IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. A 532/2009

In the matter between::

ANVER HENDRICKS **Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED ON 1 December 2010

W.H. VAN STADEN AJ

1. The Appellant appeared in the Regional Court, Cape Town, on a charge of corruption in terms of Section 1(1)(b)(i) of the Corruption Act No. 94 of 1992. He pleaded not guilty but was convicted on 15 January 2008. On 26 February 2008 he was sentenced to 3 years imprisonment in terms of Section 276(1)(h) of the Criminal Procedure Act, Act 51 of 1977.

2. The relevant allegations contained in the charge sheet can be summarised as follows:

   2.1. Kwani (Pty) Ltd ("Kwani") entered into a written agreement with Flemming Comp (Pty) Ltd doing business as Afro Comp International ("ACI") on 27 February 2000.

2.2. The Appellant, the duly authorised agent of Kwani, signed the agreement on behalf of Kwani. Joseph Clifford Flemming ("Flemming"), the sole director of ACI, signed the agreement on behalf of ACI.

2.3. By virtue of his employment as Maintenance and Support Manager as well as Training Centre Manager with Portnet, the Appellant had the duty to avoid preferring any one third party above another, with regard to Portnet business.

2.4. The Appellant agreed to receive or attempted to obtain a *"benefit of whatever nature which was not legally due"*.[1] The benefit would be received from Flemming and/or ACI by the Appellant or anyone else. The nature of this benefit was not specified with more particularity in the charge sheet.

2.5. The activities of the Appellant were wrongful in the sense of being corrupt.

2.6. The Appellant had the intention that he should commit or omit to do any act in relation to his duties and power by virtue of his employment, to wit the preferment of ACI in its business relations with Portnet. It is however immaterial whether Flemming and/or ACI had the intention to reward the Appellant for his corrupt actions.

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[1] No evidence was adduced to prove that the Appellant in fact received or obtained any benefit.

BACKGROUND FACTS

3. ACI, the company of which Flemming was the effective owner, was a small black-owned company supplying IT (information technology) products and services. Portnet was one of ACI's biggest clients. Best (Pty) Ltd ("Best") an established IT-business, was also a product and service provider of Portnet and had the sole rights to distribute and implement a financial system called Prophesy, which was utilised by Portnet. Best was a solely white-owned company that needed a black empowerment entity to partner it in a skills-transfer process so that Best could continue servicing the IT software at Portnet.

4. At all relevant times black economic empowerment and skills transfer to achieve transformation in the IT-sector was of great importance to Transnet and more particularly its subsidiary Portnet.

5. The Appellant was the acting Maintenance and Support Manager of Portnet and was in charge of the maintenance and support of all systems at South African Ports, including the billing system, the financial system, the maintenance management systems, the property management system and other smaller systems. Each of these systems had a support team with a project manager. This is how the Appellant described his designation and the scope of his employment in his evidence. In the charge sheet it is alleged that the Appellant was also the Training Centre Manager of Portnet. The state witnesses were not certain about the exact job description, except for Jonck who was clearly wrong in this respect. There appears to be no reason why the

Appellant's evidence about the nature of his employment should not be accepted.

6. The Appellant was mandated by the Executive Manager of IT & S of Portnet, Mr Musala Mosogomi, to assist Best to participate in the transformation process at Portnet. During his cross-examination the Prosecutor asked Appellant why his evidence concerning this mandate was not put to the witness Jonck. The legal representative appearing for the Appellant objected and explained that Jonck was not a party to the meeting when the mandate was given to the Appellant. The Regional Magistrate then stated that, at that time, it was the first time that she had heard about the mandate. This is not correct. The state witness Flemming specifically referred to Appellant as *"the policeman for Portnet"*, sanctioned by management to oversee that true empowerment takes place. The state witnesses Levendal and Flemming as well as the defence witness Griesel, confirmed that black economic empowerment was a priority for both Portnet and the Appellant. All the witnesses in fact confirmed that Appellant went out of his way to promote BEE. ACI for example, was persuaded by Appellant to promote empowerment by making donations to institutions such as schools. In the circumstances I accept that the Appellant was not only mandated as set out above, but was also seriously involved in promoting BEE within Portnet[2].

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[2] In S v Boesak 2003 SA 381 SCA on 397 E it was stated that *"...it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place an issue, explicitly and unambiguously, to the witness implicating his client."* Jonck however, an investigator of Transnet, as correctly pointed out by the legal representative of the Appellant, was not present at the meeting where the Appellant was mandated.

7. In attempting to fulfil this BEE-mandate, the Appellant was convinced that a joint venture between Best and ACI was advisable. Such a joint venture could benefit both Best and ACI. Best could assist ACI to develop skills and a portion of Best's business of supplying financial services to Portnet could be transferred to ACI. Best on the other hand could, by utilising ACI as a sub-contractor, comply with BEE-requirements and retain some Portnet business.

8. Appellant was seen by ACI as the key person to assist ACI to develop skills and to obtain additional contracts. Levendal was satisfied that Appellant had influence and was able to ensure that invoices are correctly processed and that payments would be fast-forwarded. The Appellant was therefore requested by ACI and Best to facilitate a joint venture agreement between ACI and Best. Negotiations ensued and Appellant mentioned to the parties involved in the negotiations that the implementation of the SAP (R3 system), an IT financial system, was part of the future projections of Portnet and that a tender process for the operation of this system would be implemented. Appellant's idea was that ACI should be developed to such an extent that it would be able to compete favourably in this tender process. Apart form Appellant, Flemming, Mr Jaap Griesel ("Griesel") of Best and ACI's auditor Mr Levendal, as a representative of ACI, also took part in the negotiations.

