

SOUTH AFRICA / JUDGMENT

Du Plessis v S (A41/2017, 14/458/2013) [2017] ZAGPPHC 1082 (7 June 2017)

[2017] ZAGPPHC 1082

COURT

North Gauteng High Court, Pretoria

BEFORE

T Brenner, R Tolmay

CASE / FILE NUMBER

A41/2017, 14/458/2013

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Date of hearing: 29 May 2017

Date of judgment: 7 June 2017

Case number: A41/2017

Case number : 14/458/2013

- (1) NOT REPORTABLE
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) REVISED

In the matter between:

JOHANNES PETRUS DU PLESSIS

Appellant

and

THE STATE

Respondent

JUDGMENT IN APPEAL

BRENNER. AJ:

1. This matter involves an appeal against sentence only.

2. Johannes Petrus du Plessis, ("du Plessis"), was charged in the

Regional Court in Pretoria of fraud, alternatively, theft. The offence involved a transaction for the sale by du Plessis to the

complainant, Marthinus Johannes Schoeman, ("Schoeman"), of a 1995 model Mercedes Benz 5500 ("the car") for an initial amount of R52 000.00 , in March 2012. The State alleged that Schoeman had paid R30 000, 00 in cash to du Plessis on 26 March 2012, as a deposit for the vehicle. Yet, on 5 April 2012, the same vehicle was sold by du Plessis to Frans Castleman ("Castleman") . Despite demand, du Plessis never repaid the sum of R30 000.00 to Schoeman.

3. Du Plessis, forty years of age at the date of trial, on 21 May 2014, pleaded not guilty. He was legally represented throughout the proceedings. At inception, his attorney argued that the complaint in casu was civil in nature and ought not to have been prosecuted in a criminal court.

4. On 3 February 2016, du Plessis was convicted of theft of R30 000.00. On 18 February 2016, he was sentenced to seven years' imprisonment, of which three years were suspended, the effective sentence being four years' imprisonment .

5. On 1 March 2016, his application for leave to appeal was dismissed. On petition to this Court, leave to appeal against conviction and sentence was granted, this on 4 November 2016. Nevertheless, du Plessis' Counsel confirmed in the heads of argument and at the hearing of this appeal that the appeal was confined to sentence only, in the result, abandoning the appeal against conviction.

6. A succinct assessment of the evidence at trial is required. It was common cause that du Plessis had advertised the vehicle for sale for R48 000,00 on a Junk Mail website on 22 March 2012. Shortly after,

Schoeman contacted him to indicate his interest.

7. Schoeman testified that du Plessis met him on 23 March 2012 at Schoeman's

workshop and showed him the car. Du. Plessis informed Schoeman that he was an advocate. It would appear that they agreed to a price of R52 000,00. Schoeman said he would revert.

8. According to Schoeman's evidence, du Plessis phoned him on 26 March 2012 to tell him that other purchasers were interested in the car. Du Plessis suggested that Schoeman should pay him a deposit of R30 000,00 and the balance of R22 000,00 at a later, unspecified date. Under cross examination by du Plessis' attorney, the reason for du Plessis wanting to sell the car was mentioned. It was stated that du Plessis had identified a C12 Mercedes 5600. It had always been his dream to acquire one, and he needed the money from the sale of the car to Schoeman to buy this other car. This is the reason why du Plessis would never have agreed to wait for months for payment of the balance:

"My instruksies is hy wou juis die geld van u afgehad het want hy wit die ander kar koop Nee, dit het nie.....Dit was nooit onder bespreking nie."

9. At 18h00 on 26 March 2012, accompanied by his son, James, Schoeman went to what appeared to be du Plessis' home in Sandlewood, Wilgers. Schoeman paid du Plessis the sum of R30 000,00 in cash. Du Plessis handed the Natis registration document for the car to Schoeman, and a copy of the ID document of one Madelein Beulink ("Beulink"),

on which du Plessis signed confirmation that he had received the deposit. Du Plessis said he was handing over the document to prove

that he would not sell the car to anyone else.

