

SOUTH AFRICA / JUDGMENT

Horn v S (CA&R80/2018) [2020] ZAECGHC 77; 2020 (2) SACR 280 (ECG) (14 July 2020) [2020] ZAECGHC 77

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe, B.R. Tokota

CASE / FILE NUMBER

CA&R80/2018

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
CASE
NO: CA&R80/2018
Date
heard: 24
June 2020
Date
delivered: 14
July 2020
In

the matter between:

MARINUS
CHRISTO HORN
Appellant
and
THE
STATE
Respondent

JUDGMENT

LOWE, J

INTRODUCTION

[1] In this matter Appellant, Accused 2 at the trial, was charged together with his brother Roche Horn (Roche), (who was Accused 1) on 73 charges as follows:

[1.1] Counts 1 and 2 Racketeering;

[1.2] Count 3 Money Laundering;

[1.3] Counts 4 – 73 Fraud alternatively Theft.

[2] [2.1] Appellant pleaded not guilty to all counts and was convicted as follows:

[2.1.1] Counts 1 and 2, Racketeering;

[2.1.2] Count 3, Money Laundering;

[2.1.3] Count 4 – 65 (Fraud) and 73 (Theft).

[2.2] Appellant was found not guilty of charges 66 to 72.

[3] Appellant was sentenced to an effective sentence on all counts of 10 years imprisonment, the Magistrate finding substantial and compelling circumstances to be present in respect of the counts relevant hereto, as to fraud and theft.

[4] The Magistrate gave Appellant leave to appeal on conviction and sentence and the State leave on sentence.

[5] It is to be noted that the crimes allegedly occurred during the period May 2000 to January 2001. Appellant pleaded on 10 October 2005 but was only convicted, after a protracted trial, in 2015, and was sentenced on 27 September 2016 to various terms of imprisonment on various counts with an effective 10 years imprisonment period. That this trial took so long to complete is to be strongly deprecated and is highly unsatisfactory.

[6] The appeal itself has been considerably delayed through no fault of this Court or the State, which is similarly to be regretted as this complicates issues relevant to the appeal against sentence.

[7] Thus what was before the Magistrate on sentence was relevant as at 27 September 2016, some 3 years 10 months ago. Appellant has at no time been incarcerated and is presently on bail.

- [8] It is in the context of the above that the appeal was argued. The record is 6689 pages in length. However on appeal the majority of the relevant facts are common cause and can be simply stated. It is not suggested that the Magistrate erred on the facts themselves but rather as to the conclusions to be drawn therefrom.
- [9] Mr Crompton who appeared for Appellant argued this matter in his usual competent style and against the common cause facts, the real issue was with what “intention” Appellant acted in relation to the charges in “dealing with [Roche] as his attorney”. Put simply the real issue on the merits of the convictions are Appellant’s mens rea and whether he had the intention to become part of Roche’s business, and to mislead the investors/lenders to that business, and perhaps in addition, whether Appellant could reasonably have known that he was assisting Roche to unlawfully appropriate the lenders’ property (money).

THE

BACKGROUND

- [10] Roche Horn conducted a business, Jean Roche Liquor, in Silverlake Pretoria. His brother, Appellant was at the time a successful attorney practising as Rinus Horn Attorneys in Central, Port Elizabeth.
- [11] Roche alleged that his business needed capital in order to exploit lucrative business opportunities available to Roche particularly as a result of “Red Bull” commencing business in South Africa.
- [12] Roche approached Horn, or so it is alleged, to assist him to obtain capital funding as “bridging capital”.
- [13] The business model proposed to potential investors was to attract loan capital funding for the delivery and sale of cigarettes and liquor, at well below trade value, by way of a “profitable contract” with a supplier.
- [14] The anticipated contract with Red Bull was put up as a real and lucrative opportunity and was an important part of the proposal business model.
- [15] Roche invited a certain Martin Oosthuizen (Oosthuizen) to obtain or introduce investors for this business opportunity, he needing bridging finance of R500,000.00, this to be secured by payment into Appellant’s Attorney Trust Account and the undertaking that the purchase price of the liquor and cigarettes would be paid therefrom only after delivery to the end buyers.
- [16] It was said that the goods would be insured against theft, would be transported by Pickfords Co (Pty) Ltd and that Roche’s life would be insured.
- [17] Oosthuizen was to receive a 10%, once off, commission on the investment loans which he introduced whilst each investor would earn interest of 10% per month on the loan capital.

- [18] The Red Bull contract, unsurprisingly, never came to light.
- [19] Oosthuizen came into the picture as a result of Appellant being unwilling to be the person sourcing the funds, Oosthuizen, his friend, then taking on this role.
- [20] Horn, notwithstanding the failure of Red Bull to come to fruition continued with the cigarettes and liquor business maintaining that this was nevertheless extremely lucrative.
- [21] The investors/lenders were provided with a schematic drawing of the business plan (D1) drafted by Appellant, with a 9 point summary of the scheme. This said that Appellant was simply “the attorney” and was not part of the business. This recorded the main issues being that R2 Million capital was needed; no cash would

exchange hands; insurance was in place; that the lenders would get 10% interest per month payable on the 1st business day of each month and that the attorney (Appellant) would be responsible for all contracts and finances. (This latter aspect is obviously crucial and placed the Appellant, as attorney, in a position of joint responsibility and trust to Horn and to lenders in respect of the transfer and payment of funds.)

