

SOUTH AFRICA / JUDGMENT

Ofarah v S (A153/2011) [2013] ZAGPJHC 216 (26 August 2013)

[2013] ZAGPJHC 216

COURT

South Gauteng High Court, Johannesburg

BEFORE

P.N. Levenberg, M. Tsoka

CASE / FILE NUMBER

A153/2011

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IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE

NO: A153/2011

DATE:26/08/2013

In

the matter between:

OFORAH,

VICTOR.....Appellant

and

THE

STATE.....Respondent

JUDGMENT**I. INTRODUCTION**

In this matter, the Appellant was charged in the Regional Magistrate's Court, Johannesburg, with various counts of fraud, forgery, and possession of stolen property. He was convicted in the Regional Magistrate's Court, on one count of fraud, several counts of forgery, and several counts of being in possession of stolen property. He was sentenced to an effective total of 14 years imprisonment. He now appeals against his conviction on all counts and his sentence.

The Appellant's troubles started on 6 July 2007, when representatives of the South African Police Services ("the SAPS") attended at premises which they contended were the Appellant's business premises to execute a search warrant. Various items were seized during the course of that search.

These items included the documents that form the subject matter of the forgery charges; numerous passports of various nationalities; and certain stamps ostensibly emanating from, inter alia, the Departments of Labour and Home Affairs, upon which the charges of receiving stolen property were based.

With the exception of the fraud charge on Count 1, all of the convictions on all counts were based upon the presence of the items seized in the search in the alleged offices of the Appellant and upon inferences that the State sought to draw from the Appellant's alleged possession of these items. Had the search not occurred, the State would have had no evidence that could have been used against the Appellant on any count, except Count 1. The validity of the warrant is therefore central to the validity of all convictions, except for Count 1.

Based upon the presence of the items seized, the State contended that the Appellant was in effect running a fraudulent "mini Home Affairs". The implication was that the Appellant was illegally procuring visas, permanent residence permits, identity documents, passports and the like for foreign nationals, who were not entitled to them. The State then attempted to articulate charges against the Appellant arising out of these alleged illegal activities.

We analyse the charges and the evidence led in support of the charges in more detail below.

There has been some delay in the hearing of this appeal as a consequence of the fact that the Magistrate's judgment was lost. Eventually the Appellant obtained a mandamus against the Magistrate forcing him to reconstruct and reproduce his judgment. The Magistrate has now produced a comprehensive 84 page judgment in compliance with that order. There is an objection from the Appellant to the process that was followed by the Magistrate in reconstructing his judgment. We do not consider this to be a good point. In view of the fact that the Magistrate's judgment was lost, an ex post facto reconstruction was unavoidable.

II. THE CONVICTION ON COUNT 1

Under Count 1, the Appellant was charged with fraud in that, on 6 July 2007 (the day of the search), the accused falsely represented to representatives of the SAPS that "he was a consultant employed by Department of Home Affairs", when in fact he was not a consultant employed by the Department of Home Affairs. The circumstances giving rise to this charge arose in the following manner.

Muzi Sebastian Khumalo, a Captain in the SAPS, was in charge of the execution of the search warrant on 6 July 2007. He arrived at the premises to be searched and introduced himself to the receptionist whose first name was Sharon. The receptionist then

placed a telephone call, allegedly to the Appellant, who arrived at the premises shortly thereafter.

When the Appellant arrived at the premises, the representatives of the SAPS introduced themselves to him. Khumalo testified that, at that point, the Appellant stated that he was a "Home Affairs consultant".¹ The fraud charge on Count 1 was based solely upon this alleged representation.

Joubert: The Law of South Africa: 2nd Ed: V6 para 306 defines fraud as: “The unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.”

