



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Non-reportable

Case No: 1107/2020

In the matter between:

AZWIFANELI GEORGE MPHANAMA

APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Mphanama v The State* (1107/2020) [2022] ZASCA 11 (24 January 2022)

Coram: Zondi and Hughes JJA and Weiner, Unterhalter and Molefe AJJA

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 24 January 2022.

Summary: Criminal law – fraud – submission by appellant, a magistrate, of false claims in terms of motor vehicle benefit scheme – prima facie evidence– approach of court discussed – appellant choosing not to testify – court finding that he had a case to answer. Defeating/obstructing the course of justice – reducing traffic fine before trial after prosecutor refused to do so – not proven beyond a reasonable doubt.

ORDER

On appeal from: Full Court of Limpopo Division of the High Court, Polokwane (Semenya J, Makgoba JP and Kaganyago J concurring):

- 1 The appeal against the convictions on counts 15 – 18 is dismissed.
- 2 The appeal against the conviction on count 21 is upheld and the conviction is set aside.

JUDGMENT

Weiner AJ (Zondi, Hughes JJA, Molefe and Unterhalter AJJA concurring)

Introduction

[1] The appellant, Azwifaneli Mphanama, was charged with three other accused, being Arnold Tshililo Mabirimisa (Mr Mabirimisa), Makhubu Harriet Phiri (Ms Phiri) and Mabirimisa Bus Service (Pty) Ltd (MBS). The appellant was accused 1, Mr Mabirimisa was accused 2, Ms Phiri was accused 3, and MBS was accused 4.

[2] They were charged with 21 counts in respect of the offences of corruption in contravention of s 8 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (counts 1-8); fraud (counts 9-18); money laundering in contravention of s 4 of the Prevention of Organised Crime Act 121 of 1999 (counts 19-20), and defeating the ends of justice (count 21).

[3] The trial took place in the Limpopo Division of the High Court, Thohoyandou (the trial court) in February 2016. The appellant was granted a discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA) in respect of all charges, save for counts 15-18 and count 21. He was convicted on counts 15-18 and sentenced to 18 months' imprisonment, suspended for three years on condition that he:

'1) . . . repays the amount of R3 638.95 to the Registrar of [the] court on or before 7 September 2017; and

2) . . . is not convicted of an offence of which dishonesty is an element and in respect of which the [appellant] is sentenced to imprisonment without the option of a fine.'

On count 21, the appellant was convicted and fined R12 000 or six months' imprisonment, which fine was to be paid in four instalments of R3 000 each.

[4] An appeal to the Full Court of the Limpopo Division of the High Court was dismissed on 6 May 2020. Special leave to appeal to this Court was granted on 25 August 2020.

The indictment

[5] On counts 9-18, it was alleged that the appellant, in the period from May 2008 to March 2009 (the period), in the Regional Division of Limpopo, 'in his capacity as the Head of Office at Dzanani Magistrates' Court, unlawfully and falsely, and with the intention to defraud, gave out and pretended to the Department of Justice and Constitutional Development and/or the Department of Justice and Correctional Services' (the Department) that:

- (a) When undertaking official trips during the period appellant utilised a Toyota RAV4 1800cc petrol multi-purpose vehicle, a RAV4 (the RAV 4); and/or
- (b) He was entitled to be compensated by the Department in terms of General minute 19 of 2008 for official trips undertaken during the period in terms of the prescribed tariffs for the RAV4; and/or
- (c) The claims submitted by the appellant for the kilometres driven were supposed to be calculated in terms of the prescribed tariffs for the RAV4; and
- (d) When making the representations, the appellant knew that:
 - (i) The vehicle which he used to undertake the official trips during the period was a Cadillac 200cc petrol sedan (the Cadillac) and not the RAV4 and he was not entitled to submit claims on the tariff applicable to the RAV4, as he did not utilise that vehicle for undertaking official trips;
 - (ii) The amounts that he was entitled to claim and receive from the Department as compensation for the official trips undertaken during the period were supposed to have been calculated in terms of the tariffs prescribed for the Cadillac.
- (e) As a result of the aforesaid misrepresentations, which the Department accepted, it processed the claims and paid the appellant in terms of the tariff

applicable to the RAV4, instead of processing the claims in terms of the tariffs prescribed for the Cadillac. This was to the prejudice of the Department in that the difference between the amount claimed and received, and the amount which should have been claimed and paid out was R10 353.09.

[6] In respect of count 21 – defeating or obstructing the course of justice – the appellant was indicted on the following facts. During or about May 2009, the appellant, in his capacity as a magistrate, unlawfully and with the intent to defeat or obstruct the course of justice, reduced a fine of R1 000 to an amount of R700 in respect of a written notice issued by a traffic official to one Herman Mudau. Mr Mudau had approached the office of the prosecutor with an application for a reduction of the amount of the fine, and the application was rejected by the prosecutor.