- [22] Appellant drafted a short standard form contract to be concluded between Horn and the relevant lenders. This provided inter alia for:

- [22.1] The loan amount to be provided;

- [22.2] A loan period of 6 months;

- [22.3] 10% interest per month payable to the lenders;

- [22.4] The interest payments would be handled by the business’s attorney;

- [22.5] The life of businessman Roche would be insured.

- [23] There was little else in the contract save for some standard conditions, domicilia and such. It was not an impressive document and did little to protect the lenders and did not even stipulate that interest would be paid monthly.

- [24] The fact remains that to have drafted D1, and the contract, Appellant must have had an in depth knowledge of the business, and intended scheme, which knowledge must have continued and expanded as the funds flow was routed through his trust account. In the end there were 52 lenders in all.

- [25] The business had no bank account – itself a serious warning note.

- [26] For reasons that should have been obvious to the even semi-vigilant, Roche’s business ran at a significant loss from the very start – despite Roche’s claims and promises. Roche purchased cigarettes and liquor selling this for less than he paid therefor.

[27] As inevitably must be concluded, as the business had no bank account, Appellant's trust account would have demonstrated the fallacy of the strategy from the get go. Many lenders received some payment of interest, but eventually all but three effectively lost their money in total. Most, if not all, interest payments that were made were paid not from the business money turnover but from subsequent lenders' money paid into the trust account.

[28] It was correctly conceded in argument for Appellant that this was no more nor less than a "pyramid scheme" for "much of the time that this business subsisted" [1].

[29] It is argued for Appellant that he was not ever part of the business but merely that he associated with Roche in the business as an attorney. It is pointed out that he did not "own" any part of the business, was based in Port Elizabeth whilst Roche and the business were in Pretoria.

[30] Apart from conceding the pyramid scheme, the heads[2] fairly and correctly set out that:

"10. It is conceded that the business operated by Horn (Roche) was a pyramid scheme, that in light of the business model pursued by Horn, the business had no prospect of making a profit, that the business was never going to make a profit and that the representations made to the lenders, that the business would yield a large return were never going to materialise. It is denied that the Appellant knew this."

[31] It is significantly not even suggested that Appellant was not the person making the relevant representations to lenders. It is thus that the crucial issue is not Appellant's involvement herewith and its extent much of which is conceded. It is his state of mind and intention (mens rea) which is in issue, and in addition, or in the alternative, in respect of fraud whether if holding an honest belief in the truth of what was told to the investors when they were persuaded to make their loans, whether he acted recklessly or carelessly as to whether this was true or false.

[32] In the result on the facts, which are mostly common cause, the issues are:

[32.1] Whether Appellant had the required mens rea for fraud/theft;

[32.2] Whether he was correctly convicted of the statutory offences of Money Laundering and Racketeering.

[33] As to Appellant's so-called involvement in Roche's business:

[33.1] Both Appellant and Roche testified that Appellant was no more than Roche's attorney, implying that he was thus not part of the business.

[33.2] Appellant set out in summary that he had a mandate as attorney from Roche and that he simply carried this out and did not know what was going on in Roche's business[3]. This is patently false as adequately pointed out by the Magistrate. Further as an attorney, not only was it Appellant's duty to establish the true facts, but to do so prior to making the representation to lenders. His attempt to distance himself from knowledge of the business and funds relevant is patently dishonest and further his insistence that he simply followed his clients' instructions is to

be deprecated as unbefitting as an attorney.

[33.3] It is conceded that all lenders' money was paid into the trust account of Rinus Horn Attorneys.

[33.4] Oosthuizen was the prime initial recruiter of investors.

[33.5] It was argued for Appellant that:

"17. From the above, the court a quo accepted that at the commencement of the business:

- a. the appellant was reluctant to get involved in Horn's business (Roche);
- b. had to be persuaded by the lenders to get involved in his capacity as an attorney in order to deal with the money;
- c. had no personal insight into Horn's business and therefore its viability; and
- d. believed Horn that the business was viable."

[34] By 20 June 2000 at the latest, only one month into the arrangement, it was clear that Red Bull would not materialise. Appellant apparently told Roche to move on and make a profit, he having been originally told by Roche that Red Bull would be so profitable, that Appellant would be able to take 22.5% of the distribution money in his Trust Account. One may pause to say that his was so lacking in detail and improbable that it beggars belief that anyone would have even thought to rely on this.

How on earth would the business have made such a profit as to pay investors/lenders 10% per month and still remain profitable, selling cigarettes and liquor.

[35] It is argued that Roche was a consummate con artist and totally deceived Appellant. What is overlooked however is that Appellant was an experienced attorney and had a duty to critically analyse what he was told, and with knowledge of what was happening in his trust account and the improbability of the Red Bull profitability, and thereafter at the end of June with its loss, he should have critically, even on his own version, have reassessed as to the prospects.

[36] This went on (improbably) to the end of October 2000, and Appellant's mandate was terminated by Roche on 13 October 2000. (In this regard it was argued for Appellant that Roche discarded Appellant prior to a time he could have been aware that the business was viable – I do not agree). The non-viability of the business was painfully apparent from the get go and even more so at end June 2000 when Red Bull, if it in fact ever existed, fell away.

