

SOUTH AFRICA / JUDGMENT

S v Tshopo and Others (29/12) [2012] ZASCA 193 (30 November 2012)

[2012] ZASCA 193**COURT**

Supreme Court of Appeal

BEFORE

Heher, Leach, Theron

CASE / FILE NUMBER

29/12

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 29/12

Not Reportable

In the matter between:

S J TSHOPO1ST APPELLANT

N M NQULO2ND APPELLANT

N D MAKATHINI3RD APPELLANT

and

THE STATERESPONDENT

Neutral citation: Tshopo v State (29/12) [2012] ZASCA 193 (30 November 2012)

Coram: HEHER, LEACH AND THERON JJA

Heard: 13 November 2012

Delivered: 30 November 2012

Updated:

Summary: Criminal law – fraud – failure to disclose in tender declaration that person connected with the tenderer was employed by the Free State province, the invitor for the tender – fraudulent misrepresentation established.

Criminal procedure – sentence – fraud in tender process – custodial sentence required.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Cillie and Moloi JJ sitting as court of first instance):

- ‘1. The appeals of the appellants against their convictions are dismissed.
2. The appeal of the first appellant against his sentence is upheld, the sentence confirmed by the high court is set aside and replaced with a sentence of three years’ imprisonment.’

HEHER JA (LEACH AND THERON JJA concurring):

- [1] The appellants, a brother and sister, were charged before a magistrate with fraud. They pleaded not guilty. They were convicted and sentenced, respectively, to four years imprisonment in terms of s 276(1)(b) of the Criminal Procedure Act 51 of 1977 and two years imprisonment conditionally suspended for five years. A third accused, one Makathini, was likewise charged and convicted and sentenced to four years imprisonment of which two years was conditionally suspended.
- [2] The three accused appealed unsuccessfully to the High Court against their convictions and sentences. They were all granted leave to appeal further to this Court. Only the two appellants have pursued the appeal. The second appellant limited her appeal to her conviction.
- [3] The charge sheet contained a lengthy preamble to the charge of fraud. The basic averments were clearly regarded by the State as fundamental to an appreciation of the charge:
 1. The Free State Education Department (‘the Department’) issued a tender for the delivery of school books.
 2. An objective of the tender was to attract tenderers from previously disadvantaged communities, to benefit and to uplift them.
 3. The Treasury instructions which formed part of the tender document and had to be complied with provided that no nepotism, bias, favour, or abuse of power would be allowed.

4. The tender application also contained a 'Declaration of Interest' in which tenderers were required to declare any bond, whether family, friendship or work-related, with any member of the Tender Board or the Free State Department of Education. The purpose of this declaration was to satisfy the objectives and ensure transparency.
5. Second appellant signed the tender application on behalf of Abelusi Enterprises.
6. According to the tender application accused no 3 held a 50% interest in Abelusi Enterprises and he applied for the tax clearance certificate which was required from the tenderer.
7. First appellant controlled the bank account of Abelusi Enterprises. He himself withdrew R429 533.06 from that account. R48 000 was transferred from the account to the bank account of the first appellant.
8. First appellant used the second appellant as a front to apply for the tender because he foresaw that he might not be successful because of his work and family connections.

[4] In the context of this preamble the State alleged that the accused were guilty of the crime of fraud, in that, on or about 4 July 2001 and at or near Bloemfontein the accused tendered as set out in the preamble, and wrongfully and unlawfully, falsely and with the intention to defraud, represented to the Department of Education that:

- (a) the applicant and persons connected with the tender were not employees of the Free State Provincial Administration ('the Administration');
- (b) the applicant and persons connected with the tender had no relationship with an employee of the Department or the Administration;
- (c) the tax number of Abelusi Enterprises was 0594536424;
- (d) the accused were the owners of Abelusi Enterprises.

