

SOUTH AFRICA / JUDGMENT

Schell v Rall (A545/2016) [2017] ZAGPPHC 1177 (26 October 2017)

[2017] ZAGPPHC 1177

COURT

North Gauteng High Court, Pretoria

BEFORE

D S Molefe, C Collis

CASE / FILE NUMBER

A545/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA)

(1)

NOT REPORTABLE.

(2)

NOT OF INTEREST TO OTHER JUDGES

(3)

REVISED

Case

Number: A545/2016

26/10/2017

In

the matter between:

Wayne
Edward
Schell
First Appellant
Wilma
Schon
Rall
Second Appellant
and
The
State
Respondent

JUDGMENT**MOLEFE J**

[1] The first and second appellants were arraigned in the Specialized Commercial Crimes Court, Regional Court, Pretoria on the following counts:

1.1 Count 1

- fraud

1.2 Count 2 -theft read with section 51 of Act 105 of 1997;

1.3 Count 3 -fraud

1.4 Count 4 - contravention of section 424

(3) of Act 61 of 1973;

1.5 Count 5 -fraud

1.6 Count 6

- fraud read with section 51 of Act 105 1997;

1.7 Count 7

- fraud read with section 51 of Act 105 of 1997;

1.8 Count 8

- fraud read with section 51 of Act 105 of 1997;

1.9 Count 9

- fraud read with section 51 of Act 105 of 1997.

[2] At the close of the State's case, both appellants were discharged on count 4 in terms of the provisions of section 174 of the Criminal Procedure Act 51 of 1977.

[3] At the end of the trial the appellants were acquitted on count 3. The appellants were convicted on the following counts:

3.1 First appellant: count 1; count 2 - theft in respect of the amount of R515 982.29; counts 5, 6, 7 and 9.

3.2 Second appellant: count 1; count 2 - theft in respect of the amount of R515 982.29; counts 7, 8 and 9.

[4] On 25 January 20 3, the appellants were sentenced as follows:

4.1 First appellant

count 1 and 2 taken together- three (3) years' imprisonment;

counts 5, 6, 7 and taken together - six

(6) years' imprisonment;

4.2 Second appellant:

count 1 and 2 taken together - three

(3) years' imprisonment;

counts 7, 8 and 9 taken together - six

(6) years' imprisonment.

The Court ordered that the sentences should run concurrently and both appellants were therefore effectively sentenced to a term of six (6) years imprisonment.

[5] Leave to appeal against both convictions and sentences was granted by the court a quo.

Background

Counts 1 and 2

[6] The appellants registered a company styled Adult Based Continued Development Education (Proprietary) Limited ("ABCDE") in April 2003 and they formally became the directors thereof on 23 March 2004. SECUDAC (Pty) Ltd ("SECUDAC"), a company of which some of the complainants were directors or had an interest, approached BCDE to form a consortium. The consortium tendered to the South African Police Services ("SAPS") to provide Adult Basic Education and Training ("ABET"). The SAPS tender was awarded to the SECUDAC/ ABCDE consortium. The appellants were convicted of having misrepresented themselves to have been directors of BCDE during negotiations to establish the said consortium (count 7).

[7] It was formally agreed between the consortium members that ABCDE would conduct the financial affairs of the consortium and SECUDAC would conduct the training. The first payment of R989 925.00 was made by the SAPS, in terms of phase 1 of the project, into the appellants banking accounts held in the name of their company, Employment Group. The appellants were convicted of theft of this amount or part thereof (count 2).

[8] The appellants gave a post-dated cheque in the amount of R478 630.88 to SECUDAC in lieu of the amount calculated by the appellants to be owed to SECUDAC. On presentation of the cheque on a later date by SECUDAC, payment was dishonored (count 3)

Counts 5, 6 and 8

- [9] ABCDE tendered or an unrelated project with the Health and Welfare Sector Education Training Authority ("HWSETA") in June 2003. In its proposal, ABCDE misrepresented that it was registered for VAT and that the first appellant was a director of ABCDE, whilst that was not the case (count 5).
- [10] In terms of the contract awarded by HWSETA, the appellants supplied invoices to HWSETA wherein they claimed VAT in the amount of R193 620.00 whilst not registered for VAT (counts 6 and 8).
- [11] After HWSETA had made payments to ABCDE, inclusive of VAT, the appellants failed to pay over to the South African Revenue Service ("SARS") the VAT amounts received (counts 7 and 9).

