

**IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG  
REPUBLIC OF SOUTH AFRICA**

CASE NO: **AR624/10**

In the matter between:

**ROWAN CHARLES WICKS**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**KRUGER J:**

[1] The Appellant was convicted, in the Commercial Crimes Court, sitting in Durban, of three counts of fraud. The sentence imposed was the following:

“5.1 To pay a fine of R15 000,00 or undergo three years imprisonment.

5.2 A further seven years imprisonment but suspended in terms of section 297(1)(b) of Act 51 of 1977 for a period of five years on the following conditions:

5.2.1 the Appellant is not again convicted of the crimes of fraud or a competent verdict thereof which

offence is committed during the period of suspension.

- 5.2.2 The Appellant pays the complainants, the Singhs, compensation in full and final settlement of any losses they suffered resulting from the fraud perpetrated by the Appellant, the sum of Five Hundred Thousand Rand (R500 000,00) in respect of any losses suffered.
- 5.2.3 The Appellant forfeits any rights to reclaim the alleged loan of One Million Rand (R1 000 000,00) made by him to the Singhs upon the takeover of the business of East Griqualand Cartage.
- 5.2.4 The Clerk of the Court shall pay the said sum (of Five Hundred Thousand Rand (R500 000,00)) to either Mr Wunderpaul Singh or Shirley Singh who shall have the money placed in a trust in respect of which they shall be trustees."

[2] With leave of the Court *a quo*, he now appeals against both his conviction and sentence.

[3] The facts are largely common cause and are briefly stated hereinafter. The Appellant was a member of and held an 80% interest in the business known as East Griqualand Cartage CC ("the business"). The remaining 20% interest vested in his mother and erstwhile co-accused, Mrs Lorna Wicks. During 2000 and under the pretext of wanting to emigrate to either New Zealand or Australia, the Appellant offered to sell the aforesaid business to some members of his staff. An application for finance was made to Ithala Bank ("the bank") who in

turn expressed an interest in financing the sale. The bank requested certain documents and information from both the sellers and purchasers which included, *inter alia*, a resumé of the purchasers and the annual financial statements of the business.

[4] The Appellant duly instructed his accountant, Mr Wayne Oliver to prepare the necessary financial statements for the financial years ending February 1999 and February 2000. These were duly submitted to the bank. The bank however was not satisfied that the purchasers had the necessary managerial skills and declined the application for finance. As a result the sale fell through.

[5] A few months later, and during 2011, the Appellant met the Singh family ("the Singhs") and indicated to them that he was desirous of selling the business. He referred them to a Mr Sammy Govender of Ithala Bank whom he said possessed all the relevant documents and who had attempted earlier to facilitate the sale to his staff members. He also indicated that the bank was prepared to finance the deal.

[6] The Singhs met Mr Govender who indicated to them that the business was a viable and profitable one and that the bank would be interested in providing the necessary finance. He confirmed that he was in possession of the financial statements for the tax years ending February 1999 and February 2000 and provided the Singhs with a copy of same. The Singhs requested a copy of the financial statements for the year ending February 2001 which the Appellant provided. The Singhs then approached another accountant, who was their relative, who confirmed, after a perusal of the aforesaid financial

statements, that the business was indeed sound and profitable and recommended the purchase of same.

[7] An agreement of sale was concluded for the purchase of the business for the sum of R4.5 million. The bank agreed to finance the deal subject, *inter alia*, to

- (a) The purchasers forming or acquiring a close corporation or company;
- (b) The Appellant providing a balance sheet for the period 1 March 2001 to 31 December 2001 and
- (c) The purchasers paying a deposit of R1 000 000.

[8] The purchasers did not have the funds to pay the deposit and the Appellant paid same, either as a loan or in order to conclude the sale.

[9] With the assistance of the Appellant and Mr Oliver, the Singhs acquired the shares in and to the company known as Rapid Dawn 117 (Pty) Ltd ("Rapid Dawn"). The Appellant also, via Mr Oliver, provided the financial statements for the period 1 March 2001 to 31 December 2001. In May 2002, the deal was finalised and the Singhs took over the business of East Griqualand Cartage CC, via Rapid Dawn.

