IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MTHATHA]

CASE NO. CA&R29/2024

In the matter between:

AYANDA MATINISE **Appellant**

and

THE STATE **Respondent**

JUDGMENT

JOLWANA J

Background.

[1] It is now more than five years since the onset of the worldwide pandemic which became commonly known as the covid-19 pandemic. No country was spared from the ravages of this pandemic whose death toll, according to *Worldometer*[1], stood at more than seven million deaths worldwide and more than one hundred thousand in South Africa as at the 13 April 2024. South Africa was one of the countries in which reports of confirmed infections and deaths started trickling in thick and fast and later

[1] https://www.worldometers.info

engulfed the whole country like wild fire. The South African government found itself having to declare a national state of disaster in terms of the Disaster Management Act[2]. The covid-19 pandemic forced the hand of the South African government to also impose a national lockdown amongst other drastic measures that it took. It also made a fundamental shift in some of the procurement processes in respect of the things that were considered urgently needed to ameliorate the situation and save lives.

[2] These included a drastic change in the procurement processes by various government departments and other State entitles all of which had to procure, with extreme urgency, Personal Protective Equipment (PPE) including masks to mitigate the infection rates amongst its citizens and prevent some of the preventable infections and losses of lives. For its part, the Eastern Cape Provincial Department of Health (the department) also adopted a policy of issuing commitment letters for the urgent procurement of surgical masks and gloves from service providers.

[3] This matter has its genesis in a fraudulent commitment letter that was purportedly issued to a service provider for the procurement of surgical masks and gloves in the circumstances alluded to above. This is an appeal against the conviction and the sentence imposed on the appellant on charges of fraud and forgery. He had pleaded not guilty to all the charges preferred against him and elected not to disclose the basis of his defence. The appellant was nevertheless convicted and sentenced to 10 years imprisonment at the conclusion of his trial. The appeal is with the leave of this Court granted on petition to the Judge President subsequent to the refusal of his application for leave to appeal by the court *a quo*.

---

[2] Disaster Management Act 57 of 2002

The evidence of the State.

[4] The first witness for the State was Ms Mgijima who testified that she was employed by the department as the general manager, supply chain management. There were six units that she was responsible for, which were the demand management, acquisition management, contracts management, procurement and logistics, asset management, supply chain management and risk and compliance. This matter emanated from the supply chain management unit which was primarily responsible for the procurement of the PPE during the covid-19 pandemic. In the supply chain management unit, they generally followed two processes. There was a competitive bidding process which was the primary procurement process. After the declaration of the national state of disaster, national treasury issued an instruction notice giving government departments guidelines on the deviation processes they needed to follow in urgently procuring PPE and the maximum permissible prices.

[5] At that time masks that were available on the market were the KN95 masks. However, the department's facilities were in urgent need of the N95 masks. Because of the scarcity of the N95 masks in the market, they decided to adopt a procurement process in which suppliers would indicate that they would be able to supply the N95 masks. They would then be issued with commitment letters on the basis of which they would be allocated a certain number of items they would supply and on delivery, they would be issued with purchase orders. Either herself and in her absence, Ms Bolo, a colleague of hers, would sign commitment letters. When Ms Mgijima was shown a commitment letter that had purportedly been issued to Falaz Protection Services (Falaz) and was asked to identify the signature thereon, her immediate response was that it seemed to have been signed by Ms Bolo. However, the KN95

masks and the three ply blue surgical masks for which that commitment letter was issued were not part of the deviation process as they were not scarce items.

[6] She testified that the Falaz commitment letter looked like the commitment letters they normally issued, and it was in the department’s letterhead that they normally used. The difference was that it also included nitrile non sterile powder free examination masks which was a description they would use with reference to gloves. Furthermore, the medium size referred to therein was also used for gloves and the quantities of the masks were not the quantities that they would normally procure from a single supplier. Her conclusion was therefore that the Falaz commitment letter was not from her department. She only got to know about Falaz when she received a call from a man who identified himself as the owner of Falaz. This person said that he had delivered stock to the department and he was making a follow up regarding payment. He also mentioned that he was working with Ayanda who was a personal assistant to the MEC.

[7] She already knew the appellant as someone who was working in the office of the former MEC of the department. That man said that some stock had been delivered to their O R Tambo District offices. On that same day she received a phone call from Ms Titi who was the director of finance and supply chain management in the O.R. Tambo District. Ms Titi told her that she had received a call from a supplier who was making a follow up on payment. Ms Mgijima testified that she and Ms Bolo had no knowledge of the commitment letter, and they did not know Falaz and Falaz was not in their list of suppliers. Ms Bolo had told her that she got the Falaz commitment letter from Mr Matshotyana, the general manager for clinical support services.