9. Griesel informed Levendal that the shelf-company Kwani, of which he was in effective control, rather than Best, should be a party to the agreement with ACI. Levendal was tasked to draft this agreement

which was finally entered into on 27 February 2000. The salient terms of this agreement are the following:

9.1. Kwani is duly represented by Appellant (paragraph 2 of the agreement).

9.2. Appellant shall attend monthly (or fortnightly) progress meetings in a non-executive capacity (paragraph 5).

9.3. Kwani must provide adequate collateral security for ACI to obtain a suitable overdraft facility, large enough to enable ACI to continue unrestricted with normal business operations and the envisaged larger output and capacity. In the interim a facility of R 200 000.00 will be established by ACI for Kwani (paragraph 6 to 9).

9.4. For the duration of the joint venture between the parties all cheques made out for an amount exceeding R 7 500.00, will require prior notification to Appellant (paragraph 10).

9.5. Kwani will receive a management fee of R 5 000.00 per month, payable to a nominated management company (paragraph 12.1).

9.6. As compensation for Kwani's services it would receive 30% of the profit during the period from availing the overdraft facility until Kwani becomes a shareholder of ACI (paragraph 12.2).

9.7. Kwani has the option to obtain 30%of the total issued shares of ACI (paragraph 13). The agreement will commence upon the

successful increase of the overdraft facility and will terminate upon the restructuring of the ACI Group (paragraph 15).

10. The Appellant, as was envisaged in paragraph 2[3], signed the agreement *"For Kwani"*.

11. The Appellant did not receive any direct financial benefits from either ACI or Flemming.

12. Neither of the state witnesses, Levendal or Flemming, or the defence witness Griesel, appears to have perceived any of the actions of the Appellant as being corrupt. The auditor Levendal specifically stated that he accepted the *bona fides* of the Appellant. The fact that he knew that the Appellant was attempting to develop ACI as a BEE-compliant supplier of Portnet was one of the factors convincing him of such good faith.

13. The changeover between Best and ACI actually took place and requests for services were directed to ACI by Portnet and ACI started invoicing. Levendal had regular contact with Appellant mainly to speed up payment of invoices. There can be little doubt therefore that the Appellant in the course of his employment did in fact use his influence to favour ACI. As stated hereunder that is of course not necessarily enough to justify a conviction on a charge of corruption.

14. The suspensive condition of the contract requiring that Kwani initially had the obligation to increase ACI's overdraft facility by R 200 000.00

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[3] Paragraph 9.1 (Supra).

was never fulfilled and the joint venture agreement referred to in paragraph 8, above never came to fruition.

15. At the trial the State tendered the evidence of three witnesses. The Appellant gave evidence and Griesel was also called as a defence witness.

16. The facts outlined above are facts which emerged during the trial and which are either not in dispute or cannot reasonably be disputed.

CERTAIN ASPECTS OF THE EVIDENCE FOR THE STATE

17. The first state witness, the auditor of ACI, (Levendal) testified that during the negotiations, Griesel made certain oral statements concerning the Appellant. Griesel informed him that he did not want his or Best's name mentioned in the agreement. He requested that Kwani should be included as a contracting party rather than Best. Griesel also told Levendal that he and Appellant were joint owners of Kwani, that Appellant was a director of Kwani and that Appellant would be signatory to the bank account of Kwani. He furthermore stated that Appellant would be compensated for his services rendered with a management fee.

18. The second state witness, Flemming, was clearly upset and emotional about the fact that the promises of ACI being developed and favoured by Portnet in its attempts to promote empowerment, were not kept. Flemming confirmed that apart from the fact that the Appellant signed the agreement, he did not receive any benefit whatsoever from Flemming or ACI. His evidence does not create the impression at all

that he perceived his or ACI's actions as constituting bribery of the Appellant.

19. The third witness was Mr F H A Jonck, the assistant manager of Transnet Group Audit Services ("Jonck"). He was requested to investigate a complaint apparently lodged by Flemming. In many respects his evidence appears to relate to the conclusions that he reached after interviews with interested parties.

20. Jonck stated in his evidence that, on his interpretation of paragraph 12 of the agreement, the interests of the Appellant and Kwani was identical and that the 30% profit realised during that period would be due to the Appellant. According to Jonck the Appellant furthermore would have received the R 5 000.00 administration fee referred to in the contract. In his interview with the Appellant Jonck confronted him with his interpretation that the Appellant was not entitled to sign the agreement, as he would receive benefits in conflict with the terms of his employment.

21. Jonck also said that Appellant told him that he never read the contract and that he was under the impression that he had signed the contract as a witness and not as a representative of Kwani.

THE DEFENCE CASE

22. In his evidence the Appellant maintained that it was his intention to sign the agreement as a witness only and not as a representative of Kwani. In this respect he was supported by Griesel. Suffice to say, the Regional Magistrate was clearly correct in rejecting this evidence. The

fact that the Appellant's evidence was unacceptable in one respect, does not however mean that his evidence should be rejected in totality. False evidence does not necessarily justify an inference of an accused person's guilt or that his evidence in other respects are not acceptable. A possible reason for the Appellant untruthfully denying his involvement in the agreement as a representative of Kwani, may be the fact that Jonck confronted Appellant with his personal view that the Appellant had acted unlawfully when signing the agreement on behalf of Kwani[4].

THE REGIONAL MAGISTRATE'S APPROACH

23. The Regional Magistrate stated that the court was faced with two conflicting versions as to how the Appellant came to sign the agreement and in what capacity he did so. The Magistrate accepted the version of the state witnesses that the Appellant signed as a representative of Kwani and rejected the version of the Appellant that he signed the contract as a witness. The Regional Magistrate was clearly correct to reject the evidence of the Appellant and Griesel that the Appellant intended to merely sign as a witness.

24. The Regional Magistrate however went further and concluded that by signing as a representative on behalf of Kwani the Appellant became a party to the contract *"and as such he entered into a corrupt relationship"*. As I point out hereunder when dealing with the requirement that the appellant must have acted corruptly, that is, unlawfully, the question is whether there is no justification for his

[4] See S v Mtsweni 1985 (1) SA 590 AA at 593 H to 594 D.

conduct.[5] In my view, the evidence shows, as indicated hereunder,[6] that his conduct of entering into the agreement was probably justified.