[10] Shortly thereafter the Singhs started experiencing problems with the business. Ultimately it was discovered that the financial statements which had been furnished to the bank were false and did not correspond with the financial statements submitted to the South African Revenue Service (SARS). The Appellant and his mother were

duly charged with fraud. Mrs Wicks was acquitted and the Appellant convicted and sentenced as aforesaid.

[11] The issues on appeal are two fold, viz, (a) on the merits and (b) whether the Appellant had a fair trial. In respect of the merits, it has been submitted that the State had failed to prove beyond a reasonable doubt:

- (a) The existence of false financial statements.
- (b) That the Appellant was a party to the production of these false financial statements which were submitted to the Singh family and Ithala Bank; and
- (c) This resulted in a sale of the members interest in East Griqualand Cartage.

[12] The issues on the merits are, in my opinion, straightforward. The defence conceded that the documents that were prepared for and submitted to Ithala Bank were false. It was also not disputed that the bank, relying on these false financial statements, agreed to provide the necessary finance which resulted in the sale of the members interest or the business of East Griqualand Cartage to Rapid Dawn (the Singhs). The only issue on appeal (an indeed during the trial) is whether the Appellant was a party to the production of the said false financial statements.

[13] In this regard the State relied essentially on the evidence of Mr Wayne Oliver. Mr Oliver testified that he was instructed by the Appellant to prepare a balance sheet in respect of the business for the financial year ending 28 February 1999. He received a trial balance

and supporting documentation prepared by the businesses' internal bookkeeper, Mrs N V O'Connor. He prepared the documents; travelled to Kokstad; met and discussed same with the Appellant who signed same and thereafter, upon returning to Pietermaritzburg, submitted same to the Receiver of Revenue. The same process was followed with regard to the preparation of the balance sheets for the financial years ending 29 February 2000 and 28 February 2001. He confirmed that the nett income, after tax, in respect of the aforesaid tax periods were R103 466,00; R221 321,00 and R1 277,00, respectively.

[14] During or about June 2001 the Appellant had indicated that he was desirous of selling the business. The Appellant was concerned as the aforesaid financial statements did not reflect sufficient income to enable him to secure the selling price that he wanted. A discussion thereafter ensued relating to how various changes could be made to the balance sheets in order to achieve the desired objective. Mr Oliver thereafter produced the false financial statements for the financial years ending 29 February 2000 and 28 February 2001. The nett income, after tax, in respect of the said tax periods were reflected as R1 368 766,00 and R1 882 702,00 respectively. He confirmed that these false financial statements were not signed off by a chartered accountant as he did not have any working papers to verify the figures. Prior to finalizing these financial statements he met with and discussed same with the Appellant. He recalled that the Appellant's main concern was that the profit that was to be reflected on these documents was to be sufficient to secure a decent selling price as well as to secure repayment instalments to the financial institution which was to provide the finance to the purchasers. It is common cause that the aforesaid false financial statements were submitted to Ithala Bank

in an attempt to secure the finance necessary for the purchase of the business by certain staff members. It is also common cause that the bank relied on these false financial statements when it provided finance to the Singhs for purposes of acquiring the business.

[15] During the process of evaluating the Singhs application for finance, the bank requested an interim balance sheet for the period 1 March 2001 to 31 December 2001 from the Appellant. Mr Oliver confirmed that after discussion with the Appellant he prepared a false financial statement which was not a true reflection of the state of affairs of the business at the time. This was done in order to continue the false impression that had been created in the February 2000 and February 2001 financial statements and in perpetuation of the fraud created in the previous financial statements. He confirmed that had he prepared financial statements reflecting the true state of affairs, their fraudulent actions would have been exposed. The nett profit or income reflected on the 31 December 2001 financial statement was R1 587 151,00.