[8] Ms Bokleni testified that she was the quality assurance manager in the O R Tambo District. On 17 September 2020 she received a call from a person who introduced himself as Ayanda from the office of the MEC. This person told her that the department had purchased some masks for delivery to their offices. He said that he had been asked by the MEC to arrange for their storage until the MEC distributed them herself. A few minutes later, she received another call from a person who said that he was the supplier of the said masks and that a truck was on the way to deliver the masks. However, when the delivery arrived, she was not present. She asked a storekeeper, Ms Madubaduba who was also her assistant to receive the said stock.

[9] On 3 October 2020 at about midnight, she received a text message from the said supplier saying that they could not get hold of the appellant and enquired if the stock was still safe. In the morning, she called the appellant, but she could not get hold of him. She sent him a text message saying that the supplier was worried as he had not been paid. The appellant responded that he would call the supplier and revert to her but he never heard from him again. On 13 October 2020 the supplier called her saying that he would be sending people to fetch the stock and on 14 October 2020 and again on 15 October 2020 the people sent by the supplier arrived and collected all their stock.

[10] Ms Bolo testified that she was the manager of the supply chain management unit stationed at the department's offices in Bhisho. She knew Ms Mgijima as her colleague. The appellant once approached her in her office enquiring about the department's policies saying that he was from the office of the MEC and was an advisor in the MEC's office. She gave the appellant copies of the policies. Ms Bolo was asked if she recognised the signature on the Falaz commitment letter which was shown to her. She testified that the signature thereon looked like hers or was similar

to hers and she recognised it as such. That commitment letter was signed on 9 September 2020 but she was not on duty on that day as she had taken leave of absence to attend her brother's funeral.

[11] She testified that Ms Mgijima was authorised to sign commitment letters, and in her absence she was also authorised to sign them. She saw the commitment letter issued to Falaz for the first time when Mr Matshotyana sent it to her. When she was asked during cross-examination why, when she received the commitment letter from Mr Matshotyana she did not immediately dispute or question its authenticity, and why her immediate response was to ask Mr Matshotyana whether or not there was a problem. She testified that procurement processes were confidential, thus making it difficult for her to know who to trust besides her colleagues in her team. Their commitment letters were drawn by Ms Mtshawulana and signed by Ms Mgijima. She testified that there was a deviation process for N95 masks and for KN95 masks and insisted that they also received KN95 masks through the deviation process.

[12] The evidence of Ms Mtshawulana was that she was in the employ of the department holding the position of an assistant director, administration. Her offices were based at the Emergency Medical Services (EMS) in Vincent, East London. Her duties included managing finance, supply chain management, human resource and general administration. She was therefore also involved in the procurement of goods. She testified that during covid-19 there were two items that could not be procured through the open tender system. They were the N95 masks and examination gloves for which a deviation process was approved. Suppliers who were able to supply those items were issued with commitment letters instead of purchase orders and they would be given purchase orders on delivery. She testified that she was responsible for producing commitment letters that would then be signed by Ms

Mgijima and in her absence, Ms Bolo was also authorised to sign them. After a commitment letter would have been signed, she would either email it to the relevant supplier, or the supplier would fetch it from her office. Suppliers that were able to supply those items were entered into a spreadsheet.

[13] With reference to the Falaz commitment letter, she testified that it was similar to their commitment letters, and in this case, it was issued for the procurement of KN95 masks and three-ply blue surgical masks. She was asked who signed it and she said that it was meant to be signed by Ms Mgijima but was signed *per procurationem*[3], Ms Bolo. She did not know who drew or produced it because it was for KN95 and three ply blue surgical masks for which commitment letters were not normally issued. She never produced that particular commitment letter for Falaz. The reference to nitrile non-sterile powder free examination masks was also indicative that it did not come from her office.