[37] Notwithstanding Appellant's termination and the appointment of another attorney in his place, he attended a meeting called by P Brass with investors in Port Elizabeth on 16 November 2000 (he says as an observer). The meeting intention was to placate the investors as to the "distribution" that was to be made. The money was still in his trust account, at least in part, and he made the distribution in accordance with instructions (although terminated)

on 17 November 2000. Brass encouraged the investors to remain invested saying that he had put money into the business and that they would still be able to recover their capital. The investors all stayed in and Appellant's role in this is somewhat controversial to which I will refer more fully in due course.

[38] Importantly in considering Appellant's role, the Court a quo correctly found that his relationship with Roche was not restricted to one of attorney and client as follows[4]:

“Wat beskuldigde nommer 2 betref alhoewel hy ook net soos beskuldigde 1 wel ter tale was en uitvoerige getuienis gegee het moet die hof die opmerking maak dat ek reeds nou in die opsomming van sy eie getuienis verwys na aspekte waar sy getuienis met mekaar bots oor die stellings wat hy maak oor sy belang by die besigheid van beskuldigde nommer 1 en alhoewel dit sy getuienis is dat hy net volgens mandaat en volgens instruksie opgetree het is daar talle voorbeelde wat dan reeds opgesom is waar die beskuldigde optree en anders as 'n persoon wat bloot volgens mandaat optree. Die hof het reeds verwys na die gevalle waar sy getuienis in die verband dat hy geen insae gehad het in die besigheid van beskuldigde 1 nie, geen idee gehad het wat daarmee aangaan nie, nie te strook is met die gedurige verduidelikings wat hy vir beskuldigde en waarskuwings wat hy beskuldigde 1 gegee het om sy besigheid op so manier te begin bedryf dat hy 'n wins toon nie. Wat beskuldigde nommer 2 verder betref is die hof van oordeel dat sy posisie in hierdie geval nie beskou kan word as iemand wat nie ook 'n plig gehad het en ten minste 'n fidusiêre plig gehad het teenoor die uitleners in die saak nie. Die geld is in trust by hom inbetaal. Uiteraard moet dit vir hulle 'n mate van gerusstelling daarstel al was dit net daardie aspek wat vir hulle gerus gestel is vanweë die feit dat daardie geld verseker is en gedek word terwyl daardie geld nog binne in sy rekening is. Vir 'n persoon in sy posisie en met sy ondervinding om dan suiwer te gaan sê dat hy somer blindelings enige instruksie van beskuldigde nommer 1 sou uitvoer en uitbetaal sonder om dit te bevraagteken terwyl hy nie eers insae het in die besigheid van beskuldigde 1 aan die een kant nie

maar aan die ander kant wel genoeg insae het om hom die waarskuwings te gee kan die hof nie bevind dat hy eerlik was met die hof oor daardie aspekte nie. Die fidusiêre plig wat hy gehad het na my mening ook teenoor die uitleners het juis behels dat hy dit moes bestuur soos wat in daardie uiteensetting uiteengesit is naamlik dat die geld so lank as moontlik binne in daardie tjekrekening sal bly en dat slegs wanneer die geleentheid hom voordoen wanneer die aankope gemaak moet word en die verskaffer betaal word hy daardie geld wat tot op daardie stadium die beskerming geniet van die getrouheidsfonds daardie geld in daardie rekening sou hou en ook dan die ontvangstes van die verkopers af of van die aankopers af weer in daardie rekening sou ontvang ten einde daardie selfde fidusiêre plig en die versekering wat aan die getuies in daardie verband bestaan te kon eerbiedig, maar die getuienis wat voor die hof is dui dat daar totaal 'n ander werkswyse gevolg is. Ek kan dit so stel dat dit duidelik was dat die beskuldigde sonder om eers enigsins te betwyfel op sy eie weergawe somer net instruksies van beskuldigde nommer 1 se kant af uitgevoer het. Buiten dit is dit baie duidelik dat hy inderdaad insae gehad het van tyd tot tyd al is dit nou net aan die einde van die maand in die rekening van beskuldigde nommer 1 en dat hy dit moes gehad het voordat hy die nodige verdelingstjeks kon doen. Hy sal dit moes gehad het voordat hy enige ander uitbetalings doen omdat sy rekening nie in debiet in mag gaan soos wat dit gegaan het toe die tjek van Sunny View Motors nie eerbiedig is nie. So derhalwe om

voor te hou aan die een kant het hy net instruksies uitgevoer en nie werklik insae gehad in die rekening nie hou nie tred met sy ander weergawe wat hy sê dat hy moet toesien dat daar genoeg geld in die rekening is teen die 25ste ten einde die verdelings te behartig nie. Dit is onwaarskynlik dat hy homself nie op hoogte gehou het van wat in daardie rekening aan die gang is nie sodat hy dan in staat sou

wees om die nodige verdelings aan die einde van elke maand te kon doen. Die hof het reeds verwys ook na die werkswyse wat beskuldigde nommer 2 gevolg het om in teenstelling met sy getuienis en sy aandrang daarop dat hy deurgaans die uitleners se belange ook in aanmerking geneem het en dit ook voorop gestel het ten spyte daarvan dat dit aan die ander kant sy weergawe is dat hy geen maandaat gehad het om hulle te beskerm nie dat hy soos die rekord in KR aandui telkemale sy eie fooie tjekkie administreer het voordat daar nog enige uitbetalings in die vorm van rente gemaak is aan enige van die uitleners in die saak.”