Ad Conviction

- [12] Seven witnesses testified on behalf of the State and the second appellant testified in her own defence. The first appellant elected not to testify.

Count 1 - Fraud

- [13] The State relied on evidence of two (2) witnesses to prove this count against the appellants, Professor Smit and Mr Marais, both directors of SECUDAC during the time the alleged misrepresentation was made. Professor Smit testified that in March 2003, he approached ABCDE to start discussions about the possible formation of a consortium . A week or two after, he had a first meeting with the first appellant, at Unisa and at which meeting the first appellant introduced himself as the director of ABCDE. SECUDAC and ABCDE formed a consortium and jointly submitted a tender for the SAPS project. There were several subsequent meetings held between the parties and at one of

these subsequent meetings, the first appellant introduced the second appellant, as co-director of ABCDE. It is common cause that the second appellant submitted forms to have the first appellant and herself formally registered as directors of ABCDE, to its auditors in January 2004 and that the first and second appellant, were only formally registered as directors of ABCDE on 23 March

2004. It was agreed that ABCDE and SECUDAC will share the profits at 50% each, after all expenses have been paid. It was further agreed that the profit sharing will take place only after the completion of the project and after the contracting authority had settled the consortium's claim. It was Professor Smit's testimony that had they known that the appellants were not directors of the ABCDE, they would not have formed the consortium with them and that any suggestion by the appellants that prior to 23 March 2004 they were directors, amounted to a misrepresentation.

- [14] Mr Marais testified that ABCDE was introduced to them by Professor McKay, as a sub-contractor, previously used by her and that the two appellants had introduced themselves to her as directors of ABCDE.

[15] The second appellant testified and denied ever introducing herself as a director of ABCDE and that she was authorized to act on behalf of ABCDE.

[16] First appellant's counsel[1] submitted that the State failed to prove, beyond a reasonable doubt, that the alleged misrepresentation actually or, potentially prejudiced the complainants, other than their testimony, that had they known the appellants' true status, they would not have formed a consortium with them.

[17] Second appellant' counsel[2] submitted that there is no evidence to gainsay the second appellant's version that she was authorized to act on behalf of ABCDE and that her evidence is corroborated by the common ground fact that the first appellant signed the Se ice Level Agreement as a designated representative of ABCDE and not as a dire tor.

[18] It was further submitted on behalf of the second appellant that it is improbable that the appellants could have been introduced as the directors of ABCDE in circumstances where:

18.1 Professor S it is the one who approached the appellants to form a consortium on suggestion of Professor Mckay, who ought to have known who the appellants were;

18.2 the conclusion that the appellants introduced themselves as directors of ABCDE is inconceivable, in that Professor Smit's version is that he saw the advertisement of the SAPS tender in the last half of March 2003 and the meeting between himself and the first appellant, at Unisa, was a week or two after he saw the advertisement. It is at this meeting that the first appellant introduced himself as a director of ABCDE. Before the consortium was formed and subsequent to the first meeting, the first appellant introduced the second appellant Jerry Mohage and Elizabeth Mokotong

as directors of ABCDE. It is however common cause that ABCDE was registered on 25 April 2003[3];

18.3 if the evidence of Professor Smit was to be accepted, then it would mean that he met the fi t appellant for the first time in the last week of March 2003. According to his version, the second meeting took place during the first or second week of April 2003 and ABCDE was not registered then. It is therefore improbable that the first appellant could have introduced himself as a director of ABC E, a non-existing company.

[19] Counsel for the second appellant further argued that when SECUDAC entered into a consortium with ABCDE, Professor Smit surely satisfied himself about the legitimacy of ABCD by inspecting the registration certificate which clearly stipulated who ABCDE's directors were.

[20] I agree with counsel for the second appellant's argument that there is no evidence that the second appellant introduced herself as a director and that even if the Magistrate believed Professor Smit's evidence, she ought to have found the second appellant's version, that she did not introduced herself as a director, as reasonably possibly true and acquitted her for this reason alone.

