

SOUTH AFRICA / JUDGMENT

Randell v S (CA&R393/16) [2017] ZAECHGC 130; [2018] 1 All SA 845 (ECG) (14 December 2017) [2017] ZAECHGC 130

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M Makaula, NG Beshe

CASE / FILE NUMBER

CA&R393/16

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION – GRAHAMSTOWN

Case No: CA&R

393/16

Date Heard: 6/09/2017

Date Delivered: 14/12/2017
In

the matter between: MICHAEL
WHARTON
RANDELL
Appellant
and
THE
STATE
Respondent

JUDGMENT

MAKAULA J:

A.

Introduction:

[1] The appellant was convicted on a charge of fraud on 20 April 2016 by the Regional Court sitting in Port Elizabeth. He was sentence to an effective term of imprisonment for four years imprisonment effectively. The appeal against conviction only is with the leave of the court a quo.

[2] The appeal is premised on irregularities and misdirections by the court a quo. The genesis of the grounds of appeal is the following dictum by the magistrate in his judgment:

“The observations made by Alkema J in the matter of Law Society of the Cape of Good Hope v Randell (sic) incidentally the same accused, 2015 JOL 33627 (EC) referred to because they are a truism in terms of the overwhelming evidence coupled with the undisputed evidence in this matter”.

[3] The rest of the grounds spiral from this quotation and the questioning of the accused by the court a quo.

B. The Issue:

[4] What this court has to decide is whether the irregularities and misdirections, if any, resulted in a failure of justice which

vitiating the proceedings.

C. The Law:

[5] Section 322 (1)(C) of the Criminal Procedure Act 51 of 1977 (the Act) provides as follows:

“322 Powers of court of appeal:

(1) In the case of an appeal against a conviction or on any question of law reserved, the court of Appeal may-

(a) . . .

(b) . . .

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect". (Emphasis added)

[6] Identical provisions are found in the predecessor of section 322(1)(C) of the Act, namely section 369(1) (a) of Act 56 of 1955

(the 1955 Act) especially the proviso thereto. Holmes JA,[1] dealing with the meaning of "failure of justice" in the context of the provisions of section 369(1)(a) of the 1955 Act had this to say:

"As to the meaning of "failure of justice", the Afrikaans text has to be considered because the 1944 and 1955 Acts was signed in Afrikaans. The former uses the word

"regskending" and the latter contains the expression "geregtigheid nie geskied nie". All these linguistic variants harmonise in meaning when one bears in mind what was said by De Wet, JA., In Rex v Rose, 1937 AD 467 at pp 476-7:

"Now the term justice is not limited in meaning to the notion of retribution for the wrongdoer: it also connotes that the wrongdoer

should be fairly tried in accordance with the principles of law."

In interpreting the proviso and seeking a test to apply, this court has decided in a series of cases that it will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity;

.

This is a sound general test which works well in most cases of irregularity. But it is not an exclusive test, and the courts

have more than once recognized that in an exceptional case an irregularity can be of such a nature as per se to amount to a failure of justice, and to be so held, without the necessity of applying the forgoing test". (Emphasis added)

[7] Prior and post 1994 the 'irregularities' referred to in the Act have been developed due to the provisions of section 25(3) of the Interim Constitution Act 200 of 1993 and the subsequent provisions of section 35(3) and 36 of the Constitution of the Republic of South Africa Act 105 of 1996.[2] (The Constitution)

[8] In State v Zuma[3], Kentridge AJ said the following about the importance of substantive fairness in relation to section 25(3) of the Constitution:

“That caveat is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman and Another; S v Mthwana 1992(1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the

function of a

Court of criminal appeal in South Africa was to enquire

‘whether there has been an irregularity or illegality, that is a departure from the formalities, rules in principles of procedure according to which our law requires a criminal trial to be initiated or conducted’.

A court of appeal, it was said at (377)

‘does not enquire whether the trial was fair in accordance with “notions of basic fairness and justice”, or with the “ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration”’.

That was an authoritative statement of law before 27 April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with justice ‘notions of basic fairness and justice’. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions”.

D. Background Facts:

[9] I mention upfront that, but for the irregularities and misdirections contended for by the appellant, it is not contested that the State proved beyond reasonable doubt that his actions amounted to fraud. Put differently, the evidence conclusively establishes the guilt of the accused beyond any reasonable doubt. I shall, below refer to such evidence.

[10] The appellant was an attorney by profession before he was struck off the roll of attorneys in the case mentioned in para 2 above. He served as the vice chairperson of the school Governing Body of Greenwood Primary School (the Governing Body) in Port Elizabeth. Mr Lascot, who passed away before the commencement of the trial in the court a quo, was the chairperson of the Governing Body. Mr Shelver, the Headmaster of the school at the time served as a Governing Body

member. The evidence reveals that the appellant was also the legal advisor to the school in his capacity as an attorney. Mr Shelver was charged with the appellant, however there was a separation of trials when he changed his initial plea of not guilty.

He pleaded guilty to theft and was convicted as such and received a non-custodial sentence. Mr Shelver testified against the appellant.

- [11] Briefly the evidence disclosed that Mrs Schauder, who is a relative of Mr Lascot, advised the latter during that she was selling her property described as 5 Forbes Avenue (the property). She was selling the property for R750 000.00. Mr Lascot informed the appellant and Mr Shelver about the sale of the property. After deliberations amongst them, it was agreed that a Trust be formed with the three of them being trustees and the school a beneficiary. Indeed the Greenwood Property Trust (The Trust) was established on 15 April 1999. He informed them that the property contiguous to the school was for sale.
- [12] Mr Lascot asked her to sell the property to the school. Because of her sentimental attachment to the school, she agreed and reduced the selling price to R500 000.00. The property was eventually sold to the school for an amount of R500 000.00 through an Estate Agent Mr Derek Owen Smith.
- [13] Prior to the registration of the Trust, the three of them approached the school Governing Body and informed it that the property was for sale. The Governing Body resolved on 15 March 1999 to purchase the property for the sum of R500 000.00. The Governing Body mandated them to register a Trust which would be the vehicle through which the property would be purchased for the benefit of the school. The school was to be the sole beneficiary. Indeed, as the trust documents reveal, the school was a sole beneficiary with the three of them being the Trustees.
- [14] The Trust, through a Standard Bank loan, purchased the property for R500 000.00. The Trust in turn leased the property to the school. According to the evidence of Mrs Jenniter Ann Hayson, the Bursar for the school, an initial amount of R100 000.00 was paid to the Trust. Thereafter monthly payments were made by the school to the Trust to cater for the monthly instalments. The instalments were R6231.31 which subsequently increased to R7000.00 and eventually to R9000.00 monthly. The instalments constituted a one third of the bond repayments. The balance to make up the full instalment was raised through rentals paid to the school by members of the public who rented the property.
- [15] On 2 August 2005 unbeknown to the school, the three of them took a resolution, since it was a discretionary Trust, to substitute

