



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

Case Number: A102/2024

Regional Court case number: SH7/28/2020

In the appeal of

RIDWAAN RAJAH

FIRST APPELLANT

**GOOD HOPE PLASTERERS t/a
GOOD HOPE CONSTRUCTION**

SECOND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

Date of hearing: 6 September 2024

Date of judgment: 12 September 2024

Bhoopchand AJ:

1. This is an appeal against the judgment of the Bellville Specialised Commercial Crimes Court. The Appellants are Ridwaan Rajah and Good Hope Plasterers CC, trading as Good Hope Construction. The Appellants were cited as Accused 1 and 2 in the court below. To avoid confusion, they shall be referred to throughout this judgment as the First Appellant and the Second Appellant. The Respondent is the State. Other significant players in this matter include the National Department of Public Works (the DPW) and Winlite Aluminium Windows and Doors (Pty) Ltd (Winlite), which has since been liquidated.
2. The trial in the Regional Court commenced on 2 August 2021. The Appellants were charged with fraud on count 1 and theft as an alternative. The charge on count 2 was for theft, and on count 3, the First Appellant was charged with perjury, alternatively making a false affidavit in contravention of section 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. The Appellants pleaded not guilty on all counts, and the First Appellant tendered a plea explanation in terms of section 115(2) of the Criminal Procedure Act 51 of 1977. The Appellants were acquitted on count 1 and convicted on count 2. The First Appellant was convicted on count 3.
3. In October 2010, the Second Appellant and the DPW concluded a contract to renovate buildings in the parliamentary precinct in Plein Street, Cape Town. The DPW appointed a professional consultant team, including an architect as the principal agent, a quantity surveyor, and an engineer. It also provided a project manager from its ranks to oversee the project. The DPW contracted the First Appellant as its Principal Contractor. The first Appellant tendered a contract price of R 7 302 113.16, which the DPW accepted. On completion of the contract, the contract amount escalated to R10 820 422.98.
4. The contract terms concluded between the First Appellant and the DPW were largely based on the standard form of the Joint Buildings Contracts Committee

(JBCC), the standard contract for large projects in the construction industry. The Second Appellant was required to appoint its subcontractors to discharge its obligations under the contract with the DPW. The Second Appellant appointed Winlite as a domestic contractor to construct four curtain screens on the parliamentary premises. The contract price between Winlite and the Second Appellant was R1 368 000.¹

5. The site was handed over to the Second Appellant towards the end of 2010. There was a delay in commencing the work largely due to the pace at which police clearance certificates were issued for the employees of the contractor and sub-contractors. Winlite anticipated an increase in the price of the materials it intended to use to erect the screens and brought this to the notice of the Second Appellant. After discussions with the DPW's project manager and in an attempt to avert the price rise, the Second Appellant and the DPW agreed to an advance payment to cover the costs of materials that Winlite would use to construct the curtain screens. The materials would be held offsite on Winlite's premises.
6. DPW would make the advance payment to the Second Appellant to forward to Winlite, provided certain conditions were met. Of these conditions, Winlite would provide a guarantee to the DPW to cover the costs of the materials kept offsite, despite there being no contract between the DPW and Winlite. Winlite provided the guarantee from Lombard Insurance in favour of the DPW on 1 December 2010. The guarantee was a bond for unused materials kept off-site.² The DPW released R519 037.90 on 14 March 2011 to the Second Appellant to pay its subcontractor, Winlite. The Second Appellant paid Winlite R467 131.11 on 18 March 2011 and retained R51 906.79, or ten per cent.
7. The onsite work commenced in March 2011, and Winlite installed two of the four screens. The DPW rejected Winlite's work. The implications were that the two screen curtains had to be dismantled, reworked, and reinstalled. Winlite

¹ Two other types of sub-contractors are referred to in the JBCC agreements, namely nominated and selected sub-contractors.

failed to respond to warnings to rectify its defective work, concurrently ran into financial problems, and was liquidated. The DPW duly claimed against the guarantee for the advance payment it had made. The insurers informed the DPW that they would not honour the guarantee as Winlite had no contract with the DPW.

8. The work proceeded to completion, with the Second Appellant appointing another sub-contractor to complete Winlite's part of the contract. The final certificate of completion was signed off on 5 April 2014. A final statement of account was duly processed by the DPW and signed off by the DPW's manager, the principal agent, and the quantity surveyor on 7 June 2014. On perusing the statement of account, the First Appellant rejected it as the DPW had allegedly omitted or deducted the first advance covering the costs of materials held offsite by Winlite. The Second Appellant applied to this court in September 2015 for an order to include the advance payment in the final statement.

THE MOTION PROCEEDINGS

9. The Second Appellant applied to this court to declare that R519 037.90 is to be included in the final account as an amount due and payable to it. The second Appellant sought consequential relief. The Respondents (the DPW and the Principal Agent) were required to amend the final account to include the sum of R519 037.90 in determining the final amount payable by the DPW to the Second Appellant.
10. The First Appellant deposed to the affidavit in the application on behalf of the Second Appellant. The First Appellant acted as the sole member of the Second Appellant.³ The State relied upon three paragraphs of the founding affidavit, namely paragraphs 14, 19, and 39, in compiling the charge sheet against the Appellants. The material part of paragraph 14 states that the contract sum agreed upon between Winlite and the Second Appellant was

³ The Notice of Motion is dated 22 September 2015. First Appellant's wife became a member of the CC on the 15 April 2015 and his brother, a member on the 9 December 2016.

R1 900 000 (excluding VAT). In paragraph 19, the First Appellant stated that the Second Appellant advanced the sum of R519 037.90 to Winlite for the materials kept offsite. In paragraph 39, the First Appellant states that on completion of the project, the DPW did not compensate the Second Appellant for the advance made on the DPW's behalf for the materials purchased and held offsite. The First Appellant stated that the Second Appellant paid for the materials, which became the property of the DPW, and the latter refused to pay.

11. The content of the following paragraphs, in addition to those identified by the State, is relevant to the case preferred against the Appellants and the determination of this appeal:

11.1. Paragraph 2: The First Appellant stated that the contents of the affidavit fell within his knowledge, unless indicated to the contrary, and are true and correct,

11.2. Paragraph 12: The final account excludes the sum of R519 037.90 in respect of an advance made to Winlite,

11.3. Paragraph 13: The amount advanced to Winlite rightfully stands to be included in the final account,

11.4. Paragraph 15: The commencement of the project was inordinately delayed. Winlite approached the Second Appellant to request that the DPW pay for the materials it intended to use in the project, which were kept off-site,

11.5. Paragraph 17: The DPW agreed to pay for the materials kept off-site by Winlite, provided that a guarantee made out in favour of the DPW had to be issued.

11.6. Paragraph 18: the guarantee was provided on 2 March 2011,

- 11.7. Paragraph 20: A dispute arose between the Second Appellant and Winlite over the quality of the work done by Winlite. Winlite departed the site and failed to return the materials it held off-site to the Second Appellant or the DPW.
- 11.8. Paragraph 26: The DPW lodged a claim for the value of the materials kept off-site
- 11.9. Paragraph 28: The insurance company informed the DPW that it would not honour the claim as the claim was time-barred and the DPW failed to submit the claim timeously,
- 11.10. Paragraph 29: The First Appellant forwarded several e-mails to the Respondents advising that the amount of R519 037.90 had to be incorporated into the account as the materials belonged to the DPW and a guarantee was made out in favour of the DPW,
- 11.11. Paragraph 32.2: The Second Appellant objected to the final account submitted by the Respondents as the amount of R519 037.90 had been omitted.
- 11.12. Paragraph 32.3: The materials (remaining) offsite were not brought back to the site for the construction of the remaining two screens,
- 11.13. Paragraph 33: Although the sum had been included in an interim payment certificate, it was not (?)⁴ omitted from the final account, which means that the Second Appellant has not been paid for the said materials,
- 11.14. Paragraph 38.1: The DPW did not agree with the understanding of the guarantee, nor did it agree that it was liable to pay for the materials, as the Second Appellant contended.

⁴ The word "not" is correct, as the evaluation later in this judgment reveals.

12. The DPW did not file an answering affidavit to the Second Appellant's founding affidavit. Instead, the DPW opted to agree to an order taken in this Court on 26 October 2015, in which the amount of R519 037.90 had to be included in the final statement of account. The DPW duly paid the Second Appellant the amount of R519 037.90, representing the amount initially advanced by the DPW for Winlite's materials kept off-site.

