

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)

In the matter between:

THE WHICHEVER IS NOT A CASE
CASE NO: A 349/2010
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
15-07-2011 [Signature]
DATE SIGNATURE

MCMILLAN VULINDLELA MCHIZA APPELLANT

15/7/2011

And

THE STATE RESPONDENT

JUDGMENT

MAVUNDLA J,

- [1] The appellant was convicted by the Regional Court in Vereeniging on 28 January 2009, on contravention of section 3(a)(i)(aa) of Act 12 of 2004 (corruption) and sentenced to six years imprisonment. Leave to appeal against both the conviction and sentence was granted on petition.

[2] The applicant approached this Court by way of a notice of motion, seeking an order for the setting aside of his conviction and sentence, and for the remission of the matter to the Regional Court in Vereeniging for a hearing *de novo*, alternatively for the hearing of further evidence to be adduced by the defence witnesses to be subpoenaed on his behalf.

[3] The appellant brought an application for condonation of the late filing of his heads of argument, which was not opposed and consequently granted. I shall say no more about this aspect.

[4] Essentially the applicant seeks leave to adduce further evidence. In motivating this application, the applicant contends that he did not have a fair trial because his erstwhile legal representative consulted him briefly and once just before the trial commenced. He further contended that the legal representative failed to arrange for certain witnesses to be called on his behalf. It was further submitted that his erstwhile legal representative did not effectively cross examine witnesses, in particular Captain Majola,

who was involved with project Vica, the authority in terms of s252A of Act 51 of 1977.

- [5] The evidence the applicant seeks to have adduced is an organogram, which he contends would indicate that Captain Majola was indeed the initial investigating officer of the project Vica. This evidence, so it was contended by the applicant, would demonstrate that Captain Majola, framed him in these proceedings.

LEGAL POSITION ON APPEAL

- [6] In dealing with this application, I need to bear in mind that the Supreme Court Act provides *inter alia*, that-

"S22 Powers of Court on hearing of appeals:

The appellate division or a provincial division, or a local division having appeal jurisdiction shall have power

- (a) on hearing an appeal to receive further evidence either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject matter of the

appeal, with such instructions as regards taking of further evidence or otherwise as to the division concerned seems necessary;

- (b) to confirm, amend or set aside the judgment or order which is the subject matter of the appeal and to give any judgment or make any order which the circumstances may require.’ ”

[7] The court of appeal has a wide discretion to allow the re-opening of a case after conviction, for the hearing of further evidence. Such a discretion is used sparingly and in special circumstances, if it is found that it is in the interest of justice to do so and would not defeat the principle of finality to matters; *vide Rail Commuters Action Group v Transnet Ltd t/a Metrorail*.¹

[8] The appellant was convicted on a count of fraud. It is common cause that the appellant was employed as a member of the South African Police Service. It is also common cause that the

¹ 2005 (2) SA 359 (CC) at 388F-389B para [42]-[43].

appellant was a manager of project known as *Vica* Project which was investigating syndicated motor vehicle theft. One of the targets in this operation was the complainant, Mr. Molimi.

[9] It is common cause that Mr. Molimi was not physically known to the appellant. The evidence, which was led and accepted against the appellant, was that the appellant telephonically contacted Mr. Molimi, the complainant, advising him that he wanted to talk to him about something which he would not want to discuss over the phone. The appellant advised the complainant to meet at Benoni Magistrates court.

[10] On the 6 October 2007 the complainant was accompanied by his friend Mr. Ndlovu to the agreed meeting place. On arriving at the agreed meeting place, the complainant went out of his motor vehicle leaving Mr. Ndlovu alone, while he went to buy air time. On his return to the motor vehicle, the appellant told him to leave as he wanted to talk to Mr. Molimi alone, who he thought was Mr. Ndlovu. The complainant obliged to this request. On his return to the motor vehicle after the appellant

had left, Mr. Ndlovu informed him of his discussion with the appellant, the nature of which was an offer to exchange various documents purportedly incriminating the complainant in motor vehicle theft, for a sum of money in order to abort the investigation against him. Mr. Ndlovu further advised him that the appellant arranged to meet with him at Nando's for the exchange of the documents and money. The complainant reported the matter to the police and subsequently met with Captain Majola who set up a trap.