The linguistic content of the alleged misrepresentation is hard to understand. The term “a consultant employed by Department of Home Affairs” can mean any number of things. Does it mean that he is an “employee” of Home Affairs? Does it mean that he has been engaged by Home Affairs from time to time to perform services for them? Or is it simply imperfect English meaning “I am a consultant for private individuals who need help with procedures at Home Affairs”? It is reasonably possible that, even if the statement was made in the exact form alleged by Khumalo, that is what the Appellant intended to convey.

The ambiguity of the alleged statement makes it difficult to determine beyond reasonable doubt that the Appellant intentionally made a false representation that caused actual or potential prejudice.

Moreover, the evidence of Khumalo is contradicted by the evidence of another one of the State witnesses charged with carrying out the search warrant, Inspector Muzi Jeffrey Malinga. Malinga states that, when the Appellant arrived at the premises: “He told us that it was his place and he was the one who was operating there under the Oforah Immigration Consultant”.² There is no suggestion by Malinga that the Appellant represented himself as a consultant or employee of Home Affairs.

Having regard to the vagueness of the alleged representation and the contradictions between the State’s own witnesses, we cannot find that the misrepresentation has been proved beyond reasonable doubt. We think that it is more probable that the Appellant represented himself to be an immigration consultant than that he would have suggested that he was somehow officially connected to Home Affairs.

There is also no evidence that the Appellant made the alleged statement with intent to defraud or that the statement caused actual or potential prejudice to the Police. There is absolutely no suggestion by the State witnesses as to what the actual or potential prejudice arising out of the alleged misrepresentation might have been.

Generally speaking, it is undesirable to elevate an exculpatory statement made by an accused person at the time of his arrest, however fantastic it may be, to the level of a fraudulent misrepresentation. As a practical matter, any experienced police officer presented with a false exculpatory statement by a suspect is unlikely to believe it and to act in a manner that is potentially

prejudicial to the administration of justice. It is usually undesirable for the police to use these types of exculpatory statements (which rely only upon the word of the policeman against that of the accused) to substitute for real evidence in support of the real charge for which the accused is arrested or searched in the first place.

Accordingly, we find there is insufficient evidence to convict the Appellant on Count 1. The conviction on Count 1 (together with the sentence of two years) is therefore set aside.

III. THE ADEQUACY OF THE SEARCH WARRANT AND ITS IMPACT ON THE STATE'S CASE

After introducing themselves to the Appellant, the police then conducted a search of the premises. On the floor they found boxes of passports appertaining to various nationalities. These passports were allegedly photographed³. By the time that the matter came to trial these passports had allegedly been lost. As the passports did not form the subject

matter of any charge, we do not deal with them further.

Between the wall and certain steel cabinets on the premises, the police found several stamps – i.e. objects with handles and inscriptions on the bottom, which can then be dipped in ink and stamped onto official documents or documents that are being

made to look official.

The stamps ostensibly emanated from the Department of Labour, the Department of Home Affairs, the Santa Gold Clinic, Dr M.A. Muhammed and the Central Criminal Register in Lagos.

These stamps formed the subject matter of Counts 25 – 31 – possession of goods (other than stock or produce) in regard to which there was allegedly a reasonable suspicion that the goods had been stolen and the Appellant was unable to give a satisfactory account of such possession.⁴

In addition, certain allegedly forged documents were found on the premises. These documents formed the subject matter of Charges 2 – 23, a number of which were discharged at the close of the State's case.

The forgery charges that remained after the close of the State's case were Count 4 (a medical certificate ostensibly issued under the name of Dr M.A. Muhammed); Count 5 (a radiological report issued under the name of the Santa Gold Clinic); Count 14 (a medical certificate of Tamele Sansow purportedly issued under the name of Dr M.A. Muhammed); Count 15 (a radiological report

of Akpakpan Victor, ostensibly issued by the Santa Gold Clinic); Count 18 (a medical certificate of Mr Teko allegedly issued by Dr M.A. Muhammed).

