

SOUTH AFRICA / JUDGMENT

Motau v S (A02/2019, SH 01/2016) [2020] ZALMPPHC 16 (23 April 2020)

[2020] ZALMPPHC 16

COURT

Limpopo High Court, Polokwane

BEFORE

GC Muller, TC Tshidada

CASE / FILE NUMBER

A02/2019, SH 01/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

Appeal No. A02/2019

Bela Bela SH 01/2016

23/4/2020

FANCY JACOB MOTAU

V

THE STATE

JUDGMENT

MULLER J:

[1] The appellant was convicted in the regional court of-

- (a) contravention of section 3(a) of The Prevention and Combatting of Corrupt Activities Act;^[1]
- (b) fraud; and
- (c) contravention of section 68(1) of the South African Police Services Act^[2],
 - impersonating a police officer.

[2] He was sentenced to-

- (a) 12 years imprisonment on count 1,

- (b) 5 years imprisonment on count 2, and
- (c) 1 year imprisonment on count 3. It was ordered that the sentences on count 2 and 3 run concurrently.
- [3] An application for leave to appeal was refused by the regional court magistrate. Leave to appeal against the conviction on count 1 was granted on petition to the Judge President. Leave to appeal against the convictions and the sentences imposed in respect of count 2 and 3 was refused.
- [4] To understand the background to both count 1 and count 2, it will be necessary to refer briefly to the allegations in respect of counts 2 and 3. In respect of count 2, it was alleged that the appellant defrauded, the complainant, GJL Human by misrepresenting to him:
 - (a) that the appellant is a member of the SA Police Service and the investigating officer of case dockets Bela Bela CAS 250/4/13 and CAS 475/8/13.
 - (b) that said dockets were allocated to him for investigation after the previous investigating officer had gone on pension;
 - (c) that appellant as such was entitled to submit a statement to the control prosecutor supported by his commanding officer as motivation for the final withdrawal of the said dockets.
- [5] The appellant by means of the misrepresentation induced the said Human to his prejudice or potential prejudice to pay him R25 000 cash and by means of bottles of liquor whereas in truth the appellant knew: -
 - (a) that he is not a member of the SA Police Service;
 - (b) that he was not the investigating officer of the two dockets and
 - (c) that he is unauthorised or unable to submit a statement in relation to the dockets to the control prosecutor to withdraw the charges as the charges had already been withdrawn and the dockets filed.
- [6] The appellant was convicted on count 2 on the basis that he-
 - (a) was not a police officer;
 - (b) was not the investigating officer of the two case dockets; and
 - (c) was unauthorised to perform any investigation or to cause the control prosecutor to withdraw the charges.
- [7] The conviction on count 3 is based upon the acceptance of the fact that the appellant was not a police officer and that he unlawfully pretended to Human to be a member of the SA Police Service.

[8] The question that arises in this appeal is whether the appellant is guilty of corruption on the basis of the proven facts which led to his conviction that he unlawfully impersonated a policeman on the one

hand, and that he defrauded Human by falsely giving out to him that he is the investigating officer in two dockets and in terms whereof he is able to submit a statement to his commanding officer and the control prosecutor to withdraw the charges that he is investigating against Human for gratification, on the other.

[9] The purpose of the corruption charge was to bring to book a corrupt police official. The state, no doubt, is able to formulate as many charges that the facts and the law allows. The State is entitled to

charge the appellant of any offence covered by the facts. As can be gleaned from the convictions on count 2 and 3 the same facts may constitute two crimes.

[10] It was, at common law, an offence to offer or give a state official an unauthorized consideration in respect of such official doing or abstaining from doing or having done or abstain from any act and exercise of his official duties. The important object of the common law offence of bribery was to protect the State. It was held in *R v Chorle*[3] that:

"The law of bribery is designed to protect the State against those who by gifts tempt its officials to use their opportunities as such to further private interests in State affairs and there is no reason why the law, which in its original form was wide enough to secure that protection, should by restrictive interpretation, be cut down to something less than is necessary to achieve its objects.," [4]

[11] The 1918 Prevention of Corruption Act[5] extended the crime from employees of the State to agents who generally included employees of the State.[6] The Prevention of Corruption Act of 1958[7] replaced the 1918 Act and provided that any person who 'corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to his principal's affairs or business ' was guilty of an offence.'[8]

[12] Both the common law offence and the 1958 Act was repealed by The Corruption Act.[9] This Act required that the act which is penalised must relate to the powers and duties of the person sought to be influenced by the giving or offering or paying of a benefit.[10] The PCCA Act in turn replaced The Corruption Act. The appellant was charged with contravening section 3(a) of the PCCA Act which contains an elaborate formulation of a general offence of corruption. It must be emphasized that the provisions of section 3 are widely formulated and also include private individuals who are not State employees.

