

SOUTH AFRICA / JUDGMENT

Nakedi v S (A173/2016) [2018] ZAFSHC 36 (29 March 2018)

[2018] ZAFSHC 36**COURT**

Free State High Court, Bloemfontein

BEFORE

S Naidoo, J P Daffue

CASE / FILE NUMBER

A173/2016

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN**

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NO

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Appeal

Case No: A173/2016

In

the matter between:

LEHLOHONOLO

MOTSOASELE PERCIVAL

NAKEDI

Appellant

and

THE

STATE

Respondent

JUDGMENT

CORAM:

DAFFUE J et NAIDOO J

HEARD ON: 7 & 8 AUGUST 2017

DELIVERED ON: 29 MARCH 2018

JUDGMENT

BY: S NAIDOO, J

INTRODUCTION

[1] The appellant was charged in the Regional Court, Bloemfontein as follows:

1.1 Count 1 – Fraud;

1.2 Count 2 – Corruption in contravention of section 1(1)(b) read with sections 2 and 3 of the Corruption Act 94 of 1992;

1.3 Corruption in contravention of section 3(a)(ii), read with sections 1, 2, 20, 24, 25 and 26 of the Prevention and Combating of Corrupt Activities Act 12 of 2004, alternatively, receiving an unauthorised gratification by a person who is party to an employment relationship, in contravention of section 10(a), read with 1, 2, 20, 21, 25 and 26 of the Prevention and Combating of Corrupt Activities Act 12 of 2004;

1.4 Money Laundering in contravention of the provisions of section 4 of the Prevention of Organised Crime Act 121 of 1998 (POCA).

The accused pleaded not guilty to all counts and after a lengthy trial, was convicted on counts 1, 2 and 4. He was found guilty on Count 3 and not guilty in respect of the alternative thereto. He was, sentenced as follows:

Count 1 - Ten (10) years' imprisonment

Count 2 - Eight (8) years' imprisonment

Count 3 - Eight (8) years' imprisonment

Count 4 - Seven (7) years' imprisonment, suspended

for three years on condition that the appellant is not convicted of contravening section 4(b) of the POCA, fraud, theft or attempted

theft, within the period of suspension. The sentences in respect of counts 2 and 3 were ordered to run concurrently with that in respect of count 1.

The matter came before us, with the leave of the court a quo, on appeal against the convictions and sentences. The appellant was represented by Adv GI Hulley SC, with Adv CJ Smith, while the respondent was represented by Adv J De Nysschen.

BACKGROUND

[2] The appellant started his tenure with the Mangaung Local Municipality (MLM) in March 2003, when he was appointed its General Manager: Mechanical Services. A few years prior to this, MLM had put in place a vehicle monitoring and tracking system. A call was made to the public for monitoring systems and several companies responded. Ultimately three companies were shortlisted and invited to participate in live demonstrations of their products, which took place from 1999 to 2001. These were SMS Technologies, Taco-log and Electro-tech. As part of his duties, when he took up his position as General Manager, the appellant was tasked with finalising the monitoring system.

[3] A company called Sitech Systems (Pty) Ltd (Sitech) made contact with MLM in 2003, shortly after the appellant's appointment,

regarding management of their fleet of vehicles, and offered a vehicle tracking/monitoring product. A contract was concluded with

Sitech and their tracking devices were fitted into motor vehicles belonging to MLM. Sitech, which was not one of the original three

companies mentioned in paragraph 2, is a Gauteng-based company and, as such, apparently required a local partner in order to implement

the contract in the Free State. For this purpose, an entity called Sinako Property Solutions CC (Sinako) was appointed.

[4] The appellant requested Willem Pretorius (Pretorius), a manager in the Mechanical Services Division of MLM, to prepare and submit a report to him regarding the vehicle monitoring system. Pretorius prepared the report and submitted it to the appellant, and such

report did not include Sitech. The report was addressed to the Executive Director, Mr Mohlokoane. The appellant did not submit the report to the Executive Director.

It is common cause between the parties that Ms Brigitte Silwana (Mrs Silwana) was at that stage the sole member of Sinako and she is the wife of Mzwandile Silwana (Mr Silwana), who was the Executive Director of Strategy and Transformation at MLM. It is also common cause that Mr Silwana was the sole member of an entity known as Sinani Management Solutions CC (Sinani).

[5] The basis of the state's case against the appellant is that he and Mr Silwane formed a corrupt relationship and acted in furtherance of the common purpose of liaising with Sitech and being instrumental in appointing Sitech and Sinako as service providers to MLM, for the installation and maintenance of motor vehicle tracking devices in respect of motor vehicles belonging to MLM. This resulted in MLM to suffering actual or potential prejudice by

awarding a tender to Sitech, resulting in the conclusion of a contract or contracts with Sitech and paying to it an amount of at least R5 347 056.57. The state also alleges that the appellant and Mr Zwandile Silwane unlawfully and corruptly benefitted from such contracts, as Sitech paid an amount R532 624.00 to Sinako. The appellant did not dispute receiving large amounts of money from Sinako and Sinani. I will return to this later.

- [6] The state called a large number of witnesses and it is not necessary to traverse the evidence of each of them. At the beginning of the trial, particularly, during the testimony of Mr Fourie, the forensic auditor, the prosecutor indicated that he will be leading

hearsay evidence, as Fourie's report was based on documents gathered and collated by other people. The state did not apply at the end of its case to have the hearsay evidence admitted, but did so at the end of the case. The accused, who was represented by a Mr Johnson at the trial, testified in his defence, without making an application for his discharge at the end of the state case. It is also noteworthy that the authenticity of the documents relied upon by the state was not placed in issue by the defence.

- [7] Mr Hulley raised a number of points in support of the appeal against the convictions and sentences of the appellant. I will deal with the most pertinent of those. He argued that the appellant's right to a fair trial was infringed by the admission of the hearsay evidence, without such evidence having been properly dealt with. His argument was that the court committed a gross irregularity by not making a ruling on the admissibility of such evidence at the end of the state case, as the state failed to make application for the admission of such evidence. He argued further that if the court had properly considered and disallowed such evidence, as it should have done, there would have been insufficient evidence upon which the court could convict the appellant and he ought to have been granted a discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (the CPA).
- [8] The other point raised by Mr Hulley is that the handing up of a large number of documents by the state, without calling witnesses to prove their authenticity and then leaving it to the defence to challenge the authenticity of such documents, offends against the right to a fair trial enshrined in section 35(3)(h) of the Constitution. The state should seek the consent of the defence for the handing up of such documents, failing which, the state must prove the authenticity of same. The court must be left in no doubt that the documents have been admitted.
- [9] Regarding the hearsay evidence, the state, indeed, did not make application at the end of its case for the admission of such evidence and the court did not consider this aspect at the end of the state case. Mr Fourie compiled an extensive report based on some 900 000 documents seized by the National Prosecuting Authority (NPA) in the course of its investigation of this and other matters. Mr Fourie explained in detail the manner in which the documents were scanned, collated, categorised and numbered. He was not involved in the scanning and compiling of the exhibits, which was done by the auditing firm KPMG. I should perhaps mention that at the end of Mr Fourie's evidence, Mr Johnson asked for a postponement to

consider the voluminous documents handed in and the extensive evidence presented by Mr Fourie, before he could cross examine him. The matter was postponed for six months after which Mr Fourie was cross-examined. Mr Johnson said nothing about the authenticity of the documents during or after cross-examining Mr Fourie, nor did he raise the issue of the inadmissibility of the hearsay evidence. The appellant then testified, approximately one year after the state closed its case. There was no application for a discharge in terms of section 174 of the CPA, before the appellant testified. One can only conclude that there was a conscious decision by the appellant, duly advised by Mr Johnson, not to make such an application

