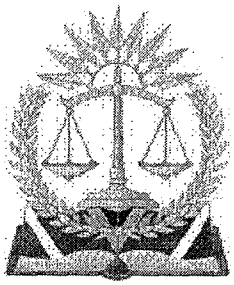


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: A 415/2012

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

29/11/2019 .....
DATE SIGNATURE

In the matter between:

AJAY SHOLA **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

CORAM:

SETHUSHA AJ

[1] This is an appeal against both conviction and sentence imposed by the Regional Court Division, Johannesburg. The appellant was convicted on a charge of fraud, and sentenced to eight (8) years imprisonment. The appellant approaches this court on appeal with leave from the court a quo.

[2] Mr Bauer appeared for the appellant whilst Mr Chauke appeared for the state.

[3] Both in his heads of argument and in his oral submissions Mr Bauer submitted the following:

[3.1] This court be requested to adjudicate upon the fact that procedural irregularities were committed by the *court a quo* in regard to the procedure adopted to establish whether the *court a quo* had de facto jurisdiction before the appellant was required to plea.

[3.1.1]The *court a quo* erred in failing to find that it does not enjoy jurisdiction to try the matter due to the fact that the offence was committed in Nigeria.

[3.1.2] The contract was signed by Mr Sterkboom and the appellant in Nigeria relating to the event to be held in Nigeria. PABHA – the awards event was hosted in Nigeria.

[3.1.3] Section 110A of the Criminal Law Amendment Act (CPA) giving limited extra-territorial jurisdiction to RSA courts for acts committed abroad was not in force at the time of the appellant's trial. It was only in force in 2009. Therefor RSA courts do not assume jurisdiction over crimes committed abroad. In the premise it constituted an irregularity.

[3.2] On the merits, he argued the court a quo was not impartial in the conduct of the trial. He posed questions not limited to elucidation or clarification of evidence, but meant to favour the state. The court a quo made a provisional ruling in regard to the jurisdiction plea, nevertheless Sterkboom, for the state was allowed to testify as to her alleged reasons why the R.S.A court allegedly had jurisdiction.

[3.3] The court a quo erred in failing to draw a negative inference from the contradictions and self-destructive evidence between state witnesses in court; and failing to find that the ulterior motive to falsely implicate the appellant by Sterkboom and Nelissa being crucial to the extent that it tarnishes their credibility of their version, calling upon for acquittal of the appellant.

[3.4] Mr Sterkboom confirmed that it was the attorney who had been responsible for drafting the ultimate agreement referring to Exh "B". Mr Sterkboom led the court *a quo* to believe that her company was to raise development funds to fund the joint venture project between them. She changed this latter position to now reflect that she was contracting to receive appropriate financial reward for further roll out into Africa.

[3.5] It is submitted that the evidence of Sterkboom conclusively proved that she had been acting in concert with the lawyers of Endemol and they have been responsible for making a misrepresentation on the agreement – that SOLSAN was at all a SA (pty) LTD entity. The finding by the court a quo that the appellant was responsible for actus .... Was thus clearly an error.

[3.6] The court *a quo* erred in failing to find that the dealings between the entities had been vested in the civil law domain with part performance that had already taken place and that such performance ad compromise and settlement had removed the possibility of any possible element of unlawfulness, prejudice and for criminal prerequisites of *mens rea* (in the form of intent) for fraud to have been committed.

[3.7] The court *a quo* erred in finding that the state succeeded in proving the case beyond reasonable doubt, and that the version of the appellant was not reasonably possibly true.

[3.8] Sterkboom admitted that she was informed by the appellant that SOLSAN was registered in the USA with subsidiaries in the RSA wanting to spread into an African continent.

[3.9] Sterkboom admitted that from the outset her dealings with the appellant, Exh "A", nowhere makes any allegation that SOLSAN is an SA pty ltd entity. This clearly exhibits that it displayed the name of the entity as SOLSAN Communication Ventures Incorporated.

[3.10] The trial court erred in failing to find that Sterkboom's version was improbable.

[3.11] On sentence, the court *a quo* erred in not considering any comparative sentences handed down by the High court in similar matters dealing with first offenders.

[4] On the other hand, Mr Chauke submitted the following in his heads of argument and oral submissions:

[4.1] The court *a quo's* judgment was comprehensive and well considered.

[4.2] The court *a quo* rightfully ignored the evidence of Chima Okereke, a Nigerian lawyer who was called by the appellant to testify due to time constraints could not finish his testimony.

[4.3] The court *a quo* correctly found that misrepresentation by the appellant as detailed by Sterkboom and Mbeki induced Endemol represented by the latter to enter into a contract with the appellant. The appellant knew that he does not have the financial means required to perform in terms of the contract.

