FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 418/2010

In the review between:-

THE STATE

and

THAMI MDANTILE

CORAM: HANCKE, J et RAMPAI, J

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 17 MARCH 2011

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[1] The matter came by way of a special review in terms of section 304(4) Act 51 of 1977. The accused was arrested on 3 March 2010 and charged with the offence of fraud. His second appearance in the Bloemfontein District Court was on 11 March 2010. On that day he pleaded guilty to the charge. He was not legally represented. He was found guilty. He was then sentenced to R2 000,00 or 2 (two) months imprisonment in default of payment. The entire sentence was conditionally suspended.

[2] The matter subsequently came to the attention of Mr.

Mokgobo, the district control magistrate. He had some reservations about the correctness of the conviction. He apparently discussed the matter with the district trial magistrate, Mr. Nikamanzi. The two magistrates fundamentally differed. The trial magistrate firmly held the view that the conviction was sound in law, a view not shared by the control magistrate. They jointly caused the matter to be taken up on special review.

[3] Before I deal with the divergent views of the magistrate, I deem it necessary to outline the historical background. The matter was initially allocated to Mthembu AJ. On 20 September 2010 he referred the matter to the Deputy Director of Public Prosecutions and requested for some input by way of written heads of argument.

[4] The director's written comments were dated 11 November 2010. By them Mthembu AJ was no longer acting. The matter was then allocated to Murray AJ. On 15 December 2010 she stated:

> "I have studied the record and the reasons provided by the Magistrate and the Control Magistrate, as well as the

> submissions by Adv Giorgi and fully agree with her conclusion and recommendation.
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> I therefore conclude that the indictment on which the accused was convicted was invalid and that institution of proceedings de novo in terms of Section 324(b) of Act 51 of 1977 would be appropriate in the instant case and that the accused should be charged with the contravention of Section 12(1)(s) of Schedule 1 of Act 9 of 1989.
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> The following order is therefore made:
>
> 1. The conviction and sentence is set aside."

[5] On 30 December 2011 Ms Rose Motaung, the lady responsible for the reviews in this division, returned the record to the Bloemfontein District Court. I am given to understand that Musi JP subsequently received a query. On his instructions the district court record was recalled. The matter was then allocated to me on 22 February 2011.

[6] The procedure for dealing with special cases which come to the high court from the magistrates' court in terms of section 304(4) Act 51 of 1977 for special reviews, is laid down in section 304(2)(a). The section provides:

> "(2) *(a)* If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance

> with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, **and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal**:"

[7] The *proviso* is not relevant to the case at hand, hence I have omitted it. The required statement by the trial magistrate and another by the control magistrate were already included in the record when it was first dispatched to this high court from the district court.

[8] It is obvious *ex facie* its structural form on paper that the order so made on 15 December 2010, did not comply with the letter of the law (section 304(2). In the first place, it was embodied in an informal memorandum instead a formal judgment. In the second place, it was not signed by any other judge who share the views expressed and concurred with the writer of the judgment. In the third place, it was not delivered in an open court as a review judgment is supposed to.

[9] The learned acting judge erred as regards the internal procedure, structural format and external mode of communicating with the magistrates' court concerned. The order was retrieved before the trial magistrate had acted on it. In the circumstances the memorandum or letter had no binding force of a court order. For all intents and purposes it can be regarded as *pro non scripto*.

[10] Having disposed of that aspect, I now turn to the review. The charge against the accused was one of fraud. The prosecution alleged that the accused unlawfully, falsely and with intent to defraud gave out and pretended to Mr. Alpheus Boy Themba in Bloemfontein on 3 March 2010, to the prejudice or potential prejudice of the South African Railways, that he was a lawful holder of a railway ticket, whereas when he so gave out and so pretended, the accused knew that, in truth and in fact, he did not have a valid ticket that allowed him to be inside the train and to travel by train to his intended destination.

[11] On 11 March 2010 the accused pleaded guilty to the aforesaid charge in terms of section 112(1)(b) Act 51 of 1977. Accused was apparently asked to tell the court about the circumstances which led to his arrest at the Bloemfontein

railway station.

