

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, MTHATHA)

CASE NO. CA & R85/2022

In the matter between:

CHWAYITA ONGAMA YONGAMA YAKO

Appellant

and

THE STATE

Respondent

APPEAL JUDGMENT

THE COURT,

[1] The appellant appealed with the leave of the court *a quo* principally against his *conviction* on charges of theft and fraud. We do not intend to repeat the several grounds relied upon in the very extensive and thorough notice of appeal filed on his behalf.

[2] The State perfunctorily opposed the appeal despite the magistrate noting in her judgment in the application for leave to appeal that after “*anxious consideration*” of the submissions made before her, she was persuaded that reasonable prospects existed that another court might come to a different conclusion.

[3] It appears that much of the hype in resisting the appeal stems from the fact that the appellant did not himself testify in the trial pursuant to a failed application for discharge in terms of the provisions of section 174 of the Criminal Procedure Act, No. 51 of 1977, leaving it open to debate whether this had effectively sealed his fate and damned him to the two convictions.

[4] Our panel also put counsel through the wringer for the appellant's failure to have testified at the trial, until it became plain through a thorough interrogation of all the evidence that the State had not on either of the charges proven its case beyond reasonable doubt on the premised bases relied upon such as to place any burden on the appellant to have had to come and gainsay or explain away any of the testimony.

[5] In the case of the conviction for theft the principal act of supposed misappropriation of the funds in question (R1 290 000.00) was contradicted by the evidence of the State's own witness, Mr. Takatshane (also known as Mr. Mbana), the chief executive officer of MPA Management Services, trading as "CMD".

[6] He was expected to testify that the appellant had not paid him certain professional fees agreed upon in that sum and that the payments supposedly made to him (referenced in the bank statements of Cross-Med Health Centre (Pty) Ltd as having been paid to "CMD") had instead been diverted to an entity that the appellant had a personal interest in, namely Malulu Investments.

[7] However, the evidence established that the payments were made to Malulu Investments at the behest of Mr. Takatshane/Mbana/MPA trading as "CMD". This was pursuant to their agreement and as a trade-off for the witness' own investment of a 20% stake in Malulu. Further, since the appellant was the sole director (and sole board member) of Cross-Med Health Centre, the company he was alleged to have stolen the funds from, there was nothing *per se* untoward about him having given effect to the transaction as he did.

[8] None of the aspersions and/or suspicions cast upon the appellant as having been in criminal breach of his fiduciary duties toward the company were even remotely met through the evidence that the State placed before the trial court.

[9] At worst the trial court reflected that the written record of the parties' agreement (in respect of the trade-off and acquisition by Mr. Takatshane of a 20% stake in Malulu Investments) postdated the payments to the appellant and raised a suspicion of unjustified transactions which required an answer, but it was not in issue that a ratification letter of their deal in fact supported the witness' claim that the payments made by the appellant on the basis of their agreement to Malulu was not in any way sinister.

[10] Mr. Takatshane indeed testified unequivocally that he was owed nothing by Cross-Med and had in fact been overpaid by R70 000.00.

[11] Despite the perspective that the appellant in his capacity as sole director (and board member) had used the company's bank account to make the payments in furtherance of his interest, this was self-negated by the relevant documentation that confirms that the payments were transparently made, not in breach of his fiduciary responsibilities and not unjustified after all.

[12] The emphasis of the State's case incidentally was to the effect that fictional entries had been made by the appellant when he made the payments reflecting on the company's banking profile that they were for CMD, when in reality they were made for an ulterior purpose and that CMD was in fact not paid. This was the force and *raison d'être* for the charge, namely that CMD had not been paid despite what the company's bank statements evinced, but this premise was self-evidently discounted by Mr. Takatshane himself.

[13] We are satisfied that the appellant's conviction on this charge, based on very tenuous threads of suspicion of culpable wrongdoing on his part, was a huge stretch.

[14] In respect of the fraud conviction, we agree that the evidence of the State fell short in the number of respects that were carefully and meticulously analyzed and drawn attention to in the heads of argument filed on behalf of the appellant.¹

[15] Fundamental to this charge was whether the appellant had made the misrepresentation contended for, which conclusion could not have been sustained once the trial court accepted that it had become common cause at the end that the appellant owned the license and practice number issued in the name of Cross Med Mthatha Private (Pty) Ltd, which he withdrew at the end of the lease agreement. What banking changes he effected were to ensure that payments came to his designated account as the authorized holder of the license which he was perfectly entitled to do. Inasmuch as it was suggested that some of the monies paid over by medical aid schemes might not have been for his account, that is a matter for a civil debatement of account. Importantly, it was conceded by the State that the appellant ran his own practice during the period of the alleged fraud and that there was no evidence that the money from the medical aid schemes paid to his bank account was money due to Cross-Med Health.

[16] In conclusion there was no obligation on the appellant to prove his innocence and no adverse inference fell to be drawn by his failure to testify adjudged against the poor case proffered by the State. It simply failed to prove its case against him on the criminal standard in respect of either charge.

[17] In the result the appeal succeeds and both convictions are set aside.

B HARTLE
JUDGE OF THE HIGH COURT

¹ See para 144 at page 56 of the appellant's supplementary heads of argument.

Z Z MATEBESE
ACTING JUDGE OF THE HIGH COURT

DATE OF APPEAL : 21 August 2024

DATE OF JUDGMENT : 30 August 2024

Appearances:

For the Appellant: Mr. N Zilwa of Zilwa Attorneys, Mthatha (ref. Mr Zilwa)

*For the Respondent: Mr. M B Rangule of The National Prosecuting Authority, Mthatha
(ref. Mr. Rangula)*