[39] The Court also found, correctly, that without Appellant’s active participation, no one would have invested/lent money relevant to the scheme[5].

[40] Again importantly, and correctly, the Court a quo found that Appellant was an evasive witness on numerous issues and that he frequently gave contradictory answers to the same question[6]. On many occasions, said the Court a quo, he sought to take shelter behind the fact that he simply followed his clients’ instructions. At the end of the day the Court a quo found, again correctly, that he knowingly assisted Roche to utilise the funds of lenders for a purpose other than that for which the money had been lent.

[41] Having regard to what appears hereafter it is vital to note that the Court a quo found that it was clear that from 30 June 2000 Appellant knew that the business was not viable. This is vital as counts 4 – 15 relate to investments/loans that pre-dated this in a total sum of R553,000.00 - and at a time when the representations made possibly legitimately included the Red Bull prospect.

[42] When the Red Bull contract did not materialise, this to Appellant’s knowledge, he crucially did not bring this to the investors’

attention and when confronted herewith Appellant deliberately misrepresented the true facts[7].

[43] There is no doubt that Appellant used the deception to benefit personally financially despite being well aware of the true facts[8]. A question remains however as to the start date of his knowledge of deceit.

[44] In this regard the Court a quo correctly found that (at best for Appellant) the Red Bull contract was central to the business scheme as was the realisation of the massive profit that would be needed to settle the sums due to Oosthuizen and the investors. There can be no other explanation for Appellant not informing investors, both existing and future of the failure of Red Bull than that he was protecting Roche and himself, at the investors’ expense, and to their prejudice.

- [45] In summary Appellant cannot avoid the fact that not a single transaction accorded with D and D1, as investors deposited some 1.5 Million Rand into the Trust Account, and against the loss of Red Bull it was inevitable that Appellant knew or ought reasonably to have known that the Roche business was no more nor less than a pyramid scheme. Moreover having control over and knowledge of the money flow in this Trust Account, the flow did not accord with D1 and exhibited the fallacy of the business and existence of a pyramid scheme.
- [46] Not a single legitimate deposit flowed into the Trust Account relevant to sales or profit – this alone indicates without doubt that this was a fraudulent scheme. There being no suggestion, money was being held elsewhere for the benefit of the business as it had no bank account of its own of any form[9].

THE LEGAL ISSUES AGAINST THIS MAINLY COMMON CAUSE BACKGROUND

FRAUD

- [47] The essential elements of fraud are unlawfulness, misrepresentation, prejudice and intention.
- [48] The essence of the crime is deceiving or misleading the victim by way of an incorrect (false) statement of fact or law made by one to another.
- [49] Even a false representation of the perpetrator's state of mind (opinion) is sufficient.
- [50] To be liable the person making the statement must have done so knowing or at least foreseeing that it might be false[10]. Knowledge of falsity is established if this is known by the perpetrator, as also if he or she has no honest belief in its truth, or acts recklessly, carelessly, as to whether it is true or false. Snyman[11] sets out that:

"She can even be said to know that her representation is false if, although suspicious of their correctness, she intentionally abstains

from checking on sources of information with the express purpose of avoiding any doubts about the facts which form the subject matter of the representation. All these rules applied in practice, it is submitted, are merely applications of the rule that *dolus eventualis* suffices, in other words that it is sufficient if X foresees the possibility that her representation may be false but nevertheless decides to make it."

- [51] The importance is that *dolus eventualis* is sufficient for a fraud conviction. Importantly the intention required is more than the intention to make somebody believe that something which is false is true, but is such as to induce that person to embark on a prejudicial course of action as a result

thereof[12]. Motive is immaterial.

- [52] Obviously however one must appreciate that timing and date is important as the intention required must be present at the time of the misrepresentation relevant. In this matter thus it is only investors that invested at or after the requisite intention is established that ground

sufficient for a conviction on a particular count. The question in this matter then is when if at all, date wise, the requisite intention, even in the form of *dolus eventualis*, is established relevant to each count. The counts stretch from 18 May 2000 to 10 January 2001, and for each it should have been established as to when the requisite intention was established. The existence of the reality of the intended Red Bull contract is clearly relevant to this and fell away without question by 20 June

2000. The question is if it was clear that Appellant held the requisite intention hereafter, and whether this can also be said to be the case for counts 4 to 15 which all occurred prior to 20 June
2000. In my view this issue was insufficiently considered by both the Magistrate and in argument and that it was not established, beyond reasonable doubt, that Appellant had the relevant *mens rea* in this regard until after 20 June 2000.

MONEY LAUNDERING

- [53] In this matter the charge (Count 3) is a contravention of Section 4, 8 and 1 of the Prevention of Organised Crime Act 121 of 1998 (POCA) in the period May 2000 to January 2001. Put simply it relates to the money in Appellant's Trust Account and the misappropriation thereof by both accused for purposes other than held out with the effect of concealing or disguising the source,

location, disposition, movement and ownership of such money or enabling or assisting the accused in the commission of the offences

while the accused knew or ought reasonably to have known that the money was the proceeds of unlawful activities.