[13] It is helpful to refer to the formulation of the offence offered by Snyman:[11]

"Anybody who accepts any gratification from anybody in order to influence the receiver to conduct himself in a way which amounts to the unlawful exercise of any duties, commits corruption".[12]

[14] From the above exposition, the elements of the crime may be distilled as:

- (i) the acceptance of by the appellant;
- (ii) of a gratification;
- (iii) in order to act in a certain way;
- (iv) unlawfulness; and
- (v) intention.[13]

[15] I turn immediately to the gravamen of the charge in count 1. I will paraphrase the charge to make it digestible. The particulars set out in the charge sheet are the same facts that the State relied upon for the conviction count 2 and 3. It is alleged that the appellant during the period May to August 2015 directly or indirectly accepted or agreed to accept gratification from GJL Human, consisting of cash payments on different occasions, totaling the amount of R25 000.00, and a payment by means of 2 bottles of liquor whether as a benefit to himself or as benefit of another or to influence his commanding

officer and or the control prosecutor to act in a manner that amounts to illegal, dishonest, unauthorised or misuse or selling of information or material acquired in the course of the exercise carrying out or performance of any powers, duties or functions

arising out of a constitutional, statutory, contractual or any other legal obligation that amounts to an abuse of a position of authority, breach of trust, or a violation of a legal duty or set of rules designed to achieve on unjustified result or that amounts to any unauthorized or improper inducement to do or not to do anything by agreeing or offering to accept gratification from GJL Human in order for the appellant together with his commanding officer to cause dockets Bela Bela CAS 250/4/13 and CAS 475/08/13 to be finally withdrawn or closed or struck off the roll by the control prosecutor and/or for the appellant to supply information to the said GJL Human or employees or owners of Bela Bela Entertainment Lounge about planned operations or raids by the Limpopo Gambling Board in order to avoid arrest or possible prosecutions for illegal gambling.

[16] The appellant was convicted on count 2, the elements of the crime will now be examined to determine whether the facts also proved that the appellant contravened of section 3(a) of the PCCA Act.

- [17] It will be recalled that in respect of the allegations set out in count 1 the appellant intended to achieve two main objectives. The first is that he as police officer and the investigating officer of two Bela Bela case dockets with the assistance of his commanding officer will influence the control prosecutor to finally withdraw, close or struck the charges off the roll. And secondly, that he intended to supply Human and or with information of planned or possible raids undertaken by the Limpopo Gambling Board to avoid prosecution.
- [18] In respect of the appellant's first aim or objective the State proved that the appellant accepted and received gratification from GJL Human on various occasions between May 2015 and August 2015 totaling to R25000.00 as well as gratification consisting of 2 bottles of liquor.[14] It was also proved that the appellant was not a police officer and that he was not the investigating officer in respect of the two dockets Bela Bela CAS 250/4/13 and CAS 475/08/13. The undisputed evidence is that the control prosecutor had declined to prosecute on 13 April 2015 in respect of both dockets. (The charges had already been withdrawn when the appellant accepted the gratification).
- [19] It must, therefore, be accepted as proven, for purposes of count 1, that the appellant was not a police officer and thus not appointed to investigate the two case dockets; He had no commanding officer. They could not submit a statement to the control prosecutor to influence him to withdraw the charges. (The dockets had in any event been withdrawn and filed prior to him agreeing to accept the gratification).
- [20] The crime requires a double intention. It follows that the state must prove:
- (a) that the appellant, have intended to accept the gratification and
 - (b) that the appellant intended (in order) to act in a certain way in the future.
- [21] The additional requirement (b) above, was explained in S v Shaik and Others:[15]
- 'It follows that the concession by the appellants were correctly made; if Shaik gave benefits to Zuma with the intention to influence him to commit or omit to do any act in relation to his duties in terms of s 96(2) or 136(2) of the Constitution Shaik committed an offence in terms of s (1)(a)(i) of the CA.'
- [22] Different considerations apply in relation to the appellant's aim to supply information to Human or the employees or owners of Bela Bela Entertainment Lounge about planned operations or raids by the Limpopo Gambling Board to assist Human to avoid arrest and prosecution for operating an illegal gambling business in contravention of section 77(b) of the Limpopo Gambling Act 4 of 1996.
- [23] The appellant need not necessarily be a police officer to be able to commit the offence. Direct evidence that the appellant received such information from a police officer or official of the Gambling Board may have been sufficient for a conviction. Circumstantial evidence may be presented that the appellant received information of planned raids or police actions from a police officer or official of the Gambling Board and that he conveyed that information

to Human will also be sufficient for a conviction. It will depend on the circumstances and the facts of the case to prove the misuse or selling of information or material acquired in the course of the exercise, carrying out or performance of any powers, any duties or functions arising out of a constitutional, statutory or other legal duty which amounted to an abuse of authority, breach of trust, or a violation of a legal duty or set of rules by a police officer of other officer.

