

SOUTH AFRICA / JUDGMENT

Luzipho v S (CA&R155/2017) [2018] ZAECHGC 8; 2018 (1) SACR 635 (ECG) (30 January 2018) [2018] ZAECHGC 8

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G G Goosen, N G Beshe

CASE / FILE NUMBER

CA&R 155/2017

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: CA&R 155/2017

Date heard: 22 November 2017

Date delivered: 30 January 2018

In the matter between

NTOMBIZIKILE LUZIPHO

Appellant

And

THE STATE

Respondent

JUDGMENT

GOOSEN, J.

- [1] The appellant was convicted in the regional court, Port Elizabeth on 22 counts involving inter-alia fraud and attempted fraud and statutory offences relating to the registration of fictitious births and deaths in terms of the Births and Deaths Registration Act 51 of 1992 and the Immigration Act 68 of

1997. She was sentenced to an effective eight years imprisonment. The appellant had pleaded guilty to four counts (counts 19 - 22 on the charge sheet), which related to the fictitious registration of the birth and death of “Luzipho Mthetho” and the fraudulent claiming of insurance benefits in relation thereto. For these four offences the appellant was sentenced to 8 years’ imprisonment.

[2] The appeal is directed against the appellant’s conviction and sentence in respect of the remaining counts for which she was

convicted. The appeal against sentence in respect of counts 19 to 22 is conditional upon the success of the appeal against conviction on counts 1 to 18.

[3] The appellant was employed as a Senior Administration Clerk in the registry section of the Department of Home Affairs regional office in Port Elizabeth. The offences for which the appellant was convicted are alleged to have been committed in the period between May 2008 and December 2008. The appellant was initially charged, together with Marthalindi Hanabe, a fellow employee in the Department of Home Affairs. Hanabe entered a plea of guilty, resulting in a separation of trials. In the separated trial the appellant was charged, together with one Ntombizandile Roloti. The appellant was charged with 22 counts (counts 1 – 22) and a further 12 counts (counts 23 –

34) jointly with Roloti. At the close of the prosecution case. The appellant was discharged, in terms of section 174 of the Criminal Procedure Act 51 of 1977, on counts 23 – 34. Her co-accused was acquitted on these counts at the conclusion of the matter.

[4] In relation to the 22 counts for which the appellant was convicted the state’s case was that the appellant and Hanabe acted in common purpose to commit the specified offences. The modus operandi employed by the appellant and Hanabe, which was admitted by the appellant in relation to counts 19 to 22 involved the following: They utilised the assigned user identity of Hanabe which granted access to the computer system of the Department to register fictitious births; a fictitious identity number for the “mother” and “father” was utilised to process the registration of a birth thereby creating a “child”; they thereafter personally or through an agent took out policies with various

insurance companies to cover the life of the fictitious child; they subsequently processed and registered the “death” of the fictitious child; thereafter they submitted claims against the insurance companies by supplying false police reports or mortuary references and a notification of death. As a result they were paid the benefits of the insurance policies.

[5] As indicated the appellant entered a plea of guilty in relation to those charges, which related to the creation of the “child”

Luzipho Mthetho. In relation to these charges the s 220 admissions made record the facts foundational to the modus operandi described above. The 22 counts, with which the appellant was charged may, for convenience, be grouped into five groups, each “group”

relating to the creation of a particular false identity and the consequent fraudulent conduct. The appellant denied that she was in any manner involved in the creation of the other four false identities and the further criminal conduct relevant thereto. In

relation to these four “groups” of charges it was the appellant’s case that Hanabe was solely responsible and that she had no knowledge of the unlawful conduct.

[6] The state led the evidence of two witnesses relevant to counts 1 to 22, namely Lizo Kobus Jasie (Jasie) and Marthalindi Hanabe (Hanabe). The appellant also made extensive admissions in terms of s 220 relating to the charges in count 1 to 22. These concerned the conduct of Hanabe, the process of registration of each of the fictitious

identities in respect of both birth and death and the fact that the claims were made against the relevant insurance companies. In consequence of these admissions the central issue in dispute at trial was whether the appellant was a party to and/or acted in concert with Hanabe in the commission of the offences other than those framed in counts 19 to 22. The appellant testified in her defence.

