



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Reportable/ ~~Not Reportable~~

Case no: AR332/2023

In the matter between:

SIPHO DERRICK SHABALALA

APPELLANT

and

THE STATE

FIRST RESPONDENT

Coram: NKOSI J, NGQANDA AJ and GAJOO AJ

Heard: 18 October 2024

Delivered: 29 November 2024

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Pillay J, sitting as court of first instance):

The appellant's appeal against his conviction and sentence is dismissed.

JUDGMENT

Nkosi J (Ngqanda and Gajoo AJ concurring)

Introduction

[1] The appellant, Sipho Derrick Shabalala, appeared before the court *a quo* court on charges of fraud, corruption, money laundering, and contravention of the Public Finance Management Act 1 of 1999 (PFMA). The appellant was found guilty as charged and sentenced as follows: (i) fraud, 15 years' imprisonment; (ii) corruption, 15 years' imprisonment; (iii) money laundering, 10 years' imprisonment and (iv) contravention of the PFMA, 5 years' imprisonment. The sentences imposed with respect to corruption, money laundering, and contravention of the PFMA were ordered to run concurrently with the sentence for fraud, such that the appellant's effective sentence was 15 years' imprisonment.

[2] Aggrieved by the convictions and sentences imposed, the appellant sought leave to appeal, which the court *a quo* refused. A subsequent petition to the Supreme Court of Appeal (SCA) was successful, and with leave thus obtained, the appellant now appeals to this court in respect of both conviction and sentence. The appellant remains on bail pending the outcome of this appeal.

The issue(s) on appeal

[3] The appellant challenges both his convictions and sentence. Though overlapping in certain respects, the appellants' challenges may broadly be summarised as follows. First, that the court *a quo* failed to consider all the material

evidence, particularly a key affidavit, and improperly introduced new material in a second judgment that was not contemplated in its initial *ex tempore* judgment.

[4] Second, that the court *a quo* erred in its credibility findings, particularly regarding testimony favourable to him. This challenge goes beyond mere dissatisfaction with the court's assessment and suggests a material misdirection in its approach to witness credibility.

[5] Third, that the court *a quo* misapplied the essential elements constituting fraud and incorrectly attributed committee decisions to the appellant's individual conduct.

[6] Fourth, that the court *a quo* made findings unsupported by the evidence led during the trial and misapplied the relevant corruption legislation. Furthermore, that the court failed to provide adequate reasons for declining to discharge the appellant as required by law.

[7] Lastly, that the court *a quo* exhibited bias against the appellant and imposed an excessive sentence of 15 years' imprisonment. The appellant submitted that this bias tainted the proceedings and that the sentence warrants reduction by this Court.

[8] The appellant's grounds of appeal encompass allegations that the court *a quo* failed to consider the evidence and misdirected itself not only on the points of law, but also by drawing certain inferences purportedly unsupported by trial evidence. For the sake of convenience, I shall address the appellant's grounds of appeal sequentially as they appear in his Notice of Appeal, with some consolidation to avoid prolixity.

Whether the court *a quo* failed to consider all the evidence before it

[9] Central to the appellant's grounds of appeal is the contention that the court *a quo* erred in failing to consider the evidence of Mr Mike Mabuyakhulu (MEC Mabuyakhulu), who is the erstwhile MEC for the Department of Local Government and Traditional Affairs (DLGTA) in KwaZulu-Natal (KZN). During the relevant period, MEC Mabuyakhulu served as both the MEC for the DLGTA and the Treasurer of the African National Congress (ANC) in the KZN province.

[10] It is common cause that MEC Mabuyakhulu was listed amongst the State witnesses for the trial but, for reasons unknown to the trial Judge, was not called by the State to testify on its behalf at the trial. Instead, his evidence is contained in an affidavit that was deposed to by him on 19 October 2010. This was in response to a list of questions that were posed to him by Colonel Petrus Johannes Du Plooy (Col Du Plooy), who was the investigating officer in respect of this matter. The contents of MEC Mabuyakhulu's affidavit are dealt with in more detail later on in this judgment.

[11] Notably, MEC Mabuyakhulu states in the opening paragraphs of his affidavit that—

‘I have been asked to comment on issues which took place some five years ago, and in certain instances I do not have a clear recollection of events or have had recourse to documents (where these exist) to refresh my memory’¹

[12] In fact, his vivid recollection of the matter becomes more apparent when one reads his comments on the specific documents he was requested to comment on. The opening statement to his comments reads as follows:

¹ See para 3 of Mabuyakhulu's affidavit, which appears at page 676 of the record.

‘Given that the documents were written several years ago I do not have a clear and precise recollection of events or their precise sequence, but will endeavour to answer the questions to the best of my recollection.’²

[13] He then goes on to give responses that are somewhat vague and devoid of first-hand knowledge. From reading MEC Mabuyakhulu’s comments on each document, one gets the impression that his involvement in the acquisition of the water purification plants from Intaka was very limited. By way of background, I think a brief summary of what is stated by MEC Mabuyakhulu in his aforesaid affidavit is appropriate.