[21] Nothing from the trial record suggest that such misrepresentation caused actual or potential prejudice to the complainants except that they testified if they knew of the appellant's rue status, they would not have formed a consortium with them. Prejudice is one of the most fundamental elements of fraud. Misrepresentation or a li does not render a person liable to fraud unless, it results in some form of harm or prejudice or the potential thereof[4]. In my opinion the Magistrate erred in failing to satisfy herself that all the essential elements of fraud were proved before she convicted the appellants. The State's counsel[5] conceded during the argument of t e appeal that the second appellants' conviction on count 1 could not stand. In my opinion, the appeal by both the first and second appellants, on count 1, should be upheld and the conviction be set aside.

Count 2 - Theft

[22] The averments in count 2 are that on or about 27 May 2004, the appellants as members of the consort m, received an amount of R989 925.00 from the SAPS on behalf of the consortium as part payment in terms of the ABET tender. Further, that the appellants wrongly a d intentionally utilized the said amount for their own benefit and/or for purposes not falling within their mandate, and in effect that they stole the said amount or a part thereof, which was the property of / or from its lawful possessor, being SECU AC and/or ABCDE and/or the consortium.

[23] The appellants admitted that they received an amount of R989 925.00 which was paid into their Empowerment Group bank account and that they utilized the money received on behalf of the consortium for purposes other than those intended by the consortium, that is to cross-subsidize ABCDE operations.

[24] It is common cause that:

24.1 when the appellants spent the R989 925.00, they did so without the consent of the other members of the consortium, inter alia directors of SECUDAC;

24.2 on 12 August 2004, in a meeting held between the appellants and the directors of SEC DAG, the appellants admitted their indebtedness to the consortium and the second appellant proceeded to hand a post-dated cheque in favour of SECUDAC, to Professor Smit, to the amount of R478 630.88;

24.3 the cheque as post-dated to 20 August 2004 as there were no funds in the Employment Group's bank account and the second appellant was expecting a return on an investment made by ABCDE of R100 000.00, in West Africa;

24.4 the cheque as subsequently dishonoured by the bank. This was the source of the co plaint to the police and stood at the heart of count 3, of which both appellants were acquitted.

[25] The second appellant testified that she never intended to steal any money as alleged in the charge sheet. From the reasoning of the Magistrate in acquitting the appellants in count 3, it is clear that she upheld the second appellant's explanation that she believed the cheque would be honoured upon presentation.

[26] In granting the application for leave to appeal the Magistrate stated that:

"The reasoning of the court is clear as to forming the basis why I convicted the accused, but reflecting and applying my mind globally to the issues, the counts especially 3, upon which I have released the accused in terms of section 174 can, when also taken in conjunction with other charges, lead another court to think differently and that would be the basis for this court to say that the element of intentions as well can be a debatable thing, based on what I have said now"[6].

Theft consists in an unlawful appropriation with intent to steal of a thing capable of being stolen.

[27] The primary issue to be decided on this count is whether the appellants had the intention to steal the consortium's money. It is established law that a guilty verdict on a charge of theft is not legally competent, if the intention to deprive the owner permanently is wanting[7]. If the second appellant's version that she was expecting money and intended to replace the consortium's money was found to be probable to acquit the appellants in count 3, then in my opinion, the conviction on count 2 is not justifiable and ought to be set aside. More importantly, the Court a quo is silent on whether the State proved, beyond reasonable doubt, that the appellants had the intention to deprive the consortium of its money permanently. The appeal by both the appellants in respect of count 2 should therefore be upheld and the conviction is set aside.

Conviction of the First Appellant - Count 5

[28] The first appellant was convicted of having represented himself to HWSETA as a director of ABCD and that he compiled the documents to be presented to HWSETA which reflected that ABCDE was registered for VAT, when ABCDE was never registered for VAT. The second appellant testified that the first appellant is the person who dealt with the registration of the Company for VAT purposes and she conceded that the ABCDE was not officially exempted from VAT. She further conceded in her testimony that the VAT number used in the documentation presented to HWSETA, does not belong to ABCDE and that the first appellant was at that time, not a director

of ABCDE.

I do not agree with the submission of the first appellant's counsel at the hearing of this appeal that the conviction on this count should stand.

A mere misrepresentation or a lie does not render a person liable for fraud unless it results in some form of harm or prejudice.

Prejudice was not proved in the trial on this count. The appeal against the conviction of the first appellant on this count should

therefore be upheld and the conviction set aside.

