



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: A47/2022

In the matter between

ARTHUR ITUMELENG MOGAECHO

APPELLANT

and

THE STATE

RESPONDENT

Coram: MHLAMBI ADJP, VAN RHYNJ

Heard: 27 JANUARY 2025

Delivered: 24 APRIL 2025

Summary: Criminal Law and Procedure - appeal - separation of trials in terms of s 157(2) of the Criminal Procedure Act 51 of 1977 - grounds for application not disclosed - only ground was that an agreement reached with the prosecution - contents of such agreement not to be disclosed- separation of trials prejudicial to appellant - trial not conducted in accordance with the notion of basic fairness and justice - unfair trial - incomplete record on appeal - principles restated.

ORDER

1. The appeal against the conviction and sentence are upheld.
2. The accused is acquitted and discharged.

JUDGMENT

Van Rhyn J (Mhlambi ADJP concurring)

[1] The appellant, Mr Arthur Itumeleng Mogaeche, was convicted on 21 February 2013 in the Regional Court held at Botshabelo on 14 counts of Fraud (counts 1, 3, 4, 10, 12, 13 and 20 up to and including 27). He was acquitted on counts 2, 6, 7, 8, 9, 11, 14, 15, 16, 18 and 19. He was sentenced to six years direct imprisonment. Leave to appeal the conviction and sentence was granted by the Regional Court Magistrate on 20 October 2020. The matter was enrolled for the hearing of the appeal on 21 November 2022 but was postponed for, *inter alia*, reconstruction and pagination of the incomplete record. The appeal was thereafter postponed on numerous occasions and when the matter was eventually heard on 27 January 2025, the record pertaining to the sentencing procedure had been supplemented by the court *a quo* without any input by the appellant. However, the record pertaining to the merits as well as the sentencing proceedings were still incomplete. To understand how the above scenario unfolded it is necessary to consider a synopsis of the history.

[2] The appellant was employed as a Public Prosecutor with the National Prosecution Authority stationed at Botshabelo Magistrates' Court, Free State Province. The appellant made his first appearance in court on 31st of July 2002 subsequent to his arrest on 30 July 2002. According to the charge sheet he was 28 years old at the time. Initially five accused stood trial on 27 charges of fraud, alternatively, 23 charges of theft, being the appellant who appeared as accused 1, accused 2 an interpreter, accused 3 and 5, both court orderlies and accused 4, a clerk employed at the Office of the Clerk of the Court, all of whom were so employed at the Botshabelo Magistrates' Court. On his first appearance the appellant was remanded in custody whereafter he was remitted to bail on the 8th of August 2002. The trial against the appellant and his co-accused commenced 21 June 2004 and the appellant's bail has been extended ever since.

[3] The appellant pleaded not guilty to all the charges as well as the alternative charges levelled against him and refrained from making any plea explanation in

accordance with the provisions of s 115 of the Criminal Procedure Act 51 of 1977 ('the CPA') In this regard it is apposite to mention that his co-accused also pleaded not guilty to all the charges and the alternative charges and similarly did not provide any plea explanation. The State presented the testimonies of approximately 32 witnesses whereafter the appellant testified in his defence. Numerous exhibits, consisting of documentary evidence, were handed in during the trial. On 15 February 2005, during the course of the State's case, the prosecutor, Mr Botha, indicated to the court that having heard the testimony of the only witness who could possibly connect accused 5 with the commission of the offences, the evidence tendered by the particular witness failed to link accused 5 with the charges against him and he therefore requested the presiding magistrate to find the said accused not guilty. As a result, accused 5 was found not guilty and discharged.

[4] After conclusion of the case for the prosecution all the remaining accused, including the appellant, brought applications for discharge in terms of the provisions of s 174 of the CPA. On 7 June 2005 the applications by the remaining accused were denied. However, the appellant and his co-accused were acquitted in respect of count 17. During the course of the trial, the appellant twice applied to the Free State High Court for review of the criminal case against him. (Case no.: A413/2007 and A168/2016) Both review applications were dismissed. Leave to appeal to the Supreme Court of Appeal was granted in respect of Case No.: A168/2016. The outcome of the second application for leave to appeal is not clear from the record, but it is assumed that the application was unsuccessful. In any event the trial continued.

