

SOUTH AFRICA / JUDGMENT

Du Plessis v S (A451/2009) [2014] ZAGPPHC 488 (21 May 2014)

[2014] ZAGPPHC 488**COURT**

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka, N Ranchod

CASE / FILE NUMBER

A451/2009

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****CASE****NO: A451/2009****DATE:**

21 MAY 2014

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

In the matter

between:

MARIA

GORETTI DU

PLESSIS.....Applicant

and

THE

STATE.....

Respondent

JUDGMENT - Leave

to Appeal

MAKGOKA, J;

[1] This is an

application for leave to appeal against the order of the judgment of

this court handed down on 30 August 2013, in

terms of which the

applicant's appeal against the conviction on 10 counts of

fraud, was dismissed. The application is opposed

by the State.

[2]

The test applicable whether or not to grant leave to appeal, is trite and well settled. At common law¹

is has always been whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different

conclusion. The test was recently restated as follows:

The

mere possibility that another court might come to a different conclusion was not sufficient, nor that it would offer solace to the

applicant to know that the final decision in a serious case would be given by a court of appeal. See *S v*

Swanepoel

1978

(2) SA 410 (A).²

[3] The main

complaint is two-fold: First, that this court erred in finding that the thrust of the applicant's evidence was

that someone else

knowing her password could have abused her FAT number to commit the fraud. The following instances of her evidence establish beyond

doubt, that this indeed was the thrust of her evidence. Firstly, the applicant sought to rely on the fact that

some employees had

disclosed their passwords to others, and allowed them to use them, to show that it was a 'free for all'

situation. Secondly,

she suggested that appellant 2 might have known her password when she worked with him during the latter's

internship. Thirdly, she

testified that someone might have 'stolen' her password

during brief moments when she left

her station without logging off.

The applicant was therefore at pains to show that someone else, who knew her FAT and password,

was responsible for the fraudulent

transactions. Generally, even a cursory regard to the trial record would reveal that much effort

and energy were spent during the trial

on this aspect, especially by the applicant's attorney during cross-examination.

[4]

For these reasons it is disingenuous to now seek to disavow and

eschew that version. There is therefore simply no merit in this

contention. In fact, the fallacy of the argument is betrayed by the contents of para [4] of the application for leave to appeal,

in which

the court is criticised for rejecting the applicant's version

that someone else could have abused her password (wrongly

referred to
in the application for leave to appeal as the FAT number).³

[5]

The second contention, which was heavily relied on in argument, is that this court did not give due consideration to the possibility that the fraudulent supporting documents and assessments may have been handed to the applicant by someone else before she effected the fraudulent simulations. This is what counsel for the appellant, Mr Muller

SC,

referred to as 'the second defence'. The upshot of this argument is that the applicant did not know that she was committing fraud as and when she received documents from her seniors, and that the state had failed to prove that she knew that fraud was being committed. Counsel stressed that this defence was not 'mentioned' either by the trial court, nor this court, and that for that reason, there were prospects that another court might arrive to a different conclusion.

[5]

In my view, so-called defence is based purely on speculative hypotheses and remote possibilities. It is no defence at all, to, in

the light of strong and incriminating evidence, shrug one's shoulders off, and plead ignorance. The inherent difficulty with this

version is that it is at odds with the thrust of the applicant's defence, namely that someone else used her FAT and passwords to

effect the fraudulent transactions. Implicit in that defence, is an acknowledgement of knowledge that those transactions were fraudulent.

This is a logical corollary. Unfortunately, in criminal proceedings, one cannot plead defences in the alternate

without running into the

difficulty that the applicant now finds herself in. What is more, with this ground of the application,

the applicant is inviting the

court to focus too intently on an individual part of the evidence, whereas the correct method is

to have regard to the totality of the

evidence as a whole. In the present case, when one looks at the totality of the evidence,

there is no indication that what is

contended for, would be of any assistance to the appellant within the mosaic of the evidence.

Furthermore, as correctly argued by Mr Mohlaka,

counsel

for the state, this so-called defence was only mooted for the first time during the evidence in chief of the applicant, with the result that none of the state witnesses had an opportunity to comment on it.

[6]

The applicant seeks leave to appeal against the factual findings. The approach to be adopted by a court of appeal when it deals with such

findings, is found in the collective principles laid down in *R v Dhlumayo* 1948

(2) SA 677 (A). A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is merely left in doubt as to

the correctness of the conclusion, then it will uphold it. See also *DPP v S*

2000

(2) SA 711 (T); *S v*

Leve 2011

(1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another* NNO 2011

(1) SACR 469 (SCA). In the present matter, the applicant has, to my mind, failed to identify any material misdirection in the manner in which the evidence was considered.

[7] As a result,

after careful, dispassionate and detached regard to the contents of the notice of application for leave to appeal, as well as the oral

arguments, I am unable to detect any material misdirection in the evaluation of the evidence to justify a finding that another court

might arrive to a different conclusion. The application for leave to appeal falls to fail.

[8] In the result

the following order is made:

1. The applicant's application for leave to appeal against the judgment and order of this court regarding the conviction is dismissed.

TM MAKGOKA
JUDGE OF THE HIGH
COURT
I agree
N RANCHOD

DATE OF HEARING :

13 MAY 2014

JUDGMENT

DELIVERED : 21 MAY 2014

FOR THE APPLICANT : ADV. G.C MULLER SC

INSTRUCTED BY : GERHARD STOOP ATTORNEYS, PRETORIA

FOR THE RESPONDENT : ADV. K.L MOHLAKA

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA

¹This common law test has now been codified in s 17 of the Superior Courts Act, 10 of 2013.

²9 v Magudla 2010

(2) SA 316 (E) para 8.

³The non-significance of the FAT number was dealt with in paras [45], [47] and [58] of this court's judgment.

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