IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE
In the matter between:

CASE NO: A2524/2002

DATE: 19/4/2005

MASINDI RAPHAEL RAMOVHA APPELLANT

And

THE STATE RESPONDENT

JUDGMENT

WEBSTER J

The appellant, an assistant to a Sanlam brokers consultant in the Randburg office, was convicted on four (4) counts of fraud and sentenced to twelve (12) years' imprisonment, all four counts being taken as one for purposes of sentence. He appealed against both conviction and sentence.

The case that the State sought to prove against the appellant is that he, being a member of a syndicate or alternatively, acting in the execution or furtherance of a common purpose or conspiracy, falsely and with the intent to defraud and

the prejudice or potential prejudice of various policyholders of Sanlam gave out and pretended to Sanlam and, or alternatively its employees, that he was entitled to make inquiries into the values of the policies held by the respective policyholders from his computer terminal; that he or any of the syndicate members had the right to alter or change the personal particulars of the said policyholders as contained in the records of Sanlam; that he or any of the syndicate members was/were entitled to apply for loans on the said policies or to surrender such policies; that he or any of the syndicate members was or were entitled to receive the proceeds from the respective policies or to have the proceeds therefrom deposited in the fraudulently opened bank accounts whereas he was not entitled to do any of the abovementioned acts. The appellant denied the evidence so tendered and persisted that he was not the only person who could have accessed the information relating to the four policies and denied that he acted as aforesaid. Due to time constraints the trial Magistrate could not analyse the evidence led before him nor furnish reasons for accepting the evidence of the State witnesses and rejecting the appellant's version as not being reasonably possibly true. Instead, he set out what he regarded to be facts

that were common cause or not in dispute and then what he deemed to be inherent probabilities and inferences before concluding that the only inference was that the appellant had been " ... actively involved in and participated and associated him (sic) with these crimes".

The evidence against the appellant was that Sanlam had a strict policy with regard to the usage of personal computers. Each employee was issued with a secret code which corresponds with the employee's pay number, and a password. The latter was chosen by each employee and was valid for 30 days whereafter each employee had to enter another password. Each password could not be re-used within twelve (12) months of its expiry. Access could not be gained to the database without a valid code and corresponding password. The evidence was further that no employee of Sanlam could make inquiries about assurance policies of any of its clients without the written authority of a policyholder having been first had and obtained. It was emphasized by the State witnesses that no employee was permitted to disclose his or her secret code and password to any other person both within

Sanlam and outside. To this end, each employee signed a pledge of secrecy.

It was not in dispute that in consequence of fraudulent transactions that were being perpetrated on Sanlam a programme was introduced which identified the source of all inquiries made in respect of policies in excess of R30 000.00 in value. This was done without it being known to the employees of Sanlam. Various witnesses in particular Ms. Louw, a forensic investigator, Ms. Steyn, the operational manager of the broker services in Southern Gauteng, and based in Randburg and Marius Otto, a systems programmer testified that various inquiries had been made from the appellant's personal computer on several occasions in respect of the five counts that the appellant had originally been charged with. In each count the address and bank details of each policyholder were first altered without the knowledge or authority of the policyholder concerned. Thereafter the loan application form or surrender form was faxed to Sanlam purporting to come from the policyholder concerned.

Various inquiries were made against each one of these policies. All emanated from the appellant's personal computer and identified by his personal code and password.

There was evidence that more than twenty inquiries on the complainant's policy were made from the appellant's computer. No evidence was led on what occurred thereafter, the reason for this being that the forensic investigator, Ms. Louw, did not investigate this complaint.

The evidence on count three was that fictitious surrender forms had been received from the complainant. These had been processed by Sanlam and the proceeds paid into the fictitious bank account and thereafter paid out by the bank. The fraud was discovered when enquiries were directed to Sanlam on behalf of the complainant in July 2000. In all over 40 inquiries were made in this count from the appellant's personal computer.