THE SIU INVESTIGATION

13. In terms of Presidential Proclamation R54 of 2014 to the Special Investigating Units and Special Tribunals Act 74 of 1996, the President of South Africa tasked the Special Investigating Unit to investigate allegations of the nature of serious maladministration and unlawful conduct, negligent loss of public money, and corruption, among others relating to state contracts. The work done at the parliamentary precinct, including the tender under scrutiny in this case, was included in the list for investigation. The investigation was allocated to the Chief Forensic Investigator Samuel Adams ("Adams").
14. Adams was mandated to investigate the building works at the parliamentary complex under project WCS045653. He looked at aspects of the tendering, appointment of contractors, consultants, and the conduct of state employees, whether there were any irregularities within their systems and processes and whether there was compliance with the provisions of the Public Finance Management Act 1 of 1999.
15. The Special Investigating Unit proceeded to uplift documents relating to the contract, including the final statement of account and the application raised by the Second Appellant to compel the DPW to include an amount omitted from the final account. Adams learnt that the court had ordered the payment. It became a concern for him as it referred to a claim for materials held offsite. The DPW paid the Second Appellant for offsite materials, but the Second Appellant paid Winlite for work in progress. Adams noted that the certificate of final completion was signed off on behalf of the Second Appellant. The

Second Appellant had not signed the final statement of account. The other signatures, including those of the professional consultant team and the DPW's onsite project manager, were affixed by 24 February 2014.

16. Adams interviewed the director of Winlite (since deceased), the State Accountant, D Ricketts, the liquidator of Winlite, the administrative officer Henrietta Amon and the DPW's legal advisor, A K Carriem. Adams found that the Second Appellant had paid Winlite R467 134.11 on 18 March 2011. Adams understood that there was no contractual relationship between the DPW and Winlite. He was also aware that the relationship between Winlite and the Second Appellant soured after Winlite produced poor work that the DPW rejected. The owner of Winlite told Adams that he had not received the advance payment. Adams was unaware that the Second Appellant had requested an advance payment from the DPW or that Winlite had requested an advance payment from the Second Appellant. Once Winlite had left the site, the DPW called up the guarantee, but it was rejected because the guarantee incorrectly reflected the employer as the DPW, and Winlite had no contract with the DPW.
17. The case presented by Adams became apparent during his examination in chief by the State. Adams stated that the DPW had made two duplicate payments of R519 037.90 to the Second Appellant, the first in 2011 and the second after the court order on 19 November 2015. Winlite's invoices indicated that the Second Appellant's payment was a progress payment, not an advance payment for materials held offsite. The Appellants stated they were not paid for the material offsite and then obtained a court order to force the department to pay them again. The ten per cent that the Second Appellant retained was not due to it. The amount retained by the Second Appellant should have been returned to the DPW as it was for the materials kept offsite.
18. Adams testified that the DPW suffered a loss of R519 034.90 (the second payment) and a loss of R51 903.49, the 10% retained by the Second Appellant. The Second Appellant should have returned both amounts to the DPW. Adams referred the case for prosecution on the tenuous premise that

the Second Appellant had not paid its subcontractor for materials held offsite but for work done onsite.

THE CHARGES

19. The First Appellant was summonsed to appear in court on 5 October 2020. The trial in the matter began on 2 August 2021. The Appellants were charged with three counts with alternate charges preferred to counts one and three. The first count was one of fraud with an alternate charge of theft. The second count was of theft. The third count related to perjury, alternatively, making a false statement in an affidavit, thus contravening section 9 of Act 16 of 1963.
20. On the first count of fraud, the State alleged that the Appellants intended to defraud the DPW of R519 037.90. The date implicated on this count is 22 September 2015, when the First Appellant deposed to the founding affidavit. On the alternative theft charge, the State alleged that on 19 November 2015, the Appellants unlawfully and intentionally stole R519 037.90 from the DPW. The DPW paid the Second Appellant R519 037.90 on this date after the court order was taken by agreement. Appellants were acquitted on count one, comprising fraud and theft charges.
21. On the second count of theft, the State alleged that the Appellants, over a period from 9 March 2011 to the date of the trial, unlawfully appropriated an amount of R519 037.90, the property of or in the lawful possession of the DPW intending to deprive the DPW of the amount permanently.
22. On the third count of perjury, the State alleged that the First Appellant deposed to an affidavit on or about 23 September 2015 wherein the content of paragraphs 14, 19, and 39 contained misrepresentations, lies, and false statements. The details contained in these paragraphs shall be addressed later in this judgment.

THE PLEA EXPLANATION

23. The First Appellant explained, among others, that :

- 23.1. The DPW paid an amount of R718 867.28 to the Second Appellant on 14 March 2011, of which R519 037.90 was an advance for materials held offsite by Winlite. Winlite provided an insurance guarantee to the DPW for the materials held offsite,
- 23.2. The Second Appellant effected payment of R467 134.11 to Winlite, representing a 10% deduction of R519 037.90, the value of the materials held offsite,
- 23.3. It is settled practice for a principal contractor to retain 10% of funds earmarked for payment to the domestic sub-contractor as a protective measure,
- 23.4. The DPW rejected the two screens erected by Winlite, and the latter left the site,
- 23.5. The amount required to rectify Winlite's defective work, re-install two screens, and install two further screens was about R600 000 for the Second Appellant's account,
- 23.6. The insurers refused to honour the claim as Winlite was cited as the contractor in the guarantee instead of the Second Appellant,
- 23.7. The DPW acquired ownership of the offsite materials. Due to no fault of the Second Appellant, the DPW failed to recover the materials offsite or to recoup the resultant loss from the insurer,
- 23.8. The Second Appellant paid for the materials and had no other option but to approach the High Court for the losses it suffered when the DPW omitted the payment from the final statement of account,

- 23.9. The First Appellant instructed his staff to provide the documents relevant to the contract, and his attorney drafted the affidavits and submitted them to Senior Counsel to finalise,
- 23.10. The affidavit did not reflect the 10% retention amount being withheld as a standard temporary measure. The amount reflected as a payment to Winlite in paragraph 19 was incorrect, but the last sentence was correct,
- 23.11. The contract between Winlite and the Second Appellant amounted to R1 368,000. The amount reflected in paragraph 14 was incorrect as it reflected the contract price between the Second Appellant and the subcontractor employed to undo and redo Winlite's defective work,
- 23.12. The First Appellant had provided the proof of payment of 18 March 2011 of R467 134.11 it made to Winlite at the request of the DPW on 21 October 2015. The DPW agreed to settle the amount of R519 037.90 claimed in the application,
- 23.13. The amount was lawfully due and received by the Second Appellant. The First Appellant denied that he wilfully and intentionally deposed any untruths in the affidavit to mislead anyone or the court.

CROSS-EXAMINATION OF ADAMS

24. Adams stated that no payments were made for materials kept off-site. He referred to three invoices issued by Winlite that were marked as exhibit 'S'.⁵ The First invoice reflected an amount of R598 272.00.⁶ The second invoice

⁵ Invoice 1, dated 19 November 2010, was for R598 272 for a progress claim for November 2010; invoice 2 was dated 19 April 2011 and reflected an amount of R166 946.65 and an outstanding amount of R131 140.89 from Nov 2010. The difference between the amount invoiced for November 2010 and the outstanding balance from November 2010 amounts to R467 131.11- the advance amount paid by the Second Appellant to Winlite. The first invoice of R598272 was the amount reflected in the guarantee.

⁶ The evidence reflected that the materials kept off-site were initially valued at R598 272, but on inspection of the materials by the Project Manager and Quantity Surveyor, the value of materials was reduced to R519 037.90

from Winlite refers to an outstanding amount of R131 140.89 from the November 2010 invoice. If the latter amount is deducted from the amount reflected as owing for November, the difference is R467 132, the advance amount paid by the Second Appellant to Winlite. Adams insisted that the latter was a progress payment.⁷

25. Adams was confronted with a sequence of facts to challenge whether the payment was a progress payment or for materials kept offsite. Winlite and the Second Appellant signed the contract on 9 February 2011. Winlite commenced work on the site on 27 March 2011. Winlite had not done any work when the first invoice was issued. Adams was shown e-mails from 2 March 2011, which dealt with the off-site materials. The architect and the quantity surveyor inspected the materials. Once valued by the architect and quantity surveyor, the materials off-site were worth R519,037.90. Adams had not contacted the architect or the quantity surveyor. Despite the facts, Adams declined to concede that the payment was for materials held offsite.⁸ Adams insisted that the amount paid to Winlite by the Second Appellant was for work done.
26. Adams insisted that the Second Appellant was not entitled to the 10% retention on the advance. He stated that it was not applicable, but when confronted with the building subcontract between Winlite and the Second Appellant, he indicated it was. He eventually conceded this point. Adams also accepted that the Second Appellant's court application was settled by agreement.
27. Adams admitted that his entire investigation was based on the complaints received. The complaint was that the amount paid to Winlite was progress payments, not payments for materials kept offsite. He changed his view when presented with the invoice (Exhibit "V") issued by Winlite. Winlite invoiced the Second Appellant for materials held offsite amounting to R519 037.90 minus

⁷ Adams probably suggested that the Second Appellant had pocketed the advance made for materials and had not paid its sub-contractor.

ten per cent. Adams then conceded that the advance was for payment of the materials held offsite. Winlite's defective work was a loss for the Second Appellant, not the DPW. The DPW tried to claim against the guarantee as they thought it was their loss, not the Appellants' loss. Adams accepted that someone in authority in the DPW was satisfied that the payment had to be made.

