



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

CASE NO: A147/2008

DATE: 28 AUGUST 2009

In the matter between:

**TSHIBVUMO PHANUEL CORNWELL Appellant
TSHAVHUNGWA**

and

**ANDRIES LAMPRECHT, 1st Respondent
REGIONAL COURT MAGISTRATE, PRETORIA**

NATIONAL DIRECTOR OF PUBLIC 2nd Respondent

PROSECUTIONS

THE MINISTER OF JUSTICE AND 3rd Respondent

CONSTITUTIONAL DEVELOPMENT

JUDGMENT

HARTZENBERG J

This is an appeal, coupled with an application for the review of some of the decisions of a Regional Magistrate, during a criminal trial. The appellant was originally charged with 11

different counts consisting of counts of fraud, corruption and perjury and a 12th count of drunken driving.

The appellant was a Deputy Director of Public Prosecutions assigned to the then existing Directorate of Special Operations, colloquially known as the Scorpions. He was suspended from office during March 2004. His suspension and the subsequent criminal charges arose from an investigation that he was mandated and authorized to conduct in respect of loans obtained from the Mpumalanga Economic Empowerment Company ("the MEEC") during May 2003. Awaiting trial, he was imprisoned for more than a year. He was initially released on bail but it was withdrawn not long thereafter, because he interfered with State witnesses. He remained in custody until 30 November 2005 when bail was set in an amount of R50 000. That was during the course of the trial.

The trial commenced on 26 July 2005 when he pleaded not guilty to all 12 charges. The State led the evidence of some 20 witnesses. At the close of the State's case the appellant applied for a discharge in terms of section 174 of Act 51 of 1977. On the 11 charges. The application was granted in respect of counts 2, 3, 6. 8 and

9. He was placed on his defence on counts 1, 4, 5, 7, 10, 11 and 12. He called one witness to testify and closed his case towards the end of July 2006. On 3 August 2006 the matter was postponed until 24 and 25 October for argument and finalization of the matter. It was arranged that written heads of argument were to be submitted to the magistrate prior to 24 October 2006.

No written heads of argument were submitted by the appellant before 24 October 2006. The reason was that he was unable to raise the necessary funds to have the heads drawn and be represented by the advocate who had represented him throughout the trial, adv. Rautenbach. On 12 October 2006 he wrote a letter to the State Attorney asking for representation. The letter was directed to the State Attorney, Johannesburg. The State Attorney, Pretoria, on 7 December 2006 wrote a letter to the State Attorney, Johannesburg returning the request for legal representation dated 12 October 2006, which landed in his office on 28 November 2006. He expressed annoyance with the Johannesburg office for having informed the appellant that the matter was dealt with in his Pretoria office, whilst that was not the case.

In the meanwhile, and on 18 October 2006, the magistrate phoned the prosecutor to find out whether she had received heads of argument from the other side. She then informed him that she had heard from advocate Rautenbach that he would not prepare or file heads or appear unless the contractually agreed fee was paid with the attorneys. In his judgment the magistrate describes his reaction as follows:

*"I then informed Ms Breytenbach that we will continue as arranged and, regardless of whether Mr. Rautenbach files Heads of Argument beforehand or on the 24th and regardless of whether he is going to appear on the 24th, I will proceed to hear oral argument in terms of section 175 of the CPA on the 24th and. if at all possible, I will still hand down judgment on the 25th.
"*

On 24 October the appellant, in person, applied for a postponement because he encountered financial problems. The magistrate was of the view that the appellant on previous instances had indicated that if he was unable to arrange for representation he would conduct his own defence¹. He further took into account that the appellant is a

¹ It does not appear that that was done when the postponement for 24 October 2006 was arranged on 3 August 2006. As a matter of fact it happened before the

trained lawyer and decided that the appellant was competent to conduct his own defence. Other issues that he regarded as germane to the situation is firstly that he is seated in Lydenburg. and that sitting in Pretoria and being unavailable in his court requires a lot of logistical maneuvering and inconvenience for him and extra expense and inconvenience for the State. Secondly it was his view that as all the evidence had been led and the appellant had been in possession of the State's heads that the risk of prejudice to the appellant as a result of not being represented was minimal. Thirdly he was of the view that the appellant had ample time to get the necessary finance and took into account that at an earlier stage the appellant had rejected the offer of legal representation at State expense. Fourthly he regarded it as discourteous of both Mr. Rautenbach and the appellant not to have notified him in advance that there would be an application for a postponement. The magistrate says that he then ruled that the provisions of section 73(2C)² of the CPA became

commencement of the trial and during June 2005.

