

SOUTH AFRICA / JUDGMENT

Ndyamarha and Another v S (Appeal) (CA & R 245/2022) [2025] ZAECKMKHC 22 (11 March 2025)

[2025] ZAECKMKHC 22

COURT

Eastern Cape High Court, Makhandha

BEFORE

Metu, S.A. Collett

CASE / FILE NUMBER

CA&R 245/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MAKHANDA)

CASE NO. CA&R 245/2022

In the matter between:

BATHANDWA BAZUKILE NDYAMARHA

FIRST APPELLANT

NDYAMARHA TRADING CLOSE CORPORATION SECOND APPELLANT

(registration number 2010/102267/23)

and

THE STATE

RESPONDENT

JUDGMENT ON APPEAL

Metu AJ

INTRODUCTION

[1.] Following upon the conviction and sentence by the Regional Division of the Eastern Cape held at the Commercial Crimes Court – East London, an application for leave to appeal was made and granted against conviction only. Cumulatively, the appellants were found guilty of four (4) alternative counts of theft of money on diverse occasions amounting to a total of R2 001 500.00[1].

[2.] The appellants appeal to this Court against conviction with the leave of the Court a quo. The first appellant is out on bail pending finalisation of the appeal. The appellants were legally represented at the trial and pleaded not guilty to all the charges. The main issue in this appeal is whether theft has been proved beyond reasonable doubt.

[3.] The first appellant is the sole director, with a hundred percent (100%) shareholding with the second appellant. The second appellant is a juristic person incorporated in accordance with the Close Corporation Act, 69 of 1984. The name of the second appellant was changed to Bessie Projects 87 on 23 October 2019[2]. At all times material, the second appellant has been the registered account holder of the various bank accounts held with FNB into which the money was deposited and used by the first appellant for his profit and personal gain.

SUMMARY OF EVIDENCE

[4.] It is unnecessary to recapitulate the evidence in its entirety as the bulk of evidence is common cause and we do so only to the extent necessary to substantiate the conclusion at the end of this judgment. Where necessary, an excerpt of the evidence will be extracted.

[5.] The case for the state rests on the evidence of Messrs Cocks and Blignaut of Siyawela Travelling CC; Messrs Jonker and van Vore of Eastern Cape Department of Education (“ECDoE”); Warrant Officer Ndevu of South African Police Services; Ms Mazwa of National Prosecuting Authority; and Sergeant Kana of the Directorate Of The Priority Crime Investigation (“Hawks”).

[6.] The second appellant operates what it terms a ‘virtual bed & breakfast’, which, according to the first appellant, was an innovative way of being cost-effective as there was no constant business for accommodation. With this concept, he neither had to pay rent for the ‘virtual bed & breakfast’ places, nor pay salaries nor pay cleaning staff. Under its accommodation umbrella, the second appellant would transact with Siyawela who would source accommodation on behalf of the ECDoE.

[7.] How the transactions which are now the subject matter of this case took place can be summarised as follows:

[7.1.] Siyawela would receive a request from the ECDoE for accommodation. The request would specify the number of people to be accommodated, the date and the duration for which the accommodation was sought.

[7.2.] Siyawela would issue the tender and invite quotations from service providers, in this instance, being the second respondent. Thereafter, a markup would be incorporated into the quote and sent to ECDoE.

[7.3.] The ECDoE would then pay the invoiced amount to Siyawela.

[7.4.] Siyawela would then remit payment to the second appellant according to the quotation.

[8.] The first appellant was using at least three (3) institutions: Bay Lodge, Fairview Lodge, and Royal Lodge. All three (3) were what the first appellant referred to as 'virtual bed and breakfasts'. In essence, these entities existed in name only.

[9.] In accordance with this scheme, Siyawela invoiced the ECDoE. The first and second appellants were paid a total amount of R2 001 500.00 as and for accommodation. Despite this payment, the first and second appellants did not provide any accommodation or service for the payment received.

[10.] The first appellant alleged that he outsourced accommodation to Mr. Rhaji, an ECDoE official. Curiously, the first appellant, other than allegedly speaking with him on the phone, never met Mr. Rhaji in person.

[11.] The first appellant withdrew cash and ostensibly paid Mr. Rhaji R700 000.00 for the accommodation he outsourced to him. Even when this payment was remitted, Mr. Rhaji and the first appellant did not meet.

[12.] The appellants' case hinges on evidence of the first appellant as a single witness. There are several disparate grounds of appeal that the appellants rely on. However, this appeal essentially dovetails on the ground that the trial Magistrate erred in finding the appellants were guilty of theft when the transactions between the second appellant and Siyawela were a contract for the accommodation of students.

[13.] The first appellant contended that he was the only member of the second respondent and therefore anything that was amiss would come back to him in terms of responsibility. He vouched that when he formed the virtual bed & breakfasts he had not intention to defraud.

[14.] According to the first appellant, there was a prepaid procurement system between Siyawela Travelling CC and the second appellant. The submission made on behalf of the appellants was that the evidence placed before the Court a quo did not prove the elements of the crime of theft. The argument continues that, at best for the state, an available remedy could be *condictio indebiti*, which is founded in civil law. The hallmark of this argument is that the Court must distinguish between theft and breach of contract.

[15.] It was further submitted that notwithstanding the liquidity challenges that the appellants were facing of not being able to pay back the money relating to the prepaid contract, that on its own did not amount to theft but rather a civil breach.