28. Adams could not assist with what was included or excluded in the final account. He had not consulted with any relevant personnel from the DPW or the professional consulting team. Adams was told that the final account indicates that the Second Appellant was paid R519 037.90 as part of the contract price. It was put to Adams that if the DPW managed to claim the R519 037.90 from the insurance company which issued the guarantee, then the DPW could not regard the advance as a payment made to the Second Appellant. This aspect was further elucidated. If the DPW hypothetically claimed against the guarantee and it was paid, but the amount on the accounts still shows that the DPW paid that to the Second Appellant, would Adams not then agree that the Second Appellant suffered a loss because it paid away the R519 037.90 to Winlite. Adams agreed.
29. Adams stated that the invoice changed the case concept (as initiated against the Appellants). On questioning from the court, Adams noted that "the payment on this invoice corresponds with the payment in Winlite's bank account, and the invoice states it is for materials off-site. Adams agreed that he might have had a different view if he had seen the invoice before. He testified that the R519 037.90 was the Second Appellant's loss.
30. It was suggested to Adams that count 1, which related to progress payments and not to materials kept off-site, was unsustainable. Adams declined to comment. It was then suggested that the Second Appellant was fully within its rights to ask for the final account to be amended to include the amount it had paid to Winlite for materials kept off-site. That is why the DPW paid the amount when faced with the application. Adams agreed.

31. On re-examination, Adams stated further that when Exhibit “V” was presented for the first time, he had seen a document stating that Winlite had invoiced for the material offsite. Exhibit “V” also indicated that the Second Appellant suffered the loss.⁹ Adams testified that if he had known of exhibit “V,” the investigation would not have proceeded. The State’s position concerning exhibit “V” is captured in its submissions on conviction. Alarming, the State submitted that it “begs to differ” with Adams, a witness it called when he stated that the invoice showed the Second Appellant had suffered a loss.
32. The impression the Court obtains from reading Adam's testimony is that he formed a cursory opinion on perusing the documents presented to him. He pursued an investigation of the Appellant upon the tenuous premise that the payment made by the Second Appellant to Winlite was a progress payment and not for materials held offsite. Adams was largely influenced by the owner of Winlite, who denied receiving payment for materials held offsite. Adam did a curtailed investigation and failed to interview some important personnel involved in the project. The Appellant's description of Adam's capitulation, when confronted with exhibit ‘V’ during cross-examination as his Damascus moment, is apt. The Court considers the testimony of Adams elicited during his cross-examination to be crucial to the guilt or otherwise of the Appellants. Yet, it did not warrant a mention in the Regional Court's judgment.

TESTIMONY OF THE OTHER STATE WITNESSES

33. David Andrew Ricketts, the State Accountant employed by the DPW, testified that the project manager verified the amounts paid to contractors. The payments made to the Second Appellant were already authorised when he received them. He did not investigate the amounts reflected on the certified invoices, as this was not part of his job. Ricketts could not confirm or refute that a double payment was made to the Second Appellant, nor could he comment on the final statement of account.
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34. Henrietta Amon, a senior administrative officer in the legal services section of the DPW, confirmed that Lombard Insurance declined to honour the guarantee as there was no contract between the DPW and Winlite. The DPW had erred by not checking this aspect when receiving the guarantee.
35. Amon was asked about the litigation dealing with the amount omitted from the final account. She could not assist. The court asked whether Amon was involved in processing the final account and asked her whether the DPW owed the Second Appellant a further R519 037.90. Amon responded that she was not involved in computing the final account. When the Court further questioned her, Amon stated that the DPW disagreed that it owed the Second Appellant a further R519 037.90.
36. Mohamed Suaad Carriem, the legal advisor to the DPW, was asked about the amount retained by the Second Appellant, i.e., R51 903. 79. Carriem was asked whether the Second Appellant was entitled to retain 10% of the amount paid for materials off-site. He stated that the retention amount was for works completed, not for materials to be supplied. Carriem bore no independent knowledge of any payments that were made.
37. Carriem could not assist the court in determining whether the series of payments were correctly computed or calculated. Nor could Carriem comment on the accuracy or completeness of the final payment certificate. Carriem initially stated that the quantity surveyor would be the best person to comment on the accuracy or completeness of the final statement of account. However, he later stated that he could not answer that question. It was put to Carriem that an advance was requested to avoid price increases in materials. Carriem testified that Ms Van Den Hoven had informed him that the DPW would be liable if the materials were brought onsite. This was why the DPW settled with the Second Appellant after the latter launched the application. Regarding the guarantee, the DPW, including Carriem, overlooked that Winlite had no contract with the DPW. Carriem did not know that the Appellant and his brother informed the project manager that the guarantee the DPW insisted on

having with Winlite was incorrect. Carriem asserted that the guarantee should have come from the Second Appellant.

38. Carriem testified that the 10% retention is for latent defects. It was put to Carriem that the First Appellant would testify they were compelled to bring the application. The DPW paid the Appellants R519 037.90 to forward to Winlite, of which R467 000 was paid. When the DPW computed the final account, they omitted the R519 037.90 because they could not recoup this amount from the guarantee. The amount omitted is a subtraction from the amount due to the Appellants. It was paid initially, but in the end, the DPW took it away from the final statement. Carriem had no comment on the proposition put to him. Carriem repeated that, in his opinion, the Second Appellant was not entitled to retain the 10% and hang onto it even after the matter had been settled. Carriem could not think of any lawful grounds on which the Second Appellant retained the 10%.
39. The crucial part of Carriem's evidence is related to the advance payment and the guarantee. Carriem was not involved in the computation of the final statement of account and could not assist the Regional Court in this respect. Carriem testified that the advance payment to the Appellants subcontractor was exceptional and that the State would not normally make advance payments. The incorrect and ineffective guarantee obtained from Winlite escaped his scrutiny, and he accepted responsibility for it.
40. Adams did not consult with Neeltjie Clasina Van Der Hoven (Van Der Hoven), the DPW's head of building projects. The State indicated they intended to call Van Der Hoven to explain the final statement of account but reneged. The failure to call Van Der Hoven, the project manager, or any member of the professional consulting team meant that the State would flounder in its attempt to prove that the Appellants stole the amounts as charged.
41. An analysis of the witness testimony at the close of the State's case indicates that the State had not provided proof at all, let alone proof beyond a reasonable doubt that the State should prevail on the theft charges as

formulated in the charge sheet. The State failed to call any witness who could explain why the DPW had settled the application to compel the DPW to include the advance payment of R519 037.90 in the final statement of account. The State intended to call Van Der Hoven, the DPW's head of building projects. It reneged on that intention.

42. The witnesses who testified confirmed that the DPW erroneously obtained a guarantee for the advance payment from Winlite. None of them could explain the computation of the final statement of account. The State had yet to prove the element of intention required to prevail on the fraud, theft, and perjury charges. The State would require the Appellants to incriminate themselves on the fraud and theft charge and the First Appellant to admit an intention to perjure himself in his founding affidavit.

THE SECTION 174 APPLICATION

43. The State closed its case at the end of Carriem's testimony. The State did not consider it necessary to lead competent evidence on the final statement of account by any personnel who knew how the account was computed. Although the State indicated it would call Van Der Hoven, it did not follow through with this intention.
44. The Appellants raised a section 174 application for their discharge. The Appellants surveyed the evidence of the State. They asserted that the State did not disprove their contention that the DPW omitted and thus deducted the advance from its final statement of account. The Appellants tendered a plea explanation for the errors made in the founding affidavit. They submitted that the only reasonable prospect of conviction would be if the First Appellant testified and confessed to doing so wilfully and intentionally.
45. The State conceded in argument that the advance payment made to Winlite by the Second Appellant on behalf of the DPW was for materials held offsite. The State submitted that the Appellants could not use the guarantee to impute liability onto the DPW. The DPW provided the advance payment, and the

result was that the DPW suffered a loss of R519 037.90. The Second Appellant paid R467 134.11 to Winlite, i.e. 10% less than the actual amount received as an advance towards Winlite. Carriem had testified that the Second Appellant had no basis for retaining the 10% as it defeats the purpose of the DPW advancing such payment. The subcontract agreement makes provision for the retention of 10%, but that is for work completed. Carriem also testified that the Appellants should have disclosed that they retained 10% of the advance payment (R51 903.79). The Appellants had this amount and did not disclose it to the DPW. The Appellants were involved in negotiations for 14 months and never thought of returning the 10% retained to the DPW. The purpose was to deprive the DPW of this amount permanently.

46. It is thus apparent that the State concentrated on proving that the Appellants had stolen the 10% they retained and did not subsequently disclose or return to the DPW. From the tenor of the submissions made, the State knew it failed to prove that the Appellants intended to steal R519 037.90 from the DPW.
47. The rationale of a section 174 application is to avoid wasting valuable court time and to protect the Appellant's constitutional rights to a fair trial. The Regional Court found that the State had proved a prima facie case, which the Appellants had to answer. The court came to this decision based on the admissions made by the First Appellant concerning the errors in the founding affidavit. The Regional Court referred to the admissions as misrepresentations made by the First Appellant. This was incorrect.
48. The Regional Court referred to the 10% retention, the state of mind of the First Appellant in so far as the proof of intention was required for the charges. The Regional Court suggested that the First Appellant was in the best position to explain why the errors were not committed intentionally. The Regional Court quoted Hiemstra in stating that if there is a suspicious atmosphere about the case, it is not wrong to keep the finality of the discharge in abeyance. The section 174 application was dismissed.