² *The section reads:* "If an accused refuses or fails to appoint a legal adviser of his or her own choice within a reasonable time and his or her failure to do so is due to his or her own fault, the court may, in addition to any other order which it may make in terms of section 342A, order that the trial proceed without legal representation unless the court is of the opinion that that may result in substantial injustice, in which event the court may subject to the Legal Aid Act, 1969 (Act No. 22 of 1969), order that a legal adviser be assigned to the accused at the expense of the State: Provided that the court may order that the costs of

applicable and further ruled to hear the State's argument on 24 October and then to adjourn the case to 25 October to enable the appellant to prepare himself or to get a legal adviser to represent him.

On 25 October the appellant arrived very late at court, claiming to have worked throughout the night to prepare 150 pages of argument. The appellant asked for a postponement to go to a doctor for an injection for the migraine which he alleged he was suffering from. The magistrate's attitude was that medication for migraine can be bought over the counter; that the appellant could have done that and refused the application for a postponement. He effectively compelled the appellant to argue the matter.

The matter was then postponed to 4 and 5 January 2007. Leave was granted to the parties to file further heads of argument on or before 15 December 2006. The appellant sent an e-mail, indicating the he intended applying for his recusal, to the magistrate, on 18 December 2006. On 4 January 2007 the appellant did not appear on time. Although he did not, initially, disclose it in his review

such representation be recovered from the accused: Provided further that the accused shall not be compelled to appoint a legal adviser if he or she prefers to conduct his or her own defence. "

proceedings he was trying to get an interdict against the magistrate to prevent him from giving his judgment. His attempt was unsuccessful as the judge hearing the matter was not prepared to do so without notice to the magistrate. There was a warrant for the appellant's arrest but he made an appearance at a late stage and the warrant was set aside and the matter postponed to 5 January. On 5 January the appellant applied for a postponement which was refused. The magistrate then started to deal with the application for his recusal, the appellant having indicated, that it would be pointless to argue as the magistrate had already indicated that he will not recuse himself, and that he was suffering from migraine and unable to address the court. Whilst the magistrate was giving judgment the appellant collapsed and vomited in court. The magistrate ordered that he be removed to hospital by ambulance and that a medical certificate about his condition be obtained.

The hearing resumed on 11 January 2007. The appellant again applied for a postponement to consult with a doctor. The magistrate indicated that he was not going to be busy in court for a long time and handed down two written judgments, one refusing to recuse himself and one finding the appellant guilty on counts 1, 5, 10, 11 and 12. The

matter was postponed to 9 March 2007 for sentence and on the latter date, at the request of the appellant, again postponed to 7 May 2007 on which date he was sentenced to 5 years imprisonment on each of counts 1 and 5 with an order that 4 years of the sentence on count 5 are to run concurrently with the sentence on count 1. He was sentenced to 1 year imprisonment on each of counts 10 and 11, which were charges of perjury alleged to have been committed during his bail applications. The sentences on the two charges were both suspended. He was sentenced to pay a fine of R40 000 on the drunken driving charge, count no. 12.

The review application and the appeal are for all practical purposes the same. There is nothing in the review application which cannot be ascertained from the record. The appellant states that the magistrate must have had other information when he made findings in respect of the witness Mashikinya and that he must have read the statement, that formed part of the bail record, of one Ernest Khoza, who did not testify, to have made certain other findings. No evidence outside the record was submitted. The decisions that the appellant alleges are to be reviewed and set aside are 1. the magistrate's refusal to discharge

the appellant on counts 1, 4, 5, 7, 10 and 11 in terms of section 174 of the CPA, at the close of the State case; 2 the refusal to postpone the matter for arrangement of legal representation for the appellant; 3 the refusal to postpone the matter on 25 October 2006 and 5 January 2007 to enable the appellant to receive medical treatment; 4 the refusal of the magistrate to recuse himself and 5 the decision to convict the appellant on counts 1,5, 10, 11 and 12.

