has been irregular and as such should not have been allowed to weigh against the appellants. The magistratements that many contradictions exist in the State’s case. He also points out that the appellants’ problem centred on the evidence obtained irregularly. On comparison of the two he concludes that the evidence of the State with the contradictions and all was more plausible than the first appellant’s evidence. Even though there is no evidence to verify the documents in the docket that were used to discredit the appellants’ version. It is as clear that the explanation advanced by the appellants was not assessed properly by the court below and was categorised as “not good”

and “absurd”.

26]I am not convinced that the explanation advanced by the first appellant can be discarded as being not reasonably possibly true. At page 93, line 23 to 25 of the record C A Young, the insurance assessor, stated that the first appellant informed him that he had had insurance with Outsurance. This was when they discussed what insurances the appellant had taken out over the property at 42 Heerengracht: “*En in dieselfde tyd toe hy my kom sien, toe noem hy aan my dat hy versekering het by Outsurance.*” When Young was asked if he followed up on this aspect of Outsurance, he responded that it was not his job to do so. The magistrate when faced with the evidence as it stood could not reach a decision beyond a reasonable doubt. This doubt would be whether the appellants had claimed that a break-in occurred at the guest house, as they alleged as opposed to the State’s version that it was reported that it took place at their residential address in Mulke Close.

27]The appellants are therefore entitled to the benefit of the doubt.

In the circumstances the following order is made:

1. The appeal against the conviction is successful.
2. The conviction and sentence are set aside.

W HUGHES-MADONDO

ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

(i) costs of such proceedings

(ii)

I concur

PAKATI

ACTING JUDGE

NORTHERN CAPE HIGH COURT, KIMBERLEY

On behalf of the Appellant:	Adv. P.J. HEYMANS
Instructed by TOWEL and GROENEWALDD	
On behalf of the Respondent:	Adv.R.R. MAKHAGA (Office of the DPP)