FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A118/2009

In the case between:

MOKGEBE ANDREAS MBAMBO Appellant

and

THE STATE Respondent

CORAM: MOCUMIE *et* JORDAAN, JJ

JUDGEMENT: MOCUMIE, J

HEARD ON: 21 SEPTEMBER 2009

DELIVERED ON: 5 NOVEMBER 2009

MOCUMIE J

[1] The appellant appeared in the Regional Court, Welkom on two counts in terms of the Corruption Act,12 of 2004 ('the Corruption Act'). On 27 February 2009 he was found not guilty and discharged on count 1-fraud alternatively theft and count 2 ,contravention of section 4(1)(b)(i)(aa) read with section 1 and 6 of the Corruption Act-directly

or indirectly agreeing or offering to give any gratification to a public officer for his benefit in order to act illegally or dishonestly and found guilty as charged on the alternative to count 2, to wit contravention of section 3(a) (i) (aa) of the Corruption Act-accepting or agreeing to accept any gratification from any other person for his benefit or another person in order to act personally or by influencing another person so to act that amounts to illegal or dishonest exercise or carrying out of any powers or duties. He was sentenced to 24 months imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 51 of 1977 ("the CPA").

He now appeals against his conviction with leave of the court *a quo.*

[2] In his Heads of argument and in oral argument, Mr Schuurman, on behalf of the appellant, attacked the presiding officer's findings on the basis that the evidence of the complainant was not sufficient to have

established the state's case beyond reasonable doubt. He submitted that the complainant's evidence was riddled with contradictions, inconsistencies and improbabilities; that the complainant and his witnesses gave contradicting evidence and thus the appellant's version should not have been rejected as not reasonably and probably true.

[3] It was common cause between the State and the defence or at least not seriously disputed that the complainant and the appellant were in a handler-and-informer relationship since August 2003. In other words the complainant was registered as an official informer and the appellant was his handler. Subsequently to his registration as an informer the complainant gave the appellant information of a planned robbery. The appellant and the Station Commissioner then Superintendent Dikgang sought authorization from their Provincial office to have the complainant infiltrate the group. The complainant had to go along with the would-be-robbers so as not to make them suspicious of any leak of

their criminal activity to the police; during the commission of the robbery he would be arrested with them; but that when the trial commenced the charge against him will be withdrawn and that he will be used as a state witness.

[4] It was also common cause between the State and the defence or at least not seriously disputed that subsequent to the complainant's arrest, the complainant was kept incarcerated with the other suspects as agreed upon and was released on bail of R2 000,00.The appellant used the complainant's informers' fees to pay bail for him. The complainant was given R1 000, 00 as part of the R3 000, 00 which he was entitled to after he had given the police information which led to the arrest of the robbers. The complainant signed for the R 1000, 00 and was shown the bail receipt in the amount of R 2000, 00 by the appellant.

[5] There was a twist in the tail while the robbery case was still pending against the complainant. The complainant alleged that he informed the appellant about death threats that he

was receiving from his co-accused as they suspected that he was an informer. Consequently, so he alleged, he did not feel safe in Thabong and relocated for a while to Botshabelo. There were delays which caused the prosecution not to initiate the trial which led to several postponements. In the complainant's view the appellant did not take the death threats seriously. According to him the appellant instead demanded that he pays him R 1000, 00 to have the case withdrawn against him.

[6] The case was postponed many times. On one of the many times that the case was postponed by the court on request of the prosecutor the complainant demanded that the appellant give him traveling costs which the latter could not do. The complainant believed that the appellant was treating him unfairly and instead approached the appellant's superiors and informed them that the appellant had demanded R 1000, 00 from him to withdraw the case against him. The police set a trap for the appellant using the complainant as bait. The complainant and the appellant met as arranged on 24 August

2004.The complainant gave the appellant R1 000, 00 whilst they were in the appellant's car in Welkom next to Erikson shopping Centre. The police, unknown to the appellant, kept them under observation at all times until the transaction was concluded. The appellant was arrested at Welkom police station. The police found initially R700, 00 of the R1 000, 00 the complainant had given to the appellant in the latter's possession and later found the missing R300, 00 at Checkers Supermarket where the appellant had gone to buy groceries earlier on that day. The police had given the complainant a tape recorder that he had to switch on to record the transaction. It was discovered afterwards that either he did not switch it on or it was defective. But the transaction was not recorded.

