IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

HIGH COURT REF: 1018

CASE NO: DCA 76/2013

DATE: 1 APRIL 2014

CASE NO: A229/14

In the matter between:

THE STATE **Applicant**

and

THABO STEPHEN TSWAI **Respondent**

JUDGMENT

MOTHLE J

1. This matter came by way of review and was allocated to Acting Justice Mogotsi in his chambers for consideration. Judge Mogotsi referred the case back the trial Magistrate to comment on queries raised in his letter on 8 November 2013. The Magistrate MN Muhtari

responded to Judge Mogotsi's queries in a letter date stamped 18 December 2013. The matter was then referred to Madam Justice Kubushi for further consideration in the absence of Mr Justice Mogotsi. Madam Justice Kubushi then referred the queries raised by Mr Justice Mogotsi as well as the response thereto by the Magistrate, to the Director of Public Prosecutions, Gauteng Division Pretoria for their comment.

2. The Deputy Director of Public Prosecutions, M J Van Vuuren responded on the referral in a memorandum dated 5 March 2014. In the absence of both acting Justice Mogotsi and Madam Justice Kubushi, the matter has been referred to me for further attention.

3. The four accused being Thabo Stephen Tswai, Lehutla William Mosotho, Letau Junior Sehlola as well as Lizo Andile, were all charged with a crime of theft for which they stood trial in the Magistrates Court District Nebo. Accused No.4 was not present in Court and a separation of trials was ordered. All 3 accused conducted their own defence.

4. The State alleged that on or about 27 February 2013 at or near Vleisboom in the District of Nebo, the accused did unlawfully and intentionally steal the following items, to wit 200 by heavy tile valued at R12.590.00; One x 1,000 L Jo-Jo tank valued at R1,499.95; one 2500 L tank valued at R1,989,95. The total value of items being R16,079.90, the property or in the lawful possession of Sunny Mogadine or Cashbuild. The accused pleaded not guilty but at the end of the trial on 18 September 2013 they were found guilty. Accused No. 1 and 2 were sentenced to a R6,000.00 fine each or twelve months imprisonment while Accused No 3 was sentenced to R1.500.00 fine or 3 months imprisonment. All accused were declared unfit to possess a firearm. The Magistrate ordered that the payment of the

fines be deferred.

5. According to the evidence Accused No. 1 and 2 were employed by Cashbuild as security guards. Accused No. 3 was not known to the complainant. During the evening of 3 February 2013, a number of items went missing from the store. From the charge sheet, a substantial amount of tiles were stolen. The value thereof is estimated at R29,362.35. It appears that the premises were entered through the roof. The stolen items were allegedly recovered from the accused. According to the presiding officer the accused elected to conduct their own defence. However, by perusal of the record it emerged that Ms Ndlovu of Legal Aid had at some stage represented Accused No. 1. This was never canvassed with the accused and there is no indication on the record that she withdrew

6. On reading the record Mr Acting Justice Mogotsi raised the following queries with the Magistrate:

6.1.1. “Whether the Accused were allowed to participate in the amendment of the charge sheet or not, and if they objected or not?

6.1.2. Whether the Accused before the charge was put to them allowed to express their views about legal representation? From the record it is evident that Accused No. 1 wanted legal aid.

6.1.3. Was it not proper, to explain briefly the provisions of Section 115 of Act 51 of 1977, to the Accused?

6.1.4. Did the closing of the State case, not amount to a stopping of prosecution?

6.1.5. Were the accused convicted, on a basis of evidence of witness who was arrested before or not? Were charges withdrawn, or was the accused warned in terms of Section 204 of Act 51 of 1977?

6.1.6. Was it not proper to hold a trial within a trial I respect of Mr Ramakogoales' evidence?

6.1.7. Were the accused made aware of the results of not challenging incriminating evidence?

6.1.8. Were contradictions regarding descriptions of the tiles taking into consideration during the evaluation of evidence?

6.1.9 Is there sufficient evidence to support a conviction?"

7. The Magistrate responded in a 2-page memorandum to each and every query raised by Mr Acting Justice Mogotsi as follows:

"(a) There was no need for the State to apply (sic) 86 CPA 51/1997. He changed the annexure to the charge sheet and put the new charge on record. The Court felt that it was not necessary for the accused to participate on (sic) 86 CPA 51/1977 due to the fact that the State incorrectly applied it

(b) It was an oversight on my side. Indeed Accused 1 applied for legal aid. Ms Ndlovu from Legal Aid appeared once and there is nowhere in the record that Accused terminated assistance by Legal Aid representative.

(c) Section 115 CPA 51/77 not explained in details, this was an oversight on

my side.

(d) It is not stopping of prosecution, the State on its own closed its case after the application to trace Tau was not granted. The Court considered the delay in finalising of the matter and the length of time given to the State to trace Tau.