> "On the 3 March 2010, I was at train Station Bloemfontein. I without a valid train ticket I bought (sic) a train by sneaking in (sic) the train. I gave the Security Officer R20,00 to allow me to enter the platform and I (sic) can get inside the train when nobody sees me I then entered the platform and got inside the train. The SAPS members were doing the stop and search inside the train and (sic) believe that commuter point out to train (sic) that I bought (sic) the train without a ticket."

[12] When the accused was through with his own explanation, the following exchange in the form of question and answer took place between the magistrate and the accused:

- "Did you have a train ticket with you.

No.

- Did you know it was wrongful and punishable to climb (sic) a train without a ticket?

Yes.

- Do you admit that this incident took place, have (sic) in Bloemfontein (sic) the jurisdictional area of these (sic) court.

Yes.

- Do you also admit that Transnet did not allow you to climb (sic) the train without a ticket.

NB No answer by the accused recorded.

- You **misrepresented** yourself as a person who has (sic) a train ticket. (my emphasis)

NB No comment by the accused recorded."

[13] On the strength of his plea as explained by the accused and amplified or supplemented by his answers to the judicial questions, the trial magistrate found the accused guilty as charged. It is regrettable that the accused's answers, if any, were not recorded. It is also lamentable that no penetrating judicial questions were asked about his encounter with Mr. Themba, the ticket examiner especially as regards the element of false representation.

[14] The district control magistrate had some reservations as to whether, on the proven facts, the conviction of the accused could be sustained as sound in law. He came to the conclusion that the conviction on a charge of fraud could not stand. Therefore, he asked that the conviction and sentence be set aside and that a retrial be directed.

[15] The issue in the case or rather the question of law to be

determined in this special review, is whether the accused was correctly convicted of fraud or not? Whenever a lower court seeks special guidance of a high court in terms of section 304(4) on a question of law certainty, must exist with regard to all the facts to which the question of law relates.

[16] On 3 March 2010 the accused went to the railway station in Bloemfontein. His aim was to travel by train. As to what his intended destination was, does not appear on the record. Whatever his destination was, he apparently did not have money for the required train fare or he simply did not want to pay. On his arrival at the station, he walked passed the ticket sales office. He proceeded straight to the platform security gate. At that check point, only train passengers were allowed to pass or to go through onto the platform. There, passengers were identified by means of their valid train tickets. Nobody without a valid train ticker was supposed to go through. The gate was manned by a security guard. It is of vital importance to constantly keep in mind the physical set-up at the particular railway station.

[17] The accused was a casual train vendor or hawker. He, therefore, probably knew the physical security set-up and the

weaknesses of the system over there. Seemingly he knew the security guard who was on duty at the time. He gave R20,00 to the security guard to allow him to enter the platform without a ticket. Although he produced no valid train ticket, the security guard allowed him to step onto the platform as if he was a lawful holder of a valid train ticket. He subsequently boarded the train as if he was a *bona fide* passenger. Mr. A.B. Themba, a ticket examiner, approached him inside the train and asked to see his ticket. He produced no ticket since he had none. He was arrested and later charged with fraud. He reckoned that the ticket examiner approached him and demanded to see his ticket, because he was acting on a tip-off from a certain commuter.

[18] The control magistrate summarised the facts as follows:

> "2. The facts on which the accused was convicted were the following:
>
> 2.1 Accused boarded a train without a ticket.
>
> 2.2 He was smuggled into the platform and ultimately in the train by a security guard after accused paid him R20.00 (twenty rand)
>
> 2.3 Later in the train he was confronted by a Train Guard. Alpheus Boy Themba who demanded a

> ticket as a matter of routine inspection. Accused could not produce one and was consequently arrested."

[19] Adv. S. Giorgi, on the instruction of the Deputy Director of Public Prosecution, made a similar summary of the material facts:

> "1. The accused was convicted and sentenced for fraud after boarding a train without a valid ticket. He was smuggled onto the platform and onto the train by a security guard after paying him R20. He was later confronted by a train guard and could not produce a valid ticket. He was consequently arrested.
>
> The question to be answered is whether the accused was correctly found guilty of fraud."