Admissions made in terms of s 220 of the CPA

[7] The admissions made by the appellant which are relevant to this appeal include the following:

- ‘1.6 By virtue of his position as Head of the Office, [the appellant] was in terms of the motor vehicle financing benefit for magistrates entitled to be reimbursed for kilometres travelled [on official business];
- 1.7 General minute 19 of 2008 . . . makes provision for the amounts that Magistrates can claim in respect of kilometres travelled;
- 1.8 The General minute further prescribes tariffs for different categories of vehicles in terms of which the amount to be claimed as compensation for official trips undertaken by the Magistrates are determined;
- 1.9 A Magistrate who qualifies for the travelling allowance is obliged to submit particulars of the vehicle he/she intends to utilise for official trips to the Department;
- 1.10 A Magistrate cannot without the authority of the Department utilise a vehicle other than the one in respect of which the particulars were submitted to the Department when undertaking an official trip.’

Evidence of the State

Magistrate Nditsheni Baldwin Makamela

[8] Mr Makamela was employed by the Department as a magistrate. He was the Acting Head of Office at the Magistrate’s Court at Dzanani, to which position he was

appointed in March 2015. Prior to his appointment, the Head of Office was the appellant.

[9] Mr Makamela testified that, prior to April 2008, the appellant had driven a RAV4 for all his official duties. However, in approximately late April or early May 2008, the appellant informed him that he had bought the Cadillac vehicle. Mr Makamela and Mr Nduambi, a messenger, went outside to see the Cadillac. From late April 2008, the appellant only drove the Cadillac. The appellant informed Mr Makamela that he had sold the RAV4 to Ms Phiri. After that date, Mr Makamela never saw the appellant driving the RAV4 again – it was no longer in his possession; it was in the possession of Ms Phiri.

[10] Mr Makamela was questioned by the appellant's counsel as to whether or not the sub-regional head at Thohoyandou, Magistrate Mudau¹, would have approved claims from the appellant if he did not see the appellant drive the vehicle in respect of which the claim was made. Mr Makamela responded that Magistrate Mudau was not present, and did not see the vehicle that the appellant was driving, as the appellant would travel from Dzanani, where he was based, to Louis Trichardt,² where he was assisting Magistrate Molokomme, who was new. On each occasion, the appellant was seen driving the Cadillac. Magistrate Mudau remained in Thohoyandou.

[11] Mr Makamela stated that the claim forms are certified by the claimant. The appellant would not take the motor vehicle to Magistrate Mudau. The messenger of the court would take the forms to Magistrate Mudau for approval. He would certify them without inspecting the actual vehicle which was used. There is a declaration attached to the claim forms which would be signed by the claimant and an element of honesty was expected from a claimant.

Magistrate Bernard Jacques Stapelberg

[12] Mr Stapelberg was a magistrate with the Judicial Quality Assurance Office, situated at the Magistrates Commission in Pretoria. Part of the functions of his office

¹ Referred to with his title, to distinguish him from Mr Herman Mudau.

² In 2003, the Minister of Arts and Culture approved the change of name from 'Louis Trichardt' to 'Makhado'.

was to deal with the conduct of magistrates. He was appointed to investigate various complaints lodged against the appellant.

[13] Mr Stapelberg disputed that, in order to submit a claim for travel expenses, the particulars of that motor vehicle have to be registered with the Department. He stated that one could use any vehicle, as long as the correct claim was made. He further stated that there would be nothing irregular in interchanging motor vehicles, as long as the kilometres claimed and the tariff used belonged to the vehicle being used.

Mr Stapelberg referred to the claim forms submitted, which showed that the appellant would often travel to Louis Trichardt. This evidence was confirmed by both Mr Makamela and Mr Molokomme.

[14] Mr Stapelberg handed in a letter which the appellant had written on 19 October 2009 (the October letter) in response to the complaints made against him. This letter refers to complaints made by 'an anonymous concerned citizen' as well the minute of the Chief Magistrate dated 15 October 2009. In dealing with the complaints, the appellant stated the following in regard to the utilisation of a vehicle and the claims made:

'I find it very strange for a magistrate who to date does not understand how the motor financing scheme works. I suggest he reads the guidelines on the manual for a better understanding. During the period under review, I owned a RAV4 1.8 and a black Cadillac 2 litre engine, of which I had submitted registration certificate for a RAV4 to the Sub-Regional Head for official use. I used to interchange the two motor vehicle, although the two motor vehicles differed in their engine capacity, I never took a chance of claiming with the 2 litre engine, as I know I would be defrauding the state neither would the Sub-Regional Head approve my claims. The sub-regional head approved my genuine claims as he knew the vehicle which I had submitted its certificate. The months September, October, November, the RAV4 was still my property.' The reference to the magistrate who does not understand how the scheme works, is a reference to Mr Makamela.