[5] At the commencement of the trial the appellant was legally represented by an attorney. However, during the trial, which lasted approximately nine years, his attorney withdrew as his legal representative whereafter the appellant appeared in person. At the hearing of the appeal the appellant again appeared in person. The appellant's co-accused were represented by attorneys at the commencement of the trial. However, during the trial the attorneys withdrew and were substituted by other legal representatives.

[6] The charges preferred against the appellant and his former co-accused all stem from incidents which transpired following the issuing of so called 'J534' forms (also

known as Written Notice to Appear or a Notice of Intention to Prosecute) in relation to, *inter alia*, less serious traffic related offences. The J534 allow an individual to admit guilt and pay a fine instead of appearing in court. From the contents of Schedule A, appended to the charge sheet, it is evident that these incidents occurred during the period April 2002 to June 2002. The State alleged that the appellant together with the co-accused acted in the execution of a common purpose to commit the offences of fraud, alternatively theft and entered into an agreement or engaged in an arrangement or transaction amongst themselves to defraud or steal money from members of the public who made representation for the reduction of fines on the J534 forms as well as steeling from members of the public issued with such fines who were desirous to make such acknowledgment of debt payments at the Botshabelo Magistrates' Court.

[7] The evidence tendered by the State indicates that after being issued with a J534 upon which an amount is indicated which could be paid prior to the trial date, which date also appears on the said document, the complainants approached the Botshabelo Magistrates' Court with the view of making representations for the amount to be reduced. They then came across personnel at the court, in numerous cases referred to as policeman wearing a uniform and also other employees, who assisted them by informing them that the amount had been reduced from, for example R300 to R200 or R150. After payment of such reduced amount the complainant left without being issued with a receipt only to be summoned to court at a later stage, after a warrant was issued, on the basis that no payment was received as alleged by the complainant. Due to the numerous complaints, all of a similar nature that payments were indeed made subsequent to the amounts being reduced at court, investigations were conducted which resulted in the arrest of the appellant and his co-accused.

[8] During the proceedings and after the appellant had presented his testimony in chief and while under cross examination, accused 3's legal representative applied for the separation of trials in terms of the provisions of s 157(2) of the CPA. Accused 2 and accused 4 also made such applications which applications were not opposed by the prosecution. On 12 August 2010 the presiding magistrate granted the application for separation of trials and the matter continued against the appellant as the only remaining accused. The appellant, at this stage appearing in person, made a successful application to recall some of the witnesses who had already testified and

the matter proceeded until judgment was pronounced on 18 February 2013 in terms whereof the appellant was convicted as referred to above.

[9] The grounds upon which the Appellant's appeal against the conviction rests can concisely be summarised as follows:

9.1 That the charge sheet read with the pre-amble to the charge sheet were legally defective resulting in an infringement of the appellants right to be duly informed of the charge he was called upon to face during the trial;

9.2 That the court *a quo* misdirected itself in convicting the appellant on the strength of a defective charge sheet;

9.3 That the charge sheet did not contain any allegation of actual or potential prejudice of members of the public in respect of the charges of fraud, in the absence of which the indictment does not disclose an offence;

9.4 That the charge sheet and the pre-amble to the charge sheet, due to the absence of an allegation of prejudice as against the Department of Justice, did not disclose an offence committed by the appellant and furthermore the allegations made in the pre-amble materially differ from the allegations made in the charge sheet regarding misrepresentations made to members of the public;

9.5 In the alternative, that the charge sheet and the pre-amble to the charge sheet lacked sufficient details so as to enable the appellant to prepare a response to the allegations resulting in the appellant being denied a fair trial;

9.6 Regarding the averment that the appellant acted together with the co-accused to a achieve a common purpose, the charge sheet and the pre-amble to the charge sheet lacked sufficient detail pertaining to the role of the applicant in respect of his actions and the facts upon which the State relies in order to establish common purpose;

9.7 The detail provided in the charge sheet and the pre-amble to the charge sheet

lacked sufficient particularity and details pertaining to the role of each of the accused charged by the State in that the only detail provided was in respect of the former accused 4;

9.8 No allegation of unlawfulness is made in the charge sheet with regard to the reduction of admission of guilt fines in respect of the fifth charge and the evidence presented during the trial by the respondent that the appellant not being authorized to receive unwritten representations amounted to trial by ambush and infringed the appellant's right to a fair trial;