[7] The magistrate delivered a terse judgment described by the appellant’s counsel as “the laconic and exceptionally unhelpful”, in which he rejected the appellant’s version and accepted the evidence of Hanabe and Jasie. In doing so the magistrate accepted

that Hanabe was both a single witness and a co-perpetrator to whose evidence cautionary rules are applicable. The magistrate stated that the cautionary rule required that the evidence of a single witness should be found to be acceptable in all material respects. The judgment records that the witness Hanabe made a very good impression upon the magistrate.

[8] The criticism levelled at the magistrate’s judgment, namely that it is terse, is certainly justified. For reasons that will be set out hereunder however, it cannot be said that the judgment is “entirely unhelpful”.

[9] Our courts have on several occasions addressed the fundamental importance of a trial court, whether a lower or higher court, furnishing

reasons

for their decisions.[1] The failure to set out the findings of fact and to furnish reasons for its judgment places an appeal or reviewing court at a disadvantage in adjudicating the matter.[2]

[10] In *S v Franzenberg and others*

[3] it was said:

It is clearly in the interests of justice that a Judge, either sitting alone or with assessors, should give reasons for the finding of the trial Court - *S v Immelman* 1978 (3) SA A 726 (A) at 729A - B and the cases there cited. This is now enshrined in s 146 of the Criminal Procedure Act 51 of 1977, which imposes on a trial Judge the duty to give the reasons for the decision or the finding of the

Court on questions of fact, including where the Judge sits with an assessor or assessors and there is a difference of opinion, the reasons for the decision of the member of the Court in the minority. The importance of complying with this duty was recently emphasised by Howie JA, as he then was, in *S v Calitz en 'n Ander* 2003 (1) SACR 116 (SCA) in para [12], when he said:

'Hoe dit ook al sy, dit moet beklemtoon word dat die behoorlike beskerming, enersyds, van 'n appellant se grondwetlike reg tot appèl

en, andersyds, die gemeenskap se belang dat oortreders behoorlik gestraf word, van 'n regterlike amptenaar vereis dat deeglike

aandag gegee word aan die formulering en verstrekking van vonnisredes. Daarsonder word gesonde strafregpleging belemmer.”

[11] These remarks are, in my view, equally apposite to magistrates whose obligation to furnish reasons for a decision or finding is enshrined in s 93 ter (3) of the Magistrates Courts Act 32 of 1944. As was noted in *Franzenberg*

[4] in the absence of any or proper reasons, the appeal court:

‘...(a) has to do its best on the material on record; (b) cannot proceed on the assumption that there was no misdirection or irregularity in the process of reaching the decision that was reached by the Court a quo;

(c) cannot assume that the Court a quo had cogent reasons for seemingly accepting the witnesses who implicated the appellants; and (d) should have regard only to the

question of the onus of proof once all the relevant evidence had been examined to see whether there is any doubt as to which version is acceptable.

[12] This is not an instance, however, in which the magistrate has furnished no reasons for judgment. I have already remarked that the terse judgment is not, contrary to counsel for the appellant’s submission, “unhelpful”. The following important elements of the magistrate’s reasoning are to be gleaned from the judgment. Firstly, that the same *modus operandi* was employed in relation to each of the incidents of the creation of a false identity. Secondly, that the evidence implicating the appellant in the commission of the offences set out in counts 1 to 18 consists of that of a single witness who is also a co-perpetrator.

Accordingly, that evidence is to be approached with caution. Thirdly, that the witness Hanabe made a favourable impression upon the magistrate. Finally, in regard to the evaluation of the evidence, the discrepancy between the appellant’s version put to Jasie and her evidence and the inherent improbabilities in the version of the appellant was central to the rejection of her version.

[13] Thus, notwithstanding that the judgment is lacking in detail, it nevertheless sets out the magistrate’s central reasoning in reaching the conclusion which he did.