Magistrate Luxon Ramavhale

[15] Mr Ramavhale was appointed as the acting sub-cluster head at Thohoyandou, under Magistrate Mudau, who was the cluster-head. He testified that magistrates participating in the vehicle scheme had to indicate which motor vehicle they would be using by forwarding a certificate to the sub-cluster office, indicating which motor

vehicle they would be using. The registration certificate was required in terms of the circular to prevent fraudulent claims. In order to use another motor vehicle, an application was to be made by the magistrate, attaching the licence, and this application would go to the office of the sub-cluster head, who would forward it to the office of the Chief Magistrate.

[16] It was permissible to use two motor vehicles, as long as the registration particulars were forwarded to the office of the sub-cluster head. Mr Ramavhale also testified that the Head of the Magistrates Office would sign the trip authorisations and would approve these authorisations for the subordinates. All heads of office would submit the trip authorisations to the sub-cluster head for approval of their trips. These authorisations were submitted through the messenger of the court, and not in person.

[17] According to Mr Ramavhale, it was not possible to verify whether the particular magistrate had indeed undertaken the trip, or which vehicle they had used. They would rely on their honesty. He was unaware as to whether Magistrate Mudau, who was the sub-cluster head, followed the rules meticulously in regard to whether both motor vehicles must be registered. He could only give evidence as to what the procedure should have been, not what procedure was followed by Magistrate Mudau.

Magistrate Kwena Moses Molokomme

[18] Mr Molokomme also testified in regard to the manner in which the magistrates' motor vehicle finance scheme operated. His evidence corroborated that of Mr Makamela and Mr Ramavhale, but was, in certain respects, different to that of Mr Stapelberg – but not in any material respect as to whether or not the correct claims were made. This issue did not form part of the appellant's defence. The admissions made by the appellant in terms of s 220 of the CPA were the ones taken into account in this regard. It was common cause that a magistrate is required to submit claims for compensation only on the tariff of the vehicle actually used. No claims were made in respect of the Cadillac.

[19] Mr Molokomme confirmed the version of Mr Makamela, in that he testified that during October 2008, after Mr Molokomme's appointment in the Makhado Court, where the appellant was the Acting Head, the appellant assisted him in looking for

accommodation. He followed the appellant in his own vehicle, whilst the appellant drove the Cadillac. The appellant would often come from Dzanani to assist him in Makhado and he was always driving the Cadillac.

The appellant's version

[20] Various aspects of the appellant's version were put to Mr Makamela, Mr Stapelberg, Mr Ramavhale and Mr Molokomme. The appellant's version (which was not confirmed under oath, nor tested in cross examination, thus having no evidentiary value as the appellant chose not to testify) was, in summary, the following:

- (a) The appellant test drove the Cadillac from April to May 2008.
- (b) He would drive the RAV4 and the Cadillac, but he only claimed for when he drove the RAV4, as it was the vehicle registered with the Department.
- (c) He sold the RAV4 to Ms Phiri in September 2008. There was an agreement between Ms Phiri and the appellant that the appellant could continue using the RAV4, even after he had sold it to her.
- (d) Magistrate Mudau would not have certified the appellant's claims in respect of the claims for May to December 2008, unless he was satisfied that the appellant was driving the RAV4.
- (e) He borrowed the RAV4 from Ms Phiri for the period of January 2009 to March 2009.
- (f) He did not change the particulars of the vehicle registered for official trips with the Department because he borrowed the RAV4 from Ms Phiri for all official trips.

The trial court

[21] The trial court found that paragraph 5 of the October letter contained an admission by the appellant that he owned both vehicles and used them 'interchangeably', even though they had different engine capacities. The appellant stated that he owned the RAV4 until November 2008, but he was also the owner of the Cadillac before that time. The RAV4 was registered with the Department for official trips however, he only claimed on the tariff of the RAV4 as the Cadillac was not registered. As a result, claiming on the Cadillac tariff would be fraudulent and would not be approved. The trial court found that the appellant 'laboured . . . under the apprehension. . . ' that he could use the Cadillac, but should only claim on the tariff applicable to the RAV4, as it was the official registered vehicle. This explanation, the trial court found, is 'a far cry from the defence put up by the [appellant]'. There is no

reference in the letter to his version that he borrowed the RAV4 from Ms Phiri, either from the period May 2008 to March 2009, or at all.

[22] The version of the appellant which was put to the witnesses was that he could use either vehicle, but could only make a claim when he drove the RAV4, because that was the one that was registered with the Department. It was argued that there was no proof before the trial court that he used the Cadillac for official trips. He was test-driving the vehicle during April and May 2008. What was not put to the witnesses was what the situation with the Cadillac was for the balance of 2008, as according to the state witnesses, the appellant continued to drive the Cadillac until March 2009.