themselves for the school as beneficiaries. On 21 April 2006, they sold the property to Proud Heritage Properties 138 (Pty) Ltd for R3.5 million. The sale was not authorised by the Governing Body. In fact, they did not disclose it to the Governing Body. The purchaser, in terms of the sale agreement undertook to build six classrooms and two garages on the school grounds. The purchase price was shared between them in various forms. Apparently, the three of them represented to the governing body that the school, through the sale of the property, benefited the six classrooms, the two garages and a sum of R50 000.00 which was owed by the school to the Trust. They did not disclose to the school the actual benefit they received and shared amongst themselves.

- [16] Mr Jacobs, a chartered accountant from the firm Wessel Greeff, a firm of chartered accountants, was approached by the appellant to prepare annual financial statements for the Trust. According to the Trust documents the Trustees were Mr Shelver, Mr Lascot, and the appellant and the school was the sole beneficiary. When preparing the financial statements for the Trust, he was struck by the exorbitant amounts paid to the Trustees. He enquired from the appellant about the amounts. The appellant gave him an unsatisfactory response. Before the matter could be resolved he left Wessel Greeff and joined Mazars Moores Rowland another firm of chartered accountants.
- [17] Mr Steve Eugene Kapp, a partner in Mazars Moores Roland testified that he was in charge of the books of account for the school and was responsible for preparing its financial statements. He was in charge of the finances for the school and preparing its financial statements. He got the file for the school from Mr Jacobs. He familiarised himself with the file, having received some information from Mr Jacobs. In the process of drafting the financial statements and as he wanted to reflect the school as an asset of the Trust, he noticed that the Trust Deed had been amended by substituting the school as the sole beneficiary. The school was substituted for the three Trustees. He wrote to the Governing Body seeking a resolution to transfer the schools

beneficial interest to the Trustees. Albeit, after a long time, he received a letter penned by the appellant, as the chairperson of the Governing Body (which was read into the record), part of which states:

“ . . . The Greenwood Property Trust is a discretionary trust in terms of which the school is one of the beneficiaries. The question of a 100% beneficial interest does not arise. Whatever benefit accrues to the school accrues between the discretion of the Trustees. The school’s interest to the Trust does not constitute an asset until a vesting occurs at the discretion of the Trustees of whatever benefit is awarded to the school. There will be we believe any necessity for the financial statements to reflect a beneficial interest as such (sic). Please note that there is no suggestion that the beneficial interest was transferred to the Trustees of the Greenwood Property Trust. What transpires is that a Trustee awarded some benefits to all beneficiaries. This involved the payment of cash and also the construction of inter alia six new classrooms for the school. . . . ”

- [18] Mr Kapp was not satisfied with the response because no resolution to that effect existed. Furthermore, it was not the competency of the appellant to decide what was to be reflected as an asset in the financial statements’ so he felt. In fact, he held the view that the appellant was wrong to say that the property should not be reflected as such. He sought legal opinion which agreed with his sentiments. He wrote to the appellant and various members of the Governing Body, seeking to have a meeting with them. Not a single member of the Governing Body attended the scheduled meeting.
- [19] I mention at this stage that the letters were received by Ms Hayson who gave them to Mr Pike, an acting principal at the time. She opened the letter addressed to her and Mr Pike did likewise. She and Mr Pike agreed that the matter was serious enough to be brought to the

attention of Mr Shelver for his decision. On instructions of Mr Shelver all the letters addressed to the various Governing Body members were taken to the appellant's offices. The letters were accompanied by a schedule which required each member to acknowledge receipt by signing against his or her name. But for the signatures of Mr Hayson and Mr Pike, none of the Governing Body members signed. The inevitable conclusion, in light of later developments establishes that the appellant never gave them the letters hence none attended the meeting. Ironically, Mr Kapp was relieved of his duties as the auditor of the Trust without having received a satisfactory answer to his queries being provided.

- [20] In days to follow, the matter came up in a local newspaper. Members of the Governing Body, parents and everyone who had an interest in the school learnt for the first time from the newspaper, that the school was no longer the beneficiary and that the property had been sold by the appellant, Mr Shelver and Mr Lascot. One thing led to another and Mr Shelver and the appellant were subsequently charged criminally.

E. The Appeal:

- [21] The first leg of the appeal is premised on the provisions of section 35(3)(a) of the Constitution. The contention by the appellant is the extensive reference by the magistrate in his judgment to the judgment of Alkema J, without prior notice to the appellant that considerable reliance would be placed thereon, goes to the core of what constitutes a fair trial. It was stated that the appellant did not receive a fair trial because he was not forewarned that the findings of Alkema J could be used against him resulting in the audi alteram partem rule not being adhered to.

- [22] In amplification of this ground, Mr Hodes, on behalf of the appellant, argued as follows in his Heads of Argument:

“13 . . . The judgment in the application is a High Court judgment based upon the same facts in an application procedure against the appellant and contains factual findings of the kind the magistrate was required to make on the evidence that had been led in the trial before him. Additionally, Alkema J made findings regarding the character of the appellant and the magistrate accepted these without giving the appellant the opportunity to challenge them.