10. Schoeman testified that he informed du Plessis that the balance would be paid within two to two and one half months. After the visit, Schoeman observed that the car was registered in the name of Beulink. He phoned du Plessis to query this, and was told that Beulink was du Plessis' wife. On 12 May 2012, Du Plessis phoned Schoeman to tell him

that he now only wanted R11 500,00 to be paid, with the balance payable at a later stage, and he would hand over the car. Schoeman

said he would think about this. He reverted to du Plessis to propose a full and final payment of R15 000,00 for the car. Du Plessis

accepted. He supplied Schoeman with his bank account details at Absa Bank. He told Schoeman that the car was in the custody of his brother in Evander but that his brother would deliver same after payment of the sum of R15 000,00. Then Schoeman became suspicious and resolved not to pay until the car was delivered. He phoned du Plessis to tell him this, and du Plessis said this was fine. He said his brother would deliver the car and the parties agreed that this would happen on 14 May 2012. The car was not delivered on this date. Du Plessis explained that his brother was staying longer on the farm and this was the reason for the late delivery.

11. Schoeman became more suspicious. He engaged a private detective, Hugo Wolmarans, ("Wolmarans"), who established that the car had been sold to a third party, namely, Castleman. Schoeman was informed of this on 14 May 2012. When Wolmarans confronted du Plessis, the latter initially denied this, but "still offered to refund the deposit to Schoeman. This did not happen, so Schoeman instructed his lawyer to send du Plessis a letter of demand to repay the amount within 7 days.

12. Castleman testified that he was engaged to Yolande Pretorius ("Pretorius") in April

2012. He wanted to buy her a car. On 5 April 2012, he saw an advert for the sale of a 1995 Mercedes Benz S500 on the internet for R43 000,00. He contacted du Plessis and du Plessis brought the car for inspection to Castleman's home in Standerton on the same day. They agreed on a price of R43 500,00. Castleman withdrew the money in cash that same day and paid it over to du Plessis. Du Plessis told him that he needed the money to pay for an operation for his mother. Du Plessis gave Castleman the registration papers and Beulink's

ID. The car was handed over to Castleman that same day. A short while later, du Plessis came to his home to hand over 4 wheels and a CD case. About two weeks after that, Castleman phoned du Plessis for information to enable him to register the car in Pretorius' name. the car was duly registered in her name. Castleman could recall Pretorius informing him that she was contacted by a detective in May 2012 . The detective told her that the car which was registered in her name had been sold to another person. Castleman said he phoned du Plessis to ask about this and du Plessis told him that this was indeed so, but the purchaser had breached the agreement.

13. In testifying in his own defence, du Plessis said that, on the same day that he met Schoeman, they agreed on the price of R52 000,00 for the car. Schoeman told him he was waiting for an insurance payment. They agreed on the deposit of R30 000,00 and the balance within 48 hours. Du Plessis said he gave Schoeman the registration papers and confirmed receipt of the deposit. He said he told Schoeman that his father was terminally ill and he needed the money urgently. He later agreed with Schoeman that the balance would be paid within 7 days and if not, then a rouwkoop clause applied and Schoeman would forfeit the

deposit. He said he agreed to the 7 day extension because he urgently required money for his father's medical expenses. When payment was still not made by the tenth day, du Plessis gave Schoeman an ultimatum to pay by 10h00 the following day, otherwise he would

readvertise. By 17h00 that day, no payment was made, so du Plessis readvertised the car and sold it to Castleman.

14. Du Plessis stated that he later offered to repay the deposit to Schoeman at R10 000,00 per month despite the rouwkoop clause but this offer was rejected. By the date of trial, he had not paid the money to Schoeman. He admitted that he was a practising advocate at the time of the incident, and specialised in labour relations. It is inciteful to note his attitude towards paying the money back, when a question is posed under cross examination:

"Ek stel dit aan u as dit van die begin af die ooreenkoms was tussen u en Mnr Schoeman dan het u geen rede gehad om enigsins afbetaling aan te bied of kontrakte aan te gaan om die afbetaling te reel nie? Ek het geen regs rede gehad om dit te doen nie maar uit 'n mens/ikheid oogpunt wat sy prokureur my verduidelik het dat hy sy huis gaan verloor, het ek dit tog as menslikheid aanvaar dat ek hom sal terug betaal in paaiemente."

15. Du Plessis was correctly convicted on a charge of theft of R30 000.00.
16. We turn to sentence. Du Plessis had two previous convictions involving dishonesty. The first one was for fraud, on 4 June 2010, with his sentence being an admission of guilt fine in the sum of R1 000,00. He committed theft on 4 October 2010 which resulted in an admission of guilt fine of R800,00. From the admission of guilt fines, it may be inferred that the fraud and theft were not of great magnitude. However, by March 2012, a pattern of recidivism had emerged and du Plessis' conduct was characterised by an attitude of brazen impunity. To aggravate matters, as a legally trained person, he would have had full appreciation of the

wrongfulness of his conduct.

