



**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
Date: <u>24/03/22</u> Signature: <u>[Signature]</u>	

**CASE NO.: A165/20**

In the matter between:

**VUSANI FRANCIS MALIE N.O.**

First Appellant

**ANDREW CONWAY GAOREKWE MOLUS N.O.**

Second Appellant

**OMPHEMETSE CYNTHIA MOGODI N.O.**

Third Appellant

**ALPHEUS MALESELE POLE N.O.**

Fourth Appellant

**AMANDA CORALE DIPPENAAR N.O.**

Fifth Appellant

**DIRK JOHANNES VAN STADEN N.O.**

Sixth Appellant

**TRACY HENRY N.O.**

Seventh Appellant

**MOTLHATLHEDI NELSON MOSIAPOA N.O.**

Eighth Appellant

**WILLEM FREDERIK VAN HEERDEN N.O.**

Ninth Appellant

**YVONNE MFOLO N.O.**

Tenth Appellant

**SECHABA THOLE N.O.**

Eleventh Appellant

and

**HECTOR VERE**

Respondent

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## **JUDGMENT**

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**CORAM: NEUKIRCHER, KUMALO JJ AND NONCEMBU AJ**

### **INTRODUCTION**

- 1] The present matter comes before us by way of leave from the Supreme Court of Appeal (SCA) against an order of David J sitting in the Commercial Court<sup>1</sup>, in which he granted absolution from the instance in favour of the respondent at the close of the appellants' case.

### **THE CASE A QUO**

- 2] The Sishen Iron Ore Company (Pty) Ltd (SIOC) implements a broad-based socio-economic empowerment ownership strategy in accordance with the Mineral and Petroleum Resources Development Act, 2002 (MDPRA) and the Broad Based

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<sup>1</sup> Gauteng Division, Pretoria

Empowerment Charter for the South African Mining Industry (the Charter)<sup>2</sup> . In order to give proper effect to this strategy, the SIOC created the SIOC Community Development Trust (the Super Trust), of which they are the appointed trustees. The trust selects beneficiaries and projects located mainly within the communities within the area where the SIOC conducts its mining activities. Its focus and function is to provides and maintain infrastructure of schools, provide stationery and learning material to learners and teachers, assist teachers with the view to improving the matric pass rates, provide and maintain infrastructure to hospitals and clinics and provide hospitals and clinics with assets and equipment in order for them to function properly.

- 3] The appellants become involved in these projects by way of introduction to them by so-called beneficiary trusts, which are trusts from within the various communities within which the appellant operates, these beneficiary trusts then involve service providers that are contracted by the appellant to provide the goods and render the services. In the matter at hand, the appellant appointed the ninth defendant *a quo* (Volufon (Pty) Ltd – Volufon) to provide goods and services for learners and teachers with the aim of improving the leaners' matric pass rate.
- 4] The beneficiary trust that introduced the project was called the JTG Trust and the person who was the liaison point and in charge was a Mr Mpolokeng.<sup>3</sup>

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<sup>2</sup> Developed under s100 of the MDPRA

<sup>3</sup> The 4<sup>th</sup> defendant *a quo*

### **THE APPELLANT'S CLAIM**

- 5] The appellants instituted a delictual claim against nine defendants *a quo*. The claim, as a whole, arose from what was alleged to be a corrupt scheme in terms of which a number of employees of the Super Trust colluded with the directors of Volufon to award a contract to it in return for the payment of a bribe of R8,3 million payable in 2 tranches: R4,1 million in 2012 and R4,3 million in 2013.
- 6] It is common cause, that Volufon has been liquidated, and that of the remaining 8 defendants *a quo*, judgment was taken against 2, a settlement was entered into with a further 5 and only the present respondent continues to dispute his liability.

### **COMMERCIAL COURT**

- 7] It is apposite to mention at the outset that this trial was conducted in terms of the provisions of the Gauteng Division Commercial Court Directives. The reason for this is that this Directive provides for different processes and procedures when it comes to procuring evidence than do the Uniform Rules of Court. The procedures of the Commercial Court are also different. Importantly, witness statements are an important primary element of the Commercial Court procedure as they constitute the evidence in chief of that particular witness.<sup>4</sup> I mention this because,

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<sup>4</sup> "Rule 5.2: At this conference the dates for the filing of full witness statements by the parties will be fixed, it being understood that the witness statements will constitute, save with the leave of the Judge or Judges, the evidence in chief of the particular witness." – this pertains to the Second Case Management Conference



at the end of the day, over and above the evidence of 2 witnesses that were called (and cross-examined by the respondent), the witness statements that were, without prevarication, allowed to stand were those of one Mr Mali and Mr Ferreira. The evidence will be dealt with, briefly, in due course.