[4.4] The court *a quo* properly considered that the appellant misrepresented to Endemol that SOLSAN Communication Ventures was a duly registered company in South Africa.

[4.5] The court *a quo* was correct in finding the appellant at no stage objected to the citing of SOLSAN SA as a registered company through his dealings with Endemol. He did not even propose Tele-Africa Media Ltd as a party to the contract.

[4.6] The court *a quo* correctly found that Tele-Media Limited was changed to SOLSAN Communication ventures in 2003. This occurred three years after the signing of the contract.

[4.7] On sentence: The sentence imposed, that of direct imprisonment was warranted within the given circumstances. The court *a quo* properly exercised sentence discretion.

[5] This court has to determine, as a court of appeal, whether the appellant was correctly convicted, and or, was there the presence of irregularity arising from jurisdiction. This court has to consider whether the sentence was just.

[6] It is trite law that a court of appeal will not interfere with or tamper with the trial court's judgment regarding conviction or sentence unless it finds that the trial court misdirected itself with regard to findings of fact or the law. See *R v Dhlumayo and Another* 1948 (2) SA 677 (A). The principle was also restated in *S v Mlumbi* 1991 (1) SACR 235 (SCA) at 247g.

[7] If the trial court misdirected itself either on the facts or the law, a court of appeal will be at large to interfere and deal with the matter as it deems fit, including substituting its own order or decision for that of the trial court, which may include an order for setting aside a conviction or the altering of sentence. This was aptly amplified by Msizi AJ in the recent (unreported) decision of *Booi v State* in the Eastern Cape Division – the decision was delivered on 12 August 2014 under case number CA2 R393/13 as follows:

".....the ambit of interference by the appeal court on a finding of fact and credibility is restricted to few instances. It is only allowed in instances where there is a demonstrable and material misdirection by the trial court where the recorded evidence shows that the finding is clearly wrong."

[8] Where there is an appeal against both conviction and sentence, and the court of appeal set the conviction aside, ordinarily that would be the end of the matter, as there would be no need to examine whether the sentence imposed would have been appropriate.

[9] When evaluating or assessing evidence, it is imperative to evaluate all the evidence, and not to be selective in determining what evidence to consider. Mugent J (as he then was) In *S v Van der Meyden* 1999 (1) SACR 447 (W) stated at 450:

"What must be borne in mind however, is that the conclusion which is reached (whether it be to convict or aquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable and some of it might be found to be only false or unreliable, but none of it may simply be ignored."

[10] The facts found to be proven and the reasons for the judgment of the trial court must appear in the judgment of the trial court. If there was evidence led during the trial, but such evidence is not referred to in any way in the judgment, it is safe for a court of appeal to assume that such evidence was either disregarded or not properly weighed or even forgotten about at the time of delivering the judgment. As was stated in *S v Singh* 1975 (1) SA 227 (N) at 228.

"The best indication that a court has applied its mind in the proper manner....is to be found in its reasons for judgment, including its reasons for the acceptance and the rejection of the irrespective witnesses..."

[11] All it means is that the summary of the evidence led must indeed entail a complete embodiment of all the material evidence led.

[12] In order to apply the above-mentioned legal principles to the facts of this case, this court must determine, with regards to the conviction, in the first place, what evidence of the state witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the defence or appellant, and compare it to the factual findings made by the trial court in relation to that evidence and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decisions, findings or judgement.

[13] In my view, this means that if a court of appeal is of the view that a particular fact is so material that it should have been dealt with in the judgment, but such fact is completely absent from the judgment or merely referred to without being dealt with when it should have, this will amount to a misdirection on the part of the trial court.

[14] The state called 3 witnesses namely Chantel Sterkboom, the manager of Endemol (pty) Ltd, her husband Mr Martin Nielson and Mr Mbeki, the executive chair of Endemol. On the other hand, the appellant called Mr Wolmerans and Mr Okereke. Mr Okerekes testimony was pro non scripto as he left for Nigeria and never come back to finalize his testimony.

[15] Having correctly reiterated that at the end of the criminal trial the court must make a finding on the totality of the evidence as stated in *S v Chabalala* 2003 (1) SACR 134 (SCA), and having considered discrepancies, contradictions, consistency and corroboration in order to arrive at a proper credibility finding.

[16] The trial court arrived at a finding that Sterkboom as well as Nelissa had clear motive to falsely implicate the appellant. Therefore their credibility was placed at stake by the court a quo.

[17] The basis for the finding above by the trial court is that:

[17.1] Sterkboom during a trial within a trial had a document from which she testified.

[17.2] She had much to lose by her conduct in the negotiation process and what transpired later on after the PABHA awards.

