Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case number: A180/2020

Before: The Hon. Mr Justice Bozalek
The Hon. Ms Justice Kusevitsky

Hearing: 6 November 2020
Judgment: 10 November 2020

In the matter between:

FAATIMAH HARTLEY ***Appellant***

and

THE STATE ***Respondent***

JUDGMENT

BOZALEK J (KUSEVITSKY J concurring)

[1] The appellant was charged in the Regional Division of the Specialised Commercial Crime Court, Bellville with one count of fraud and one count of forgery and convicted of these offences on 12 September 2018. She was sentenced to four years' imprisonment on the conviction of fraud, wholly suspended for four years, and to three years' correctional supervision on the conviction for forgery.

[2] The appellant, who closed her case without testifying, was legally represented throughout the trial. Her application for leave to appeal against conviction was refused by the magistrate but granted on petition to this Court.

The charges

[3] The charge of fraud alleged that in August 2012 the appellant *'wrongfully, unlawfully, falsely and with intent to defraud'* pretended to Audi Centre and/or Claire Kingsley and/or Nedbank and/or in her vehicle asset finance application that:

> *'* *1. She was employed as an architect;*
>
> *2. That the salary statement submitted during the finance application was a genuine and valid statement; and … by means of the said false pretence induced the said Audi Centre and/or Claire Kingsley and/or Nedbank to consider and approve her asset finance application to the actual loss and prejudice in the amount of R371 456.65 … whereas in fact and in truth the appellant when she so gave out and pretended as aforesaid well knew that:*
>
> *1. her monthly salary was not a true reflection of her financial situation;*
>
> *2. that she was not employed as architect (sic)'*

[4] In the preamble to the charge the state alleged that:

> *'… 3) in support of the (finance) application the appellant submitted certain documents amongst which was a copy of her salary advice.'*

[5] The preamble further alleged that after assessing the appellant's application for finance MFC approved same and the parties entered into an instalment agreement in the

total amount of R371 456.65 for the purchase and finance of the vehicle. Paragraph 7 of the preamble alleged that *'the Accused and/or people unknown to the state generated/forged and/or caused her salary advice to be forged by inter alia generating the statement from a computer and by unlawfully using it in order for the Accused to apply for asset finance'*. In paragraph 8 it was alleged that the salary advice submitted by the Accused was not a legitimate payslip but was a forged document.

[6] On the count of forgery it was alleged that the accused had unlawfully, falsely and with intent thereby to defraud and to the prejudice of Audi Centre and/or Claire Kingsley and/or Nedbank forged an instrument, to wit a salary statement, or caused such salary statement to be created.

[7] The state led the evidence of the saleswoman, Ms Claire Kingsley, who initially recorded the appellant's application for finance, Mr AJ Van Rooyen, a forensic investigator employed by Nedbank/MFC, Mr MJ Berline an employee of the Department of Labour, the investigating officer Captain T Bailey and another policeman Lieutenant JA Beukes whose evidence took the matter no further.

Background

[8] In her judgment the magistrate summarised the state's case which, as it transpired provides a handy encapsulation of the magistrate's reasons for convicting the appellant. That case was that the appellant never registered as an architect or as an agricultural architectural technologist; the company where the appellant apparently or allegedly worked did not operate in the architectural or architectural technologist field; the appellant *inter alia* forged her salary slip to use it in her fraudulent application for motor vehicle finance. She misrepresented her occupation by stating that she was an architect

instead of an architectural technologist. She also misrepresented the name of her employer company and her then income. None of the two entities, one a CC and one a company with the name or a similar name to Bright Idea Projects, was in the architectural business. It was further the state's case that the same stamp on her salary advice '*Bright Idea Projects'*, which gave an address in Lansdowne and contact telephone numbers, was used in more than a dozen questionable finance applications. Further, that the appellant used a similar forged payslip during the same period to apply for a personal individual loan from Nedbank. It was also the state's case that the latter loan's terms were also not honoured by the appellant despite her being in a financial position to do so, judging from information gleaned from her bank statements. The appellant's election not to testify after the state's case, an informed decision, was also found by the magistrate to have strengthened the state's case. In convicting the appellant the magistrate placed great store by the appellant's failure to testify, in so doing relying on the decision in *S v Boesak*[1].