BENEFITS

25. As stated above[7], according to Levendal, Griesel informed him about the nature of the Appellant's involvement with ACI. When Levendal testified about what Griesel told him, the legal representative appearing for the Appellant objected. Although the prosecutor specifically indicated that the state would call Griesel as a witness, the Regional Magistrate made a finding that Levendal's evidence in this respect was not hearsay, because Appellant was, according to the witness, present when Griesel made the said hearsay statements. This finding was wrong. In terms of Section 3(4) of the Law of Evidence Amendment Act 45 of 1988, *"hearsay evidence" "means evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence";* The evidence in question is clearly hearsay evidence[8]. The Regional Magistrate was entitled to allow Levendal's evidence of what Griesel told him on a provisional basis, since the prosecutor indicated that Griesel would be called as a witness. Levendal's evidence is therefore not hearsay for the purposes of this judgment, since Griesel was called by the Appellant to give evidence for the defence[9]. In his evidence, however,

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[5] Paragraph [34]
[6] Paragraph [35]
[7] Paragraph 18 (Supra)
[8] Schmidt; Bewysreg (4th Edition) paragraph B and C on page 476 and the definition of *"hearsay evidence"* in Section 3(4) of Act 45 of 1988, the Law of Evidence Amendment Act. In terms of Section 3(1)(c) of Act 45 of 1988, the court has discretion to allow hearsay evidence having regard to certain prescribed factors.
[9] Section 3(1)(b) of Act 45 of 1988.

Griesel disavowed the alleged remarks and the evidence was therefore inadmissible[10]. Although one cannot but agree with the Magistrate that Griesel was not an impressive witness, the fact nevertheless remains that Griesel denied that he made the statements ascribed to him by Levendal.

26. The Regional Magistrate stated in her judgment that both Griesel and Appellant indicated to Levendal that the agreement must be entered into with Kwani rather than with Best. Levendal limited the source of this statement to Griesel only.

27. As stated above[11], the state witness Jonck also testified that in his opinion the Appellant improperly stood to gain some of the benefits accruing to Kwani in terms of the agreement and that he confronted the Appellant with this view during their interview. The Regional Magistrate adopted the same line of reasoning.

28. Despite the fact that the Appellants' evidence that he signed the contract as a witness must be rejected, there was a total lack of evidence to the effect that the Appellant would personally receive any benefits from the agreement in question. In order to justify a conviction on a charge of corruption in terms of Section 1(1)(b)(1) of the Corruption Act No. 94 of 1992, it is however not necessary for the accused to receive any benefit personally. The accused may be guilty of the offence if a benefit or a potential benefit accrues to another

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[10] S v Ndhlovu and Others 2002 (2) SACR 325 in para 292 and para 34 on pages 342 and 343; Principles of Evidence (2nd Edition) PJ Schwikkard and Others para 13.6 on page 258 to 260...

[11] Paragraph 20.

person[12]. In terms of the agreement with ACI, Kwani stood to gain benefits. The State therefore discharged the onus of proof in this respect.

THE DUTY OF THE APPELLANT IN TERMS OF THE EMPLOYMENT CONTRACT WITH PORTNET

29. In the charge sheet it was alleged that by virtue of his employment agreement with Portnet the Appellant had the duty to avoid preferring any one third party above another with regard to Portnet business[13].

30. The Appellant was not only mandated to assist Best to participate in the transformation process at Portnet, but was specifically and actively involved in the promotion of BEE. The exact terms of the Appellant's employment contract with Portnet is therefore an important issue.

31. Jonck was the only witness called to prove the terms of Appellant's employment contract with Portnet[14]. Jonck's evidence of the terms of this employment agreement was vague and unspecific. A reading of Levendal's evidence appears to confirm that the employment agreement in question was in writing. As a general rule the contents thereof should therefore be proved by producing this contract[15]. It is furthermore relevant to note that Jonck was under the impression that Appellant was a Project Manager in the IT-division of Portnet. The Appellant's evidence referred to above is clear in this respect. He was the acting Maintenance and Support Manager of Portnet and a number

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[12] See paragraph 2.4.
[13] Paragraph 2.3 above.
[14] See paragraph 2.3 above for the corresponding allegations in the charge sheet.
[15] Schmidt op.cit page 344; Commentary on the Criminal Procedure Act, Du Toit and Others page 24-87.

of Project Managers reported to him. Jonck was therefore mistaken as to the exact job description of the Appellant. The question arises as to whether this mistaken perception (of Appellant's job description) could have resulted in Jonck reaching a incorrect conclusions about the scope and nature of Appellant's duties as an employee of Portnet.

32. The Magistrate's finding that the Appellant *'In his capacity as project manager of Portnet could not perform work outside Portnet without authority as that would amount to a conflict of interest"*, is therefore not justified. This finding is based on the evidence of Jonck which should not have been accepted in respect of this important issue.

33. In the circumstances I conclude that the State has failed to prove the nature and extent of the Appellant's duties in terms of the employment agreement, with Portnet, one of the elements of the charge against the Appellant. [16]

ACTING CORRUPTLY

34. Section 1(b)(i) of the Corruption Act, Act 94 of 1992, provides that an accused person who agrees to receive or attempts to obtain any benefit, must act corruptly to be guilty of the offence[17].

35. As stated above it must be accepted that Appellant was mandated by the management of Portnet to act as an intermediatory between Best and ACI and to promote black economic empowerment. All his actions, including the signing of the agreement as a representative, appears to

[16] Paragraph 2.3 (Supra)
[17] CR Snyman - Strafreg (4de Uitgawe) paragraph 6(e) on page 398 and 399 and paragraph 8(e) on page 402 *the term corruptly refers to unlawfulness and not to intention, that is, it refers to the requirement that there must be no justification for the conduct of the accused.*

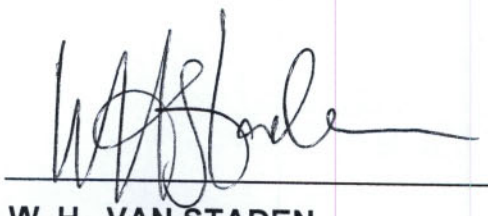
be justifiable as the actions of an employee acting in the interest of his employer by promoting black economic empowerment.