- [14] A perusal of the record indicates that there was no dispute in regard to the principal facts. The appellant had pleaded guilty to counts 19 to 22, which involved the creation of the identity of Luzipho Mthetho and the consequent fraud upon the insurance company. In this regard the appellant admitted that she made common cause with Hanabe. The s 220 admissions made by the appellant in relation to the remaining charges contained admissions detailing every fact alleged by the state in relation to those charges except the allegation that Hanabe and the appellant acted with a common purpose. Accordingly the modus operandi used to create the fictitious identities; to procure insurance cover, and thereafter to register the fictitious death and claim from the insurance company was admitted for each group of charges. The appellant admitted the particular documents utilised in each of those instances. The significance of these admissions, which need not be repeated here, is that the full sequence of the commission of the offences and the use of the appellant's cell phone number on the police reports in each such instance was not in dispute.
- [15] The only disputed issue which needed to be determined at trial was that relating to the claim made by Hanabe that the appellant was involved from the outset in each of the instances in which a fictitious identity was created and an insurance claim submitted. In other words, that they had acted in concert in pursuance of a common purpose.
- [16] Mr Price, for the appellant, argued that the court a quo was wrong to accept the evidence of Hanabe. He submitted that Hanabe was a poor witness, whose evidence was "in tatters" following cross-examination. A reading of the relatively short cross-examination of Hanabe by the appellant's attorney, Mr Griebenouw, does not indicate a witness whose version was "in tatters". On the contrary, the record reflects a witness whose evidence and version of events remained consistent throughout. She was unmoved in her testimony that in each of the instances in which a fraudulent identity was created, it was created with the knowledge and assistance of the appellant. She conceded that her user ID was used and that she took out the insurance policies in relation to four of the five instances and that the claim monies were paid into her bank account. She remained adamant however, that the proceeds of the fraud was shared between her and the appellant and that the appellant was an active participant in each instance.
- [17] A careful reading of the record indicates that no serious criticism can be levelled at Hanabe's evidence. It is clear from the magistrate's judgment that the magistrate found her to be credible. Such finding will not readily be ignored on appeal.
- [18] The magistrate considered the shift in the appellant's version in relation to the witness Jasie to be important. Jasie was an undertaker operating a funeral service. Jasie and the appellant knew each other before Jasie met Hanabe. It was common cause that in relation to several counts in respect of which the appellant did not plead guilty and denied involvement, that Jasie had provided details of the death on the official BI16634 utilised by the Department for the registration of a death. It was Jasie's evidence that the appellant had contacted him and

told him to come to the Home Affairs offices where he was introduced to Hanabe. This was to assist Hanabe with the provision of information on a BI 16634.

[19] In cross-examination of Jasie it was stated that the appellant's instruction was that:

She phoned you, gave you Mrs Hanabe's number and she also gave Ms Hanabe your number because Ms Hanabe was looking for somebody to complete the BI 16634. And she says that is what she did.

[20] In her evidence-in-chief the appellant presented a wholly different version. The record reads as follows:

Thank you Your Worship, I have no further questions to the witness. Sorry Your Worship, just the last aspect which I have overlooked. You know, Mr Kobus? – Yes, I know him.

Now he testified here in Court and under cross-examination, he told the Court that you phoned him. Is that correct? Sometime during... Well, he says September, it is not clear whether it is September or December – No, I never phoned him.

Sorry Your Worship, if I can just get to the evidence. Did you never phone him to tell him that Ms Hanabe wants to meet with him and wants to see him, because she needs help with a registration of death? – No, the undertakers I dealt with I didn't have the number.

[21] It is clear from this passage that her testimony in chief was at odds with her prior instructions to the attorney. In cross-examination the version shifted again. When asked whether she called him, she claimed not to remember. She then stated that she would have spoken to him as she did with any other undertaker who came to the office. When asked if she ever spoke to Kobus (Jasie) about anything relating to Hanabe she claimed not to remember.

[22] The significance of the change in version is striking. It was submitted by Ms de Jager, for the state, that the magistrate was correct to find that the change in version was an attempt by the appellant to distance herself from Jasie. On the version which was put to Jasie the appellant would have had to explain why it was necessary to put Hanabe in contact with Jasie for the purpose of completing a BI

16634. Such forms are completed at the office in the death registry section. Hanabe was not employed in that section.

[23] I agree with the submission. A reading of the appellant's evidence in this regard clearly reflects a change in version and an attempt to escape the inevitable consequence of an admission that she had facilitated contact between Hanabe and Jasie. That consequence is knowledge of and association with unlawful conduct.