[14] In paragraphs 5 to 7 he essentially confirms what is stated by the appellant in respect of count 2 (corruption) on pages 6 to 7 of his statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 (CPA). In particular, he confirms that from 3 November 2004 to 11 May 2009 he was the MEC for the KZN DLGTA, as well as the Treasurer of the ANC from 1998 until approximately 21 June 2008.

[15] He further states that during his tenure as the Provincial Treasurer of the ANC, he was responsible for, *inter alia*, raising funds for the ANC. He confirms that during 2005 he called upon leaders and general members of the ANC to raise funds for the ANC. He explains that the funds were required for the day-to-day administration of the organisation, and for its provincial conference which was scheduled to take place at Ndumiso College in June 2008. He recalls that the appellant was one of those who undertook to raise funds for the ANC.

² See para 8 of Mabuyakhulu’s affidavit, which appears at page 677 of the record.

[16] He states that approximately two months from the date of the conference he was informed by the appellant that he had raised some funds for the ANC and wished to pay the same to the organisation. Thereafter, on or about 11 June 2008, he received payment from the appellant in the sum of R1m. In conclusion, he confirms that it is not the policy of the ANC to disclose where private donations are received from, nor is it the policy to disclose how such funds are utilised. He concludes by stating that the funds were disbursed by him to defray the expenses of the upcoming June 2008 conference in his capacity as the ANC Provincial Treasurer at the time.

[17] He again refers to the issue of the alleged donation to the ANC in paragraphs 12.1 and 12.2 of his affidavit, where he reiterates: that all ANC leaders were requested to raise funds for the organisation; that the appellant had informed him that he had received funds and wished to pay same to the organisation; that he did not know how and where the appellant had raised those funds; that he arranged to meet with the appellant and received the funds in cash from him, and; that the funds were used by him to defray the expenses of the conference.

[18] The affidavit of MEC Mabuyakhulu, in my view, is devoid of any independent or authoritative evidence. It largely corroborates the testimony of Mr Trevor White³ and Col Du Plooy⁴, both of whom were instrumental in the investigation leading to the appellant's arrest. Significantly, the salient points of Mr White's and Col Du Plooy's evidence found confirmation in the appellant's own s 115 statement. The remaining aspects of MEC Mabuyakhulu's affidavit were addressed in the testimony of Mr Zweli Mkhize (MEC Mkhize).

³ Mr White is a forensic investigator, and his evidence appears in pages 2308 line 22 to 2310 line 14; pages 2414 line 4 to 2422 line 22 of the record.

⁴ Pages 2632 line 2 to 2633 line 24 of the record.

[19] Regarding the comments made by MEC Mabuyakhulu on the specific documents that are referred to in his affidavit, I do not believe that such comments can be regarded as independent evidence that warranted due consideration by the trial Judge in her judgment. This is because his comments are generally characterised by non-committal statements such as the statement that he was not the author of the relevant documents and, therefore, could not be expected to comment thereon.

[20] In fact, the documents he was asked to comment on included the following: firstly, the letter dated 15 July 2005 from MEC Mkhize addressed to him advising him about, *inter alia*, the potential benefits which could accrue to the KZN Province from the purchase of the Wataka water purification and processing plants (Watakas). His comment on that letter was to acknowledge receipt thereof, and to state that he did not wish to interpret the contents thereof because he believed that they speak for themselves.

[21] Secondly, the memorandum dated 10 October 2005 from the appellant, the Head of LGTA and the Acting Head of Economic Development, addressed to MEC's Mkhize and Mabuyakhulu. The response of MEC Mabuyakhulu to that letter was to acknowledge receipt thereof, and to confirm that he signed it at the place that was provided for his signature thereon.

[22] Regarding the actual contents of the said document, MEC Mabuyakhulu stated in his affidavit that he was not in a position to comment on the issue of the promised investment by Intaka in KZN as this did not fall within the ambit of his portfolio. He further stated that he declined to interpret the contents of the said

memorandum and suggested that ‘any queries concerning the intention of the letter should be directed to the drafters thereof’.

[23] Thirdly, the letter dated 27 November 2006 from the Ministry of Local Government, Housing and Traditional Affairs. MEC Mabuyakhulu confirmed in his affidavit that he read the said letter and noted that it referred to a meeting that was held on 9 June 2006. He stated that he had no recollection of the said meeting or who attended it, but did not dispute that it took place. He further stated that he could not recall the exact basis of the allocation of the Watakas but, according to his recollection, they were allocated according to, *inter alia*, the needs of the communities.