### **THE CLAIM AGAINST THE RESPONDENT**

- 8] The claim against the respondent is a delictual claim for damages based on the allegation that the respondent was, as a joint wrongdoer, a party to an unlawful scheme in terms of which Volufon paid bribes in the amount of R8,3 million to ensure its appointment as a service provider by the Super Trust, as a result of which the appellants suffered damages.

### **THE EVIDENCE**

- 9] There were several key pieces of evidence presented by the appellants that, when pieced together, placed the picture of this corrupt scheme before court.
- 10] Mr Skeen was the seventh defendant *a quo*. He was one of the directors of Volufon and testified that he was one of the persons from whom the bribe was solicited and who also made payment of the bribe money in accordance with the instructions received. His evidence was that there was a meeting at MacDonalds, Midrand during January 2012 with *inter alia* the respondent and one Mr Chisa. At this meeting certain issues pertaining to Volufon's proposal to the Super Trust were

discussed as was the fact that Volufon's representatives would have to pay a "backhander"<sup>5</sup>. It bears mentioning at this stage that although the respondent disputed the date on which this meeting was alleged to have taken place, and Mr Skeen conceded he may have gotten the date wrong, the respondent did not in fact deny his presence at such a meeting at McDonalds, Midrand – he, in fact admitted he was present. The issue as regards the date is therefore irrelevant in the bigger scheme of things and adds nothing to the issues.

- 11] Skeen's evidence was that on 14 February 2012, after Volufon submitted its proposal to the appellants, at a meeting of the appellants review committee, the respondent informed Volufon's directors<sup>6</sup> that although he could not guarantee that Volufon would win the tender, he could ensure that it did not. Although this seemed to be an idle threat when seen out of context, when taken with the evidence of Ms Chisa<sup>7</sup>, it would appear that this had some teeth. She testified in due course, that as Project Manager, although the respondent could not vote to ensure that a company won a bid, he could ensure that it's proposal never got to see the light of day as he was the one who would present it at Board level. Thus, if he felt that it did not "meet" certain "criteria", he could reject it.

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<sup>5</sup> A colloquial term for a bribe

<sup>6</sup> Represented by Mr Skeen

<sup>7</sup> The Chief Executive Officer of the Super Trust and the first defendant *a quo*

- 12] Most importantly, Ms Chisa, when asked about the prospects of the Board voting in favour of a project that the Project Director is opposed to or negative towards stated that she would assume that he would not bring it to the Board as the Project Director would have to make the call whether the project is ready for the Board or not.
- 13] Mr Skeen's evidence was that there was a further meeting, at McDonalds, Midrand, with the representatives of Volufon and where the respondent was represented by Mr Chisa<sup>8</sup>. At this meeting the respondent informed Mr Skeen *et al* that he and others were sharing in the bribe, and that Volufon must pay on the invoices which Mr Chisa would send to Volufon in due course. In fact, there is documentary evidence that shows that these invoices were, in fact, sent and paid.
- 14] Mr Skeen's evidence is that when Volufon's appointment was extended in 2013, he received a message from Mr Chisa soliciting a further bribe – this time an amount of R4,2 million was paid.

### **THE DOCUMENTARY EVIDENCE**

- 15] In this regard the uncontested evidence of Mr Ferreira, a forensic accountant, shows the flow of the money from the appellants to Volufon and from Volufon to

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<sup>8</sup> Ms Chisa's estranged husband and the second defendant *a quo*

various entities who were the recipients of the bribe. It is quite correct that there is not actual proof that the respondent, himself, received any bribe money however what the evidence does show is the flow of money, and the documents indelibly link the respondent to the flow of the funds and the bank accounts that were used to move the money.

- 16] Shortly after the second meeting at McDonalds, an invoice was sent to Volufon for an amount of R4,1 million payable to an entity called Thuthuka Educational Projects for "*educational supplies and project management*" – Volufon subsequently made payment of this invoice.
- 17] It was not disputed that Thuthuka Educational Projects did not provide any educational supplies and project management services. The bank account into which the R4,1 million was paid was that of Thuthuka Projects and Investments (Pty) Ltd (Thuthuka). Interestingly enough, even though the respondent is not a director of this company, his identity document and his municipal account were used to open the bank account for purposes of the relevant FICA requirements. Added to this is that fact that the respondent's (then) girlfriend – who is now his wife – was a signatory on the account despite the fact that she too is not a director of Thuthuka.