Grounds of appeal

[9] Overall it was submitted on appeal that the magistrate had erred in finding that the appellant had made fraudulent representations, that she had misrepresented her employment status to Nedbank or that the state had proved that the appellant's payslip was forged and/or false.

[10] Before considering the evidence against the background of the grounds of appeal it is useful to note the elements which the state was required to prove in relation to the counts of fraud and forgery. The elements of fraud are:

a) a misrepresentation/s;

b) prejudice or potential prejudice;

[1] 2001 (1) SACR 1 (CC) at para 24.

c) unlawfulness; and

d) intention.[2]

[11] The elements of the crime of forgery are:

a) making a document;

b) which is false;

c) prejudice;

d) unlawfulness;

e) intention, which includes the intention to defraud.[3]

[12] The state's case was that the appellant made two representations, the first being that she was an architect. The relevant state witness, Kingsley, testified that she recorded the details of the appellant's application for finance on her computer screen which ultimately reflected the appellant's occupation as an architect. She conceded in cross examination however that she had had regard to the appellant's payslip prior to completing the computerised application for finance and noted that that document recorded the appellant as being an architectural technologist. She conceded, furthermore, that on the computerised system the occupation of an architectural technologist was not listed and that as an employee of Nedbank/MFC she had been told to take the job description closest to that cited by the customers. It was put to Kingsley that the appellant had advised her that she was an architectural technologist and that Kingsley had replied that she would fill in what was closest to that. The witness conceded that that may have happened. Bearing in mind that Kingsley had before her the appellant's payslip recording her occupation as being an architectural technologist, it is quite clear that the state failed to prove this misrepresentation to any level of proof let alone beyond a reasonable doubt.

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[2] Criminal Law, 5th Edition CR Snyman at 531.
[3] Snyman (supra) at 540.

[13] The remaining misrepresentation relied upon by the state was that the salary statement the appellant submitted was a genuine and valid statement when in truth she well knew that the payslip showing her monthly salary was not a true reflection of her true financial situation. I will assume, in favour of the state, that this allegation encompasses her falsely representing that she was so employed.

[14] It must first be said that no direct evidence at all was presented by any witness that the salary statement in question was a forged document. The state's case was, a more onerous one, namely, that if regard was had to the surrounding circumstances the only reasonable inference which could be drawn was that the salary statement/payslip in question was not genuine. Here the state relied principally on evidence that although the payslip reflected deductions for UIF contributions, the Department of Labour had no record of any such deductions in respect of the employer in question. That employer is styled in the payslip *'Bright Idea Projects of 22 Gateway Crescent, Lansdowne'*. In it the appellant was reflected as an architectural technologist, in the *'architectural'* cost centre, earning a basic salary of R30 238.12 which, after deductions for pay as you earn tax and UIF contributions, resulted in a nett monthly pay of R23 900.00. The payslip, dated 27 June 2012 (presented to Nedbank/MFC in August 2012) recorded that at that stage the appellant had been employed for five months.

[15] The first difficulty faced by the state was that the appellant's own bank statements reflected her receiving a nett salary R23 900.00 on at least 27 July, 28 August and 28 September 2012. The evidence of the investigating officer, Captain Bailey ranged far and wide, but it included evidence that the appellant had received *'nine'* so called salary payments starting from February 2012 up to December 2012. In other words on the

state's own case the appellant had apparently received the salary she laid claim to for a total period of nine months before and after entering into the agreement.

[16] When Ms Kingsley, representing Nedbank or MFC, had regard to the appellant's salary statement prior to approving her application for motor vehicle finance her concern would, I presume, have been twofold, namely, that the appellant was in fixed employment and secondly, that her salary was such that she could afford to pay the necessary instalments on the vehicle. Proof that the appellant indeed received the salary vouched for by the salary slip for a total period of seven to nine months, including a period of four months after the application for finance was made, seriously erodes the state's case that the salary statement was not valid.