By such false pretences, the charge alleged, the accused induced the Department to its loss and prejudice, actual or potential, and to that of other potential tenderers, to accept that the facts in representations (a) to (d) existed, whereas in truth and in fact the accused made the representations well knowing that-

accused no 1 was an employee of the Administration and also married to Mantseng Anna Tshopo, an MEC in the Free State Government;

the tax number of Abelusi Enterprises was not 0594236424;

accused no 2 was the sister of accused no 1;

they were not the owners of Abelusi.

[5] The accused pleaded not guilty and made no admissions.

- [6] All three accused closed their cases without adducing evidence. The cross-examination of the State witness although prolonged had been largely ineffective in relation to material questions. The result is that the telling evidence stood unimpugned and once its thrust has been identified the essential enquiry is whether it is capable of sustaining the inferences that the State would have us draw from it.

The material facts

- [7] On 8 June 2001 the Acting Head: Education in the Free State Department of Education published an invitation to tender in relation to the distribution of learner study materials / text and prescribed books to various schools in the Province.
- [8] On 4 July an entity called Abelusi Enterprise submitted the required tender documents. In each case they were signed on its behalf by the second appellant, variously describing herself as 'Manager', 'Partner' and '50% owner', (or, in a number of instances, not qualifying her signature). For present purposes it is necessary to dwell on only one of those documents, the 'Declaration of Interest'. This consisted of a preamble and three questions with provision for particulars if any answer was positive. Only the first question and answer are relevant to the case against the accused.¹ The relevant portions of the Declaration read as follows:

'Any legal person, including persons employed by the Province, or persons who act on behalf of the Province or persons having a kinship with persons employed by the Province, including a blood relationship, may make an offer or offers in terms of this tender invitation. In view of possible allegations of favouritism, should the resulting tender, or part thereof, be awarded to persons employed by the Province, or to persons who act on behalf of the Province, or to persons connected with or related to them, it is required that the tenderer or his authorized representative shall declare his position vis-à-vis the evaluating authority and/or take an oath declaring his interest, where

- the tenderer is employed by the Province or acts on behalf of the Province; and/or
- the legal person on whose behalf the tender document is signed, has a relationship with persons/a person who are/is involved with the evaluation of the tender(s), or where it is known that such a relationship exists between the person or persons for or on whose

behalf the declarant acts and persons who are involved with the evaluation of the tender.

In order to give effect to the above, the following questionnaire shall be completed and submitted with the tender.

2. Are you or any person connected with the tenderer, employed by the Province?

NO

3. Do you, or any person connected with the tenderer, have any relationship (family, friend, other) with a person employed in the

department concerned or its administration and who may be involved with the evaluation or adjudication of this tender?

4. Are you, or any person connected with the tenderer, aware of any relationship (family, friend, other) between the tenderer and any person employed by the department concerned, or its administration who may be involved with the evaluation or adjudication of this tender?

NO'

The answers were, in each case, apparently furnished by the second appellant in her own hand.

- [9] In the document called a 'preference certificate' which embodied a claim for a price preference of 10% for an enterprise owned by previously disadvantaged individuals the second appellant furnished information about Abelusi Enterprise as follows:

'Postal address P.O. Box 720

VIRGINIA

Physical address 400 EUREKA PARK

9430

Telephone No 0722280193.

Contact person JOHNNY

Company/Enterprise ENTERPRISE

Income tax reference no 0594236424

VAT registration no (if applicable) TO FOLLOW

Company/Close Corporation registration no N/A.

Type of firm

X Partnership'.

The second appellant described the principal business activity of Abelusi as 'supply and distribution of school stationery' and stated that it had been in business for two years. In a schedule to the certificate she listed the partners and their ownership, identifying herself and the third accused as having owned 50% each since 1999.

- [10] The Department awarded the tender to Abelusi Enterprise and on 10 October 2001 the second appellant signed a memorandum of agreement on its behalf for the distribution and delivery of school stationery, text- and prescribed books. The agreement was countersigned on behalf of the Department on 25 October.