[14] She further testified that she first saw the Falaz commitment letter when Ms Bolo sent it to her on WhatsApp. Furthermore, she routinely entered the details of their suppliers in a spreadsheet and the name of Falaz was not in her spreadsheet. She knew the appellant as she met him when he came with another lady delivering gloves at their EMS base in Vincent. The said lady was there on behalf of AVNG Investments, one of their suppliers. She had been told by Mr Matshotyana that the appellant would come with the said lady to deliver some gloves. The appellant arrived with that lady and she took them to their stores. She told appellant and the AVNG lady to come and get a commitment letter from her office when they finished with the delivery. She prepared a commitment letter for AVNG which she gave to the

---

[3] Per *procurationem* indicates that the person signing signs on behalf of a principal by virtue of an authority which may be implied or express – Dictionary of Legal Words and Phrases, second edition volume 3 service issue 24, June2021, para 32.

appellant. The appellant enquired if the department still needed more gloves and she told him that they still needed more gloves. The appellant then said that he would come back but he never came back.

[15] Ms Mtshawulana denied ever giving the appellant the Falaz commitment letter saying that she only gave him a commitment letter for AVNG. She testified that she could not have given him a commitment letter for the KN95 masks and surgical gloves as those items were already awarded and an order was issued for them. The AVNG commitment letter was given to the appellant on 2 September 2020 and after that she never saw the appellant again. Before that date she did not know the appellant. She was told by Mr Nokela that the appellant was from the MEC's office. When she gave the appellant the AVNG commitment letter, she already knew that he was from the office of the MEC. She also testified that she and Ms Mgijima were the only ones who drew or produced commitment letters. She disputed Ms Bolo's evidence that a deviation process was done for KN95 masks.

[16] The State made an application to have a statement of a witness the State had intended to call to testify but who, due to ill health, could not be called, admitted as evidence. That application was made in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988. That application was opposed by the appellant but the court *a quo* ruled in favour of the State and admitted the said statement which was then read it into the record and handed up to the court. That statement was taken from one Sefalafala who, inter alia, described himself in it as the director of Falaz. Some of the contents of that statement were the following. He owned a manufacturing plant in Randburg, Gauteng where he manufactured masks. On 9 September 2020 he received a call from Khato who was his friend enquiring if he would be able to provide masks for the department. Khato told him that he had

received a call from one Ayanda whose surname he did not know who said that he was employed by the department and he wanted to purchase masks for the department.

[17] He thereupon furnished Khato with the details of Falaz, one of his business entities. On 10 September 2020 he received a commitment letter from Khato via WhatsApp in which he was required to supply 700 000 KN95 masks and one million surgical gloves. He arranged for 500 000 KN95 masks to be delivered to an address in Mthatha. He then instructed his driver to speak to Ayanda regarding a delivery and Ayanda told the truck driver that they should leave the stock. The next day he phoned Ayanda enquiring about the purchase order for the masks and Ayanda said that they were busy with it. After about two weeks elapsed without receiving a purchase order he became concerned. Mr Thato then contracted the chief of staff of the department who said that Ayanda was no longer with the department, and that they knew nothing about an order placed with Falaz. He then made arrangements to fetch the goods from Mthatha. After the evidence of Sefalafala’s affidavit, the State closed its case.

The evidence of the appellant.

[18] The appellant testified that on 17 September 2020 he was working for the department as a messenger in the office of the MEC in Bhisho. The commitment letter that was sent to Falaz was given to him by Ms Mtshawulana for him to give it to Khato. On that day a friend of his was going to fetch a commitment letter for AVNG and he accompanied that friend and that was how he got to meet Ms Mtshawulana. His friend told him that Ms Mtshawulana was giving out jobs in the department. He and his friend drove to Vincent where Ms Mtshawulana’s office was. They walked

into an office and the AVNG agent introduced him after which Ms Mtshawulana printed a commitment letter. While the letter was being printed the appellant saw Mr Nokela who shares the same clan name of Tshane with him. He greeted Mr Nokela and had a brief conversation with him after which Mr Nokela left. The AVNG agent told him that she was asking for a job from Ms Mtshawulana and that she had received a commitment letter from her. After some time, he met Khato whom he already knew as he had told him before that he was doing fumigation for the department. Khato told him that he was also interested in other jobs other than fumigation. He then told Khato about a lady whom, according to the AVNG agent, was giving out jobs. Khato asked him to speak to the said lady on his behalf. When he went to East London at some stage, he also went to see Ms Mtshawulana in her office.