36. The State witnesses Levendal and Flemming also do not appear to regard their own actions or the actions of the Appellant, as being corrupt. The Appellant's circumstances and conduct stands on more or less a similar footing as the facts in S v Palm[18], where the accused was a member of a Close Corporation involved in the clandestine purchase of armaments for Krygkor during the 1980's.

37. In my opinion the State has failed to prove that the Appellant's activities were *"corrupt"* in the sence of being unlawful, i.e. that beyond reasonable doubt there has been no justification for his conduct. To the contrary, the evidence reveals a probability that his conduct was justified.

CONCLUSION

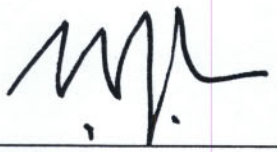
38. In all the circumstances I am of the view that the State has failed to prove the Appellant's guilt. I would allow the appeal and set aside the conviction and sentence imposed.



W. H. VAN STADEN
Acting Judge of the High Court

[18] 1997 (1) SACR 70 (T) at 79 c – h...

I agree and it is so ordered.



W.J. LOUW

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JUDGMENT DELIVERED ON 1 December 2010

W.H. VAN STADEN AJ

1. The Appellant appeared in the Regional Court, Cape Town, on a charge of corruption in terms of Section 1(1)(b)(i) of the Corruption Act No. 94 of 1992. He pleaded not guilty but was convicted on 15 January 2008. On 26 February 2008 he was sentenced to 3 years imprisonment in terms of Section 276(1)(h) of the Criminal Procedure Act, Act 51 of 1977.

2. The relevant allegations contained in the charge sheet can be summarised as follows:

   2.1. Kwani (Pty) Ltd ("Kwani") entered into a written agreement with Flemming Comp (Pty) Ltd doing business as Afro Comp International ("ACI") on 27 February 2000.

2.2. The Appellant, the duly authorised agent of Kwani, signed the agreement on behalf of Kwani. Joseph Clifford Flemming ("Flemming"), the sole director of ACI, signed the agreement on behalf of ACI.

2.3. By virtue of his employment as Maintenance and Support Manager as well as Training Centre Manager with Portnet, the Appellant had the duty to avoid preferring any one third party above another, with regard to Portnet business.

2.4. The Appellant agreed to receive or attempted to obtain a *"benefit of whatever nature which was not legally due"*.[1] The benefit would be received from Flemming and/or ACI by the Appellant or anyone else. The nature of this benefit was not specified with more particularity in the charge sheet.

2.5. The activities of the Appellant were wrongful in the sense of being corrupt.

2.6. The Appellant had the intention that he should commit or omit to do any act in relation to his duties and power by virtue of his employment, to wit the preferment of ACI in its business relations with Portnet. It is however immaterial whether Flemming and/or ACI had the intention to reward the Appellant for his corrupt actions.

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[1] No evidence was adduced to prove that the Appellant in fact received or obtained any benefit.

BACKGROUND FACTS

3. ACI, the company of which Flemming was the effective owner, was a small black-owned company supplying IT (information technology) products and services. Portnet was one of ACI's biggest clients. Best (Pty) Ltd ("Best") an established IT-business, was also a product and service provider of Portnet and had the sole rights to distribute and implement a financial system called Prophesy, which was utilised by Portnet. Best was a solely white-owned company that needed a black empowerment entity to partner it in a skills-transfer process so that Best could continue servicing the IT software at Portnet.

4. At all relevant times black economic empowerment and skills transfer to achieve transformation in the IT-sector was of great importance to Transnet and more particularly its subsidiary Portnet.

5. The Appellant was the acting Maintenance and Support Manager of Portnet and was in charge of the maintenance and support of all systems at South African Ports, including the billing system, the financial system, the maintenance management systems, the property management system and other smaller systems. Each of these systems had a support team with a project manager. This is how the Appellant described his designation and the scope of his employment in his evidence. In the charge sheet it is alleged that the Appellant was also the Training Centre Manager of Portnet. The state witnesses were not certain about the exact job description, except for Jonck who was clearly wrong in this respect. There appears to be no reason why the

Appellant's evidence about the nature of his employment should not be accepted.

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7. In attempting to fulfil this BEE-mandate, the Appellant was convinced that a joint venture between Best and ACI was advisable. Such a joint venture could benefit both Best and ACI. Best could assist ACI to develop skills and a portion of Best's business of supplying financial services to Portnet could be transferred to ACI. Best on the other hand could, by utilising ACI as a sub-contractor, comply with BEE-requirements and retain some Portnet business.

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successful increase of the overdraft facility and will terminate upon the restructuring of the ACI Group (paragraph 15).

10. The Appellant, as was envisaged in paragraph 2[3], signed the agreement *"For Kwani"*.

11. The Appellant did not receive any direct financial benefits from either ACI or Flemming.

12. Neither of the state witnesses, Levendal or Flemming, or the defence witness Griesel, appears to have perceived any of the actions of the Appellant as being corrupt. The auditor Levendal specifically stated that he accepted the *bona fides* of the Appellant. The fact that he knew that the Appellant was attempting to develop ACI as a BEE-compliant supplier of Portnet was one of the factors convincing him of such good faith.

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that he perceived his or ACI's actions as constituting bribery of the Appellant.