16. An issue that is most disconcerting is that the magistrate dealt with the judgment in the application in his reasons for granting leave to appeal and stated at Volume VI page 1249 lines 8 to 11 as follows:

“. . . was made reference to this particular judgment in terms of its legal position as to what constitutes dishonest, disrespectful or whatever other like conduct and that was the relevance of this particular judgment”.

17. In this regard, it is respectfully submitted that for a Presiding Officer to allow himself to be informed of or for him to take into account the bad character of an accused is detrimental to a fair trial and constitutes a failure of justice. This would be analogous to having regard to previous convictions during trial, which is a contravention of section 121 of the Criminal Procedure Act, 51 of 1977.
18. It is clear that the approach adopted by the magistrate in this regard was highly prejudicial by virtue of the effect that it had on his mind. Consequently, the appellant was seriously prejudiced and such an approach resulted in an unfair trial”.
- [23] The second leg relates to the questions put by the magistrate to the appellant. It was argued that the questions related to fiduciary duties owed by the appellant in his various capacities which issue is the cornerstone of Alkema J’s judgment.

The appellant argued that in hindsight, the magistrate may very well have had regard to the judgment in the application when he questioned the appellant, something which results in the impression that the magistrate wanted to produce answers which were favourable to the State. Such conduct suggested a preconceived bias against the appellant which resulted in irregularities, so it was argued.

- [24] The third leg is that the consequences of the approach adopted by the magistrate is that he committed the same mistake which was made by Alkema J in his judgment that the appellant met with Mrs Schauder, when in fact the appellant vehemently denied in his testimony that he met or spoke to her. That is based on an excerpt from the judgment where the magistrate said that the appellant as the member of the triad:

“Surreptitiously, deceitfully and dishonestly and fraudulently made misrepresentations firstly to Mrs Schauder by unlawfully and intentionally failing to disclose to her and their beneficiary intentions and interest in the purchase of the property and fundamentally caused her to sell the property at R250 000.00 less thinking that the sole beneficiary was the school”.

- [25] For the above reasons, the appellant argued that the conviction should be set aside on the basis that the irregularities and

misdirections committed by the magistrate resulted in a failure of justice which vitiated the proceedings.

F. The paragraphs in Alkema J’s Judgment relied upon by the Magistrate:

- [26] Apart from what I referred to in the preceding paragraphs, the following paragraphs from Alkema’s judgment referred to by the magistrate go to the root of the appeal before us. I shall, for the sake of completeness and due to their significant on the merits of the appeal include in their entirety the reference by the magistrate to the judgment of Alkema J. I quote verbatim from the judgment where the magistrate stated:

“The accused himself could not point out what shortcomings there were, if any, in the subsequent meetings in relation to the meetings in relation to the previous meetings or the minutes. (sic)

The following indications again emphasise that it was the school and not the triad that . . . I already touched on this one. (sic)

The observations made by Alkema J in the matter of Law Society of the Cape of Good Hope v Randell, incidentally the same accused, 2015 JOL 33627(EC) are referred to because they are a truism in terms of the overwhelming evidence coupled with the undisputed evidence in this matter.

In paragraph 28 he states:

“In this regard I point out that when the trust was formed the school issued a letter to the Master signed by Lascot and Shelver on behalf of the school in terms of which the school

consented in its capacity as the then sole beneficiary of the Trust to the Master exempting the Trustees of the Trust from furnishing security”.

I have already made reference to this. He then goes on to say:

“It is therefore not an issue of what the facts are but rather what construction should be placed on the agreed facts; put differently it is where the actions of the Trustees and that of the respondent particularly amount in law to dishonest behaviour”.

And then he goes on to say:

“The fiduciary duty can only arise in circumstances where the legal convictions of society recognise and give legal protection to a relationship between two or more persons in which one or more persons stand in a position of trust to another person or class of persons. If such a person acts in breach of the trust placed in him or her by the other person he or she acts in breach of his or her fiduciary duty and in law has to have acted wrongfully and unlawfully. It follows that the fiduciary duty may arise in all branches of the law, be it criminal, the law of contract, the law of persons or family or the law of delict. Examples are found in certain relationships between parent and child; teachers and learner and in this instance that relate to the accused, attorney and client; medical practitioner and patient; husband and wife (indistinct); employer and employee; trustee and beneficiary under a deed of trust or shareholder and a board of directors”. (sic)

Then he goes on to say:

“In terms of section 16(2) of the SA Schools Act 1996 a governing body stands in a position of trust towards a school”.

“The respondent served on the governing body of the school for an extended period of time. At the time of the relevant event he was the vice chairperson of the governing body of the school; as such he stood in a position of trust to the school. Secondly in his capacity as trustee of the trust he stood in a position of trust to the school which was a beneficiary of the trust”.

“It is now (indistinct) that a trust is not a separate entity such as for instance a company. However its assets and liabilities vests in the hands of its trustees who are required to keep trust separate from their personal assets and enjoyment. Trustees in their representative capacities are obliged to deal with a trust to further the interests of the beneficiary and not to further their personal interests. Trustees may however also be beneficiaries under a trust”.

Then it goes on to say:

“Where a fiduciary duty arises in a particular case will depend on the facts of such a case. For the reasons mentioned I have no doubt that on the facts of this case respondent at all material times had actually a fiduciary duty to the school. Those in a position of trust who have such a fiduciary duty must act in the best interests of the beneficiary of that trust and they may not act to their own advantage at the cost of the beneficiaries”.

Then the court also referred to the Supreme Court of Appeal where it says:

“Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret of it at the other’s expense, or place himself in a position where his interests conflicts with his duty. The principle underlies an extensive field of legal relationship”.

He then goes on to say:

“Nor can he make any profit his agency save the agreed remuneration”.

And he goes on to say:

“All such profits belong not to him but to his principal. There is only one way by which a transaction can be validated and that is by the free consent of the principal (indistinct) upon disclosure”.

It then quote from (indistinct) & Yates where he says:

“There are certain fundamental fiduciaries, fiduciary duties, trustees may accordingly not do any of the following. . .”