No evidence was tendered that the Appellant had been seen using the stamps or forged documents for any purpose or that he had been trying to pass them off as valid stamps or documents. No evidence was tendered that the Appellant was involved in activities

which utilised those stamps and forged documents. The State's case was based entirely upon the fact that, during the course of the search, these documents were found on premises that were allegedly controlled by the Appellant.

It follows that, if these items were improperly seized during the course of the search, all evidence connecting the Appellant to Counts 4, 5, 14, 15, 18, and 25 – 31 might have to be ruled inadmissible, resulting in acquittals on all of those charges.

The search warrant in this case is a most unsatisfactory document. In Section II it is stated that:

“Whereas it appears to me from the criminal proceedings in the State v Victor surname unknown which person(s) is/are charged with not yet charged case no [blank] that there is an article to wit computers which is required as evidence at such proceeding and which:

is concerned in the commission of an offence,

is concerned in the suspected commission on an offence,

is on reasonable grounds believed to be concerned in the commission of an offence,

is on reasonable grounds suspected to be concerned in the suspected commission of an offence,

may accord evidence of the commission of an offence,

may afford evidence of the suspected commission of an offence,

is intended to be used in the commission of an offence,

is on reasonable grounds believed to be intended and to be used in the commission of an offence.”

The search warrant does not, as it should, specifically identify the parties who can conduct the search. It authorises “the Station Commander” (who is not identified) at an unknown police station to approach premises located at “35 Diamond House, corner Stiemens and Miller Street” and to “enter and search on the premises and, if found to seize” the “computers” (which are also not specifically identified).

The warrant also does not identify the specific office premises on the property concerned or even the suburb at which the search is to take place. The affidavit (allegedly made on oath, which should have disclosed reasonable grounds to believe that the search warrant was appropriate) was never produced at the trial or adequately explained.

Section 35(5) of the Constitution of the Republic of South Africa of 1996 (“the Constitution”) provides:

“35(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice”. [emphasis added].

Section 14 of the Constitution provides:

“Everyone has the right to privacy, which includes the right not to have –

their person or home searched;

their property searched;
their possessions seized; or
the privacy of their communications infringed.”

Section 10 of the Constitution provides:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

Section 36 of the Constitution provides that the rights in the Bill of Rights “may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”, taking into account various factors, as specified in the section.

It follows that a search of the nature conducted by the Police in this case would be unconstitutional under sections 10 and 14 of the Constitution, unless it is authorised in terms of a law of general application that complies with the requirements of

Section 36 of the Constitution.

The law of general application that permits searches and seizures is to be found in sections 20 – 22 of the Criminal Procedure Act 51 of 1977 (“the CPA”). The relevant provisions are:

“20. The State may, in accordance with the provisions of this Chapter, seize anything (in this Chapter referred to as an article) –

which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;

which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or

which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.

21(1) Subject to the provisions of sections 22, 24 and 25, an article referred to in section 20 shall be seized only by virtue of a search warrant issued –

by a magistrate or justice of the peace, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that such an article is in the possession or under the control of or upon any person or at any premises within his area of jurisdiction; ...

(2) A search warrant issued under subsection (1) shall require a police official to seize the article in question and shall to that end authorise such police official to search any person identified in the warrant, or to enter and to search any premises identified in the warrant and to search any person found on or at such premises. ...

22 A Police official may without a search warrant search any person or container or premises for the purpose of seizing any articles referred to in section 20 –

- (a) if the person concerned consents to the search or the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and seizure of the articles in question; or
- (b) if he on reasonable grounds believes –
 - (i) that a search warrant will be issued to him under paragraph (a) of section 21(2) if he applies for such warrant; and
 - (ii) that the delay in obtaining such warrant would defeat the object of the search.” [emphasis added].

In *The Minister of Safety and Security v Van Der Merwe & Others* 2011 (2) SACR 301 (CC), the Constitutional Court considered the validity of a search warrant. At para [21], the Constitutional Court held:

“[21] Search and seizure warrants by their very nature implicate at least two Constitutional rights, namely the rights to dignity and privacy. ...