[10] When faced with hearsay evidence, a court is obliged to carefully scrutinise such evidence to ensure that its admission does not infringe on the accused's constitutionally protected rights, rendering the trial unfair. Both the state and defence referred to a number of cases with regard to how hearsay evidence should be approached by a court and the admissibility thereof. The provisions

of section 3 of the Law of Evidence Amendment Act 45 of 1988 (the Evidence Act), also prescribe the trial court's approach in this regard. The matter of *S v Ndhlovu and Others* 2002(2) SACR 325 (SCA) sets out useful guidelines on how to deal with hearsay evidence. At para 18, the court held that the accused should not "be ambushed by the late or unheralded admission of hearsay evidence". The court emphasised that the prosecution must, before closing its case request the court to rule on the admissibility of the hearsay evidence "so that the accused can appreciate the full evidentiary ambit he or she faces".

[11] In the present matter, the prosecutor did not request the court to make a ruling on the hearsay evidence led and the court did not deal with this issue, at the end of the state's case. This does amount to an irregularity, but it is also well established in our law that not every irregularity or misdirection necessarily renders a trial unfair. Fairness of the trial does not mean fairness only to the accused. It means fairness to the public who is represented by the prosecution. Therefore a determination of fairness involves a consideration of the totality of evidence, including the effect of an irregularity on the fairness of the trial.

[12] The introduction of section 3 of the Evidence Act was to mitigate the rigidity and inflexibility of the common law principles relating to hearsay evidence, hence section 3(1)(c) allows the court to consider a number of factors to determine if the interests of justice will be served by the admission of hearsay evidence. In my view this applies in a large measure to this matter and the trial court clearly adopted the approach of evaluating the totality of evidence. Mr Fourie's evidence, as I indicated earlier, was a summary of the findings that emerged from hundreds of thousands of documents. His evidence was in fact corroborated by a number of the other state witnesses such as Mohlokoane, Pretorius and Killops.

[13] During his oral address to court Mr Hulley, on being asked which of the documents referred to by Fourie were being disputed, indicated that he had no quarrel with those aspects of Fourie's evidence which were corroborated by the other state witnesses who testified. It

would appear therefore, that the dispute relates largely the bank statements relating to the various bank accounts relevant to this matter, that were investigated, (such as those of MLM, Sitech, Sinako and Sinani) as well as the registration documents relating to Sinako and Sinani.

[14] The trial court placed little or no reliance on these documents and focused on the viva voce evidence of the other state witness in arriving at the conclusions it did. In my view this approach cannot be faulted as the appellant did not dispute or seriously place in issue the documentary hearsay evidence. There was also no attack on the authenticity of the

documents. In my view, where evidence by one party is allowed provisionally, the opposing party cannot simply adopt a supine approach, by saying and doing nothing, and then expect or even hope that the court will leave such evidence out of account. This is particularly so in view of the appellant being represented by a seasoned and competent legal practitioner in the form of Mr Johnson, who did a very good job of presenting the appellant's case. The court clearly concluded that such hearsay and documentary evidence

was not disputed by the appellant.

[15] I return to the reports written by Pretorius and the appellant, mentioned in paragraph [4] above. As indicated, Pretorius prepared a report on the progress and outcome of the Vehicle Monitoring System, at the behest of the appellant, who was his superior officer. This report was dated September 2003 and was addressed to Mr George Mohlokoane, the Executive Director, Infrastructure and Mechanical

Services and who was the appellant's senior. The report was given to the appellant, but he did not forward it to Mohlokoane. I should mention that Sitech was not included as one of the service providers in Pretorius' report. It seems that Mohlokoane went on leave about three months later, and the appellant then amended Pretorius' report without the latter's knowledge, in January 2004. He was by then acting as Executive Director in Mohlokoane's place, and signed the report on behalf of Mohlokoane. The report was addressed to the Municipal Manager, Mr Matlole.

[16] The appellant, prior to submission of the report, addressed a letter to Mr Matlole, which he also signed on behalf of Mohlokoane during the latter's absence, in which he indicated that the Municipality has approved implementation of a project and negotiated

a contract with an approved service provider. He was referring to Sitech. He did not mention, in the letter or the report, the three service providers who were previously shortlisted. Mr Matlole was, however, on leave at the time and Mr Mzwandile Silwana was acting as Municipal Manager. Mr Silwana accepted the report and approved the submission in his capacity as acting Municipal Manager.

[17] It is common cause that Sitech was not awarded the contract as a result of following a tender process, nor was the contract concluded in accordance with MLM's other methods of procurement. Mohlokoane explained the process involved if a situation required a deviation from the normal procurement procedures (usually in the case of urgent matters or

emergencies), and the Sitech contract did not qualify as a deviation from normal procurement methods. The almost indecent haste with which the approval of the project, and the appointment of Sitech as the approved service provider, was pushed through the various departments of MLM gave rise to justifiable suspicion that there was something irregular afoot.

- [18] It is perhaps worth mentioning in this regard that Pretorius' report (which was never forwarded to Mohlokoane) was dated 8 September 2003. Almost four months later, the appellant sent a letter dated 3 January 2004 to the Municipal Manager advising that Sitech was the approved service provider. This was followed by the report he compiled, based obviously on Pretorius' earlier report, and dated 6 January 2004. Mr Silwana approved the submission and report on 8 January 2004. The unease that there was something suspicious going on was borne out by the appellant's secretary's evidence that the municipal officials were instructed to refer all Sitech-related matters to the appellant. In addition, the evidence of Pretorius and Mohlokoane was that they knew nothing of the manner in which the submission and report regarding the appointment of Sitech were tabled or approved. They were also unaware of an entity called Sinako. Save for a matter which falls to be dealt with as a deviation, it is highly improbable that a routine submission or report, which followed the normal procurement process would be approved in a matter of 5 days.
- [19] Although the handing up of bank statements of MLM, Sitech, Sinako and Sinani as evidence was ultimately placed in dispute, the appellant admitted that he received large amounts of money from Sinako and Sinani, which he alleged was from Mr Silwana for work done in respect of other municipalities, one of which was the Gariiep Municipality. He alleged that he did not pay much attention to the source from where the money came because he was expecting money from Silwana and is not sure which bank accounts such monies were paid from. In addition to the bank statements, the registration documents of Sinani and Sinako were also placed in dispute, and Mr Hulley argued that the membership of Sinani and Sinako were not proved, and consequently the paper trail regarding the flow of monies from MLM to Sitech to Sinako and Sinani had no evidential value and ought to have been disregarded.
- [20]. Mr Hulley's submissions regarding the discharge of the appellant at the end of the state's case, therefore, must be seen in the light of what I have set out above. The only documents in dispute are the documents I have mentioned in paragraph
- [19] above. When consideration is given to the rest of the evidence led by the state, my view is that there was definitely enough evidence to put the appellant on his defence to answer the case put forth by the state. It seems that this may well be why Mr Johnson made the decision not to apply for the discharge of the appellant in terms of section 174 of the CPA. This must also have been uppermost in the mind of the trial court, who on the strength of the state's case, expected the appellant to answer such a case. In that regard, my view is that there was no misdirection committed by the trial court.