“On the respondent’s own version, he, Lascot and Shelper decided to use the trust as a vehicle to conduct their joint venture with the aim to benefit themselves financially. On the respondent’s own version the trust was established the school (indistinct) it had already decided to amend the trust deed (indistinct) by appointing themselves as the further beneficiaries. This was part of the plan and the only way in which they would benefit. Those intentions however were concealed from the school and the other members of the governing body. They appointed themselves secretly and planned the sale without the knowledge or consent of the school governing body”.

This is exactly what the evidence in this particular case also proves.

Then the Honourable Judge goes on to say:

“There is fallacy on the argument to say (indistinct) fiduciary duty does not arise from the terms of the deed of trust or from any

(indistinct). But from the peculiar relationship (reads very fast and softly and indistinct) . . . (sic) The law recognises the breach of such duty. As I noted earlier as wrongful and unlawful. The fact that the trustees may have acted strictly in accordance with the terms of the trust deed is neither here nor there. It does not diminish or negate the fiduciary duties which the respondent holds in law to the school. It also does not excuse the respondent in law to observe such duty and action according to (indistinct). Their failure to do so remains unlawful and wrongful notwithstanding that he may have acted strictly in accordance with the (indistinct) trust”.

Then towards what I am about to finish now on this:

“I have no doubt that he acted in a serious breach of his fiduciary duty to the school. The trust was the registered owner of the property it purchased from Mr Schuader. (Indistinct) to be used as a library. The duty of the trustees was to deal with the trust and not to further their own personal interests. The school as the sole beneficiary at all relevant times had (indistinct) and reasonable expectation that it will be informed of the extent (indistinct) of all trust assets and that such assets be held and managed by the trustees for the exclusive benefit of the school as sole beneficiary. These circumstances related a fiduciary relationship between the trustees and the school”.

And then further:

“(Indistinct) that he had little or no experience in trust law and was unaware that a fiduciary relationship existed and that he acted in breach thereof. The terms of the trust deed were (indistinct) and designed (indistinct). And the other two trustees was inherently dishonest and fraudulent. (Indistinct) the conduct was premeditated, carefully planned and executed over a period of time. The conduct has a strong (indistinct)”.

The Judgment of the court a quo:

[27] The magistrate dealt amply and correctly with the elements of fraud and the issue of onus and the principles applicable in establishing whether the State discharged the onus vesting on it. At the outset of its judgment the court a quo reasoned as follows:

“Coming back to the evaluation I have already indicated that the evaluation of witnesses evidence requires that one needs to look at the totality of the evidence, a court should avoid compartmentalisation and in the same vein the court should also eschew any personal approach on the evaluation of the evidence”.

[28] The court a quo in its evaluation of the evidence started by accepting that the minutes, which form the basis of the evidence of the witnesses, were a true reflection of the outcomes and resolutions taken in the SGB meetings held. It accepted the minutes as a synopsis of what took place in those SGB meetings. It found, correctly in my view, that the appellant attended most, if not all, the SGB meetings, particularly where the issue of the property was discussed. In this regard, the court a quo reasoned as follows:

“Accused was present at all the meetings of the s.g.b. in which or at least when the following took place;

- (I) According to the minutes when Shelver was tasked by the s.g.b. to look into the viability of submitting an offer for the purchase of the property by the school Exhibit “H1”;
- (II) When the s.g.b. was informed that Lascot and Shelver were negotiating terms with the bank and the seller as per Exhibit “H2”;
- (III) When Lascot presented the s.g.b. with a breakdown of costs for the purchase as well as alterations to the property, Exhibit “H3”;
- (IIII) When the s.g.b. decided that the purchase price of the property would be a sound investment and negotiations for its purchase should comments as per “H3”; (sic) and
- (V) When the s.g.b. was informed that Lascot and Shelver had entered into negotiations for the purchase price of the property and that a sum of R500 000.00 was agreed upon with the seller being responsible for the transfer costs as per “H4”;
- (IV) When a proposal was made that the property be purchased and all s.g.b. members agreed unanimously. It was said that the property was to be registered in the name of the Trust”.

[29] The minutes as found by the court a quo also reflect that the appellant was to draw up the Trust Deed and Mr Lascot to secure the financing of the property. A report was made to the SGB that Standard Bank had approved the purchase of the property and the registration of the bond was to ensue. It was resolved that two thirds of the bond repayment would come from the leased buildings and the school would pay the remaining third of the bond amount. The SGB was subsequently advised that the property had been transferred to the Trust[4]. The property was registered in the name of the Trust. Mr Shelver stood as surety on behalf of the Trust.

[30] The court a quo accepted the correctness of the minutes and the evidence of Ms Elaine Thompson who served as the secretary to the SGB and responsible for the taking of the minutes. Her confirmation that the minutes were synopsis of the resolution taken by the meeting on various sittings, was accepted by the court a quo.

[31] As correctly found by the magistrate, the appellant himself confirmed most of the resolutions reflected on the minutes. This to me puts paid the contention by the court a quo that the minutes were a true reflection of what occurred at the time of the acquisition of the property.

[32] The magistrate in accepting the minutes and in finding that the evidence clearly shows that it was the school which was the purchaser of the property referred to the evidence of Mr Smith, the Estate Agent especially in the backdrop of Exhibit “D”, which was a letter written by Mr Smith to Mrs Schauder the owner of the property. The court a quo, taking into account Exhibit “D” and the minutes of the Governing Body dated 2 March 1999, which revealed the school offer of R500 000.00 and the fact that it would not have funds to pay for the transfer duty as proof thereof. Mr Smith further confirmed being the author of Exhibit

“D”. To throw light as regards this aspect I shall refer to certain excerpt of Exhibit “D”. Exhibit “D” provides as follows:

“I refer to our telephone conversation during lunchtime today when I gave you details of my meeting with Andre van Rensburg of Price Waterhouse Coopers. As you realise, my meeting with Andre resulted from the meeting that I had with Michelle Lascot, the Chairman of the Board of Governors of Greenwood Primary School and Patrick Shelver, the Headmaster of the school, at which meeting I advised them that if you sold the company, Skybridge Investments to the Trust that had been formed, it would result in payment of approximately R62 500.00 to the Department of Inland Revenue. The reason for this was that you would first have to transfer all other assets out of the company.