(e) Mr Ramakogoale was not arrested. The matter was not withdrawn against him; he was not declared a witness in terms of Section 204 of the Criminal Code. Accused 4 is the one who is at large and trial was separated against him. According to the record, page 16, paragraph 20, was taken by police together with accused persons. According to the record, page 16, paragraph 20, Ramakogoale was taken by

police together with accused persons. He narrated the whole story about the tiles.

No, it was not necessary due to the fact that he admitted having submitted the statement to the police. He confirmed his signature. The State applied to declare him a hostile witness. Application was granted. In the case of Schwikkard and Van der Merwe, Principles of Evidence Hi (2009) at paragraph 12 and 2 and S v Mgcina 2007 (1) SACR 82 (T), the Courts have made it clear that there are some situations in which the admissibility of such evidence may properly be decided without holding a trial within a trial. One such case was S v Henna & Another 2006 (2) SACR (3) (SE) at 39. Firstly the parties had agreed that the issue was to be dealt with in argument when ail evidence had been heard, so there was no

question of prejudice to the accused. Secondly, the facts upon which the issue was to be decided were common cause as the accused did not testify and evidence of constitutional conduct was given by the State witness. The basis was laid. The Court was satisfied and matter proceeded without holding trial within trial. The fundamental rule for cross-examination on the contents of a document is to have any relevance and any evidential weight whatsoever in such a document and the document must be authenticated.

No, this was an oversight on my side.

The Court did not notice any discrepancies with regard to the files.

Is there sufficient evidence to support a conviction?

There is sufficient evidence to support a conviction. That is the reason the Court convicted all three accused persons on a charge of theft. The evidence the Court relied on, is the evidence of a single witness, Mr Ramakogoale. In the case of S v Banana 2000 (2) SACR 1 (Z5C) it was said that there will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel, in essence a common sense approach should be applied. Where the evidence of a single witness is corroborated in any way which tends to indicate that the whole story was not

concocted, the caution enjoyed may be overcome and acceptance facilitated. But corroboration is not essential. Any other feature which increases the

confidence of the Court in the reliability of the single witness may also overcome the caution.

However, the Court concedes that procedural irregularities raised by your office cannot be justified."

8. The prosecution in its response points out the following:

8.1 The application for the amendment of the charge sheet prior to the accused's pleading was not necessary.

8.2 The explanation of plea in terms of Section 115 of the Criminal Procedure Act, 51 of 1977 was not explained to the accused in that they could have chosen to remain silent. Instead, Accused No. 3 elected to offer some evidence about the incident which could be construed as an admission. The Magistrate admits that this was an oversight.

8.3 The Magistrate did not assist the accused during cross- examination of the State's witnesses. He has a duty to do so as was stated in S v Roothman. S v Johnson, S v Tsaso. Tsaso v Van Wvk 1989 (3) SA 368 (E).

8.4 A trial within a trial should have been conducted to determine the voluntariness and freeness of the statement by Joseph Lediga Ramakogoale. This was not done. Hearsay evidence was also elicited from this witness. There is no indication that the Magistrate disregarded this evidence;

8.5 A declaration of the witness as a hostile witness was not explained to the accused;

8.6 There was no evidence as to how the accuseds were arrested and the goods recovered from them;

8.7 The presiding Magistrate did not inform the accused of their right to seek a discharge in terms of Section 174 of Act 51 of 1977. The Magistrate did not even consider to grant this discharge mero moto after the close of the State's case. See S v Lubaxa 2001 (2) SACR 703 (SCA).

9. For reasons stated in the preceding paragraphs and the authorities cited, with which I agree, I am of the view that the irregularities committed by the Magistrate are so overwhelming that both conviction and sentence should be set aside.

10. It is indeed correct that the Magistrate, by his own admission, misdirected himself, in that the procedural requirements to advise the unrepresented accused of their rights were not observed. This material omission vitiates the entire proceedings such that it cannot be said that the trial was conducted in accordance with justice.

11. I am therefore of the view that both conviction and sentence should be set aside. It is also a matter of record that the accused had paid or were paying fines in lieu of serving prison sentence. They have to be refunded accordingly.

In the circumstances I make the following order:

1. The conviction and sentence imposed by the Magistrate on the accused is hereby set aside and substituted by the following:

"*The accused are found not guilty".*

2. The accused are to be refunded all the fines they have paid in respect of

this conviction and sentence;

3. The order of this Court is antedated to the 18 September 2013.

S P MOTHLE

Judge of the High Court of South Africa Gauteng Division, Pretoria.

I Agree

E JORDAAN

Judge of the High Court of South Africa Gauteng Division, Pretoria

Date: 26 March 2014.