THE TESTIMONY OF THE ACCUSED AND HIS BROTHER

49. The First Appellant, a Quantity Surveyor, testified that the DPW agreed to pay Winlite the money to procure the materials for the curtain walls and to mitigate the predicted rise in costs. Winlite could either provide a construction guarantee or agree to a 10% deduction from every payment held in a retention fund until the contract is completed. Winlite opted for the 10% retention. Winlite would have received the amount retained at the end of their contract, provided there were no defects in their work. Provision of security by the contractor or sub-contractor by either guarantee or retention is practised by every company involved in the building industry in South Africa and the world. The 10% the Appellants retained from the advance was to cover any damages it suffered against Winlite.
50. The First Appellant testified that his brother and the manager had noticed that the DPW had omitted the payment they had made for the materials held offsite by Winlite from the final statement of account. The DPW had unfairly omitted the R519 037.90 from the final account. From February 2014 to September 2015, they tried extensively in an amicable way to convince the DPW that the guarantee the DPW obtained from Winlite was not the Appellants' fault. The Appellants were lawfully entitled to include the amount in the final statement of account.
51. The founding affidavit correctly refers to the DPW, excluding R519 037.90 from the final statement of account. The First Appellant admitted that the amount reflected in the founding affidavit as a payment to Winlite was incorrect. The contract price with Winlite was also incorrect. All information relating to the matter was given to the attorneys. The amounts appeared to be correct when he saw the affidavit. The Second Appellant was engaged in many contracts when the affidavit was finalised. The First Appellant was assured by his attorney that the figures were correct. He contended that the amount reflected in paragraph 19, i.e., R519 037.90, was the value of the materials held offsite. The First Appellant testified that the allegation made in paragraph 39 of the affidavit that the Appellants had not been compensated for the advance made on behalf of the DPW for the materials purchased and

held offsite was correct. Senior Counsel drafted the affidavit. The DPW had requested proof that Winlite had been paid before it agreed to include the R519 037.90 in the final statement of account and paid the amount. The proof of payment was provided to the DPW.

52. Under cross-examination, the First Appellant confirmed that only one payment was made to Winlite for materials kept offsite. The subcontract did not make provisions for advance payments. The advance payment to Winlite was processed as a progress for work completed. Winlite acknowledged that the payment qualified for a 10% deduction. It was unfair to expect the Appellants to warn the DPW that the guarantee should have been between the Appellants and Winlite, not between Winlite and the DPW. The contract between the Appellants and the DPW allowed for advance payments, but the agreement between the Appellants and Winlite did not. The subcontract with Winlite was not amended to allow for the advance payment that was made. The guarantee created an obligation on the part of the insurer to pay upon the happening of an event, which included loss of the materials. The guarantee required by the DPW had an impact on the subcontract between the Appellants and Winlite. The Appellants got together with Winlite and agreed that the advance payment would be a progress payment. These instances occur frequently in the construction industry and are not always regulated.
53. Further, under cross-examination, the First Appellant testified that the Appellants did not need to inform the DPW that they had retained 10% of the amount paid for the materials held offsite. The DPW was not entitled to the 10% retained as they had the guarantee to cover them for any loss relating to the materials. The 10% retained was to cover any damages the Appellants suffered due to Winlite's defective work.
54. It was a mistake not to deduct the retention from the amount reflected in the affidavit. Neither was it a misrepresentation. The First Appellant admitted that the amount paid to Winlite in paragraph 12 of the affidavit was also incorrect. The statement in paragraph 39 was correct. Paragraph 39 contained the allegation that the Appellants had completed the project but had not been

compensated for the advance made on behalf of the DPW. The First Appellant explained that the DPW deducted this amount from the money paid to them. The full amount of R519 037.90 was claimed and paid by the DPW. The 10% that was retained was spent. The Appellants were getting it back from the DPW. Winlite went into liquidation after they left the site. The 10% retention was used towards getting a new contractor. The full amount was not due to Winlite because of the retention policy. If the 10% retention was due to anybody, it was due to Winlite and not the DPW.

55. The brother of the First Appellant testified. He is a financial accountant and the contracts director of the second appellant. He was responsible for the overall financial management of the building sites and dealt with contractual matters that arose. He testified that the DPW had the right to claim the guarantee. The DPW was incapable of securing itself properly. The DPW paid for and owned the materials off-site. The DPW bore the risk if Winlite defaulted, and the materials did not come onsite.
56. The brother testified that the JBCC contracts permit a risk-associated security position that comprises either a variable guarantee or a reduction in the monthly payments as a cash retention. The Second Appellant opted for monthly retention of payments made by the DPW. The Second Appellant, in turn, followed suit by implementing a similar security provision with their subcontractors.
57. It was put to the brother that the DPW suffered losses, as in this case. The brother replied that any loss suffered by the DPW occurred through their error in demanding a guarantee from Winlite. The Appellants did not inform the DPW of the retained amount, nor did they return it to the DPW. It was put to the brother that the Appellants had a legal and contractual duty to disclose to the DPW that the Second Appellant would retain 10% of the advance payment regarding materials offsite. The DPW paid out an additional amount of R51 903.70. The brother disagreed.

58. The brother testified that the State misunderstood contractual matters in the construction industry. The Second Appellant had a contract with Winlite that allowed it to deduct the 10% retention, which it duly did and which Winlite accepted. The Second Appellant had the right to set off costs once Winlite abandoned its obligation. Due to Winlite's default, the Second Appellant was saddled with an additional cost of about R1 300 000. The brother explained that the JBCC contract permitted the Second Appellant to deduct 10% of the contract sum for contracts exceeding R1 million. It was, therefore, legal and agreed to between the Second Appellant and Winlite.
59. The claim against the DPW occurred due to their failure to act on the guarantee they required. The State suggested to this witness that the First Appellant testified that he had made a mistake when he failed to deduct the 10%. The State incorrectly made the latter proposition. The First Appellant had testified that it was a mistake not to explain this in his affidavit as the amount paid to Winlite. The brother testified that the Second Appellant would have been able to claim their loss to the maximum of what was paid to Winlite if the DPW had asked the Appellants to provide the guarantee to them.
60. After perusing the final statement of account, the brother testified that he noticed that the DPW had removed their payment of the amount for materials held offsite. The professional consultant team was informed that the Appellants did not agree with removing the item from the final statement of account. There were numerous emails between the Appellants and the DPW's Van Der Hoven. The Department's onsite representative, Eric Williams, agreed that the item's removal was wrong. The brother repeated this explanation under cross-examination. The DPW had deducted the R519 037.90. The Second Appellant had suffered a loss of about R1,3 million and could only claw back the R519 037.90 from the DPW.
61. The testimony of the First Appellant and his brother were consistent on the facts material to this matter. Although the Regional Court has the advantage of observing the demeanour of the witnesses when they testify, there is nothing in the trial transcript to suggest that they were dishonest, unreliable, or

unprofessional. They repeatedly stressed that the Prosecutor did not understand the building industry and that there were practices peculiar to the industry. It is unclear how the Regional Court concluded that their testimony, especially about the defences they raised, were all lies.

THE JUDGMENT AND CONVICTION

62. The Regional court found that both Appellants acted unlawfully in their dealings with the DPW. The DPW released R519 037.90 on 8 March 2011 to the Second Appellant for payment to Winlite for materials kept offsite after the Lombard guarantee was issued. The advance payment was for the materials required for curtain walls three and four.¹⁰ The Second Appellant paid an amount of R467 134.11 to Winlite. Winlite erected just two of the four screens before it went into liquidation. The materials kept offsite were never recovered or returned to the DPW.
63. The First Appellant stated in his founding affidavit that the final account presented for the Second Appellant's approval excluded the amount of R519,037.88. The First Appellant falsely stated in his affidavit that R519 037.30 constituted an advance paid by the First Appellant to Winlite for goods manufactured and kept offsite. Twenty-four days after the High Court order, i.e., on 19 November 2015, DPW paid (or paid again) R519 037.30 to the Second Appellant. The Second Appellant did not pay the full amount to Winlite (the first time around). The First Appellant also falsely stated in his affidavit that the contract sum with Winlite was about R1 900 000.
64. The Regional Court summarised the case for the Defence. The Defence had claimed that, at most, the Appellants acted negligently. The Second Appellant retained 10% of the advance payment as it was contractually entitled to do as a protective measure. There was no legal duty to reveal the latter to the DPW. The Second Appellant believed it was legally entitled to set off the 10% against the R600 000 in additional costs incurred through the sub-contractor's

¹⁰ This is incorrect. The advance payment for materials held off-site was for all four screens.

malperformance. It was put to the state witness Carriem that the DPW was mistaken about the format or nature of the Lombard guarantee. Exhibit “V”, an invoice from Winlite, proved that Winlite was also under the impression that the 10% retained was legally in order. Winlite fully agreed to the retained amount, knowing that the materials held offsite were sponsored (or paid for) by the DPW. The defence raised included the contention that the incorrect figures amounted, at most, to possible negligence as the Appellants did not intend to commit any crime. The State proved no commission of a crime beyond a reasonable doubt. To understand the defence raised, the court had to consider other contracts relevant to the sub-contract with Winlite.

