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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA DIVISION)

APPEAL CASE NO: A403/2018
COURT *A QUO* CASE NO: 14/1579/2011
DATE: 25 February 2021
REPORTABLE:***NO***
OF INTEREST TO OTHER JUDGES:***NO***
REVISED:***Yes***
DATE: 17/3/2021

In the matter between:

MADISHA, THABO Appellant

- and -

THE STATE Respondent

Coram: Sardiwalla J *et* Millar AJ

Heard on: 25 February 2021 – This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: 17 March 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 17 March 2021.

Summary: Criminal law and procedure – conviction – appellant convicted on uncorroborated evidence of co-accused – application of cautionary rules in evaluation of evidence - Magistrate incorrectly accepted evidence of co-accused uncritically and disregarded relevant contradictory evidence – appeal upheld and conviction and sentence set aside. .

ORDER

On appeal from: The District Court of Tshwane Central (Magistrate Patterson sitting as Court of first instance):

(1) The appellant's appeal against his conviction and sentence is upheld.

(2) The appellant's conviction and sentence by the District Court of Tshwane Central be and is hereby set aside.

JUDGMENT

MILLAR, A J

1. This Appeal is against a conviction on charges of contravening Sections 6(b) and (c) of the Prevention of Organized Crime Act 121 of 1998. The Appellant was charged together with 13 other parties of this and various other offences and appeared in Court for the first time on 31 August 2011. The trial was

protracted and on 20 October 2016, some five years later, the Appellant was convicted. Thereafter and on 10 May 2017 he was sentenced to five years imprisonment. This Appeal is brought with leave having been granted by the Court a *quo.*

2. The charges brought against the Appellant and 12 other parties stemmed from an attempt to defraud the South African Revenue Services of the sum of R9.2 million. It was not disputed that the personal records of a provisional taxpayer were accessed and amended so that a significant refund which became due to that taxpayer was then paid into a third-party bank account – Botlhatlogo Business Enterprise CC ("Botlhatlogo").

3. A portion of the proceeds were dissipated from the third-party bank account, some of which were paid into the bank account of Lebsa Business Enterprise CC ("Lebsa"), a close corporation of which the Appellant was not a member but on whose bank account he had authority to sign. It is the transactions on that bank account commencing on 4 August 2011 up to and including 5 August 2011 and involving the dissipation of R133 544.50 that formed the basis of the charges against the Appellant and his subsequent conviction.

4. The Appellant did not testify at the trial but after having pleaded not guilty the following explanation in respect of the plea was placed on record. The Appellant was at the time employed by a finance company called Afro Oracle

Financial Services. Persons approached this company for finance from time to time. The practice of the company was that when persons approached them for finance and finance was given, a condition of such finance was that one of the employees of Afro Oracle Financial Services would be given signing powers on the bank account of the party seeking finance.

5. This was done ostensibly so that when the time came for repayment of what had been advanced by way of finance, Afro Oracle Financial Services would have no delay or difficulty in obtaining payment of what was due to it. However, no such funding was granted to Lebsa. It was also placed on record that no funding was in fact ever granted by Afro Oracle Financial Services to Lebsa. The plea explanation went no further than this.

6. None of the evidence led by the state from either the South African Revenue Services Investigator, Mr. Klopper ("Klopper") or the South African Police Service Investigator, Lieutenant Molekwa ("Molekwa") implicated the appellant. The high-water mark of their respective evidence at least insofar as the appellant is concerned was that he was a signatory on Lebsa's bank account, and importantly that the appellants signature did not appear on any of the documents from the bank relating to any of the transactions referred to in paragraph 2 above.

7. Further evidence led on behalf of other co-accused in the trial and pertinent to the appellant was that of Thabo Ramose("Ramose"), his employer at Afro

Oracle and a co-accused[1], Lebogang John Thamaga ("Thamaga") who was also the sole member of Lebsa.

8. No evidence was led by either Klopper or Molekwa that the appellant actually ever shared in the proceeds that were withdrawn from the Lebsa bank account. There was in fact no evidence led by the State at all to either implicate or connect the appellant to the fraudulent transactions. At the conclusion of the State's case, the only evidence upon which it could be said that the appellant was implicated in the crime for which he was charged was that he was a "signatory" on the bank account of Lebsa.

9. The evidence of Ramose established that his business did indeed provide bridging and other financial assistance to smaller companies that were awarded tenders, and which required capital in order to perform their obligations in terms of those tenders. He also testified that one of the conditions of his business was that when finance was given, he would require that he would usually either himself or occasionally an employee, be appointed as a signatory on the bank account of the company to which he provided finance so that his business would have some security and would be able to retrieve payment of what was due to it more easily.

