

SOUTH AFRICA / JUDGMENT

Phiri v S - Appeal Judgment (A21/2022)

[2023] ZALMPTHC 7 (17 July 2023)

[2023] ZALMPTHC 7

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi, MF Kganyago

CASE / FILE NUMBER

A21/2022

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IN THE HIGH COURT OF

SOUTH AFRICA

LIMPOPO LOCAL

DIVISION, THOHOYANDOU

CASE NO:

A21/2022

REPORTABLE: YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date:

17/07/2023

AML

PHATUDI

THANDI

PHIRI

APPELLANT

AND

THE

STATE

RESPONDENT

APPEAL JUDGEMENT

AML PHATUDI J

[1]

This is an appeal against convictions and sentences handed down in the Regional Court for the Limpopo Division, Musina (per Dr H Cloete), on four (4) fraud counts relating to customs and excise matters.

[2]

The State alleged that the appellant unlawfully and with intent to defraud, gave out and pretended to SARS or its officers, that the endorsements or information depicted on the bills of entry (referred throughout the trial court's proceedings as DA73) with serial numbers- S/29227/07, S/29228/07, S/29229/07 and S/29230/07 - were true and correct.

[3] The

State alleged further that the appellant presented the said bills of entry, being an officer or an employee of SARS Beit Bridge Customs Office. When she declared that she inspected, processed and certified that the consignments linked to the serial numbers, have been duly cleared for export by the Beit Bridge Customs Office of SARS, whereas in truth and in fact, she knew that the said bills of entry were not presented to her and she did not physically inspect the goods or consignments.

[4] The

appellant, tipping the fraudulent scales, affixed her office stamp numbered eleven (11) for operations team depicted on the said bills of entry. All these amounted to misrepresentation which caused the South African Revenue Services to suffer prejudice, actual or potential, to the amount of R1 103 413.00.

[5] The

trial court pronounced a guilty verdict on all four (4) main counts. In meting out the sentence, the trial court took all four counts as one for purposes of sentence and sentenced the appellant to four (4) years direct imprisonment. The trial court added: "The court will just, in case you are released again because of the rules and the new rules of correctional services, add another three (3) years, suspended for five (5) years on condition that you are not convicted of fraud again."

[6]

The appellant approaches this appeal court with leave, against convictions and sentences, of the trial court. Immediately thereafter, the trial court admitted the appellant to bail[1]

pending appeal, subject to certain conditions. She, however, failed in her application for variation and relaxation of bail conditions. To date, the appellant is on bail pending the outcome in this appeal.

[7] The

appellant was an External Verification Officer (EVO) employed by the South African Revenue Services (SARS) attached to the South African Revenue Services Customs and Exercise Office(s) (Customs) at Beit Bridge Boarder Post (BB).

[8]

On 20 November 2006, the appellant, as EVO, was at work at BB, mainly to physically inspect the goods and or consignments and to verify the information depicted on DA73[2] - with a view to clear those goods or consignment(s).

[9]

SARS Specialist Investigator's office received a tip-off of fraudulent activities of certain clearing agents. The investigation led to the discovery of some irregularities in some DA73s. The irregularities amounted to a number of 'ghost exports.'

This means that a document (DA73) would be stamped, as if inspected, and certified but the goods or consignment, whereas in fact, they did not leave the country.

[10] The Specialist

Investigator(s) depicted irregularities in some DA73 inspections conducted at BB. They found that the stamp used on the said documents, is the stamp allocated to the appellant. The appellant admitted that the stamp used on the documents is hers. She further admitted that she is the one who inspected the goods, though not everything that was on the truck. The appellant, as EVO, conceded that she is duty bound to verify, that which is on the document (DA73) with what is in the consignment or truck.

What is documented

in DA73 must correspond to the letter, the motor vehicle that carries the consignment.

[11] The appellant

conceded further that the subject DA73 and related documents forming part of investigation, had serial numbers- S/29227/07; S/29228/07; S/29229/07 and S/29230/07. The appellant admitted to have stamped all the documents referred.

