THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 881/2011
Reportable

In the matter between:

MARK MINNIES	**First Appellant**
IEKERAAM HINI	**Second Appellant**
MARK ADAMS	**Third Appellant**
LINFORD PILOT	**Fourth Appellant**
and	
THE STATE	**Respondent**

Neutral citation: *Minnies v State* (881/2011) [2012] ZASCA 102 (1 June 2012)

Coram: Mthiyane DP, Leach and Tshiqi JJA and Petse and Ndita AJJA

Heard: 10 May 2012

Delivered: 1 June 2012

Summary: Criminal law – contravention of s 34(1)(b) of the South African Reserve Bank Act 90 of 1989 – offering counterfeit money for sale (not as legal tender) to a buyer who knew it to be counterfeit, not constituting tendering in contravention of s 34(1)(b).

O R D E R

On appeal from: Western Cape High Court, Cape Town (J H Erasmus J and Matojane AJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the court below is set aside and in its place is substituted the following order:

'(a) The appeal is allowed.

b) The convictions and the sentences of the appellants are set aside.'

J U D G M E N T

LEACH JA and PETSE AJA (MTHIYANE DP,TSHIQI JA AND NDITA AJA concurring)

[1] Arising out of events which occurred on 19 July 2006, the appellants were tried in the Specialised Commercial Crime Court, Bellville on a charge of unlawfully tendering counterfeit money in contravention of s 34(1)(*b*) of the South African Reserve Bank Act 90 of 1989 ('the Act'). They were convicted as charged and sentenced to various terms of imprisonment. The appellants appealed against both their convictions and sentences to the Western Cape High Court, Cape Town. The appeal was dismissed but, with leave of the high court, the appellants appeal now to this court against their convictions only.

[2] The State's case on the relevant facts, accepted by the trial court, is the stuff of a low grade Hollywood thriller. It may be summarised as follows. The principal state witness, Alfred Robert Laidlaw, was an acquaintance of the first appellant whom he had not seen for many years; the first appellant contacted Laidlaw and told him that he was looking for a buyer for counterfeit money; this led to a meeting between Laidlaw and the first, third and fourth appellants on 12 July 2006 during which Laidlaw was shown a counterfeit bank note; an offer was made to sell a large quantity of similar counterfeit bank notes at 50% of their face value; Laidlaw thereafter contacted the police who decided to set a trap; pursuant thereto to at midday on 19 July 2006 Laidlaw proceeded to the parking lot of the Good Hope Centre in Cape Town accompanied by a police agent who was posing as a potential purchaser; they met the four appellants who showed them a sports bag containing a considerable number of R100 counterfeit notes; at the time a number of other policemen were lurking nearby ready to pounce as soon as the transaction was concluded; however at the moment critique the appellants saw a nearby Metro police motor vehicle, panicked and took flight, speeding away from the scene in one of the two motor vehicles they had used to come to the scene; the police pursued them; a high speed car chase took place through the streets of the city until they eventually forced the appellants to stop and arrested them

[3] It is apparent from this that the counterfeit banknotes which the appellants were wishing to sell were not handed over to Laidlaw and his companion but had merely been offered to them. The State however contended that this was sufficient to constitute an offence under s 34(1)(*b*) of the Act which provides that any person who 'utters, tenders or accepts any . . . note . . . which has been forged, altered or unlawfully issued, knowing it to be forged, altered or unlawfully issued' commits an offence. Consequently the State alleged the following in the charge sheet:

'That the accused are guilty of the crime of contravening the provisions of section 34(1)(b) read with section 1 of the South African Reserve Bank Act 90 of 1989 and further read with section 2 of the Prevention of Counterfeiting of Currency Act 16 of 1965—

TENDERING OF COUNTERFEIT MONEY

In that on or about 19/07/2006 and at or near Cape Town in the regional division of the Cape, the accused did unlawfully tender, accept or utter any notes or coins to Alfred Robert Laidlaw which had been forged, altered or unlawfully issued, knowing it to have been forged,

altered or unlawfully issued, to wit 3 648 x R100 RSA notes.'

[4] This charge was poorly drawn. As the State's case related solely to counterfeit banknotes, the reference in the charge to coins was of no relevance. By the same token, reference to s 2 of the Prevention of Counterfeiting of Currency Act 16 of 965 was also misplaced. As appears from s 1 thereof, that Act does not apply to banknotes allegedly issued under the South African Reserve Bank Act 90 of 1989. Moreover, the allegations that the accused unlawfully accepted or uttered notes to Laidlaw are irrelevant as the State has never contended that the appellants were guilty of uttering or accepting.

[5] Be that as it may, the parties were agreed that the charge should be construed as merely alleging that the appellants had unlawfully tendered counterfeit banknotes in contravention of s 34(1)(*b*) despite the evidence clearly establishing that when the offer to sell the counterfeit money in question was made and the money shown to Laidlaw and his companion, all concerned knew that the banknotes were counterfeit and not genuine.

[6] The following issues were argued before us during the hearing of the appeal: (a) whether in the legal and factual context of this case the word 'tender' should be construed as synonymous with the word 'utter'; (b) whether the court below erred in holding that a conviction of 'tendering' counterfeit notes was permissible despite the absence of evidence of an intention on the part of the appellants to offer or pass off the same as genuine notes; (c) whether in any event the court below erred in relying on the evidence of Laidlaw who was not only a single incriminating witness but also whose evidence was fraught with contradictions and inconsistencies which detracted from its truthfulness and reliability; (d) whether the court below should have drawn an adverse inference against the State consequent upon its failure to call the witness David to corroborate Laidlaw's testimony. From what appears below, it is unnecessary to decide all these issues.