The evidence relating to count four was that the personal details of the policy had been altered in the files of Sanlam. On 2 August 2000 a loan application form was faxed to Sanlam. The

forensic investigator visited the complainant who denied having submitted a change of his particulars to Sanlam. Having arranged with the South African Police Services and the bank to spring a trap the money was paid into the fictitious account. The fictitious account holder was contacted by the bank to come to the bank as there was something amiss with the bank account. A person went into the bank, identified himself as the complainant and was arrested. It was not the appellant. Thirty-seven enquiries were made from the appellant's personal computer on this transaction.

On count five the evidence was that the appellant first made inquiries on the policy on 25 August 2000. The application form for a loan was faxed to Sanlam on 13 September 2000. Upon inquires by Sanlam the policyholder disclaimed having submitted the loan application and having changed his address and bank details. Arrangements were made with the bank and the police as had been done in count four. The money was paid into the fictitious account and the fraudulent policyholder invited to the bank. Nobody responded and the money was refunded to Sanlam eventually. Several inquiries had been made from the appellant's

database. Ms Louw testified further that no outsider could hack into Sanlam's database. This was confirmed by the witness Otto.

Marcelle Cilliers testified that he commenced working for Sanlam as a broker consultant on 1 May 2000. On 1 June 2000 he was given his own secret code number and password. Before that he had used the appellant's identity code. He knew that this was against the policy of Sanlam as he had been previously employed there. He testified that he never used the appellant's secret code or password after 1 June 2000. He denied having made any inquiries on the policies of the complainants.

The appellant's evidence was that he was not the only person who had access to the personal computer that he used. He testified that he shared it with another fellow employee. The personal computer was slow to log-on and a practice had evolved whereby once the computer had been switched on and the person doing so had logged on using his secret code and password the computer would not be switched off or the other user log-on his particulars as the machine could then be used by any person. In addition, he testified, he had served Cilliers as from 1 May 2000.

He confirmed that Cilliers did not have a secret code or password. Cilliers asked him for permission to use his code and password so as to work on the computer. He agreed to this despite the company policy as Cilliers was his senior. This arrangement persisted even after Cilliers had been allocated a password and given a laptop as Cilliers could not access the Sanlam database from his laptop. He denied having made any inquiries on the assurance policies of any of the complainants. He testified that initially he wrote his password on a piece of paper for Cilliers. Later he wrote it on a desk pad as it changed every thirty days.

On appeal before us it was submitted by Mr. Mphaga, who appeared for the appellant that the trial Magistrate failed to evaluate the evidence properly and did not attach adequate weight to the probabilities. He submitted that there was no evidence on record, and it had in fact been conceded by the State witnesses, that nobody ever saw the appellant made the inquiries relating to the policies that form the subject matter of this appeal. He submitted further that the exhibit recording the inquiries alleged to have been made by the appellant was inadmissible as evidence having been prepared by a colleague of Otto. He submitted that

with regard to the security of the database no evidence was led regarding its reliability and technical operations and the person who devised the programme had not been called to testify. In the absence of a proper basis for this expert evidence the trial Court could not make any adverse finding against the appellant. He submitted that the arrangements with Cilliers exposed the security system to being breached by anyone of the seven persons that the appellant shared the desk with in the open-plan office he worked in. He submitted further that the inference drawn by the trial Magistrate that the appellant was the only person who could have made the inquiries was not the only reasonable inference that could be drawn from the facts. He criticised the evidence of Otto as it was essentially hearsay. He submitted that the appellant's version was reasonably possibly true and ought to have been accepted as such by the trial Court.

Mr Smit, for the respondent, supported the conviction. He conceded that the only incriminating evidence against the appellant were the fact that his salary or secret code, his password and his personal computer had been used to make the various inquiries. He submitted further that since the fact that inquiries

could be traced back to their source were not known by Sanlam staff there was no reason for any person to conceal their identity and utilise the appellant's particulars.

There are various unsatisfactory features in the case. I shall not list all of them but will allude to the salient ones which not only raise doubt about the appellant's complicity but which lay the failure of proving the appellant's guilt squarely at the State's door.