- [11] The state led evidence of the history of Abelusi Enterprise preceding the submission of its tender. A certain Lizwe Winston Magope testified that he caused it to be registered as a close corporation in the year 2000 for the purpose of applying for a tender for the supply of school books to the Department for one year. The application for the tender was successful. The business promoted a partnership between himself and the first appellant who was his brother-in-law. When the tender was awarded Mogope was employed as a teacher by the Department and it was agreed that the first appellant would run the affairs of Abelusi. Before the completion of the services that had to be provided by Abelusi, Mogope became aware that he should not, as an employee of the Department, have been involved in a contract with it. He then ceased to take any further part in the administration of Abelusi. As far as he was aware the contract ended after the first year. He had no knowledge of the second tender and contract, ie for the distribution of books.
- [12] The state called a Mr Heinrich Vermaas to testify about his relationship with the first appellant. At some stage they contemplated a joint business venture and for that purpose set up a close corporation. The postal address of the corporation was to be Vermaas's personal business address viz P O Box 720, Virginia. He confirmed that the telephone number furnished by the second appellant in the preference claim, viz 0722280183, was the number of his own business and had been such since 1997. It was the intention of himself and the first appellant to use all the facilities of his business in the joint venture.
- [13] The criminal investigation into irregularities in tenders employed a forensic partner of Deloitte & Touche, accountants and auditors, Mr Jaco Spies. He prepared a report pertinent to the prosecution of the three accused and testified about and confirmed its contents. Twenty-one bank accounts were identified as relevant to the investigation held in the names of each of the three accused. The report was handed in by consent. Both counsel for the defence admitted its contents and accepted its correctness. The attitude of counsel was that the entire report was irrelevant to the issues in the case.
- [14] The mandate conferred on Mr Spies was described in his report in the following terms:
- Analyse the flow of funds between the identified bank accounts for the period 1 January 2001 to 31 January 2003 of the following entities and individuals:
 - Abelusi Enterprises;
 - SJ Tsopo [the first appellant];
 - MA Tsopo [his wife, the MEC for Health];
 - M Nqulo [the second appellant];
 - ND Makhathini [the third accused];
 - LE Segobo.
 - Establish the flow of funds between the accounts with emphasis on:

- ° Deposits made by the Department of Education into the account of Abelusi for the tender;
- ° Funds received by MA Tsopo;
- ° Funds received by SJ Tsopo;
- ° Income of SJ Tsopo and MA Tsopo above their salaries;
- ° Withdrawals, transfers and payments from the accounts of SJ Tsopo and MA Tsopo;
- ° Income of SJ Tsopo and MA Tsopo generated by this tender;
- ° Funds received by the directors (Nqulo and Makhathini) for the tender;
- ° How much money was paid to LE Segobo.'

[15] According to the Spies report:

• MN Nqulo signed a document requesting the Head: Education Department to pay any amount due to Abelusi Enterprise into a transmission account with account number 908 649 7737. . . . ;

- According to the "Signing Instructions" obtained from the SAPS . . . the account had the following two authorised signatories, and any one of them could sign the document;

° SJ Tsopo ID 600720 5642 084

° MN Nqulo ID 770603 0877 083;

- None of the available documentation regarding transactions processed on this account was signed by MN Nqulo;
- SJ Tsopo, a registration clerk at the Provincial Government Traffic Department in Virginia and husband of MA Tsopo (MEC Health Free State Province) controlled the account in the name of Abelusi Enterprises. He also signed the available documentation relating to transactions on the account;
- The account was opened on 2 November 2001.'

[16] During the period 2 November 2001 to 31 January 2003 the Department paid R138 162,74 and the Free State Provincial Administration paid R160 679,59 into the bank account of Abelusi. In addition there was a Department of Education cheque for R56 314,20 deposited in the account and a direct credit of R8876,53 from the Department. These amount, totalling R364 033,06, represented the income generated by the distribution tender.