[16] In 2002 he prepared two sets of financial statements for the financial period ending 28 February 2002. The financial statements submitted to SARS reflected a true account of the state of the business. It reflected a nett loss of R222 422,00. Following a request for a copy of the recent financial statements from Mr Paul Singh (who had taken over the business during or about May 2002) he prepared a set of financial statements which fraudulently reflected that the business had generated a profit, after tax, of R1 750 946,00. These financial statements were once again prepared with the knowledge, authority and consent of the Appellant. He further confirmed that the

said financial statements were prepared to "keep the profit up and consistent with the previous year".

[17] Ithala Bank's representative, Mr Sammy Govender, confirmed the receipt of and the bank's reliance upon the fraudulent financial statements. Of importance is his evidence that he had been presented with the financial statements for the tax years ending 28 February 1999 and 29 February 2000 at the time when the Appellant was negotiating the sale of the business with certain staff members. He confirmed that the Appellants had furnished these financial statements (which later proved to be false) long before the Singh family expressed an interest in acquiring the business. He also confirmed that had the bank been presented with a copy of the financial statements which had been submitted to SARS, the bank would not have agreed to finance the purchase of the business. This was simply because the latter financial statements reflected that the business did not generate sufficient income to service the loan required.

[18] The Appellant's response to this evidence was a total denial. He confirmed that Mr Oliver had been instructed to prepare the financial statements for the tax years 28 February 1999, 29 February 2000, 28 February 2001 and 28 February 2002 and to submit same to SARS. He emphatically denied meeting with Mr Oliver and discussing ways of amending the financial statements in order to secure the purchase price he desired. He averred that the preparation of the false financial statements was entirely the idea of and work of Mr Oliver. He further averred that whatever false financial statements which existed with his signature thereon, he signed in the belief that it was a copy of the document which had been forwarded to SARS. He did not read or

check the documents but merely signed same. Later in his evidence the Appellant averred that the said false financial statements were prepared by Mr Oliver in collaboration with Mr Paul Singh.

[19] Much of the debate in the Court *a quo* and indeed Counsel's submissions on appeal relate to the negotiations between the Appellant and the Singh family, in particular Mr Paul Singh. The issues relating to, *inter alia*,

- (a) The final purchase price;
- (b) The payment of R1 000 000,00 deposit;
- (c) Whether the business was sold as a going concern or whether assets only were sold;
- (d) Alleged threats made by Paul Singh to the Appellant after it became known that the financial statements submitted to the bank were false; etc

are in my opinion, irrelevant.

[20] Mr Hewitt SC, who represented the accused in the Court *a quo*, with respect missed the point completely and, in my view, contributed substantially to the extremely lengthy record before us on appeal. This misconception was perpetuated on appeal. I say that the point was missed for precisely the reason that the false financial statements were presented to the bank at the time the Appellant was negotiating a sale to certain staff members. This was long before the Singh family became involved. The unchallenged, undisputed evidence was that the Singhs were informed that the bank was already in possession of the relevant financial statements and were prepared, on the strength

of the said financial statements, to provide the necessary finance. This was confirmed by Mr Sammy Govender. His unchallenged evidence was that all he required from the Singh family were details of their (the Singhs) own financial standing. This had nothing to do with the Appellant or Mr Oliver. This is not an oversimplification of the issues. They were clearly defined by Mr Hewitt at the outset of the trial. Sadly though this was forgotten as the trial progressed. The fraud had already been committed by presenting the false financial statements in an attempt to entice the bank to finance the sale to the staff members. This fraud was perpetuated by the Appellant when the Singhs expressed an interest in the business. The evidence is also clear that Mr Oliver had not met the Singhs at the stage when he was requested to prepare the interim financial statements for the period 1 March 2001 to 31 December 2001. These documents were prepared at the request of the Appellant with the knowledge that the false representations had to be perpetuated. As stated earlier in this judgment, it was their reliance upon these false financial statements that led to the conclusion of the sale of East Griqualand Cartage to the Singhs via Rapid Dawn 117 (Pty) Ltd.

[21] The Court *a quo* was correct in rejecting the Appellant's evidence that he was not a party to and was unaware of the production of the false financial statements. Various questions arise – namely:

- (a) Why would Mr Oliver, on his own accord, falsify the financial statements?
- (b) What benefit was there for him?