- [54] Put simply this relates to a process whereby "dirty money" is given a cloak of respectability and is hidden from the authorities. Effectively criminals hiding money derived from unlawful activity[13]. It is to launder money of traces of the original source of legality. The offence can be established by intention or negligence. Fraud and money laundering of the money concerned is not an improper splitting of charges. The *actus reus* required, as a consequence, is to disguise the movement and ownership of the property or ownership thereof or to assist the offenders to avoid prosecution or to remove or diminish the proceeds of some criminal activity.
- [55] In my view, it is a considerable stretch on the facts of the matter to conclude that what occurred in the Trust Account in anyway constituted the disguising or concealing of the proceeds of criminal activity as is required. It seems to me that the purpose of the use of the Trust Account was such simply as to clothe the scheme with the appearance of rectitude and legality and not to launder (disguise) the proceeds thereof.

- [56] In my view Appellant's counsel in a very short submission made the crucial point that the money was not received into the Trust Account for the purposes set out in Section 4 of POCA nor did the Magistrate, in my view, get to grips with the issues relevant in this regard, his reasoning being unpersuasive and his conclusion, in my view on this issue, incorrect.
- [57] In the result the money laundering conviction falls to be set aside, nor did the State essentially address this issue in any detail (for understandable reasons) concentrating rather on Racketeering.
- [58] The conviction on Court 3 must accordingly be set aside.

RACKETEERING UNDER POCA

Sections 2(1)(e), 2(1)(f), as read with Sections 2(2) and 4

- [59] In essence racketeering requires the existence of an enterprise (as defined), a pattern of racketeering activity (as defined) and that the accused participated in the conduct of the enterprises affairs directly or indirectly (proved beyond reasonable doubt).
- [60] A "pattern of racketeering activity" is defined in POCA as[14]:

"the planned, ongoing, continuous or repeated participation or involvement in any offence referred to in Schedule 1 and includes at least two offences referred to in Schedule 1, of which one of the offences occurred after the commencement of this Act and the last offence occurred within 10 years (excluding any period of imprisonment) after the commission of such prior offence referred to in Schedule 1.

...

Section 2(1)(e) punishes a person who, while managing, employed or associated with any enterprise, participates in the conduct, directly or indirectly, of such enterprise through a pattern of racketeering activity.

Section 2(1)(f) punishes a person who manages the operation or activities of an enterprise (ie actus reus) and who knows or ought reasonably to have known that any person, while employed or associated with that enterprise, participated in the conduct, directly or indirectly, of the affairs of that enterprise through a pattern of racketeering activity (ie mens rea).

Cloete JA in Eyssen pointed out that the concept of 'participation' distinguishes s 2(1)(e) from s 2(1)(f) for which participation is not required of the accused, but rather knowing (or ought to have known) that another person has participated. Cloete JA defines 'participation' as follows:

The participation must be by way of ongoing, continuous or repeated participation or involvement. The use of 'involvement' as well as the work 'participation' widens the ambit of the definition. So does the use of the words 'ongoing,

continuous or repeated'. Although similar in meaning, these are nuances of difference. 'Ongoing' conveys the idea of 'not as yet completed'. 'Continuous' (as opposed to 'continual') means uninterrupted in time or sequence. 'Repeated' means recurring.

Some limitation is introduced into the definition by the requirement that the participation or involvement must be in any Schedule 1 offence. The limitation is, however, not substantial, Schedule 1 lists a considerable number of offences, both statutory and common law, and includes (as item 33): ‘Any offence the punishment wherefor may be a period of imprisonment exceeding one year without the option of a fine.’

‘Enterprise’ in POCA ‘includes any individual, partnership, corporation, association or other juristic person or legal entity, and any union or group of individuals associated in fact, although not a juristic person or legal entity’. Such enterprise can be one that operates legally or illegally.’

The words ‘through a pattern of racketeering’ would, seem to require some causal link between the pattern of racketeering activity and the participants in the enterprise’s affairs.”

[61] In *De Vries v State* [15], the Court ruled that to convict of the underlying offences (fraud/theft in the matter) does not constitute a splitting of charges with POCA offences.

[62] The real issue then, in this matter, will turn on whether Appellant whilst associated with the Roche business participated in the conduct of the business, directly or indirectly, through a pattern of racketeering, Section 2(1)(e), or under Section 2(1)(f)

was a person who managed such operation. The participation element is required for Section 2(1)(e) but not for Section 2(1)(f).

[63] It seems to me here that Section 2(1)(e) in this matter is satisfied by way of participation, Appellant in fact being associated therewith, and by operating the Trust Account, participated therein. The requisite of Section 2(1)(f) in “managing” the operation is not satisfied on the evidence.

THE LEGAL APPROACH

APPROACH TO EVIDENCE:

[64] In *S v Van der Meyden*[16] the following is stated:

“The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the

logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.”

[65] Importantly, in that case Nugent J (as he then was) warned against separating evidence into compartments and to examine either the defence or State case in isolation. [17]

- [66] In summary then it is important to consider the position of both Appellants, the totality of the evidence and to bring into account all material evidence.
- [67] The State must discharge the onus that falls upon it to prove its case beyond reasonable doubt, the emphasis thus not falling on the degree of probability but on the degree of doubt.
- [68] In this regard I have kept in mind the following passage from Van der Meyden and Van Aswegen[18], it is as follows:

“It is difficult to see how a defence can possibly be true if at the same time the State's case with which it is irreconcilable is 'completely acceptable and unshaken'. The passage seems to suggest that the evidence is to be separated into compartments, and the 'defence case' examined in isolation, to determine whether it is so internally contradictory or improbable as to be beyond the realm of reasonable possibility, failing which the accused is entitled to be acquitted. If that is what was meant, it is not correct. A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence. The conclusion which it arrives at must account for all the evidence.”