[24] Lastly, the letter dated 2 February 2010 from Ngubane Wills Incorporated in relation to the issue of the alleged donation to the ANC. MEC Mabuyakhulu responded to that letter by repeating the contents of paragraphs 5 to 7 of his affidavit. He further stated that he did not have an independent recollection of the precise details of the funding of the Watakas or the structure of the commercial transactions thereof, apart from what appears in the memoranda and submissions that were submitted to him.

[25] Ms Shazi, who appeared on behalf of the appellant, referred us to the following passage in *S v Van der Meyden*⁵:

‘...[w]hat must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or acquit) must account for all the evidence. Some of it might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.’

⁵ *S v Van der Meyden* 1999 (2) 79 (W) at 82C-E.

[26] She submitted that the evidence of MEC Mabuyakhulu was totally ignored by the court *a quo* in its conviction of the appellant. However, the above analysis of the contents of MEC Mabuyakhulu's affidavit clearly shows that the evidence contained therein was considered by the court *a quo*, albeit from other sources. This was confirmed by the trial Judge in her judgment on the appellant's application for leave to appeal, which was refused by the court *a quo* before it was granted by the Supreme Court of Appeal.

[27] The appellant contends that the court *a quo* 'ignored' MEC Mabuyakhulu's affidavit and rendered judgment without consideration of its contents. However, the appellant's notice of appeal fails to specify the evidence within the affidavit that the court allegedly disregarded. That aspect was covered by Ms Shazi in her oral submissions to this court, the details of which will be dealt with later on in this judgment. She argued that the evidence of MEC Mabuyakhulu was material for consideration by the court *a quo* before it handed down the *ex tempore* judgment on 13 and 14 June 2022.

[28] In the matter of *S v Bhengu*⁶ it was stated by the court that—

'What is required of a judicial officer is to set out in his judgment the material portions of the evidence. He must ascertain and select what is material. This involves effort and understanding.'

[29] Based on my perusal of the voluminous record in this matter, that appears to be precisely what the trial Judge did in this case. She clearly set out in her judgment on conviction the material portions of the judgment, as well as the reasons for her findings. On my perusal of the *ex tempore* judgment of the court *a quo*, read with the final version thereof that was edited and signed by the trial Judge on 8 September

⁶ *S v Bhengu* 1998 (2) SACR 231 (N) at 232D-G.

2022, I am satisfied that the court *a quo* was meticulous in its assessment of all the evidence that was presented to it during the trial. Obviously, such evidence did not include the appellant's own evidence as he elected not to testify in his own defence during the trial. In such instances, it was held by the CC in *S v Boesak*⁷ that:

'The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence.'

[30] In conclusion, I am satisfied that the court *a quo* considered all the material evidence that was led before it during the trial. This includes all the evidence that is contained in MEC Mabuyakhulu's affidavit, that is, bearing in mind that he was not the primary source of such evidence. The appellant elected not to testify in his own defence during the trial even though the evidence adduced by the State against him, which was largely corroborated by the admissions he made in his s 115 statement, clearly called for an answer from him. As stated by the Constitutional Court in *Boesak*, the appellant must live with the consequences of his decision.

⁷ *S v Boesak* [2000] ZACC 25; 2001 (1) BCLR 36; 2001 (1) SA 912 para 24 (*Boesak*).

Whether the court *a quo* ‘handed down’ a second judgment in the absence of the appellant

[31] It is common cause that the appellant was convicted by the court *a quo* in terms of a judgment that was delivered *ex tempore* on 13 and 14 June 2022. After reading the summary of the evidence for the whole day on 13 June 2022, the trial Judge announced at the commencement of the hearing on 14 June 2022 that considering the pedestrian pace at which the delivery of judgment was going the previous day, she had decided to pause the summary of the evidence and proceed straight to her findings. She indicated that when the transcript comes out she would simply insert the remaining part of the summary and, thereafter, edit, sign off, and release her judgment.

[32] The explanation she provided in her *ex tempore* judgment was that she thought everyone was keener to know what her findings were, to which neither counsel objected. She then stated that after summarising the evidence the next part of the judgment would fall under the heading ‘Procurement prescripts’, followed by ‘Section 217 of the Constitution’, followed by the ‘KwaZulu-Natal Procurement Act’, followed by ‘Item 16A of the Treasury Regulations’, and ending with ‘Practice Note No. SEM02/2005.’ After the appellant was convicted, the matter was adjourned to 5 September 2022.

[33] The appellant’s contention, on the other hand, is that the court *a quo* misdirected itself materially in a number of respects, thereby vitiating his conviction. His version, briefly stated, is that on 2 August 2022, the trial Judge circulated another judgment comprising 129 pages (Second Judgment) to the parties’ legal representatives. That judgment has approximately 30 additional pages of new material which did not form part of the ‘first judgment’.

[34] He further contends: that the new material includes references to MEC Mabuyakhulu's affidavit and direct quotations from it, yet the court *a quo* did not have such an affidavit and did not know its contents when it handed down the *ex tempore* judgment, that the court *a quo ex post facto* embellished, altered, and added to the first judgment to include the evidence it had not considered when it gave its first judgment in open court and convicted the appellant and; that the court *a quo* amended considerable parts of the findings in the judgment, which changed its substance.