[7] The only dispute between the State and the defence is the purpose of the R1 000, 00. In other words why did the complainant give the appellant the R1 000, 00. Was it to "bribe" the appellant to have the case of robbery withdrawn against the complainant as the State alleged or was it to

keep it for the complainant until he wanted it back as the appellant alleged.

[8] There are two conflicting versions as to why the complainant gave the appellant the R1000, 00. The State's version is that the appellant elicited R1 000, 00 from the complainant to have the robbery case withdrawn against him.

[9] The appellant's version is that the complainant gave him the R1 000,00 to keep for him as he was afraid that he might use it before he got the R 2000,00 from the bail bond which money was meant for a feast at his home later. The complainant had also told him to use the money for himself in the mean time.

[10] The cardinal principle of criminal law is that the state must prove its case beyond reasonable doubt whereas the accused/appellant must be acquitted if it is reasonably possible that he might be innocent. See **S v Van Aswegen** 2001 (2) SACR 97 (SCA) at 101a-e and cases quoted

therein. It is also trite that where there are conflicting versions "… it is important to consider not only the credibility of the witnesses but also the reliability of such witnesses." See **S v Janse Van Rensburg** 2009 (2) SACR 216 (CPD) at 220c-e and cases quoted therein.

(11) The trial court concluded that the complainant was a reliable witness and although a single witness as regards the crucial part of the case, the purpose of the R 1000, 00, he was corroborated by other state witnesses: four police officers who formed the team that arrested the appellant on 24 August 2004.

[12] The trial court observed, without making any finding on the complainant's credibility and reliability, that the appellant's version was improbable in the face of the evidence of the State.

[13] In convicting the appellant, the trial court committed a number of fundamental misdirections. It suffices to refer to

only two at this stage. First, the magistrate disregarded the contradictions and inconsistencies in the evidence of the complainant with regard to the alternative of count 2 as will be highlighted hereunder.

[14] The evidence adduced showed that the complainant had a tendency to exaggerate the evidence if not lie deliberately to mislead the court. The complainant testified that after he was arrested in the robbery case he was kept in detention for three months before he was released on bail. Whereas through cross-examination it was shown that he was detained for a month and a few days. He alleged that Inspector Mokoena, the investigating officer of the robbery case, arrested him on trumped-up charges of possession of a firearm in February 2004 and kept him in detention for 8 months with the sole purpose to force him to withdraw the charges against the appellant. In truth, as was revealed by cross-examination, that never happened. In fact this story did not even add up with the evidence in this case as the appellant was only arrested in August 2004.

[15] The complainant denied that he was aware of any arrangement that he will be arrested and then released when the trial commenced. Clearly this cannot be probable because if there was no such prior agreement why would he have actively participated in a robbery that he had reported to the police. Furthermore why would the police pay bail for his release. The police depended on his participation to arrest the would-be robbers. He also denied meeting with the appellant and Superintendent Dikgang the day before the commission of the robbery to confirm all the details and the place where the robbery would allegedly take place. Superintendent Dikgang corroborated the appellant about this meeting and in all other respects in this regard. Otherwise how would the police have known about the place that would have been robbed and engaged other police members in the operation without having seen the place prior to the robbery. The complainant was not in their company but with the would-be-robbers.He denied that the appellant took him to the prosecutor to explain to him that

the charge against him will only be withdrawn against him when the trial commenced. The prosecutor also explained to him that because he was still an accused he was not entitled to traveling costs, for traveling to and from Botshabelo on every remand date, as he demanded. Evidently the complainant became very impatient with the "slow wheels of justice" when the case against him was not withdrawn shortly after his release on bail as he had anticipated. He immediately put the blame squarely on the appellant's door step. He wanted the robbery case withdrawn against him prematurely and he was not getting his way.