- [24] Indeed, it is a proven fact, the appellant was not performing any duties or functions arising out of a constitutional, statutory or other legal duty which could amount to an abuse of power, breach of trust, or the violation of a legal duty or set of rules as required by section 3(a). Human testified, in chief, that it was him who suggested to the appellant that the appellant should act as extra security for him or his employer for financial reward with a view to supplying Human with information whenever there are raids or warrants to be executed by the Limpopo Gambling Board. But Human at that time

as a result of the misrepresentation laboured under the impression, that the appellant was a police officer who was able to obtain such information. The information was needed to allow him enough time to close the shop so that warrants could not be executed. Although no specific amount was agreed upon for his services, the appellant agreed with the proposition. During May 2015, Human's employer instructed Human to pay the appellant R7000.00 every month. It was R3000 for the appellant and R4000.00 for the colonel. The appellant also accepted that proposal. The appellant contacted him and informed him about the raids, police action in town and other police activities. Human explained that the appellant contacted him with information which the appellant thought was part of Human's business and also when members of the Limpopo Gambling Board were in town or in town to investigate any other cases. Human testified that the appellant contacted him in May, June and July 2015. In May the appellant informed him that he should not worry. In the same month the appellant informed Human that he will be going away for the weekend and would appreciate extra pocket money for that purpose. He was given an amount of R4000.00 to divide between himself and his colonel.

- [25] Counsel for the respondent argued that this evidence established that the appellant provided Human with information of raids by the Limpopo Gambling Board. I cannot agree with his contention. The evidence fell short, even by inferential reasoning, that the appellant had information of planned raids by the Limpopo Gambling Board or that the Gambling Board indeed undertook raids. Even upon acceptance of the evidence that the appellant had informed him of members of the Gambling Board being in town or even of police action being undertaken is not proof that the members of the Gambling Board had indeed planned to raid or had undertaken raids at the premises where Human was employed or that the police did undertake police action. The mere fact that he told Human so is not proof that his statement was true.

- [26] The accepted factual matrix that the appellant misrepresented that he was a police officer and that he was the investigating officer in the two dockets in question are important facts that simply cannot be ignored when consideration is given whether that the appellant intended (in order) to act in a certain way in the future.
- [27] He had invented the existence of his commanding officer, the so-called 'colonel' which he had employed to give credence to his elaborate fraudulent scheme to solicit money from Human, which the State proved was his main objective. The appellant exploited Humans' initial criminal conduct and his willingness to partake in corrupt activities.
- [28] Human initiated the possibility for the appellant to act as extra security for his employer and himself. The appellant simply played along by supplying vague reports of the Gambling Board being in town or police raids or actions being undertaken in and around town. No evidence was adduced that members of the Board raided or even planned to raid the premises where Human was employed in May, June or July
2015. Such evidence, if presented, could have been sufficient to show that the appellant was privy to such information and that he conveyed confidential information of such raids or planned raids to Human. As the evidence stands at present, this court is faced with evidence which was accepted by the regional court magistrate, that the appellant deceived Human to believe that he was a police officer who with the assistance of his commanding officer was able, to influence the investigation to the extent that the charges will be withdrawn and that he (as the police officer in charge of the investigation) was able obtain information with regard to possible raids on the place of business of Human. And in doing so, Human acted to his prejudice or potential prejudice to pay the appellant various sums of money.[16]
- [29] The appellant, therefore, lacked the additional intention to act in a certain way in return for the gratification. The appellant never intended to accept the gratification as an inducement to act in a certain manner, neither when he solicited the gratification from Human, by making the misrepresentation, nor on any of the occasions when gratifications were paid to him.
- [30] The State framed count 1 on the basis that the appellant was indeed a police officer. Counts 2 and 3, again, were framed on the basis that he was nothing of the sort. The facts on which the State relied for a conviction are mutually exclusive.
- [31] Accordingly, the State, in my judgment, has failed to prove that the appellant accepted the gratification in the exercise of his official duty as a police officer, in order (with the intention) to act in a certain manner, that amounts to "illegal, dishonest, unauthorized, incomplete, or biased or the misuse or selling of information acquired in the course of the exercise, carry out or performance of any duties or functions arising from his capacity as a police officer which is a constitutional, statutory or other legal duty which amounted to an abuse of authority, breach of trust, or a violation of a legal duty or set of rules.