The charges against the appellant were serious. Over and above the fact that he lost his job, he faced the possibility of imprisonment for a long time. The record, excluding hundreds of pages of exhibits, at the close of the State's case, was about 1000 pages. That the magistrate must have regarded counts 1 and 5 as particularly involved and serious is evident from the way that he dealt with them in his written judgment. His summary of the evidence in respect of count 1 and the analysis thereof comprise 11 pages, of the 70 page judgment done in a 1.5 spacing with a letter size of 12. In addition there are 50 footnotes to substantiate the synopsis and reasoning. The application of the law to the facts took up another two and a half pages with a further 8 footnotes. As for count 5, it was dealt with

simultaneously with count 4 on which the appellant was acquitted. The major portion of the discussion of the evidence, comprising 27 pages of the judgment, bolstered by a further 77 footnotes, dealt with count 5 and the application of the law to the facts took up another two pages. The appellant was sentenced to five years imprisonment on each one of these two charges

A rough summary of the allegations against the appellant on these two counts is as follows: In respect of count 1 the charge sheet alleged that when the appellant applied for a home loan of R 1,2 million, he fraudulently inflated his income, through misrepresentations or non disclosures, in order to persuade Nedbank to its prejudice or potential prejudice to grant the home loan. The evidence was that the application form was filled out by a Ms. Martin and that the appellant's salary and the salary of his wife were supplied. In addition thereto it was recorded that the appellant receives a monthly consultancy fee of R11 000.00 from Ramcorp CC³ and an income of R3500.00 as rental. The latter two amounts were the amounts with which the income was allegedly inflated. Ms. Martin could not

³ The whole basis of the investigation against the appellant was that he corruptly obtained a Risk Management agreement for Ramcorp CC through which he channeled large amounts, received from the MEEC (in excess of R600 00.00), to himself and his family in exchange therefore that the investigation would not be directed against the management of the MEEC.

remember whether the form was filled out in the presence of the appellant or by way of telephone conversation. She conceded that the appellant could have given the additional income up as prospective income, only expected in the future. Her evidence was that alleged income had to be verified before it could be considered for the application and that the salaries of the appellant and his wife were indeed verified by salary advices and that the extra income was not verified. She confirmed further that the joint salary income of the appellant and his wife was sufficient to obtain a loan of R 1,2 million. Both she and the other witness from Nedbank, Mr. Soons-Bontoft testified that if they were aware that the appellant had obtained any portion of his income through criminal conduct, that the application would not even have been considered.

It is clear that the State failed to prove that the appellant represented to Nedbank that he earned an extra income. It is also clear that Nedbank only relied on allegations of alleged income that had been substantiated. I could not understand the magistrate's reasoning to have found him guilty of fraud on the basis that there was potential "reputational" prejudice for Nedbank, who did not lay a charge. Ms Breytenbach explained the finding of the magistrate as follows: The appellant, when he mentioned

the R11 000,00, referred to Ramcorp. The monies which Ramcorp received were fraudulently obtained. By not disclosing to Nedbank that the monies were fraudulently obtained there was a risk that Nedbank's reputation could suffer in the banking industry if it transpired subsequently that it granted a loan to a fraudster. Without saying anything further about that reasoning, it is incomprehensible from what basis it emanates in the light of the following finding on count 4⁴ on which the appellant was acquitted:

"[70] As indicated above, the evidence in this matter did not prove that the R603 386.00 emanated from the MEEC, merely using Ramcorp CC as a vehicle, and that the payments which made up that amount was(sic) received in connection with a corrupt relationship that existed between Khoza and the accused. The payments were all made due to causas (sic) other than corrupt payments, and the existence of those causas (sic) could not be discounted by the state. "

The State's case against the appellant on count 5 was that he falsely pretended to his employer that he was investigating irregularities in the granting of loans by the MEEC as a result of which he was afforded financial and

⁴ Count 4 was a count of corruption in which it was alleged that the appellant and Khoza had a corrupt relationship by means of which monies were channeled from the MEEC to the appellant through Ramcorp CC.

logistical support to conduct the investigation, whilst he knew' that he was not investigating the MEEC and/or its officials but that in truth he was procuring a risk management contract for Ramcorp CC and diverting the investigation from the MEEC and its official. The magistrate discussed count 5 together with count 4 on which the appellant was acquitted.

The magistrate's reasoning was that the appellant had undertaken to do a thorough investigation; that he had reason to suspect that employees of the MEEC may have been involved in corrupt deals with the applicants for loans and that a proper investigation would have required a probing of the affairs of the MEEC officials and in particular that of Khoza. The magistrate found that he deliberately diverted the investigation from them and that he so falsely represented to his employer that there was a proper investigation, whilst he knew that that was not the case.