- [35] All law-abiding citizens of this country are deeply concerned about the scourge of crime. In order to address this problem effectively, every lawful means must be employed to enhance the capacity of the Police to root out crime or at least reduce it significantly. Warrants issued in terms of s21 of the CPA are important weapons designed to help the police to carry out efficiently their constitutional mandate of, amongst others, preventing, combating and investigating crime. In the course of employing this tool, they inevitably interfere with the equally important constitutional rights of individuals who are targeted by these warrants.
- [36] Safeguards are therefore necessary to ameliorate the effect of this interference. This they do by limiting the extent to which rights are impaired. That limitation may in turn be achieved by specifying the procedure for the issuing of warrants and by reducing the potential for abuse in their execution. Safeguards also ensure that the power to issue and execute warrants is exercised within the confines of the authorising legislation and the Constitution.
- [37] These safeguards are: first, the significance of vesting the authority to issue warrants in judicial officers; second, the jurisdictional requirements for issuing warrants; third, the ambit of the terms of the warrants; and fourth, the bases on which a court may set warrants aside ...
- [39] Secondly, the section requires that the decision to issue a warrant be made only if the affidavit in support of the application contains the following objective jurisdictional facts:

- (i) the existence of a reasonable suspicion that a crime has been committed; (ii) the existence of reasonable grounds to believe that objects connected with the offence may be found on the premises or persons intended to be searched. Both jurisdictional facts play a critical role in ensuring that the rights of the searched person are not lightly interfered with. When even one of them is missing, that should spell doom to the application for a warrant.

[40] The third safeguard relates to the terms of a warrant.

[41] The last safeguard comprises the grounds upon which an aggrieved searched person may rely in a court challenge to the validity of a warrant. The challenge could be based on vagueness, over breadth or the absence of jurisdictional facts that are foundational to the issue of a warrant.

[42] A discussion of these safeguards highlights the centrality of the offence in the issuing of a warrant and sets the stage for the analysis of the intelligibility principle.

[43] The intelligibility requirement is a common law principle introduced by the courts and is quite separate and distinct from the requirements of ss20 and 21. As the name suggests, intelligibility is on the one hand about ensuring that the police officer understands fully her authority in the warrant to enable her to carry out the duty required of her, and on the other that the searched person also understands the reasons for the invasion of his privacy ...

[55] What emerges from this analysis is that a valid warrant is one that, in a reasonably intelligible manner: (a) states the statutory provision in terms of which it is issued; (b) identifies the searches; (c) clearly mentions the authority and confers upon the searcher; (d) identifies the person, container or premises to be searched; (e) describes the article to be searched for and seized, with sufficient particularity; and (f) specifies the offence which triggered the criminal investigation and names the suspected offender.

[56] In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:

- (a) The person issuing the warrant must have authority and jurisdiction; (b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts; (c) the terms of the warrant must be neither vague nor overbroad; (d) a warrant must be reasonably intelligible to both the searcher and the searched person; (e) the

court must always consider the validity of the warrants with a jealous regard for the searched persons constitutional rights; and

- (f) the terms of the warrant must be construed with reasonable strictness.”⁵ [emphasis added].

In the present case, the State has failed to demonstrate compliance with the second procedural safeguard for the issue of warrants as contemplated in Van Der Merwe in that there is no evidence that the warrant was issued on the strength of an affidavit that demonstrated the existence of a

reasonable suspicion that a crime had been committed and that there were reasonable grounds to believe that objects connected with the offence might be found on the premises or persons intended to be search. On the contrary, the fact that the warrant fails to identify any offence and states that nobody has as yet been charged, indicates, at least prima facie, that the jurisdictional requirement was not complied with. Had an offence been specified, it would surely have been identified in the warrant.

The warrant also fails to comply with the requirements of intelligibility on a number of counts: (i) it does not identify the offence; (ii) it does not identify the person to be searched; (iii) it does not identify the premises to be searched with sufficient specificity; (iv) it does not identify the searcher.