- 18] The further bribe of R4,2 million was also paid into Thuthuka's bank account. This is clearly stated by Mr Ferreira and it appears from the bank statement and financial records of Volufon and Thuthuka.

### **THE ORDER OF ABSOLUTION**

- 19] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel**<sup>9</sup>

*"When absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff."*

- 20] The SCA in **Gordon Lloyd Page & Associates v Rivera and Another**<sup>10</sup> explained the application of the test as follows:

*"This implies that the plaintiff has to make out a prima facie case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution because without such evidence no court could find for the plaintiff...As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one...the test has*

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<sup>9</sup> 1976 (4) SA 403 (A) at 409 G-H

<sup>10</sup> 2001 (1) SA 88 (SCA) para 2; Osman Tyres and Spares CC and Another v ADT Security (Pty) Ltd [2020] 3 All SA 73 (SCA)

*from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff'... a test had its origin in jury trials when the reasonable man was a reasonable member of the jury...Having said this, absolution at the end of the plaintiff's case, in the ordinary course of events will nevertheless be granted sparingly<sup>11</sup> but when the occasion arises, a court should order it in the interest of justice."*

- 21] In granting the absolution, the court *a quo* found that the evidence against the respondent was "*unsatisfactory, vague and inconclusive*". The court *a quo* found that the sum total of the evidence against the respondent amounted to the allegations that although he was not the one who could ensure that Volufon was awarded the contract, he could ensure that it was not; that Mr Chisa had referred to him as a "partner" and that the respondent had informed Mr Skeen that the money must be paid upon the furnishing of the invoices. The court *a quo* then found that the evidence of Mr Skeen did not satisfy the reasonable man test, especially when faced with the denials put up by the respondent in his cross-examination and the evidence contained in his witness statement and that, accordingly, a court would not grant judgment in favour of the plaintiff.

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Our emphasis

- 22] It appears that the court *a quo* erred in several material respects: firstly, it erred in not taking into account that the respondent admitted to being present at the McDonalds meetings where these bribes were solicited. He also did not deny that he had informed Mr Skeen that whilst he could not ensure that the contract was awarded to them, he could ensure that it was not. This ties in with the evidence of Ms Chisa.
- 23] The evidence on how the bribe was to be paid was also never seriously disputed. And the paper trail linking the respondent and his (now) wife to the company into which the money was paid by Volufon stands uncontroverted, as does all the evidence by Mr Ferreira as his evidence was never disputed by the respondent – the court *a quo* erred in not taking this into account.
- 24] It is our view that, given just these few issues, there is sufficient *prima facie* evidence against the respondent that was presented by the appellants upon which a court, applying its mind reasonably, could or might find for the appellants. As a result, we are of the view that the court *a quo* erred in granting the application for absolution from the instance.

### **ORDER**

- 25] Thus the order that is granted is the following:
1. The appeal is upheld with costs.

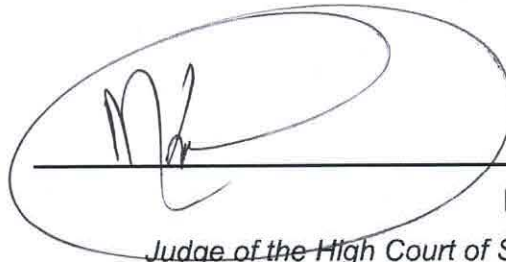
2. The order of the court *a quo* is set aside and replaced with the following  
**The respondent's application for absolution from the instance is dismissed with costs.**
3. The matter is remitted to the trial court for completion of the matter.



**NEUKIRCHER J**

*Judge of the High Court of South Africa*

*Gauteng Division, Pretoria*



I agree

**KUMALO J**

*Judge of the High Court of South Africa*

*Gauteng Division, Pretoria*



**NONCEMBU AJ**

*Acting Judge of the High Court of South Africa*

*Gauteng Division, Pretoria*

Counsel for appellants: SD Wagener SC  
On instruction of : Weavind & Weavind Inc  
Counsel for respondent: Adv Senosi; with him Adv Motsemme  
Instructed by : Schuler Heerschop Pienaar

Date of hearing : 2 February 2022  
Date of judgment: 24 MARCH 2022