[21] I made the point earlier that if a party does not challenge evidence that was provisionally admitted, the court may accept that such evidence is not in dispute. Mr De Nysschen referred to the case of *S v Boesak* 2000(1) SACR 633 (SCA), where the Supreme Court of Appeal said the following:

“The cross-examiner must put his defence on each and every aspect which he wishes to put in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as catch can, nor should it be turned into a forensic ambush”.

The defence embarked on extensive cross-examination on the very documents they placed in dispute. Mr De Nysschen correctly pointed out that the defence must make an election in specific terms whether they are disputing the documents or admitting them. In the present circumstances the conduct of the defence is indicative of their admitting the documentary evidence.

[22] It is so that the prosecutor and the court were remiss in not dealing with the issue of hearsay evidence at the end of the state’s case, and this amounts to an irregularity. As I alluded to earlier, not every misdirection or irregularity vitiates the proceedings or renders the trial unfair. A fair trial includes the notion of fairness to both parties and the end result, in my view, is that the accused did not have an unfair trial. The trial court is in a far better position to observe witnesses and is intrinsically a part of the atmosphere of the trial, and as such is better able to make credibility and other pertinent findings in support of the order it finally makes.

[23] An appeal court has been enjoined in a long line of cases emanating from our courts to be alive to this fact. The judgement of the trial court is very extensive. The court undertook a thorough analysis of the evidence, and paid due regard to the material parts of the evidence upon which its judgment was based. It is so that not every aspect was covered in the judgment, but this in itself does not warrant the interference of this court, as I am unable to find that such aspects as were not covered were ignored or not considered by the trial court. It is evident that, save for Radebe, the court was impressed by the state witnesses, particularly with regard to the manner in which they testified and the content of their testimony. In my view, not every aspect of Radebe’s evidence can be rejected, as portions of his evidence were corroborated by other state witnesses. One does gain the impression, though, that his interactions with the appellant went far deeper than he chose to disclose. By contrast, the appellant did not fare well in the witness box. He was evasive, arrogant at times and feigned ignorance of certain matters which were well within his knowledge and contemplation. The trial court’s overall impression of him and its assessment of his evidence was correct, leading to a rejection of his version as so improbable that it was false.

[24] I turn now to deal with the specific charges preferred against the appellant. In my view, this court cannot interfere with the convictions in counts 1 and 2, as it is clear from what I have set out above that the trial court’s reasoning in respect of those two counts is sound, in spite of omissions or mistakes, which are not material.

[25] In respect of count 3, the appellant was charged with a contravention of section 3(a)(ii) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (Corrupt Activities Act). This Act came into operation on 27 April 2004. The Corrupt Activities Act repealed the Corruption Act 94 of 1992. The conduct which forms the subject of this charge occurred before the Corrupt Activities Act came into operation, ie during the period 4 March 2003 to 22 April 2004. The gratification of R130 000.00 referred to in count 3 was received on 16 October 2004, after the Act came into operation. The elements of the offence were present before the Act came into operation, therefore the offence was committed prior to the Act coming into operation. The receipt of the monies took place after the Act came into operation. The absence of transitional provisions in the Corrupt Activities Act, creates a lacuna in the Act, and I am of the view that no offence took place under the Corrupt Activities Act. Count 3 is therefore not competent, and the appellant should be given the benefit of the lacuna in the Act.

[26] In count 4, the appellant was charged with contravening section 4(a) and/or (b) of the Prevention of Organised Crime Act 121 of 1998 (POCA). The trial court dealt with the relevant facts extensively and I do not intend repeating them here. Section 4 of POCA reads as follows:

“Any person who knows or ought reasonably to have known that the property is or forms part of the proceeds of unlawful activities and –

- (a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
 - (b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person, which has or is likely to have the effect –
 - (i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
 - (ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere –
 - (aa) to avoid prosecution; or
 - (bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,
- shall be guilty of an offence.”

[27] Mr Hulley argued that the trial court did not indicate whether the appellant was guilty of contravening section 4 or section 6 of POCA. This is erroneous, as the appellant was not charged with contravening section 6. The correct argument would have been that the trial court did not clearly indicate whether the appellant was convicted of a contravention of

section 4(a) or section 4(b) of POCA. The reasoning of the trial court in respect of this count was somewhat circuitous, without determining whether an offence was committed in respect of subsection (a) or (b) of section 4. Mr Hulley referred to the case of *S v De Vries and Others* 2012(1) SACR 186 (SCA), which gives greater clarity on the import of section 4 of POCA. This matter involved robbing trucks carrying cigarettes and thereafter selling the cigarettes to a third person (the appellant), who owned a wholesale business at which the cigarettes were sold to the public. The appellant was not involved in the robberies but the Supreme Court of Appeal held that by receiving the cigarettes, he made himself guilty of theft which is a continuing crime. The court held further that “By proceeding to use the cigarettes as part of his stock or concealing the source, movement and ownership of the cigarettes and enabling and assisting the robbers to either avoid prosecution or to remove property acquired in the robberies, the appellant clearly made himself guilty of a contravention of s 4”. The appellant in this matter played a leading role in committing fraud and contravening the Corruption Act, but there is no evidence that he laundered the money which he received from Sinako and Sitech, in order to disguise the source, movement or ownership of the money. There is equally nothing in the evidence to suggest that he acted in a way which assisted Sitech, Sinako or Sinani, knowing they committed offences, to avoid prosecution. [See also *S v Dos Santos and Others* 2012 (2) SACR 382 (SCA) and *S v Prinsloo* 2016

(2) SACR 25 (SCA)].

[28] With regard to the sentence, it is well settled in our law that an appeal court should interfere with the sentence imposed by a trial court only if the trial court has misdirected itself in the imposition of sentence, resulting in a sentence which is so inappropriate that it induces a sense of shock. The enquiry is not whether the sentence is right or wrong but whether the court

exercised its discretion properly and judicially. If it is apparent that the court did not exercise its discretion at all or exercised it improperly or unreasonably, then this would be a misdirection that vitiates the court’s decision on sentence. [See in this regard *S v Pillay* 1977

(4) SA 531 (A) at p 535 E-F, *S v Rabie* 1975

(4) SA 855 (A), *S v Giannoulis* 1975

(4) SA 867 (A) and *Director of Public Prosecutions KwaZulu Natal v P* 2006(1) SACR 243 (SCA)].