10. Ramose also testified that his business received many applications and that often these applications were made orally. He did not keep records of all the

[1] Accused 11 in the trial

applications that had been made and also did not keep records of transactions that did not proceed. He was unable to testify positively whether Lebsa had or had not ever made an application or whether his business had an incomplete transaction with Lebsa. He was however able to testify positively that no transaction was entered into as he had records for those transactions that were entered into.

11. Thamaga testified that he was an entrepreneur who had established Lebsa while living in Polokwane. He had then moved to Tshwane and began conducting business there. Besides the business of Lebsa, he was also a pastor and it was through this and a fellow pastor that he had come to meet the appellant. The appellant had told him that he was able to procure business and so they had decided that the appellant would become a "co-signatory" on the bank account of Lebsa. The evidence of Thamaga was that he understood that once the appellant became entitled to sign on the bank account of Lebsa, they were ostensibly business partners even though the appellant was never registered as a member of Lebsa. The date on which the appellant became the "co-signatory" was 16 February 2011.

12. No business eventuated between 16 February 2011 until some stage in July 2011 when the appellant had approached him and informed him that there was a business opportunity and that they had to quote for the removal of rubble. Thamaga testified that he had discussed this opportunity with the appellant and that he had prepared a written quote. He was not able to produce a copy

of the written quote in court and testified that a copy was in the possession of the attorney who had appeared for him at his bail application and could be obtained from him if required.

13. He testified that he did not know with whom the contract for the removal of the rubble would be entered into with, did not know how much rubble was to be removed or from where or to where it was to be removed. Notwithstanding this, he testified that the appellant had conducted all the negotiations for this contract and knew the details.

14. On 5 August 2011, he had been in Johannesburg when he had received a call from the appellant. The appellant informed him that the persons for whom the rubble was to be removed had made an advance payment to Lebsa but that they had overpaid by some R115 000.00 and required a refund immediately. The appellant asked that he travel immediately to Tshwane and meet him at the bank which he did.

15. When he arrived at the bank, he met the appellant. He initially testified that he had gone into the bank on his own and the appellant had waited outside but then changed this to say that both he and the appellant had gone into the bank together. He testified that the reason that they had gone into the bank together was that the appellant was a “co-signatory” on the bank account and that it was necessary for him to be present in order for the refund to be authorized.

16. He testified that he had suggested that the refund be effected by way of a transfer but that the appellant who was in regular telephonic contact with the customer had said that the customer insisted on a cash refund. The bank manager had indicated that the branch did not carry sufficient cash to make R115 000.00 immediately available and had proposed the issue of a bank cheque for R100 000.00 which could be cashed at another branch and that the R15 000.00 be withdrawn “outside” (presumably meaning from an automated teller machine). He testified that they had both signed documents authorizing the issue of the bank cheque and that they had gone “outside” and drawn the R15 000.00. He testified that the bank manager would be called to testify and corroborate his evidence.

17. They had then driven corner Church and […] Streets in Tshwane where unknown persons were met and the R115 000.00 which was in a parcel, was handed by Thamaga through the passenger window to a third person who then left. In his evidence he identified another co accused as the person to whom the money had been handed.

18. In cross examination he testified that in respect of a specific deposit or R25 678.00 which was made into the bank account of Lebsa on 5 June 2011, he had on the same day the deposit was made, gone and transferred the full amount to another account in payment to a third party. He testified that the appellant had had nothing to do with this particular transaction and that he had

gone to the bank with the people who had given him the business and the transfer had been effected. The appellant was not present on that day and did not co-sign for the transfer at the bank on that day.

19. Thamaga was cross examined at some length in regard to the events at the bank. He persisted in testifying that the appellant was present with him when he had seen the bank manager. He testified that the bank manager could be called, or the CCTV footage would verify this.

20. The documentary evidence before the Court establishes that the appellant was indeed appointed as a signatory on the bank account of Lebsa on 16 February 2011. The document which confirms the appointment specifically provides that insofar as the operation of the bank account was concerned, that "both signatories to sign" **(page 708)**. /// On a plain reading of this document, it is apparent that Thamaga ought not to have been in a position to sign for any withdrawal alone and yet the documents evidencing the requisition of the bank cheque bare only the signature of Thamaga. **(page 824).** //// There were no documents entered into evidence in regard to the counter withdrawal.

