

SOUTH AFRICA / JUDGMENT

Tshopo and Others v S (A60/08)

[2011] ZAFSHC 114; 2013 (1) SACR 127 (FB) (17 June 2011)

[2011] ZAFSHC 114

COURT

Free State High Court, Bloemfontein

BEFORE

Cillié, Moloi

CASE / FILE NUMBER

A60/08

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FREE

STATE HIGH COURT, BLOEMFONTEIN REPUBLIC
OF SOUTH AFRICA
Review No. : A60/08

In the review between:

S. J
TSHOPO
.....1st
Appellant
N.
M NQULO
.....2nd
Appellant
N.
D MAKHATINI
.....3rd
Appellant
versus
THE STATE
.....Accused

CORAM:

CILLIe
et
MOLOI,
J

JUDGMENT

BY: MOLOI, J

DELIVERED ON: 17 JUNE 2011

APPEAL**JUDGMENT**

MOLOI, J

- [1] The three appellants were convicted and sentenced in the Regional Court, Bloemfontein on a charge of fraud. The trial court refused them leave to appeal both the conviction and sentence imposed. They come before us on appeal leave having been granted by this court after successful petition was lodged with the Judge President. The appellants were sentenced as follows: The first appellant was sentenced to four (4) years imprisonment. The second appellant was sentenced to two (2) years imprisonment wholly suspended for five (5) years on certain conditions. The third appellant was sentenced to four (4) years imprisonment of which two
- (2) years imprisonment was suspended for four (4) years conditionally. The appeal is against both the conviction and sentence.
- [2] The essence of the charge is that the accused secured a tender from the provincial Department of Education to distribute books and other educational material to schools without disclosing that 1st appellant was under an obligation as an official in the employ of the provincial administration to disclose that relationship as well as his relationship with the Member of the Executive Council (MEC) of the province for the Department of Health and later for the Department of Education, who was his wife; that the second appellant's name was used as the tenderer holding a 50% interest in a business known as Abelusi in whose name the tender was submitted and that the third appellant was the registered member of Abelusi who permitted his business to be used in securing the tender and also allowed his tax certificate to be so used to validate the tender as a pre-condition thereof. It is also alleged that the Department of Education and/or other tenderers suffered prejudice or potential prejudice as a result of their conduct.
- [3] The facts in this matter are largely common-course and reliance is placed on documentary evidence in proof of the allegations. Only the respondent led evidence as all three appellants closed their case after an application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977, was dismissed at the close of the state case. Though several grounds for appeal were advanced, at the hearing there were actually narrowed down to two issues, ie whether there was misrepresentation leading to actual or potential prejudice and whether it could be said the first appellant was "connected" with Abelusi as far as the first and second appellants were concerned, and whether the third appellant knew or ought to

have known that his business and tax certificates were to be used to defraud..

[4] The evidence showed the following:

- (a) that Abelusi applied for a tender to distribute school books and/or other educational materials to certain schools;
 - (b) that Abelusi had the second and third appellants as members each holding 50% of the interest;
 - (c) that Abelusi's tax clearance certificate was used to secure the tender;
 - (d) that the tender application was completed by the first appellant on behalf of the second appellant who is his sister;
 - (e) that the first appellant was handling the financial transactions of Abelusi and made payments from its account;
 - (f) that the tender form required a "Declaration of Interest" to be signed and that required a tenderer to disclose relationship(s) he/she had with any person employed by the Provincial Administration or connected therewith and to state the nature of the relationship/kinship so as to dispel the allegations of favouritism in awarding of tenders. The first appellant was employed by the Traffic Department of the Provincial Administration and was married to the MEC for Health and later for the Department of Education. They both failed to disclose their affinity and relationships;
 - (g) the third appellant provided a tax certificate to the first appellant for purposes of submitting a tender and allowed his business, Abelusi, to be used for that purpose;
- [5] Mr Edeling for both the first and the second appellants argued strongly that it was not proved that the first appellant was "connected" to Abelusi more than he assisted his sister, the second appellant, to complete the tender forms and handled the financial affairs of Abelusi. According to him to be connected the first appeiiant should have been a "partner" of the firm with a "financial interest". The evidence of the State, however, proved that (a) the first appellant personally indicated to SARS that he traded as Abelusi (See Exh H); (b) he personally obtained from Vermaas an address which he used for Abelusi;
- (c) he had signing powers of the account of Abelusi with ABSA bank and later he personally opened a new account for Abelulsi; (d) he withdrew monies from the Abelusi account at will and transferred monies to his wife's account and to one Segobo who was incidentally an employee of the Department of Education which called for tenders, (e) the second appellant gave the cheques she received on behalf of Abelusi to the first appellant and she never knew what happened to the money and (f) the second and third appellants, the declared partners in Abelusi, seem not to have received any cheques from the first appellant;

- [6] From the above, it seems, the first appellant was more 'connected' to Abelusi than the second and third appellants. The latter seem to have merely been used by the first appellant and that the first appellant's involvement with Abelusi should have been revealed in the tender documents to dispel that notion of favoritism the department sought to counter by signing the Declaration of Interest.
- [7] 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: The third appellant knew or should have known what his business was involved with. Failure to reveal the relationship with the state is prejudicial to other tenderers as well and renders the state incapable of administering public funds fairly and equitably.

Prejudice is not only proprietary: See SNYMAN, CRIMINAL LAW at p 537-8 5th edition also S v HEYNE 1956

(3) SA 604 (A) 623-625, S v JASS 1965

(3) SA 248 (E) at 250, S v PELSER 1967

(1) PH H102 (O) and S v MACATLANE 1927 TPD 708.

- [8] In dealing with sentence the trial court took into consideration all the relevant factors and balanced them all one against the other as required and imposed the sentence that was appropriate in the circumstances. The trial court took note of the mitigating and aggravating circumstances and this court does not intend to repeat those in this judgment. Suffice to say that the circumstances in which a court of appeal may interfere with the sentencing discretion of the trial court are limited as mentioned in several decisions including. S v PILLAY 1977

(4) SA 551 (A) S v ANDERSON 1964

(3) SA 494 (A), S v ABELS 1948

(1) SA 706 (O) S v FRANCIS 1991

(2) SACR 198 (A).

This court cannot find fault with the trial courts discretion in imposing the sentences it did.

[9] In the result the appeal of all three appellants stands to be DISMISSED. The convictions and sentences imposed by the trial court are confirmed.

MOLOI, J

I concur, and it is so ordered CILLIE, J

I concur, and it is so ordered

CILLIE, J

On behalf of the 1st and 2nd Appellants: Mr. H Venter Lovius Block 31 First Avenue Westdene BLOEMFONTEIN 9300 On behalf of the 3rd Appellant: Mr. N W Phalatsi Phalatsi & Partners Iustitia Building, Gr Floor BLOEMFONTEIN 9300 On behalf of the Defendant: Adv Swanepoel Director of Public Prosecutions Waterfall Centre Aliwal Street BLOEMFONTEIN 9300

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