

IN THE HIGH COURT OF SOUTH AFRICA**(WESTERN CAPE HIGH COURT, CAPE TOWN)****CASE NUMBER:**

A1071/2004

5 **DATE:**

2 DECEMBER 2005

In the matter between:

PIETER STEPHANUS VAN HEERDEN

Appellant

and

10 **THE STATE**

Respondent

J U D G M E N T15 **FITZGERALD, AJ:**

On 10 May 2004 in the George Regional Court, the appellant was convicted, inter alia, of three counts of theft.

20 There were other charges levelled against the appellant, but he was either acquitted on those charges or has not appealed against his convictions thereon.

The appellant accordingly now appeals only against those
25 convictions described in charges 2, 4 and 9 of the charge
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sheet which relate to the theft of certain quantities of sheep and a so-called "staalskuur".

Charges 2, 4 and 9, which are the subject of this appeal were
5 considered together for the purposes of sentence and the
appellant was, on that basis, sentenced to four years
imprisonment, the whole of which was suspended for a period
of five years on certain conditions. One such condition was
that he pay the complainant, a Ms Havenga, an amount of
10 R8 000,00 damages, together with interest thereon by means
of monthly instalments of R2 000,00. .

In brief summary, it was the contention of Mr Saunders, who
appeared on behalf of the appellant, both in court today, and
15 in his written submissions, that the magistrate in the court *a*
quo misdirected himself, *inter alia*, in that he made fallacious
credibility findings and failed to take the probabilities into
account. He also suggested that the Court *a quo* erroneously
accepted the evidence of the complainant and her daughter
20 and that it misdirected itself in regarding the evidence of the
daughter as corroboration of the evidence of the complainant.

In essence, the fundamental contention on behalf of the
appellant was that the conduct of the complainant, after she
25 discovered the allegedly improper conduct on his part, is

inconsistent with her factual evidence and in fact supported his evidence. The court *a quo* had regard to this submission and effectively considered that adequate explanations existed for any alleged inconsistencies.

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One of the inconsistencies which Mr Saunders has emphasised, is that the sheep forming the subject of the second charge, were sold in the period 28 June 1995 to 1 July 1995 and that notwithstanding the alleged unwillingness of the
10 appellant to disclose to the complainant the identity of the purchaser thereof, she nevertheless during October 1995 appointed him as a so called independent contractor in regard to certain construction work which was to take place on her farm in Swellendam.

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Mr Saunders' contention is that had she been aware of the conduct of the appellant in respect of which she complained, she would never, in those circumstances, have appointed him as an independent contractor. Accordingly, so it was
20 submitted, the only reasonable inference is that she was not aggrieved by his conduct and, in particular, that she had instructed him to act on her behalf in the sale of her property.

The explanation proffered by the complainant was that she
25 required proof of any actual wrongdoing on the part of the

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appellant and that the nature of their relationship was such that she was initially prepared to give him the benefit of the doubt.

- 5 What is, in my view, relevant in this regard, is that it appeared to be common cause that it was only in about February 1996 that the complainant, by chance, came across the deed of sale in relation to the sale of the 427 sheep which forms the subject matter of charge 2, and that, in due course, having discussed
10 the matter with her local minister, she decided to prosecute the appellant.

In the light of the circumstances regarding the commencement of the appellant's employment by the complainant, her
15 apparent reliance upon him in regard to her affairs and her evidence with regard to the disintegration of their relationship, it does not seem that the explanation proffered by the complainant falls to be rejected.

- 20 Similarly, and with regard to that count relating to the sale on 27 March 1996 of the "staalskuur", which it was common cause belonged to the complainant, I do not consider that the conduct of the complainant is any way improbable and should be rejected. Her conduct subsequent to the sale thereof by
25 appellant is, in my view, inconsistent with the allegation by

appellant that she had authorised him to sell it.

As stated above, it was the contention of the appellant, that the sale of that property which forms the subject matter of the theft charges, was effected by him on the instructions of the complainant and on her behalf.

In my view the objective evidence indicates the contrary and the rejection by the court *a quo* of the evidence of the appellant in this regard was warranted.

By way of example, it seems common cause that the deed of sale relating to the alleged sale of 427 sheep, forming the subject matter of the second claim, which is Exhibit E, at record page 1549, was not personally handed by the appellant to the complainant at the time of its conclusion, but according to the latter was coincidentally found by her during February 1996. It is also relevant that this document reflects the appellant as the seller of the sheep in question and makes no reference to his having sold such sheep as the alleged agent of the complainant or on her behalf.

I also find support for my view in the fact that those witnesses with whom the appellant dealt, *inter alia*, with regard to the sale of the sheep, all testified that they considered him to be

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acting in his personal capacity and not on behalf of the complainant. The appellant was, in his evidence, unable to explain how, in the circumstances contended by him, this view was reached. His assertion that these witnesses were essentially untruthful witnesses cannot, in my view, prevail.

Mr Saunders, in his heads of argument, also stressed the alleged misdirection of the court *a quo* with regard to the apparent relevance attached to the demeanour of the complainant and her daughter. This raises the question of the approach of a Court of Appeal to an appeal on the facts and it is trite that subject to the incidence of the onus of proof, the same general principles apply on appeal in both criminal and civil related matters. In Santam Beperk v Biddulph 2004(5) SA 586 (SCA) at 589F, the Supreme Court of Appeal stated as follows:

"Whilst a Court of Appeal is generally reluctant to disturb findings which depend on credibility, it is trite that it will do so where such findings are plainly wrong. This is especially so where the reasons given for the finding was seriously flawed. Overemphasis of the advantages which a trial court enjoys, needs to be avoided lest an appellant's right of appeal 'becomes illusory'. It is equally true that findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration".

In criminal matters, it is equally well established that the proper test is not whether a witness is truthful and his evidence reliable, but whether the State has established beyond a reasonable doubt that the essential features of the story which he tells are true.

Applying these principles, I am not persuaded that the magistrate misdirected himself in accepting the evidence of those witnesses who testified on behalf of the State and in rejecting the evidence on behalf of the appellant.

Indeed I am satisfied that there are objective circumstances upon which the court *a quo* reasonably relied in order to satisfy itself that the version of the appellant was not reasonably possibly true and that, conversely, the essential features of the evidence adduced on behalf of the State were true.

It follows in my view that there have been no misdirection and I accordingly propose that the appeal be dismissed.



FITZGERALD, AJ

YEKISO, J: I agree and it is so ordered.

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YEKISO, J