The evidence of Ms Louw was that on all the documents faxed in the five counts, the fax number of the sender appeared to have been deliberately withheld or concealed. The "blotting marks" on the top of the pages by which this concealment was achieved were identical virtually on all documents sent to Sanlam. Her evidence leaves no doubt that all the documents were faxed from one fax machine. No evidence was led on any attempts to trace this fax machine. But that was not an insurmountable task.

Ms Louw testified that a fax number was found on a document faxed to Sanlam in respect of one fraudulent transaction. The number of the transmitter was that of a certain

Van Der Merwe and Company or Roux Van Der Merwe Assessors. This information was handed over to the police. This information was of a crucial nature as it would have facilitated the identification of the fraudster or the syndicate the State believed was involved. Further, the person arrested in the case where Bouwer was the complainant was a Van Der Merwe, according to Ms. Louw. What the involvement of Van Der Merwe was or how he came to be the owner of the bank account into which the proceeds of Bouwer's policy were paid into were matters clearly within the State's knowledge or could have been easily ascertained. There was no evidence that this Van Der Merwe was unavailable to testify. In fact there was no explanation about Van Der Merwe or the firm forthcoming from the State. Van Der Merwe was in a position to give " ... weighty relevant evidence ... " for the State. In these circumstances I agree with Mr. Mphaga that an adverse inference should have been drawn against the State (S v Ipeleng 1993(2) SACR 185 (T)).

The adverse inference against the State is not limited to the weakening of the State's case against the appellant but leaves many other questions open to speculation or conjecture and that is

the question of hacking which was raised by the defence. The witnesses Louw and Otto would have the court believe that Sanlam had a "hacker-proof" computer programme. What the nature of the business of Roux Van Der Merwe Assessors was could have answered all if not many of the questions about the identity of the perpetrators. The well-publicised case of a teenager who hacked into the Pentagon and State computers as well as the very recent amateur hacker who infiltrated ABSA Bank's database transferring thousands of rands from outside ABSA offices are too discomforting to support the trial Court's inference that the appellant must have been the person who submitted the false documents and/or made the inquiries from this personal computer he had access to.

The two versions presented to the trial Court are mutually destructive. At the end of the day it is necessary to make a credibility finding. Central to this exercise are two witnesses, namely Cilliers and the appellant. The Magistrate resolved this conflict by considering the probabilities and seeking corroboration in the evidence of witnesses, such as Steyn and Loots, to determine which of the two versions to accept. In doing so he

failed to examine the versions of the main witnesses and test the credibility of Cilliers and the appellant. The core of the dispute is whether Cilliers continued to use the appellant's secret code and passwords after the end of May.

The evidence given by Cilliers when he initially testified was simple and straight forward and were it his only evidence on record it would not be easy to find that the trial Magistrate had erred in accepting it for it was clear that once he had been given a laptop he no longer used the appellant's computer. But this is not so. The relevant transcript reads as follows:

"Is dit so dat gedurende Meimaand het mnr Ramovha, hoe het hy aan u die "access code" gegee? Is dit inderdaad neergeskryf deur hom of wat is die posisie? --- Dit was neergeskryf gewees op 'n *stukkie papier, ja. Dit is korrek, ja.*

Was dit later enigsins op 'n sogenaamde "desk pad" of iets geskryf, kalender? --- Hy het op 'n latere stadium wel op die "desk pad" ook sy kode neergeskryf, dit is korrek.

U sê op 'n latere stadium. Wanneer was dit nou? --- Jong, ek, dit was, dit sal in die tydperk wees wat ek wel sy kode gebruik het.

Verwys u nou na net die maand periode of ... (tussenbeide) -- Dit is korrek, ja.

Nou hoekom sou hy, hoekom was dit dan eers op 'n *stukkie papier en later op die "desk pad"? Hoekom was dit nou nodig om dit op die "desk pad" te skryf? --- Daardie papiertjie ... (tussenbeide)*

As u die papiertjie gehad het? --- Daardie papiertjie het ek nooit by my gehou nie, ek het dit nooit gememoriseer nie. So elke keer as ek toegang tot die databasis wou gehad het moes ek van voor af aansoek gedoen het by mnr Ramovha vir sy kode.

