

SOUTH AFRICA / JUDGMENT

Malatji v S (A966/04) [2010]

ZAGPPHC 220 (9 December 2010)

[2010] ZAGPPHC 220

COURT

North Gauteng High Court, Pretoria

BEFORE

Msimeki, Ebersohn

CASE / FILE NUMBER

A966/04

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NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: A966/04

DATE: 09/12/2010

In the matter between

JACOBUS LINUS MALATJI.....APPELLANT

And

THE STATE.....RESPONDENT

JUDGMENT

MSIMEKI, J

[1] The Appellant had been a practising attorney of this court. He was charged and convicted of:

1. Count 1: theft of trust funds
2. Count 2: contravening section 78 read with section 78 (7) and 83 (a) of Act 53 of 1979 (“the Attorneys Act”).

[2] He was sentenced to 5 years imprisonment on count 1. He was, on count 2, fined R 1.000.00 or 12 months imprisonment wholly and conditionally suspended for a period of 5 years.

[3] Mr Flatela represented the Appellant while Ms Harmzen appeared on behalf of the Respondent.

- [4] An application to add the last ground of appeal by way of an amendment, which was not opposed, was granted.
- [5] With the leave of the court a quo the Appellant now appeals against the conviction and sentence.
- [6] The appeal is based on the following grounds:

AD CONVICTION:

“1.1 finding that the State witnesses, especially SUTHERLAND and NKUNA were reliable witnesses:

finding that the State proved beyond reasonable doubt that the Applicant/Appellant had the necessary intention to steal, especially in the light of the evidence of LEKGANYANE that he instructed the Applicant/Appellant to pay out the money;

rejecting the Applicant/Appellant’s as well as LEKGANYANE’s evidence;

placing an onus on the Appellant/Applicant;

finding that the Appellant/Applicant’s version is not reasonably possibly true;

finding in regard of (sic) count 2 that the State proved beyond reasonable doubt that the Appellant/Applicant had the necessary mens rea.”

AD SENTENCE:

“The Learned Magistrate erred in:

not taking into account, alternatively giving adequate weight to the recommendations of DR LABUSCHAGNE that the Appellant/Applicant is good human material for a community based sentence;

by imposing a shockingly inappropriate sentence.”

The added ground of appeal is that:

“the Learned Magistrate committed an irregularity by cross examining the Appellant and his witness at length.”

- [7] The State to prove its case, called three witnesses Mr Ronald Sutherland (“Sutherland”), Mr Sam Nkuna (“Nkuna”) and Mr Moeti Mpuru (“Mpuru”) while the Appellant and Mr Makgoka Lekganyane (“Lekganyane”) testified on the side of the defence.
- [8] The State case is that Leswika la Motheo Developers (Pty) Ltd (“Leswika la Motheo”) and Dikgoro Developers and Construction CC (“Dikgoro”) on 30 April 1999 concluded a Joint Venture Agreement (“the JV agreement”). In terms of the agreement Leswika la Motheo assigned all its rights and obligations, in terms of the approved application for Eenzam, (Project Approval Number 1998001), and signed between the Northern Province Housing Board and Leswika La Motheo relating to the subsidization of Project – linked, Housing

project for Eenzam to Dikgoro. In consideration of the cession Dikgoro would pay R600.00 per housing unit for the 500 units which amounted to R 300.000.00. R 150.000.00 was payable upon the signing of the JV agreement. R50.000.00 was payable within 4 weeks from the date of signing of the agreement while R 100.00.00 was payable within a period of sixty days from the signing of the agreement or upon such further extended period agreed to in writing by the parties. In terms of clause 3 (d) of the JV agreement:

All monies paid by Dikgoro to Leswika “shall be held in trust by Malatji attorneys until all the elements of the agreement have been fully complied with by both parties and the Department of Housing has accepted the Joint Venture agreement concluded by the parties.”

Clause 9 (b) of the J V agreement provides:

“(b) In the event of cancellation of this agreement the parties shall within 48 hours restore each other to the position in which they were before as if this agreement had not been entered into.”

The JV agreement reveals that Mpuru represented Dikgoro when the agreement was concluded while the Appellant represented Leswika La Motheo. The JV agreement is Exh “B”. Evidence further revealed that Sutherland, Nkuna and Mpuru were the members of Dikgoro while Lekganyane was the sole director of Leswika La Motheo.