[29] In casu, the magistrate took account of the personal circumstances of the appellant, and undertook a detailed examination of the circumstances

in which the offences were committed in deciding on an appropriate sentence. She examined the dicta in various cases, dealing with theft from an employer as well as the need to impose stringent sentences in matters involving white collar crimes. The court was of the view that given the seriousness of the offences, that the appellant was a senior official in a position of trust, and in spite of his being a first offender, a custodial sentence would be the only appropriate sentence.

I cannot fault the reasoning of the court in respect of the sentencing in this matter. I pause to point out that given the order which will follow, I refer to the sentences in respect of counts 1 and 2. There is indeed a need to deal stringently with people in the position of the appellant due to the alarming increase in crimes such as those committed by the appellant. The courts do indeed need to send a strong and clear message that corruption is intolerable and that severe sanctions will be a necessary consequence of convictions in such cases. I therefore, cannot find that the court misdirected itself in respect of the sentences relating to counts 1 and 2 in this matter.

[30] In the circumstances, I make the following order:

30.1 The appeal against the convictions and sentences in respect of counts 1 and 2 is dismissed.

30.2 The conviction and sentence in respect of count 3 are set aside and replaced with the following order – The accused is found Not Guilty.

30.3 The conviction and sentence in respect of count 4 are set aside and replaced with the following order – The accused is found Not Guilty.

30.4 The order of the court a quo that the sentence in count 2 run concurrently with that in count 1, is confirmed.

S NAIDOO, J

I concur

J P DAFFUE, J

JUDGMENT

BY: J P DAFFUE, J

[31] I agree with the reasoning and conclusions of my learned colleague, Naidoo J, but need to point out that I approached the appeal somewhat differently.

[32] Appellant not only attacked the convictions and sentences on the merits, but raised certain points in limine. I shall firstly consider the points in limine and thereafter the submissions on the merits.

POINTS IN LIMINE: RIGHT TO A FAIR TRIAL

[33] Adv G I Hulley SC, appearing with Adv C J Smith for the appellant, raised two pertinent issues, i.e. that the court a quo committed serious and gross irregularities which vitiated the trial as a fair trial in that (a) in the absence of an application by the State for admission of hearsay and documentary evidence at the end of the State's case, such evidence should have been disallowed;

- (b) if the court a quo disallowed the evidence as it should have done, the admissible evidence would be insufficient to such an extent that the court a quo ought to have granted appellant a discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977 (“the Act”).
- [34] Thus, he submitted further, the conviction of the appellant infringed several of the appellant’s constitutional rights amongst which s 35(3) of the Constitution of the Republic of South Africa, 1996, which guarantee an accused person the right to a fair trial. Adv J M de Nysschen submitted on behalf of the State that no irregularities occurred, but in any event, appellant who was represented by an experienced attorney, did not attack the veracity of the hearsay or documentary evidence relied upon and made an informed decision not to apply for discharge at the end of the State’s case. So, we were told, the appellant was in the final analysis not prejudiced.
- [35] The State led hearsay and documentary evidence and the evidence was provisionally allowed on the basis that the court a quo would be formally requested prior to the closure of the State’s case to finally allow the evidence. This did not happen, but closing arguments were submitted to the court a quo at the end of the case and the court a quo then dealt with the issue in her judgment.
- [36] Mr Hulley argued with a measure of conviction that the prosecutor could not merely hand in documents from the bar without proof of its authenticity, its origin and without evidence regarding the protection and integrity of the chain of evidence. No doubt, voluminous documents were presented in this fashion, but the crux of the matter is really which of the documents were material to convictions in casu. By far the majority of documents handed in or referred to in the testimony of the forensic auditor, Fourie, were nor relied upon by the court a quo and do not have to be relied upon to adjudicate this appeal. Mr Hulley was invited in his oral address to indicate precisely which documents having a bearing on appellant’s convictions should have been disallowed, instead of relying on generalisations. In my view he limited the complaint to the bank statements of the Municipality, Sinani Management Solutions CC (“Sinani”),

Sitech Systems (Pty) Ltd (“Sitech”) and Sinako Property Solutions CC (“Sinako”) as well as company registration

documents of Sinako and Sinani.

- [37] The protection of an accused person lies in the right to a fair trial entrenched in s 35(3) of the Constitution. Some irregularities do result in a failure of justice as mentioned in s 322(1) of the Act. However, not every irregularity has as its consequence an unfair trial as understood in s 35(3) of the Constitution. See: *S v Jaipal* [2005] ZACC 1; 2005
- (4) SA 581 (CC) at paras [38] to [51]. Obviously, a failure of justice that led to an unfair trial in accordance with notions of basic substantive fairness and justice should have the effect that the proceedings be set aside, alternatively lead to the accused’s

acquittal.

[38] It is acknowledged that the trial court, without compromising objectivity, has a duty to manage a criminal trial within the law governing criminal procedure, has a duty to ensure that an accused is properly defended and that his constitutional rights are not negatively affected either by commission or omission. The right to a fair was described in *S v Shaik* [2007] ZACC 19; 2008

(2) SA 208 (CC) at para [43] in these terms:

“The right to a fair trial requires a substantive, rather than a formal or textual approach. It is clear also that fairness is not a one - way street conferring an unlimited right on an accused to demand the most favourable possible treatment. A fair trial also requires ‘fairness to the public as represented by the State. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.’”

Admissibility of hearsay and documentary evidence

[39] As mentioned the State relied on hearsay and documentary evidence. Much has been made of this in the appellant’s heads of argument and during oral argument. No doubt, the court should scrutinise hearsay evidence closely, especially if it is important evidence that inter alia points towards the guilt of an accused or is an important aspect in the chain of evidence.

[40] It is necessary to mention some authorities and how a court should approach an application to allow hearsay evidence. Cameron JA (as he then was) found in *S v Ndhlovu and others* 2002 (2) SACR 325 (SCA) at para [26] that the Law of Evidence Amendment Act, 45 of 1988 “provides a constitutionally sound framework for the admission of hearsay evidence,…” The right to challenge evidence entails the right to resist admission of hearsay evidence and to scrutinise its probative value and reliability. This would mean that, once the evidence is allowed provisionally, the cross-examiner has a duty to challenge that evidence. He cannot sit back and hope that the evidence will not be allowed finally. In fact, if the evidence is not challenged, it may be a factor to be considered by the trial court whether or not to allow the evidence. It was emphasized in *Ndhlovu* at para [18] that a determination shall be made before the close of the State’s case about the admissibility of hearsay evidence

provisionally allowed. Failure to do so is a misdirection. No doubt, the accused should not be ambushed; he should be able to appreciate the full evidentiary ambit he faces.

[41] It was emphasised in *S v Molimi* [2008] ZACC 2; 2008 (2) SACR 76 (CC) at paras

[35] and [36] that a court having to make a determination whether to allow hearsay evidence in the interests of justice must have regard to every factor that should be taken into account, more specifically those mentioned in s 3(1)(c) of Act 45 of 1988.