[17] The principal findings made by Spies after having conducted his analysis were:

1. The Abelusi account appears to have been controlled by the first appellant. Cash withdrawals amounting to R248 470 were made from the account by him and R13 500 was transferred from the account to his credit card account.

2. R48 000 was transferred from the Abelusi account to the cheque account of M A Tshopo, the wife of the first appellant, and R27 348,86 was deposited into her Nedbank loan account from the Abelusi account.
3. The second appellant did not receive any funds directly from Abelusi.
4. The third appellant did not receive any funds directly from Abelusi, except apparently a cheque for R2000 derived from an internal transfer slip signed by the first appellant.
5. An amount of R3000,00 was transferred from Abelusi to L E Segobo an employee of the Department.

[18] The original documents making up the tender application seem to have consisted of some relating to a tender for the distribution of the learner materials (E7) and one for the supply of such materials (E6). The declaration of interest that embodied the representation relied on by the state, and the preference certificate, containing the particulars of the tenderer, both bore the prefix E6 to the tender number. Counsel argued in consequence that the second appellant had furnished the information contained in those two documents in relation to a tender not the subject of the charge. Counsel was clutching at straws. Any apparent ambiguity in the substance of the tender application was, as the magistrate recognised, clarified by the award and conclusion of the agreement to implement the tender which unambiguously related to the distribution of materials. The failure of the second accused to offer an alternative explanation in evidence simply strengthens further the inference that Abelusi's only interest was in distribution. That the second appellant signed two tender applications on behalf of Abelusi (E6 and E7), the documentation for which had been confused by the state, remained counsel's

speculation. It finds no foundation in fact or in the cross-examination of the witnesses.

[19] The first appellant signing a warning statement that was produced as an exhibit ('F') in court. Commenting on this in his judgment the magistrate said:

'As per his answer to question 7 on his warning statement, exhibit F, accused 1 said that he assisted his sister, accused 2, with the completion of the tender document. It is not clear whether by that he meant that he actually completed the documents in his own handwriting. But be that as it may, he certainly knows that his sister's address and telephone number are not as they appear on those documents, namely P.O. Box 720, Virginia, that is the post-box number and the telephone number 057-2126653. These numbers belong to Mr Heinrich Vermaas who testified that he and accused 1 had discussed the possibility of getting into business together. It is obvious that accused 2 would not have known of this address and telephone number and that the only person who knew about them was accused 1.'

The magistrate's deductions are valid (and counsel conceded as much). It must also be remarked of the admission that it demonstrates active participation in the preparation of the tender application by the first appellant and justifies the inference that he had insight into the replies furnished by the second appellant in the declaration of interest. All the documents were

apparently signed by the second appellant on the same day, 4 July 2001. The warning statement of the first appellant also reflects the following answer to the question ‘Are you in any way involved in Abelusi?’:

‘Yes . . . I am handling the financial side of Abelusi.’ The first appellant’s extra-curial admission and the conclusions justified in relation to them were however not evidence against his co-accused.

