

SOUTH AFRICA / JUDGMENT

Nkosi v S (A276/2015) [2018] ZAGPJHC 604; 2019 (1) SACR 570 (GJ) (2 November 2018) [2018] ZAGPJHC 604

COURT

South Gauteng High Court, Johannesburg

BEFORE

L. Windell, A. P. Bezuidenhout

CASE / FILE NUMBER

A276/2015

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: A 276/2015

DPP

Ref no : 10/2/5/2-(2015/238)

In

the matter between:

SIBUSISO

ISAAC

NKOSI APPELLANT

And

THE

STATE RESPONDENT

JUDGMENT

WINDELL, J:

INTRODUCTION

- [1] The appellant, a 76 year old man, was convicted in the Boksburg Regional Court on 29 May 2015 of one count of fraud and two counts of theft.
- [2] He was sentenced to 10 years imprisonment on the fraud charge (Count 1), five years imprisonment on the one theft charge (Count 2), and three years' imprisonment on the other theft charge (Count 3). The terms of imprisonment were wholly suspended for a period of five years on condition that he refunds the respective complainants.
- [2] He failed to comply with the suspensive conditions and the State applied for the putting into operation of the suspended sentences.

The appellant then applied for leave to appeal his conviction and the court a quo subsequently granted the appellant leave to appeal his conviction. The appellant is currently on bail pending the appeal.

- [3] The appellant's main contention during the trial and during the hearing of the appeal was that this was a civil matter and that he still intended on delivering on his promises as soon as other third parties had performed their obligations.

COUNT 1

- [4] Mrs Constance Malatjie is the complainant in Count 1 (the fraud charge). In 2009 she received a contract to transport coal to and from the mines and she needed trucks. She was not creditworthy and could therefore not approach a financial institution for credit. She got word that the appellant would be able to assist. They met and the appellant represented to her that he would be able to provide her with trucks. He told her that he was in a partnership with Mr Jurgens from a business by the name of Truck Den, and he would be able to supply her with 20 trucks if she paid a deposit of R 700 000 (it was initially R 1,5 million but Ms Malatje only had (R 700 000). Mr Sicelo Nkosi was present when the appellant made the representation and confirmed Ms. Malatji's evidence. Ms Malatji wanted to see the trucks before she made the deposit and they subsequently met at Truck Den where she was introduced to Mr Jurgens who told her that he and the appellant were partners. She was shown the trucks and was told that the trucks would be ready for delivery within two weeks as the hydraulics needed to be fitted. She was also given a spreadsheet which contained all the particulars of the trucks she was buying (chassis number, registration number, type of truck and trailer registration numbers). As a result of the representation she deposited R 700 000 in the appellant's son's account. Mr Sicelo Nkosi and Mr Babajide accompanied her to Truck Den and were present when the trucks were shown to Ms Malatji and the promise of delivery within two weeks was made. Ms Malatji testified that she only paid the deposit

because she trusted the appellant and believed that he would deliver the trucks.

- [5] After two weeks the trucks were not delivered and appellant told Ms Malatji that they were still busy with the fitting of the hydraulics. Three months later and the trucks had still not been delivered. When she demanded back her money the appellant told Ms Malatji that Mr Jurgens sold her trucks to a third party without informing him but that she should not worry as he would be able to get other trucks. Ms Malatji insisted on some sort of proof that she paid the R700 000 and as a result a written "Vehicle Lease Agreement" was provided wherein it was specifically noted that she has paid an amount of R 700 000 as deposit for 20 trucks with 20 trailers. The so called lease agreement did not materialise and in February 2010 the appellant signed a "Debt Settlement Agreement" in terms of which he had to pay Ms Malatji R 750 000 on or before February
2011. For the next four years Ms Malatje attempted to get back her money but despite many efforts and all sorts of schemes involving the appellant and third parties, the money was not paid back. In 2014 Ms Malatje laid a criminal charge against the appellant.

COUNT 3

- [6] During February 2010 the complainants in Count 3, Mr Thebe Mzansi met with the appellant and Mr Jurgens at Truck Den. They were interested in buying two trucks and after discussions with the appellant they paid an amount of R130 000 into the account of Mannel Enterprises (an account which the appellant had access to) as a deposit. The trucks were never delivered to them.

COUNT 4

- [7] The complainant in Count 4, Mr Emmanuel Makhubela also met with the appellant during September 2009 and paid an amount of R75 000.00

into the account of Mr Jurgens as a deposit to buy a truck. Mr Jurgens then transferred the money to the appellants account. He was told that the truck would be delivered within 48 hours of the deposit being paid, otherwise he would be refunded. He never received the truck. The money was used by the appellant for personal expenses.