[19] He asked Ms Mtshawulana if she still remembered him and she said she still remembered that he worked in the office of the MEC and he was a relative of Mr Nokela. He told her that his friend Khato was looking for a job. She then said that she had some jobs and that Khato should approach her. Khato approached her and he later told him that he met Ms Mtshawulana and all went well and that he was awaiting a commitment letter from her. He again went to Ms Mtshawulana's office with the AVNG agent to deliver invoices and about three or four boxes of gloves which were outstanding from an earlier delivery. He then enquired from Ms Mtshawulana about Khato's job, and she said that she would attend to it. Ms Mtshawulana then printed a signed commitment letter and gave it to him. He took a photo of the said commitment letter and sent it to Khato.

[20[Appellant testified that he did not know Ms Bolo and he saw her for the first time in court. The AVNG commitment letter was given directly to the agent of AVNG. After he had sent the Falaz commitment letter to Khato it transpired that Khato had sent it to Falaz and Falaz had communicated directly with Ms Mtshawulana. Khato gave his number to Falaz as Falaz was going to do the delivery of the masks and Falaz was not getting through to Ms Mtshawulana. The commitment letter for Falaz was given to him on the date it was issued which was the 9 September 2020 by Ms Mtshawulana and he thereupon sent it to Khato.

[21] The appellant also called the investigating officer, Ms Bizani to testify as she had not been called by the State. Ms Bizani testified that she was the investigating officer of this case. The case was first investigated by Mark Behrens, but she also did her own investigations when she took over. She did not know the author of the Falaz commitment letter. From that point, the court started making remarks discouraging the eliciting of the evidence of this witness even to the extent of being openly hostile to the appellant's attorney. When the appellant's attorney asked Ms Bizani a question about the signature on the commitment letter the presiding magistrate indicated that his patience was wearing thin. The investigating officer said that she did not know who signed the letter, but the letter reflected the details of Ms Mgijima. She testified that she asked Ms Mgijima if she was the author of the letter and she told her that she did not write it and that she did not know the signature affixed thereon.

[22] When the appellant's attorney indicated that it was Ms Mgijima's evidence that she delegated some of her duties to Ms Bolo and asked Ms Bizani if she could not see the name of Ms Bolo in that signature, the presiding magistrate jumped in asking if the appellant's attorney was about to finish and said that he was about to stop the further questioning of this witness. Despite that open hostility, the appellant's attorney continued and asked if the investigating officer was aware that the signature

and the content of the commitment letter were disputed, she responded affirmatively. She was then asked if she took the letter to a forensic analyst to confirm if the letter was not signed by Ms Bolo and she said she did not do so. She was then asked if her colleague, the initial investigating officer had done so, the presiding magistrate again interjected before the witness could answer this question. The magistrate asked if that evidence would not be before court if Mark Behrens had taken the letter for forensic analysis of the signature and indicated that the court's time was being wasted. The prosecutor also entered the fray objecting to the questioning of this witness about the signature on the commitment letter on the basis that the appellant's attorney was cross-examining his own witness.

[23] On the prosecutor's objection the appellant's attorney argued that the State had conveniently not called the investigating officer despite her explanation on the issue of the forensic analysis of the signature being crucial to the charges. The court then said that it would not allow the appellant's attorney to contravene the rules by cross-examining a witness he had called. The appellant's attorney then indicated that he would withdraw questions determined by the court as cross-examination. At that point, the presiding magistrate said that "*They are all cross-examination, your questions. And I rule them off*." The appellant's attorney asked if all his questions were being ruled off and the court said yes. There were further exchanges between the appellant's attorney and the presiding magistrate in which it was clear that the court was not just being openly hostile but was also being openly obstructive thus preventing the elicitation of this crucial evidence from the investigating officer. When at some point the appellant's attorney made another attempt to pursue the issue of the signature on the commitment letter, the court continued with its open hostility to

the extent of disparagingly questioning the capability of the appellant's attorney to lead and cross-examine witnesses in a criminal trial.

[24] At this stage the appellant's attorney asked if the matter could stand down so that he could catch his breath. Instead of granting this request, the presiding magistrate subjected the appellant's attorney to more ridicule and repeated questioning his capability in the running of a criminal trial. Appellant's attorney's request for an adjournment was not entertained, instead, the court excoriated him for not taking an adjournment that had apparently been offered by the court earlier. However, on perusal of the record, it does not appear that an adjournment was offered at any stage after the investigating officer started testifying. In any event, this specific adjournment request was for a specific reason that the appellant's attorney felt he needed to catch his breath. This was perfectly normal and there was nothing out of the ordinary with this request especially after he had been openly ridiculed in court in the manner he was treated. In the final analysis, the matter was not adjourned, and appellant's attorney had to continue under those obviously difficult circumstances. The trial continued without the appellant's attorney having been allowed to elicit evidence relating to the signature on commitment letter from the investigating officer.