65. The Regional Court cited the relevant law before assessing the witnesses. All four State witnesses impressed the Magistrate as professional, unbiased, honest, and reliable witnesses. She qualified the observation by saying that they were not perfect. The First Appellant and his brother did not impress her. They were not entirely honest and reliable. They admitted to including serious and erroneous figures in their affidavits in the High Court application. They indicated that these were mere mistakes, which at most, amounted to negligence. Their legal team prepared the documents. They conceded at the end of the trial that there was no contract between the DPW and their domestic sub-contractor.¹¹ They could not explain why the 10% retention was not revealed in the affidavit. The Regional Court referred to the First Appellant and his brother’s educational status. They had tertiary qualifications. They were both in the business world but could not distinguish a company from a close corporation or determine how many members constituted their close corporation. The Appellants could not provide any reason for failing to return the money to the DPW.¹²
66. The court’s evaluation of the evidentiary material followed. The court reminded itself that the legal elements of the crimes the State required convictions had to be proven beyond reasonable doubt. In addition, it reminded itself that it

¹¹ This is incorrect, as the brothers pointed out that the DPW had no contract with Winlite. Hence, Winlite approached them to ask the DPW for an advance ahead of the anticipated increase in the price of the materials.

¹² The brothers testified repeatedly that the amounts were legally due to them.

may only convict on the reasonableness and reliability of the evidentiary material.

67. The court considered the undisputed evidence and stated that it assisted in reaching a verdict. The First Appellant is tertiary qualified. The First Appellant admitted the DPW paid an advance of R519 037.90 for offsite material on 8 March 2011.¹³ Winlite requested the Second Appellant to approach the DPW before 8 March 2011 for upfront payments for materials held offsite. It was also common cause that the advance payment was for materials kept offsite, i.e., curtain walls 3 and 4, which Winlite never installed. The Second Appellant paid Winlite R467 134.11 on 18 March 2011 for the materials.
68. The purpose of the application to the High Court was to compel the DPW and Mr Sean Logie, the Architect and Second Respondent in the application, to include the sum of R519 037.90 in the relevant final account. The First Appellant included materially incorrect figures in paragraphs 14 and 19 of his affidavit.
69. The Regional Court then identified three main aspects of the dispute.¹⁴ These were whether the Appellants intentionally committed fraud and/or theft and perjury, whether or not the First Appellant unlawfully and intentionally made a misrepresentation in his founding affidavit for purposes of civil proceedings. The Appellants alleged that they had paid over the full amount of R519 037.90 to Winlite on 18 March 2011, knowing they did not. The Regional Court asked itself whether the incorrect figures in the founding affidavit occurred through negligence or were made intentionally.
70. The Regional Court found that the Appellants had not committed fraud pursuant to count 1. The DPW paid the Second Appellant R519 037.90 pursuant to a court order. The court order was taken by agreement. Neither

¹³ This is incorrect. The First Appellant testified that the payment was made on the 14 March 2024. The Appellants bank statements confirms the payment date as the 14 March 2011.

the DPW nor the High Court were induced to act to their detriment through the misrepresentations perpetuated by the Appellants.

71. The Regional Court acquitted the Appellants on the alternative to count 1, i.e., theft. The Appellants did not intend to steal the amount of R519 037.90 twice. The court reasoned that a double *contract that existed simultaneously with the intent to steal* was not proven beyond a reasonable doubt. The Regional Court observed that the State did not charge the Appellants with theft of only R51 903.74.
72. The Regional Court assessed the Appellants' culpability under count 2 involving the standalone theft charge. The Magistrate asked rhetorically whether the State had proved all the "illegal"¹⁵ elements of the crime, especially the intention to steal. The court then proceeded to analyse the errors in the founding affidavit to determine whether the First Appellant had made a mistake, was merely negligent, or had the intention to commit a crime. The court found at least four instances in the affidavit where the First Applicant signed off incorrect information of a material nature as correct. The Magistrate specified two of them. The Second Appellant claimed it had paid R519 037.44 to Winlite when the amount was R467 134.11. This payment did not accord with the terms of the subcontract. The Appellants claimed that their contract price with Winlite was R1 900 000, knowing well that it was only for R1368 000, a difference of about R532 000.
73. The First Appellant and his brother had tertiary qualifications. Both operated in a field dealing with monies and contracts. The First Appellant had more than one opportunity to read the affidavit. The First Appellant should have understood the importance of making correct averments in an affidavit. There was a higher duty to be accurate when interacting with a minister or a senior figure. There was no room for errors in these circumstances unless the Appellants wanted to. The Appellants could not blame anyone else for the errors in the affidavit. The Magistrate wondered whether the Appellants would

¹⁵ This is probably a typing or transcribing error.

have persisted in using the same attorney as they did if the attorney was responsible for the errors. The Regional Court found that the First Appellant did foresee the errors and reconciled himself to the fact that the affidavit consisted of misrepresentations.

74. The Regional Court then considered whether the Appellants intended to benefit illegally and financially from their contract and the High Court application and found in the affirmative. That was the sole purpose of the application. The incorrect numbers amounted to hundreds of thousands of rands. The First Appellant knew that making a misrepresentation with fraudulent intent was a crime. He knew that theft was a crime; he knew that to lie under oath in his affidavit in civil proceedings was a crime. The First Appellant's knowledge of these crimes and his intent to act criminally was never placed in dispute during the trial.¹⁶
75. The Regional Court found that the Appellants unlawfully and intentionally stole R519 037.90 from the DPW. The amount was not due to them for at least three reasons. The DPW had already paid the amount to the Second Appellant shortly after Winlite had requested the advance. Winlite was the Second Appellant's sub-contractor, and the Department had no contract with Winlite. The Appellants knew the amount requested in the application was not due to them. The proof they had was their business account, which reflected the payment from the DPW and Winlite's invoice date. The Regional Court found further that the Second Appellant could not retain the 10% of R519 037.90 for itself. The DPW had paid for materials, and once Winlite defaulted, the Second Appellant should have returned the ten per cent to the DPW.
76. On the perjury charge, the Regional Court found that the First Appellant had, in addition to paragraphs 14 and 19, included incorrect facts in paragraphs 39 and 40 of the affidavit. The First Appellant had included the wrong facts to commit theft of the DPW's funds. The First Appellant had intentionally chosen

¹⁶ The evidence led at the trial contradicts this finding.

to claim an amount exceeding the invoice. The court found that the State had proved all legal elements of this crime beyond reasonable doubt.

77. The Regional Court reflected on the proven facts and weighed them against the versions of the First Appellant and his brother. The court found that their versions were not reasonably possibly true. They were all rejected as lies. Their defence of fault in the form of negligence was also not reasonably possibly true. The court said it was a lie. The First Appellant acted with intent to steal and lie under oath. The Regional Court provided three reasons for finding the First Appellant guilty of perjury and theft. In the affidavit, the First Appellant misrepresented the amount claimed from the DPW and why it was due to them. The First Appellant contended that the Second Appellant paid what the DPW was supposed to pay and that the DPW never paid them, knowing that both these accusations were false. The Appellants misrepresented the amount due to them from the DPW and the amount they paid to their subcontractor. The Appellants admitted that the purpose of the application was to get additional funds or to force the DPW to pay additional thousands of rands to the Second Appellant. Both the theft and the perjury were committed on different days. The First Appellant did not deny that he was asked whether he understood the contents of his declaration, had any objection to taking the prescribed oath, and considered the prescribed oath to be binding on his conscience. He did not state that he was denied the opportunity to read his statement again. He did not claim that he was in haste to sign the affidavit.
78. The Regional Court found that the First Appellant lied under oath to gain financially. He lied as to why he wanted to claim. He lied about the amount and the purpose as to why he wanted to claim. He lied as to the substantial amount he wanted to obtain. The First Appellant never checked the correctness of the amount because he knew the misrepresentations would allow the Second Appellant to gain financially.
79. The Regional Court acquitted the Appellants on the first count of fraud or theft, convicted them on the second count related to theft, and convicted the First

Appellant of perjury. The court was careful not to convict the Appellants of a lesser amount on the theft charges as it was not included in the charge sheet.

GROUND OF APPEAL

80. The Appellants raised more than 20 grounds of appeal. These included findings of fact or rulings of law in which the Magistrate erred and misdirected herself in that she:

80.1. Accepted the evidence presented by the State proved that the crimes set out in the charge sheet had been committed, that it proved the guilt of the Appellants beyond a reasonable doubt, that the charges did not amount to a duplication of offences, and that the second count of theft the charge as to time and place was not vague and embarrassing,

80.2. Failed to take into consideration the lie told by Winlite on which the States case was built (i.e., that the Second Appellant had not made an advance payment for materials held offsite by Winlite), failed to consider the evidence of Adams that had he known of exhibit "V", no charges would have been levelled against the Appellants, accepted the evidence of the State witnesses without examining or analysing their evidence, ignoring the collaborating evidence of innocence, acquitting the Appellants of theft on count one but convicting them on the same charge of theft on count two.