[9] The States case is briefly as follows:

SUTHERLAND

His testimony is that he was a member of Dikgoro together with Nkuna and Mpuru. Their members’ interest in the Dikgoro was 30 : 30 : 40 respectively. He confirms the conclusion of the JV agreement and its terms and conditions. The JV agreement would enable Dikgoro to buy into housing project at Eenzam, in the district of Jane Furse in Limpopo which had been granted to Leswika La Motheo by the Department of Housing. The project was for the building of low cost housing. He raised a loan of R 150.000.00 which was the amount which had to be paid to Leswika La Motheo as deposit. The money had to be repaid. The money was paid into the Appellant’s trust account subject to the conditions provided for in clause 3 (d) of the JV agreement. The R150.000.00 was in a form of a cheque which he personally gave the Appellant who then disappeared until he saw him at the commencement of the criminal proceedings in August 2005.

NKUNA

He confirms the evidence of Sutherland regarding the joint venture and the payment of the deposit of R150.000.00 as well as their membership of Dikgoro. He does not know what became of the R150.000.00 that was paid into the Appellant’s trust account. He never gave the Appellant instructions to pay out the R150.000.00.

MPURU

He too, confirmed that the JV agreement was concluded between Leswika La Motheo and Dikgoro in terms of which Dikgoro would take the implementation of the housing project that had been given to Leswika La Motheo by the Department of Housing in Limpopo for the construction of low cost housing in Eenzam. According to him the Department never approved the joint venture which appeared to have problems. He too does not know what happened to the R150.000.00 which was paid into the Appellant's trust account. He testified that Dikgoro was paid R53.000.00 for what it did in respect of the project.

THE APPELLANT

[10] The Appellant pleaded not guilty and made the following admissions :

"1. I, Jacobus Linus Malatjie make the following admissions freely and voluntary (sic).

2. I admit that I was admitted on the 3rd of July 1990 as a qualified attorney.
3. I admit I had an attorney's firm under the style JL Malatjie Attorney.
4. I admit that I had a trust account at First National Bank number 52360068715 held at Groblersdal.
5. I admit that two cheques with the amounts of R150 000,00 and R150 000,00 were deposited into the said trust account on 3 May 1999 and 6 May 1999 respectively.
6. I admit that the first cheque was drawn by P Lombaard and the second cheque was drawn by W. J. Strydom.
7. I admit that both P Lombaard and W J Strydom wrote and/or deposited these cheques on behalf of Dikgoro Developers and Construction CC."

His evidence reveals that Leswika La Motheo was his client. Lekganyane asked him to sign the JV agreement representing Leswika La Motheo. He also confirms that Dikgoro bought into a housing project that the Department of Housing had awarded to Leswika La Motheo. He testified that Lekganyane informed him that he had discussed with the members of Dikgoro and that it had been agreed that the R150.000.00 that had been deposited into his trust account could be released to him and that Dikgoro could then move onto site. He seemed to remember that Nkuna had confirmed the arrangement.

Regarding count 2 his testimony was that an amount of R834.500.00 had been paid into his trust account. The amount unfortunately was reversed by the bank about two months later. The bank, according to him, had lost the cheque in respect of the amount and had needed a replacement cheque. He could not get the replacement cheque because the bank had not furnished him with a letter confirming the loss of the cheque.

LEKGANYANE

He was sole director of Leswika La Motheo and the Appellant's client. He authorised the Appellant to release the amount of R150.000.00 after he had agreed with Dikgoro. He and Dikgoro had agreed that the balance would be paid from the profits of the project. He instructed the Appellant to represent him even when the JV agreement was signed.

[11] The State had to prove the guilt of the Appellant beyond reasonable doubt. The court had to acquit the Appellant if his version was reasonably possibly true. The court did not even have to believe him. The Appellant would have been entitled to the benefit of doubt in the event that doubt was created in the mind of the court. The court, however, was entitled to reject the Appellant's version if it found it improbable and false beyond doubt. (See in this regard *S v V* 2000 (1) SACR 453 (SCA)).

COMMON CAUSE FACTS

[12] These are that:

1. Leswika La Motheo had been awarded a tender to build 500 low cost houses at Eenzam by the Department of Housing Limpopo.
2. Leswika La Motheo and Dikgoro having an interest in the project, had concluded the JV agreement referred to above.
3. Dikgoro paid the deposit of R150.000.00 which was deposited into the Appellant's trust account.
4. The balance of R150.000.00 was never paid.
5. The Department of Housing needed to approve the JV agreement.
6. Lekganyane was the director of Leswika La Motheo and the Appellant was their legal representative.
7. The R150.000.00 paid into the Appellant's trust account was to be held in trust by the Appellant's firm until all the elements of the agreement were fully complied with by both the parties and the Department of Housing had accepted the JV agreement concluded by the parties.