The court a quo's judgment.

[25] In its analysis of the evidence, the court *a quo* correctly pointed out that the commitment letter that was at the centre of the charges faced by the appellant appeared to have been signed by Ms Bolo. The court noted that the Falaz commitment letter included KN95 masks in the items that were being procured which were not part of the deviation process. The court found that Ms Mgijima was

unequivocal that the commitment letter was not issued by the department. It also found to be "*a fact not speculation that any official dealing with commitment letters would have known that the letter of Falaz was not issued by the department*".

[26] After asking itself some rhetorical questions like why would Ms Bolo or Ms Mtshawulana, who knew the systems and procedures of the department, order things the department did not need, the court said that there was no evidence that those officials had anything to do with Falaz. It concluded that it was the appellant who was dealing with the matter and the department. It is unclear if in concluding as he did, the presiding magistrate was saying that because those officials who testified might not have issued a commitment letter in that fashion, therefore no other departmental official or any other person other than the appellant could have done so. It was equally unclear that because items that should not have been ordered were ordered, therefore, it could not be those officials in the supply chain management unit who did or could have done so. The court said that the errors in the Falaz commitment letter indicated that it was issued by somebody who did not even know what was required. It then said that the appellant was just a messenger and, on that basis, concluded that as a messenger who would not have known what was required, he was the one who forged that commitment letter. In making this conclusion, the court did not explain, with reference to the evidence, the basis on which it arrived at the conclusion that it was only the appellant who could have forged the Falaz commitment letter.

[27] After considering the evidence of Ms Bolo regarding the appellant having said that he was a legal advisor, assistant to the MEC and a messenger which inexplicably, the court accepted as having been proved, all of which the court said were lies by the appellant, the court commented that after those lies were told fraud

was committed. It approached that specific issue on the basis that because the appellant had lied about his position in the department, therefore, it was the appellant who forged the Falaz commitment letter. The difficulty with the court's conclusion in this regard is that even if the appellant lied about those aspects, how that had anything to do with forging the commitment letter is difficult to understand.

[28] Some of the troubling comments of the court *a quo* in its judgment do call for special mention. For example, the court said that a departmental official who was committing fraud could not have made errors in the commitment letter. It said that a departmental official would have committed fraud in a proper way which it appeared to describe it as being the way they normally did things. The basis on which the court made conclusions about how departmental officials would have issued a fraudulent commitment letter is difficult to understand. Similarly, how it excluded any and all other departmental officials including those who might have worked in the supply chain management unit but were not responsible for the issuing and signing of commitment letters was not explained. This is besides the fact that it was not clear from the evidence how many officials worked in the supply chain management office as no clear evidence was led in this regard and whether or not all of them besides Ms Mgijima, Ms Mtshawulana and Ms Bolo, were familiar with commitment letters. This is again besides the fact that the court did not say anything about Mr Nokela and Mr Matshotyana whom the evidence suggests, were somehow involved in the workings of that office or at least, had some proximity to it. In making all those conclusions without any evidential basis, it appears that the court embarked on untrammelled conjecture.

[29] There is another concerning and inexplicable conclusion by the court *a quo*. It was the court's conclusion that because Ms Bolo was on leave, she could not have

signed the Falaz commitment letter. The basis on which the court excluded the possibility of Ms Bolo signing the letter before she went on leave was not examined by the court. There was no evidence of how commitment letters were ordinarily signed. In other words, it was never explored with witnesses whether Ms Bolo only signed the letters by hand and not electronically which, if she could also sign electronically, she could have done so wherever she was. Most surprisingly, the court said that as a matter of law, he who alleges must prove. It then said that if one alleged that A committed an act, one has a duty to prove that. I am not sure what the court meant by this. I assume that the court understood that in criminal proceedings an accused person has no duty to prove anything. What was required of the court was for it to make a proper assessment of all the evidence including appellant's version.

[30] This basic principle of our criminal trial jurisprudence has been stated and restated on numerous occasions by our courts. In *Olawale*[4] the Supreme Court of Appeal *per* Mhlantla JA, the approach to the assessment of evidence in a criminal trial was set out as follows:

> "It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.

---

[4] Olawale v S [2010] 1 All SA 451 (SCA) at 455 paras 13-14.