It follows that the warrant was invalidly issued. In addition, the search went significantly beyond what was specifically authorised in the warrant – i.e. the seizure of “computers”. None of the items seized which the State relied upon to prove its case fell under the rubric of “computers”.

In the result, as the warrant was invalidly issued and the evidence seized exceeded the terms of the warrant, the Appellant’s constitutional rights to privacy and dignity were violated in gathering the evidence. In terms of section 35(5) the evidence must be therefore be excluded if its admission “would render the trial unfair or otherwise be detrimental to the administration of justice”.

In *S v Tandwa* 2008 (1) SACR 613 (SCA) para [116], the Supreme Court of Appeal held in relation to section 35(5) of the Constitution:

“The notable feature of the Constitution specifically excludes the provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but when admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must excluded in all cases where submission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.” [emphasis added].

It is our opinion that, in the present case, the inclusion of evidence seized during the search would both render the trial unfair and be otherwise detrimental to the interest of justice for the following reasons.

In the present case, admitting the evidence could potentially render the trial unfair, because the fruits of the unlawful search are the only evidence against the Appellant on most of the offences charged. There is no corroborative evidence whatsoever to link the Appellant to the alleged crimes except for the evidence that was illegally

obtained in violation of his constitutional rights. The risk of a miscarriage of justice is made that much greater by the fact that there is no such corroborating evidence.

The admission of the evidence would in the circumstances of this case also be detrimental to the administration of justice. The warrant is so inadequate, cavalier and fatally defective, and the extent to which its terms were exceeded so significant, that the conduct of the SAPS, however well-intentioned it may have been, cannot be countenanced. Allowing evidence that is obtained in such a flagrantly unacceptable manner could lead to a plethora of similar unlawful searches and seizures by police.⁶

There is a suggestion by the State that the Appellant consented to the search because he did not object to it. Consent requires knowledge of the rights allegedly waived. In this instance, the Appellant was a layperson confronted with a number of policemen

and a search warrant. It would be asking too much of him to scrutinise that warrant, determine precisely in what respects it was invalid, and then have the courage to demand that the police desist from conducting the search.

In the words of Thring J in *Beheersmaatschappij Helling INV & Others v Magistrate, Cape Town & Others* 2007 (1) SACR 99 (C) 120-121:

“It seems to me, first, to be trite that, if the relevant search warrants were invalid because they had been unlawfully issued, no amount of consent or agreement by the targets of the search could have the effect of rendering them valid or lawful. I think it is very probable that the responses of the persons concerned would have been different had they not been shown the search warrants: in that event, they would, very probably, not have acquiesced or agreed to anything; ... They assumed (wrongly on my findings) that the police were entitled to act as they were acting. Secondly, it is quite clear that the targets of the searches were unaware, at the time, of the unlawfulness of the conduct of the police. They had no reason to believe that the search warrants had been issued unlawfully.”

The State also argued that the appellant’s legal representatives did not object to the introduction of the search warrant into evidence. The introduction of the search warrant into evidence in this particular case cannot validate the use of the fruits of the unlawful search.

In the State’s favour, there does not appear to have been any objection by the Appellant’s legal representative at trial to the introduction into evidence of the tainted items based solely upon the invalidity of the search warrant. However, we do not believe that this effectively validated the search and permitted the Magistrate to have regard to the fruit of the poisonous tree for the following reasons.

Section 35(5) of the Constitution is expressed in peremptory language. If the Court concludes that admitting the evidence would render the trial unfair or otherwise be detrimental to the administration of justice that it is the end of the enquiry. It is irrelevant whether the Appellant's counsel at trial was astute enough to raise an objection that he should have raised, although this may be a factor that the Court should take into account in determining whether the inclusion of the evidence would

render the trial unfair or otherwise be detrimental to the administration of justice.