[16] Second, the magistrate, unreservedly, accepted Inspector Herbst's evidence that the docket which the appellant is alleged to have shown to the complainant, presumably the robbery case, was found in the appellant's vehicle when he was arrested. The state's own witness, Captain Van der Merwe testified that the case docket concerned was only fetched from the magistrate court two moths after the

appellant was arrested. He explained the arduous procedure the police must go through to get any docket from the prosecutor. The magistrate says the following in this regard in his judgment:

> "Die logies vraag is nou of inspekteur Herbst aan die hof 'n leuen vertel en of sy moontlik 'n fout maak…Die blote feit dat inspekteur Lenong kom getuig dat hy wel dossiere van inspekteur Herbst ontvang het,is bewys daarvan dat inspekteur Herbst inderdaad dossiere oorhandig het en kan daar geen rede wees waarom die hof nie glo dat inspekteur Herbst die waarheid praat nie.Die tweede gedeelte van hierde vraag is egter of inspekteur Herbst nie moontlik 'n fout kon maak ten opsigte van die identiteit van die dossier in hierdie omstandighede nie…Die hof is van oordeel dat inspekteur Herbst nie maaklik 'n fout sal began met die herken van hierdie dossier nie."

[17] There is no objective evidence why the presiding officer came to the conclusion that inspector Herbst could not make a mistake with the identification of this docket in the light of what inspector Lenong said further on in his

evidence that he was certain Inspector Herbst did not give him the robbery docket on the day the appellant was arrested; what Inspector Mokoena,the investigation officer of the robbery said about the docket: that the docket was at the Regional court the day the appellant was arrested; and Captain Van der Merwe's unequivocal evidence that the docket was only retrieved from the court on 2 September 2004 after the appellant's arrest on 24 August 2004. Almost a month later. To the contrary the presiding did not doubt Captain Van Der Merwe's evidence in this regard. The only explanation that can be found for choosing Inspector Herbst's evidence above three witnesses is his remarks that "…die kern van hierdie misdryf (is) oneerlikheid en alhoewel daar 'n groot gewag gemaak is ten opsigte van die prosedure <u>in werklikheid dat dossiere elke dag weg raak</u> …" (My underlining).There is no objective evidence on which the presiding officer could say that the procedure on how dockets are retrieved from the Regional court could have been breached in this instance. More so when the State chose not to lead evidence of the Regional court prosecutor responsible in that period or the Control/Senior prosecutor.

[18] The presiding officer concluded that the evidence of the police officers on when, how and where the trap was set corroborated the complainant's evidence. In principle this cannot be correct. **Cloete JA** in **S v Gentle** 2005 (1) SACR 420 (SCA) at 430j states categorically the following in this regard:

> "…by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, on the issues in dispute (cf R v W 1949 (3) SA 772 (A) at A 778 - 9). If the evidence of the complainant differs in significant detail from the evidence of other State witnesses, the Court must critically examine the differences with a view to establishing whether the complainant's evidence is reliable. But the fact that the complainant's evidence accords with the evidence of other State witnesses on issues not in dispute does not provide corroboration." (My underlining)

[19] In my view if there was corroboration sought for the

complainant's evidence it could have been found in other evidence which the State opted not to lead. For instance the evidence of Inspector Magasane who was alleged to be present when the complainant called the appellant from Inspector Smith's office. Insp Smith says clearly the complainant spoke to the appellant in Sesotho, a language which he doesn't understand, whilst Inspector Magasane was with them. How difficult could it have been for the State to lead evidence of Insp Magasane on the content of the conversation which convinced the appellant to rush and meet the complainant .Contrary to what was submitted during argument by State Counsel, the defence had no duty to call Insp Magasane when the State opted not to call him for unknown reasons. In a criminal case if the party who bears the evidential burden fails to adduce evidence, (s)he loses. (**Law of Evidence Issue 6, CWH Schmidt H Rademeyer, 3-36; <u>S v Texeira</u>** 1980(3) SA 755(A)

[20] In my view there were material contradictions, inconsistencies and improbabilities in the evidence of the

complainant which if looked at individually may not necessarily be material but collectively they impact negatively on the credibility of the complainant as a single witness whose credibility was under the spot light arising from the aforesaid inconsistencies and improbabilities.