[13] The Appellant, as alluded to above, filed an amended ground of appeal, namely that the Learned Magistrate had committed an irregularity by cross examining the Appellant and his witness. It will be recalled that the Learned Magistrate, at the end of the defence case, had been asked to recuse himself. After due consideration of the facts of the case and the law by the him, the application for recusal was dismissed or refused.

Section 35(3) of Act 108 of 1996 ("the Constitution") provides that every accused person such as the Appellant has a right to a fair trial.

In *S v Rall* 1982

(1) SA 828 at 831 to 832 B when dealing with the conduct of a trial by a judge the court said:

“He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (See, for example, S v Wood 1964 (3) SA 103 (O) at 105 G; Rondalia Versekeringskoporasie van SA Bpk v Lira 1971 (2) SA 586 (A) at 589 G; Solomon and Another NNO v De Waal 1972 (1) SA 575 (A) at 580 H.). The judge should consequently refrain from questioning any witnesses or the accused in a way that because of its frequency, length, timing, form, tone, contents or otherwise conveys or is likely to convey the opposite impression (cf Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd 1976 (2) SA 565 (A) at 570 E – F; Jones v National Coal Board [1957] EWCA Civ 3; (1957) 2 All ER 155 (CA) at 159 F).”

Further, the court in the same case added that a judge in asking questions should ensure that he is not precluded from detachedly or objectively appreciating and adjudicating upon issues being fought out before him by litigants. Failing to do that results in him descending into the arena which could cause his vision to be clouded by the dust of the conflict. Calm and dispassionate observation are paramount and need to be retained right through the trial.

Lastly the court expected a judge to refrain from questioning the witness or the accused in a way that may intimidate or disconcert him or duly influence the quality or nature of their answers as that could affect their demeanour or impair their credibility. (S v Rall (supra) at 832 C - H)

[14] The question that needs to be asked is whether, indeed, there were irregularities that were committed by the Learned Magistrate, and if so – whether justice at the end of the day was done and seen to be done.

One needs to consider what the Appellant complains about to determine whether indeed the Learned Magistrate committed the irregularities that he is said to have committed.

1. PROOF OF PAYMENT OF R150.000.00

The Learned Magistrate is said to have misunderstood the Appellant when he answered the question: “any proof that you can furnish that you paid whomever this R150.000.00 do you have it?” Answer: “I can check my records but I think the recipient can confirm receipt of the money.”

If indeed, the Magistrate misunderstood the Appellant’s evidence that surely called for clarification by the Appellant himself. That could only be done by way of questions asked by the court. If anything, this shows that the court was justified when it sought clarification. More questions would be needed if it took long for the direct answers to be given or proper understanding to be achieved. This much is apparent from a number of questions that the court asked which were not answered directly. This applied to both the Appellant and Lekganyane, his witness.

The court, for an example, at page 245 line 20 to 22 said:

“Mr Lekganyane, I am going to put questions to you because there are a lot that I do not understand from your evidence. And please take your time to recall and to answer any questions I put to you. – All right. At page 247 lines 8 – 10 the court said : “I have written down your testimony. So I do not want you to repeat what I already understand. I want you to repeat what I do not understand.”

Going back to the first complaint, it is clear that the question was direct and simple. It related to the R150.000.00 but the answer appear not to have been confined to the clear question. The court had wanted to hear more about the R150.000.00 and how it ended up. I find nothing wrong with the question.

2. THE MONEY IN THE TRUST ACCOUNT

Lekganyane's testimony is that the money was deposited into the Appellant's trust account because he did not have a bank account at the time. It is said that this important clarification was unchallenged. Firstly it is clear that the clarification that the court needed is acknowledged. Secondly I fail to understand how this is an irregularity. The answer, in any event, cannot, in the light of clause 13 (d) of the JV agreement be correct as the JV agreement required the money to be deposited into the trust account and to remain there until all the conditions had been met.

3. THE MANY QUESTIONS THAT THE MAGISTRARE IS SAID TO HAVE ASKED THE DEFENCE WITNESS

I have already referred to this and provided answers above. I do not agree that the witness was intimidated and harassed. He was asked simple and straight forward questions which indeed, needed clarification on the aspects for the proper determination of the

issues.

4. REGARDING THE CONDITIONS OF THE JV AGREEMENT AS HAVING BEEN FULFILLED

I fail to understand how this can be said to be an irregularity. It has always been the State's case that the important conditions of the JV agreement were never met. There is no doubt about this. The Appellant and his witness are equally aware of this.