In this regard it is important to bear in mind that at the time of the appellant's suspension the investigation was ongoing and that objectively viewed it cannot be said that there would not be an investigation into the affairs of those persons. The magistrate's finding was based full square on

the evidence of Ms. Engelbrecht to the effect that she had advised Me. Mashikinya, who conducted the investigation, to get the bank statements of the officials and that the latter had told her that the appellant had indicated to her that it was unnecessary as those officials were inept but not dishonest.

Mr. Rautenbach levelled criticism against Ms. Engelbrecht's evidence that she had obtained information from one Genricks that officials of the MEEC had received kick-backs from borrowers. The basis was that she had taken a statement from Genricks and did not make mention of the alleged kick-backs in the statement. He criticized her explanation that she deliberately did not mention that aspect as she regarded it, at that early stage as unwise to bring up. Genricks who could corroborate her evidence was not called. The magistrate accepted Engelbrecht's explanation. He rejected the evidence of Ms. Mashikinya and of the appellant's direct senior Nel's Ms. Mashikinya gave evidence that she indeed obtained bank statements of some of the employees of the MEEC. She did not think that there was any undue interference by the appellant. Nel's evidence was to the effect that in this case the object of the

investigation was to look into the affairs of the borrowers and in particular into the affairs of one Murray. He was the target. Nel's evidence was that as a derivative of that investigation it would transpire that there were further aspects that had to be investigated that that had to be done later.

Crucial for the magistrate's finding was his acceptance that the appellant had put a stop to the possibility of an investigation into the affairs of the employees of the MEEC by advising that it was unnecessary to obtain their bank statements. The investigation was still ongoing when the appellant was arrested. In addition thereto the magistrate considered information obtained from the liquidators of one of the borrowers, Savannah, as an important indicator that the appellant diverted the investigation away from the employees of the MEEC. The information was that a loan for a large amount was granted to the borrower but that it received R200 000 less than the amount that was granted. Ms. Mashikinya explained that she investigated the situation and was informed that due to a shortage of money R200 000 less than the amount of the loan was paid to the borrower. What is important on this aspect is that according to Nel the discovery of the "missing" R200 000 was only

made after the appellant's arrest. Engelbrecht's evidence was that it was before his arrest. How long before or after his arrest the discovery was made was not clear. The magistrate did not make a finding as to how long before the appellant's arrest the information became available.

The first charge of perjury related to a statement during his bail application by the appellant that he had no other income than his salary. The state relied on the application for a home loan in which he mentioned an extra income of R11 000. He certified the information in the form as correct. It must be remembered that the latter statement was not on oath, was recorded by Ms. Martin and that she conceded that it may have been mentioned as future income. The second count of perjury related to a statement in a review application before Mynhardt J, in one of the bail matters. In the founding affidavit the appellant stated that he had prosecuted in the Bronkhorstspuit heist matter and that in prison he was told that some of the members of the gang would like to speak to him. He said that he feared for his life. The State produced evidence that he did not prosecute in the Bronkhorstspuit matter. In the replying affidavit the appellant admitted that he did not prosecute in that matter but explained that he prosecuted in a similar earlier matter

and that people who were later prosecuted in the Bronkhorstspuit matter attended the court in which he prosecuted regularly.

Mr. Rautenbach argues that before the close of the State's case the magistrate was obliged to make a ruling as to what components of the bail proceedings were to stand as evidence in the trial. He relies on *S v Molimi*, 2008 (5) BCLR 451 (CC) par. 36 in which the admissibility of hearsay evidence was considered. The State did not ask the magistrate to make any ruling and the question was not addressed in the judgment. The argument is that the conviction on the two counts should be set aside on that ground alone. An argument that the State failed to prove that the appellant had an income other than his salary cannot be rejected out of hand just as in the case of the second count of perjury it cannot be rejected out of hand that the appellant possibly made a *bona fide* mistake and did not have the *mens rea* to commit perjury. It is ironic that the appellant, who was acquitted on count 4 of corruption and who was charged on count 1 with inflating his income and on count 10 of perjury' when he stated that he had no other income, was found guilty on both count 1 and count 10. The convictions on counts 1 and 10 could only have been justified if the State had proved that the accused had the corrupt relationship with Khoza, of which he was

accused in count 4.