[17] Further evidence the state relied on concerned other aspects of the salary slip which, it was contended, tended to show that it was a forged document. Mr Berline testified that the Department of Labour had no record of UIF records of payments being made by an employer, Bright Idea Projects. He conceded, however, that this meant no more than that company was not registered on the Department of Labour's database and that it could be an instance of an employer deducting UIF contributions from an employee but not declaring them or paying them over. Berline was referred to cases of other employers for whom the appellant had definitely worked and had had UIF contributions deducted but where he was unable to find any record of such deductions. From this evidence it is clear that the mere absence of any record with the Department of Labour of Bright Idea Projects having made payments of the UIF contributions certainly cannot by itself lead irresistibly to the conclusion that the company did not exist or that the payslip was a forgery.

[18] Mr Van Rooyen, the private forensic investigator, testified that during March 2015 (some two and a half years after the initial application) he was approached by the South African Police Services to review the credit application for the motor vehicle purchased by the appellant. This background in itself is significant since it suggests that Nedbank/MFC was not the original complainant in the matter. The witness further testified that he identified the name *'Bright Idea Projects'* and its address as a *'high risk address'* which he had previously had to deal with in other credit applications which his employer had received. The stamp on the payslip i.e. Bright Idea Projects, apparently led him to suspect the validity of the appellant's payslip/s since he had seen the stamp being used in other questionable credit applications.

[19] This in turn led him to make inquiries of the professional societies relating to architects and architectural technologists. These inquiries established that the appellant was not registered in either of these occupations. Several observations are relevant at this point. Firstly, the aforesaid evidence was hearsay since no witness from any professional society was ever called. The evidence was objected to on behalf of the appellant and I can find no clear indication in the record that the Court ever ruled finally on the admissibility of such evidence. It was provisionally admitted and in order for it to be finally admitted required that the Court have regard to all the factors mentioned in sec 3(1)(c) of Act 45 of 1988 and come to the conclusion that it was in the interest of justice that such evidence be admitted. As far as can be ascertained no such exercise was ever performed by the Court and in particular why the person in question (who was never identified by name) did not testify and what prejudice there might be to the appellant. Secondly, defence counsel placed into the record a certificate indicating that the appellant had been awarded a diploma in architectural technology by the Cape Peninsula University of Technology on

1 December 2010. The investigating officer, Captain Bailey, conceded in cross examination that the appellant was indeed a qualified architectural technologist.

[20] Finally, it should be noted that the fact that a person qualified as an architectural technologist is not registered as such with a professional body may or may not amount to an offence, either on the part of that person or their employer but it does not in itself prove that such person has not been employed as an architectural technologist or performed such work. Mr Van Rooyen then made something of the fact that the vehicle finance application referred to the employer as *'Ratadear'* rather than Bright Idea Projects (notwithstanding that this alleged misrepresentation formed no part of the charge). It was put to Ms Kingsley that she had misheard the appellant saying *'Bright Idea'* but she was insistent that this was not the case. Any discrepancy, however, takes the state's case no further because it was common cause that Ms Kingsley and Nedbank were at the same time furnished with a salary slip reflecting the appellant's employer as Bright Idea Projects. It is thus unlikely that the appellant did not say Bright Idea or that ultimately there could have been any confusion on the identity of the appellant's employer. Van Rooyen testified that, notwithstanding his suspicions, he did not investigate whether Bright Idea Projects existed in fact or not. He also had to concede that although the appellant fell into arrears in her payments on the motor vehicle she eventually made several lump sum payments over a relatively short period of time and the account was thereby brought fully up to date. In fact, the entire account had been settled by the time prosecution took place and the motor vehicle restored to the appellant even though the original term of the contract had not expired. Mr Van Rooyen's evidence regarding other applications for finance which involved documents bearing the stamp of Bright Idea Projects was vague both in its general detail and, save for one, devoid of any

linkage to the appellant. It thus added little if anything, to the state's case against the appellant on either counts.