17. Du Plessis was therefore a third offender for an offence involving dishonesty, which reveals a disturbing propensity to commit crimes of this nature. At date of sentence, he was forty two years' old and married with an eight year old daughter. His wife was temporarily employed at a creche and was the sole breadwinner. He had two degrees, including an LLB degree.
18. At the date of sentence, it was submitted to the trial Court in address on sentence that du Plessis had been convicted and sentenced on yet a fourth charge of theft, which had been committed after the theft in casu, and for which he was sentenced to five years' imprisonment. His attorney submitted that du Plessis had qualified for a conversion of sentence to correctional supervision, in regard to this fourth conviction of theft. He had already been in custody for the fourth conviction for one year and four months as at February
2016. He had attended "various rehabilitation programmes". These facts are plainly not relevant for purposes of the sentence in casu, since the offence for which he was convicted took place after the offence in casu.
19. It was argued that the theft was not planned, and that the money was used to pay accounts for du Plessis' sick father. No independent corroboration was provided in the form of medical accounts and proof of payment. It was proposed that the debt to Schoeman would be repaid on du Plessis' release from custody and that an appropriate sentence in this case would be a term of imprisonment suspended on condition that no further theft was committed and that the debt was repaid within a certain period. It was further argued that the amount stolen did not justify the case being heard in the Regional Court. It was mentioned that the offence was not committed whilst du Plessis was acting as an advocate.
20. The case of *S v Kasselmann* and another 1995 {1} SASV 429 T warrants mention. Here, the two accused, first offenders, both policemen, had stolen R400 000.00 in cash, of which R335 000.00 was recovered. The money was intended for use in a police trap. They handed themselves over to the authorities, and confessed to the crimes of theft and obstruction of justice.
21. On appeal, a term of five years' imprisonment for both counts taken together, was set aside, and reduced to three years' correctional supervision. It was found that they were not criminals in the true sense of the word, but had become so, due to their succumbing to temptation .
22. In *S v Mooketsi* and another 2015 (1) SACR 205 NCK, two security guards, first offenders, were convicted of theft of R820 000.00. They had pretended to have been subjected to a robbery

while the sum of R1 080 000.00 was in their possession. They pleaded guilty and were convicted of theft and obstruction of justice. All the money was retrieved.

23. The trial Court sentenced them to ten years' imprisonment on the theft count, and three years on the obstruction count , with both

sentences ordered to run concurrently, the Court finding that they had abused their position of trust. They had however, expressed remorse .

24. On appeal before a twojudge bench, their sentences were reduced. On the count of theft, they received seven years' imprisonment, of which four years were suspended. On the count of obstruction of justice, they received three years, which were to run concurrently with the theft sentence. The effective sentence was three years.

25. The facts in casu are distinguishable in several respects from those in Kasselmann and Mooketsi, in which the perpetrators pleaded guilty and there was substantial recovery of the amounts stolen.

26. Du Plessis showed no remorse, pleaded not guilty, was devious in advancing a patently spurious defence based on a "rouwkoop" clause, and maintained to the date when he testified in his own defence that he had no legal duty to repay the money. It was not put to Schoeman by du Plessis' attorney that the car was being sold to

pay for his father's medical expenses. Indeed, on the contrary, it was put to Schoeman that du Plessis told him that he had wanted to use the money to buy another Mercedes Benz. He was a third offender. Plainly, the two previous admission of guilt fines had not created enough of a deterrent to restrain du Plessis from continuing with his predatory conduct.

27. Du Plessis received payment of the cash amount of R43 500,00 from Castleman in April

2012. He could have used some of this money to repay Schoeman.

28. Until the date of trial in May 2014, despite the lapse of two years since the theft, du Plessis had still not repaid the deposit to Schoeman. He should have had a greater appreciation of the wrongfulness of his conduct, having been legally trained. He was a mature man, being thirty eight at the date of the theft.

29. We are of the view that the effective sentence of four years' imprisonment was appropriate, and not shocking or disturbing, in the light of the established facts, and, a fortiori, considering the overall conduct of du Plessis.

30. The following order is granted: the appeal against sentence is dismissed.

T BRENNER

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

7 June 2017

I agree.

R TOLMAY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

It is so ordered.

Appearances

For the Appellant:

Adv P F Pistorius

Instructed by:

Elsa du Plessis Attorneys

Counsel for Respondent: Adv M J van Vuuren

Instructed by:

The Director of Public Prosecutions

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