> In evaluating the evidence against the appellant, one must look at the reliability and credibility of the witnesses, consider if any of them had a motive to falsely implicate the appellant and further look at the probabilities of the State's version"

[31] There are many other examples of the unfortunate manner in which the appellant's trial in this matter was conducted and of the numerous factual misdirections and inaccurate statements of the law. Some of them make it difficult not to conclude that the court determined the appellant's guilt without evaluating all the evidence and arrive at any conclusion it considered appropriate informed by the evidence. For instance, at some point the court specifically said that there was no supporting evidence that the signature on the commitment letter was that of Ms Bolo. The difficulty with this approach is not just that it was a misdirection of law. It is also the fact that the court seemed to have expected the appellant to prove by way of evidence that the signature in that document was that of Ms Bolo. In this regard, the correct approach was whether the State had proved that it was the appellant who forged Ms Bolo's signature. On the contrary, the court approached the issue of the signature on the commitment letter on the basis that the appellant needed to prove that he did not forge Ms Bolo's signature.

[32] Another articulation of this principle was set out earlier by the same court in *Viveiros*[5] in which Zulman JA said:

> "It is trite that there is no obligation upon an accused person, where the State bears the onus, "to convince the court". If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is impermissible to look at the probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out

[5] S v Vivieros [2000] 2 All SA 86 (A); 2000(1) SACR 453 (SCA) para 3.

> in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

[33] It was part of Ms Mtshawulana's evidence that she had been told by Mr Matshotyana that the appellant would deliver some gloves supplied by AVNG. The appellant and the AVNG agent indeed delivered them after which she invited him to her office and handed to him a commitment letters for AVNG. How Ms Mtshawulana would give the AVNG commitment letter to the appellant in the presence of the AVNG agent flew in the face of her own evidence that suppliers could fetch their commitment letters. The other matter of concern is Mr Matshotyana's role in the general procurement processes of the department. The evidence established that he was one of the employees of the department and seemingly dealt with the supply chain management office. The evidence of Ms Bolo was also that she saw the Falaz commitment letter for the first time after it was sent to her by Mr Matshotyana. It was unclear how Mr Matshotyana got to be in possession of the said commitment letter as he was never called by the State to testify. Another person whose role in the procurement office remained mysterious was Mr Nokela who seemed to be lingering around the procurement office with no clarity as to his presence or role in that office. I mention these officials not to suggest that they were somehow implicated in the forgery but to show that the appellant was not the only one might not have known the finer details of issuing commitment letters. Ms Bolo's evidence that she did not immediately question the authenticity of what looked like her signature in the Falaz commitment letter when it was sent to her by Mr Matshotyana for the reason that she did not know whom to trust is not without significance. None of this evidence was considered by the court *a quo*.

The admission of Sefalafala's affidavit.

[34] In dealing with Sefalafala's affidavit in its judgment, the court *a quo* merely indicated that it had ruled it admissible in terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 1988. It did not explain its reasoning in admitting Sefalafala's affidavit beyond saying that it did so in the interests of justice. What the interests of justice required on the facts of this case was not explained. Section 3(1)(c) of this Act has no less than seven considerations that must be taken into account in deciding whether or not in a specific case hearsay evidence should be admitted in the interests of justice. The court made no analysis of the factors on which it based its decision to admit that affidavit in relation to the provisions of section 3(1)(c)[6]. This is as concerning as the court *a quo*'s approach to contradictions between Sefalafala's affidavit and the appellant's evidence. The court appeared to have overlooked the fact that Sefalafala's affidavit was tendered by the State to prove that the appellant was implicated in the offences. To criticise the appellant for inconsistences between the evidence of the State and the version of the appellant in the manner it did is mind boggling to say the least.

[35] There is another matter of serious, if not grave concern in how the court *a quo* dealt with the affidavit of Sefalafala. It is that the court allowed a situation in which even the person who took the affidavit was not called by the prosecutor and no explanation was proffered as to this egregious disregard of one of the well-known principles of admission of documents especially in a criminal trial. In other words, not only was Sefalafala's evidence accepted in the form of an affidavit, even the affidavit itself was simply handed up from the bar to be part of the record. The police officer who saw and spoke with Sefalafala and obtained his evidence in the form of an affidavit was not called to testify. It was incumbent upon the prosecutor to call this

[6] Mawanda Makhala and Another v Director of Public Prosecutions, Western Cape 2025 (1) SACR 275 (CC).

person to confirm to the court that he saw Sefalafala and personally interviewed him and took his affidavit from him. He would also have testified about where he took it, when this happened and most importantly, confirm if the signature thereon was that of Sefalafala. In this regard the court not only had a right but also a duty to raise this issue with the prosecutor as soon as it realised that an impermissible procedure to admit this crucial piece of evidence into the record was being embarked upon.