It was then agreed that I would write a letter to you setting out in date sequence the various meetings that I had had with the management team of Greenwood Primary School. For ease of reference I intend tabulating the sequence of events.

- (a) In the latter part of November 1998 I was approached by Greenwood Primary School who asked if I would attend a meeting to discuss the possibility of their purchasing 5 Forbes Avenue. At this meeting they indicated that although the Government of the Eastern

Cape did not have funds to purchase the property, the parents and interested parties were in the process of forming a Trust for the purpose of acquiring the property. They did not give me any details of how it would be financed but asked if I could give them full details of the property. . .

- (b) The following week I was contacted by Michelle Lascot who advised me that they were very interested in the property but that as the school would be closing within approximately two weeks for the year-end holidays they would not be able to proceed further until the school opened again and their Board of Governors held their first meeting.
- (d) . . . However, the result of their investigation revealed that unless they were prepared to sacrifice their existing swimming pool they would not be able to get another playing field on the site. They then showed me a plan which would result in the existing dwelling being converted into classrooms with the rest of the land shown as open playground space. Michelle Lascot, acting as spokesman for the group, stated that the maximum that the school could pay for the property would be R500 000.00 subject to their being able to purchase the Company as opposed to taking transfer of the property. By so doing it would save them R50 000.00 in transfer duty.
- (e) . . . This would result in a secondary dividend tax of approximately R62 500.00. It was then decided that I should
- (f) have a further meeting with the School Committee and indicate to them that you and your family had agreed to accept a figure of R500 000.00 but that you would not be able to sell the shares in the Company and it would be necessary for them to take transfer of the property.

- (9) . . . Michelle Lascot, who was acting as spokesman, indicated that in that event the Trust would not have sufficient money to purchase the property as it would cost them R50 000.00 in transfer duty. Patrick Shelper concurred with this remarks and indicated that the School Committee had made the offer based on a total cost of R500 000.00 and did not have the additional funds to pay the transfer duty. . . .

I believe that once you and your family have had a chance to consider this that I should arrange a meeting with the School Committee as soon as possible.

I believe that if we cannot come to a satisfactory arrangement with Greenwood Primary School that we should tell them that the sellers are withdrawing their agreement to sell at the price indicated above and that you now wanted to notify them that you intended opening negotiations with other parties.

The letter is signed by Derek Smith.

[33] Relying on the letter written by Mrs Schauder to the Estate Agency Board EAAB, pursuant to a complaint by Mr Shelper on behalf of the school, the court a quo decided that the contents of the letter fortified the conclusion that the school was the purchaser and not the Trust. In my view, correctly so. The relevant portion of Exhibit “G” which is the letter by Mrs Schauder read as follows:

“. . . We took into consideration what the value that the property would be to the Greenwood School and with the agreement of my shareholders, we reduced the price drastically in order to accommodate the needs of the school.

. . . All the negotiations were done by Mr Smith and myself in good faith and I can only conclude that somewhere in the proceedings there was a breakdown of communications.

. . . As my children, who are the shareholders, and I have stated from the start, we dropped our asking price of R850 000.00 (Eight hundred and fifty thousand rand), sold “voetstoots” to R500 000.00 (Five hundred thousand rand) for the Greenwood School. We also agreed to pay the Transfer costs of R50 000.00 bringing the purchase price down to R450 000.00. This we did all sincerity, as our idealism for the welfare of education in the new South Africa was our prime concern. We felt that we could contribute in a tangible way. . .

I believe that Mr Derek Smith conducted these negotiations in accordance with the instructions of Skybridge Investments (Pty) Ltd and that he reported back to me each time after meeting with representatives of the Greenwood Property Trust and, on a number of occasions, he made it clear and that he had pointed out that the property was being sold “voetstoots” and that we were not providing either Electrical Wiring or a Beetle Free Certificate. . . .

In time, and with careful management the school will recover the costs paid out for the wiring and with all the added school ground they will expand into a great and gracious educational institution. . . We should all strive for peace and harmony in a country that has so many more urgent requirements, and Mr Derek Smith, an Estate Agent of repute in this city is the first to share with me a feeling of goodwill towards the school.”

- [34] The court a quo further took into account, correctly so in my view, that the minutes of the SGB show that the school dealt with the property as if it was its own. That is borne out by the alterations which were made subsequent to the registration of the Trust. In the minutes the School Governing Body without consulting the Trust took resolutions in respect of certain alterations to the school, the demarcation of the boundary between two houses, further alterations to the property which amounted to about R50 000.00 and various other aspects.
- [35] The list of other factors taken by the court a quo in finding that the school was the actual purchaser appears in the judgment and I need not deal with them exhaustively. Suffice to say that the court a quo was correct in this regard hence there was no appeal premised on this aspect of the judgment.
- [36] Having correctly found on the convincing evidence that the school was the actual purchaser and the Trust was formed for the purpose of purchasing the property, the court a quo dealt with the issue of the change of the Trustees to be the beneficiaries of the Trust and the removal of the school thereof.

The court a quo found that this issue was not disclosed to the Governing Body of the school. Furthermore, the issue of the sale of the school was not discussed with the Governing Body of the school. That is further compounded by the nondisclosure by the appellant and the other two of the amount for which the school was sold and the consequent sharing by them of the spoils of the purchase price. In my view, it is apparent from the judgment that these issues are not disputed by the appellant namely: the non-disclosure of the sale of the property and the consequences that followed.

- [37] The judgment of the court a quo exhaustively deals with the issue of Mr Jacobs who, as stated before, was the accountant of the school. It needs no repetition that Kapp was the person who set the cat amongst the pigeons, so to speak. His discovery of the change of beneficiaries, the payment of exorbitant amounts from the Trust to the appellant, Mr Lascot and Mr Shelver, the letters he sent to the Governing Body alerting it of the irregularities and the unsatisfactory response by the appellant led Mr Kapp to take the action he did. The court a quo pertinently dealt and valuated the evidence of Mr Shelver. Though not in so many words, the court a quo discredited the evidence of this witness. The analysis and the valuation of his evidence by the court a quo is characterised by severe criticism in the following terms:

“That he was not comfortable with the change of the beneficiaries and especially that it was to be done or the changes were to be effected without the knowledge of the s.g.b. But if one also takes into account the fact that this discomfort must have been only in 2005 it sound to be a bit incredible, especially that

at the time when according to him the accused had expressed his reservations and/or adverse commons against the practise. He even risked by making himself a surety for the bond. 'The two do not really reconcile much and do not make him to be a very honest witness, neither would be his evidence that right from the beginning the question of (indistinct) the two garages was on the cards'. When they formed the (indistinct) because it appears to have been if one looks at the evidence it must have been a development as the years came by. (sic): . . .