Count 6 and B - Fraud

[29] Count 6 and 8 relate to VAT fraud committed by the appellants against HWSETA in November 003 and March 2004, respectively. The two counts are identical but for the dates and were dealt with together by the Magistrate. The respondent's counsel correctly submitted that the Court a quo incorrectly convicted the first appellant on count 6 and that he should have been convicted on count 8 and further that the Court a quo incorrectly convicted the second appellant on count 8, when she should have been convicted on count 6.

[30] It is common cause that ABCDE was not registered for VAT. It is also not in dispute that in November 2003 and March 2004, ABCDE claimed VAT from HWSETA, quoting a VA number to wit 42/00935/73, which was later found not to exist on the SARS database. The two amounts of R193 620.00, respectively, were paid pursuant to such V T claims into an account controlled by ABCDE.

[31] It is evident from the record that the Magistrate accepted that the first appellant was responsible for submitting the second invoice

dated March 2004 which formed the subject of count 8 and that the second appellant was responsible for submitting the first invoice , dated November 2003, which formed the subject of count 6. The Magistrate mistakenly convicted the appellants the wrong way around

by convicting the first appellant on count 6, instead of count 8 and the second appellant on count 8, instead of count 6. The Magistrate also found that the appellants, when submitting the invoices, did not act in furtherance of a common purpose[8].

[32] The second appellant testified that she did not consider using the VAT number provided by the first appellant as fraudulent as she had been authorized to use it. She attributed the non-existent VAT number used on the invoices to be a mistake on her part and that it was never her intention to supply wrong information and/or to mislead HWSETA.

[33] The second appellant's counsel submitted that in all probability, the second appellant was naive but there is no factual basis to suggest that she acted unscrupulously or with the intention to defraud.

[34] this submission It is trite that intention is knowledge of wrongfulness. Second appellant's testimony that she did not know at that time that she could not claim VAT , is highly improbable. In my view the first and second appellants were correctly convicted - the first appellant on count 8 and the second appellant on count 6. I am satisfied that there is no misdirection with the trial court's reasoning and findings in the convictions of both appellants.

Counts 7 and 9

[35] The Court a quo convicted both appellants on counts 7 and 9, having found that the provisions of section 51 of Act 105 of 1997, applies in that the appellants acted with a common purpose in commission of counts 6 and 8. Both these counts are similar. They relate to what the State alleges was a failure by the appellants to disclose to SARS the amount levied as VAT in counts 6 and 8. Count 7 deals with the amount so levied in November 2003 and count 9 deals with the amount so levied in March

2004. The Court a quo however found that the appellants were not acting in furtherance of a common purpose when committing counts 6 and 8.

[36] Although the State's counsel conceded during the hearing of this appeal that the Magistrate should have acquitted the appellants on both counts 7 and 9, on the basis that the charges did not disclose an offence, I deem it necessary to deal with the convictions of the appellants on these counts. It is untenable to find on the one hand that when the appellants levied the VAT amounts that they did not act in common purpose but to elude on the other hand that they acted in furtherance of common purpose when they failed to disclose the money allegedly defrauded, to SARS. On this ground alone, the conviction on either count 7 or 9 is not sustainable and stands to be set aside.

[37] Furthermore, section 28 of the Value Added Act, 89 of 1991 ("VAT Act") obliges only vendors, registered as such, to be liable for VAT in terms of that Act. No other law regulates the collection or payment of monies levied as VAT to SARS. It is common cause that ABCDE was not registered as a vendor with SARS. Accordingly, there was no legal or factual basis upon which ABCDE could have disclosed to SARS the VAT charged and received. The relationship created by the VAT Act between SARS and the vendors is a contractual one. Accordingly, the contravention of any provision of the VAT Act does not necessarily render the vendor guilty of fraud (see *Director of Public Prosecution, Western Cape v Parker*[9]).

[38] I agree with the argument by counsel for the second appellant that it is incomprehensible how SARS could have been defrauded by the appellants' failure to disclose to it (SARS) that they had fraudulently levied and collected VAT which formed the basis of counts 6 and 8. It is submitted that this is tantamount to an argument that because a thief had failed to report to a police station that he had committed theft, he was in addition to being charged with the theft, also guilty of defeating the ends of justice.