[35] At the outset, I wish to record that I find the appellant's reference to a 'second judgment' rather surprising, particularly, because neither he nor his counsel had raised any objection when the trial Judge announced in open court that she had decided to 'pause' the summary of the evidence and proceed straight to her reasons for judgment. She explained that she thought everyone was more keen to know what her findings were. Incidentally, the 30 additional pages of 'new material' comprise exactly those aspects of the judgment which the trial Judge indicated would be inserted in the transcript of the judgment when it came out.

[36] It is common cause that during the process of editing the judgment that was handed down *ex tempore* on 13 and 14 June 2022, certain additions were made by the trial Judge to the final judgment that was edited and signed by her on 8 September 2022. Except for the remaining part of the summary of the evidence and the legal prescripts she deliberately omitted when she handed down the *ex tempore* judgment, the notable additions to the part of the judgment comprising the reasons for judgment are the two new paragraphs appearing on pages 104 to 105 of the final judgment.

[37] In the first paragraph, the trial Judge explains why she said the appellant used his position, powers, and privileges as a member of the Central Procurement Committee (CPC) to ‘improperly and impermissibly’ benefit the ANC. In the second paragraph, she states that MEC Mabuyakhulu acknowledged receiving R1m from the appellant and using it ‘to defray expenses arising from the then upcoming June 2008 conference.’ She also expressed concern that for reasons not disclosed to the court *a quo*, MEC Mabuyakhulu was not available to be questioned in court regarding the amount of the donation and why it was not reflected in the financial records of the ANC. She concluded by stating that ‘the evidence that the ANC received the donation was dubious.’

[38] Regarding the circumstances which led to her decision to omit certain parts of the judgment that was handed down *ex tempore* on 13 and 14 June 2022, an elaborate explanation is provided by the trial Judge in her judgment on application for leave to appeal⁸, the brief summary of which is that: she commenced handing down the judgment on conviction in the matter on 13 June 2022. The next morning, on 14 June 2022, she indicated that she would skip reading out the summary of evidence and the legal prescripts and provide the parties with her findings and conclusions in order to expedite the handing down of the judgment. Neither party objected, hence she proceeded to do so.

[39] She thereafter received a request from the appellant’s counsel, Ms Shazi, to provide her with the complete judgment incorporating the summary of evidence and legal prescripts to facilitate her preparation for sentencing proceedings. She acceded to Ms Shazi’s request and provided her with an unsigned draft judgment on 27 July

⁸ Vol 34 pages 3410 to 3412 of the record.

2022 (July draft). She stated that it was recorded in the July draft she received from Sneller that the appellant was convicted on count 5, which she admitted was an error as it was common cause that the appellant was acquitted of that count in open court on 14 June 2022. The said error was corrected in her final judgment on conviction that was edited and signed on 8 September 2022.

[40] It was indicated by Ms Shazi in her submissions to this court that the appellant was persisting with all his grounds of appeal regardless of the explanation provided by the trial Judge. She referred us to the matter of *Tuta v The State*⁹, where the following was held by the Constitutional Court regarding *ex tempore* judgments:

‘In busy criminal courts, the *ex tempore* judgment is often a necessary part of judicial practice. No discouragement of this useful practice is warranted. Infelicities of style, grammar, spelling and word choice may require revision; and they should be permitted. A patent error or omission may be corrected. However, the substantive reasons for the judgment, handed down in court, must stand. That is the authoritative pronouncement of the court, conveyed to the accused. Importantly, it is through this judgment that the accused is convicted and it is also through it that the reasons for the conviction are reflected. If an *ex tempore* judgment is given, its reasons are authoritative and they may not be altered or embellished to give further expression to what the court meant to convey. The time for that is when the judgment is handed down by the court. This is somewhat less permissive holding as to the competence of a trial court to vary its judgment in a criminal case than was allowed in *Wells*, a pre-constitutional error decision. However, in my view, it better accords with the constitutionally entrenched rights of an accused to a fair trial and the duties of a court to pronounce with finality upon the case before it.’

[41] In my view, the appellant’s reliance *Tuta* is misplaced because the circumstances of *Mr Tuta*, who was the applicant in that case, are significantly different from those of the appellant in *casu*. Unlike the appellant, *Mr Tuta* gave

⁹ *Tuta v The State* [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) at para 6 (*Tuta*).

evidence in defence at his trial and based on two grounds of appeal. The first ground was that the curtailment of the prosecution's cross-examination of him by the trial Judge resulted in him not knowing the prosecution's case as to his state of mind, thus undermining his right to a fair trial. The Court found that the intervention of the trial Judge did not undermine the applicant's right to a fair trial because he already knew the case he had to meet at the point in the trial when the intervention occurred.