He can't recall where the decision to compile this bond guarantee or confirmation came from. And to me it sounds somewhat strange and to a degree dishonest. (sic)

“. . . And again this to me appears to be dishonest and to somewhat trying to downplay his role on this because it was done in his

office. The signatures were done in his office and also said he could not say if there was s.g.b. approval for Exhibit “H8” which then was a self-contradiction to what he had early stated, and at the stage his stood surety for the bond on 29 April 1999 the idea was still thought that the triad in the school would benefit but later subdivision of the property proved futile”.

[38] There are numerous examples which I may refer to where Mr Shelver was found to have been wavering, strange, controversial an ultimately found to be a bad witness.

[39] The accused's evidence and analysis thereof is dealt with in the judgment a quo. The magistrate, before quoting extensively from the judgment of Alkema J, dealt prominently with whether the appellant was a credible and honest witness. The court a quo made its credibility findings independently of Alkema J's judgment. I shall have to deal pertinently with the findings of the court a quo in this regard.

[40] The court a quo started by doubting the credibility of Mr Shelver. The court found that his evidence was not credible and he was a dishonest

witness in many respects. The court did not rely on his evidence where it was not corroborated by other evidence.

[41] In respect of the appellant, the court at the very beginning found that, he tried to minimise his professional knowledge of writing up Trust Deeds. In dismissing the appellant's alleged lack of experience, the court a quo reasoned:

“To me again for him to sound that the amount of twenty five Trust preparations or drafts was very limited, also appears to be a

question of accused also minimising or wanting this court to think that he did not really have sufficient experience in Trust preparation even though when one looks at the contents and format of the Trust that he actually drafted in this matter is so well

crafted and very much articulate that it can only come from a very experienced mind . . . (sic). (a)gain this is another instance in my view where the accused is minimising his own or underplaying his own experience at the same time trying to make it as if Lascot had better legal knowledge in this regard than him. But to me the evidence clearly shows that he is the one who had the better knowledge”.

[42] The court a quo went on to deal with the manner in which the beneficiary i.e. the school’s was substituted by them in order to facilitate the sale and transfer of the property. The court a quo alluded to the fact that the appellant knew that was wrong but carried on to draft the Deed of Sale pertaining the property.

All that was done without the knowledge of the school. The court a quo reasoned that the appellant was dishonest in keeping the information away from the School Governing Body, especially because of his involvement in various other School Governing Bodies where he had served and his vast knowledge of the South African School Act 84 of 1996.

[43] The magistrate alluded to the fact that at the time of the sale of the property, the appellant and the other two had no money to purchase the property. That much is clear from the evidence, Mrs Schauder wanted to sell to the school hence the reduced price. Despite the lack of money, the appellant and the other two formed the Trust with the school as the sole beneficiary. The court a quo reasoned:

“In other words there can be only one conclusion that one can draw from his evidence as well that he wanted to use the school as a vehicle for their later personal enrichment which exactly is what happened”.

[44] The court a quo meant to state that:

“And as was argued by the prosecutor the accused did admit that if the school was not entrusted in paying the bond of the property he would not have prepared the trust deed which again clearly talks to the use of the manipulation of the school for the purpose of this joint venture, business venture that they thought about or even (indistinct) right from the beginning where they knew right from the beginning that they were going to benefit. And the only thing then one can really conclude is that they wanted to use the school as that vehicle and that in the process they had to ensure during that protracted period of about eight years that they kept it a secret that the school would never know just in case the school would resale before their benefit was realised”.

[45] Having found that the appellant misrepresented to Mrs Schauder that the school was the purchaser of the property, the court a quo stated as follows:

“Accused admitted to having made a misrepresentation to Mrs Schauder that . . . or rather an untrue statement to Mrs Schauder that the only beneficiary was the school and concealing that they would also be the beneficiaries so as to make her reduce the price. His denial that he was defrauding her nor that this was dishonest to her or that they decided to conceal or hide this from her as unfavourable connotation (indistinct) or that it was a lie has a misleading structure and again talks to his own dishonesty and incredibility and unreliability of him as a witness”.

The court a quo further made remarks as to the honesty or otherwise of the appellant. This can be found in the following statement from the

judgment:

“His change in evidence that the initial intention was that the school be the sole beneficiary is not only contradictory to his earlier

testimony but again shows his own dishonesty as a witness of mendacity as a witness”.

“And so are the adjustments in his evidence in this regard which shift all the blame to the deceased, Lascot, as shown in part of the evidence that he gave, the particular from page 798 – 799.

Also his evidence that the trust deed’s reflection of date of establishment of the trust as 15 March 1999 and the date of the s.g.b. minutes say he was supposed to draw up this trust as just a pure coincidence that in fact not a particularly noteworthy

coincidence depicts him further again as not a very good witness that can be trusted. (sic) And his further attempts to mislead the court by way of making an adjustment that the s.g.b. meeting must have been in the evening was equally inconsistent with the recorded time of 14h00 as the time the s.g.b. made that particular day. (sic)

Then the accused admitted that the triad did not inform the school about the intentions as regards the trust and the property and the beneficiaries. Accused admitted that they told the s.g.b. that the school was the sole beneficiary but not when they were adding themselves as beneficiaries because it was an education (indistinct) trust. This again shows how mendacious the accused is as a witness because there was more duty to tell the school of the latter state of affairs than before. (sic) In other words there was more duty to tell them that they were adding themselves as the beneficiaries than when they were making the school the sole beneficiary. And yet in both instances they were committing a deliberate misrepresentation. And the response that they did not think it necessary to explain the situation, it reflects again on his candour in a very much adverse way.