5. FAILURE OF THE MAGISTRATE TO CONSIDER CONTRADICTIONS

It is important to consider the contradictions in the light of the evidence in its entirety. The question whether the contradictions go to the root of the case has to be properly considered. The contradictions, if any, in my view, are not material and do not affect the judgment of the court a quo.

6. THE MAGISTRATE DESCENDING INTO THE ARENA

The Magistrate, as he was entitled to, asked questions to have issues clarified. The Magistrate, indeed, asked a number of questions, perhaps more than was desirable, as the State conceded. I, however, find nothing wrong with the questions. I do not, agree that the court descended into the arena.

7. CROSS EXAMINATION OF THE ACCUSED AND HIS WITNESS BY THE COURT

The questions that the court asked sought clarity on issues. The Appellant and the witness appear to have caused the court to ask more questions when they did not answer the questions directly. Clarity was, in deed, needed. It has also been so conceded as I have shown above. With these concerns that were raised, and which I dealt with, justice, in my view, was done and has been demonstrated to have been done.

- [15] The question that needs to be answered is whether the guilt of the Appellant has been proved by the state beyond reasonable doubt. Clause 3 (d) of the JV agreement clearly demonstrates that all monies paid by Dikgoro to Leswika La Motheo had to be held in trust by the Appellant's firm until all the elements of the agreement had been fully complied with by both parties and the Department of Housing had accepted the JV agreement concluded by the parties.
- [16] The Appellant received payment of the R150.000.00 which ended up in his trust account. This money, according to clause 3 (d) of the JV agreement, had to remain in trust until all the conditions were met. The money, in the event of cancellation of the agreement in terms of clause 9
- (b) thereof, had to be refunded to Dikgoro as the parties were within 48 hours, to be restored to their positions in which they were before as if the agreement had not been entered into. The balance of R150.000.00 was not paid as stipulated by the agreement. Evidence further has it that the Department of Housing did not accept the joint venture agreement. The defence further conceded that there was a problem with the JV agreement. The chief had not been happy with the fact that the project was to be implemented in his area. Lekganyane testified to that effect as well as the fact that the JV agreement never took off and that not a single low cost house was built in terms of the JV agreement. The money was not refunded. The Appellant testified that he released the money once he was authorised to do that by Nkuna. Cross examined on the aspect he testified that it could have been Nkuna who authorised him. It appeared he was no longer sure when the cross examination proceeded because he then testified that he had spoken to someone at Dikgoro to confirm if the conditions of the agreement had been met. The Appellant found it very

difficult to explain how the R150.000.00 had ended up. He, during the trial, asked that the matter be postponed in order for him to furnish proof regarding how the R150.000.00 had been used. He failed to get the proof ending up telling the court that the practise had changed hands and that his auditor had passed on. How the money was used was never shown to the court. The explanation that he furnished regarding count 2 was not helpful either. The argument on behalf of the State that the fact that the Appellant utilised the deposit without the necessary authority and contrary to the terms of the agreement amounted to misappropriation of trust funds which constituted theft, in my view, the circumstances of the Appellant's case appear to have merit. (See in this regard Cape Law Society v Parker 2000

- (1) SA 582 (C)). Lekganyane's testimony that the money would have been in his account if he had a bank account and that he alone could instruct the Appellant to release the money cannot be correct. Firstly clause 3 (d) of the JV agreement does not say so. Secondly Dikgoro had an equal say with regard to what was to become of the money that was deposited into the Appellant's trust account in the event that the conditions were not complied with.
- [17] I do not find fault with the manner in which the court a quo handled the trial neither do I find fault with the judgment of the court a quo which, in my view, is a well informed judgment. The court a quo duly considered and evaluated the evidence in its entirety. The State witnesses were indeed, good witnesses. Nkuna, at the time of giving evidence, was no longer a member of Dikgoro. The money that was paid had been from Sutherland. Sutherland suffered immensely as a result of failing to repay the R150.000.00 that he had given the Appellant. He lost almost all he had due to the action that had been instituted against him Mr Strydom, by the owner of the money that he had failed to repay. Sutherland, Nkuna and Mpuru testified that they had never authorised the Appellant to release the money. They all testified about the difficulties they experienced in tracing the Appellant who had ceased practising and relocated. The contradictions if any, in their evidence, in my view, is immaterial. The court a quo was justified in accepting their evidence as they were good, honest, credible and reliable witnesses.
- [18] The same thing cannot be said about the Appellant and his witness. R150.000.00 was received and deposited without a receipt. Sutherland testified that he had personally given the cheque to the Appellant. The receipt was never given to Nkuna or Mpuru although the Appellant had promised to give the receipt to either of them. The Appellant had difficulty when asked to tell the court as to who had authorised him to release the R150.000.00 paid into his trust account. His answers easily showed the absence of truth in his evidence on the aspect. The Appellant and Lekganyane contradicted each other materially. Their versions were tainted with improbabilities. The Appellant dismally failed to show how the R150.000.00 had been used. Lekganyane called the R150.000.00 his money well aware of the fact that time never came for the money to belong to him. The conditions were never complied with to justify