[42] Brand JA considered the admissibility of hearsay evidence in *Giesecke & Devrient SA v Minister of Safety and Security* 2012 (2) SA 137 (SCA). At para [28] the learned judge of appeal relied on Zeffert et al, *The South African Law of Evidence* and *S v Ndhlovu* supra, and quoted with approval the following from *Ndhlovu*, para [15]:

”...the very purpose for the introduction of s 3(1)(c) was to ‘supersede the excessive rigidity and inflexibility – and occasional absurdity – of the common-law position’ by creating another avenue for the admission of hearsay evidence which turns on what the interests of justice require.”

He proceeded as follows at para [31]:

“The section requires that the court should have regard to the collective and interrelated effect of all the considerations in paras

- (i) – (iv) of the section and any other factor that should, in the opinion of the court, be taken into account. This section introduces a high degree of flexibility to the admission of hearsay evidence with the ultimate goal of doing what the interests of justice require.”

[43] I shall accept for purposes hereof that the documentary and hearsay evidence were correctly allowed for the reasons provided and bearing in mind the authorities quoted supra. Therefore I shall not endeavour to scrutinise the court a quo’s reasons in any depth. The only issue to be considered is the failure to make a ruling timeously and whether or not such failure rendered the trial to be unfair. In order to consider this I believe it is required to consider the totality of the facts eventually tendered, but in particular the common cause facts as at the end of the State’s case.

Common cause facts and the election not to apply for discharge.

[44] The following facts are either common cause or not seriously disputed:

44.1 The documentary and hearsay evidence, after being allowed provisionally, were never disputed by appellant, with reference to the evidence led by inter alia Messrs Fourie, Mohlokoana, Pretorius and Killops;

44.2 After Fourie, the forensic auditor’s evidence in chief, Mr Johnson, who initially appeared for appellant, asked for a postponement to prepare for cross-examination due to the voluminous nature of the documents referred to by Fourie and relied upon by the State which were provisionally allowed. The case was postponed from 27 January 2009 to 5 November 2009, a period of nine months, but the case was again postponed and cross-examination of Fourie started on 6 April 2010 only;

44.3 There was never any suggestion that scanned documents or copies of documents were tampered with – the authenticity of documents was never placed in dispute;

44.4 Fourie’s version is to an extent a summary of the versions of other State witnesses that eventually testified under oath as well;

44.5 Appellant was appointed the Municipality's General Manager from 1 March 2003 and it was part of his duties to deal with the Municipality's Vehicle Monitoring System, a program which was started already in 1997;

44.6 Pretorius initiated the system in 1997 and eventually three local companies were shortlisted as suppliers of tracking devices prior to appellant's employment with the Municipality;

44.7 The three shortlisted companies were SMS Technologies, Taco-log and Electro-tech; Sitech not having been on the scene by then;

44.8 Mr Radebe of Sitech came into contact with employees of the Municipality shortly after appellant's appointment and met with inter alia Pretorius and appellant;

44.9 In September 2003 appellant, who was Pretorius' senior, instructed him to write a report about the Vehicle Monitoring System, which he did, addressing the report to Mohlokoana, the Executive Director: Infrastructure Mechanical Services and appellant's senior;

44.10 Appellant failed to submit the report to Mohlokoana, but when Mohlokoana was on leave and appellant acting in his position,

appellant compiled his own report on 6 January 2004, without informing Pretorius and/or directing him to amend his alleged wrong

report to include Sitech; in his report appellant recommended to the acting Municipal Manager at the time, Mr Mzwandile Silwana, the husband of Mrs Briggette Silwana, that Sitech be appointed as supplier and in so doing provided incorrect and misleading information in a document which he kept away from important and relevant role players like Pretorius and Mohlokoana;

44.11 As mentioned, Sitech was never shortlisted and also not included in Pretorius' report, but appellant did not mention that three entities were shortlisted, merely that Sitech's product was found to be more effective and advanced;

44.12 In a letter addressed to the Municipal Manager, Mr Matlole dated 3 January 2004, signed by appellant on behalf of Mohlokoana (whilst he was on leave), appellant recorded that the Municipality "has approved the implementation of the project and has negotiated contractual terms with the approved service provider" which turned out to be Sitech; Matlole was on leave at the time and Mzwandile Silwana approved the submission and report as acting Municipal Manager on 8 January 2004;

44.13 A contract was eventually concluded between the Municipality and Sitech, a Gauteng company, whilst the three shortlisted companies

were local businesses; the process for approval was undertaken with tremendous haste as appellant regarded the matter as extremely

urgent, although he did not do anything for a period of several months from receipt of Pretorius' report;

44.14 When Killops of Sitech came to Bloemfontein after the main contract was entered into, he was told that they could not start with operations until a local representative company was appointed as subcontractor and after negotiations by Radebe from Sitech, Sinako was appointed as subcontractor;

44.15 Sitech subcontracted with Sinako, an entity fully owned by Briggette Silwana, the wife of Mzwandile Silwana – an aspect that Mr Hulley put in dispute, but it is common cause that she signed the subcontract on behalf of Sinako;

44.16 Neither Pretorius, nor Mohlokoana knew anything at the time of the recommendation of Sitech as supplier, its appointment as main contractor, as well as the existence of Sinako, the subcontractor and as Pretorius testified, appellant instructed staff to leave all dealings with Sitech to him;

44.17 Appellant received two large payments, which according to his lawyer, were received from Mzwandile Silwana for outside work in which they and others were involved;

44.18 During the period March 2004 to June 2005 Sitech received R5 347 056.57 from the Municipality and Sitech paid to

Sinako an amount of R532 624 during that time which is roughly 10% of the payments received from the Municipality;

44.19 Sitech terminated its contract with the Municipality after the facts mentioned herein were discovered;

44.20 The contract could not have been awarded to Sitech insofar as no proper tender processes were followed in terms of the Municipality's

Supply Chain Management Policy and no deviation from the applicable tender process was required and/or sought;

44.21 Killops met Mzwandile Silwana at the Bloemfontein Airport when problems pertaining to the contract had arisen – he believing

at the time that he was speaking to the member of Sinako, the subcontractor – only to find out later that Mzwandile Silwana

was actually working for the Municipality and that his wife was the member of Sinako;

44.22 Prior to the appointment of the subcontractor, Radebe met Briggette Silwana at the Mall in Bloemfontein, he having been introduced to her by the appellant (it may be noted that appellant denied this in his evidence, but Radebe's version was never disputed in cross-examination);

44.23 Mzwandile Silwana, a senior employee of the Municipality who acted as Municipal Manager when appellant recommended Sitech as the preferred supplier, which recommendation he accepted, signed an undated Marketing Agency Agreement on behalf of Sinako.

[45] Appellant may regard himself fortunate that he employed the services of Mr Johnson, an experienced attorney, who assisted him with vigour and who put up a commendable defence. The mere fact that hearsay and documentary evidence by Fourie in particular were not attacked is easy to explain. It turned out later that appellant did not deny the payments relied upon by the State, although he tried to deny the source thereof. The veracity of Fourie's version was also not attacked. The alleged infringements of constitutional rights could not, on their own, lead to an acquittal of the appellant on the charges preferred against him, but should be judged having regard to the totality of the evidence presented.