- [20] In the judgment of the court a quo there is a reference to Exhibit H as support for the proposition that ‘the first accused personally indicated to SARS that he traded as Abelusi’. Exhibit H comprised the ‘Annual Financial Statements’ of ‘S J Tsopo (sic) Trading as Abelusi Enterprises’ for the periods ended 28 February 2002, 28 February 2003 and 29 February 2004 respectively. They contain no indication of the involvement of the second appellant, Makathini or any other person in the business of Abelusi.
- [21] The only reasonable inference to be drawn from the evidence is that the first appellant, who held a 50% interest in the original Abelusi (albeit as a sleeping partner because of his potential conflict of interest) continued in the same or a similar capacity to influence the affairs of Abelusi in its second manifestation (when it tendered for and obtained the contract for distribution). Whether the second appellant and the third accused actually held a proprietary interest in Abelusi is of little consequence. What matters is that the first appellant undoubtedly did and that it entitled him to enjoy the fruits of the contract clinched by the successful tender. The business of Abelusi was, in short, carried on solely or principally in the interest of the first appellant. What further matters is that the second appellant misrepresented the true ownership of Abelusi by failing to disclose and, indeed, denying his interest in the tender application that she signed.
- [22] In the absence of evidence to the contrary, it is also the sole reasonable inference that the second appellant was aware when she completed and submitted the tender application that-
- (i) her brother, the first appellant, was employed by the Province;
 - (ii) her sister-in-law was an MEC in the Free State Administration;
 - (iii) the first appellant wished to have his interest in Abelusi suppressed in relation to the application;
 - (iv) she was required by the declaration of Interest to state whether she or any person connected with the tenderer was employed by or acted on behalf of the Province, in order to lessen the possibility of allegations of favouritism on the part of the evaluation authority and the province if it should afterwards appear that an employee of the province was connected with the tenderer.
- [23] The meaning that should be given to the use of the word ‘connection’ in the declaration is that which the ordinary reader would attach to it. Because the State relies on fraud the subjective understanding of the appellants must be decisive, but the appellants did not tell the court that they possessed an understanding that differs from that of the ordinary reader.

In the context of the explanation in the preamble to the Declaration the ordinary reader would have interpreted 'connected with the tenderer' as including any person who stood to derive financial benefits from the performance of the contract by reason of his or her interest in the tenderer and / or one who directed its affairs. In both senses the second appellant must have known that the first appellant was 'connected with' Abelusi.

- [24] The first appellant in his extra-curial statement admitted to having helped the second appellant with the completion of the tender application.
- [25] Since both appellants knew that the first appellant was financially and personally involved in the direction of Abelusi's affairs and was an employee of the Province, they must necessarily have known that the tenderer was bound to disclose that connection. Not only did they not make such a disclosure but the second appellant (with the knowledge and concurrence of the first appellant) denied the connection. The inference drawn by the magistrate that the deception was carried out so as not to place the award in jeopardy was the only reasonable inference consistent with the proved facts, including the unchallenged reason for the status of a sleeping partner adopted by the first appellant during the initial activities of Abelusi. The misrepresentation relied on in the charge sheet (subpara (a) of para 4 of this judgment read with the answer to question 2 in the Declaration of Interest) was thus proved beyond a reasonable doubt, as was the intention to deceive the Department. That the Department relied on the misrepresentation is inherent in the substance of the preamble. That it did so is not in dispute.
- [26] As to the element of prejudice by the fraudulent representation I agree with the finding of the court a quo:

'It was argued that the Department of Education has not suffered any prejudice or potential prejudice as it paid monies for services

actually rendered and not more. The state has an interest in keeping strict control over state tenders which are being unscrupulously used for self enrichment by the public servants. So does the general public whose funds are used to finance such projects and also other tenderers. There is evidence that the members of the public complain that the employees of the state misuse their position to obtain tenders. The failure to reveal in tender application the employment relationship with the state and the relationship with the MEC, the first appellant's wife and the relationship between the first and second appellants is prejudicial to other tenderers and the community at large and frustrate the state's efforts to eliminate the favouritism the declaration of interest seek to combat.'

Sentence

- [27] The first appellant appeals against a sentence of four years direct imprisonment imposed by the magistrate and confirmed by the full bench of the High Court on appeal.

[28] The magistrate seems to have accepted that the services required by the contract concluded between the Department of Education and Abelusi in consequence of the award to it of the tender were not performed. He said:

‘The rest of the money went to accused 1 as either cash withdrawals or transfers into his various accounts. All this makes it clear that accused 1 dealt with that money as his own and that there was no intention on his part to use it for the reason for which the Department of Education had intended it. His failure to take the court into his confidence meant that he could not show the court that the money was indeed used for the supply and / or distribution of study material to the designated schools and this is in spite of what Dr Moilia said. Because clearly Dr Moilia’s testimony differs to that of Inspector Calitz as far as the credibility of these tenders is concerned.’