[42] The second ground of appeal relied upon by *Mr Tuta* was that the trial Judge failed to have regard to all the evidence led at trial from which his subjective state of mind might have been inferred. The Court declined to entertain that ground on the basis that a failure by a trial court to evaluate the evidence properly is an error of fact to which the jurisdiction of the Constitutional Court does not extend. However, the Court nonetheless proceeded to consider an oral submission made by *Mr Tuta's* counsel that the trial court had, in addition, failed to formulate the correct test for putative private defence and applied the wrong test to the evidence, which was an error of law that carried the risk of an unsound conviction and an unfair trial for *Mr Tuta*.

[43] It turned out that the incorrect formulation of the test for putative private defence appeared in the *ex tempore* judgment that was handed down by the trial Judge in court, but the signed judgment that was published on SAFLII contained the correct formulation of the test for putative private defence. According to our understanding, it is within that context that the Constitutional Court in *Tuta* held that:

'if an *ex tempore* judgment is given, its reasons are authoritative, and they may not be altered or embellished to give further expression to what the court meant to convey.' The Court held that

such pronouncement ‘better accords with the constitutionally entrenched rights of an accused to a fair trial and the duties of a court to pronounce with finality upon the case before it’.

[44] In the present case, a considerable amount of time was spent by Ms Shazi pointing out to this court the number of additions made by the trial Judge to the *ex tempore* judgment that was handed down by her on 13 and 14 June 2022. With the leave of this court, she submitted a further document after the hearing of this appeal detailing further differences between the *ex tempore* judgment and the final judgment. In essence, the additions made by the trial Judge to the *ex tempore* judgment are largely explanations of her findings and embellishments aimed at enhancing the readability of the judgment. In my view, nothing turns on the additions and/or embellishments in the final judgment unless it can be shown to the satisfaction of this court that they had the effect of undermining the appellant’s constitutionally entrenched right to a fair trial, and precisely how so. Besides, the appellant’s notice of application for leave to appeal to this court is silent in that regard.

Whether the court *a quo* misdirected itself by failing to follow the principles set out by the Constitutional Court in impugning the credibility of witnesses

[45] It is contended by the appellant that none of the witnesses who testified for the State had implicated him in the commission of the offences he was convicted of. He goes on to state that in fact, all the witnesses who had any contact with him during the procurement process had categorically stated that he did not improperly influence them on the process.

[46] The evidence does not support the appellant’s contention. The State’s evidence demonstrates that the appellant initiated the project to procure Watakas

from Intaka Investments (Pty) Ltd (Intaka), of which Dr Savoi is a director. The appellant acknowledged that his involvement in the project followed an invitation to join a government delegation sponsored by Dr Savoi to observe Watakas in operation in Brazil. As Head of Treasury, the appellant understood that water service provision to rural communities fell under the purview of the DLGTA. Had he been convinced of the Watakas' efficacy in addressing KZN's water shortage, the appropriate course of action would have been to engage Ms Gumbi-Masilela, then Head of the DLGTA, and advocate for a competitive tender process. Such a process would have allowed for a comprehensive evaluation of the Watakas' benefits against alternative solutions available in the market.

[47] Instead, the appellant had deliberately circumvented the legal requirement to comply with the procurement processes in the acquisition of the Watakas by sending an internal memorandum to MEC Mkhize¹⁰ in which he recommended in no uncertain terms that, *inter alia*, 'an amount of R22m be allocated from the Poverty Alleviation to provide the water purifying equipment to optimise on the benefits from this equipment.' As the Head of Treasury at the time, the appellant must have been fully aware that MEC Mkhize would not only act on his recommendation but also impress upon his counterpart in the DLGTA, MEC Mabuyakhulu, to do likewise.

[48] In essence, the appellant had set the ball rolling by applying his influence at the highest level of the political formation in the Province at the time. Thereafter, all he had to do was monitor further developments from the side-lines while he applied

¹⁰ Dated 9 May 2005 (Vol 1 page 1 of the record).

undue pressure on Ms Gumbi-Masilela and the subordinate officials in the three departments concerned to see to it that the project came to fruition.

[49] At no stage during that process did the appellant disclose to either one of the two MECs or any of the officials who ended up being saddled with the project, that he stood to acquire benefits for both himself and the ANC if the project came to fruition. All he did was to make a vague statement to MEC Mkhize that ‘we have been exposed to the workings of the equipment in similar conditions in Brazil’, without making the full disclosure to him that he was part of the delegation that was sponsored by Dr Savoi to travel to Brazil, and that he and his wife had subsequently developed a personal relationship with Dr Savoi.

[50] In the circumstances, I do not believe that the trial Judge can be faulted for the finding she made against MEC Mkhize during her assessment of the evidence that was led during the trial. It is clear from the contents of the aforesaid memorandum that the appellant’s intention was to influence MEC Mkhize improperly to ‘rush’ into the acquisition of the Watakas without due compliance with the procurement processes of the Province. In my view, the trial Judge was justified in her finding that MEC Mkhize had shown himself to be a State witness who was favourably disposed towards the appellant as evidenced by his denial of what appears to be an obvious inference from the contents of the aforesaid memorandum.