In this case, we do not believe that the failure to object is sufficiently weighty in its consequences to warrant inclusion of the evidence. We are not satisfied that the Appellant's counsel properly addressed himself to the nuances of this issue at

the time when the evidence was introduced. The conduct of the police in relation to the issue and execution of the warrant is so flagrant that the failure to object cannot override the other considerations that militate in favour of excluding the evidence.

In any event, the Appellant maintained that the evidence had been planted on his premises and that the evidence that had been found had not been properly secured after the search. To our mind, this is close enough to an objection.

The defect in the search warrant cannot be remedied by recourse to section 22(b) of the CPA (which allows for searches without warrant where there are reasonable grounds to suspect that a search warrant will be issued and that delay in obtaining the warrant would defeat the objects of the search) for a number of

reasons:

To allow a Policeman who learns of something in the course of an otherwise unlawful search to legitimise his search by recourse to section 22(b) would defeat the constitutional injunction against search and seizure except by laws of general application.

It would discourage police from ensuring that they obtain proper warrants before they conduct a search and it is therefore not in the interests of justice.

It would encourage arbitrary police action.

In this case, the reliance on the illegally obtained evidence is especially egregious because all of the evidence was illegally obtained. In fact, the State does not seem to have relied in any way upon evidence that it extracted from the "computers" that were supposed to be the object of the search in the first place.

It follows that the State was not entitled to utilise the stamps and documents seized to prove the guilt of the Appellant. The State was also not entitled to introduce evidence that it had found the stamps and the allegedly forged documents on the premises.

Without the stamps and the allegedly forged documents as evidence, there was nothing to implicate the Appellant in the commission of counts 4, 5, 14, 16, 18 and 25-31. The finding that the evidence should not have been admitted must inexorably result in the

Appellant's acquittal.

Even if we are wrong in our view that the evidence should be excluded, there was in any event insufficient evidence to convict the Appellant of the counts in question for reasons more fully stated below.

III. THE FORGERY COUNTS – COUNTS 4, 5, 14, 15 AND 18

Even if the State is permitted to rely upon the illegally obtained evidence, the evidence tendered by the State still falls short of what is necessary to prove the forgery charges.

Joubert: The Law of South Africa: 2nd Ed: V6 para 317 defines forgery as follows:

“Forgery is committed by unlawfully creating a false document with intent to defraud to the actual or potential prejudice of another. It is a species of fraud. In forgery the misrepresentation takes place by way of the falsification of a document. Apart from this, all the requirements of the crime of fraud must be present, such as the intent to defraud and the actual or potential prejudice. However, whereas fraud is completed only where the misrepresentation has come to the notice of the representee, forgery is completed the moment the document is falsified. If the document is then brought to the attention of others, a separate offence is committed, namely uttering the document.”

In the present case, the State set out to prove that certain specified documents that were seized during the course of the search were forgeries. Assuming that the State had succeeded in proving that the documents concerned were forgeries, that would not

be sufficient evidence to convict the Appellant of the crime of forgery for the following reasons.

First, the fact that the Appellant may have been in possession of forged documents does not demonstrate that he himself is guilty of forgery or even that he was aware that there were forged documents in his possession. The crime with which the Appellant is charged is forgery, not possession of forged documents. To put it another way, there is no evidence that the Appellant committed the actus reus of forgery.

Second, there is no evidence that the Appellant intended to defraud.

Third, there was in any event, in our opinion, insufficient evidence that the documents concerned were even under the custody and control of the Appellant himself. The evidence that the offices being searched were in fact the offices of the Appellant

and that he was solely responsible for everything that came in and out of the office was inadequate.

Fourth, there was in any event no evidence at all to demonstrate that the radiological reports that form the subject matter of counts 5 and 15 were in fact forgeries.

IV. POSSESSION OF STOLEN PROPERTY – COUNTS 25-31

Counts 25-31 relate to a breach of section 36 of the GLA, which provides:

“Any person who is found in possession of any goods ... in regard to which there is reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.”