- [69] It follows from the requirement that the State must prove an accused person's guilt beyond reasonable doubt that the onus rests on it to prove every element of the crime alleged, including that the accused is the perpetrator of the crime, that he or she had the required intention, that the crime in question was committed and that the act in question was unlawful. It also follows from the fact that the onus rests upon the State to prove the guilt of an accused beyond reasonable doubt that no onus rests on the accused to prove his or her innocence and I refer to S v Mhlongo[19] and R v Hlongwane[20] in this regard.
- [70] In order to be acquitted, the version of an accused need only be reasonably possibly true. The position was set out thus by

Nugent J (as he then was) in Van der Meyden [21]:

“The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383).”

- [71] There are no separate and independent tests but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt which will be so, only if there is at the time no reasonable possibility that an innocent explanation by an accused person which had been put forward might be true. The two are inseparable, each being the logical corollary of the other.
- [72] As was pointed out in S v Hadebe and Others[22], there is no substitute for a detailed and critical evaluation of each and every component in a body of evidence but once this had been done it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, it was pointed out one may fail to see the wood for the trees.

[73] Further, in weighing the evidence, this must be weighed against the intrinsic probabilities[23]. In *S v Singh*[24], the following appears:

“The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case.” [25]

THE APPROACH ON APPEAL

[74] In a matter such as this it is well worthwhile reminding of the general principles according to which a Court of Appeal should consider the appeal. In short the Court must bear in mind that the trial Court observed the witnesses in person and could assess their demeanour. If there was no misdirection of fact by the trial Court, the point of departure is that its conclusion was correct. The Court of Appeal will only reject the trial Court’s assessment of the evidence if convinced that the assessment is wrong. Even if the Court is in doubt the trial Court’s judgment must remain in place. Of course Court of Appeal has greater liberty to disturb the findings of the Court below when dealing with inferences and probabilities. The Court of Appeal does not look zealously for points upon which to contradict the trial Court’s conclusions. The Court of Appeal’s doubts about the trial Court’s correctness on the facts are insufficient to set aside the decision. If however the Court of Appeal is convinced that the trial Court reached an incorrect factual conclusion it will reject the conclusion. One must of course not only analyze the trial Court’s findings but also its reasons.

[75] The reluctance of the Court of Appeal to depart from the Magistrate’s credibility finding has long been maintained. In this regard it is of course true that not every error made by witnesses, not every contradiction or deviation necessarily affects the credibility of a witness. These issues must be carefully weighed viewing the evidence as a whole in order to decide whether the truth has been told despite possible shortcomings[26].

THE RESULT

[76] In my view, the Magistrate correctly analysed the background evidence and credibility issues and has not been shown to have erred in this regard, being presumed to be correct, as set out above.

[77] The real issue is whether on those facts, and as analysed, Appellant had the necessary intention either direct (knowing them to be false) or by *dolus eventualis*, foreseeing the possibility that his representation to the investors may be false but nevertheless making same.

[78] Either of the above is sufficient to satisfy the fraud charges providing the representation was made at the time of or subsequent to the formation if the *mens rea*.

[79] In my view, and for the reason that follows this was not the case in respect of Counts 4 to 15 which all predated the date when it became clear that the Red Bull contract would certainly not ever materialise.

- [80] The probabilities point towards Appellant having been aware of the falsity of the representation prior to this date but in my view this was not proved beyond reasonable doubt in respect of Counts 4 -15.
- [81] That, thereafter, Appellant deliberately and knowingly by his representation misled the lenders intentionally a fraudulently, is proved beyond reasonable doubt.
- [82] The Magistrate on the appropriate test on appeal cannot be faulted in this regard.
- [83] The Appellant's dishonest attempt to distance himself from culpability in his position as an attorney, presenting to potential investors in his trust account, was patently and potentially such as to persuade them of the veracity of the scheme and the safety of their funds as per the flow and security thereof as described in D1, failed miserably at least from 20 June 2000 forward.
- [84] As a seasoned attorney there is no doubt at all that he knew, or at the very least foresaw, the very real possibility that his representations to investors/lenders which persuaded them to ultimately invest/lend and thereafter remain invested (from about 20 June 2000) were false. This was unquestionably established on the evidence, the intention being to induce the investors to embark on a course of lending money into the business (for a 6 month period) and accordingly a course of action prejudicial to themselves, the scheme/business being patently such as to be a pyramid scheme in which most if not all investors would lose their money.
- [85] The further question arises however as to whether this accrues to investments made after his mandate was terminated in October 2000. This would be relevant to Counts 65 to 73. He was acquitted on Counts 66 to 72 and found guilty of theft on Count 73. So why Counts 65 and 73? Count 65 relates to 11 December 2000. Whilst 73 relates to 10 January 2001.
- [86] I am at a loss to follow the reasoning in this regard in respect of Count 65 either that of the Magistrate or the argument on appeal. In my view, the conviction on Count 65 cannot be sustained.