[20] The two summaries are not entirely accurate. To say that the accused was smuggled onto the platform may create a wrong impression that he was unwillingly and unknowingly albeit secretly taken to the platform. However, his own version was that his landing on the platform was not singularly brought about by the security guard. He was not a passive, ignorant and helpless captive like a victim of

kidnapping smuggled into one country from another like prohibited goods. On the contrary, his own explanation in terms of section 112(1)(b) showed that he was very instrumental for his presence on the station platform. He was a very active architect of the deceptive scheme. The security guard was a mere facilitator of a deceptive and corruptive design engineered by the accused himself. On his own accord, he sneaked into the train. He was not aided and abetted by the security guard at that point in time.

[21] The accused bribed a security guard. His intention by offering the bride was to induce the security guard to give him unauthorised access to the platform. The security guard accepted the bride, opened the gate and allowed the accused to enter the platform without being in possession of a valid train ticket which entitled him to proceed from the security gate onto the platform. Therefore the accused and the security guard colluded to cheat the system. They jointly portrayed the accused as a *bona fide* train passenger. The security guard pocketed the money for his own personal benefit. The dominant common intention of their deceptive design was to let the accused have a free ride to his destination. No doubt, such a design was potentially

prejudicial to the business operations of the South African Railway or Transnet Limited.

[22] The accused knew, at the time he walked onto the platform that he was not lawfully entitled to be there. Notwithstanding his knowledge that he was required to have a valid train ticket to travel by train, he boarded the train without such a ticket. He was not actually smuggled into the train by the security guard. He sneaked into the train, to use his own words. He stealthily boarded the train because he knew, at the time he was boarding that he was not supposed to board the train without a ticket. It is of vital importance to bear in mind that the train boarding was preceded by deceitful platform entry. Therefore the accused's move from the gate onto the platform and from the platform into the train was characterised by an element of cheating.

[23] The control magistrate had some doubt as to whether the element of misrepresentation was established by the accused voluntarily explanation or the judicial questioning. Well, I have no doubt about it. I get the impression that he was concerned by the fact that there was no direct evidence that the accused expressly made a false representation to

the ticket examiner, for instance, by handing an expired train ticket to the ticket examiner. The control magistrate expressed his doubt as follows:

> "It is my understanding of the above definition that for the crime of fraud to be committed, a misrepresentation must have been made and on the strength thereof somebody must have acted to his/her prejudice. This is not the case in our matter as the deception if any, did not cause the train guard to act to his prejudice."

I am in respectful disagreement with the control magistrate as regards the second leg of his quotation. I shall revert to it to clarify my critique.

[24] The trial magistrate on the other hand commented as follows as regards the element of misrepresentation:

> "The accused was later in the train approached by Alpheus Boy Themba the train guard who demanded the train ticket from him for inspection.
>
> The accused could not give the guard the said ticket notwithstanding the accused **averment that he had the ticket** and he later admitted that he did not have the ticket to be on the train. The accused was accordingly arrested and charged for

fraud.

I am of the view that the accused misrepresented himself as an authorised passenger on the train to the guard, knowing so well at the time that he was not allowed to be on the train and **further claimed that he was in possession of the train ticket**, whereas in truth and in fact he did not have such train ticket. It is for the aforesaid reasons that **I strongly believe that indeed there was misrepresentation from the accused directed to the train guard**."

[25] The trial magistrate found that the element of misrepresentation was established by virtue of a false "averment" and a false "claim" the accused made to the ticket examiner. The difficulty I had about the finding was that it was not supported by the evidence as recorded. Therefore, there is no objective rationale between the conclusion and the reasons given in support thereof.

[26] There is no evidence on record of the precise details of the encounter between the accused and the ticket examiner. One thing certain is that the ticket examiner approached the accused inside the train and that he wanted to examine the accused's ticket.

[27] The response of the accused, if there was any, was or is not apparent from his explanation and was apparently not elicited by the trial magistrate through judicial questioning. The *lacuna* is lamentable. As a result thereof there is no reliable indication that, at first, the accused falsely told the ticket examiner that he had a valid ticket, but later changed his tune by admitting that, in fact, and contrary to his earlier claim, he had no such ticket.