Nou mnr Ramovha se getuienis vandag was dat daar wel toestemming van hoër gesag was dat u hierdie kodes kon gebruik. Is dit so of was daar nie sodanige toestemming nie, of wat was die posisie? --- Dit was werklikwaar glad nie van toepassing gewees nie. Ek het nooit toestemming van hoër af gekry nie. Ek was self onder verhoor ook gewees by die werk omdat ek dit juis gedoen het op sy kode. Indien daar wel dan toestemming van bo af sou gewees het sou ek glad geen stappe teen my gekry het by die werk nie.

Watter stappe is teen u geneem? --- Ek was dissiplinêr verhoor gewees.

Ja? Wanneer was dit nou? --- Ek kan nie die presiese datum onthou nie.

En die beskuldigde, mnr Ramovha, is hy enigsins dissiplinêr hanteer of nie? --- Nee, nie volgens ... (tussenbeide)

Volgens u kennis? --- Nie volgens my ...(tussenbeide)

Oor die aspek nou. --- Verskoon tog?

Weet u nie? --- Nee, nee, ek weet glad nie.

Volgens u kennis nie? --- Nee, ek dra nie kennis nie.

Nou in die verklaring wat die beskuldigde ingehandig het of wou ingehandig het in borgverrigtinge gee hy te kenne dat u op 'n stadium wel u eie rekenaar gekry het maar dat u ook nog steeds syne gebruik het omdat daar u nie toegang het vo/gens die verklaring nie.

"FIF Profile. So therefore he still had to come and use mine." Is dit so? Het u nog van tyd tot tyd sy rekenaar gebruik vir daardie doeleindes? --- Toe ek my "lap top" gekry het is dit slegs vir kwotasiedoeleindes en vir "e-mail" doeleindes gewees. Die "lap top" wat uitgedeel is vir my is glad nie beskikbaar vir toegang tot die Sanlam databasis vir polisinligting nie.

So u kon nie met die "lap top" inligting van Sanlam verkry nie? --- Glad nie.

So het u nog steeds dan, watter rekenaar het u dan gebruik om inligting te bekom uit indien u dan nou nie met die "lap top" dit kon bekom nie? --- In die tydperk wat ek my, as ek vandag inligting van die Sanlam databasis wil hê dan moet ek nog steeds 'n gekoppelde rekenaar kry soos die een wat toegeken was aan mnr Ramovha, maar ek teken dan net aan op my eie kode.

So dit is dan inderdaad so dat u, of heel moontlik dat u dan nog steeds gebruik gemaak het van hierdie betrokke rekenaar van die beskuldigde, maar volgens u weergawe nou u eie toegangskodes gebruik het? Dat u die rekenaar gebruik het maar u eie toegangskodes gebruik het ... (tussenbeide) --- Dit is korrek, ja.

Om die databasis binne te gaan? --- Dit is korrek, Edelagbare.

Indien sy getuienis sou wees, of inderdaad is dat u wel na Meimaand nog steeds van sy kodes gebruik gemaak het om toegang te verkry tot die databasis? --- Dit was, nee, ek ontken dit ten volle. Dit was glad nie nodig vir my gewees vir sy eie kode nie want ek het toe my eie kode gekry.

En voorts in die verklaring was, lui ook dat u gedurende Novembermaand sy verwysing sou neergeskryf het in u dagboek. Dra u kennis daarvan? --- Dit is korrek, ja.

Wat het u neergeskryf in u dagboek? --- Ek het sy toegangskode tot die Sanlam databasis neergeskryf.

Ekskuus tog, herhaal net. Ek het? --- Sy toegangskode ... (tussenbeide)

Nie sy salariskode nie? --- Sy, ja die, dit is hoekom daar is twee van hulle.

Altwee? --- Dit is korrek, ja.

Die salariskode en die sogenaamde "access code"? --- En die "access code" het ek neergeskryf, en dit was nadat ek 'n direkte versoek van bestuur af verkry het om dit te bekom.

Dit was voor sy arrestasie, as ek reg verstaan? --- Dit was voor sy arrestasie. Dit is korrek, Edelagbare.