- (c) Why did he simply not make copies of the financial statements, which had been forwarded to SARS, and submit these to the bank?

[22] This must be seen against the background (as the Appellant would want the Court to believe) that Mr Oliver was not a party to the sale negotiations and was unaware of the price at which the business was to be sold.

[23] The Court *a quo*, in my opinion also correctly rejected the Appellant's defence that there was no need for him to provide the bank or the Singh family with financial statements as he was merely selling assets and not the business of East Griqualand Cartage. Indeed all the evidence as well as the various agreements and the advert in terms of the Insolvency Act, point to the fact that the business of East Griqualand Cartage was sold as a going concern.

[24] I am satisfied that the Appellant was correctly convicted of the offence of fraud. The Magistrate appeared to have erred in that he convicted the Appellant on three counts of fraud whereas it is clear from the record that the Appellant only faced one count of fraud. In this regard, the record is to be amended to reflect the Appellant's guilt on one count of fraud.

[25] I turn now to consider the second issue on appeal – namely whether the Appellant had a fair trial. It has been submitted that the irregularities in the trial were the following:

1. The Magistrate's criticism of the Appellant's senior counsel as evidenced in his judgment was unjustified.
2. The Magistrate's antagonism for the Appellant's senior counsel affected the Magistrate's objectivity.
3. The Magistrate used his criticism of the Appellant's senior counsel as a tool to ignore contradictions and improbabilities in the evidence of the State witnesses, to ignore every concession given by the State witnesses which were favourable to the Appellant and to ignore all unsatisfactory features in the State case.
4. The accumulative effect of the instances of intervention by the Magistrate in the proceedings sustains the inference that the Magistrate has not been fair and impartial and this was placed on record.
5. The Magistrate irregularly curtailed and interrupted cross-examination of the State witnesses.
6. The Magistrate questioned defence witnesses in a manner that was impermissible and excessive.
7. The Magistrate's intemperate conduct and use of intemperate language.
8. The Magistrate's demeanour findings regarding the Appellant and Dr Gouws are not borne out by the record.

[26] The main issue is the alleged intervention by the Magistrate during the proceedings and whether this impacted on the right of the Appellant to a fair trial.

[27] In **R v Hepworth 1928 AD 265 at 277**, Curlewis JA remarked:

"A criminal trial is not a game ... and a Judge's position is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

[28] In **S v Rall 1982 (1) SA 828**, Trollip AJA held at 831- 832:

"While it is difficult and undesirable to attempt to define precisely the limits within which such judicial questioning should be confined, it is possible, I think, to indicate some broad, well known limitations, relevant here, that should generally be observed ...

1. ... The Judge must ensure that "justice is done". It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused. ...The Judge should consequently refrain from questioning any witnesses or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression. ...
2. A Judge should also refrain from indulging in questioning witnesses or the accused in such as way or to such an extent

that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. ...

3. A Judge should also refrain from questioning a witness or the accused in a way that may intimate or disconcert him or unduly influence the quality or nature of his replies and thus effect his demeanor or his credibility. ...

... Now any serious transgression of the limitations just mentioned will generally constitute an irregularity in the proceedings. Whether or not this Court will then intervene to grant appropriate relief at the instance of the accused depends upon whether or not the irregularity has resulted in a failure of justice. ... that in turn depends upon whether or not the irregularity prejudiced the accused, or possibly whether or not this court's intervention is required in the interests of public policy. ... Of course, if the offending questioning of the witness or the accused by the Judge sustains the inference that in fact he was not open minded, impartial, or fair during the trial, this court will intervene and grant appropriate relief."

[29] In **S v Le Grange & 2 others 2009 (2) SA 434**, Ponnann JA held, at paragraph 14 (page 44):

"A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be "manifest to all those who are concerned in the

trial and its outcome, especially the accused". The right to a fair trial is now entrenched in our Constitution. As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by s35(3) of our Constitution. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State."