9.9 The court *a quo* misdirected itself by drawing an inference that the appellant acted in common purpose with his former co-accused in defrauding the public and/or the Department of Justice having regard to the testimony of the witnesses who did not implicate the appellant *per se* as one of the persons who accepted money from them;

9.10 The court *a quo* erred in finding that the State has proved the guilt of the appellant beyond reasonable doubt.

[10] The appellant's grounds of appeal in respect of the sentence of six years imprisonment can concisely be summarised as follows:

10.1 Due to the record pertaining to sentencing not being available, the presiding magistrate was contacted to reconstruct the record. Such reconstruction occurred without the input of the appellant and the representative of the State, Mr Strauss. The failure of the presiding magistrate to invite the input of the appellant to the reconstruction of the sentencing proceedings has violated the applicant's right to a fair appeal process;

10.2 The reconstructed sentencing proceedings do not include the evidence of the Probation Officer's and the Correctional Officer's Reports as well as the evidence adduced during the trial in mitigation by, inter alia, the appellant;

10.3 The court *a quo* misdirected itself in finding that the appellant failed to show any remorse when such was clear from the reports filed by the Correctional Officer and

Probation Officer;

10.4 The sentence imposed upon the appellant is shockingly inappropriate;

10.5 The court *a quo* over emphasized the seriousness of the offence and the interest of the society at the expense of the personal circumstances of the appellant.

[11] Section 35(3) of the Constitution entrenches the right to a fair trial. Section 35(3)(d) of the Constitution provides as follows: 'Every accused person has the right to a fair trial, which includes the right- (d) to have their trial begin and conclude without unreasonable delay.' The right that a trial must begin and conclude within a reasonable time belongs to all the parties, in other words, to the appellant, his co-accused, and to the State. The law must be applied equally to those who are involved in any case. In *Sanderson v Attorney-General Eastern Cape* 1998 (1) SACR 227 (CC), the court held that it is by no means only the accused who has a legitimate interest in a criminal trial commencing and concluding reasonably expeditiously. It remains an established principle that the public interest is served by bringing litigation to finality.

[12] The trial commenced on 21 June 2004 and the proceedings against the appellant were concluded when he was convicted on 21 February 2013 and sentenced some time later. The reconstructed record pertaining to the sentencing proceedings do not specifically reflect the date of sentencing the accused. By simply looking at the time that has elapsed since the trial commenced until conviction of the appellant, it is obvious that the proceedings span a period of 9 years. It is evident from the record that numerous incidents and, obviously at the time, quite relevant reasons caused the multitude of postponements. Some of the postponements were due to illness and medical procedures, some due to the unavailability of the prosecutor and many of the postponements due to the unavailability of the legal representatives who appeared on behalf of the accused (including the appellant) or due to applications to Legal Aid South Africa or Legal Wise for the appointment of legal representatives to proceed with the trial.

[13] An application for separation of trials was brought by the co-accused of the appellant in terms of Section 157 of the CPA. This section provides that:

'157(2) Where two or more persons are charged jointly, whether with the same offence or with different offences, the Court may at any time during the trial, upon the application of the prosecutor or of any of the accused direct that the trial of one or more of the accused shall be held separately from the trial of the other accused, and the Court may abstain from giving judgment in respect of any of such accused.'

[14] When accused 3's attorney applied (from the bar and in absence of any evidence on oath) for a separation of trials he indicated that he wishes not to disclose the reason for the application but that it would be prejudicial for accused 3 to remain an accused before the court. It was furthermore contended that it would be in the interest of justice to grant the application for separation. The legal representative who appeared on behalf of accused 2 and accused 4 then similarly applied for a separation of trials from the case against the appellant. The reason for the application was that an agreement was concluded with the prosecution, the content of which may not be disclosed. The appellant, clearly being surprised by the events and the application, requested an adjournment to consider the implications of the application for separation of trials by his co-accused. The appellant mentioned that he will have to consider the application, more particularly the aspect that the court was not informed about the exact reason or grounds for the application for separation.

[15] When the matter resumed the following day, the appellant relayed his disappointment with the fact that the presiding magistrate failed to advise him regarding the implications of an application for separation of trials mainly because he is an undefended accused and he specifically requested clarity from the court and an explanation of the implications if such a separation of trials is granted. The appellant then voiced his concerns that when the attorney who appeared on behalf of accused 2, Mr Kgwale, applied for the separation of trials, the prosecutor spoke to Mr Kgwale and according to the appellant '... I do not know whether he was coaching Mr Kgwale or what exactly was he doing at that very moment ...', which the appellant mentioned on the basis that it appeared as if the prosecutor interrupted the said Mr Kgwale's address in regards the application. The appellant placed his concerns on record that the exact reason(s) for the application for separation by his co-accused was not advanced in support of the application. He contended that he was unable to determine how a separation of trials will affect him and whether it will be prejudicial to him or not.

The appellant then raised a crucial aspect namely, how will the court be able to adjudicate upon an application for separation of trials if the grounds for such an application is not disclosed. The presiding magistrate merely replied that the reason for the application has not been disclosed because it might possibly be to prevent any perception of bias.

[16] The appellant disclosed that he learned, during the postponement the previous day, that accused 3 intends to tender a plea of guilty to some of the charges and that a similar offer was made to him by the prosecutor. The appellant was then interrupted by the prosecutor who objected to the information being placed on record on the basis that any discussions on this topic were not meant to be revealed to the court. The appellant clearly insisted that he is being prejudiced due to the fact that he does not know what the basis for the application for separation of trials is. The presiding magistrate subsequently granted the application for separation of trials in terms of the provisions of s 157(2) of the CPA without the reason for the application for separation of trials being disclosed by any of the appellant's co-accused and based solely on the contention that an agreement was reached between the co-accused and the State.

[17] The decision as to whether to grant a separation of trials is a discretionary one.¹ A court may also of its own accord raise the issue of a separation.² It is trite that society requires that joint offenders be tried together, as separate trials invariably lead to a waste of State resources. Multiple trials ought therefore to be avoided where possible. The principle test in deciding whether to grant an application for separation is whether it is probable (not merely possible) that the applicant(s) will suffer prejudice if a joint trial takes place.³ At the end of the day, the question to be answered is whether separation will be in the interests of justice.

[18] The application for separation of trials was brought on 11 August 2010. It has to be kept in mind that the trial commenced on 21 June 2004, thus more than six years after commencement of the trial. The State presented the evidence against all the accused on the basis that that they acted together in association and participation in a

¹ *R v Bagas* 1952 (1) SA 437 (A).

² *S v Ndwandwe* 1970 (4) SA 502 (N).

³ *S v Witbooi & Others* 1994 (1) SACR 44 (CK).

to exercise her discretion judicially or properly when the grounds for an application for separation of trials have not been disclosed. There must be a probability, not the mere possibility, of prejudice which may give grounds for separation. The evidence before court at the time when the application for separation was heard contained evidence implicating the appellant's co-accused. The appellant was cross-examined by the prosecutor regarding the evidence presented by the State witnesses, also pertaining to the conduct of his co-accused. The appellant prepared his defence to the charges levelled against him on the basis of common purpose as per the charge sheet. When the trials were separated, the incriminating evidence that was lead with regard to the appellant's co-accused was and remained on record. Such evidence was eventually used by the presiding magistrate against the appellant for his conviction on the basis of common purpose without any of the co-accused being present to refute the evidence against them. The appellant, having already testified in chief, would not have been able to refute the evidence which the State witnesses adduced against his co-accused that the offences were all committed in the furtherance of a common purpose designed to fraudulently steal money from the public or the Department of Justice.

[21] In the result I am of the view that the appellant was prejudiced by the separation of trials that was ordered approximately six years after commencement of the trial and under circumstances where it was unclear and uncertain whether pleas of guilty, at least in respect of some of the charges, had indeed been tendered by the appellant's co-accused before a different magistrate.

[22] A further issue encountered in this appeal is that not only is the record in respect of sentencing not available and was only at a later stage reconstructed by the presiding magistrate, the record in respect of the proceedings on the merits is also incomplete. From the record it is evident that the following sections are not available:

22.1 On 24 June 2004 the case was postponed to 1 November 2004. No record is available for 1 November 2004. It seems as if the matter was merely postponed to the following day, the 2nd of November 2004 because one of the legal representatives was not available. The case was postponed to 8 November 2004.

22.2 From the record it appears that the next date of appearance was on 14 February 2005. The court proceedings on 8 November 2004 are not available. There is no indication what occurred in the time between 8 November 2004 up to 14 February 2005.

22.3 In volume 2 of the record the transcriber made notes that numerous instances occurred where the recording is inaudible due to the recording being at 'high speed', more specifically sections of cassette 1, 2, 3 and 5.

2.4 The record resumes with the testimony of a witness, Mr Shokane on 14 February 2005 whereas the last witness who testified on 2 November 2004 was Mr Gathlake. He was excused from further attendance. Clearly some of the evidence tendered by Mr Shokane is not part of the transcribed record.

22.5 Volume 4 of the record seems to be a reconstruction of the record as it does not reflect the date of hearing except that on the last page of volume 4 it is indicated that the matter will proceed on 14 February 2005. In any event the next volume, being volume 5 does not commence with the proceedings on 14 February 2005 but with the testimony of J M Labuschagne on 15 February 2005.

22.6 The last page of volume 5 of the record reflects page 808, whereas the next volume, volume 6 starts at p 811.

22.7 On 9 March 2006 the matter was postponed to the following day being 10 March 2006. The next page in volume 8 of the record however reflects that the matter continued on 12 March 2009. It is possible that the trial did not proceed in the period between the previous hearing on 9 March 2006 up to 12 March 2009 due to the fact that the appellant launched an appeal to the High Court, but it is unclear what the situation actually was in that no record of the proceedings is available.

22.8 It furthermore is evident that the proceedings between 29 April 2010 up until 11 August 2010 has not been included in the record, neither has the proceedings in the period 11 May 2012 up to 3 September 2012 been made available. It is therefore not evident from the record whether the matter proceeded during these periods or not.

[23] The constitutional right of an accused to a fair trial includes the right of appeal.⁵ Where an accused has the right to appeal and a missing or incomplete record makes it impossible to consider and adjudicate such appeal, the conviction or sentence will often be set aside. If the appeal court or the review court is not furnished with a proper record of proceedings, then the right to a fair hearing of the appeal or review is encroached upon and the matter cannot properly be adjudicated.⁶ The mere fact that the record of the proceedings might be lost or incomplete would not, however, automatically entitle an accused to the setting aside of a conviction or sentence. Such relief will only be granted where a valid and enforceable right of appeal is frustrated by the fact that the record is lost or incomplete and cannot be reconstructed. In the matter at hand the appeal has been delayed to enable the appellant and the State to reconstruct the record and to ensure that a properly paginated and indexed record of the proceedings in the court a quo is available for the appeal.

[24] Despite numerous efforts by Mr Strauss, counsel on behalf of the respondent, and the appellant, and presumably due to the lapse of a considerable period of time, it was not possible for the record to be reconstructed in full. In conclusion, I am of the view that the trial was not being conducted in accordance with the notion of basic fairness and justice in respect of the appellant. A separation of trials was granted at a very late stage of the criminal proceedings without the grounds for the separation being provided to the presiding magistrate. Eventually the appellant was convicted on certain of the charges levelled against him, not on the evidence implicating him *per se*, but on the doctrine of common purpose at a stage when his co-accused were no longer before court to refute the evidence adduced by the State. In the result I propose the following order:

[25] ORDER:

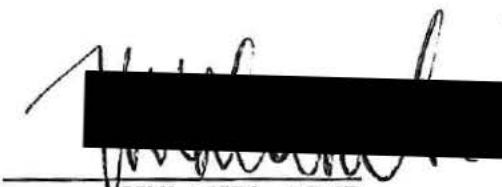
1. The appeal against the conviction and sentence are upheld.
2. The accused is acquitted and discharged.

⁵ Section 35(3)(o) of the Constitution.

⁶ *S v Sebothe and Others* 2006 (2) SACR 1 (T) at para [8].


I VAN RHYN, J

I concur.


MHLAMBI, ADJP

On behalf of the Appellant:

In person

On behalf of the Respondent:
Instructed by:

Adv. M Strauss
DIRECTOR PUBLIC PROSECUTIONS
Bloemfontein