[36] That Sefalafala's affidavit was central, if not key to the court *a quo*'s conviction of the appellant and occupied its mind throughout is also bolstered by its reference to it both in its judgment convicting the appellant and also in its judgment on the sentence imposed. In sentencing the appellant, the court, *inter alia*, said the following:

> "Even when the evidence was very strong against him, for example, an affidavit from Falaz put in, which said it was the accused who was negotiating this deal. In my view, one would have changed his plea to guilty at that stage, not to go further and deny the obvious, deny the obvious – waste the time of the Court. It comes to mind that the contents of that affidavit which directly implicates the accused, were not at all challenged."

The fact that the hearsay evidence of Sefalafala was irregularly, and improperly entered into the record, even if it could have somehow been admitted, must lead to the ineluctable conclusion that the evidence on which the appellant was convicted and sentenced was, at best, sullied.

Inferential reasoning.

[37] It is clear from the record that the court embarked on wide scale speculation to fill the gaping holes in the evidence tendered by the State. For instance, it said that it came out clearly that appellant requested Khato Mbodi to approach Falaz for a

tender. The factual basis for this conclusion was not set out by the court *a quo* in its judgment save for what Sefalafala said about him in his affidavit. The court went on to say that Falaz furnished Khato with its particulars which Khato must have handed them to the appellant. It then inferred from its own speculation that the appellant must have completed or written the commitment letter. As a matter of law, inferential reasoning cannot be based on speculation. It must be based on solid factual foundation. That this is so was eloquently explained by the full court of this Division recently in *Tom*[7] as follows:

> "The principles in relation to inferential reasoning are well established. The standard of proof beyond reasonable doubt in criminal proceedings requires the application of, what the court in the oft-quoted case of *R v Blom* (*Blom*) referred to, as the two "**cardinal rules of logic**":
>
> > '**In reasoning by inference there are two cardinal orders of logic which cannot be ignored:**
> >
> > **(1) The inference sought to be drawn must be consistent which all the proved facts. If it is not, the inference cannot be drawn.**
> >
> > **(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct**.'
>
> Some of the key principles underlying the test in *Blom*, as amplified in *R v De Villiers* are the following: the facts from which the prosecution seeks to draw the inference of guilt must not also be reasonably consistent with a hypothesis other than the one relied upon, in other words, the inference of guilt must be the only reasonable inference; there must be some evidential foundation to support the inference to be drawn, and speculation, conjecture or a bare possibility will not be sufficient, as the inferential conclusion sought to be drawn is determined against the strength of the factual premise provided by the context of the facts of the case, all of the circumstances established by the evidence must be considered and weighed in

[7] Tom v S 2023 (2) SACR 283 (ECMk) paras 10-11.

> deciding whether the inference is consistent with the proved facts. The evidence must be considered as a whole, and not by a piece-meal approach and, following from the fact that the burden of proof rests on the State throughout criminal proceedings to prove the guilt of the accused beyond reasonable doubt, the accused person is not required to establish that some other inference should be drawn, or to prove particular facts which are to support such other inference."

[38] The court *a quo* was either not aware of these time honoured principles, or it did not truly understand their implications and therefore applied them incorrectly which led to the serious misdirections that are evident from the record. Where the analysis of the evidence should have begun, the court went straight to the conclusion of guilt after making transient references to what it called, "*facts not speculation*". As explained quite succinctly, in *Tom*, this is as impermissible as is the shifting of the burden of proof from the State to the appellant. While the court *a quo* made references to inferential reasoning, the established facts on which it drew its inferences were not explained as a result of which one cannot tell from the judgment which facts the court found to be established on which it then drew its inferences. This is hardly surprising as it never really considered and properly analysed the appellant's evidence which it was obliged to do, nor did it consider internal contradictions in the evidence of the State about which it could have made whatever conclusions as to their impact. It could only have rejected appellant's evidence after considering it and making whatever conclusions about it, but ignoring appellant's evidence was not an option.

