REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED

30/03/2016 .....

DATE SIGNATURE

30/3/2016

In the matter between: **CASE NO: A360 / 2013**

DATE OF HEARING: 03/03/2016

DANIEL PIET MAHASHE **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

SIKHWARI, AJ

[1] This matter came by way of appeal from the regional court of Gauteng sitting at Carletonville' the appellant having been granted leave to appeal by the court *a quo*.

[2] The appellant was charged with twelve (12) counts for contravening Section 45 of the Regulation of Interception of Communications and Provisions of Communications Related Information Act, Act No 70 of 2002, as amended ("the Act"). The appellant pleaded guilty to all counts and was found guilty by the court *a quo*. The appellant was subsequently sentenced to four months term of direct imprisonment in respect of each count and the sentences were ordered to run cumulatively; which come to effective sentence of four years.

[3] When the appellant appeared in the court *a quo* he was represented by an attorney, Joseph Maseko. The appellant pleaded guilty to all 12 counts and prepared a statement in terms of Section 112(2) of the Criminal Procedure Act, Act No 51 of 1977, as amended.

[4] The appellant's appeal is not based on the facts which are on the record. It is based on facts which are stated in his founding affidavit, more particularly in paragraph 3 thereof. The appellant's main contention is that he pleaded guilty due to undue influence from his erstwhile attorney, Mr Maseko, who assured him that he has concluded a plea bargain arrangement with the State Prosecutor and the Presiding Magistrate to impose a non-custodial sentence.

[5] Parties have agreed that this matter be treated and / or be heard as both an appeal and review in view of the fact that the appeal is based on facts which are outside the record of proceedings.

[6] The principle expressed by the court in *S v Botha* 2006 (1) SACR 105 (SCA) is to the effect that the test to determine the irregularity which does not appear from the record is two-fold: *firstly*, whether irregularity has occurred; *secondly*, whether the said irregularity has led to failure of justice.

[7] In the case of *Qoko v La Grange NO & Another* 2004 (2) SACR 521 at page 527D-E & 528B-C the court stated that "the applicant bears the onus of proving on a balance of probability that he was wrongfully induced by threats and promises to tender a plea of guilty. He must establish his bon fides by giving a proper explanation of why he pleaded guilty and why he now wishes to change his plea to one of not guilty, which involves setting out a bona fide defence to the charge. He does not have to prove his

defence. For the purposes of the review application it is sufficient to raise a defence which might be reasonably possibly be true".

[8] In his affidavit, the appellant state that he had a defence to the charges but was persuaded by his erstwhile attorney Maseko to plead guilty. The appellant was contradicted by the erstwhile attorney, Joseph Maseko, who stated in his affidavit that he did not mislead the appellant to plead guilty. The attorney stated that he accordingly advised the appellant that he has no reasonable prospects of success in view of the fact that credit cards were found in his person hidden in his underwear. The attorney stated further under oath that he advised the appellant that his record of previous convictions will be taken as an aggravating factor which will likely lead to sentence of direct imprisonment.

[9] The appellant did not deal with the version of the attorney in reply except to offer a bare denial. The appellant's version that he did not plead guilty voluntarily was disputed by his erstwhile attorney Maseko. In light of the above, the appellant has failed to discharge the onus which is on him. There is no evidence to suggest that attorney Joseph Maseko has misled the appellant. Therefore, there is no proof of occurrence of the alleged irregularity. It appears to this court that it is the imminent reality of the prospects of serving four years imprisonment which has triggered the allegations of irregularity. In this court's view, the appellant has failed the first stage of the test.

[10] The second stage is whether the irregularity has led to the failure of justice. In paragraph 5 of his founding affidavit, the appellant states in general terms that he has a defence. He states that the cards were found in his vehicle which had previously borrowed it to a friend. The appellant does not take the court into his confidence by stating the name of the said friend and / or the circumstances under which the cards were found. In argument, counsel of the appellant stated that the name will be disclosed at the trial *de novo*.

[11] The appellant has a duty to persuade the court that indeed an irregularity has led to the failure of justice. That duty requires him to explain his defence in more details. This is more so in view of the fact that the appellant has to deal with an incriminating affidavit of Paul Jacobus Louw and Wynand Kruger on behalf of the respondent.

[12] In paragraphs 3, 4, 5, 6 and 7 of his statement in terms of Section 112(2) of the Act, the appellant has admitted that he was found in possession of the cards for which he was convicted and that he was in his sober mind when he makes the admission. The appellant signed this statement. In court, the respondent and the appellant agreed that the factual circumstances are common cause between the parties. The appellant heard this submission but did

not dispute it. Much is expected from the appellant in order to oust these admissions.

[13] It is the view of this court that the appellant has failed the second leg of the test. The appellant has explained no defence in his founding affidavit. Appellant has failed to deal with allegations in the affidavits of police officer Wynard Kruger and the State Prosecutor PJ Louw. The appellant has failed to take the court into his confidence by divulging the name of the friend who borrowed the car or to attach the confirmatory affidavit of the said friend. These were necessary in order for the appellant to establish his *bona fides*.

[14] Police Officer Wynard Kuger stated in his affidavit that on the date of the incident he stopped the appellant's vehicle. There were two occupants in the vehicle, being the police informer and the appellant. He conducted a search. He found the appellant in possession of 17 various bank cards. The said cards were hidden in the private parts of the appellant. The appellant has not dealt with this version of the police officer other than to offer a bare denial.

[15] PJ Louw has stated in his affidavit that he was the prosecutor at the court *a quo* where the appellant has pleaded guilty to 12 counts of unlawful possession of cloned bank cards in

contravention of Section 45 of the Regulations of Communication and Provision of Communication Related Information Act 70 of 2002. PJ Louw denied the existence of any plea bargain arrangement. To this regard, he is supported by the appellant's erstwhile attorney Maseko.

[16] In the premises, it is the finding of this court that there were no irregularities committed at the trial of the matter at the court *a quo*. There was no failure of justice in the circumstances of this case.

[17] No argument was submitted by the appellant on sentence in the heads of argument. However, in reply the appellant argued that the sentence of four years imprisonment is harsh and shocking without elaborating much. This court finds no basis to interfere with the sentences imposed by the court a quo.

[18] The following order is made:

1. That appellant is granted condonation for the late filing of heads of argument.

2. That the review is dismissed in respect of both conviction and sentences.

3. That the conviction and sentences imposed by the court *a quo* are confirmed.

SIKHWARI, AJ

ACTING JUDGE OF THE HIGH COURT, PRETORIA

I agree.

KOLLAPEN, J

JUDGE OF THE HIGH COURT, PRETORIA