[21] That leaves the evidence of Captain Bailey. Key elements in his evidence were that he examined 11 months' worth of the appellant's bank statements from January 2012 to November 2012. He found that they were original statements and that some R450 000.00 in total flowed into the account. Over that same period however 82% thereof flowed out through via *'transactions and ATM withdrawals'* which in his opinion was highly unusual for a *'normal bank account'*. Inexplicably these bank accounts were never placed in front of the Court nor made available to the defence. He testified that a telephone number attributable to Bright Idea Projects appeared in documentation in some 17 applications for credit which were regarded as suspicious or fraudulent. Again no details were provided of these applications. Concerning the payslip presented by the appellant Bailey testified that this was followed up and he confirmed that there was *'an existing business'* called Bright Idea Projects which had been active since February 2013 but in the Gauteng area. Bailey also testified that certain numbers on the appellant's payslip indicated that it was created by the employer and not the appellant. He testified concerning the UIF deductions and concluded that in the light of the fact that the Department of Labour had no record of such payment the payslip appeared to be a forgery. He also testified that he contacted a professional body and established that not only does an individual architect or architectural technologist have to register but the employer business as well. When he learnt that neither Bright Idea Projects nor the appellant was registered as such he concluded that this confirmed his suspicion that the payslip was a forgery.

[22] Needless to say the same criticisms which apply to Van Rooyen's evidence regarding the professional accreditation of the employer and employee (the appellant) apply to Bailey's evidence. Similarly, the same reservations which apply to earlier evidence that UIF payments, although seemingly deducted from the appellant's salary, were not paid over to the Department of Labour, also apply. Captain Bailey also noted that according to records he had observed ABSA had made telephonic contact with a Mr Adams from Bright Idea Projects who had confirmed the appellant's employment with that entity from 1 February 2012.

[23] Much of the rest of Captain Bailey's evidence involved his opinion that the pattern of the appellant's repayments (or non-payment) and her payment of lump sums indicated someone who could not afford to purchase the vehicle and also his opinion that her arrest on the fraud charges and her subsequent effort to settle the arrears fortified his adverse impression in this regard. Needless to say this evidence, being essentially speculative and subjective and made largely on the basis of bank statements not before the Court, similarly added little, if anything, to the state's case.

[24] The effect of Captain Bailey's evidence was to cast a cloud of suspicion over a person allegedly running the Cape Town business, Bright Idea Projects, one Ziad Mohamed whom he established or concluded was the brother in law of the appellant and by extension, the appellant.

[25] Ultimately Captain Bailey concluded that the payslip presented by the appellant was a forgery. He based this conclusion *inter alia* on the fact that the alleged employer was not registered to pay over UIF contributions and nor was it or the appellant registered with the South African Council for Architectural Professionals in terms of Act 44 of

2000. He expressed the opinion that any suggestion by either of these parties that they had simply neglected to register was merely an excuse. The witness added that the appellant's Nedbank banking records over a period of 11 months was a *'typical cosmetic inflated account'*. His opinion was that although credit providers normally have to provide three months' bank statements the appellant had *'gone the extra mile'* and generated (falsely) eight salary transactions and thereafter that the account had *'collapsed'* because the appellant's intention was not to honour her debt in relation to the vehicle. To make this point he noted that there were no *'DSTV, life insurance or school fees'*. He appeared to rely on FNB records relating to a R120 000 personal loan finance obtained from Nedbank two months after obtaining the vehicle finance which, according to him, the appellant had not honoured.

[26] I already dealt with the questionable reasoning that because there was no record of UIF monies being received by the Department of Labour a salary slip reflecting such deductions must be a forgery. Similar questionable reasoning was employed by Captain Bailey when he concluded that because the alleged employer was not registered with the Department of Labour it could not have been registered under the Income Tax Act. Nor did there appear to be any direct evidence that the alleged employer was not registered with the tax authorities. The witness' evidence regarding his *'impression'* of the appellant's bank statements was no more than that, an opinion, and one not backed up by any detailed or concrete analysis. The same applies to the witness evidence that the same banking records cast doubt on the appellant's ability or intention to honour the agreement. That evidence was also belied by the fact that the appellant, although she had fallen in arrears with her instalments, repaid them in due course and settled the account in full prematurely.