Exhibit “V” reflects that the school being the only beneficiary at the time (indistinct) the favouring of security by the trustees. (sic) And to say the school did so was again clearly a lie because this is not in terms of the evidence in this case at all. And again one would definitely expect that if then they wanted to really add themselves as beneficiaries, (indistinct) would have already disclosed this state of affairs to the beneficiaries so as for the beneficiary to really reassess their position as regards

the security.

Accused said that the witness will have the impression that the trust was needed by the school, was needed to purchase the property were mistaken on the law. (sic) But not only can nobody as

I have already indicated where nobody can fault those who held this mistake, but most importantly they were being deceived and defrauded

into making that very mistake even on the facts. (sic) And I think that is exactly the crux of the case itself”.

[46] The court had regard to the bank balance of the School; and found that the school could not have been able to purchase the property in cash without raising a loan contrary to the contention by the appellant. In that regard the court found that the accused “was therefore misleading the court by his evidence that the school could have easily or had the ability to buy or acquire the property in its name . . .”

[47] Pertaining to the denial by the accused that he was conflicted in that he should not have acted as a beneficiary of the Trust, whilst he was a member of the Governing Body of the school the court a quo concluded that “one can’t think that it does come from a lawyer and attorney of accused’s calibre”.

[48] Throughout the rest of the judgment, before reference to Alkema’s J judgment, the magistrate characterised the accused on various instances as follows:

- again to me the easy shift reflect to him being not a very good witness;
- in fact he would have been more honest and open with the school regarding his own involvement;
- the development thereof are completely inconsistent with accused not having had his current legislation which consists throughout and in fact he still shows that the accused is not honest as a witness in this court; (sic)
- these later concessions that were made in court make his inconsistencies on the correctness and beliefs or the correctness of his action in this regard to amount to dishonest testimony;
- but the accused was very evasive in terms of his answers to questions by the Prosecutor that the s.g.b. was entitled to know what the whole benefit was . . . (to) me this statement by the accused sounds very arrogant and unreasonable and in fact defensive;
- clearly reflects absence (indistinct) on accused’s part, as well as how far he is prepared to go to mislead the Court in his attempt to prove his innocence as well as running away from the truth.

[49] The credibility findings and/or characterisation of the appellant as mendacious, dishonest etc., by the court a quo before reference to the judgment of Alkema J dispels the argument proffered before us that the magistrate relied on the judgment of Alkema J in its findings in this regard. I referred extensively to the judgment of the court below to illustrate this fact. Absent reference to Alkema J’s judgment, the credibility findings or the findings regarding the character of the appellant would remain. Reference to the judgment of Alkema J is made late in the judgment. The findings by the court below about in place absent the character and demeanour of the appellant span from page 981 – 1001 and are on each account

supported by the evidence tendered. Each attack on the character of the accused is reasoned and not baseless. Such findings have no reliance on Alkema's judgment. The portions of the judgment of Alkema relied on by the magistrate, primarily deal with the fiduciary duties owed by the appellant to the school in his various capacities.

- [50] The concern raised by the magistrate in his judgment on leave to appeal referred to in paragraph 22 above is unfortunate. I say so because of the reason articulated above that reference to the character of the appellant only appears in the last three sentences of Alkema J's judgment. The reading of the excerpts relied upon by the magistrate does not support the argument that Alkema J attacked the character of the appellant. My understanding thereof is that Alkema J dealt with the fiduciary

duties owed by the appellant to the school. In fact, as an experienced attorney, the appellant ought to have known about the fiduciary duties he owed to the school in the various capacities he held. Reference to Alkema's judgment as contended does not amount to an irregularity or a misdirection.

- [51] Even if the references to Alkema J's judgment may be excised from the judgment, the conviction of the appellant would remain correct. Assuming for a moment that the appellant's attack on the judgment is valid and should be sustained, does reference thereto result to the failure of justice? My answer is in the negative. The attack by the magistrate on the character of the appellant is factually based, as alluded to. Reference by the magistrate on Alkema J's judgment without notifying the appellant resulted in the failure of justice. The appellant was not prejudiced by such failure.

- [52] The second ground of appeal pertains the questioning by the magistrate of the appellant based on the fiduciary duties he owed the school, which issue is the cornerstone of Alkema J's judgment.

- [53] The issue of fiduciary duties was first raised by Mr Kapp in his testimony. He referred to the fact that the appellant was conflicted in his duties. He testified in this regard as follows:

"... my concern, was that it seemed to be like a conflict of interest being a trustee of a trust that simultaneously being a Board of Governors Member where initially the trust was the sole beneficiary and thereafter became only part of one of many beneficiaries including same trustee and Governing Board Member. (sic) My view was, there was some conflict there and that concerned me, a conflict of interest."

- [54] Further on in his testimony, Mr Kapp opined as follows about the conduct of the appellant which lead him to report the matter:

"Either/or it is fraudulent in nature or it is theft for that matter, or it is a breach of any person in a fiduciary capacity in performing the duty imposed upon that person by any Act. He breached that fiduciary capacity in what he decided. (sic) Or any employee under the management of such person will also, any act by such an employee would also be considered a reportable

irregularity to be audited'. (sic) (Emphasis added).

[55] The issue of fiduciary duties further came up during cross-examination of Mr Shelver as follows:

"Public Prosecutor: Did you feel it was – did you as the governing body member were acting in the best interests of the school?" (sic) . . .

Answer:

Well you know what really worried me was that as the headmaster of the school and as a member of the governing body, you know, we have fiduciary duties and always act in the best interests of the school and so it was like a yo-yo effect you know. As myself leading the school I felt that the school needed to be informed". (sic)

[56] Furthermore, under cross-examination the public prosecutor asked him as follows:

"So would you consider yourself to be in a position as attorney to the school. There is fiduciary relationship between the two of you, that you have to act in their best interest, not so? . . . Yes".