[12] The evidence

led, demonstrated, for instance, in S/29228/07, the exporter made use of a truck with registration letters and numbers TNJ [...] and a

trailer with registration letters and numbers FDX [...]. The investigation revealed that TNJ [...] is the number plate assigned to a forklift belonging to Barlow World Company with its main offices in Cape Town, on the one hand, and, on the other, FDX [...], is a number plate assigned to a taxi in Jabulani street, Johannesburg. The owners of the actual vehicles bearing the said registration numbers denied having ever transported any goods to Zimbabwe, let alone being in BB.

[13]

The motor vehicles mentioned in S/29227/07 – marked Exhibit A1; S/29229/07 – marked exhibit C and S/29230/07

– marked

exhibit D, were untraceable in South Africa. Further investigation revealed that in one of the exhibits, only the “horse”[3]

went through the border post but not the “truck and trailer.”

[14] The evidence

led by the State demonstrated that all those transactions referred to in the serial numbers, are fraudulent representation concerning the consignments and details of the motor vehicle. The State further demonstrated that the SARS suffered prejudice, or, potential prejudice, amounting to R1 103 413.00.

[15] The appellant

challenges the judgment of the trial court on the basis that the ‘State has dismally failed to prove beyond any reasonable doubt, firstly, that the appellant made an unlawful and intentional misrepresentation and, secondly, that SARS suffered actual or potential loss’. The other ground of appeal is that ‘the court a quo erred in its judgment...that the prejudice element of fraud is contained in exhibit A1, B, C and D.’

[16]

It is perhaps an opportune time to first define the offence- fraud.

It is the

unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. A

settled classical legal position is that ‘

. . fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in the truth, or (3)

recklessly, careless whether it be true or false. Although I have treated the second and third as distinct

cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth.’[4]

Snyman

describes the elements of the crime to be the following: “(a) a misrepresentation (b) actual prejudice (c) a causal link between the misrepresentation and the prejudice (d) an appropriation of the property (e) unlawfulness and (f) intention.”[5]

[17]

I find it apposite to indicate, as a point of departure, the principle set in R v Dhlumayo and Another[6].

It is stipulated that

‘A

court of appeal must bear in mind that a trial court saw the witnesses in person and could assess their demeanour. If there was no

misdirection of facts by the trial court, the point of departure is that its conclusion was correct. The court of appeal will only reject

a trial court’s assessment of evidence if it is convinced that the assessment is wrong. If the court is in doubt, the trial court’s

judgement must remain in place. The court of appeal does not zealously look for points upon which to contradict the trial court’s

conclusions, and the fact that something has not been mentioned does not in itself mean that it has been overlooked.’[7]

[18]

It is trite law that an appeal court decides the appeal on the facts before it as contained within the four corners of the record of

appeal. The appeal court is thus duty bound to establish from the record, if the trial court, either misdirected itself on facts, or,

applied the law erroneously to the facts. The appellant bears the onus to satisfy this appeal court, that the trial court misdirected

itself and/or erred when assessing the evidence based on the facts and the law before it[8].

[19]

The trial court assessed the evidence tendered and indicated that ‘as far as the credibility is concerned...

the [appellant] was

unable to explain in detail and answer certain questions’.

Counsel representing the appellant was constrained to concede that

the evidence of Van Der Walt was explicit in as far as the procedure

an inspecting officer is expected to follow when inspecting, verifying and clearing the consignment at the border post. [20] Counsel opines that the State failed to prove either actual or potential prejudice. He concedes that the evidence of Van Der Walt, corroborated by the appellant's testimony, demonstrates that indeed the goods and or consignments as per serial numbers mentioned, did not exit the BB. He submits that the appellant's main contestation is that the State did not prove prejudice.

[21] The issue to be determined is whether the appellant's misrepresentation demonstrated in serial numbers mentioned hereinabove, prejudiced the State.

[22] The Supreme Court of Appeal held in *S v Shaik*[9] and others that 'potential prejudice is occasioned at the time of making the false representation...'