[27] Notably absent from the state's case was any evidence from an investigator visiting the place of business of the alleged employer in Cape Town and making inquiries from its directors or managers as to the nature of the business at the relevant time, if needs be seeking documentary confirmation of its activities. The investigation conducted by both Messrs Van Rooyen and Bailey appeared to be somewhat superficial, comprising mainly a *'desktop'* investigation enhanced by telephonic queries to one or two government departments and a professional body.

[28] The evidence regarding the appellant's later application for a personal loan was, on the face of it, irrelevant to the charges that she was facing. Over the objections of the appellant's legal representative the Court admitted such evidence as being similar fact evidence. As was noted by Friedman ACJ in S v M[4] *'(s)imilar fact evidence is evidence which refers to the peculiar or immoral or illegal conduct of a party on an occasion or occasions other than the incident or occurrence in contention, but which is also of such a character that it is pertinent to or in essential similar to the conduct on the occasion which forms the issue or subject matter of the dispute'*. However, similar fact evidence is generally irrelevant because its prejudicial effect outweighs its probative value. As is observed by the authors of Principles of Evidence, 3rd edition, Schwikkard and Van der Merwe, similar fact evidence may also result in procedural inconvenience since the accused is frequently taken by surprise when this type of evidence is introduced.

[29] An approach to the admissibility of similar fact evidence which commends itself is the so called nexus requirement in terms whereof there must be a link between the fact in issue (the *probandum*) and the similar facts (the *probands*). This has been explained as follows: *'You are not to draw inferences from one transaction to another which is not*

[4] 1995 (1) SACR 667 (BA) at 648 d – e.

specifically connected with it merely because the two resemble each other. They must be linked together by the chain of cause and effect in some assignable way before you can draw your inference'.

[30] In the present case the evidence which Bailey sought to introduce and rely on was that some two months after applying for motor vehicle finance the appellant had apparently applied for a personal loan of R120 000 with a bank and used a similar salary slip albeit two months older; coupled to that the appellant had eventually fallen into arrears with those loan repayments.[5]

[31] To my mind in this situation the nexus requirement is not satisfied in that the fact sought to be proved, namely, that the salary slip which the appellant produced to Nedbank/MFC was a forgery, is simply not linked by claim of cause and effect to the additional evidence sought to be introduced. The fact that she fell into arrears with the subsequent loan repayments or that she used a similar salary slip but one which was two months older in no way conduces to establish that the first salary slip was a forgery or invalid. At best the evidence, taken together, establishes that the appellant applied for both motor vehicle finance and a personal loan within a period of two or three months and had a less than exemplary credit record in repaying the instalments on both accounts. Nothing in this establishes fraud or forgery in relation to the charges facing the appellant and in my view the magistrate erred in admitting the evidence of a later personal loan application and in relying on such evidence.

Analysis

[32] It is trite that where in a criminal trial the onus of proof is clearly on the state, the accused is not obliged to convince or persuade the trial court of anything and any

[5] Principles of Evidence (supra) at page 74.

suggestion to that effect is misplaced.[6] The principle established in *S v Boesak* is that: *'the fact that an accused is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during a 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 justifiable depends on the weight of the evidence'* **[my underlining]**.

[33] The question in the present matter then is whether the weight of the evidence presented by the state was sufficient to put the appellant on her defence and to require an answer from her in the form of her testimony or that of witnesses. As I have indicated, in relation to the fraud charge the evidence that the appellant represented that she was employed as an architect holds no water. What remained was her alleged representation that the salary statement was a valid document whereas in fact it was a forged document which did not truly reflect her financial situation.