Nou waarom het hulle u versoek om dit te doen? Wat was die rede? --- Bestuur het vir my genoem dat daar gaan 'n *dametjie van hoofkantoor of* 'n *persoon van hoofkantoor opkom en sy wil sekere aksies op mnr Ramovha se rekenaar doen en hulle was, hulle het 'n vermoede gehad dat hulle moontlik sy kode gaan nodig kry om aan te teken op die rekenaar.*

Nou hoe lank na dit, nadat u hierdie inligting gekry het is hy toe gearresteer? Kan u onthou? --- Ek kan glad nie onthou nie.

Wie spesifiek het u versoek om dit te bekom by hom van u werksplek? Wie is die persoon wat u dit gevra het om ... (tussenbeide) --- Koos Loots.

Ekskuus tog? --- Koos Loots. Mnr. Koos Loots, my verkope bestuurder.

Watse bestuurder? --- My verkoopsbestuurder, 'sales manager".

En wat het u toe vir die beskuldigde toe gesê waarom wil u die inligting hê by hom? --- Nee, ek het niks gesê nie. Ek het vir hom gevra vir die kode en hy het dit vir my gegee.

Hy het nie vrae gevra of gesê nee of enigiets nie? --- Nee, glad geen, niks geweier nie.

Ek wil u iets anders vra. Ek weet nie of u die dokumente hier gesien het nie, die navrae wat gedoen word op polisse. U is vertroud daarmee. Mens doen 'n navraag oor die waarde van 'n polis. --- Ja.

Is dit korrek? Indien daar nou magtiging is ensovoorts, ensovoorts, dan doen jy 'n navraag oor die waarde van die polisse

op die rekenaar, op die databasis, is dit korrek? --- Dit is korrek, ja.

Nou mnr Ramovha het hier getuig dat indien jy 'n *navraag doen dan kry hy nou daardie waarde van die polis en dit sal basies dieselfde bly vir* 'n *maand lank tot die volgende maand. Is dit korrek of ... (tussenbeide) --- Dit is min of meer korrek, ja.*

So op die oog af, as ek reg is, wil dit voorkom asof dit eintlik dan onnodig is vir my as 'n *leek in elk geval wat nou nie werk met die goed nie, om byvoorbeeld een dag drie of vier keer navraag oor die waarde te doen want dit gaan dieselfde wees. Of is ek verkeerd as ek dit sê? --- As ek dit, kan ek bietjie uitbrei?*

Ja. --- Wat gebeur, is as ek 'n *waarde-navraag doen dan sal die waarde, behoort nie te verskil van dag tot dag nie, maar van maand tot maand wel. Maar op die strokie, die spesifieke strokie waarvan melding is, is daar* 'n *magdom inligting. Die spesifieke strokie sal vir my ook sê as* 'n *polis afgekoop is. So as ek daardie strokie aanvra dan sal ek die waarde-inligting kry maar ek kan 'n sakeleêr aanduiding ook sien met ander woorde hoe ver is hulle besig met* 'n *afkoping of* 'n *lening en indien dit al wel gerealiseer is dan sal daardie inligting ook op die spesifieke strokie verskyn met die dag en die datum en die tjekbedrag wat die geld oorbetaal is.*

Nee, nee, goed, ek hoor wat u sê, maar dit is vir my net snaaks hoekom, dit sat 'n *mens dan seker nou sien as jy dit nou die inligting, toegang het toe die inligting dan sien jy al daardie, is ek reg? Ek praat nou baie leketaal maar jy sien al daardie inligting of jy bekom dit alles van die rekenaar af? --- Een strokie, dit is korrek, Edelagbare.*

Ja, met ander woorde as jy dieselfde dag nog drie of vier doen dan gaan jy basies dieselfde inligting kry? --- Elke keer dieselfde inligting.

Ja, so dan my vraag is, weet u wat die nut sou wees om drie of vier keer op dieselfde dag die inligting te kry? Ekskuus, laat hy net tolk. Dieselfde dag. --- As ek vandag 'n *versoek kry vir* 'n *lening of 'n afkoping en dit is* 'n *dringende versoek en iets wat ek baie graag afgehandel wil wees, dan sal ek vandag drie of vier tot vyf keer sal ek dieselfde strokie trek en die oomblik wanneer die fisiese afkoping gefinaliseer is by hoofkantoor dan sal dit onmiddellik op die leêr verskyn. Dan kan die inligting van vanoggend tot vanmiddag wel verskil.*

Ek verstaan. --- Hoewel die waarde sal dieselfde wees.