80.3. By finding that the fraud charge that no misrepresentation was made and, therefore, the Appellants were not guilty yet finding on the same facts that the crime of perjury had been committed as an intentional misrepresentation had been made, that the High Court order directing the DPW to lawfully pay the Second Appellant the money described in the charge sheet was obtained by intentional misrepresentations, by making the latter finding without recourse to any evidence as to why the order was agreed to considering that there were witnesses the State

could have called to indicate whether the order was made by intentional misrepresentation or not,

80.4. Ignored the High Court's order with the consent of the DPW, which order was not rescinded, and which directed the DPW to pay the money described in the charge sheet,

80.5. Concluded the evidence that was not supported by the facts and which evidence allowed for conclusions other than guilt,

80.6. Failed to consider the probabilities and surrounding facts that supported a finding of innocence, not finding and detailing exactly what was stolen in the theft charge, when it was stolen, how it was stolen and by whom it was stolen, finding that the two payments that were allegedly stolen were made to the Second Appellant,

80.7. Rejected the evidence that the statement on which the perjury charge was based was not material, was a mistake and was never made to supply false information,

80.8. Rejected the Appellant's claim that they lacked the *mens rea* to commit the crime of theft and perjury and failed to explore, analyse, or take cognisance of the relevant probabilities, corroboration, and surrounding facts that confirmed their defence.

THE LAW APPLICABLE TO APPEALS

81. The appeal in this matter arises from alleged errors and misdirections on the part of the Regional Court in its findings of fact and rulings of law.¹⁷ A court of appeal will be slow to interfere with the trial court's findings of fact without

¹⁷ A concise summary of the principles relating to an appeal on the findings of fact is provided in *Lehloka v S* (A213/21) [2022] ZAWCHC 34 (16 March 2022) ("Lehloka") (unreported) at para 12

proof of a material misdirection. Its powers to interfere are limited.¹⁸ In the absence of a verifiable and material misdirection by the trial court, its findings of fact are presumed to be correct. They will only be disregarded if the recorded evidence shows they are wrong. When an appeal is lodged against the trial court's findings of fact, the appeal court should appreciate that the trial court was in a more favourable position than itself to form a judgment because it was, among others, able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial.¹⁹

82. An appeal court will be deferential and slow to interfere with a trial court's credibility findings.²⁰ The deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule the factual findings of the trial court to do justice to the case.²¹ Where a court of appeal is convinced that the conclusion reached by the trial court is wrong, it will reverse it.²²
83. In criminal proceedings, the state bears the onus to prove the accused's guilt beyond reasonable doubt²³. The accused bears no onus to prove their innocence.²⁴ The accused's version cannot be rejected because it is improbable, but only once the trial court has found, on credible evidence, that the explanation is false beyond a reasonable doubt.²⁵ The corollary is that if the accused's version is reasonably possibly true, the accused is entitled to an acquittal. An Appellant's conviction will be sustained if his version of events is considered false after considering all the evidence.²⁶

¹⁸ R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705-706, : S v Francis 1991 (1) SACR 198 (A) at 204E

¹⁹ S v Monyane and Others 2008 (1) SACR 543 (SCA)

²⁰ R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706; S v Kebana 2010 (1) All SA 310 (SCA) para 12, S v Pistorius 2014 (2) SACR 315 (SCA) par [30]

²¹ Makate v Vodacom Ltd 2016 (4) SA 121 (CC)

²² See CWH Schmidt and H Rademeyer *Law of Evidence* (Services Issue 21, May 2023) at 3-40, and the cases cited

²³ S v Mbuli 2003 (1) SACR 97 (SCA) at 110D-F; S v Jackson 1998 (1) SACR 470 (SCA) and S v Schackell 2001 (4) SACR 279 (SCA)

²⁴ S v Combrinck 2012 (1) SACR 93 (SCA) at para 15, Lehloka (Supra)

²⁵ S v V 2000 (1) SACR 453 (SCA) at 455B, Lehloka (Supra)

²⁶ S v Sithole and Others 1999 (1) SACR 585 at 590, Lehloka (Supra)

84. Splitting of charges and duplication of convictions should be avoided. The underlying ratio for the rule is to prevent multiple convictions arising from culpable facts which constitute one offence only.²⁷ Common sense and fairness should prevail when the rule is applied.²⁸ Section 83 of the Criminal Procedure Act authorises the State to put to an accused as many charges as possible, as may be justified by the facts, either in the form of main charges or alternatives. The court must ensure no duplication of convictions at the end of the trial.²⁹
85. With the efflux of time, three tests have been developed by our courts as a practical guide to determine whether there has been a splitting of offences and duplication of convictions, namely the ‘single intent test’,³⁰ the ‘continuous transaction test’³¹ and the ‘evidence test’.³² No general test has been developed.³³ Thus, in instances where the offences may have been carried out with the same single intent or formed part of a single continuous ‘transaction’ or course of conduct, or where the same evidence which was required to prove the one offence would necessarily also prove the other, charging the accused with all these offences was considered to amount to an impermissible so-called ‘splitting of charges’ which could potentially result in a duplication of convictions, and consequently the accused would only be charged with (or convicted of) one of them.³⁴
86. As a further aid in applying the “intent test”, the court will have regard to the essential elements of the crime to prove each charge. The ‘intent test’ is applied if there are two acts, and each would constitute a separate or different act, but there is only one or a single intent; where both acts seem to be

²⁷ *State v Sarah Prins* (D997/2002) [2003] ZAWCHC 40 (29 August 2003), *S v Grobler en 'n Ander* 1966 (1) SA 507 (A) at 523B; *S v Tantsi* 1992 (2) SACR 333 (TK) at 334f; *S v Davids* 1998 (2) SA 313 (C) at 316B

²⁸ *R v Kuzwayo* 1960 (1) SA 340 (A) at 344B

²⁹ *S v Grobler* (supra) at 513G

³⁰ *R v Sabuy* : 1905 TS 170

³¹ *Bam v S* (A144/18) [2020] ZAWCHC 68; [2020] 4 All SA 21 (WCC); 2020 (2) SACR 584 (WCC) (20 July 2020)

³² *R v Gordon* 1909 EDC 214

³³ *R v Johannes* 1925 TPD 782, *Ex Parte Minister of Justice: In re Rex v Moseme* 1936 AD 52; *S v Grobler en 'n Ander* (supra) at 518AF; *S v Wehr* 1998 (1) SACR 99 (C) at 100

³⁴ Hoexter, Cowling et al *SA Criminal Law & Procedure* Vol 3 Chp 3, C2-C3 as cited in *Bam v S* (supra) at paragraph 33

committed to achieving or attaining this single intent, there is only one offence.³⁵ The SCA held that the tests are nothing more than guidelines. In each matter, to determine whether there might be an improper splitting of charges and a resultant duplication of convictions, a Court must adopt a common sense approach in light of the fundamental requirement of fairness to an accused.³⁶

EVALUATION

87. The overarching impression is of five elements that permeate this case, each pivotal to the charges levelled against the Appellants. They are the advance payment, the guarantee, the ten per cent retention, the founding affidavit, and the final statement of account. The court shall examine each of them.
88. An advance payment, or prepayment, is a financial transaction in which a payer provides funds to a payee before goods or services are delivered. This is typically done to secure a product or service in advance. On behalf of the Appellants, it was argued that the advance was an amount paid to Winlite by the DPW in terms of a separate agreement between Winlite and the DPW underscored by a guarantee supplied by Lombards. It was related to 'materials offsite', meaning money was required to fund the purchase and work on screens offsite intended for the building work. This submission does not accord with the evidence.
89. The evidence supports the conclusion that the advance payment was forwarded against the Second Appellant's tender price. Due to delays in the commencement of the building project occasioned by the slow pace of police clearances, Winlite asked the Second Appellant to approach the DPW for a payment in advance to secure materials to be used in the offsite manufacture of curtain screens. Winlite feared an imminent increase in the price of the materials. The Second Appellant obliged, and the DPW acceded to the

³⁵ S v Nyumbeka 2012 (2) SACR 367 (WCC)

³⁶ S v BM 2014 (2) SACR 23 (SCA) at para [3] followed in S v McRae & Ano 2014 (2) SACR 215 (SCA)

request on condition that Winlite provided security for the value of the materials.

