

SOUTH AFRICA / JUDGMENT

Smit v S (1256/2022) [2023] ZASCA 154 (17 November 2023) [2023] ZASCA 154

COURT

Supreme Court of Appeal

BEFORE

Nicholls, Mothle, Mabindla-Boqwana, Meyer,
Kathree-Setiloane

CASE / FILE NUMBER

1256/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1256/2022

In the matter between:

GERHARDUS SMIT

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: Smit v The State (1256/2022) [2023] ZASCA 154 (17 November 2023)

Coram: NICHOLLS, MOTHLE, MABINDLA-BOQWANA and MEYER JJA and KATHREE-SETILOANE
AJA

Heard: No oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 17 November 2023

Summary: Criminal law and procedure – fraud – whether appellant had intent, in the form of *dolus eventualis*, to commit fraud – whether the appellant, as an unrepresented accused, was given insufficient assistance by the regional court – held – no evidence that the appellant had intent in the form of *dolus eventualis* at time the agreement of sale was concluded – appellant afforded ample opportunity to obtain legal representation by the regional court.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (F M M Snyman and S Gura JJ, sitting as court of appeal):

1 The appeal against conviction and sentence is upheld.

2 The order of the high court is replaced with the following:

‘The conviction and sentence imposed by the magistrate are set aside.’

Nicholls JA (Mothle, Mabindla-Boqwana and Meyer JJA and Kathree-Setiloane AJA concurring):

- [1] The appellant was found guilty of fraud by the Regional Court, Lichtenburg (the regional court) and sentenced to 15 years’ imprisonment. His conviction was upheld by the North West Division of the High Court, Mahikeng (the high court). The appeal is with the special leave of this Court.
- [2] The facts are undisputed. On 4 and 6 December 2017, the appellant, through his business Germa Agri Boerdery, purchased cattle worth R2 078 812.80 from Chris du Plessis (Mr du Plessis), the complainant. This was not the first time that the appellant and Mr du Plessis had done business and all previous transactions were concluded in a similar manner.
- [3] The appellant would be given seven days within which to pay Mr Du Plessis for the cattle, at a pre-determined price according to weight. At Mr du Plessis’s farm, the cattle were weighed and immediately on-sold by the appellant to Grainvest, another company, at a profit. The cattle would be loaded on to trucks belonging to Grainvest and a copy of the weighbridge would be sent to Mr Du Plessis to indicate how much he was owed by the appellant. Based upon the weight, an invoice would be sent by the appellant to Grainvest who would pay within three days.
- [4] On this occasion, Grainvest paid the appellant within the customary three days. The appellant, however, did not pay Mr du Plessis within the seven days, as agreed. Instead, the appellant loaned R1 440 000.00 to his friend, Jan Labuschagne (Mr Labuschagne), with whom he shared business premises. No loan agreement was entered into with Mr Labuschagne, but he promised to pay the appellant timeously to enable him to pay Mr du Plessis. The appellant stated that he had previously loaned money to Mr Labuschagne, which had always been repaid. The appellant used the remaining R600 000 to buy cattle, which he then sold. This money, also, was not allocated towards paying Mr du Plessis.

Instead, according to the appellant, it ‘disappeared into the system’.

- [5] When he did not receive payment after seven days, Mr du Plessis contacted the appellant who justified his non-payment on the basis that Grainvest had not paid him, but would do so the following day. The appellant admitted that this was not the truth. A day or two later, he then contacted Mr du Plessis and asked to see him. He told Mr du Plessis that he could not repay him because the money from Grainvest had been used to make other payments. He made a statement to the police to this effect as well. No mention was made to the police or to Mr du Plessis of the loan to Mr Labuschagne. To date, Mr du Plessis has been paid none of the monies owed to him and Mr Labuschagne has since committed suicide.
- [6] The appellant’s defence, throughout, was that he had no intention to defraud Mr Du Plessis, or steal from him. He always believed that Mr Labuschagne would pay him back, at which point he would then pay Mr du Plessis the money that was owed to him. Unlike previous business dealings with Mr du Plessis, this was merely a ‘transaction which did not go well’. When he entered into the agreement with Mr du Plessis, he did not do so on the basis that he was not going to pay him. Nor did he decide beforehand not to pay him.
- [7] Both the regional court and the high court concluded that at the time of the conclusion of the agreement of sale, the appellant had no intention of paying Mr du Plessis. The regional court found that the appellant had dealt with Mr du Plessis’s money ‘as if it was his’. The high court found that the intent to defraud need not be direct or indirect but could be established by being subjectively reasonably foreseeable. Applying the principles of *dolus eventualis*, the high court found that even though the appellant may not have had the direct intention or even the indirect intention not to pay Mr du Plessis, ‘but by acting in the manner in which he has, giving the money to Labuschagne, the appellant has had the intent in the form of *dolus eventualis*.’[1]
- [8] The state has conceded the appeal on the basis that the proven facts do not exclude the reasonable inference that at the time when the agreement between Mr du Plessis and the appellant was entered into, the appellant had every intention of paying the money owed, but what later transpired, prevented him from doing so.
- [9] This is a concession well made. Fraud is the unlawful and intentional making of a misrepresentation which causes actual or potential prejudice. In other words, the perpetrator must have misled the victim by making a false or unlawful statement. There is no evidence, nor was it suggested, that the appellant had any intention other than to pay Mr du Plessis at the time that he purchased the cattle from him, nor did he make any such representation knowing it to be false. On the totality of the evidence the inference cannot ineluctably be drawn that the appellant had no intention to pay the money owed by him. That he might have been reckless in loaning the money received from Grainvest to Mr Labuschagne, cannot possibly, on the available facts, translate into intent in the form of *dolus eventualis*. For these reasons, it is plain that the state had failed to prove the intent to defraud. The appeal must accordingly succeed.

[10] Insofar as it may have initially been submitted that the appellant, as an unrepresented accused, was given insufficient assistance by the regional court, this submission is without foundation. The appellant was given ample opportunity to obtain legal representation. As the high court pointed out, the trial was postponed on 12 occasions to enable the appellant to either obtain legal representation, consult with his legal representative or change to a different legal

representative. On the day the trial finally started, a legal representative from Legal Aid was willing and able to proceed with

the case. The appellant, however, terminated his mandate on that very day and chose to run his own defence. Therefore, the appellant's

protestation that he was not fit and able to cross-exam witnesses was disingenuous in the circumstances. The record shows he was afforded a fair trial by the regional court and was guided where necessary. It is noteworthy that the appellant himself did not proceed with this line of argument in the heads of argument before this Court, despite the state conceding this issue as well.

[11] In the result the following order is made:

1 The appeal against conviction and sentence is upheld.

2 The order of the high court is replaced with the following:

C E HEATON NICHOLLS

JUDGE OF APPEAL

Appearances

For the appellants: W W Gibbs

Instructed by:

Hennie van Biljon Attorneys, Litchenburg

Maree & Maree Attorneys, Mahikeng

Symington de Kok, Bloemfontein

For the respondent: W van Biljon

Instructed by:

The Director of Public Prosecutions, Litchenburg

Savage Jooste & Adams, Mahikeng

The Deputy Director of Public Prosecutions,

Bloemfontein

[1] See para 24 of the high court judgment.

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