REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO PROVINCIAL DIVISION, POLOKWANE)

CASE NO: AA15/2017

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

DATE: 6.5.2020 SIGNATURE: .....

In the matter between:

AZWIFANELI GEORGE MPHANAMA : APPELLANT

And

THE STATE : RESPONDENT

JUDGMENT

SEMENYA J:

[1] The issue in this appeal is whether the evidence tendered by the State during the trial was sufficient to establish the guilt of the appellant beyond reasonable doubt. The appellant was indicted together with three others before the trial court on 21 counts. He was cited as accused No.1. He was acquitted on all counts except on count 15 to 18 and on count 21. Counts 15 to 18 were taken together for sentence purposes. On these counts the appellant was sentenced to eighteen months' imprisonment which was wholly suspended for 3 years on condition, firstly, that he repays the amount of R3 638.95, and, secondly, that he is not convicted of an offence of which dishonesty is an element and in respect of which he is sentenced to imprisonment without an option of a fine. On count 21 the appellant was sentenced to twelve thousand rand (R12000.00) or six months' imprisonment. Payment of the said fine was to be made in specified instalments. The appeal is against conviction in respect of counts 15, 16, 17, and 21 only.

[2] In count 15 to 18 the appellant was charged with fraud wherein it is alleged that he defrauded the Department of Justice and Correctional Services by misrepresenting to the said Department that he is entitled to

be compensated for using his motor vehicle to undertake official journeys calculated on the basis that he had travelled in a RAV4 SUV when he had actually travelled in a Cadillac 2 litre sedan. In count 21 the appellant was charged with defeating or obstructing the course of justice in that he had reduced a traffic fine before the case was not yet placed before him. The appellant pleaded not guilty on all charges and elected not to make any statement during proceedings in terms of section 115(2) of the Criminal Procedure Act 51 of 1977 (the CPA). It was further placed on record that the appellant will not answer any questions that the trial court may put to him at that stage. The appellant furthermore did not testify in his defence. The matter was therefore solely decided on the evidence as tendered by the State.

[3] The common cause and/or otherwise undisputed facts in this matter are that the appellant was a senior magistrate as well as the judicial head of Dzanani Magistrates Court as at the dates of the commission of the offences he was convicted of. As a magistrate, the appellant belonged to a motor finance scheme in terms of which he was entitled to be compensated for the expenses he shall have incurred for using his own motor vehicle to undertake official journeys. The appellant owned two motor vehicles, a Toyota RAV 4 and a Cadillac, and had used both

vehicles to undertake official trips but was compensated on the tariffs that were applicable for the journeys undertaken in a RAV. With regard to count 21, the allegations that the appellant had reduced a traffic fine was not disputed.

[4] Three magistrates namely Nditsheni Baldwin Makamela (Makamela), Kwena Moses Molokomme (Molokomme) and Luxon Ramavhale (Ramavhale), who were stationed within the same Sub-Region (cluster) of Thohoyandou as the appellant, testified with regard to the manner in which magistrates motor vehicle finance scheme operates. Their version is to the effect that in terms of a circular issued by the Magistrates Commission, any magistrate who was desirous to participate in the scheme was required to inform the Sub-Regional Head about the motor vehicle that he/she intends to use for purposes of official journeys. This was done by submitting the registration certificate of the said motor vehicle to the Sub-Regional Head, who will in turn forward same to the office of the Chief Magistrate. A magistrate may use another motor vehicle only on application and approval by the Sub-Regional Head. This version contradicts that of Senior Magistrate Stapelberg who was attached to the Magistrates Commission as it shall appear clearer later in this judgment. However, what is common cause in the evidence of all

magistrates is that a magistrate is required to submit claims for compensation only on the basis of the actual motor vehicle that he had travelled in.

[5] The grounds for appeal rests mainly on the following statement as it appears in the trial court's judgment:

> "The evidence in my view calls for an answer from the accused. However, accepting that each of the counts 9 to 18 is composite claim of various trips undertaken the sum of which were on the accused's version undertaken with the Cadillac and some with the RAV 4 it is impossible on the evidence presented or the evidence of the witnesses who testified, the magistrate, to determine on which occasion he used the RAV 4. I am not prepared to convict the accused on speculation. However, from December 2008 until March 2009 the accused claimed as if he used the RAV 4 when he was no longer the owner of the RAV 4 and of which the vehicle was in the possession of accused 3."

[6] Fraud is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another- **see C R Snyman, Criminal Law sixth edition at page 524 and J R L Milton South African criminal law and Procedure, 3rd volume 2 at 702**. It was submitted on behalf of the appellant that the paragraph cited in paragraph 5 above seems to

suggest that the trial court convicted the appellant solely on the admission that he made in a letter addressed to the Magistrates Commission. It was argued that the said admission alone could not constitute prove of the allegations levelled against the appellant beyond a reasonable doubt as is required in a criminal case. The appellant, however, did not dispute, either by way of cross-examination or evidence under oath, the version of Makamela and other State witnesses that he was driving the Cadillac at all relevant times, that he had sold the RAV4 to the 3rd accused and that he was no longer in possession thereof during the period referred to in count 15, 16, 17 and 18. The version put to Makamela during cross-examination was that the appellant's version was that he had borrowed the RAV4 from the 3rd accused and used it in each and every instance because he had not yet submitted the particulars of the Cadillac to the Sub- regional Head. The appellant deemed it not necessary to repeat this version under oath despite the fact that it was vehemently denied by Makamela. He had thereby denied the State the opportunity to test it by way of cross-examination. This version further contradicts the admissions that he had made to the Magistrates Commission.

[7] With regard to prejudice, Senior Magistrate Stapelberg testified that in terms of paragraph 8.4101.3.2 of the Departmental Finance Instruction of the Department of Justice, a magistrate is obliged to maintain a reliable vehicle to be used for official journeys. A magistrate is allowed to utilise another private vehicle if for one reason or another he cannot use his own vehicle. In that case the department is obliged to compensate the magistrate according to the engine capacity of the vehicle used. The evidence proved that the engine capacity of a 200CC Cadillac was lower than that of a RAV4 which is a 1800CC multipurpose vehicle. It further proved that the appellant was paid more than what he was entitled to on that basis. It is for this reason that the trial court ordered him to repay the difference. Counsel for the respondent correctly argued that this difference constituted prejudice on the part of the Department. In **R v Heyne and Others 1956 (3) SA 604 (AD)**, it was held that in order to satisfy the requirement of prejudice, the false statement must be such as to involve some risk of harm, which need not be financial or proprietary but must not be too remote or fanciful to some person, not necessarily the person to whom it was addressed. It cannot be denied that the Department paid more than it was supposed to due to the misrepresentation contained in the claim form that were submitted to it by the appellant. It is for this reason that I find the appellant's argument

that the trial court's finding that fraud was committed is incredulous and defiant of logic to be without merit.

[8] On the count of defeating or obstructing the course of justice, the appellant contended that the State failed to produce evidence that proves that the appellant's conduct was actually or potentially detrimental to the administration of justice. According to C R Snyman, above on page 327, the elements of the offence are '*(a) conduct, (b) which amounts to defeating or obstructing (c) the course or administration of justice and which takes place (d) unlawfully and (e) intentionally.*' The uncontested evidence of Herman Rauvhona Mudau (Mudau) was that he was issued with a written notice to appear in court for committing a traffic offence. He was fined R1000. He took the written notice to the prosecutor with a request for the reduction of the said fine. The prosecutor refused to reduce the amount and wrote the words 'rejected" across the written notice and put his stamp on it. He took the written notice to the appellant and the latter reduced the fine to R700.00. In **S v Bazzard 1992 (1) SACR 303 (NC)** it was held that it suffices that the perpetrator subjectively foresaw the possibility that his conduct, in the ordinary cause of events, will lead to obstruction of the prosecution of the case or the investigation thereof by the police. It was further held

that the course or administration of justice which must be obstructed in order to constitute this crime refers to the process which is destined to eventuate in a court case between parties or between the state and its subject-see Snyman at page 330 paragraphs 7 and 8.

[9] As a point of departure, it can be safely assumed that the appellant, as a Senior Magistrate and the judicial head of Magistrate Dzanani, was fully conversant with the procedure laid in section 57 of the CPA which is are follows:

> *Section 57 - Admission of guilt and payment of fine without appearance in court*
>
> ...
>
> *(3) Where-*
>
> *(a) a summons is issued against an accused under section 54 and the public prosecutor of the court concerned, in accordance with the directives issued by the National Director of Public Prosecutions provided for in subsection (11), endorses the summons to the effect that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a fine stipulated on the*

summons in respect of that offence without appearing in court; or

(b) a written notice under section 56 is handed to the accused and the endorsement in terms of subsection (1) (c) of that section purports to have been made by a peace officer, the accused may, without appearing in court, admit his or her guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at that local authority.

(4)

(a) The summons or the written notice may stipulate that the admission of guilt fine shall be paid before a date specified in the summons or written notice, as the case may be.

(b) An admission of guilt fine may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.

(5) (a)

(i) Subject to the provisions of subparagraphs (ii) and (iii), an accused who intends to pay an admission of guilt fine in terms of subsection (1), shall surrender the summons or the written notice, as the case may be, at the time of the payment of the fine.

(ii) ...

(6) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown in writing.

(7) An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with the determination made by the Minister from time to time in respect of the offence in question, as provided for in subsection (2).

(8) An admission of guilt fine paid at a police station or a local authority in terms of subsection (3) and the summons or, as the case may be, the written notice surrendered under subsection (5), shall, as soon as is expedient, be forwarded to the clerk of the magistrate's court which has jurisdiction, and that clerk of the court shall thereafter, as soon as is expedient, enter the essential particulars of that summons or, as the

case may be, that written notice and of any summons or written notice surrendered to the clerk of the court under subsection (5), in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (9), be deemed to have been convicted and sentenced by the court in respect of the offence in question.

(9) The judicial officer presiding at the court in question shall examine the documents and if it appears to him or her that a conviction or sentence under subsection (8) is not in accordance with justice or, except as provided in subsection (6), is not in accordance with a determination made by the Minister under subsection (2) or does not comply with a directive issued by the National Director of Public Prosecutions as provided for in subsection (11) that judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer that charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the Minister under subsection (2), the judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the admission of

guilt fine exceeds the said determination be refunded to the accused concerned.

...**(my own emphasis)**

[10] It follows from the provisions of section 57(6) and (9) of the CPA that a magistrate has no powers to reduce a traffic fine as the appellant in this case did. Such powers rest solely with the prosecutor. A judicial officer's powers in respect of written notices are limited to those provided for in sub- section (9) only. The trial court's finding that the conduct of the appellant was irregular can therefore not be faulted. The respondent submitted that the appellant was aware, by virtue of his position as a magistrate, that his conduct in reducing and endorsing the admission of guilt will result in finalisation of the matter. This argument stems from sub-section (8) which provides that the accused shall be deemed to have been convicted and sentenced. The respondent further argued, in line with the decision in **S v Burger 1975 (2) SA 601 (C)**, that in so doing, the appellant foresaw the possibility that his conduct might defeat the administration of justice. I am in agreement with the argument proffered by the respondent in this regard. The appellant was fully aware that the prosecutor has rejected Mudau's plea to have the fine fixed by the peace officer reduced. A reasonable conclusion that can be arrived

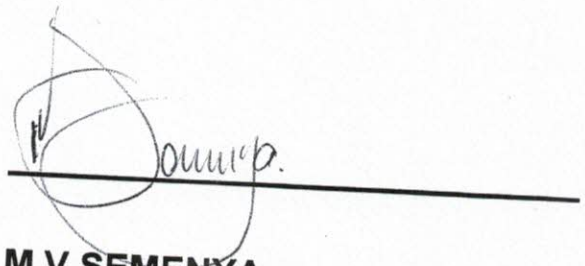
at is that the prosecutor, as the *dominis litis*, desired that Mudau should pay the whole amount or go to court to argue the matter. This is common practice and the appellant cannot argue that he was not aware of this fact. It is for this reason that I agree with counsel for the respondent's contention that the appellant subjectively intended to obstruct the process which was destined to eventuate in a court case between the State and Mudau-see Bazzard above.