[51] In fact, the appellant was so determined to see the project coming to fruition that he even sent the relevant draft agreements to be concluded amongst the three

departments concerned to MEC Mkhize¹¹ for his perusal and discussion with MEC Mabuyakhulu and the Acting Head of the Economic Department. By then, the cost of the acquisition of the 22 Watakas had ballooned from R22m to R43,230m. Needless to say, for an expenditure of that magnitude one would have expected MEC Mkhize to insist upon compliance with the procurement processes, which he never did.

[52] As for Ms Coetzee, her evidence that she was the Accounting Officer of the Provincial Treasury at the time was, in my view, merely a farce. Whether or not she was, the fact of the matter is that she had no knowledge of the actual origins of the project in respect of which a hefty sum of R43m was expended by the Province without due compliance with the procurement processes. As stated elsewhere in this judgment, she and the other officials in the three departments concerned had unwittingly become pawns in a larger scheme of things that was carefully orchestrated by the appellant to benefit himself and the ANC at the expense of the poor.

Whether the court *a quo* had misdirected itself on the elements of fraud

[53] Irrespective of what was stated by the court *a quo* in the opening paragraphs of its judgment, its finding regarding the charge of fraud was that the appellant ‘misrepresented, to the prejudice of the South African Government and the fiscus, that the procurement of the Wataka purification plants was urgent and of fair value, and that the normal procurement process should be waived.’ In the circumstances, I do not understand the basis of the appellant’s contention that the court *a quo* misdirected itself in such a finding.

¹¹ Under cover of an internal memorandum dated 11 July 2005 (See Vol 1 page 4 of the record).

[54] The finding of the court *a quo* that the appellant was guilty of the crime of fraud was borne out by, *inter alia*, the direct evidence that was led against him by the State at the trial, which was not refuted by the appellant by giving his own evidence to the contrary. The effect of his decision not to testify in his own defence was to leave the evidence that was led by the State against him unchallenged.

The decision of the CPC to waive compliance with the procurement prescripts

[55] It is contended by the appellant under this ground that he was not the Central Procurement Committee (CPC), but just one member out of the 11 members of that Committee, of whom six were required to constitute a quorum. His further contention was that his one vote did not constitute a decision of the CPC. Instead, a decision of the CPC is taken by the majority vote of its members.

[56] In my view, this ground is indicative of an apparent misunderstanding on the part of the appellant of the basis on which he was convicted by the court *a quo*. It is immaterial as to who made an application for waiver or how many members of the CPC voted for the approval thereof. What is of crucial importance is that he failed to disclose his relationship with Dr Savoi, or the benefit he stood to acquire for himself and the ANC, when the CPC members voted by round-robin in favour of granting the waiver. This is exacerbated by the fact that he was the Chairperson of the CPC at the time.

[57] The same applies to the Cabinet resolution to accept the recommendation and authorise the allocation of R43m from the Poverty Alleviation Fund. In my view, it is immaterial that the appellant was not a member of the Cabinet that adopted the resolution to accept the recommendation. It was precisely for that reason that the

appellant decided to first approach MEC Mkhize to improperly influence him about the purported urgency and benefits of the Watakas so that MEC Mkhize would, in turn, convince his Cabinet colleagues to accept the relevant recommendation.

Whether the court *a quo* made findings which are not supported by evidence/ or are contrary to the evidence adduced by the State

[58] Contrary to what is suggested by the appellant under this ground, my view is that the findings made by the court *a quo* against the appellant were all supported by evidence. This included the evidence that an amount of R1.053m was paid by Dr Savoi to Kuboni & Shezi Attorneys at the behest of the appellant, which was confirmed by the appellant in his s 115 statement. It is inexplicable as to how the reduced amount of R1m was allegedly paid by the appellant to MEC Mabuyakhulu in cash, and what entitled him to use the said amount for his personal benefit in the first place.

[59] This court concurs with the court *a quo*'s finding that the payment in question supports the inference that the appellant received an illicit benefit from Dr Savoi for facilitating business dealings between Dr Savoi's company and the KZN Provincial Government. This inference is given credence by the appellant's admissions in his s 115 statement in which he stated, *inter alia*, that:

(a) In March 2004 he was invited to be part of the delegation that visited Brazil to be shown how the equipment operated as it had already been installed in hospitals in Brazil;

(b) In 2005, after receiving communication from the then Special Advisor to the Minister of Public Enterprises, Mr Rafiq Bagus, reiterating the trade benefits of Dr Savoi's projects to the Provincial Government, he requested Dr Savoi to provide him with a proposal for the provision of water purification plants which he had already

provided to the Trade and Investment KwaZulu-Natal (TIKZN) because there was a critical need for clean water in rural communities;