[20] In the light of contradictions and improbabilities highlighted, I do not agree with the trial court that the evidence of the complainant was satisfactory in every material respect. In fact, in my view the magistrate did not warn himself sufficiently of the caution he should exercise in cases of a single witness in the same circumstances under discussion. These inconsistencies and improbabilities are material and point to the unreliability of the complainant as a single witness who had the opportunity and the motive to falsely implicate the appellant. He was for a long time under the witness protection programme and was not happy with how the case was dragging on and not commenced as he had anticipated and he blamed the appellant squarely for his misfortunes.

[21] Lastly the State submitted that the appellant's statement that the complainant tried to bribe him which was found to be a confession by the presiding officer and thus not admissible be reconsidered. The State placing reliance on **Keys v Attorney General, Cape Provincial Division and Others 1996 (1) SACR 134 (CC)** was of the view that the statement was an extracurial admission albeit not reduced to writing and ought to have been allowed even if it was obtained contrary to section 35 of the Constitution Act 1996.i.e without the appellant having being appraised of his right to legal representation and importantly his right not to incriminate himself before he could utter such words as alleged by Insp Smith. I do not intend to go in depth on this aspect suffice to say that the presiding officer was correct in his approach. The admission of a statement (reduced to writing or not) obtained or made without a warning that it may be used against the maker will inevitably taint the fairness of any subsequent trial. This means that in this case it was improper for the police in particular Inspector Smith not to have

apprised the appellant of his constitutional rights before he could allegedly make such a statement and then turn around to use the same against him. The right to a fair trial envisaged in section 35(1) of the Constitution of South Africa requires a substantive rather than a formal or textual approach. The reliance on **Key v Attorney General, Cape Provincial Division** supra in these circumstances is misplaced. To have allowed that purported statement would have had an adverse effect on the rights of the accused to a fair trial. See **S v Orrie and Another** [2005] All SA 212 (SCA) at 223; **S v Molimi** *supra* at 622-623.

[22] Having concluded that the trial court misdirected itself as set out in the preceding paragraphs it is important to reiterate what **Nkabinde J** recently stated categorically in **S v Molimi** 2008 (2) SA (CC) 76 at 99 f-g:

> "[50] It is a cardinal principle of our criminal law that when the State tries a person for allegedly committing an offence, it is required, where the incidence of proof is not altered by statute

> (and it is not in this case), as is the case in this matter, to prove the guilt of the accused beyond reasonable doubt. That standard of proof, 'universally required in civilised systems of criminal justice', is a core component of the fundamental fair trial right that every person enjoys under s 35(3) of the Constitution. In S v Zuma and Others, this court, per Kentridge AJ, held that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be beyond reasonable doubt. The standard, borrowing the words used by Plasket J in S v T, 'is not part of a charter for criminals and neither is it a mere technicality'. When the State fails to discharge the onus at the end of the case against the accused, the latter is entitled to an acquittal."

[23] Having said that the evidence of the complainant raises strong suspicions of the appellant's complicity in the commission of corruption, the appellant like any accused in a criminal trial cannot be convicted simply because his version is improbable. **Nkabinde J** in **Molimi** supra at 100g states:

> "(T)here is no onus on the applicant to prove his innocence. A

mere suspicion, strong as it might be, is not adequate to confirm his conviction. Convictions based on suspicion or speculation, as the court stated in S v T, are the hallmark of a tyrannical system of law and South Africans have a bitter experience of such a system and where it leads to. That system cannot and ought not, in our constitutional democracy, be countenanced."

[24] For the reasons given in the above paragraphs and on a conspectus of all the evidence I am of the view that the appeal ought to succeed.

[25] **In the circumstances I make the following order**.

ORDER

1. **The appeal against the conviction succeeds**.
2. **The conviction and sentence are set aside**.

B. C. MOCUMIE, J

I concur.

A. F. JORDAAN, J

BCM/em