90. There was no contract between Winlite and the DPW. The DPW appreciated the need to curtail costs but erred in requiring the guarantee from Winlite. The guarantee should have come from the Second Appellant. Payment of R519 037.90 was made into the Second Appellant's bank account, the Appellants deducted ten per cent from the advance, and the Appellants objected to its omission from the final statement of account. Counsel for the Appellants conveyed to the State witness Adams that the advance was made against the tender price. The DPW settled the application to reinstate the item in the final statement of account. This interpretation accords with the evidence.
91. State witness Carriem described the advance as 'exceptional' as the State rarely makes this payment, let alone to a domestic subcontractor. The JBCC defines an advance payment guarantee as a guarantee at call obtained by the contractor from an institution approved by the employer in the amount as stated in the contract data. The JBCC contracts allowed for two methods of transitional security to ensure that work by contractors and subcontractors was properly done, i.e., the provision of a guarantee by an insurer or the retention of a percentage of payments due. The guarantee was provided for the DPW to secure the value of the goods kept off-site. The DPW erroneously demanded that Winlite provide the guarantee despite having no contract with the Appellants' subcontractor.
92. Carriem testified that the DPW assesses all guarantees, but this particular guarantee escaped their scrutiny. It was an oversight on his part. Through its error, the DPW failed to realise that the guarantee obtained by Winlite cited Winlite as the contractor and the DPW as the employer. Winlite erected two screens, which the DPW rejected. Winlite subsequently abandoned the site and defaulted on its contract with the Second Appellant. The Second Appellant had to appoint another subcontractor at an increased cost to dismantle the work done by Winlite and complete the installation of four curtain screens on the parliamentary premises. The DPW thought they had

secured the materials held offsite by holding the guarantee. Lombard Insurance rejected the claim as the document reflected Winlite as the contractor and the DPW as the employer. When the DPW failed to secure payment, they chose to omit the item for materials held offsite from the Second Appellant's final statement of account.

93. As the DPW made the advance against the Second Appellant's contract price, the Second Appellant was entitled to retain ten per cent of the advance it paid to Winlite against the subcontract price. The invoice issued by Winlite to the Second Appellant dated 8 February 2011 ("exhibit V") confirms that Winlite accepted that the Second Appellant was entitled to retain ten per cent of the amount invoiced. Winlite opted for this form of security to ensure its work was properly executed.
94. Whilst it is correct that the subcontract between the Second Appellant and Winlite did not cater for a percentage retention of payments made for materials held offsite, it must be remembered that State witness Carriem described the advance as an exceptional payment. The First Appellant testified that they approached their subcontractor and agreed to process it as a progress payment. The subcontract with Winlite for about R1.3m included the cost of materials supplied by Winlite. If the Appellants had paid Winlite in the normal course of the subcontract, the payment would have been part of a progress payment. State witness Adams failed to grasp this aspect of the subcontract and investigated the Appellants on the tenuous basis that the advance was for work done and not for materials held offsite. Much time and effort was expended at the trial in debating this issue.
95. The First Appellant insisted that it was common practice in the building industry for the contractor to retain a percentage of payments made to its subcontractors, the amount of which would be reimbursed if they executed their contractual obligations properly. Had the contract with Winlite run its course, the Second Appellant would have retained ten per cent of all payments against the subcontract tender price of R 1 368 000, i.e., R136 800. The Second Appellant would have returned the amount retained if Winlite had

completed its obligations properly or deducted an appropriate amount for defective work. The ten per cent retained was the Appellant's money, paid to them by the DPW against the contract price. They did not have to declare the amount retained to the DPW or return it when Winlite defaulted.

96. Winlite did default, and the Appellants suffered considerable loss for their account in appointing another subcontractor to dismantle Winlite's defective work on the two screens, redo the installation and install the other screens afresh. The First Appellant testified that the ten per cent retained had been used towards the costs of the new subcontractor. The DPW had deducted the full amount it paid to the Appellants as an advance from the final statement of account as the guarantee had been rejected. The First Appellant testified that if anyone was entitled to receive the ten per cent retention, it could have only been Winlite. However, Winlite defaulted, costing the Appellants much more than the contract price with Winlite to rectify Winlite's defective work.
97. On completion of the work, the DPW and the Principal Agent compiled the final statement of account. The First Appellant and his brother testified that the DPW had omitted the line item, i.e., the advance payment for materials held offsite. The omission, in effect, amounted to a subtraction of the advance amount from the final tender price. The DPW attempted to short-change the Appellants for an error they perpetrated and admitted to regarding the guarantee. They could not use the guarantee to reclaim the amount expended on the remaining materials for the third and fourth screens. None of the State witnesses could testify to the final statement of account and whether the payment for materials held offsite was omitted from the account or whether the DPW had subtracted the amount from the Appellants' tender price.
98. There is a logical explanation for the Appellants' contention that the DPW had, by omitting the item for materials held offsite, effectively deducted R519 037.90 from the contract price. The final account is defined in the JBCC as a document prepared by the principal agent which reflects the contract value of the works at final completion or termination. A statement of account in the context of a building contract would list the services provided by the

contractor and the payments made by the employer. It reconciles the two to determine whether a balance is owed or an overpayment is made. The DPW deleted the line item for materials advanced to the Appellants as it had already paid for it. Suppose one understands the testimony of the First Appellant that the omission amounted to a deduction. In that case, it means that whilst the DPW deleted the line item, it retained its payment for the materials held offsite. Proper accounting would have required the DPW to deduct the R519 037.90 from its payments to achieve an equitable reconciliation of services provided against payments made.

99. The computation of the final statement of account supports the First Appellant's allegation in paragraph 33 of the founding affidavit. He contended, "Although the sum had been included in an interim payment certificate, it was not omitted from the final account, which means that the Second Appellant has not been paid for the said materials". As alluded to, an equitable reconciliation would have necessitated the DPW omitting the payment of R519 037.90 from the final statement if it omitted the line item for the cost of materials held offsite.
100. The final statement computed by the Principal Agent is complex, including additional payments, inflationary adjustments, and other omissions. It required explaining by the personnel qualified to explain it. The State opted not to call any of these personnel, although the State indicated its intention to call Ms Van Den Hoven from the DPW. Van Den Hoven would have been able to indicate why the DPW agreed to pay the amount of R519 037.90 after the Second Appellant instituted an application in this court and had taken an order by agreement to this effect. Ms Van Den Hoven would have been in a position, together with any of Mr Williams, the project manager, Mr Logie, the Principal Agent, or the Quantity Surveyor, to interpret the final statement of account. None of the witnesses called by the State, i.e., Adams, Ricketts, Amon, or Carriem, could comment on the final statement of account. The analysis thus far is in sync with the evidence.

101. This court then turns to deal with the appeal. At first blush, the judgment of the Regional Court strikes the reader as a well-written and reasoned treatise. It is structured into logical parts and quotes ample caselaw and legal writers supporting the conclusions reached. It summarises the case for the State and the Defence. It provides a theoretical framework for the types of theft, the evaluation of witness testimony, and quotes excerpts of the evidence to support its findings. There is nothing to fault the judgment in these respects. The judgment follows the tenor of the Regional Court's control over the proceedings during the trial.
102. The Regional Court granted the Appellants leave to appeal against their convictions on counts two and three. The Appellants did not appeal the sentence imposed. The Magistrate provided her reasons for granting leave to appeal. The Magistrate surveyed her judgment and concluded that she may have erred on one aspect, i.e., the ambit of the theft charge.
103. The Regional Court stood by its reasons for the judgment on count 2 of theft. It referred to the reasons for rejecting the First Appellant's defence of negligent mistake regarding perjury. It rejected the First Appellant's further defence that he did not properly read his affidavit before he signed it. The Regional Court then referred to the State's opinion that a reduced amount was stolen, not the amount mentioned in count 2 of the charge sheet. The Regional Court believed that justice must be seen to be done, and open justice enhances confidence in the South African Criminal Justice process. Because of a possible assets forfeiture application arising from the theft charge, the Regional Court accepted a slight possibility that an appeal court may take a different view on the Regional Court's judgment on the findings of fact or the conclusions of law.
104. This court takes its cue to determine this appeal from the concession that the Regional Court makes, i.e. the extent to which the State had whittled the amount involved in the second count of theft. As alluded to in the earlier part of this judgment, the fact that the State had changed its focus from obtaining a conviction on the theft of R519 037.90 to just ten per cent of it had become

apparent at the section 174 hearing. At that juncture, The State conceded that the DPW had made an advance payment for materials held offsite. The failure of the State to call witnesses to testify to the final statement of account and the State's written argument gave the first hint that it could not prove the full extent of the theft charge on count two. The State's failure to prove that the Appellants stole R519 037.90 from the DPW became manifest in its cross-examination of the First Appellant and his brother and its final submissions on conviction and sentence. The Regional Court inexplicably failed to detect this shift in the State's case.

105. During oral argument, the State Prosecutor readily conceded that she failed to prove the theft charge per the charge sheet. She conceded further that the State had abandoned proving the full ambit of count two of the theft charge as early as the close of the State's case in the trial. The State Prosecutor, however, maintained that the Appellants had been convicted of theft of ten per cent of the advance. This submission cannot be sustained. The charge sheet did not provide for a charge of theft on a lesser amount, nor was there any attempt to amend it. The Regional Court noted that the State did not charge the Appellants for the theft of R51 903. 70 and declined to convict them for the theft of the ten per cent of the advance they allegedly retained. The State did not cross-appeal the judgment.
106. Is this a material error and misdirection of the Regional Court? The answer has to be in the affirmative. The Regional Court found the Appellants guilty of a crime that the State could not prove, let alone prove beyond a reasonable doubt. The charge of theft on count 2 has to be overturned. It is a misdirection of fact and law. The Regional Court erred in its assessment of the evidence and the application of the law in determining whether the Appellants were guilty of theft. The misdirection is serious and would be prejudicial to the Appellants and an injustice if the conviction on count 2 is not overturned. The State has to shoulder some, if not all, blame for the conviction. The State had the opportunity to spell out its position and categorically disclose that it had not proven the count of theft per the charge sheet.