[23] Van Der Walt testified that there is prejudice towards the State because there were no goods that was supposed to have been supervised by Northern Haulage ever came to BB border post or left the border post. This, according to Van Der Walt, means that the goods went somewhere but not outside South Africa. The prejudice is the value of the goods that are not exported, although the documents shows otherwise.

[24] Custom duties and VAT are not payable on the exports but payable on imports. When goods that are destined to exportation and are not exported, custom duties and VAT becomes payable because the goods are in the hands of local market and will be calculated on customs value.

[25] The customs value is used to calculate the custom duties and the Value Added Tax. The customs value is not the money that is due and payable to SARS, but it is the value on which the Duties and VAT is based. When said that there is a loss or potential loss to the State, such is determined on the customs value, because it is the value that as attached to that specific commodity. In casu, potential loss, or, potential prejudice the State stands to suffer, amount to R1, 103 413.00, calculated on the basis

that the goods were never exported. The goods, as demonstrated, are likely to be sold with no VAT and Income Tax being paid to SARS. The actual or potential amount the State stands to lose (prejudice) is what the State calculated as the customs value declared on each of the bills of entry and not what the defrauder gained.

[26] The appellant knew when she appended her signature on the bills of entry that the representation was false. The State proved a causal link between the misrepresentation and the prejudice.

[27] It is trite law that the appeal court is duty bound to establish from the record, if the trial court, either misdirected itself on facts, or, applied the law erroneously to the facts. I, having perused the trial court's judgment, am unable to find any fault that would warrant interference with its findings. In the result, the appellant's appeal on conviction falls to fail. She is the author of her own misfortune.

[28] The discretion as to what an appropriate sentence would be is pre-eminently on the doorstep of the trial court, which must be exercised, judiciously. A classical principle dictates that this appeal court should be careful not to erode that discretion. This appeal court would be justified to interfere only if the trial court's discretion was not judicially and properly exercised[10].

[29] In any event, counsel for the appellant submits that the appellant abandons her appeal against sentence. I loath to deal with the trial court's sentences. The sentences imposed by the trial court should as well stand.

[30] In the result,
I make the following order
ORDER

30.1

The appellant's appeal against convictions and sentences is dismissed

30.2

The appellant must report at Musina Police Station, Limpopo Province, within 72 hours from 18 July 2023

AML PHATUDI

JUDGE OF THE HIGH

COURT

I agree
MF KGANYAGO
APPEARANCES
FOR

THE APPELLANT: Adv.
JP MORTON
INSTRUCTED

BY: Erwee
Attorneys
MUSINA
FOR

THE STATE: Adv.
MM MAPONYA
INSTRUCTED

BY: DPP.
GAUTENG PRETORIA
SPECIALIST
TAX UNIT

HEARD: 03 February 2023

JUDGMENT: 17 July 2023

JUDGEMENT

DATE: Judgment handed down electronically by circulation to the parties' legal representatives by email and publication through SAFLII. The date deemed handed down is 17 July 2023.

[1] Bail fixed at the sum of R20 000.

[2] DA73- is a document purposely used for the clearing agent to request a Custom officer from SARS, to physically, inspect the consignment

that needs to be cleared.

[3] Horse- refers to an automotive vehicle with a short chassis equipped with a swivel for attaching a trailer and used especially for the highway hauling of freight.

[4] Rex v Myers [1948] 1 All SA 354 (A); 1948

(1) SA 375 (A) at 382; Ndwambi v S (611/2013) [2015] ZASCA 59; 2016 (2) SACR 195 (SCA) (31 March 2015)

[5] C. R. Snyman. Edition 4

[6] 1948

(2) SA 678 (A)

- [7] See: S v Robinson 1968 (1) SA 666 (A) @675 H; S v Hadebe and Others 1997
(2) SACR 641 (SCA) @ 645; S v Mononyane and Others 2008 (1) SACR 543 (SCA) [15]
- [8] See: Pillay v Krishner and Another 1946 SA 946 (A) page 941- G-h
- [9]
- [2006] ZASCA 105; 2007
- (1) SA 240 SCA
- [10] S v Rabie 1975(4) SA *55 (A)
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