There was evidence that the appellant had driven while under the influence of liquor. The conviction on count 12 cannot be attacked other than upon the basis that as the appellant did not have a fair trial, that it has to be set aside. The sentence on count is a rather severe one, bearing in mind that Nedbank did not lay a charge. The fine of R40 000 on count 12 can certainly also not be described otherwise than a stiff sentence.

The foregoing indicates that at the close of the case it cannot be said that the State had a clear cut case. There was a large quantity of evidence before the court. There were in the State case different versions on critical aspects, some implicating the appellant and others exculpating him. It must have been clear to the magistrate that an objective argument by a legal representative on behalf of the appellant would be invaluable to the court when it was to evaluate the evidence and come to factual findings. Likewise there were different offences and many possible legal arguments to which the input on behalf of the appellant could be of great value.

One has sympathy with the magistrate who clearly

wanted to finalize the matter, it must have been frustrating to hear that there would possibly not be appearance on behalf of the appellant on 24 October 2006 and that probably there would be an application for a postponement. It was unfortunate for the magistrate to have informed the prosecutor, already on 18 October, that he would not grant any postponement. It is difficult to see how in those circumstances he would have been able to adjudicate objectively on an application for a postponement.

One of the realities with which presiding officers in criminal courts are often faced is unexpected and inconvenient applications for postponements. In many cases postponements are sought where the accused persons are really remiss. The fact of the matter is that the presiding officer is obliged to see to it that an accused person gets a fair trial, see section 35(3) of the Constitution. That right includes the right to be represented by a legal practitioner of his choice. One of the issues at stake for an accused in a criminal trial is often that he may be deprived of his liberty, like in this very matter. The result is that more often than not a court will be compelled to grant a postponement, lest it be found, later on, that the accused was deprived of his right to a fair trial.

In this case it must have been evident to the magistrate

that a proper argument on behalf of the appellant could not be put on paper in a short period of time. It must also have been evident to him that an evaluation of the evidence required an application of the mind to various bits of evidence the weight of which had to be assessed in the context in which it had been given and weighed up against each other. It must have been evident also that there are delicate legal principles that had to be applied to the facts. In the circumstances the magistrate should have assessed the position objectively, by determining why the postponement was required and whether it was reasonable or unreasonable in the circumstances. Accepting, without deciding it to be the position, that the magistrate was entitled to invoke the provisions of section 73(2C) of the CPA. it is clear that there were a number of options available. It would have been a safe option to postpone the matter and to order that the appellant be afforded the services of a legal adviser through legal aid.

The factual position was that there were no heads and that the appellant would have been at a disadvantage if no heads were submitted on his behalf. The magistrate's assessment that the case had progressed to such a stage that there was a minimum potential of prejudice to the

appellant if he was to be compelled to conduct his own defence, is at the very least questionable. If there was a possibility of prejudice that possibility had to be negated. Many- legal practitioners are unable to present their clients' cases objectively. It must be an exceptional litigant, and especially an accused, that will be able to argue his own case objectively. It was asking the impossible of the appellant to have him sit in court and listen to the State's argument on 24 October 2006 and to be able to argue the case the very next day. It was a small consolation to invite the appellant to submit written heads before 15 December 2006. If he wanted to make use of a legal practitioner he first had to get the necessary finance and then that practitioner had to study himself into this complex case. He would, in any event, not have had the benefit of the State's argument on 24 October.

In all the circumstances it cannot be said that the appellant had a fair trial in terms of section 35(3) of the Constitution. The result is that the conviction and sentences are to be set aside.

The convictions of the appellant imposed on 11 January 2007 and the sentences imposed on 7 May 2007 are hereby

set aside.

**W J HARTZENBERG
JUDGE OF THE HIGH COURT**

I agree

**V V THLAPI
ACTING JUDGE OF THE HIGH COURT**

I agree

**J VAN DEVENTER
ACTING JUDGE OF THE HIGH COURT**

HEARD ON : 19 August 2009

ON BEHALF OF THE APPELLANT

Counsel : G RAUTENBACH

Instructed by : SECHELE INCORPORATED

ON BEHALF OF THE 2nd RESPONDENT

Counsel : G BREYTENBACH S MOGOSHI

Instructed by : THE STATE ATTORNEY

ON BEHALF OF THE 1st AND 3rd RESPONDENT

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