Ja. (Pouse) Mr. Ramovha, questions after the court's question.

FURTHER CROSS-EXAMINATION BY MR RAMOVHA: So Mr Cilliers, is it your evidence that despite the fact that you had acquired your lap top and your pay code, at one stage you could not access the Sanlam information? Am I correct? --- That is correct, yes.

For how long subsequent to the acquisition of your pay code and lap top did you continue failing to access Sanlam's information? --- On my own pay code, sir?

Yes. --- It was just for a month that I didn't have a code where I used Mr Ramovha's code. For June I had my own code and I accessed the information from using my own code.

But from June and subsequently you were using your own lap top, not so? --- That is to draw quotations and for Internet purposes, yes. If I can just elaborate. This computer that I used, my lap top, and Mr Ramovha's computer that was on his table, the desk top, didn't do the same functions.

So in other words from June onwards it was still necessary at times to use accused's computer? --- No, it wasn't necessary, no.

COURT: I don't follow now. --- Sorry, ja. I used his computer to access the data base but I used my own code to sign on."

The significance of the above evidence is that Cilliers did in fact use the appellant's computer even after he had been given his laptop. He would have the court believe that when he used the appellant's computer he would use his own secret password or access code. I have difficulty with this. The State's evidence is that to access the computer system a person had to use his own code and password. Without these no person could switch on or activate the computer. As I understand this evidence the appellant's computer was no different from a cellular telephone where a SIM card number must be punched in, in order to activate it. Only one SIM card number will activate it. My understanding of the evidence in this case is precisely that. The appellant's computer could be activated by one password. Cilliers could not use his laptop to perform his duties even simple ones such as logging on details of policies that had been written up by an agent so that such agent's commission could be paid to such agent. Hence the use of the appellant's computer by a Ms Pretorius and for other needs. This was clearly conceded by Cilliers:

"And you could do that transaction on your lap top, am I correct? --- I still can't do that transaction on my lap top, no. It is not linked to the data base at all.

But in the course and scope of your duty it does at times become necessary to use that transaction, not so? --- To use the transaction, for me?

Yes. --- The Image transaction?

Yes. ---I don't use the Image transaction at all, no.

Are your certain about this? --- Yes. I don't know what that transaction is.

Because the accused's evidence is that you could not as you also stated, use that system, I mean you could not do that activity called Image transaction on your lap top and it became necessary for you to use his system, even after June 2001, until 2000 I mean. --- That is correct yes.

That is correct? Now I understand you now. You say it is correct that you could not do the Image transaction on your lap top and subsequent to June 2000 you used accused's system in order to do that. --- Not the said transaction, no. I've used Mr Ramovha's table top, his computer, yes, but not for the Image program or whatever it is.

But earlier on just now you said that is correct. What is correct? --- That I have used Mr Ramovha's computer.

After June? --- After June, but accessing my own code, yes. Because my lap top is not linked to the Sanlam data base. If I use my lap top I will not get the information."

This information had been suppressed by Cilliers when he initially testified. His reason for doing so was to distance himself from the fact that at all times material to the fraudulent inquiries he had use of and access to the appellant's computer. The trial Magistrate, probably not familiar with computers, may not have fully grasp the significance of the concessions made by Cilliers when he was recalled. These concessions change the entire evaluation of the evidence. In my view they render the appellant's version reasonably possibly true. Add to this the unexplained involvement of the unsatisfactory features I alluded to earlier in the judgment it becomes clear that the conviction cannot stand.

It is my considered view that the appeal should succeed. I would accordingly uphold the appeal and set aside the convictions and sentence.

G. WEBSTER

JUDGE IN THE HIGH COURT

I agree.

J VAN DER WESTHUIZEN
JUDGE IN THE HIGH COURT