- [32] The appellant did not perform any such duties or functions arising out of a constitutional, statutory or other legal duty which could amount to an abuse of power breach of trust or the violation of a legal duty or set of rules.[17] The appellant merely deceived Human to think so and to act to his prejudice.
- [33] There is no justification for the appellant to have made the misrepresentation to Human which he knew to be false to benefit financially from his fraudulent scheme. The appellant, at all times, knew full well that he acted unlawfully.
- [34] There is a matter of concern that unfortunately must be addressed. Neither the appellant nor the respondent filed their heads of argument on time. The appellant filed his heads of argument the day prior to the hearing without a substantive application for condonation. Counsel for the respondent did not file heads of argument at all and was unable to hand up his heads of argument when called upon by the Court to do so. We were told that his heads were outside the courtroom. The Court had to adjourn for a half hour to afford counsel the opportunity to retrieve his heads from wherever they were. When he eventually returned he handed up the heads of argument also without a substantial application for condonation.
- [35] We decided, regardless of the flagrant failure by both parties to comply with the rules of this court, to nevertheless proceed with the appeal in the interest of justice as the appellant is serving a lengthy custodial sentence. He is certainly not to be blamed for the remissness of his legal representative to comply with the rules of this court.
- [36] Neither the attorney for the appellant nor counsel for the respondent can claim to be ignorant of the rules. They were, after all, informed in writing by the registrar when to file their heads of argument. It is the duty of each and every practitioner who exercises his right and the privilege to appear in the High Court to uphold, and not
- defy, the dignity of the court by adhering to its practices and rules.
- [36] The members of this court were disadvantaged in preparing for the appeal which leads to wasting of resources and time. Time is a precious commodity in this division where Judges work under tremendous pressure and time constraints. The parties appearing in the appeal are also put at a disadvantage by the late filing of their heads of argument. They did not afford each other the opportunity to reflect and to consider the arguments raised by the other. That again leads to poor presentation of their arguments in court.
- [36] Having said that, it must in fairness be pointed out that counsel for the respondent was probably brought under the impression that the appellant has abandoned his appeal by the failure to file heads of arguments and was possibly caught by surprise when the appellant filed his heads of argument late. He was nevertheless able to draft heads of argument. Both practitioners were requested to file supplementary heads of argument, which they have filed in due time.

In the result the following order is made.

ORDER

1. The appeal against the conviction and sentence in respect of count 1 is upheld.
2. The conviction and sentence are set aside.

GC MULLER

JUDGE OF THE HIGH COURT LIMPOPO

DIVISION: POLOKWANE

I concur

TC TSHIDADA

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES:

For the Appellant: Mr Malumbete

Malumbete & Makhubele Attorneys

Polokwane

For the Respondent: Adv M M Mphaga

The Deputy Director of Public Prosecutions

Date of hearing: 20 March 2020.

Date of Judgment:

- [1] Act 12 of 2004 (Hereinafter called the PCCA Act).
- [2] Act 68 of 1995.
- [3] 1945 AD 487.
- [4] The 'State' included municipal officials.
- [5] Act 4 of 1918.
- [6] S v Shaik and Others [2006] ZASCA 105; 2007 (1) SACR 247 (SCA) par 71.
- [7] Act 6 of 1958.
- [8] Section 2(b).
- [9] Act 94 of 1992.
- [10] S v Shaik supra par 73.

- [11] Snyman CR Criminal Law 6th ed LexisNexis (2014). See also Scholtz and Others v The State (428/17, 491/17, 635/17, 636/17 [2018] ZASCA 106 (21 Augustus 2018) par 119-126.
- [12] Snyman supra 403.
- [13] Snyman supra 404.
- [14] The definition of 'gratification' in section 1 includes money and includes any donation or gift or valuable consideration.
- [15]
- [2006] ZASCA 105; 2007 (1) SA 240 (SCA) par74.
- [16] The motive is irrelevant. S v Van Biljon 1965 (3) SA 314 (T) 318.
- [17] Section 25(b) of PCCA does not assist the State. The State proved that the appellant was neither in a position to act in a certain way nor that the appellant intended to so to act.

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