[46] Mr Hulley submitted that Fourie's evidence should have been found inadmissible in totality as hearsay. Clearly, this is incorrect insofar as Fourie's version was corroborated by several State witnesses that were called to testify.

[47] Regarding the documentary evidence, he submitted that documents could not simply be handed in from the bar. He accepted that a document need not be identified or authenticated by a witness if its authenticity is admitted by the opponent. In criminal proceedings formal admissions may be made in terms of ss 220 and 213 of the Act and this was not the case in casu. Reliance was placed on *R v De Meyer* 1949

(3) SA 892 (OPD) for the submission that even if an accused fails to cross-examine a witness providing secondary evidence in this regard, such failure should not be seen as an admission of the correctness of the evidence. In *De Meyer* it was found that the complainant's evidence that he was the licensee of premises in respect of which a liquor licence was issued, was inadmissible in the absence of an admission by the accused. The licence was not produced as evidential material. In that case the accused did not cross-examine the complainant at all in this regard, but the court found on appeal at pp 896-7 that the failure to attack inadmissible evidence in cross-examination did not result in an admission of the facts. The case is distinguishable in that the court a quo provisionally allowed the evidence and it was for the appellant to put his version to the witness as stated in *S v Boesak* [2000] ZASCA 112; 2000

(1) SACR 633 (SCA) at para [50].

[48] Mr Hulley also relied on *S v King* 2013 JDR 1514 (GSJ) for the submission that the documents handed in as exhibits by the State should have been found to be inadmissible.

Victor J was severely critical of the approach adopted by the State pertaining to numerous documents on which the State hoped to rely. He stated the following:

“It emerged that the state sought the admissibility of documents for the truth of their contents knowing that the authors would never be called.....In other words cross examination would ensure on at least 3000 pages of documents and the result would be a hit and miss scenario.”

Voluminous documents were handed in in casu, but apparently to give some background of a much wider investigation pertaining to criminal activities by employees and other officials at the Municipality. It is common cause that other offenders, including the Silwana couple, were charged in the High Court in respect of misconduct committed and investigated by the forensic auditor, Fourie, and his team. In the final analysis, Mr Hulley’s complaint is focused on the following documents only, to wit the bank statements of the Municipality, Sinani, Sitech and Sinako as well as company registration documents of Sinako and Sinani. Consequently, so it is alleged, the State failed to prove the membership of Sinako and Sinani and the money trail from the Municipality to Sitech, from Sitech to Sinako and from Sinako to Sinani and appellant. We are not bound by the King judgment, but in any event, the factual matrix and relief sought in King differ completely from the circumstances in casu. It must also be pointed out that appellant and his legal representative had ample time – from 27 January 2009 when Fourie’s

examination in chief was concluded, to 6 April 2010 when cross-examination started, to study Fourie’s evidence and the documents relevant to the matter.

[49] Mr Johnson on behalf of appellant made a deliberate election not to apply for his discharge in terms of s 174 of the Act. When the State closed its case on 26 November 2010, the matter was postponed to 16 May 2011 and the record was transcribed on the directions of the court a quo. On 16 May 2011 the matter was again postponed for a further six months to 14 November 2011. On this day appellant was called to testify in his defence. Notwithstanding the lapse of a year and Mr Johnson and the appellant being in possession of all relevant documentation and the record of proceedings, no application for discharge was made.

[50] I accept that Nugent AJA (as he then was) held in *S v Lubaxa* 2001

(2) SACR 703 (SCA) that an accused person, excluding the situation where there are more than one accused, is entitled to be discharged at the close of the State’s case if there is no possibility of a conviction except if he gives evidence and incriminates himself.

This is the situation, whether or not the accused is legally represented.

[51] Recognition of the common cause facts known at the end of the State’s case points in one direction only and that is that appellant had a case to answer. Thus, without taking into consideration the alleged inadmissible evidence, it cannot be said that there was no evidence upon which a reasonable person, acting carefully, may convict.

[52] Criminal proceedings are not vitiated by any misdirection. The materiality thereof must be considered in order to establish whether the accused had a fair trial as guaranteed in s 35(3) of the Constitution. I again refer to the Jaipal and Shaik judgments supra.

[53] The Supreme Court of Appeal made the following quite clear in *S v Boesak* supra at para [50], relying in para [51] on the well-known *Sarfu* judgment of the Constitutional Court:

“The cross-examiner must put his defence on each and every aspect which he wishes to put in issue, explicitly and unambiguously, to the witness implicating his client. A criminal trial is not a game of catch-as catch-can, nor should it be turned into a forensic ambush.”

[54] In the final analysis, although the conduct of the prosecution in not seeking a ruling on admissibility prior to the closure of the State’s case and the court a quo’s consequent failure to make an appropriate ruling ought to be deprecated, this did not amount to such gross misconduct by the prosecutor and a material misdirection by the court a quo as to vitiate the proceedings if the totality of the evidence and fairness to both parties are considered. In the result and on that basis, the appellant was afforded a fair trial.

THE MERITS OF THE CASE

Approach on appeal

[55] An appeal is a re-trial on the record although the ambit thereof is limited to the issues raised by the appellant. There is no reason why this court may not reconsider the complete record of the entire proceedings in the court a quo. See *S v Zondi* 2003 (2) SACR 277 (W) at 242h.

[56] When an appeal is lodged against a court a quo’s findings of fact, the appeal court should take into account that the court a quo was in a more favourable position than itself to form a judgment because it was able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial. See *Schmidt and Rademeyer*, *Law of Evidence* 3-40. The appeal court will normally accept factual findings made by the court a quo, unless there is some indication that a mistake was made. See *R v Dhlumayo* 1948 (2) SA 677 (A) at 696 and 705. The Court of Appeal summarised this issue as follows in *S v Hadebe and Others* 1997

(2) SACR 641 (SCA) at 645e - f:

“Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.”

[57] The presumption is that the trial court’s conclusion on the facts is correct. The appeal court will only reverse it where it is convinced that such conclusion is wrong. In such a case, if the appeal court is merely left in doubt as to the correctness of the conclusion, it will uphold it. The Supreme Court of Appeal in *S v Naidoo and Others* 2003 (1) SACR 347 (SCA) at para [26] reiterated this principle as follows:

‘In the final analysis, a court of appeal does not overturn a trial court’s findings of fact unless they are shown to be vitiated by material misdirection or are shown by the record to be wrong.’

[58] The SCA emphasised that it could be useful for the understanding of the evidence as a whole to break it down into components, but the appeal court should, in assessing the court a quo's findings of fact, be careful not to focus too intently on the separate parts and in doing so losing sight of the fact that the whole body of evidence might shed valuable light on the evidential value of its components. See also *S v Hadebe and Others* 1998 (1) SACR 422 (SCA) at 426a – h and *S v Ramulifho* 2013

(1) SACR 388 (SCA) at 392g - h.

[59] No judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked.