[17.3] The court *a quo* made a finding that generally Sterkboom did not make a very favourable impression upon the court.

[17.4] The court *a quo* found that Mr Neilson had a clear motive to falsely implicate the accused due to his very close relationship with Chantel Sterkboom. A question mark must be raised next to his testimony.

[18] The court *a quo* having evaluated the testimony of Sterkboom and Neilson with its weaknesses and or unreliability and dishonesty, reasoned that the testimony of Mr Mbeki as having contradictions that were never contested, losing sight that it is not for the appellant to prove his innocence.

[19] The trial court found that the state succeeded in proving its case beyond reasonable doubt. Based upon the above, I find it to amount to a misdirection.

[20] I have looked at the number, nature and extent of the inconsistencies or or contradictions in the evidence of Sterkboom, and I am convinced that in light of the appellants defence, such contradictions or inconsistencies impact negatively on the credibility of the state witness, Sterkboom, regard to the effect that she amongst others tampered with Exh "B" without knowledge and consent of the appellant, otherwise he would have signed or initialled the amendment.

[21] I nevertheless feel constrained to express my serious reservations regarding the magistrate's comments about political involvement / interference / remarks leaves more to be desired.

"....and the same, lessons have not been learned from the previous 10 years. There was quite a bit of, if I may put it, political fallout from this issue, I see Mr Mbena got involved and so forth..... (witness). I think that certainly helped getting the one big payment that we did. Yet of the R1 million ja,....."

[22] I however agree that this court should not lightly interfere with the court a quo's findings. However, the inconsistencies or contradictions that are found expressed during the trial were not minor and immaterial. They had a bearing on the probabilities.

[23] I nevertheless feel constrained to express my reservations regarding the court a quo's comments in relation to the approach to be taken by the court in relation to inconsistencies or contradictions between the state witnesses testimony in court.

[24] It is from the court *a quo's* reasons for judgment in that "...I gave the accused four opportunities to tell the court in the accused's point of view how Endemol could have enforced their rights if the citation or the example motion was not correct. The accused could not give the court that indication and that goes to the crux of the matter." It is not for the appellant to prove his innocence.

[25] I have been unable to find from reading the judgment the reasons why the court a quo concluded that there were no improbabilities present in the version of the state witnesses. The only reasonable inference to draw from the lack of the factual basis for the said finding is that the trial court failed to consider the probabilities and improbabilities.

[26] The appellant was not the drafter of the contract as well as the amendment thereof. Throughout the drafting of the contracts both parties were legally represented by highly experienced lawyers.

[27] In my view the fact that Endemol was given an opportunity to go ahead and sign into a joint venture with SOLSAN Communication Ventures Pty Ltd it indicates that the lawyers for Endemol did not see the possibility of fraudulent actions by the appellant.

[28] The appellant, from the outset played open cards with Mr Sterkboom in that he mentioned the existence of SOLSAN in other countries. He did explain why SOLSAN in SA did not succeed in having registered as there was a company with a similar name. We accept that he did not approach Endemol for the contract amendment, however, it does not amount to fraud. The name used was one of his companies that were still in operation.

[29] The appellant bears no onus to prove his innocence.

[30] Considering a number of holes in the state's case even if it is viewed on its own, as if the appellant had no version or defence at all. The state did not succeed in proving its case according to the required standard.

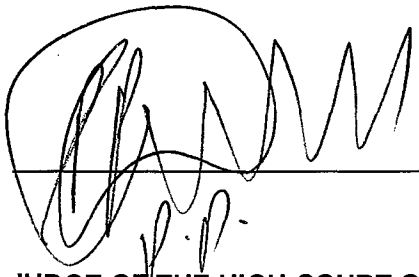
[31] As for the aspect of jurisdiction, it is my view that the court a quo correctly arrived at its conclusion giving it jurisdiction to hear the matter considering that negotiations which led Endemol to render service in Nigeria, were initiated in Sandton within the magisterial district of this court. Exh "B" specifically states that the parties consent to jurisdiction to the laws of the Republic of South Africa which includes civil and criminal law.

[32] Accordingly, I am of the view that the appeal should succeed and the conviction is accordingly set aside.

[33] In the premise, I propose the following order:

[33.1] The appeal is upheld.

[33.2] The conviction and sentence is set aside.

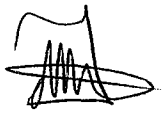


NC SETHUSHA

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

I agree, it is so ordered:



T MAUMELA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

APPEARANCES

FOR THE APPELLANT:	**ADV BLAUER** **INSTRUCTED BY POTGIETER, PENZHORN AND TAUTE ATTORNEYS, PRETORIA.**
FOR THE RESPONDENT:	**ADV CHAUKE** **INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTION. GAUTENG**