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THE DEFENCE CASE

22. In his evidence the Appellant maintained that it was his intention to sign the agreement as a witness only and not as a representative of Kwani. In this respect he was supported by Griesel. Suffice to say, the Regional Magistrate was clearly correct in rejecting this evidence. The

fact that the Appellant's evidence was unacceptable in one respect, does not however mean that his evidence should be rejected in totality. False evidence does not necessarily justify an inference of an accused person's guilt or that his evidence in other respects are not acceptable. A possible reason for the Appellant untruthfully denying his involvement in the agreement as a representative of Kwani, may be the fact that Jonck confronted Appellant with his personal view that the Appellant had acted unlawfully when signing the agreement on behalf of Kwani[4].

THE REGIONAL MAGISTRATE'S APPROACH

23. The Regional Magistrate stated that the court was faced with two conflicting versions as to how the Appellant came to sign the agreement and in what capacity he did so. The Magistrate accepted the version of the state witnesses that the Appellant signed as a representative of Kwani and rejected the version of the Appellant that he signed the contract as a witness. The Regional Magistrate was clearly correct to reject the evidence of the Appellant and Griesel that the Appellant intended to merely sign as a witness.

24. The Regional Magistrate however went further and concluded that by signing as a representative on behalf of Kwani the Appellant became a party to the contract *"and as such he entered into a corrupt relationship"*. As I point out hereunder when dealing with the requirement that the appellant must have acted corruptly, that is, unlawfully, the question is whether there is no justification for his

[4] See S v Mtsweni 1985 (1) SA 590 AA at 593 H to 594 D.

conduct.[5] In my view, the evidence shows, as indicated hereunder,[6] that his conduct of entering into the agreement was probably justified.

BENEFITS

25. As stated above[7], according to Levendal, Griesel informed him about the nature of the Appellant's involvement with ACI. When Levendal testified about what Griesel told him, the legal representative appearing for the Appellant objected. Although the prosecutor specifically indicated that the state would call Griesel as a witness, the Regional Magistrate made a finding that Levendal's evidence in this respect was not hearsay, because Appellant was, according to the witness, present when Griesel made the said hearsay statements. This finding was wrong. In terms of Section 3(4) of the Law of Evidence Amendment Act 45 of 1988, *"hearsay evidence" "means evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence";* The evidence in question is clearly hearsay evidence[8]. The Regional Magistrate was entitled to allow Levendal's evidence of what Griesel told him on a provisional basis, since the prosecutor indicated that Griesel would be called as a witness. Levendal's evidence is therefore not hearsay for the purposes of this judgment, since Griesel was called by the Appellant to give evidence for the defence[9]. In his evidence, however,

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[5] Paragraph [34]
[6] Paragraph [35]
[7] Paragraph 18 (Supra)
[8] Schmidt; Bewysreg (4th Edition) paragraph B and C on page 476 and the definition of *"hearsay evidence"* in Section 3(4) of Act 45 of 1988, the Law of Evidence Amendment Act. In terms of Section 3(1)(c) of Act 45 of 1988, the court has discretion to allow hearsay evidence having regard to certain prescribed factors.
[9] Section 3(1)(b) of Act 45 of 1988.

Griesel disavowed the alleged remarks and the evidence was therefore inadmissible[10]. Although one cannot but agree with the Magistrate that Griesel was not an impressive witness, the fact nevertheless remains that Griesel denied that he made the statements ascribed to him by Levendal.

26. The Regional Magistrate stated in her judgment that both Griesel and Appellant indicated to Levendal that the agreement must be entered into with Kwani rather than with Best. Levendal limited the source of this statement to Griesel only.

27. As stated above[11], the state witness Jonck also testified that in his opinion the Appellant improperly stood to gain some of the benefits accruing to Kwani in terms of the agreement and that he confronted the Appellant with this view during their interview. The Regional Magistrate adopted the same line of reasoning.

28. Despite the fact that the Appellants' evidence that he signed the contract as a witness must be rejected, there was a total lack of evidence to the effect that the Appellant would personally receive any benefits from the agreement in question. In order to justify a conviction on a charge of corruption in terms of Section 1(1)(b)(1) of the Corruption Act No. 94 of 1992, it is however not necessary for the accused to receive any benefit personally. The accused may be guilty of the offence if a benefit or a potential benefit accrues to another

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[10] S v Ndhlovu and Others 2002 (2) SACR 325 in para 292 and para 34 on pages 342 and 343; Principles of Evidence (2nd Edition) PJ Schwikkard and Others para 13.6 on page 258 to 260...

[11] Paragraph 20.

person[12]. In terms of the agreement with ACI, Kwani stood to gain benefits. The State therefore discharged the onus of proof in this respect.

THE DUTY OF THE APPELLANT IN TERMS OF THE EMPLOYMENT CONTRACT WITH PORTNET

29. In the charge sheet it was alleged that by virtue of his employment agreement with Portnet the Appellant had the duty to avoid preferring any one third party above another with regard to Portnet business[13].

30. The Appellant was not only mandated to assist Best to participate in the transformation process at Portnet, but was specifically and actively involved in the promotion of BEE. The exact terms of the Appellant's employment contract with Portnet is therefore an important issue.

31. Jonck was the only witness called to prove the terms of Appellant's employment contract with Portnet[14]. Jonck's evidence of the terms of this employment agreement was vague and unspecific. A reading of Levendal's evidence appears to confirm that the employment agreement in question was in writing. As a general rule the contents thereof should therefore be proved by producing this contract[15]. It is furthermore relevant to note that Jonck was under the impression that Appellant was a Project Manager in the IT-division of Portnet. The Appellant's evidence referred to above is clear in this respect. He was the acting Maintenance and Support Manager of Portnet and a number

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[12] See paragraph 2.4.
[13] Paragraph 2.3 above.
[14] See paragraph 2.3 above for the corresponding allegations in the charge sheet.
[15] Schmidt op.cit page 344; Commentary on the Criminal Procedure Act, Du Toit and Others page 24-87.

of Project Managers reported to him. Jonck was therefore mistaken as to the exact job description of the Appellant. The question arises as to whether this mistaken perception (of Appellant's job description) could have resulted in Jonck reaching a incorrect conclusions about the scope and nature of Appellant's duties as an employee of Portnet.