[7] The cardinal legal issue to determine is whether offering to sell the counterfeit banknotes in these circumstances amounted to an unlawful 'tendering' as envisaged by the section. The reason why the trial court concluded that an unlawful tender of

the counterfeit notes had taken place is not clear. However, in dismissing the appellants' appeal, the high court accepted the correctness of the decision in *S v Modisakeng* 1998 (1) SACR 278 (T). In that matter the appellant had handed a counterfeit banknote to a police trap who had expressed interest in purchasing forged currency. He did so in order to allow the trap to sample the forgeries he had for sale. The court held that because the trap had known that the note was forged, the appellant had not committed the offence of uttering. It went on to conclude that the intention of the legislature was to cast the net as widely as possible in s 34(1)(*b*) and that, as 'tendering' as envisaged by the section must be taken as something different from 'uttering', the word 'tender' should be construed as embracing the appellant's actions in handing over the note despite both he and the trap knowing that it was false.

[8] In dismissing the appellants' appeal, the high court accepted the correctness of the *Modisakeng* decision. On a similar process of reasoning it concluded that the appellants' offer to sell counterfeit money to Laidlaw and his companion amounted to a tender as envisaged by the section, despite the relevant parties being aware that the money that was being offered for sale was counterfeit. The correctness of this decision was at the core of the debate in this court.

[9] In attempting to support the reasoning of the judgment in *Modisakeng*, counsel for the State argued that it was necessary to read the words 'utters', 'tenders or accepts' in 34(1)(*b*) disjunctively and to thereby ascribe a different meaning to each. Accordingly, while accepting that a crime of uttering in the context of counterfeit banknotes connotes intentionally passing off the false notes by representing them as genuine to the actual potential prejudice of another[1] - and that for this reason the appellants' actions fell short of establishing an uttering [2] - it was contended that this was not necessarily the case with tendering.

[10] There is a close relationship between uttering and tendering. Indeed in many instances the act of uttering will involve the tender of money. Thus the learned

1 Compare Snyman *Criminal Law* 5th Edition 543.
2 Cf *R v Toni* 1949 (1) SA 109 (A) at 113 and *Kolia v Rex* 1937 NPD 105.

authors of *South African Criminal Law and Procedure* Vol 3[3] in referring to uttering or otherwise dealing in counterfeit forgeries, state:[4]

'. . . that an uttering involves a parting with (money) or an offering of it. In this sense an uttering would include a tendering. Nevertheless the words 'uttering' and 'tendering' should be read disjunctively, mainly it seems, to obviate difficulties where the accused does not specifically tender counterfeit money in payment of goods but rather passes a counterfeit coin in return for good coin tendered to him.'

As support for this latter contention, the learned authers refer to *R v Franks*[5] where the accused tendered a genuine coin and on receiving a genuine coin as change, by sleight of hand substituted a counterfeit coin which he then returned, claiming that it was counterfeit, and demanding a genuine coin. On being given a further genuine coin he again substituted a counterfeit coin which he again returned. He was found to have uttered counterfeit coins.

[11] Bearing in mind the close relationship between uttering on the one hand and tendering on the other, there seems to be no reason for the legislature to have intended to draw any material distinction between the two in respect of the criminal intent required to commit the offence. This is especially so as, similar to uttering, in the context of currency the ordinary use of the word 'tender' is to offer money in payment. Indeed, and significantly, the legislature in the Act referred to banknotes as 'legal tender' – see eg s 34(2)(*c*). But more importantly, s 17(1) of the Act provides that a tender of a banknote 'shall be a legal tender of payment of an amount equal to the amount specified on the note'. There is no reason to draw any distinction between a tender as envisaged in this section and a tender envisaged in s 34(1)(*b*). Accordingly tender in the latter section must be construed as an action whereby counterfeit money is offered as genuine currency. That is the clear meaning of the section.

[12] In the light of this conclusion, the fact that all relevant parties in the present case were aware that the appellants were attempting to sell counterfeit money is

3 Milton & Cowling *South African Criminal Law and Procedure* Vol 3.
4 Para A2-16.
5 *R v Franks* (1794) 2 Leach 644.

fatal to the charge levied against them. There was no use or passing off of the banknotes as if they were genuine and therefore no 'tendering' of the counterfeit notes – and on that issue, the judgment in *Modisakeng* was wrongly decided. As there was no unlawful tender as envisaged by s 34(1)(*b*), the appellants ought not to have been convicted on the charge on which they were arraigned and their appeal must succeed.

[13] In closing, we wish to add that the appellants appear clearly to have been involved in counterfeiting activities. It is a matter of both surprise and concern that they were not, at the very least in the alternative, charged with the commission of some other statutory offence. Whether the prosecution was remiss or not is, however, not the question that has to be answered in this case.

[14] The following order is made:

1 The appeal is upheld.

2 The order of the court below is set aside and in its place is substituted the following order:

'(a) The appeal is allowed.

(b) The convictions and the sentences of the appellants are set aside.'

L E Leach
Judge of Appeal

X M Petse
Acting Judge of Appeal

APPEARANCES:

For Appellant:	J van der Berg Instructed by: A K Kajee & Associates, Cravenby Webbers Attorneys, Bloemfontein
For Respondent:	E van Zyl (with her S Liedeman) Instructed by: The Director of Public Prosecutions, Cape Town The Director of Public Prosecutions, Bloemfontein