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

(1) REPORTABLE: ~~YES~~ (NO)
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ (NO)
(3) REVISED.
2014:05:21
DATE
SIGNATURE

CASE NO: **A451/2009**

21/5/2014

In the matter between:

MARIA GORETTI DU PLESSIS Applicant

and

THE STATE Respondent

J U D G M E N T - Leave to Appeal

MAKGOKA, J:

[1] This is an application for leave to appeal against the order of the judgment of this court handed down on 30 August 2013, in terms of which the applicant's appeal against the conviction on 10 counts of fraud, was dismissed. The application is opposed by the State.

[2] The test applicable whether or not to grant leave to appeal, is trite and well settled. At common law[1] is has always been whether there are reasonable prospects that another court, given the same set of facts, might arrive to a different conclusion. The test was recently restated as follows:

'The mere possibility that another court might come to a different conclusion was not sufficient, nor that it would offer solace to the applicant to know that the final decision in a serious case would be given by a court of appeal. See *S v Swanepoel* 1978 (2) SA 410 (A)'.[2]

[3] The main complaint is two-fold: First, that this court erred in finding that the thrust of the applicant's evidence was that someone else knowing her password could have abused her FAT number to commit the fraud. The following instances of her evidence establish beyond doubt, that this indeed was the thrust of her evidence. Firstly, the applicant sought to rely on the fact that some employees had disclosed their passwords to others, and allowed them to use them, to show that it was a 'free for all' situation. Secondly, she suggested that appellant 2 might have known her password when she worked with him during the latter's internship. Thirdly, she testified that someone might have 'stolen' her password during brief moments when she left her station without logging off. The applicant was therefore at pains to show that someone else, who knew her FAT and password, was responsible for the fraudulent transactions. Generally, even a cursory regard to the trial record would reveal that much effort and energy were spent during the trial on this aspect, especially by the applicant's attorney during cross-examination.

[4] For these reasons it is disingenuous to now seek to disavow and eschew that version. There is therefore simply no merit in this contention. In fact, the fallacy of the argument is betrayed by the contents of para [4] of the application for leave to appeal, in which the court is criticised for rejecting the applicant's version that someone else could have abused her password (wrongly referred to in the application for leave to appeal as the FAT number).[3]

[5] The second contention, which was heavily relied on in argument, is that this court did not give due consideration to the possibility that the fraudulent supporting

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[1] This common law test has now been codified in s 17 of the Superior Courts Act, 10 of 2013.
[2] *S v Magadla* 2010 (2) SA 316 (E) para 8.
[3] The non-significance of the FAT number was dealt with in paras [45], [47] and [58] of this court's judgment.

documents and assessments may have been handed to the applicant by someone else before she effected the fraudulent simulations. This is what counsel for the appellant, Mr *Muller* SC, referred to as 'the second defence'. The upshot of this argument is that the applicant did not know that she was committing fraud as and when she received documents from her seniors, and that the state had failed to prove that she knew that fraud was being committed. Counsel stressed that this defence was not 'mentioned' either by the trial court, nor this court, and that for that reason, there were prospects that another court might arrive to a different conclusion.

[5] In my view, so-called defence is based purely on speculative hypotheses and remote possibilities. It is no defence at all, to, in the light of strong and incriminating evidence, shrug one's shoulders off, and plead ignorance. The inherent difficulty with this version is that it is at odds with the thrust of the applicant's defence, namely that someone else used her FAT and passwords to effect the fraudulent transactions. Implicit in that defence, is an acknowledgement of knowledge that those transactions were fraudulent. This is a logical corollary. Unfortunately, in criminal proceedings, one cannot plead defences in the alternate without running into the difficulty that the applicant now finds herself in. What is more, with this ground of the application, the applicant is inviting the court to focus too intently on an individual part of the evidence, whereas the correct method is to have regard to the totality of the evidence as a whole. In the present case, when one looks at the totality of the evidence, there is no indication that what is contended for, would be of any assistance to the appellant within the mosaic of the evidence. Furthermore, as correctly argued by Mr *Mohlaka*, counsel for the state, this so-called defence was only mooted for the first time during the evidence in chief of the applicant, with the result that none of the state witnesses had an opportunity to comment on it.

[6] The applicant seeks leave to appeal against the factual findings. The approach to be adopted by a court of appeal when it deals with such findings, is found in the collective principles laid down in *R v Dhlumayo* 1948 (2) SA 677 (A). A court of appeal will not disturb the factual finding of a trial court unless the latter had committed misdirection. Where there has been no misdirection on fact by the trial Judge, the presumption is that his conclusion is correct. The appeal court will only reverse it where it is convinced that it is wrong. In such a case, if the appeal court is

merely left in doubt as to the correctness of the conclusion, then it will uphold it. See also *DPP v S* 2000 (2) SA 711 (T); *S v Leve* 2011 (1) SACR 87 (ECG); and *Minister of Safety and Security and Others v Graig and Another NNO* 2011 (1) SACR 469 (SCA). In the present matter, the applicant has, to my mind, failed to identify any material misdirection in the manner in which the evidence was considered.

[7] As a result, after careful, dispassionate and detached regard to the contents of the notice of application for leave to appeal, as well as the oral arguments, I am unable to detect any material misdirection in the evaluation of the evidence to justify a finding that another court might arrive to a different conclusion. The application for leave to appeal falls to fail.

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

1. The applicant's application for leave to appeal against the judgment and order of this court regarding the conviction is dismissed.

TM MAKGOKA
JUDGE OF THE HIGH COURT

I agree

N RANCHOD
JUDGE OF THE HIGH COURT

DATE OF HEARING	: 13 MAY 2014
JUDGMENT DELIVERED	: 21 MAY 2014
FOR THE APPLICANT	: ADV. G.C MULLER SC
INSTRUCTED BY	: GERHARD STOOP ATTORNEYS, PRETORIA
FOR THE RESPONDENT	: ADV. K.L MOHLAKA
INSTRUCTED BY	: DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA