Sneller Verbatim/lks

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: A62/04

2006-03-16

WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE 30/3/2006 SIGNATURE

In the matter between

JOSEPH MABAYO NDHLELA Appellant

and

THE STATE Respondent

J U D G M E N T

WILLIS, J: The appellant was prosecuted in the Regional Court held at Johannesburg on the following charges:

Count 1: Corruption in contravention of section 1(i)(b) read with section 3 of the Corruption Act No. 94 of 1992;

Count 2: Fraud;

Count 3: Fraud

Count 4: Fraud

Count 5: Failing to disclose a material interest in a contract in contravention of section 234(4) read with section 441(e) of the Companies Act No. 61 of 1973.

The appellant was represented by counsel during the trial in the court *a quo*. The appellant pleaded not guilty to the charges and elected not to disclose the basis of his defence in terms of section 115 of the Criminal Procedure Act No. 51 of 1977, as amended.

An application for the appellant's discharge in terms of section 174 of the Criminal Procedure Act after the close of the State's case was dismissed. The appellant thereupon closed his case without tendering any evidence.

The appellant was acquitted on count 1, the corruption count, but convicted of fraud in respect of counts 3, 4 and 5 and convicted of contravening section 123(4) read with section 441(e) of the Companies Act 61 of 1973 in respect of count 5.

The appellant was sentenced as follows:

Count 2: 15 months' imprisonment

Count 3: 9 months' imprisonment

Count 4: 12 months' imprisonment

Count 5: R5 000 or 3 months' imprisonment.

The appellant now appeals against the aforesaid convictions and sentences.

The learned magistrate gave a very comprehensive judgment relating to the conviction of the appellant and accordingly, in my view,

it is unnecessary to analyse in any great detail the evidence with regard to this matter.

The appellant was a Director of Transnet from November 1994 to August 1997. The case in counts 2, 3 and 4 relates to the submission of recruitment fees (and the payment thereof) to Transnet by In Search Practitioners CC for services allegedly rendered by In Search for the recruitment of Dr Mkatswa as general manager (Human Resources), Mr Vilakazi as Executive Director in the Office of the Deputy Managing Director and Mr Mtinisa as Government and Parliamentary Liaison Officer.

The appellant concedes that the evidence of the State witnesses was not challenged in cross-examination and "there is no reason not to accept the evidence of these witnesses as credible". As the appellant was represented by counsel at both his trial and in the appeal and he himself declined to testify, one can safely and correctly accept the evidence of the State witness as being true. *Ex facie* the record of the evidence this also appears to be correct. It is not in dispute that In Search Practitioners CC did not in fact render the services in question to Transnet.

The appellant had previously appeared at a disciplinary inquiry relating to these issues convened by Transnet. The record of these proceedings was available but unfortunately the person responsible for the transcription had since died and Adv Kgomotso Moroka who appeared in that disciplinary enquiry as a junior counsel testified relating to the evidence that occurred therein. Adv Moroka gave damning evidence that the appellant admitted that he knew of and

was instrumental in processing the payments in question. He also knew that In Search Practitioners performed no services in the selection of the employees concerned. The appellant had been represented by counsel during that disciplinary inquiry. Accordingly, in my view, those admissions which were made at the disciplinary inquiry were correctly accepted by the learned magistrate as being admissible in evidence. Clearly they were made freely and voluntarily. I cannot fault the convictions on counts 2, 3 and 4.

In so far as count 5 is concerned, it is clear that the appellant received R682 5020,30 as commissions from Credit Life Management Services (Pty) Ltd ("CLS") and/or Electro Sport (Pty) Ltd (of which he was a director) and which arose from a highly lucrative funeral scheme in which Transnet, XP Brokers, African Life and CLS were involved. Mr van Vuuren (who had been general manager of Human Resources at Transnet at the time) testified, unsurprisingly, to the fact that the payment of these commissions, while the appellant was a director of Transnet, would be regarded as highly irregular unless agreed to by Transnet (which was not the case).

The appellant has submitted that there existed no contractual obligations or otherwise between the appellant in his capacity as a director of Electro Sport and XP Brokers or African Life Insurance. Section 234 of Act 61 of 1973 reads as follows:-

> "(1) A director of a company who is in any way, whether directly or indirectly, materially interested in a contract or proposed contract referred to in subsection (2), which has been or is to be entered

into by the company or so becomes interested in any such contract after it has been entered into, shall declare his interest and full particulars thereof as provided in this Act."

The appellant's counsel seems to be saying that as there was no contract between Electro Sport (and for that matter, CLS, XP Brokers or African Life Assurance) and the appellant entitling him to payment, the fact that he received payment of R682 520,30 is irrelevant. I disagree. The unavoidable inference (especially in the light of his failure to testify) is that he was being rewarded for his role in ensuring that Transnet was a participant in this highly lucrative funeral scheme. He did not disclose this interest.

Accordingly, I would dismiss the appeal against the convictions on counts 2, 3, 4 and 5.

In so far as sentence is concerned, the learned magistrate once again delivered a very careful judgment. He referred *inter alia* to the well-known case of *S v Sadler* 2000 (1) SACR 331 (SCA) and in particular paragraphs 11, 12, 13 and 14 thereof. The thrust thereof is the fact that an accused person is a first offender and has committed a white collar crime and is no physical danger to society is not sufficient reason not to impose a custodial sentence. The learned magistrate carefully considered a range of factors, including the report of Wilna Stander which was handed in as evidence. She, who is a social worker, also testified during the trial in mitigation of sentence. It is clear from this report that the appellant shows no remorse or any insight into his misdeeds. He gives Ms Stander an exculpatory version

which should have been given in his trial on the merits and which is inconsistent with the evidence. The following appears in the report:-

"Die beskuldigde hou vol dat hy op geen stadium hom aan kriminele gedrag skuldig gemaak het nie" and

"Die beskuldigde hou steeds vol dat hy hom nie aan misdadig-pleging skuldig gemaak het nie."

In the case of *S v Sadler (supra)* at para 14 the learned Judge says:-

"He did all these things in order to ingratiate himself with certain customers of the bank and to enrich himself." (my emphasis)

In his judgment the learned magistrate says the following:-

"There is no evidence that you benefitted financially, directly or indirectly, from the commission of these crimes. This is in view of the circumstances of this case not of great importance."

Mr Wolfaardt, who appears for the State, accepted that it was correct that there was indeed no evidence that the appellant benefitted financially directly or indirectly from the commission of the crimes. When the learned magistrate said that in view of the circumstances of the case, the fact that there was no evidence that the appellant benefitted financially, directly or indirectly, from the commission of the crimes in counts 2, 3 and 4, he did, in my opinion, to this limited extent, commit a misdirection. That there was no financial benefit to the appellant is indeed a matter of importance.

Furthermore, although the learned magistrate's judgment is a careful one, he did not pertinently consider whether the appellant

should serve his sentence subject to the provisions of section 276(1)(i) of the Criminal Procedure Act No. 51 of 1977, as amended. I accept that no judgment can be perfect and all embracing. Nevertheless, the provisions of this section are, in my opinion, of considerable importance and should not easily be overlooked. They provide that where the sentence is one not exceeding 5 years' imprisonment, the imprisonment may be such that the person sentenced may be placed under correctional supervision in the discretion of the Commissioner. In my opinion this is an excellent provision to apply to offenders such as the appellant precisely because it gives them every incentive to co-operate with the excellent rehabilitative schemes which are available nowadays. These limited misdirections, in my opinion, justify a limited intervention.

Although the sentences on counts 2, 3, 4 and 5, individually and cumulatively, are not disturbingly inappropriate, I am of the view that the provisions of section 276(1)(i) should apply. Mr Wolfaardt, who appears for the State, fairly conceded that this is a case in which the provisions thereof should apply.

As the appellant is on bail pending the hearing of this appeal, I consider it fair that he be given a reasonable opportunity to put his affairs in order and say his farewells before serving his sentence.

I propose that the following order be made:

1. The appeal against the convictions and sentences is dismissed save to the limited extent that it is directed that the provisions of section 276(1)(i) of the Criminal Procedure Act No. 51 of

1977, as amended, are to apply to the sentence on all counts, namely the imprisonment is one from which the appellant may be placed under correctional supervision in the discretion of the Commissioner.

2. The appellant is to surrender himself to the Clerk of the Court, Magistrate's Court, Johannesburg by no later than 10:00 on 22 March 2006 with a view to serving the sentence imposed upon the appellant.

MAKHANYA, J: I agree.

WILLIS, J: It is so ordered.

COUNSEL FOR THE APPELLANT:	MR F ROETS
Instructed by:	Lawley Shein
COUNSEL FOR THE RESPONDENT:	ADV J L WOLFAARDT
DATE OF HEARING:	16 MARCH 2006
DATE OF JUDGMENT:	16 MARCH 2006