(c) On 9 May 2005 he advised Dr Zweli Mkhize ('MEC Mkhize'), who was the MEC for Finance and Economic Development at the time, about the Intaka proposal. He indicated to him the benefits of the project and, as the Head of Treasury at the time, recommended to him that the funding for the project be allocated from the Poverty Alleviation Fund, subject to the approval of MEC Mkhize;

(d) On 6 December 2005 he supported the DLGTA's application to the Central Procurement Committee (CPC), of which he was the chairperson at the time by virtue of his position as the Head of Provincial Treasury, for waiver of the normal procurement procedures. The members of the CPC voted by round-robin;

(e) On 2 February 2006 the decision of the CPC to grant the DLGTA's application for waiver was ratified at the meeting of the CPC, at which he was not present. Shortly thereafter, an agreement of undertaking was signed between Intaka and the Head of Department of the DLGTA for the purchase of 22 water purification plants in February 2007;

(f) In 2004 he was a member of the ANC and, as such, had had a discussion with Dr Savoi about him donating to the ANC. That was prior to him doing business with the Provincial Government. In 2007, after the DLGTA's undertaking to purchase 22 water purification plants from Intaka, he was approached by Dr Savoi who indicated to him that he was ready to make a donation to the ANC, and wanted to donate a sum of R1m;

(g) Like most donors to political parties, Dr Savoi was uneasy about disclosing his identity as a donor to a political party. In the circumstances, the appellant directed him to an attorney, Mr Sandile Kuboni, to discuss with him the mechanism of paying the donation over to the ANC. The appellant knew Mr Kuboni through his membership of the ANC as he used to do legal work for the ANC, and also handled

donations on its behalf. The appellant had also used Mr Kuboni's services in his personal capacity;

(h) At the beginning of 2007 the appellant had several business interests, which included a hotel in Pietermaritzburg, a restaurant, and an agricultural farm, which were not doing well at the time and had hit a financial slump. A few days after his discussion with Dr Savoi about the donation to the ANC he was advised by Mr Kuboni that the donation had been paid by Dr Savoi;

(i) As he knew that the donation would be required for the ANC Provincial conference in 2008, he asked Mr Kuboni to hold off on paying the donation over to the ANC and decided that he was going to use the money to ease off the financial strain that his businesses were under. He would then pay the money over to the ANC when it was required for the conference. He requested Mr Kuboni to pay the money to his business creditors at the time and, occasionally, to his wife; and

(j) During the remainder of the year he was able to save the money from his business and make up the R1m he had used. He then advised MEC Mabuyakhulu that he had raised funds for the ANC provincial conference and that he should call for them when they were required. On 11 June 2008 he handed the sum of R1m in cash over to MEC Mabuyakhulu.

[60] The amount that was paid by Dr Savoi to Kuboni Shezi Attorneys had remained at the appellant's disposal for more than a year, and a sizeable portion of it was used to pay the appellant's creditors. This was in direct contravention of the appellant's fiduciary duties as the Head of Treasury, whose responsibilities include, *inter alia*, the proper utilisation of funds in the fiscus of the provincial government in accordance with the applicable law. The appellant abused his office to enrich himself at the expense of the poor, who are the intended beneficiaries of the poverty alleviation fund.

[61] The contents of the appellant's s 115 statement were confirmed by Mr White in his evidence¹², who testified that the investigation of Intaka revealed that a letter dated 15 February 2007¹³ was sent by Kuboni Shezi Attorneys to Dr Savoi enclosing what purported to be their tax invoice for 'legal fees'. During the investigation, the same invoice had morphed to become 'consultant's fees', and later to 'commission', before it was finally referred to as a 'donation'.

Whether the court *a quo* made findings which are not supported by evidence and/or are contrary to the evidence adduced by the State

[62] The multiplicity of issues that are raised by the appellant under this ground do not, in my view, warrant detailed scrutiny by this court of the ancillary findings made by the court *a quo* during its assessment of the evidence. In my view, it will not serve any purpose for this court to go through the judgment of the court *a quo* with a fine toothcomb to determine whether each and every ancillary finding made therein was supported by evidence. This will render this judgment unnecessarily long, in much the same way it took this court almost the whole day to hear the submissions made by the appellant's counsel alone. For the purposes of this judgment, it suffices to state that there is no merit in the appellant's argument that the court *a quo* made findings which were not supported by evidence or contrary to the evidence adduced by the State.

¹² Page 2309 lines 9 – 20 of the record.

¹³ Exhibits 'MK2' and 'MK3' at pages 623 and 624 of the record.

Whether the court *a quo* failed to apply the basic rules of documentary evidence and authentication of documents / allowed inadmissible hearsay evidence despite objections

[63] In my view, the issues raised by the appellant under these grounds should rightfully have been raised with the trial Judge during the trial. Besides, there is nothing in the record which suggests that the authenticity of any of the documentary evidence that was presented by the State witnesses at the trial was put in question by the defence at any stage during the trial. In fact, there is no doubt that the appellant had full knowledge of the contents and the author/s of each document, as well as the circumstances under which it was authored and/or formulated.