107. What of the other grounds of appeal raised by the Appellants? There is much merit in almost all of them. This court must remark on the other errors and misdirections manifest in the Regional Court's judgment and will do so briefly. It does not mean this court finds sufficient merit in each ground, but cumulatively, there would have been sufficient grounds to overturn the conviction of theft even if the State's concession had not been forthcoming.
108. The Regional Court's failure to analyse the evidence of the First Appellant and his brother before rejecting them as lies is strikingly evident. The evidence of the First Appellant and his brother were credible and consistent with each other. They protested that the State Prosecutor did not understand the building industry and its idiosyncrasies. They consistently maintained that the DPW omitted the item for materials from the final statement of account and had thereby deducted the amount of R519,037.90 from the amount due to them. The State Prosecutor was unable to unsettle their evidence in this crucial aspect. The Regional Court's finding that the defence raised by the Appellants was all lies is an error. The Regional Court concentrated on all the elements that pointed to their guilt in analysing the charges but failed to grasp or consider the probabilities or those indicative of their innocence.³⁷
109. The Regional Court's finding that the Appellants were not entitled to the ten per cent retention is also an error. It did not accord with the evidence. The State and the court failed to grasp the significance of Carriem's testimony that the State is reluctant to make advance payments. The payment made to the Appellants contractor was exceptional. The court should have viewed the ten per cent retained by the Appellants for materials held offsite in that context. The contract between the Appellants and Winlite did not make provision for the advance payment, which eventuated from the delayed police clearances and which was intended to benefit the DPW in reduced costs. The Appellants' contract with Winlite included the costs of materials used. The payment for the materials would have been included as a progress payment had it occurred in the normal course of the building works. The Appellants were entitled to

³⁷ S v Tshabalala, 2003 (1) SACR 134 (SCA) at page 140 A-B

withhold ten per cent of the advance paid, as the First Appellant and his brother confirmed in testimony.

110. The failure of the Regional Court to deal with the concession made by State witness Adams about exhibit “V” and the implications of that testimony was also an error. Adams testified that the investigation would not have proceeded had he known of the Winlite invoice. Adams’ investigation was cursory. He failed to interview the key personnel to determine whether the DPW had omitted the item for materials held offsite. The Defence’s presentation of the invoice elicited a capitulation in his stance. The Appellants described this part of the cross-examination as a Damascus moment for Adams. The court cannot disagree with the characterisation. Adams’ investigation proceeded on a tenuous basis, i.e., whether the payment made to Winlite was a payment for materials held offsite or a progress payment. He saw the papers in the application and concluded that it was a double payment without interrogating why the DPW had agreed to settle the matter.
111. The conviction on the second count of theft was based entirely upon the amount realised pursuant to the application. The charge sheet framed the charge as ongoing from 2011 to 2015. This is yet another reason why the theft charge would have been unsustainable. The Magistrate paid little attention to material aspects of the evidence, including the significance of exhibit “V” and Adams’s testimony that the SIU’s investigation would have been abandoned if he had sight of this invoice. The Magistrate failed to deal with Adams’ sources of information, particularly the input from Winlite, which proved incorrect. As alluded to, the evidence of the State witnesses escaped critical scrutiny by the lower court. The Magistrate found that the Appellants did not intentionally misrepresent the errors in the founding affidavit in the context of the fraud count. Still, they intentionally misrepresented the errors for the conviction on the theft charge. The findings are contradictory.
112. The court turns to deal with the conviction on count 3, the perjury charge. The First Appellant was charged with perjury, alternatively, making a false statement in an affidavit in contravention of section 9 of Act 16 of 1963. The

State relied upon the same three paragraphs of the founding affidavit, namely 14,19 and 39, to prove the perjury charge. The State elaborated on the count by contending that the High Court would not have granted the order had the misrepresentation and lies not been made in the First Appellant's founding affidavit. It is inconceivable how the State intended to prove this facet of the charge. We do know that it did not.

113. In its reasons for conviction on this count, the Regional Court referred to the reasons it gave in its judgment for rejecting the First Appellant's defences, which amounted to him making a negligent mistake and that he did not properly read his affidavit before he signed it. The court reminded itself of the elements of the crime, namely that the perpetrator (i) made a declaration that is (ii) false, (iii) under oath, (iv) in the course of judicial proceedings,(v) that was unlawful, and that he had the intent to do so.
114. The First Appellant alleges that the Regional Court erred and misdirected itself by rejecting the evidence that the statements on which the perjury charge was based were not material, were mistakes, and were never made to supply false information. The Appellants argued that "the High Court order was never rescinded and accordingly if it is accepted that the High Court order excused any underlying lie and theft, the Appellants should have been acquitted on all charges". The Appellants seek to draw a conclusion from two premises. The Appellants' foray into syllogisms is a non sequitur. A more considered view would be that if the application ran its course, the DPW would have had to submit an answering affidavit. As they were *au fait* with the facts, the errors would have probably been exposed and corrected in reply.
115. The State argued that the judgment accords with the proven facts on the count of perjury. This court cannot agree. The First Appellant admitted in his plea explanation that the amount the Second Appellant paid to Winlite and the amount reflected as the tender price under the subcontract was incorrect. There are mitigating factors relating directly to these errors. The Appellants ultimately wanted to be paid the R519 037.90 that was omitted and deducted from the final account statement. This court's findings on the computation of

the final statement of account lend credence to the amount claimed by the Appellants.

116. The First Appellant explained that he had erred in stating that the subcontract price amounted to R1 900 000. The subcontract price was R1 368 000. The price tendered by the subcontractor replacing Winlite was R1 900 000. The incorrect amount reflected in the founding affidavit can be accepted as an error. In paragraph 39 of the affidavit, the First Appellant alleged that the DPW had not compensated the Appellants for the advance made on its behalf. The computation of the final statement of account indicates that the allegation is correct.
117. In the context of the findings made by this Court on the theft count, the explanation for the mistakes seems more credible. The information in the founding affidavit was provided by the First Appellant's brother and manager. The Appellants were engaged in many other contracts when the affidavit was drafted. Accepting the First Appellant's reasons for the errors contained in the founding affidavit does not mean that this court condones errors of the nature evident in the founding affidavit or the adoption of a cavalier attitude towards drafting affidavits. The First Appellant testified that his attorney drafted the affidavit based on documents provided to him. He testified further that Senior Counsel finalised the affidavit. He repeatedly testified that the errors were not misrepresentations and that the Appellants did not intend to defraud the DPW. There is no reason to disbelieve him. Counsel for the Appellants submits that this is a more probable explanation for the errors. The lawyers must share some or much blame for the facts in the First Appellant's affidavit.
118. The Regional Court erred in convicting the First Appellant on the third count of perjury. The First Appellant did not have the *mens rea* to misrepresent the allegations in the founding affidavit. The conviction on count 3 cannot stand.
119. The charge sheet distinguished the different counts and their alternatives by attributing dates to them. An overall analysis of the facts underlying each conviction indicates that they were all based on the errors in three paragraphs

of the allegations in the founding affidavit. The acquittal on the fraud charge was based on the alleged misrepresentations in the founding affidavit. The Regional Court found that the DPW was not induced to pay the Second Appellant as the order stipulating the decision to pay was taken by agreement.

120. The alternative theft charge in count one is related to the payment made following the application. The acquittal on this charge occurred because the Regional Court found that the payment following the court order was not duplicated. The conviction of theft on count two was based entirely upon the errors in the founding affidavit, and so was the perjury charge. The Appellants correctly identified these charges as duplicate charges.
121. The Regional Court acquitted the Appellants on the fraud charge based upon the errors contained in the founding affidavit but charged the Appellants on the theft charge in count two and the perjury charge in count three with intentional misrepresentation on the same set of errors in the founding affidavit. The charge sheet framed the second count of theft as an ongoing offence from March 2011 to the trial date. The conviction was entirely premised on the founding affidavit deposed in September 2015. Whether the court of appeal applies the single intent, continuous transaction, or the evidence tests to the acquittals and convictions, it comes to the same conclusion. There was a duplication of charges requiring the attention of the Regional Court before it convicted the Appellants. Common sense, as the SCA advocates, would have militated against double convictions that flow from the same narrow set of facts.
122. Considering all the evidence rendered by the State witnesses, the First Appellant, and his brother, the concessions made by the State Prosecutor, and the misdirections and errors evident in the Regional Court's judgment, this court finds that the appeal should be upheld. It follows that the conviction on sentence must fall away.

ORDER

123. The appeal is upheld.

124. It follows that the sentence on conviction cannot stand.

Bhoopchand AJ

I agree, and it is so ordered.

Kusevitsky J

Judgment was handed down on Thursday, 12 September 2024, and delivered to the parties by e-mail.

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