[24] A crucial element of the state's case was that relating to the use of the appellant's cell phone number, which appeared in all of the police reports which were submitted with the insurance claims. Those documents were admitted. Hanabe testified that they (i.e. the appellant and her) had implemented the modus operandi in each instance. The necessary documents, such as the BI 1663 and the police reports were supplied by the appellant. Her telephone

number was used in each instance as that of the police investigating officer. This was to ensure that if any queries arose upon submission of the insurance claim the appellant could deal with it. Hanabe testified that this happened in one of the instances.

[25] The admitted evidence establishes that the appellant's cell phone number appears on the documents which are utilised in relation to the first set of offences, i.e. in May 2008. This was some months before the incident in respect of which the appellant pleaded guilty, and in respect of which she claimed that the initiative had come from Hanabe. These latter offences for which the appellant pleaded guilty occurred in July and August 2008. It was the appellant's version that she had supplied her cell number to Hanabe for some other purpose, i.e. to enable people to confirm that she was employed at Home Affairs.

[26] The magistrate was very much alive to the inherent probabilities and improbabilities associated with these versions. The magistrate found that it was highly improbable that Hanabe would make use of the appellant's phone number in those matters which preceded the appellant's involvement since this could easily have led to discovery of her fraudulent conduct. In this finding, the magistrate cannot faulted.

[27] Appellant's counsel argued that the magistrate was wrong to reject the evidence of the appellant as not being reasonably possibly true. I have already dealt with two significant aspects upon which the magistrate based this finding. In regard to the first, namely the change in version, it manifestly undermined the appellant's credibility. In regard to the second, namely the inherent improbabilities in the appellant's version, it justifies the rejection of that version. Upon consideration of the evidence as a whole there can, in my view, be no doubt as to which version is acceptable. The magistrate accordingly did not err in rejecting the appellant's version as not being reasonably possibly true.

[28] In the circumstances there is no basis to find that the magistrate erred in finding that the appellant was guilty on counts 1 to 22.

[29] In regard to the appeal against sentence the appellant's counsel conceded that very little can be said about the sentence imposed by the magistrate. The question of sentence was addressed solely on the basis of a successful appeal in relation to the conviction on counts 1 to 18. It was submitted that in that event the sentence in respect of counts 19 to 22 ought to be revisited. Since the convictions stand the issue does not arise. In any event, the appellant advanced no grounds upon which this court ought to interfere with the sentence imposed by the magistrate.

- [30] The magistrate's judgment on sentence is a carefully considered one, which took into account the circumstances of the appellant and the impact that imprisonment would have upon her minor children. The magistrate structured the sentences in such a manner as would mitigate the cumulative effect and result in an effective period of imprisonment of eight years. The sentence is, given the very serious nature of the crimes, an eminently reasonable sentence. It follows that the appeal against sentence must also be dismissed.
- [31] When the trial court granted leave to appeal the appellant was granted bail pending the finalisation of the appeal. The order issued was that in the event that a sentence of incarceration is imposed on appeal the appellant should report to the Mount Road Police Station within 7 days of the appeal being finalised. It is appropriate that such order be confirmed.
- [32] I therefore make the following order:
1. The appeal is dismissed.
 2. The appellant's convictions on counts 1 – 22 and the sentences imposed in respect thereof are confirmed.
 3. The appellant is ordered to report to the Mount Road Police Station within 7 days of the date of this Order.

G. G. GOOSEN

JUDGE OF THE HIGH COURT

BESHE, J.

I agree.

N. G. BESHE

Appearances: For the Appellant

Adv. T. N. Price SC

Instructed by Griebenouw Inc.

C/o Netteltons Attorneys

For the Respondent

Adv. A. de Jager

Director of Public Prosecutions

- [1] Cf. *S v Immelman* 1978 (3) SA 76 (A); *S v Calitz en 'n Ander* 2003 (1) SACR 116 (SCA); *Mocke v The State*

[2008] ZASCA 80; [2008] 4 AllSA 330 (SCA); Strategic Liquor Services v Mumbi NO 2010 (2) SA 92 (C)

[2] S v Van der Berg and Another 2009

(1) SACR 661

[3] 2004 (1) SACR (E) at 186 J – 187C

[4] (supra) at 188 B - C

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