COUNT 73

- [87] This Count must be separately dealt with as Appellant was convicted of theft and not fraud and this in fact formed the basis of his subsequently being struck off the Roll of Attorneys.
- [88] Put shortly long after Appellant's mandate was terminated by Accused 1 (Roche) and on 10 January 2000 or thereabouts, one A I Asvat concluded an agreement of sale with Roche, drafted by Appellant, Asvat acting for Wadee's Cash & Carry, this for the purchase of cigarettes for the sum of R750,000.00. This sum was deposited into Appellant's Trust Account to be paid out in terms of the contract once delivery of the cigarettes had been made.

- [89] The contract stipulated accordingly. After correspondence between Appellant and the Attorneys for Asvat delivery was supposed to take place on 19 February 2001 but this failed to occur. Demand was made for delivery failing which repayment of the sum.
- [90] The evidence demonstrated that immediately after the sum of R750,000.00 had been deposited it was then specially cleared to enable immediate payment from those funds. In fact money was disbursed in various amounts to Roche, Appellant and as interest payments to various lenders on 17 January 2001. In fact correspondence from Appellant, as Attorney, to Asvat's Attorneys demonstrates that contrary to the contents thereof the money had already been disbursed and Asvat received neither cigarettes nor repayment.
- [91] This quite correctly and for the reasons stated by the Magistrate was found to constitute out and out theft by Appellant and Roche and moreover in the full sum of R750,000.00 he being correctly convicted thereof.

SENTENCE

- [92] In the result Appellant is subject to conviction on Counts 2 and 16 to 64 and 73 but is to be acquitted of the remaining Counts including 1, 3 and 65 to 72.
- [93] The really crucial issue as to sentence then is the success on appeal as to one count of Racketeering (he being convicted of one and not two counts in this respect) and the issue of money laundering falling away, with 12 counts of fraud prior to 22 June 2000 and Count 65.
- [94] Appellant was a first offender and a probation officer's report was handed in.
- [95] The State recorded in open Court on 16 September 2016 that Appellant was indeed a suitable candidate for correctional supervision.
- [96] As to minimum sentences, the minimum sentence legislation Act 105 of 1997, Section 51(2) was of application to Counts 12, 19, 35 and 73. As the conviction on Count 12 is to be set aside, this relates only to Counts 19, 35 and 73.
- [97] Appellant was 56 at the time of sentencing, the trial concluding some 16 years post commission of the crimes and now added to that too some 4 years ago. At the time of the crimes he was conducting his own Attorneys practice in Port Elizabeth.
- [98] He was subsequently struck from the Roll of Attorneys in 2002 predominantly due to the issues surrounding Count
73. The Magistrate accepted that as a result he "lost everything" and that his life subsequently had not been easy, and that the events had a devastating effect on his career, livelihood and reputation.
- [99] The Magistrate, however, correctly pointed out that he had abused his position of trust in misleading the investors. This was correctly regarded as an aggravating circumstance especially for an Attorney as officer of the Court.

- [100] At time of sentencing he worked as a “Legal Consultant” earning approximately R20,000.00 per month and had a daughter at university still dependant on him.
- [101] He has health issues being an asthmatic.
- [102] The Magistrate noted that despite there being no correctional supervision report at the end of the day, despite reference thereto, he was a suitable candidate for correctional supervision.
- [103] In my view, and notwithstanding the State’s submissions in this regard, the Magistrate correctly analysed sufficient relevant factors to establish the presence of substantial and compelling circumstances justifying a deviation from the prescribed minimum of 15 years’ imprisonment, alternatively, that to impose same would be such as to impose an unjust sentence.
- [104] More so now, that Appellant is unwell and over 60 years of age.
- [105] I also agree with the Magistrate, however, that correctional supervision even for the maximum period thereof, would not constitute a sufficient degree of punishment having regard to the extent of the convictions even taking into account the success in respect of various counts as set out above.
- [106] Nevertheless having regard to the success on Appeal we are not bound to the usual test for altering sentences, should we consider this just and equitable to do so, but are indeed obliged to consider sentence afresh.
- [107] The Magistrate, however, can hardly be criticized for and concluding that Section 276(1)(I) was also not suitable having a 5 year maximum.
- [108] The Magistrate took Counts 1 to 3 cumulatively for sentencing and imposed 10 years imprisonment in respect thereof.
- [109] He then sentenced Appellant to 2 years imprisonment on each Fraud Count and 3 years imprisonment on each Theft Count, with 7 years on Count 73.
- [110] He then ordered Accused 1 sentences to constitute an effective 15 years imprisonment and Appellant 10 years imprisonment.
- [111] I fully accept in considering sentence that Appellant is remorseful and is thus a suitable candidate for rehabilitation.
- [112] I also take into account his age at sentencing being 56 and now into his 60’s with poor health.
- [113] We called for supplementary Heads of Argument on sentencing due to the period that had passed since sentence was imposed and the suggestion by Mr Crompton from the Bar that Appellant was suffering a cancer related ailment.