- [8] The appellant testified and denied that he told any of the State witnesses that he is in partnership with Mr Jurgens. He explained that he was only a scout for Mr Jurgens and as Ms Malatji wanted trucks and Mr Jurgens sold trucks, he only brought the parties together. He admitted receiving the money from the respective complainants and admitted that the trucks were never delivered. He further gave the court drawn out explanations of letters of credit, which were never put to the complainants during cross examination.

EVALUATION

- [9] The court a quo found that the State witnesses were honest and reliable and they corroborated one another on all material aspects. The trial court had the advantage of observing, hearing and appraising the witnesses and was impressed by their evidence. In S v

Hadebe[1] it was held that the credibility findings and findings of fact of the trial Court cannot be disturbed unless the recorded evidence shows them to be clearly wrong. In analysing the judgment of the magistrate and the conclusions reached by him, I can find no reason to interfere with the court a quo's factual and credibility findings.

[10] The appellant was an extremely poor witness and contradicted himself on several material issues. He also deviated materially from the version that was put to the State witness. The version that he gave during cross examination and the version given under oath are irreconcilable. During cross examination he again changed his version and introduced a completely new defence namely that he was entitled to keep the money that he received from the complainants as it was his fee for obtaining a letter of credit.

[11] It is trite that the State must prove its case beyond reasonable doubt and if the appellant's version is reasonable possibly

true he is entitled to an acquittal. The court must apply its mind not only to the merits and demerits of the State and defence

witnesses, but also to the probabilities of the case. The court a quo evaluated all the evidence and rejected the appellant's version as false. In my view, the magistrate was correct in rejecting the appellant's version as false as his evidence was found wanting in several respects.

[12] According to Snyman[2], 'fraud' is 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'. In order to secure a conviction on fraud the State had to prove (i) a misrepresentation; (ii) prejudice or potential prejudice; (iii) unlawfulness and (iv) intention. The appellant misrepresented to Ms Malatji that if she paid R 700 000 she will receive trucks within two weeks of her making the payment. She was even provided with a list of the trucks she supposedly bought. As a result of the misrepresentation she was induced to pay the amount of R 700 000. The representation was clearly false as the trucks were not delivered as promised and she suffered prejudice as a result.

[13] A person commits theft by false pretences if he or she unlawfully and intentionally obtains moveable, corporeal property belonging to another with the consent of the person from whom he or she obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, and appropriates it.

All cases of theft by false pretences are at the same time also fraud[3].

As far as the theft charges are concerned the onus rests on the State to prove an intention to steal (*animus furtiva*) beyond reasonable doubt.[4] In *S v Boesak*[5] it was held as follows:

‘Theft, in substance, consists of the unlawful and intentional appropriation of the property of another (S v Visagie [1990] ZASCA 124; 1991 (1) SA 177 (A) at 181I). 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 at 616).’

[14] The court a quo did not deal with the essential elements of theft in his judgment. It should have been clear to the magistrate after hearing the evidence that the intention to steal and the element of wrongfulness (“wederegtelikheidsbewussyn”) were in dispute. It is common cause that the appellant used the money that was paid into his account as a deposit for trucks to pay personal expenses. The question the court a quo should have asked in the circumstances was the following: Did the appellant know that he was acting unlawfully in using the money that was paid into his account? It is clear from the evidence that the appellant had no permission to keep the money of the complainant after he failed to deliver the trucks. The agreement was that the money would be paid back to the complainants if the trucks were not delivered within a specified time. By utilizing the money and by failing to pay it back after he failed to deliver the trucks, the appellant effectively excluded the complainant’s control over it. The appellant’s conduct was clearly unlawful and the only reasonable conclusion that can be made in the circumstances is that the appellant had the intention to permanently deprive them of their money.

[14] In the result the following order is made:

1. The appeal against conviction is dismissed.
2. The appellant bail is revoked and is ordered to report to the clerk of the court Boksburg within 72 hours of this order.

L. WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree.

A. P. BEZUIDENHOUT

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Counsel for the appellant: Mr Nkuna

Instructed by: Nkuna Attorneys

Counsel for the respondent: Advocate H.H.P. Mkhari

Instructed by: Office of the State Attorney, Johannesburg

Date of hearing: 29 October 2018

Date of judgment: 2 November 2018

[1] 1997

(2) SACR 641 (SCA) at 645 G – H.

[2] Snyman CR Criminal Law 5ed (Durban: Lexis Nexis 2008) at 531

[3] Davies 1928 AD 165

[4] S v Luther 1962 (3) SA 506 A; S v Qumbella 1966(4) SA 356 A; S v Hartyani 1980(3) SA 613 T.

[5]

[2000] ZASCA 112; 2000

(3) SA 381 (SCA) at para.[97].

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