[30] I have quoted from the aforementioned cases extensively in order to emphasize the manner in which a judicial officer is to conduct himself during a trial. The trial in the Court *a quo* was lengthy and spanned four years. The situation in the Court was tense. All witnesses were extensively cross-examined. The behaviour of senior counsel, Mr Hewitt, in my view, contributed to much of this tension. Indeed the manner in which he conducted himself at times during the trial and the comments he made are shocking and unbecoming of an officer of the Court, especially one who holds the title of senior counsel. One needs only to peruse the judgment in order to ascertain the disruptive and at times rude behaviour of Mr Hewitt. It was certainly difficult for the Magistrate to conduct the trial whilst constantly being reminded and/or threatened that the matter was destined for determination in another court. However I am acutely

aware that this is not the forum to adjudicate upon Mr Hewitt's behaviour.

[31] The record however shows that the Magistrate constantly intervened in the proceedings and that this had the effect, at times, of impeding cross-examination. More startling is the Magistrate's constant interruption during the Prosecutor's cross-examination of the Appellant. Not only did this frustrate Appellant's counsel, but the record clearly shows that the Prosecutor became frustrated by the constant interruptions by the Magistrate. I will not overburden this judgment with extracts from the record to show the nature and extent of the Magistrate's intervention and questioning of the Appellant.

[32] The record, as stated earlier in this judgment is lengthy. The Appellant's evidence in chief covers 166 pages. Cross-examination by the Prosecutor covers 484 pages during which the Magistrate constantly intervened and questioned the Appellant. At times this questioning covered three or more pages. In total I would conservatively estimate the interventions and questioning to cover 170 pages. There was no re-examination of the Appellant by his counsel. The Magistrate thereafter proceeded to question the Appellant which covered 14 pages. The Prosecutor questioned the Appellant on issues arising from the Magistrate's questions which covered six pages. Once again continually interrupted by the Magistrate which I estimate covers approximately three pages.

[33] The Magistrate's intervention in the proceedings is also evident during the testimony of the State witnesses, particularly during cross-examination. An example of this is found during the cross-

examination of the main State witness, Mr Wayne Oliver. The impression gained from all these interventions is that the Magistrate was attempting to protect the witness. There are, of course, instances where the Magistrate's questioning was legitimate and sought clarification and elucidation of issues. However, the record is replete with interventions by the Magistrate, many of which were, in my opinion, unwarranted and unnecessary.

[34] Aware of the criticism, the Magistrate, in his judgment, attempted to clarify and explain his constant interventions and interruptions and questioning as an attempt to seek clarity on the issues or the questions asked or the answers provided. What is clear however is that he descended into the arena and at times appeared to assume the Prosecutor's role in cross-examining the Appellant. This, no doubt accounted for the lengthy cross-examination spanning 484 pages.

[35] Having regard to the limitations referred to by Trollip AJA in **S v Rall (supra)** I am of the opinion that because of the frequency of the interventions, the length, timing and tone of the questions, and the content thereof, an impression of non-impartiality was created. As a consequence, the Magistrate's transgressions of the limitations referred to in **S v Rall (supra)** constituted an irregularity in the proceedings. Did this irregularity result in a failure of justice? I am inclined to answer in the affirmative. I am of the opinion that the Appellant was prejudiced and did not receive a fair trial. There are clear instances in the record where the Magistrate appeared to have pre-judged the case and was indifferent to the objections that he was in fact doing so and that as a consequence the Appellant was not

obtaining a fair trial. As a result, I am of the view that the Magistrate was not open minded, impartial and fair during the trial. In these circumstances the proceedings are invalid and the conviction and sentence must be set aside.

[36] Having reached this conclusion, it is not necessary to consider the sentence imposed.

[37] In the result, the following order is made:

1. The appeal is upheld.
2. The conviction and sentence is set aside.

KRUGER J:

MOODLEY AJ:

I agree

DATE OF CAV:	8 November 2012
DATE OF JUDGMENT:	January 2013
FOR THE APPELLANT:	Hewitt SC with J W B Wolmarans
INSTRUCTED BY:	du Toit Havemann 0312013555 and Lloyd  (Mr lester Schoeman)
FOR THE RESPONDENT:	C A Pillay (0845200293)
INSTRUCTED BY:	Deputy Director of Public Prosecutions