32. The Magistrate's finding that the Appellant *'In his capacity as project manager of Portnet could not perform work outside Portnet without authority as that would amount to a conflict of interest"*, is therefore not justified. This finding is based on the evidence of Jonck which should not have been accepted in respect of this important issue.

33. In the circumstances I conclude that the State has failed to prove the nature and extent of the Appellant's duties in terms of the employment agreement, with Portnet, one of the elements of the charge against the Appellant. [16]

ACTING CORRUPTLY

34. Section 1(b)(i) of the Corruption Act, Act 94 of 1992, provides that an accused person who agrees to receive or attempts to obtain any benefit, must act corruptly to be guilty of the offence[17].

35. As stated above it must be accepted that Appellant was mandated by the management of Portnet to act as an intermediatory between Best and ACI and to promote black economic empowerment. All his actions, including the signing of the agreement as a representative, appears to

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[16] Paragraph 2.3 (Supra)

[17] CR Snyman - Strafreg (4de Uitgawe) paragraph 6(e) on page 398 and 399 and paragraph 8(e) on page 402 *the term corruptly refers to unlawfulness and not to intention, that is, it refers to the requirement that there must be no justification for the conduct of the accused.*

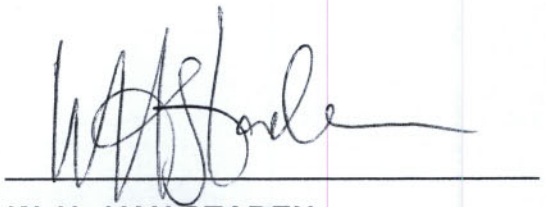
be justifiable as the actions of an employee acting in the interest of his employer by promoting black economic empowerment.

36. The State witnesses Levendal and Flemming also do not appear to regard their own actions or the actions of the Appellant, as being corrupt. The Appellant's circumstances and conduct stands on more or less a similar footing as the facts in S v Palm[18], where the accused was a member of a Close Corporation involved in the clandestine purchase of armaments for Krygkor during the 1980's.

37. In my opinion the State has failed to prove that the Appellant's activities were *"corrupt"* in the sence of being unlawful, i.e. that beyond reasonable doubt there has been no justification for his conduct. To the contrary, the evidence reveals a probability that his conduct was justified.

CONCLUSION

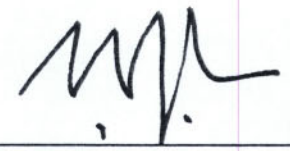
38. In all the circumstances I am of the view that the State has failed to prove the Appellant's guilt. I would allow the appeal and set aside the conviction and sentence imposed.



W. H. VAN STADEN
Acting Judge of the High Court

[18] 1997 (1) SACR 70 (T) at 79 c – h...

I agree and it is so ordered.



W.J. LOUW

Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No.: A296/2009

In the matter between:

JEFFREY HEINRICH RABIE Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED: FRIDAY 10 DECEMBER 2010

SALDANHA, J

[1.] The appellant Mr. Jeffrey Heinrich Rabie was convicted on the 14th of February 2008 in the High Court (Eastern Circuit Local Division) at Oudtshoorn on charges of abduction, rape and the murder of a six year old child. He was sentenced to five years imprisonment on the count of abduction, 20 years imprisonment for the rape and 25 years imprisonment for the murder. The sentences were ordered to run concurrently in terms of section 280(2) of the Criminal Procedure Act which resulted in an effective term of imprisonment of 25 years.

[2.] The appellant had successfully obtained leave to appeal against the convictions on the charges of abduction and the rape and leave to appeal against the sentence imposed on the charge of murder.

[3.] The charges arose out of an incident on the 3rd of February 2007, near Dysselsdorp in the district of Oudtshoorn where the appellant was alleged to have abducted Mary-Ann Deelman a 6 year old child with the intention of having sexual intercourse with her and whereafter he was alleged to have raped and murdered her. The appellant had been legally represented at the trial and had tendered a plea of not guilty to the charge of abduction and claimed that it amounted to an unfair duplication of the charges with that of the alleged rape. The appellant tendered pleas of guilty to an indecent assault and the charge of murder and made various formal admissions in terms of section 220 of the Criminal Procedure Act. The state however was not prepared to accept the pleas and elected to lead evidence on each of the charges.

[4.] At the trial the state tendered the evidence of five witnesses. A set of photographs of the scene at which the deceased was found near a bush on the banks of the Olifantsrivier near Dysselsdorp and photographs which had been taken during the post mortem examination of the deceased were by agreement submitted into evidence. A plan and satellite photographs of Dysselsdorp were also used during the course of the trial. During the course of the trial the appellant made further admissions in terms of section 220 of the Act with regard to the analysis of a specimen of blood as being that of the deceased and which had been found on his clothes. He also admitted that a specimen of his semen was found on a long pants worn by the deceased. During the course of the state's case the court undertook an inspection in loco of the area at which the incidents of the 3rd of February 2007 were alleged to have occurred.

the area where the deceased had been found was the same as that he and the deceased had taken on the day of the incident. They had walked passed the residence of Ms Erasmus on Dysselsweg and turned right into Magerman Street and proceeded into a T Junction with Belelie Street. There they turned right and walked along a passage-way between the Pinkster Kerk and houses and emerged into an open veld where they followed a footpath and walked through a ditch and around a sportsfield. On the other side of the sportsfield they followed a footpath through another ditch and proceeded to an open field. From there they walked along a footpath into a bushy area near the banks of the Olifantsrivier where the incident occurred. The distance covered along the route was estimated as between 1 and 2 kilometres from the residence of Ms Erasmus in Dysselsweg.