[11] The complainant further testified that Captain Majola handed to both him and Mr. Ndlovu an amount of R20, 000, 00 that was to be handed to the appellant at Nando's. However the appellant did not honour the meeting. He was subsequently telephonically contacted by the appellant who rescheduled the meeting to a pub in Benoni, which he gave him the directions of.

[12] The complainant further testified that, after informing Captain Majola of this new venue, he together with his friend Mr.

Ndlovu proceeded to Manzini pub. At the pub Mr. Ndlovu entered alone while he remained in the motor vehicle. Mr. Ndlovu re-emerged and invited him into the pub where the appellant showed him where to sit. The appellant and Mr. Ndlovu went to a snooker table. Shortly thereafter they left and followed the appellant in his motor vehicle into back street where Mr. Ndlovu went alone to the appellant's motor vehicle. The latter returned without the documents and without having handed the money to the appellant.

[13] Mr. Ndlovu testified that on the 5 October 2007 after he dropped the complainant at his home, that evening the latter telephonically requested him to come to his place in the morning. Indeed in the morning of the 6 October 2006 he together with the complainant proceeded to a place next to Benoni magistrates court. The complainant alighted and went to a shop. The appellant came to the motor vehicle, knocked at the window, addressed him as the complainant and invited him across the street saying that he wanted to talk to him. Mr. Ndlovu then realised that the appellant does not know the

complainant physically. He proceeded to play along as the complainant.

[14] According to Mr. Ndlovu, the appellant, who believed that he was the complainant, told him that he has various documents implicating him. Mr. Ndlovu informed the appellant that he was awaiting a call from Alexandra where he must go fetch an amount of R50, 000, 00. The appellant indicated that, this amount would be enough and the “complainant” should bring it in the afternoon.

[15] Mr. Ndlovu informed the complainant of his discussion with the appellant, who in turn reported the matter to the police. Captain Majola then arranged to set a trap. In this regard the Captain handed to both complainant and Mr. Ndlovu an amount of R20, 000, 00 which was to be handed to the appellant. The meeting with the appellant was supposed to take place at Nando's in Kempton Park. However, the appellant did not honour the appointment. However, the meeting was rescheduled to

Manzini pub. Captain Majola was informed of the changed venue.

[16] Mr. Ndlovu further testified that he proceeded with the complainant to the Manzini pub. At the pub, he first inquired from the appellant whether it was in order if he were to come in with the complainant. The appellant agreed to the inquiry, Mr. Ndlovu then fetched the complainant. When they entered the pub, the complainant was greeted by a number of people as they went to take a seat. The appellant remarked that the complainant seems to be well known to many people and seems to be a fronting person. The appellant invited him to the snooker table, once there Mr. Ndlovu inquired from him of the documents. The appellant told him that the documents are available but did not have them with him at the moment. The appellant told him to follow him in their motor vehicle, which they did.

[17] Mr. Ndlovu further testified that they followed the appellant into a back street. The appellant told him that the documents are

available and they would fetch them later. He informed the appellant that this was not what they had agreed to. The appellant failed to produce the documents and they parted ways.

[15] Captain Majola confirmed the evidence of both the complaint and Mr. Ndlovu informing him about their respective discussions with the appellant and the amount of R20, 000, 00 which he subsequently gave to them for purposes of handing it to the appellant, for the exchange of the documents from the appellant. Captain Majola further testified about the exhibit A document revealing that the telephone contacts between the appellant and the complainant on the latter's cell phone number 0827663817 originated from the telephone of the office of the appellant, number 011-570900. Majola also confirmed that, according to the document at 21h27 a call was received from cell phone number 071335 727 on the complainant's cell phone. The owner of the last mentioned cell phone number informed him that the appellant, on that particular time and date, borrowed his cell phone. He further testified that at

21H02 the complainant received another cell phone call from cell phone number 072808 3805, whose owner confirmed that he was with the appellant at Emanzini pub on the d and time day and time in question, when the latter borrowed his cell phone. He also testified that the appellant was the manager of Project *Vica* which was a covert operation investigating the target Mr. Molimi's involvement in stolen motor vehicles. He further confirmed that there was friction between himself and the appellant regarding the use of a police motor vehicle, but denied that this would have prompted him to pervert the truth against the appellant, whom he had high regard as a competent investigating officer.

[19] The State also called Mr. Sitanani and Mr. Lukhele. I deem it not necessary to chronicle their evidence because nothing much turns around their evidence. It suffices to state that Mr. Sitanani confirmed that the appellant was at the Manzini pub on the 6 October 2007. Mr. Lukhele confirmed that on 6 October 2007 the appellant made use of his cell phone with number 0728083805 while he was at Manzini pub.