[39] In light of the fact that the court expressed itself as it did regarding Sefalafala's affidavit referred to earlier, the unavoidable question is whether it was still able to consider the evidence of the appellant objectively and with an open mind when it already considered him guilty as soon as it received Sefalafala's affidavit. It is not

unreasonable in the circumstances to conclude that the court's impatience and hostility to the appellant's attorney and its downright obstruction when the investigating officer was being questioned by the appellant's attorney regarding the signature on the commitment letter, was because it had already made up its mind about his guilt. This trial was characterised by a plethora of unfortunate misdirections both on facts and the law, procedural errors and an egregious disregard for procedural fairness. This case typified how a criminal trial should not be conducted and all of these misdirections cumulatively led to the appellant not receiving a fair trial. Some of the court *a quo*'s utterances to and about the appellant's attorney were uncalled for and clearly did not inspire confidence in our criminal justice system. Courts must always exercise patience in conducting trials and allow an accused person enough berth to exercise his right to challenge the evidence of the State and to adduce evidence to disprove the case of the State against him. Openly leaning in favour of the State even in cases that could be regarded as open and shut is simply impermissible as even in those cases an accused person is still entitled like any other accused person, to challenge the evidence presented against him even if in doing so he would appear to be wasting the court's time.

The constitutional right to a fair trial.

[40] Not so long ago, the Constitutional Court in *Kapa*[8] explained the right to a fair trial and its centrality to the confidence of the public in the criminal justice system as follows:

> "[26] The right to a fair trial enshrined in section 35(3) of the Constitution encompasses various fundamental rights, including the right to remain silent,

[8] Kapa v S 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) paras 26-28.

and to adduce and challenge evidence. In *Molimi*, this Court described the right to a fair trial as follows:

> '[T]he right to a fair trial … 'has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime' …. More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy.'

[27] Although the concept of a fair trial is a cornerstone of our criminal law jurisprudence, not every minor irregularity vitiates the right to a fair trial. In *Zuma*, this Court expressed itself as follows on the nature of the irregularities that render a trial unfair:

> 'The right to a fair trial … embraces a concept of substantive fairness which is not equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman; S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire -
>
> 'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted … [A court of appeal] does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'

That was an authoritative statement of the law before 27th of April 1994. Since that date, section 25(3) has required criminal trials to be conducted in accordance with those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

[41] As earlier indicated, the court *a quo* clearly ignored all these principles which underly the notions of basic fairness and justice which are entrenched in our constitutional order. In addition to that, the court disregarded a key aspect of our criminal trial architecture which is the onus of proof in a criminal trial. The court

approached the evidence of the appellant on the basis that he had to prove his innocence. This is patently incorrect as an accused person bears no such onus which rests solely with the State. Furthermore, even the suspicious aspects of the appellant's conduct which were disconcerting, were in themselves not enough to reach the conclusion of guilt, with the State still being required to do more to prove the guilt of the appellant beyond reasonable doubt which it lamentably failed to do.

Conclusion.

[42] In essence, the appellant was charged with the forgery of the signature of Ms Bolo and fraud. Nowhere did the court make a clear finding, with reference to evidence that the appellant forged Ms Bolo's signature and the basis for that conclusion. In any event, it could not have done so as there was no way of conclusively determining if that signature was not truly that of Ms Bolo as that signature was never subjected to forensic analysis. No objective evidence was presented to the court to establish that the signature on that commitment letter was forged and that it was the appellant who committed that forgery as the prosecutor inexplicably chose not to pursue that aspect through the forensic analysis of that signature, an area of expertise that is readily available within the State machinery.

[43] It was on the basis of the numerous misdirections of facts and law, and the procedural misdirections evident from the record that this Court came to the conclusion that it did. In essence, we concluded that there was a complete failure of justice on many fronts and at numerous angles resulting in the conviction of the appellant being unsustainable, unjust and therefore indefensible, a concession which counsel for the State also correctly made during the hearing of this appeal.

The result.

[44] In the result, on 5 September 2025 the following order was issued:

1. The late prosecution of the appeal is condoned.

2. The late filing of the respondent’s heads of argument is condoned.

3. The appeal is upheld, and the conviction and sentence of the appellant is set aside.

4. It is ordered that the appellant must be released from custody at the Wellington Correctional Centre forthwith.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree:

M. MHAMBI

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

Counsel for the applicant	:	S.X. Mapoma
Instructed by	:	Makangela Mtungani Inc.
		Mthatha
Counsel for the respondent	:	M.B. RANGULA
		DPP
		Mthatha
Date heard	:	05 September 2025
Date delivered	:	02 December 2025