- [114] Appellant's supplementary Heads of Argument allege that Appellant underwent a "radical proctectomy" on 20 August 2019 due to an adeno-carcinoma which was successful. It is suggested however that his PSA count has since risen to ,49ng/ml whereas it should be ,02ng/ml. It is suggested that this indicates a cancer recurrence.
- [115] There is no medical evidence tendered in the above regard at all nor an application to have same admitted.
- [116] An Appeal Court in considering sentence will be reluctant to take into account circumstances that have arisen after sentence unless exceptional circumstances exist[27].
- [117] The State points out that what has been placed before us is highly unsatisfactory and lacks detail and clarity sufficient to assess to what extent, if at all, this impacts on sentence.
- [118] The long delay in this matter is through no fault of the State insofar as is demonstrated on what is before us and Appellant can hardly rely on changed circumstances, without more in this regard, especially as his medical position is very far from clearly before us[28].
- [119] The above notwithstanding we have carefully considered what is reliably known of Appellant's health as placed before the Magistrate and accept that he has suffered from cancer and had a surgical procedure relevant thereto with some potential for recurrence. In this regard in due course, if this recurs, his condition can then be raised before the Medical Board at Correctional Services who can consider appropriate relief[29].
- [120] Taking into account the triad of factors traditionally to be considered, I am of the opinion that Appellant should be sentenced to a period of imprisonment of less than 10 years cumulatively viewed. In respect of Count 2 and 73, a period of 6 years imprisonment is imposed on each, with 2 years in respect of each fraud count, these counts all to be considered cumulatively and

to run concurrently with the 6 years imposed on Count 2 and 75, with an effective sentence thus of 6 years imprisonment.

ORDER

- [121] The Appeal against conviction and sentence succeeds only to the extent set out below.
- [122] The convictions on Counts 1, 3 and 4 to 15 and 65, are set aside with sentences relevant thereto.
- [123] The convictions on Counts 2 and 16 to 64 and 73 are confirmed.
- [124] The sentences relevant to the conviction confirmed in [113] above are set aside and replaced with the following:

[124.1] Count 2

- 6 years imprisonment

[124.2] Counts 16 to 64 - 2 years imprisonment on each Count

[124.3] Count 73

- 6 years imprisonment.

[124.4] The sentences imposed on the Counts referred to above, Counts 2, 16 to 64 and 73 are to run concurrently, with an effective period of 6 years imprisonment.

[125] The State's Appeal against sentence is dismissed.

M.J. LOWE

JUDGE OF THE HIGH COURT

TOKOTA, J:

I agree.

B.R. TOKOTA

Appearances:

Obo Appellant:

Adv R Crompton

Instructed by:

Netteltons Attorneys, Grahamstown

Obo Respondent:

Adv Roothman

Director of Public Prosecutions, Grahamstown

[1] Appellant's Heads, paragraph 8.

[2] Appellant's Heads, paragraph 10.

[3] Record, page 4069, lines 5-11

[4] Record, page 4225 (19) to 4228 (11)

[5] Record, page 4231 (lines 4 – 7)

[6] Record, page 4229 (lines 14 – 24)

[8] Record, Exhibit BD & KR, Record, page 3518 (lines 13 to 23)

-
- [9] Exhibit KR and BD.
- [10] Ex Parte Lebowa Development Corporation Ltd 1989
- (3) SA 71 (T) 101-5
- [11] Criminal Law: Snyman 6th Edition, 531; S v Hepker 1973
- (1) SA 472 (W) 477 E-R.
- [12] Snyman 531.
- [13] Principles of Criminal Law, Burchell, 5th Edition, page 911.
- [14] Burchell 901/2
- [15] 2012
- (1) SACR 186 (SCA)
- [16] 1999
- (1) SACR 447 (W) at 449j – 450b
- [17] At 499G-I and see also D T Zefferdt, A P Paizes, A St Queen The South African Law of Evidence (2003) pp 151-152. See also S v Van Aswegen 2001
- (2) SACR 97 (SCA) at 101a-e, S v Trainor 2003
- (1) SACR 35 (SCA) at 40f-41c and S v Crossberg
- [2008] ZASCA 13; 2008 (2) SACR 317 (SCA) at 349f-i and 354b-g.
- [18] (supra)
- [19]
- [1994] ZASCA 172
- [20] 1959 (3) SA 337 (A)
- [21] (supra) at 448F-G
- [22] 1998
- (1) SACR 422 (SCA) at 426f-h
- [23] See S v Maseti 353/13 ZASCA 160 (25 November 2013).
- [24] 1975
- (1) SA 227 (N) 228 G – H
- [25] See also S v Guess 1976

(4) SA 715 (A) at 718 H.

[26] S v Dhlumayo 1948

(2) SA 677 (A) and Minister of Safety and Security and Others v Craig and Others NNO 2011

(1) SACR 469 (SCA) [58]

[27] S v Karolia 2006

(2) SACR 75 (SCA); Jafta v S 2010

(1) SACR 131 (SCA) [13]; Section 19 Superior Courts Act 10 of 2013; Section 309B Criminal Procedure Act 51 of 1977.

[27] S v Karolia 2006

(2) SACR 75 (SCA); Jafta v S 2010

(1) SACR 131 (SCA) [13];

Section 19 Superior Courts Act 10 of 2013;

Section 309B Criminal Procedure Act 51 of 1977.

[28] Arendse v Magistrate, Wynberg and Others 2017

(1) SACR 403 (WCC) [53].

[29] Section 49E Correctional Services Act 111 of 1998.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/77.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/horn-v-s-unknown-topic-aecghc-2020>

Prepared on 10 October 2026 · Esheria