Whether the court *a quo* misdirected itself as to the correct application of the law

[64] It was contended by the appellant under this ground that the court *a quo* misdirected itself in convicting the appellant on a charge under the Corruption Act 94 of 1992 (1992 Act) when such Act had been repealed at the time the offence was committed. However, all that the court *a quo* stipulated in its judgment was that in respect of counts 1 (fraud), 2 (corruption), and 3 (money laundering), ‘the allegations are proved against accused 1’, meaning the appellant.

[65] In respect of count 2 (corruption), the State had also preferred three alternative charges against the appellant for contravening the relevant provisions of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (2004 Act). Therefore, the fact that the judgment of the court *a quo* is silent as to which legislation the appellant was convicted under does not necessarily mean that it was under the 1992 Act, which had been repealed. If the 1992 Act is not applicable, then the effect of the three alternative charges under the 2004 Act is that the appellant

was convicted of the crime of corruption under the new 2004 Act, which is currently applicable.

The alleged failure of the court *a quo* to give judgment / reasons on the application for a discharge in terms of section 174

[66] Contrary to what is suggested by the appellant under this ground, it is not unusual for a court to give the reasons for its decision not to discharge an accused in terms of s 174 at the end of the trial. Ordinarily, the court would incorporate the reasons for its decision on the application in terms of s 174 in the main judgment. Assuming that it fails to do so, I do not believe that this entitles an accused person to raise such failure as a ground of appeal, particularly, if he is ultimately found guilty of any one or more of the offences with which he was charged, such as in the present case.

The remaining grounds of appeal

[67] As for the remaining grounds that are relied upon by the appellant in this matter, I am satisfied that the issues raised in respect of such grounds are adequately covered in other parts of this judgment. In particular, I do not believe that there is any basis for the allegations made by the appellant that, firstly: *the court a quo failed to apply a proper test in evaluating the guilt of the appellant*; secondly, *that the court a quo made findings which are not relevant to the indictment*; thirdly, *that the court a quo made inferences that were not based on facts*, and: lastly, *that the trial Judge was not impartial*.

Sentence

[68] Regarding the appellant's appeal against the sentence of 15 years' imprisonment that was imposed on him by the court *a quo*, I am mindful of the fact

that the sentences on two of the charges of which the appellant was convicted attract the application of the minimum sentence of 15 years' imprisonment. I have noted the comment made by the trial Judge in her judgment on sentence that she considered imposing a sentence greater than the cumulative sentence of 15 years' imprisonment upon the appellant, but decided to exercise restraint having regard to the appellant's age and his state of health. I do not believe that there is any basis for this court to interfere with her discretion in that regard.

[69] It was held by the Supreme Court of Appeal in *S v Malgas*¹⁴ that:

'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".'

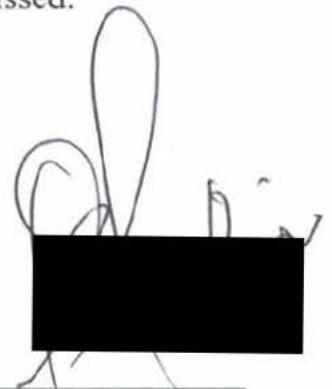
[70] In my view, none of the extremities described in *Malgas* exist in respect of the sentence that was imposed upon the appellant by the court *a quo*. Taking into account the number, the seriousness and the prevalence of the offences of which the appellant was convicted, I think the trial Judge was correct in her statement that she

¹⁴ *S v Malgas* [2001] ZASCA 30; [2001] 3 All SA 220 (A) at para 12 (*Malgas*).

exercised restraint in not imposing upon the appellant a sentence greater than the cumulative sentence of 15 years' imprisonment that was sought by the prosecution.

[71] In the result, the following order be made:

The appellant's appeal against his conviction and sentence is dismissed.



M E NKOSI

Judge of the High Court
KwaZulu-Natal Division, Pietermaritzburg

I Agree,



NQANDA

Acting Judge of the High Court
KwaZulu-Natal Division, Pietermaritzburg

I Agree,

A handwritten signature in dark ink, appearing to be 'Gajoo', is written over a black rectangular redaction box.A handwritten signature in dark ink, appearing to be 'Gajoo', is written below a horizontal line.

GAJOO

Acting Judge of the High Court
KwaZulu-Natal Division, Pietermaritzburg

Appearances

For the appellant:

Ms Shazi

Instructed by:

S D Moloi & Associates Inc.

For the respondent:

Mr Magwanyana (with Ms Ngcobo)

Instructed by:

Stemela & Lubbe Inc., Pretoria

Director of Public Prosecutions, Pietermaritzburg