[39] The principle of legality in criminal law includes amongst others a principle that:

"a court may find an accused guilty of a crime only if the kind of act performed by him is recognized by the law as a crime - in other words, a court itself may not create a crime (the ius acceptum principle)".

[10]

In my view, the Magistrate misdirected herself in convicting both appellants on counts 7 and 9 and the convictions ought to be set

aside.

Ad Sentence

[40] The Court a quo sentenced both appellants to a cumulative six

(6) years imprisonment - the first appellant on counts 5, 6, 7 and 9 and the second appellant on counts 7, 8 and 9. The appeal on conviction which is dismissed is with regards to the first appellant on count 8 and the second appellant on count 6.

[41] It is a long standing principle of our law that the imposition of a sentence is a matter falling primarily within the judicial discretion

of a trial court[11]. The appeal court can only interfere with sentence if there is an irregularity or misdirection or when the sentence is disturbingly inappropriate. As Marais JA stated in *S v Malgas*[12];

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court".

[42] It was submitted by both appellants' counsel that the trial court misdirected itself by failing to properly balance all the factors in this case and that the Magistrate breached the basics and fundamentals common to sentencing - the significance of individualization of sentence[13] It was further submitted that the cumulative sentence of six years is relatively harsh.

[43] Counsel for the first appellant submitted that the first appellant's personal circumstances, namely: that he is a first offender; his chronic medical condition; that he is married with two minor children; his contribution to the society through his work with disadvantaged children and his work with the youth at church and that he offered to repay the money, ought to have constituted mitigating factors.

[44] Counsel for the second appellant submitted that the second respondent's personal circumstances namely: that she is a first offender; she was 44 years old at time of the sentencing; she works at a post-secondary training facility (NGO) for disadvantaged youth; she played open cards with the trial court and that she offered to repay the money, ought to have constituted as mitigating factors.

[45] The cumulative six (6) year term imprisonment is in my view disproportionate to the totality of the mitigating factors and I find the trial court, to have underestimated both appellants' personal circumstances. Furthermore, both appellants have now been convicted accordingly. I have also noted with concern that the trial took an inordinately long time; more than 8 years, which adversely affected both appellants' lives.

[46] I am persuaded under the circumstances after weighing the mitigating and aggravating factors that the sentence imposed by the trial court is disturbingly and shockingly disproportionate, to the offences committed and should therefore be set aside.

[47] I therefore make the following order:

1. The appeal on conviction of the first appellant in respect of counts 1, 2, 5, 6, 7 and 9 is upheld and the first appellant is convicted of count 8;
2. The appeal on conviction of the second appellant in respect of counts 1, 2, 7, 8 and 9 is upheld and the second appellant is convicted on count 6.
3. The appeal against the 6 years imprisonment in respect of both appellants is upheld;
3.1 The first appellant's sentence in respect of count 8 is two (2) years' imprisonment, suspended for five
(5) years;
3.2 The second appellant's sentence in respect of count 6 is two (2) years' imprisonment, suspended for five (5) years.
4. The sentences are antedated to 25 January 2013.

D S MOLEFE

JUDGE OF THE HIGH COURT

I AGREE.

C COLLIS

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

On behalf of 1st Appellant

: Adv. N Raubenheimer

On behalf of 2nd Appellant

: Adv. N Manaka

Instructed

: by Legal-Aid SA / BDK Attorneys

On behalf of Respondent

: Adv. WJ van Zyl

Instructed by

: State Attorneys

Date Heard

: 3 August 2017

Date of Judgment

: 26 October 2017

[1] Advocate Nico Raubenheimer.

[2] Advocate Naome Manaka.

[3] Vol 12 page 2354 Exhibit 'B'

[4] CR Snyman, Criminal Law, 6th edition page 523 par 5.

[5] Advocate WJ van Zyl.

[6] Record page 1891 lines 8 to 1

[7] R v Sibiya 1955 (4) SA 247 (AD

[8] Record volume 9 page 1936 p r 6 - 1938 par 18.

[9] 2015 (2) SACR 109 (SCA).

[10] Professor CR Snyman Criminal Law 6th edition page 39.

[11] S v Sandler 2000 (1) SACR 33 (SCA) at 334 d - 335g.

[12] 2001 (1) SACR 469 (A) at [12]

[13] S v Magida 2005 (2) SACR 59 (SCA) at 596A.

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