[12.] **Dr. Adam Johannes Barnard** a district surgeon from Oudtshoorn conducted the post mortem examination on the 5th of February 2007 on the body of the deceased. Barnard had practised as a medical practitioner for approximately 49 years of which 40 years was as a district surgeon. He concluded that the cause of death was as a result of multiple injuries. He had observed a tear of approximately 2cm x 1cm in the area between the deceased's vagina and her anus. He was of the view that the tear had been caused by a blunt instrument which had been forced into the entrance of the vagina but without fully penetrating it. Based on his many years of experience, Barnard claimed that the tear appeared to be typical of an attempt at a forceful insertion of a penis into the relatively small vagina. Barnard was cross-examined at length

by the appellant's legal representative as to whether the tear could have been caused by the use of a finger. In this regard the version of the appellant (as set out in his plea explanation of indecent assault) was put to Barnard. He maintained though that it was improbable that a finger would have caused the injury but did not rule out the possibility thereof.

The conviction of rape

[13.] The court *a quo* found that the injuries to the vagina of the deceased had been caused by a blunt instrument although only through partial penetration. The finding was based largely on the evidence of Barnard and from the photographs taken at the post mortem examination. The question that arose was whether the only reasonable inference to be drawn was that the appellant had attempted to penetrate the vagina of the deceased with his penis. Based on his experience and observations Barnard held the very strong view that the vaginal injuries sustained by the complainant were caused as a result of an attempt to insert a penis into the deceased's vagina. He considered that the injury was also consistent with the angle at which the attempted penetration of the vagina had occurred. The court a *quo* also took into account that semen had been found on the long pants of the deceased although no semen had been found on the blood stained panty which had been found almost 5m from the place where she lay. Although no semen was found on the vaginal smear the court was correctly of the view that for the purposes of proving rape it was not necessary for the state to prove that there had been an ejaculation. In order to determine what in fact occurred the court considered all the surrounding circumstances. The court was

mindful of the appellant's version as it appeared from the plea explanation, in particular his claim that he had taken the deceased from Dysseldorp to have sexual intercourse with her. It therefore considered it improbable in the circumstances that the appellant would not have attempted to have sexual intercourse with her and that in doing so, had inflicted the injuries to her vagina. Moreover all of the evidence had to be considered in the context of the appellant's election not to put his version before the court by way of testimony. In this regard the court appropriately referred to the judgment in **S v Boesak 2001 (1) SACR 11 at para 24** where it was held;

> *"The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. What is stated above is consistent with the remarks of Madala J, writing for the Court, in Osman and Another v Attorney-General, Transvaal , 24 when he said the following:*
>
> > *'Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always*

runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would A destroy the fundamental nature of our adversarial system of criminal justice.'

[14.] This view was also supported in **S v Buda and Others 2004 (1) SACR 9 (T)** in which the following was stated;

"Yet there are, as has been held by the Supreme Court of Appeal and the Constitutional Court limits to this right. There comes a stage in a prosecution where an accused has a duty to tell her or his story or to lead other evidence, which would show that, for example, the denial of participation is reasonably possibly true. The question is, of course, whether that stage has been reached in this case."

[15.] In the matter of **S v Chabalala 2003 (1) SACR 134 (SCA) at para 20,** Heher AJA stated;

"As was pointed out in S v Mthethwa 1972 (3) SA 766 (A) at 769D: 'Where . . . there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability; see S v Nkombani and

provide a satisfactory answer, the matter is correctly left to the common sense, wisdom, experience and sense of fairness of the court.

[36] It has always been accepted that a logical point of departure is to consider the definitions of those offences in regard to which a possible duplication might have taken place".

[18.] The court *a quo* adopted a similar approach and considered each of the definitial elements of the offence of abduction. The authors **C R Snyman in Criminal Law (5th ed) at pages 405 to 407** and **Jonathan Burchell, Principles of Criminal Law (3rd Ed) pages 764 to 767** define the offence of abduction as the

"....unlawful and intentional removal of an unmarried minor , male or female from the control of his or her parent or guardian and without the consent of such parent or guardian, intending that he or she or somebody else may marry or have sexual intercourse with the minor"

[19.] The arcane origins of the offence of abduction regarded minor females as subservient in society largely subject to the authority of their parents and as economic assets. **Snyman** correctly holds the view that although the offence is today largely limited in application it appropriately punishes *"unscrupulous people who entice young people away from their parental homes"*, in order to have sexual intercourse with them or by placing them at the disposal of others for such

purposes. **(Snyman at pages 403-404.)** In this context it is important to note that the offence is committed against the parent or the guardian of the child.

[20.] In the application of the elements of the offence to the facts of the matter it appears that the evidence established the following: (a) *"the removal"*, the appellant had enticed the deceased with the promise of an amount of money to accompany him, (b) of an *"unmarried minor"*, the deceased was a 6 years old child, (c) *"from the control of her guardian"*, her grandmother was her guardian at the time of the incident and in whose care and custody she had resided, (d) *"with the intention of having sexual intercourse with the minor"*, which on the evidence appears to have been the intention of the appellant and based also on his own statement in terms of the section 112, (e) *"without the consent of the guardian,"* clearly the removal occurred without the consent and knowledge of the deceased's grandmother, and (f) *"having acted unlawfully without any justification for his conduct"* as is apparent from all of the evidence and on the admissions made by the appellant himself.

[21.] The court *a quo* also considered whether the requirement that the removal had to be for a substantial period had been proved and in this regard took note of the route taken by the appellant and the deceased and distance that they had walked, approximately 1,5km from the residential area of Dysselsdorp to the banks of the Olifantsrivier where the rape and murder occurred.