[16.] The appellant submitted that he did perceive not anything wrong when Mr Rhaji entered the picture, as it was still an arrangement for accommodation and he was able to make more money. According to the appellant, this was business as usual as the students/pupils would be accommodated. Siyawela paid the second appellant a total of five (5) invoices amounting to R2 001 500.00 which, according to the first respondent, was an ordinary business transaction.

[17.] The version put to State witnesses was that the first appellant only became aware that the transaction was fraudulent when the ECDoE did not pay Siyawela. It was further revealed to state witnesses that Mr. van Vore's signature was forged.

[18.] It is essential to point out that under cross-examination, the first appellant conceded that he and the second appellant had no legitimate claim over the money paid by Siyawela into the various bank accounts held in the names of the 'virtual bed & breakfast' entities.

[19.] According to the first appellant, these 'virtual bed & breakfast' entities held sub-accounts from which he could not transact. Hence, the money had to be transferred into the main account held in the name of the second appellant. These sub-accounts could only receive funds, but no payments could be made from those sub-accounts except to transfer funds into the main account[3].

DISCUSSION

[20.] The appellants contend that the Trial Magistrate erred in conflating the concepts of the crime of 'theft' with a civil law 'breach of contract'. The appellants put in issue that the State failed to prove the elements of theft.

[21.] The elements of theft were succinctly captured in *S v Boesak*[4], where the court held:

'Theft, in substance, consists of the unlawful and intentional appropriation of the property of another (*S v Visagie* 1991(1) SA 177 (A) at 181). The intent to steal (*animus furandi*) is present where a person (1) intentionally effects an appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing that the property is capable of being stolen, and (4) knowing that he is acting unlawfully in taking it (*Milton: South African Criminal Law and Procedure: Vol II (3rd Ed): p 616*).'

[22.] According to the investigation conducted by the witnesses called by the respondent, Mr. Rhaji was never employed by ECDoE and was unable to be traced.

[23.] The first appellant, under cross-examination, conceded that he had no right or entitlement to the various amounts paid to his physically non-existent bed & breakfast places, amounting to R 2 001 500.00.

[24.] Pertinent questions to be decided are:

[24.1.] whether the first appellant had guest houses or lodges in which he could accommodate the people according to the invoices or quotations generated;

[24.2.] whether the appellants provided any accommodation for which Siyawela paid them;

[24.3.] whether the appellants returned the money paid to the second appellant.

[25.] A consideration of the evidence revealed that none of the above questions could be answered positively.

[26.] The narrative that the Court a quo erred by conflating the concept of the crime of theft with the civil law breach of contract is misplaced. This line of argument cannot be correct as the evidence presented before the Court a quo is essentially common cause and satisfied the elements of theft simpliciter as enunciated in *S v Boesak*[5] supra.

[27.] The presiding Magistrate cannot be faulted on his findings of fact. It is trite that the Appeal Court will not interfere with the decision of the Court a quo in its finding of fact as that Court is in a the more favourable position when arriving at a decision thereon. The Court of first

instance is better poised to make observations of witnesses who have appeared before it. Only where it has been established that there were misdirections of fact or reasons for judgment are unsatisfactory will the Appeal Court interfere. The default position is that the Appeal Court assumes that the Court a quo's findings are correct and will accept these findings, unless it is convinced that these are wrong[6].

[28.] In *S v Monyane and Others*,[7] it was categorically stated that the Appeal Court is only in exceptional cases entitled to interfere with the Trial Court's evaluation of oral evidence.

[29.] In this matter, we find no reason to interfere with the Trial Magistrate's evaluation of facts. An objective assessment of the facts before the Court a quo reveals that in the evaluation process, the Trial Magistrate weighed up all the evidence presented.[8]

FINDING AND ORDER

[30.] We are persuaded that the State adduced credible evidence that proved the essential elements of theft.

[31.] Regarding the factual findings by the Trial Magistrate, we are inclined to defer to the Trial Magistrate and are satisfied that the appellant was correctly convicted.

[32.] In the circumstances, the appeal is dismissed and the appellant's conviction is confirmed.

B. METU

ACTING JUDGE OF THE HIGH COURT

I agree.

S.A. COLLETT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

For the Appellant:

Adv. J R Koekemoer

Instructed by N N Dullabh & Co

5 Bertram Street

Makhanda

For the Respondent:

Adv L Poswa

Instructed by The Office of the Deputy Director of Public Prosecutions

94 High Street

Dates heard:

27 November 2024

Date delivered:

11 March 2025

[1] Vol 2; p397 line16 – p398 line3 of the transcribed record.

[2] Vol 1, p252; lines 18 - 20 of the transcribed record, r/w application to amend close corporation @ p583 of volume 3.

[3] Vol 2, p290 @v lines 20 - 25 of the transcribed record.

[4]

[2000] ZASCA 112; 2000

(1) SACR 633 (SCA) at para 97.

[5]

[2000] ZASCA 112; 2000

(1) SACR 633 (SCA) at para 97

[6] F v Dhlumay and Another 1948 (2) SA 677 (AD) at 705-6.

[7] 2008 (1) SACR 543 (SCA), at para [15]

[8] S v Khumalo and Another 2023 JDR 4032 (GJ) @ 24.

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