[20] The complainant, Mr. Ndlovu and Captain Majola were also extensively cross examined. The version of the appellant, which was a denial of their respective evidence relating to the appellant. However, nothing of significance came out of the cross examination as all the witnesses, steadfastly remained in their testimony.

[21] I have carefully perused the record. Nowhere was it contended during the trial that the appellant requested that this organogram brought by the State. Neither was the magistrate requested to direct the State to produce such evidence. The proceedings commenced on 25 June 2008 and was completed on 28 January 2009. Besides, Captain Majola was the first witness for the State. The appellant does not state in his application why this evidence was not adduced during the trial.

[22] The defence of the appellant that he was framed by Captain Majola was considered and rejected by the Magistrate. Assuming that the appellant was framed by Captain Majola, it

would mean that Captain Majola schooled all the witnesses to pervert the truth against the appellant. The difficulty with this proposition is that the magistrate found the witnesses of the State to be credible and reliable. In this regard, it needs borne in mind that in the absence of demonstrable evidence on the record to the contrary, the acceptance of evidence and factual finding by the trial court is presumed to be correct, and a court of appeal will not interfere therewith; *vide S v Francis*.²

[23] Even if it were to be found that Captain Majola lied about the fact that he was the initial investigating officer, this in my view, would not assist the appellant in any way. The mere fact that a witness told a lie on one aspect, does not mean that his entire evidence, or even the rest of the other witnesses' evidence must be thrown out of the window. It is, in my view, preposterous to even think that all the witnesses connived to pervert the truth. There is no basis laid why the evidence of the other witnesses that implicated the appellant, must be rejected. In my view, the appellant has not acquitted himself of the duty

² 1991 (1) SACR 198 at 204c-e.

to demonstrating the weight of the materiality of the evidence he seeks to have led and that it would make much difference to his conviction.

[24] The applicant further contend that his initial attorney was incompetent and as the result did not have a fair trial. It needs to be borne in mind that seldom would a convicted person give credence to his legal representative. Generally, the incompetence of the legal representative is a matter of hind sight after conviction.³

[25] With regard to the appellant's contention that his erstwhile legal representative failed to call witnesses, it must be borne in mind that, the calling of witnesses is a matter of the discretion of his legal representative. A court of appeal cannot assail the legal representative's discretion as to how he conducts the defence. The court of appeal can only intervene, when it is clear from the record, that the appellant expressed during the trial a desire

³ Vide Halgryn v S 2002 (4) ALL SA 157 at 162d-2g; May v S All SA November[2005] 4 All SA 334 (SCA) 338d.

to call further witnesses but was ignored or denied this opportunity, which is not reflected on record *in casu*.

[23] Concerning the question of the competence or lack thereof of his erstwhile legal representative, must be adjudged on an objective assessment of the evidence on record, bearing in mind that seldom are convicted persons content, let alone being gracious, to their legal representatives. Brevity on cross examination, is not an indication of incompetence. Skilled counsel, with terse questions can achieve devastating results far better than verbosity. However, what is significant *in casu*, is the fact that the version of the appellant, which was the denial of his involvement and the veracity of the account by the State witnesses, was put to all the State witnesses by his alleged incompetent legal representative. The magistrate carefully considered the evidence of all the State witnesses and concluded that they are truthful and reliable and in my view, cannot be faulted in that regard.

[27] In the circumstances, I am not persuaded that the applicant has made a case to justify the setting aside of the judgment of the magistrate and referring this matter to be tried *de novo* and for the hearing of further evidence. The application must therefore fail.

[28] In the premises I make the following order:

1. That the application for the setting aside of the applicant's conviction by the Regional Court in Vereeniging on 28 January 2009 and for the remission of the matter to the Regional Court in Vereeniging for a hearing *de novo* is dismissed;
2. That the conviction and sentence of the appellant by the Regional Court in Vereeniging on 28 January 2009 is confirmed.


N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree


N. KOLLAPEN

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT : 08/07/2011

APPELLANT'S ATT : MATEME & MAKGAHLELE ATT

APPELLANT'S 'S ADV : MR. M. VAN WYGNGAARD

RESPONDENT'S ATT : DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT'S ADV : MR M.M. MASHUGA