[22.] The court *a quo* had also considered the various tests to be applied with regard to the question of a duplication of convictions and in this regard referred to the decision of Comrie J in **S v Davids 1998 (2) SACR 313 at 316 B-E;**

> *"Over the years various tests have been devised by the Courts, as aids to the determination of what can be a very difficult question. The case law is collected and considered in Du Toit et al: Commentary on the Criminal Procedure Act ad s 83. See too the commentary on s 106(1). Compare Hiemstra SA Strafproses 5th ed (per Kriegler) ad s 83 and s 106. The two principal tests may be called the evidence test and the intention test. They are not rules of law, nor are they exhaustive. They are no more than useful practical guides. R v Kuzwayo 1960 (1) SA 340 (A). If these tests fail to provide a satisfactory answer, then the matter is left to the wisdom, experience and sense of fairness of the Court. Indeed, the leading cases acknowledge that it has not been possible to develop a comprehensive principle, or set of principles, which will resolve all the many questions which may arise in this grey area of the law. Gordon v R 1909 EDC 254 at 268; S v Prins en 'n Ander 1977 (3) SA 807 (A) at 813; S v Christie 1982 (1) SA 464 (A) at 485.*

[23.] In respect of "the evidence test" the factors to be considered were *"whether the evidence necessary to establish the commission of one crime involves proving the commission of another crime".* In respect of the "intention test" the enquiry related to *"whether the two criminal acts are done with a single*

Sentence

[26.] Ms Andrews submitted that the trial court committed various irregularities in sentencing the appellant, such as over emphasizing of the severity of the offences, a failure to accord sufficient weight to the appellant's personal circumstances (he was a young adult with no previous convictions for violent offences) and that the court had over emphasized the deterrent value of the sentence. She further submitted that the court *a quo* had also failed to take into account that the offences had been committed by the appellant while under the influence of alcohol and drugs.

[27.] It is an oft stated principle that sentencing resides primarily in the domain and at the discretion of the trial court. In **S v Kibido 1998 (2) SACR 213 (SCA)** these principles were expressed as follows;

> *".....it is trite law that the determination of a sentence in a criminal matter is pre-eminently a matter for the discretion of the trial Court. In the exercise of that function the trial court had a wide discretion in (a) deciding which factors should be allowed to influence the court in determining the measure of punishment and (b) in determining the value to attach to each factor taken into account A failure to take certain factors into account or an improper determination of the value of such factors amounts to a misdirection, but only when the dictates of justice carried clear conviction that an error has been committed in this regard.*

[28.] The appellant having been convicted of the offences of rape and murder, to which the provisions of section 51(1) of Act 105 of 1997 read together with Part 1 of Schedule 2 (the Minimum Sentence Legislation) applied, was faced with sentences of life imprisonment unless substantial and compelling circumstances which justified the imposition of a lesser sentence were found to be present. In **S v Malgas 2001 (1) 469 (SCA),** Marais JA held that the courts are enjoined by the legislature not to deviate lightly from the prescribed minimum sentence but when doing so the courts are required to take into account all of the circumstances peculiar to the offence.

[29.] The appellant did not testify in mitigation of sentence. There was, therefore, no explanation from the appellant as to the reasons or motivation for the commission of the offence of murder despite his having initially tendered a plea of guilty thereto. However a relative of the appellant a Mr. Hansen Jordaan, a building contractor (without being solicited) testified in respect of sentence. Jordaan claimed that his intention was not to testify in mitigation or in aggravation of the sentence but that he felt compelled to testify so that the court could fully appreciate the appellant's background and circumstances. The appellant's parents had separated shortly after his birth. He, together with a brother and two sisters were brought up by their maternal grandparents. It appears that the attention that they received from the maternal grandparents was short-lived as the appellant's cousins and their mother also moved in with the grandparents and according to Jordaan the grandparents shifted their attention away from the appellant and his siblings. The appellant had progressed no further than grade 2

at school and out of embarrassment left school at the age of 14. He had since worked in the building industry and according to Jordaan was both hardworking and a reliable labourer. He was regarded as exceptionally good with the use of his hands, especially with paint work. The appellant had moved from one residence to another and at some stage had lived with the grandmother of the deceased. He had worked for Jordaan and Jordaan related how the appellant in a conversation with him about his behaviour burst out into tears and claimed that nobody had cared for him. Jordaan thereafter took the appellant under his wing and attempted, rather unsuccessfully, to curb his abuse of and dependence on alcohol and drugs. Jordaan had also been troubled by the appellant's inappropriate behaviour. He had, therefore, asked the appellant to vacate his premises approximately a week prior to the incident. He claimed that with hindsight he ought rather to have shown greater insight into the appellant's problems and should have given him more attention. The court was impressed with the evidence of Jordaan, whose evidence largely formed the basis of the court's finding that there were indeed substantial and compelling circumstances that enabled the court to deviate from the prescribed sentences of life imprisonment. The court had also considered the role that the appellant's alcohol and drug abuse had played in the commission of the offence and that the appellant was to be regarded as a first offender for having no history of violent crime. The appellant was relatively young and the court was of the view that he had the potential to be rehabilitated in the light of the skills that he had displayed as a worker in the building industry. The court was correctly of the view that

insofar as the possibility existed that the appellant could be rehabilitated it was in the public interest that he be given such an opportunity.

[30.] In balancing the appellant's circumstances with that of the interests of the community and the nature of the offence the court was mindful of the seriousness of the offences, their high prevalence and the intervention by the legislature in prescribing minimum sentences for the offences. The gruesomeness of the murder of the deceased is evident from the photographs and the medical report which formed part of the record. The deceased was both a vulnerable and defenseless six year old child who endured a brutal attack at the hands of the appellant who callously left her for dead. The court was correctly of the view that, had it only looked at the nature and gruesomeness of the offence together with the public interest, no substantial and compelling circumstances would have been found. However, on a proper consideration of all the circumstances the court correctly found that there were substantial and compelling circumstances and appropriately imposed a sentence of 25 years imprisonment for the murder.

[31.] In the result I would uphold the conviction on the abduction and rape charges as well as the sentence of 25 years imprisonment which was imposed for the offence of murder be confirmed.

I accordingly propose that the following order be made:

(1.) That the appeals against the convictions of abduction and rape be dismissed.

(2.) That the convictions in respect of abduction and rape be confirmed.

(3.) The appeal against sentence be dismissed and the sentence of 25 years on the count of murder be confirmed.

SALDANHA J

I agree.

VELDHUIZEN J

I agree and it is so ordered.

CLEAVER J