[28] Both the control magistrate and the deputy director made the submission that the element of misrepresentation was lacking; that there was no evidence of an explicit false representation by the accused to the ticket examiner, is indeed correct. To this aspect I shall return.

[29] The following passage is instructive:

> "The first requirement for fraud is that there must be a misrepresentation or, as it has been expressed, 'a perversion of the truth'. The accused must represent to the complainant that a fact or set of facts exists which in truth does not exist. Usually the misrepresentation takes place by means of spoken or written words, **but it can also take place by conduct**..."

Joubert: **The Law of South Africa**, Second Edition, Volume 6, para 308 and the decisions there cited.

[30] Long before his encounter with the ticket examiner, the accused had already behaved and acted in a manner that was deliberately calculated to actually and not theoretically harm the corporation or Transnet Limited. It is so that the accused did not produce any falsified ticket and falsely represented to the ticket examiner that such a fake was a valid ticket. Compare **S v JASS** 1965 (3) SA 248 (E).

[31] In my view the mere fact that there is no sufficient evidence or proof of an oral statement by means of which the accused actually made a false representation to the ticket examiner does not mean that he was wrongly charged with fraud. Similarly the mere fact that there is no evidence that the accused deliberately handed a fake ticket to the ticket examiner purportedly as a valid ticket, does not in the circumstances of this case mean that he did not act in a fraudulent manner.

[32] It has to be borne in mind that he did not pay and seemingly did not have the means of paying. From the moment he set

out to the station, his state of mind was to make no payment for his conveyance. At the time of boarding the train in the circumstances as previously outlined, the accused implicitly represented, by his conduct, that he had paid and that he possessed a valid train ticket. This case is not about a person who had the means and intention to pay the train fare, but because he was in a hurry rushed passed the ticket sales office and the platform security gate and boarded the train without a valid train ticket.

[33] The physical structural set-up of the railway station, coupled with the accused's intentions and subsequent actions, justify the conclusion that he behaved in a fraudulent manner. Whether he said or did anything to the ticket examiner is, on the facts, immaterial. His behaviour said and did it all. Up until he was confronted by the ticket examiner his fraudulent intent was still the same. He never changed his mind. As I see it, his mere presence in the train with a fraudulent state of mind, amounted to a false representation by conduct to the ticket examiner.

[34] In the case of fraud the law looks at the matter from the deceiver's point of view or state of mind – **R v DYONTA**

AND ANOTHER 1935 AD 52. If the deceiver candidly intended to defraud, as in this instance, and his behaviour or actions are consistent with his pervasive design, it becomes immaterial whether the false representation was manifested to a specific representee by way of an explicit or implicit distortion of the truth sometimes called positive misrepresentation or negative misrepresentation respectively. In giving the R20,00 to the security guard and in causing the security gate to be opened, the accused represented to the world that he had a valid ticket knowing, at the time, that that representation was a false representation which he made with the intention of inducing the company or Transnet Limited to act upon it through its employees by conveying him to his destination at its expense to its detriment. On the facts it must therefore be accepted that the conduct of the accused implicitly boiled down to false representation.

[35] By conduct the accused projected himself to the public in general and to the ticket examiner in particular to be a *bona fide* traveller who had paid the train fare to be where he was inside the train and to be conveyed as such whereas he knew, at all material times when he so tacitly held himself out and so tacitly pretended to the ticket examiner, that in truth

and in fact, he was not a *bona fide* traveller or lawful holder of a valid ticket. His conduct from the gate right up to the moment he met the ticket examiner was undeniably fraudulent. He was clearly a deceiver with a clearly defined fraudulent intent and behaviour. The finding of the trial magistrate on the point is one which, on review, I cannot hold to be wrong, albeit on different grounds.

[36] The control magistrate was also of the view that the element of prejudice was not established. The learned magistrate commented:

> "However, if it is accepted that the conduct of accused amounted to a misrepresentation, it would be my contention that the deception did not cause or induce the train guard to act to his prejudice as he only effected an arrest. Arrest on it won, in my view, can under no circumstances be equated with prejudice. It is my submission that prejudice either actual or potential is lacking."

[37] The following words of Wessels CJ in **<u>R v DYONTA AND ANOTHER</u>**, *supra*, on p. 57 are apposite in this case:

> "The law looks at the matter from the point of view of the

> deceiver. If he had the intention to deceive, it is immaterial whether there is actual or merely potential prejudice."