[34] In this latter regard there was undisputed evidence that according to her bank statements for a period of some nine months the appellant received the salary reflected in the salary statement both before and after her application for motor vehicle finance. What was left was the state's evidence that notwithstanding the above, Bright Idea Projects was not in fact her employer. This conclusion was based on its apparent failure to pay over UIF contributions to the Department of Labour and its alleged failure, unproved, to register as a tax payer with the tax authorities. As was put in cross examination and in argument on behalf of the appellant even if these facts are taken to be proven it does not in itself establish that the employer was fictitious, merely that it did not comply with

[6] See *S v Jochems* 1991 (1) SACR 208 (A).

applicable labour laws. No physical investigation was done as to whether the alleged employer existed and carried on business in Cape Town at the time in question. All of the suppositions and conclusions reached by the two investigators, Van Rooyen and Bailey, were based largely, if not exclusively, on desktop searches and telephone calls, some of it being inadmissible hearsay evidence.

[35] All the other evidence concerning the appellant's poor record in keeping up with her instalments and the analysis of her extended banking records leading to the conclusion that these were contrived banking records was little more than an impression or an opinion by one or more of the investigators based on their experience. What also weakens the state's case is its ex post facto nature. It is not clear how the complaint or charge against the appellant of fraud and forgery came to be laid and both Van Rooyen and Bailey's evidence smacks of ex post facto analysis and rationalisations. No one on behalf of Nedbank/MFC came forward with direct evidence that they subsequently discovered that the appellant was not earning the salary that she claimed she had or that she was not employed by Bright Idea Projects. Instead the evidence was that once a desktop search and telephonic inquiries were made some years later a conclusion was reached that the salary slip was not a valid or genuine document. To refer to this as a conclusion flatters the state's evidence since the lack of any concrete evidence rendered that conclusion more akin to opinions on the part of Messrs Van Rooyen and Bailey. In fact, there was evidence from one of the investigators that at some stage Nedbank had satisfied itself that the appellant's employment particulars, namely, her employer and her salary, were correct. The state's evidence, in the form of the opinions or conclusions mentioned by Messers Van Rooyen and Bailey amounted largely to suspicions. Had the appellant's intention been to defraud the bank it is somewhat unlikely that she would

have made payment of the instalments, albeit erratically, as opposed to simply vanishing with the vehicle. Ultimately, it was common cause, the appellant paid every cent owing to Nedbank/MFC.

[36] The body of evidence presented by the state did not meet, in my view, the test for inferential reasoning set out in *S v Blom*, namely that the inference sought to be drawn must be consistent with all the proved facts and, furthermore, the proved facts must be such that they exclude every reasonable inference from them save the one sought to be drawn.

[37] The inference which the state sought to draw was that the salary slip was a forgery. It offered no direct proof of this fact but relied on a web of suppositions regarding the identity of the employer, its failure to pay UIF contributions or register for tax, the appellant's initial poor record in meeting her monthly instalments and the broad and undetailed allegation, if not the fact, that the name, the stamp of Bright Idea Projects appeared on more than a dozen questionable applications by a party/parties unknown for credit to various institutions over the years. None of these facts or suppositions, either alone or taken cumulatively, established that the salary slip presented by the appellant was forged or that she presented it to Nedbank/MFC knowing that it did not reflect the true financial position. Weighing heavily against that conclusion was evidence that the appellant did receive such a salary for a substantial period.

[38] In my view by the close of the state's case the weight of the evidence marshalled against the appellant was insufficient to place her on her defence and to have the effect that, in the absence of a response from her, the prima facie case made out by the state hardened into one of proof beyond any reasonable doubt.

[39] In the result for these reasons I consider that the appeal must succeed and the appellant's conviction on counts 1 and 2 must be set aside and accordingly the following order is made:

39.1. The appeal against conviction succeeds and the convictions of fraud and forgery made on 12 September 2018 are set aside.

BOZALEK J

I agree.

KUSEVITSKY J

For the Appellant	:	Adv R Liddell
As Instructed		Keith Gess Attorneys
For the Respondent	:	Adv JW Smith
As Instructed	:	The Director of Public Prosecutions