[11] The appellant contended that the possibility that a fine which would have been lesser than the amount paid by Mudau and/or that a suspended sentence would have been imposed had the prosecution proceeded with the trial cannot be ruled out. I am of the view that this argument cannot stand. This aspect was not raised during the trial of the matter and cannot be raised at this stage. In any event, the nature of the offence the appellant was convicted of in count 21 is aimed at punishing an unlawful and intentional conduct that has the effect of preventing the prosecution from proceeding with the trial. What the outcome of the trial would have been, had it proceeded, is therefore irrelevant. The trial court has correctly stated that the State was precluded from recharging Mudau as he was deemed to be convicted and sentenced as envisaged in sub-section (8) above.

[12] With regard to the contention that the State failed to prove the offences beyond reasonable doubt, the respondent argued that the trial court has correctly found that there was a *prima facie* case that called for an answer from the appellant as at the close of the State's case. The cases of **S v Boesak 2001 (1) SACR 633 (SCA), S v Osman and Another v Attorney-General Transvaal 1998 (4) SA 1224 (C) and S v Hlongwa 2002 (2) SACR 37 (T)** settled the issue with regard to whether the court may to convict the accused person in circumstances where the accused has failed to testify at the close of the case for the State in the face of a *prima facie* case. In the instant matter, the trial court's findings that the evidence of the State alone proved the guilt of the appellant on count 15 to 18 and on count 21 is correct. There is no reason to interfere with the finding. A conclusion that the accused was no longer in possession of the RAV4 at relevant times cannot be faulted. The same applies to the evidence that proved that he intended to obstruct the course of justice.

[13] In the result I make the following order:

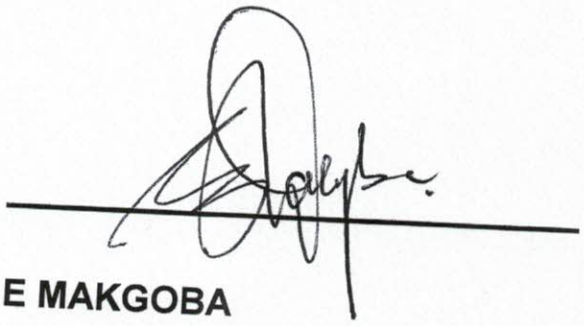
The appeal against the conviction in count 15, 16, 17, 18 and 21 is dismissed.



M V SEMENYA

JUDGE OF THE HIGH COURT;

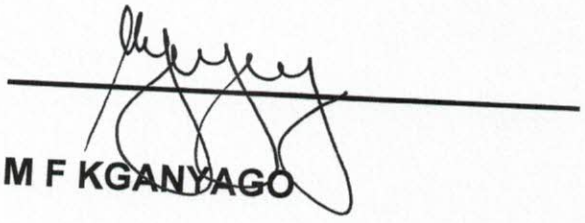
LIMPOPO DIVISION



E MAKGOBA

JUDGE PRESIDENT

LIMPOPO DIVISION



M F KGANYAGO

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION

APPEARANCES:

FOR THE APPELLANT	**: ADV M S MONENE**
INSTRUCTED BY	**:T N RAMASHIA ATTORNEYS**
FOR THE RESPONDENT	**: ADV N F DOUBADA**
	(SPECIALISED COMMERCIAL CRIME UNIT.)
RESERVED ON	**: 13 MARCH 2020**
JUDGMENT DELIVERED	**: 08 MAY 2020**