[38] In this case there was no actual prejudice. The accused intended to travel by train by tacitly representing that he had paid the train fare. The accused could have achieved his objective had he not been caught in good time. The gist of his pervasive design was to deceive. The law is that if he intended to deceive, as he admittedly did, it was immaterial whether the ticket examiner was actually deceived or whether as a result of such deceptive design, he suffered actual prejudice or potential prejudice. The conduct of the accused was potentially prejudicial to Transnet Limited, the ticket examiner's employer. There is not question about it. The potential harm was not too remote or fanciful. The mere fact that the ticket examiner was not personally prejudiced is no defence and can never be one. To constitute prejudice the false representation, be it explicit or implicit, must be such as to involve some risk of harm, which is not too remote or fanciful **to some person not necessarily the person to whom it is directly made**. **R v HEYNE AND OTHERS** 1956 (3) SA 604 (A) at 605 A.

[39] The author Joubert, *supra*, at par. 312 writes as follows about the element of prejudice:

> "Actual prejudice is not required to constitute fraud. It is sufficient if the misrepresentation is of such a nature that **it *may* cause harm or prejudice**. This risk of prejudice need not be probable, direct or reasonably certain. It is sufficient if there is a reasonable possibility that the misrepresentation may prejudice some person, who does not necessarily have to be the representee."

See also **R v SEABE** 1927 AD 28 on 32 – 34; **R v HEYNE AND OTHERS**, *supra*; **R v FRANKFORT MOTORS (PTY) LTD** 1946 OPD 255 on 259 – 260.

[40] In an attempt to travel by train without a valid ticket just as in an attempt to sell pieces of ordinary glass as precious diamonds, there is, in my view, sufficient potential prejudice to constitute fraud. The control magistrate and the deputy director were of the opinion that the accused's deception did not induce the ticket examiner to act to his prejudice. According to them the ticket examiner did nothing more than to merely effect an arrest. However, according to the authoritative sources I have cited in the aforegoing

paragraph, this view is not a correct legal proposition. Defrauding an employer, in this instance Spoornet, may indirectly also cause harm or prejudice to an employee, in this instance Mr. Themba, the ticket examiner, depending on the magnitude, the fraudulent scheme and its adverse impact on an employer's business operation. A business enterprise may be forced to scale down its economic operations as a result of such a crippling scheme with serious repercussions for employees.

[41] The evidence compels the conclusion that the intention of the accused was fraudulent. He embarked on a series of acts of deception designed to defraud the South African Railways or Spoornet, a division of Transnet Limited. His aim was not to pay less than the actual fare for a ticket to his intended destination, as Ms Giorgi contended. His real intention was to pay absolutely nothing to Spoornet. He forked out R20,00 and gave it to the security guard at the gate and not the cashier in the ticket sales office.

> "I gave R20.00 to the security officer to enter the platform."

[42] He deliberately gave the money to the wrong person and he

certainly did not expect that wrong person to give him any ticket in return. The purpose of handing the money was not to buy a ticket at all, but to gain access to the platform and eventually to the train. Moreover, it was clear and obvious that he did not expect the insufficient cash to find its way into the unintended coffers of Spoornet. If a whistle blower did not detect that the accused and the security guard had colluded to cheat the system, the prejudice to Spoornet Limited would have been actual. I find it difficult to accept that in these circumstances it can be said that fraud was not proven merely because there was no proof of any positive false representation and prejudice to the ticket examiner.

[43] In the circumstances I have come to the conclusion that both elements of misrepresentation and prejudice were established as the trial magistrate, Mr. M.G. Nikamanzi, correctly found. It follows therefore that the accused was correctly charged with fraud and correctly convicted as charged. Accordingly, I am of the view that no case has been made out for a retrial on any other charge. I would therefore confirm the conviction.

[44] Accordingly I make the following order:

44.1 The proceedings in the court below were in accordance with justice.

44.2 The conviction of the accused on a charge of fraud and his sentence are confirmed.

M.H. RAMPAI, J

I concur.

S.P.B. HANCKE, J

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