It is accepted that factual errors do appear from time to time, that reasons provided by a court a quo are unsatisfactory or that certain facts or improbabilities are overlooked. The appeal court should be hesitant to search for reasons that are in conflict with or adverse to the court a quo's conclusions. See *Dhlumayo* loc cit at para [12] on 706. However, in order to prevent a convicted person's right of appeal to be illusory, the appeal court has a duty to investigate the court a quo's factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere. See *S v M* 2006 (1) SACR 135 (SCA) para [40] at 152a - c.

[60] To secure a conviction the State had to prove all the elements of the crimes beyond reasonable doubt. The test in a criminal case has been restated in *S v V* 2000

(1) SACR 453 (SCA) at para [3]. If there is a reasonable possibility that the accused is not guilty, he should be acquitted. The accused should be convicted if the court finds not only that his version is improbable, but also that it is false beyond reasonable doubt. It is not necessary for the court to believe an accused person in order to acquit him.

Evidence of single witness

[61] It is trite that an accused may be convicted on the single evidence of any competent witness if such evidence is clear and satisfactory in every material respect. Our courts have indicated that evidence can be satisfactory, even if it is open to a degree of criticism. See *S v Sauls* 1981 (3) SA 172 (A) at 180G–H. Furthermore, the exercise of caution should not be allowed to displace the exercise of common sense. See *S v Artman* 1968 (3) SA 339 (A) at 341C.

Probabilities

[62] The State has to prove its case against an accused beyond reasonable doubt, but in evaluating the evidence, the trial court is entitled to consider the probabilities and improbabilities. This issue was considered in *S v Chabalala* 2003 (1) SACR 134 SCA at para [15] where Heher AJA (as he then was) held:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

See also: S v Trainor 2003

(1) SACR 35 (SCA) at 41b – c.

Circumstantial evidence and test to be applied

[63] The test has been authoritatively stated in R v Blom 1939 AD 188 at 202 – 203. Firstly, the inference sought to be drawn must be consistent with all the proved facts. If it is

not, the inference cannot be drawn. Secondly, the proved facts should be such that it excludes every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct. The two rules referred to above are known as the cardinal rules of logic to be applied when no direct evidence of an offence is available. An example of the cumulative effect of all the evidence pointing to the guilt of the accused is to be found in S v Reddy 1996 (2) SACR 1 (A) at 8.

Rejection of an accused’s version

[64] An accused’s version cannot be rejected merely because it appears to be improbable. It must be shown, in light of the totality of the facts, to be so untenable and/or improbable and/or false that it cannot reasonably possibly be true. See S v Schackell 2001 (2) SACR 185 (SCA) at para [30] and S v V supra.

Failure to cross-examine

[65] I have referred to S v Boesak supra and the duty on a cross-examiner to put his defence properly on each and every aspect which he wishes to place in issue to those witnesses implicating his client. A criminal trial should not be turned into a forensic ambush.

Evaluation of the evidence

[66] I am of the view that too much was made of the court a quo’s preference of the evidence of Pretorius above that of Radebe. I accept that the court a quo was not favourably impressed by Radebe as a witness and in my view he did not play open cards with the court. There was clearly

interaction between him and appellant which was kept secret and hidden from Pretorius and Mohlokoana. The introduction of

Radebe to Briggitte Silwana by appellant – which appellant did not deny initially, but for the first time only when he testified – is suspicious and tends to favour a version that appellant nominated Sinako, Briggitte's CC, which was actually run by her husband if Killops' evidence is considered.

[67] I accept that the witnesses, Pretorius included, might have made mistakes in their testimony, bearing in mind the time lapse of several years. However, the golden thread running through the evidence is that Radebe's company, Sitech, arrived on the scene just after the appointment of appellant as the Municipality's General Manager, that Sitech was given an opportunity to have its system tested long after three other entities were shortlisted, that appellant recommended Sitech as the preferred supplier on an urgent basis during the holiday season and when his direct head as well as the Municipal Manager were on leave. Co-incidentally, the person acting as Municipal Manager at the time was none other than the husband of Briggitte, she being the sole member of Sinako, although her husband was possibly de facto in charge of this CC. It is true that appellant would not know at the time he made the recommendation that the Municipality would eventually conclude a contract with Sitech, but he knew on all probabilities that there was a real chance as his friend, the acting Municipal Manager and the head of the Municipality's administration at the time, would accept his recommendation. I refer to the wide-ranging powers of a municipal manager set out in s 55 of the Local Government: Municipal Systems Act, 32 of 2000. Appellant had reason to believe that the acting Municipal manager's signature would pave the way for a lucrative deal

that would benefit him in particular as well. Therefore Sitech, although having been awarded the contract, was directed to obtain the services of a local subcontractor which came in the form of the Silwanas' entity, Sinako.

[68] The State witnesses, excluding Radebe, impressed the court a quo as credible witnesses. This cannot be criticized and has to be accepted based on the authorities quoted, save for the comments supra. Contrary to the State's witnesses, appellant was a poor, arrogant and argumentative witness. I do not deem it necessary to mention all shortcomings and contradictions, save to state that his version changed in at least one material aspect. He obviously decided that, more than a year after Radebe's testimony, he had to position himself as far as possible from Radebe's

introduction

to Briggitte Silwana. He would have heard Radebe's evidence and if that was not true, he should have alerted his attorney to this vital issue. This was not done. His version, denying the introduction, is so improbable that it can safely be accepted as false.

[69] Appellant's overall performance as a witness was correctly criticized by the court a quo. A perusal of the record indicates in the same direction. Save insofar as Pretorius might have made mistakes in respect of his introduction to Radebe and the testing of the Sitech product, his evidence as a single witness should be accepted as sufficient to prove that appellant

exploited the Municipality's system to his and others' advantage. There is in any event sufficient corroboration for Pretorius' version in the form of his and appellant's reports and the evidence of Mohlokoane and appellant's secretary that he wanted to keep the details of payments to Sitech away from her. Insofar as there is no direct evidence on certain issues, the matter may be considered based on the test applicable to circumstantial evidence. The dicta in Reddy supra with reference to the test laid down in Blom supra are apposite.

[70] If the evidence is evaluated in its totality the probabilities are so in favour of the State's case that appellant's version was correctly rejected by the court a quo as not only improbable, but false. The State has proven beyond reasonable doubt that appellant's version is not reasonably

possibly true and that the evidence presented by the State should be accepted to be true beyond reasonable doubt.

[71] Even if it is accepted that the court a quo made mistakes pertaining to factual findings, these are not so material that this court should interfere and set aside the convictions in respect of counts 1 and

2. However, the findings in respect of the law relating to counts 3 and 4 must be reconsidered and this will be done in the next paragraphs.