21. The bank statements of Lebsa were also entered into evidence and these established that between 16 February 2011 and 5 August 2011, the Lebsa account had a maximum balance of R1 345.05 but on the day before the fraudulent deposit of R389 654.78 had a balance of R11.49. It also establishes that on 5 August 2011, besides the bank cheque of R100 000.00,

a counter withdrawal of R10 000.00 was made. Besides the documents relating to the issue of the bank cheque, which was signed only by Thamaga, no evidence relating to the counter withdrawal was placed before the Court.

22. Notwithstanding that Thamaga testified that his former attorney could or would be called to produce the "quotation" or that the bank manager would testify regarding the presence of the appellant at the bank on 5 August 2011, no such evidence was ever led.

23. The appellant, aside the plea explanation, elected not to testify. It is well established in circumstances such as this that :

> *"The accused admits nothing by choosing to exercise his right not to deny the charge on oath*"[2]

and that no adverse inference can be drawn against the appellant in consequence of this.[3]

24. In summary, the case against the appellant was based, in the first instance by the State on the fact that he was a "co-signatory" on the Lebsa bank account without any other evidence whatsoever. In fact, the State's evidence was that even though the appellant was a co-signatory on the account his signature did

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[2] Tumahole Bereng v R [1949] AC 253 (PC) at 270

[3] See Sections 35(1) and 35(3)(h) of the Constitution of the Republic of South Africa 1996 which provides for the right to remain silent and the right to refrain from testifying during criminal proceedings. These rights fall within the Bill of Rights in the Constitution.

not appear on any of the documents that were tendered into evidence. The evidence of Ramose was consistent with the version put forward by the appellant in explanation of his plea. The entire case against the appellant is to be found in the evidence of Thamaga.

25. It is trite that the evidence of a co accused given in his own defence is admissible against other co accused and that when determining the weight to be attached to such evidence, it is necessary to do so with some circumspection.

26. The cautionary rule as it applies to accomplice evidence was set out by Holmes JA in S v Hlapezula and Others[4] as follows:

> *"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description – his only fiction being the substitution of the accused for the culprit. Accordingly……there has grown up a cautionary rule of practice requiring (a) recognition by the trial Court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the*

[4] 1965 (4) SA 439 (A) at 440D-H; see also the South African Law of Evidence, 2nd Edition, Zeffertt & Paizes, Lexisnexis 2009 Chapter 25.

absence of gainsaying evidence from him, or his mendacity as a witness or the implication of an accomplice by someone near and dear to him; see in particular R v Ncana 1948 (4) SA 399 (A) at 405 – 406; R v Gumede 1949 (3) SA 749(A) at 758; R v Mqantwani and another 1959 (1) SA 894 (A) at 897G to 898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond a reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned."

27. The learned Magistrate in his judgment, seems to have accepted the evidence of Thamaga uncritically and had regard only to those parts of the evidence of Klopper, Molekwa and Ramose that corroborated Thamaga's version. The fact remains that there was no evidence before the Court other than the version of Thamaga that the appellant was present at the bank with Thamaga on 5 August 2011.

28. Significantly, the evidence of Thamaga was that notwithstanding that the appellant was a "co-signatory" on the Lebsa bank account, Thamaga had on a prior occasion without either the knowledge or the presence of the appellant transacted on the bank account on his own. None of the documentary evidence placed before the Court corroborates the version of Thamaga that the appellant was indeed present. The evidence establishes rather that it was Thamaga alone who attended at the bank to make the withdrawals. It is also

noteworthy that even on Thamaga's own version, the appellant did not know, nor had he ever had sight of the alleged "quotation" for rubble removal and so even on this version, the appellant had no knowledge of how much was to have been paid.

29. The entire case against the appellant is founded upon the fact that he was appointed as a "co-signatory" on a bank account 6 months before the transaction in question and in circumstances where after having been so appointed, he was not party to any transaction until the impugned transaction.

30. The only evidence that the appellant was in any way connected with the impugned transaction is the attempt to incriminate him by Thamaga and having regard to the fact that the documents signed in the bank on the day in question do not reflect the appellant as having signed, leads to the ineluctable conclusion that the evidence of Thamaga incriminating the appellant is a fabrication and to be disbelieved and rejected.

31. In the circumstances, I propose the following order:

31.1 The appeal against conviction and sentence is upheld.

31.2 The appellant's conviction and sentence by the Tshwane District Court be and is hereby set aside.

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A MILLAR

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

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C SARDIWALLA

JUDGE OF THE HIGH COURT

HEARD ON:	25 FEBRUARY 2021
JUDGMENT DELIVERED ON:	17 MARCH 2021
COUNSEL FOR THE APPELLANT:	ADV S DLALI
INSTRUCTED BY:	NKOME ATTORNEYS
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INSTRUCTED BY:	NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS - PRETORIA
REFERENCE:	PA47/2018