[29] This finding was, it seems to me, a misdirection, since it was neither alleged nor proved that Abelusi had defaulted in any of its obligations to the Department. There was no reason to assume that it did not give full value for its tender. Indeed, the prosecutor put it to Dr Moilia, a defence witness in mitigation of sentence, that ‘it has always been the case that delivery did in fact take place’.

[30] The sentencing of the first appellant was also influenced by certain misdirections in the judgment of the magistrate at the conviction stage, which could not but have coloured his assessment of the moral blameworthiness of the appellant.

[31] First, the magistrate found that the first appellant knew that the appellant would not qualify for the award of the tender because he was employed by the province. That was not proved. At worst the evidence shows that proper disclosure might have jeopardized the award of the contract to him or an entity with which he was connected. There is no justification for inferring more than an intention on his part to avoid that possibility.

[32] Second, the magistrate found that the Department suffered actual prejudice amounting to R364 033,06 (the tender price) because that amount ‘would not have been paid to Abelusi had there been no misrepresentation’. This is untrue for the reason I have already identified. Moreover, an award of the distribution tender was inevitably going to necessitate the same or a like payment to whomever should be the successful bidder. In so far as the magistrate intended to suggest that Abelusi did not provide the required reciprocal performance for the price it received, that is also, for the reasons previously given, untrue.

[33] The consequence of relying on these misleading conclusions was that the magistrate regarded the circumstances of the crime as more aggravating than they warranted.

[34] In its judgment on the merits of the appeal the court a quo appreciated that the prejudice occasioned by reliance on the misrepresentation lay elsewhere. I have earlier quoted with approval its comment in this regard. When it came to sentence, however, the court a quo did not take into account either the misdirections of the magistrate or appreciate their effects. It was of the view that the magistrate had considered and balanced all the relevant factors and that no grounds had been established to the exercise of his discretion. Inasmuch as the

court a quo overlooked the misdirections and their effects it too erred. We are in the circumstances at liberty to consider the sentence afresh.

- [35] The appellant was about 40 years old at the time of the offence, married to the MEC for Health in the Free State government, with five dependent children. He was employed in the provincial licensing department at Virginia but apparently lost that employment before his conviction. He was a first offender. Neither during his trial or subsequently has he shown or expressed insight into or remorse concerning his conduct.
- [36] The fraud was committed in the face of an explicit statement of the justification for honest disclosure in the interests of the openness of the tender process. This is made clear in the preamble to the Declaration of Interest in the tender application.
- [37] Fraud in the procurement of state tenders is a particularly pervasive form of dishonest practice. It undermines public confidence in the government that awards tenders, apparently without regard for nepotism, and it creates perceptions unfavourable to the services provided pursuant to such tenders. It is proving notably difficult for the authorities to identify and root out such malpractices. The courts are obliged to render effective assistance lest the game be thought to be worth the candle.
- [38] In this instance the contract price secured by the misrepresentation was not overly large but nevertheless not insubstantial either.
- [39] I am satisfied that the seriousness of the offence requires a custodial sentence even when tested against the circumstances personal to the first appellant. A period of three years direct imprisonment will answer the requirements of justice in this instance.
- [40] In the result the appeals of the appellants against their convictions are dismissed but the appeal of the first appellant against the sentence confirmed by the high court is upheld and replaced by a sentence of imprisonment for three years.

J A HEHER

JUDGE OF APPEAL

APPEARANCES

APPELLANTS: W J Edeling

Eugene Holtzhausen, Bloemfontein

RESPONDENT: J B K Swanepoel

Director of Public Prosecution, Bloemfontein

¹The question numbered '2' and its answer; there is no question 1.

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Prepared on 11 October 2026 · Esheria