This statute has been interpreted by the Full Bench of the Transvaal Provincial Division in *State v Essack* 1963 (1) SA 922 (T) 924A-C as follows:

“As regards sec. 36 it is clear that the onus lies on the State in the first instance to establish affirmatively that the goods in question were found in the possession of the accused and that there exists a reasonable suspicion that they were stolen. In R v Tsotitise & Another, 1953 (1) SA 239 (T), and R v Hassen, 1956 (4) SA 41 (N), it was held that to be ‘found in possession’ one must at least have direct control over the article in question ...

It is also apparent from the decision in *R v Ismael & Another*, 1958 (1) SA 206 (AD), ... that the suspicion mentioned in the section must be one founded on reasonable grounds, and it must appear in the mind of the person holding such suspicion at the time when the accused is still in possession of the goods in question. It is not the court that must have the suspicion, but it is for the court to say whether objectively there were reasonable grounds at the relevant time for the suspicion held. It is only when these elements have been established that the question arises as to whether the accused has been unable to give a satisfactory account of his possession. That account may be given at any time, even for the first time in court.” [emphasis added].

The stamps were found during the course of the search by Malinga. Both Khumalo and Malinga testified that Malinga had found the stamps.

We have been unable to find any passage in the testimony-in-chief of either of these two witnesses that indicates that, at the time that the stamps were found, either of them harboured any suspicion at all that these items were stolen property. It appears to us that the “suspicion”, if it was formed at all, was formed afterwards, when the prosecution perhaps concluded that possession of stolen property was an easier charge to prove in the circumstances than fraud or forgery. In the absence of evidence that there was a reasonable suspicion in the minds of the Police who took possession of the stamp at the time of the search, no conviction is possible.

We also do not believe that the State has proved beyond reasonable doubt that the Appellant was in possession of the stamps. The State has not demonstrated that the premises were in fact leased or owned by the Appellant or that the Appellant was the principal of that business, or that the Appellant exercised control over the stamps.

The State has also not proved that the Appellant was aware that the stamps were in the offices searched. In this respect, the State’s evidence is that the stamps were found in a bag concealed between items of furniture. It is reasonably possible that

the Appellant, who alleges that the items were planted by the police, was unaware that these items were on the premises.

For the State to succeed, it is also necessary for the Court to be satisfied that any suspicion that was held was objectively reasonable. In our opinion, even if there had been a suspicion at the time that the stamps were stolen, the suspicion that the goods were stolen items was not objectively speaking reasonable. As emerges from the State's evidence that is more fully analysed below, the stamps that appeared to emanate from Home Affairs, the Department of Labour, and Dr Muhammed, did not in fact emanate from those sources. The evidence of the State's witness was the stamps concerned did not conform to the stamps of the alleged victims of the offence. In short, the stamps were probably forgeries, not stolen items.

In this respect, the State called a representative of the Department of Labour to testify, Elvin Phillips. Phillips testified that the stamp that ostensibly emanated from the Department of Labour did not have its origins there because:

"[T]he Department of Labour, we do not use the word Provinsiaal, we would have used the word provinsiale derateure and also the other striking thing that is incorrect of the stamp is vanaarheit, the Department van Aarheit. Van Aarheit is actually two words and not one word.

Sir, that stamp you see in front of you, is it a (sic) official Department of Labour stamp or not? – No, this is not an official Department of Labour stamp.”⁷

The State also called as a witness, a representative of the Department of Home Affairs, Antoni Botes. He testified that the so-called “Department of Home Affairs” stamp also did not emanate from that department. He stated:

“Sir, you said it supposedly belong (sic) to the Home Affairs. Can you describe what you mean with the term “supposedly”? – Ja, it is a square stamp as we use but there are two blatant mistakes on it or incorrect forms or formats of fonts.