[72] I shall deal with count 3 first. At the time when the agreement was reached between appellant and his co-perpetrators, the Corrupt Activities Act was not yet promulgated. The Corruption Act still applied. It was wrong to convict the appellant in respect of the Corrupt Activities Act as the *actus reus* occurred during the time the Corruption Act was still the law. The fact that the one payment was received after promulgation of the Corrupt Activities Act is irrelevant. Section 3 is clear. The payment must have been received in order to do something or obtain an unjustified result in future. No transitional arrangements have been catered for in s 36 of the Corrupt Activities Act to deal with a situation as in *casu* as might have been expected. The issue to be considered is whether appellant's appeal should succeed in respect of count 3 and in doing so, whether it would be possible and fair to appellant to amend the conviction in respect of count 2 to include the further payment received. In the absence of transitional arrangements this should not be done and appellant must receive the benefit of a loophole in the legislation.

[73] The conviction in respect of count 4 – money laundering – must be considered as well. It is again not necessary to interfere with the court a quo's assessment of the facts, but it is a different matter whether the established facts brought the case within the purview of the offence of money laundering. I do not think so for the following reasons.

- [74] Firstly, it does not appear clearly from the judgment whether the court a quo convicted appellant of contravention of s 4(a) or 4(b) of Poca. Appellant's counsel incorrectly argued that the court a quo failed to distinguish between the offences created in ss 4 and 6, but appellant was not charged in respect of s 6 and the court a quo did not consider that section. It is necessary to reflect on the authorities for clarity.
- [75] Mr De Nysschen relied on the Supreme Court of Appeal judgment in *S v Shaik and others* [2006] ZASCA 105; 2007 (1) SA 240 (SCA) in support for his contention that the State has proven its case beyond reasonable doubt. In my view the facts in Shaik are distinguishable from those in *casu*. In Shaik, Mr Shaik was convicted of transgression of s 1(1)(a) of the Corruption Act (count 3 of the particular counts put to him and others). The court found that fourth appellant who entered into the service agreement and the fifth appellant who received payments made in respect of the service agreement assisted Mr Shaik and the company Thales to avoid prosecution; therefore fourth and fifth appellants were correctly convicted of committing an offence in terms of s 4 of Poca, being an alternative count to the main count 3. The particular agreement was found to be contrived and designed to conceal the true nature of the payment. In *casu* appellant was, like Shaik convicted of transgressing the Corruption Act, and also for fraud. He was the main player, but he clearly did not sanitise his illegal proceeds by channelling same through either Sinako or Sinani. As part of the scheme developed by him and the Silwanas, he received relatively small portions of the proceeds. It would be a totally different scenario if he was in the shoes of the fourth and fifth appellants in Shaik; however he found himself in the same position as the first appellant, Mr Shaik.
- [76] Laundering or sanitation of illegal proceeds has occurred in *S v De Vries and others* 2012(1) SA 186 (SCA). The SCA stated in para [56] that although appellant was convicted of theft of cigarettes on the basis that he received the cigarettes knowing that they were stolen, he was also correctly convicted of contravening s 4 of Poca, because he proceeded to take the stolen cigarettes in as part of his stock in trade as a wholesaler and thereby giving the impression that these were lawfully acquired. The source, movement and ownership of the cigarettes were disguised or concealed in the process; thereby enabling the robbers who had hijacked trucks of British American Tobacco to avoid prosecution. Again, I am satisfied that appellant could not have been dealt with in similar vein. He had nothing to do with the incorporation or management of Sinako and eventually received money without it being laundered in the first place.
- [77] The laundering of illegal proceeds has been explained in more detail by Nicholls J in *S v Van der Linde* 2016
- (2) SACR 377 GJ in paras [111] – [125] with reference to an article by the well-known author, Prof Louis de Koker, as well as to De Vries *supra* and *S v Prinsloo* 2016

- (2) SA 25 (SCA). Appellant did not do as De Vries did and also not as Prinsloo did. Prinsloo, in charge of a billion Rand Ponzi scheme, took investors' money and inter alia purchased several immovable properties in the name of a trust. Clearly, in doing so the proceeds of an illegal scheme were concealed or disguised. The same result applied to the accused in *S v Moosagie* and another [2012] ZAECPHC 31 (ECP) CC 29/2010; 17 May 2012. In that matter the accused defrauded SARS and deposited the VAT refund cheque to which he was not entitled into the trust account of an estate agent where after he withdrew small amounts over a period of time and deposited these into various disparate bank accounts.
- [78] I agree with Nicholls J's observation at para [124] that it is apparent from these three cases that there must be an intention to hide or conceal what is often referred to as "hot money". Therefore the conclusion arrived at by the learned judge in para
- [125] that the accused should be acquitted in respect of the money laundering counts as there was no attempt at concealment is supported.

Sentence

- [79] A court of appeal will not alter a sentence imposed by the trial court, unless it is found that no reasonable person ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial court has not exercised its discretion properly. See *S v Fhetani* 2007 (2) SACR 590 (SCA) at para [5]; *Director of Public Prosecutions KwaZulu Natal v P* 2006 (1) SACR 243 (SCA) at 254c-f and *S v Boogaards* 2013 (1) SACR 1 (CC) at para [41].
- [80] Even first offenders are not entitled to escape sentences of incarceration in the event of serious transgressions. I agree with the court a quo that the seriousness of the offences did not warrant a non-custodial sentence. The following dicta of Ponnann JA in *S v Kekana* 2013 (1) SACR 101 (SCA) at 105d – i are apposite:

"It is true that the appellant has an unblemished record and that he was a useful member of society in gainful employment at the relevant time. Those circumstances, however, have to be weighed against the nature and severity of the offence and the requirements of society. Notwithstanding those mitigating factors being present, the seriousness of the offence makes it necessary to send out a clear message that behaviour of the kind encountered in this case cannot be countenanced. The natural indignation that the community would feel at conduct of this kind warrants recognition in the determination of an appropriate sentence...Moreover, as the version of the appellant was found by the trial court to be false and in effect contrived, it is difficult to conclude in his favour that he has demonstrated any remorse or contrition. In all of the circumstances of the case, therefore, the moral reprehensibility of the appellant's conduct remains undiminished."

- [81] In *Shaik supra* the Supreme Court of Appeal reiterated at para [222] that the

“seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance.....Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe..... It is thus not an exaggeration to say that corruption of the kind in question eats away at the very fabric of our society and is the scourge of modern democracies.”

In my view the same applies to fraud in a situation as in *casu*. Appellant, a senior employee of the Municipality, was in a position of trust, but he abused his position for personal gain.

[82] Appellant is well educated, married with two children who were twelve and eleven years old respectively when he was sentenced in 2014. His wife suffered from breast cancer at the time. He is a first offender.

[83] Over and above the seriousness of the offence, the appellant’s moral blameworthiness in the circumstances must also be taken into account. Terblanche, *The Guide to Sentencing in South Africa* 2 ed (2007) at 150 writes: “The modern view of the seriousness of crime generally also refers to blameworthiness of the offender...[T]he seriousness of the offence is affected by the extent to which the offender can be blamed or held accountable for the harm caused or risked by the [offence]...”

[84] I am not convinced that any misdirections have been committed or that the sentences are so harsh that interference is warranted. In the result the appeal against the sentences cannot succeed.

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Instructed by:

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On behalf of the respondent: Adv J M de Nysschen

Director: Public Prosecutions

BLOEMFONTEIN

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