[57] Further down under cross-examination the prosecutor further put to the appellant the following:

"Prosecutor: I put it to you that you shunned your fiduciary duty as an Attorney as well as Governing Body Member, by acting not in the school's best interest . . . I deny that as well, I acted in the school's best interest at all times.

Prosecutor: I put it to you that as Trustee, you also shunned your fiduciary duty to act in the best interest of the beneficiary of the Trust, which was your function as Trustee.

Court: Answer? – I deny that, I acted in the best interest of the beneficiary".

[58] It has been submitted by the appellant that the questioning by the magistrate left the impression that he wanted to produce answers which were favourable to the State. With respect, that impression is wrong and is not supported by the record of

proceedings. The magistrate started by questioning the appellant about the formation of the Trust by them and the role each

played thereof. The answers elicited were in this regard characterised by "you are quite right, your worship"; "No I think that is fair, a fair assessment your worship". "Yes, I think, I believe that is correct.

[59] The second aspect of the questioning relates to the fiduciary duties owed by the appellant to the school. I shall refer to it verbatim. It reads:

"What was, was Mr Lascot a legally qualified somebody? . . . No, your worship, he was a businessman.

And the drafting of the document, could we say it was your own drafting as a lawyer, lawyer/member of the people that were trying to set up the Trust? . . . Yes, your worship.

Fiduciary responsibilities? When did you start learning and having understanding of fiduciary responsibilities as a person? Or of such concepts? Yes? . . . Sorry your worship, is the question when I did . . .

Yes, when did you maybe, first to know about this term fiduciary and its implications? . . . I think I've always known about it, your worship, as a lawyer, I have.

And what has been your understanding? . . . Of fiduciary?

Yes? . . . Your worship, my understanding is that somebody who holds a fiduciary duty, holds a position where he must be faithful to the cause that he is called upon to serve.

And would that be including maybe extra careful? . . . Extra careful?

Yes? . . . Yes, it does, your worship. I think we as lawyers understand that there is extra care to be exercised when you deal with somebody else's affairs.

And if I again get you, you understood that in, you had three positions that you were holding, that required that fiduciary responsibilities,

the one of SGB member, the Trustee in relation to the Trust, as well as the Attorney in relation to the school as well? . . . I understood that, your worship, yes.

And all these responsibilities, of fiduciary responsibilities, related in a sense to the same school? . . . Related to?

The same school? In other words the object to which such responsibility has to be so exercised, was the school? . . . Yes.

Yes, where do I start, who is supposed to come first? Prosecutor? Any questions, Mr Prosecutor?

Prosecutor: Nothing, thank you, your worship.

Court: Any questions Mr Hattingh?

Mr Hattingh: I have no questions, thank you, your worship.

Court: Thanks a lot, you may go back. . . . Thank you, your worship.

[60] Having regard to the above questioning, I am unable to find support for the criticism of the questions asked by the magistrate. The appellant as an experienced admitted attorney that he knew about the fiduciary duties he owed towards the school both as a School Governing Board member and as an attorney for the school. The questions were straight forward and elicited direct answers from the appellant. Furthermore, there were no questions or concerns raised by Mr Hattingh when given an opportunity to ask questions flowing from the questions by the court a quo.

[61] The error by Alkema J and the magistrate that the appellant met with Mrs Schauder does not take the matter any further. The magistrate might have imported that error from the judgment of Alkema J but that does not necessarily mean he was unduly influenced by the

judgment.

[62] I therefore find that there are no irregularities or material misdirections which merit the interference or setting aside of the judgment of the court a quo. Even if I am wrong in that regard, the irregularities and misdirections alluded does not form part of the provisions of

sections 322(1) (c) of the CPA and the provisions of section 35(3) of the Constitution in that they do not result in a failure of justice or render the trial unfair because the conviction would stand in spite. The following words by Theron J, in *S v Msithing*[5] find application in this matter.

“To my mind, the constitutional test as developed by our courts over the past ten years or so may be summarised as follows: a fundamental irregularity which violates an accused’s right to a fair trial must result in a failure of justice. If the irregularity is not of a fundamental nature the focus shifts to what would have happened but for such irregularity. The setting aside of a conviction based on the violation of the right to a fair trial in circumstances of a minor ‘tainting’ of the proceedings will undermine the ‘pressing social need’ to prosecute crime”.

[63] Consequently, I make the following order.

1. The appeal is dismissed.

M MAKAULA

Judge of the High Court

BESHE J: I Agree.

NG BESHE

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Instructed by:

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Counsel for the Respondent:

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National Director of Prosecutions, Grahamstown

Date Heard:

6 September 2017

Date Delivered:

14 December 2017

- [1] The State v Moodie 1961 (4) SA page 752 AD at page 756 paragraphs C-E.
- [2] “35(3) Every accused person has a right to a fair trial, which includes the right – (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence; (c) to a public trial before an ordinary court; (d) to have their trial begin and conclude without unreasonable delay; (e) to be present when being tried; (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly; (g) to have a legal practitioner assigned to the accused person by the state and at state expenses, if substantial injustice would otherwise result, and to be informed of this right promptly; (h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence; (j) not to be compelled to give self-incriminating evidence; (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language. 36 Limitation of rights (1) 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 all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose”.
- [2] “35(3) Every accused person has a right to a fair trial, which includes the right –
- (a) to be informed of the charge with sufficient detail to answer it;
 - (b) to have adequate time and facilities to prepare a defence;
 - (c) to a public trial before an ordinary court;
 - (d) to have their trial begin and conclude without unreasonable delay;
 - (e) to be present when being tried;
 - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;
 - (g) to have a legal practitioner assigned to the accused person by the state and at state expenses, if substantial injustice would otherwise result, and to be informed of this right promptly;
 - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
 - (i) to adduce and challenge evidence;

- (j) not to be compelled to give self-incriminating evidence;
- (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.

36 Limitation of rights

- (1) 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 all relevant factors, including-
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose”.
- [3] 1995(1) SACR 568(CC) at 579 paragraphs 16.
- [4] Exhibit “H2” to “H9” reflect the sequence of events as disclosed in the minutes of the SGB.
- [5] 2006(1) SACR 266 (N) para 10.

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