Can you describe to us, I am not familiar with the stamp? – Okay, if you have a look at the font where it says Department of Home Affairs and the font where it says Johannesburg, it is two different fonts. In other words, it is two different types of lettering. Another problem on the stamp is that it has a word date included on it in a different font altogether from any of the others whereas in the official stamps this word does not appear at all.

Sir, I see there is numbering at the bottom of the stamp. Can you explain that to the Court? – Any stamp in the Department's possession has got a number from one up to the amount of stamps allocated to the certain office. It also enables any person with the Department to find out who stamp 176 would belong to it if it was issued to him officially ...

Sir, in your opinion is this an original authentic Home Affairs stamp? – Definitely not.”⁸
[emphasis added].

As regards the stamp that purportedly emanated from Dr Muhammed, it was Dr Muhammed's evidence that he did not believe that the stamp had emanated from his office because the address used on the stamp had changed. Although he was not absolutely certain that it was not his stamp, his evidence makes it doubtful that it was.

Strangely enough, no evidence at all was tendered concerning the provenance of the stamp that emanated from the SAPS. This is surely something that the police could have confirmed emanated from the offices of the SAPS if indeed it did.

Based on the evidence of the State, it seems likely that the Police would have assumed, at the time that they found the stamps that the stamps were forgeries and not stolen items. In any event, objectively speaking, that appears to be the reasonable suspicion in the circumstances. The fact that the stamps were probably forgeries demonstrates that there was no reasonable suspicion that they were stolen property at the time. Even if there was such a suspicion, the suspicion was not objectively reasonable.

It may seem unjust that the Appellant can escape a conviction on section 36 of the GLA because the stamps were forgeries and not stolen items. However, one can assume that the State chose to charge the Appellant under section 36 of the GLA because it recognised the difficulties that it would have in proving that the Appellant was the forger simply because forged stamps had

been found on the premises concerned. As this was the State's election the State must take the consequences if the charges that it formulated were not proved.

V. THE EVIDENCE OF THE APPELLANT

The Appellant chose to testify at the trial. On the face of it, his evidence was unimpressive and took the matter no further. He denied that he was involved in any illegal activity and maintained that the stamps had been planted on the premises.

In reaching our conclusion, we do not rely in any way on the Appellant's evidence. Our judgment is based entirely upon the State's failure to prove guilt beyond reasonable doubt.

VI. CONCLUSION

Accordingly, for the reasons set forth above we conclude that the State failed to prove its case against the Appellant on any of the charges on which he was convicted. The Appellant appears to have been convicted based more upon suspicion, conjecture and atmosphere than upon hard evidence that demonstrated his guilt beyond reasonable doubt.

This outcome is unfortunate because, if the State's suspicions are correct, fraud, forgery and illegality on a grand scale (in which the Appellant was involved) may have been going on in the premises searched. But the State and the SAPS have only themselves to blame for their failure to prove their case. Arbitrary and over-reaching police action can never serve as a substitute for a thorough and competent police investigation.

In the result we make the following order:

The appeal is upheld in its entirety.

The judgment is set aside and substituted with the following:

“The accused is found not guilty of all charges and is acquitted.”

P.N. LEVENBERG, AJ

ACTING JUDGE OF THE HIGH COURT

I agree.

M. TSOKA, J

Counsel for the Appellant: Adv JR Bauer

Instructed by: Potgieter, Penzhorn & Touts Attorneys.

Counsel for the Respondent: Adv V. Maphiri

Instructed by: The Director of Public Prosecutions.

1 Record: p13 l12-14.

2 Record: p133 l4-6.

3 Record: p870.

4 See Section 36 of the General Law Amendment Act 62 of 1955 (“the GLA”), which is analysed in more detail below.

5 See also *Powell NO & Others v Van Der Merwe NO & Others* 2005 (5) SA 62 (SCA).

6 *Beheersmaatschappijhelling INV & Others v Magistrate, Cape Town & Others* 2007 (1) SACR 99 (C) 116.

7 Record: p191 l20-25.

8 Record: p195 l23-p196 l8.

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