that. The court a quo had every reason to accept the State's version and to reject the Appellant's version as improbable and beyond doubt false. Not much is said about count 2. The decision of the court a quo on count 2, to me seems to be proper and justified. The Appellant, in my view was correctly convicted.

SENTENCE

- [19] Sentence is pre-eminently a matter for the discretion of the sentencing court. Appeal courts' power to interfere with sentences of the lower courts is limited. Such interference is justified where such sentences are vitiated by irregularities or misdirections or where the sentence is disturbingly inappropriate (See in this regard *S v Rabie* 1975 (4) SA 855 (AD) at 857 D - E). The appeal court will not tamper with the sentence where the court's discretion was

properly and judicially exercised. (See in this regard *S v Pieters* 1987 (3) SA 717 (A); *S v Pillay* 1977 (4) SA 531 (A); *S v Lowis* 1997 (1) SACR 235 (T) and *S v Rabie* (supra)).

[20] The Appellant procured the Probation officer's report as well as the report of the criminologist, Dr Labuschagne. (Exh "H").

[21] The Appellant's appeal against sentence is based on the following grounds:

1. The learned Magistrate erred in:

1.1 not taking into account alternatively giving adequate weight to the recommendations of Dr Labuschagne that the Appellant is good human material for a community based sentence;

1.2 by imposing a shockingly inappropriate sentence.

[22] Determining an appropriate sentence has always been very difficult. This is done and achieved by having regard to the well known triad which is the personal circumstances of the offender, the seriousness of the offence committed and the interests of society. This, the magistrate, in my view, did. The sentence options appear to have been duly considered by the court a quo.

[23] Theft has always been seen in a very serious light. The Attorney's Act, Act 53 of 1979 places a very serious responsibility on the shoulders of a practising member of the profession to always ensure that trust money is always respected and protected. Dikgoro and Leswika La Motheo were the interested parties in the R150.000.00 that was in the Appellant's trust account. The money remained trust money which could only be dealt with in accordance with proper and definite instructions. The circumstances of this case are such that it could never with the evidence at the court a quo's disposal be said that the Respondent, indeed, released the money as alleged by the Respondent and Lekganyane. They could not demonstrate this. On the other hand, the State demonstrated that the Appellant, indeed, received the money as alleged by the State. He too, so admitted. The movement of trust money is the concern of the Law Society. It is for this reason that the Law Society expects every Attorney to be able to account for every cent that is in his or her trust account and to have sufficient money therein in to cover his or her trust creditors at all given times. Proper records should always be kept of the trust money so that one is able to account whenever one is called upon to do so. The Respondent could not demonstrate what he did with the money or to whom payments were made if the money was paid to people or concerns. Such failure to account left the court a quo with no other conclusion than that the Appellant stole or misappropriated the money. The circumstances of the Appellant's case reveal that this theft is very very serious. The Appellant did not want to come out clean and explain exactly what had become of the money. The Appellant's position is different from the position of someone who is not an attorney who, however, finds himself stealing. A position of trust speaks volumes. In the case of the Appellant, the Attorney's Act was also there to remind the Appellant of the seriousness of the theft even before it was committed. That the Appellant has a family, children, status, etc is a given. This was well known to him before he

committed the offences. Lekganyane could not have had authority to allow him to do what he knew he was not supposed to do. He was dealing with trust money and the provisions of the Attorneys Act were applicable in his case. This much he cannot claim not to have known. The court a quo properly had regard to the recommendations of Dr Labuschagne, the probation officer's report as well as all the sentence options. The court a quo with all of these in mind, decided that a term of imprisonment was best suited in the case of the Appellant. No irregularities or misdirections were demonstrated in so far as sentence is concerned. The discretion, in my view, was properly exercised. There is therefore, no reason why the sentence should be interfered with. The appeal against sentence too ought to fail.

[24] The following order, in the result, is made.

The appeal against conviction and sentence is dismissed.

M. W. MSIMEKI

JUDGE OF THE HIGH COURT

I agree.

P. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

And it is so ordered.

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