[23] The trial court, in dealing with counts 9-14, found that:

‘However accepting that each of the counts 9 to 18 is a compensation claim of various trips undertaken, the sum of which were, on the accused’s version, undertaken with the Cadillac and some with the RAV4, it is impossible on the evidence presented, or the evidence of the witness who testified . . . to determine on which occasion he used the Cadillac and on which occasion, the RAV4. I am not prepared to convict the accused on speculation.’

[24] In regard to counts 15-18, dealing with the claims from December 2008 until March 2009, the trial court found that the appellant claimed as if he used the RAV4 when he was no longer the owner or in possession of it, as it was by then owned by, and in the possession of, Ms Phiri. The version that he borrowed the vehicle from Ms Phiri over this period was, according to the trial court, an afterthought and did not amount to evidence.

[25] The appellant, in the appeal before the full court, criticised this approach. He submitted that the reasoning applicable to counts 9-14 should have applied equally to counts 15-18, as it was mere speculation by the State that he only used the Cadillac for that period. However, the trial court’s reasoning cannot be faulted, based upon the State’s evidence and the appellant’s own version. From September 2008, or at the latest December 2008, he was no longer in possession of the RAV4. More critically, he failed to mention in the October letter that he used to borrow the RAV4 on each and every occasion that he went on an official trip during this period.

[26] For the reasons set out above, the trial court was not prepared to convict the appellant on speculation in respect of the period from May 2008 to November 2008. However, it did find that from December 2008 until March 2009, the appellant was no longer the owner of the RAV4, and that he had given no explanation for using the RAV4. Therefore, he was convicted on the counts relevant to those months.

The full court

[27] The full court, in dismissing the appeal, agreed with the conclusion reached by the trial court. It held that the appellant did not dispute, either by way of cross-examination, or evidence under oath, the version of Mr Makamela and the other State witnesses that: he was driving the Cadillac at all material times; that he had sold the RAV4 to Ms Phiri; and that he was no longer in possession thereof during the period referred to in counts 15-18. The version put to Mr Makamela and Mr Molokomme that the appellant had borrowed the RAV4 from Ms Phiri and used it in each and every instance that he was on an official trip, because he had not submitted particulars of the Cadillac to the sub-regional head, was not repeated under oath – despite the fact that this version was denied by the State witnesses. Both witnesses confirmed that during that period, he was seen only driving the Cadillac.

[28] The version that the appellant used the vehicle that he borrowed from Ms Phiri is not evidence. As stated above, he chose not to give evidence, and thus his version has no evidentiary value. He neither confirmed it under oath nor offered himself for cross-examination on the version put to the State's witnesses. None of the State witnesses conceded that his version was correct. In addition, Ms Phiri could have been called to confirm his version, but she was not. Therefore, the claims during the period from December 2008 until March 2009 remain unexplained. It is also common cause that the appellant made no attempt to substitute the Cadillac for the RAV4 as his official vehicle after he sold the RAV4.

[29] The trial court and the full court therefore found that the State had proved, beyond a reasonable doubt, that the appellant was guilty of submitting false claims for the period of December 2008 to March 2009, and that he was guilty of counts 15-18.

Legal Principles

[30] It is trite that the State bears the onus of proving the guilt of an accused beyond a reasonable doubt.³ However, the State does not need to prove the guilt beyond any shadow of a doubt. In *S v Phallo*,⁴ this Court analysed the position as follows:

‘On the basis of this evidence it was argued that the State had at best, proved its case on a balance of probabilities but not beyond reasonable doubt. Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of Malan JA in *R v Mlambo* 1957 (4) SA 727 (A). The learned judge deals, at 737 F - H, with an argument (popular at the Bar then) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistent with the accused’s guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which “. . . at one time found almost universal favour and which has served the purpose so successfully for generations” (at 738 A). This approach was then formulated by the learned judge as follows (at 738 A - B):

“In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.

An accused’s claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.”

. . .

The approach of our law as represented by *R v Mlambo*, *supra*, corresponds with that of the English courts. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (King’s Bench) it was said at 373 H by Denning J:

“. . . the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the cause of justice.

³ *S v Mia and Another* [2008] ZASCA 117; 2009 (1) SACR 330 (SCA); [2009] 1 All SA 447 (SCA).

⁴ *S v Phallo and Others* [1999] ZASCA 84 paras 10-11.

If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.'"

[31] In respect of all the counts upon which the appellant was convicted, both the trial court and the full court concluded that the version of the appellant was improbable. The full court found that the trial court had correctly held that there was a *prima facie* case that called for an answer from the appellant at the close of the State's case.

[32] In *S v Boesak*,⁵ Langa DP, writing for the Constitutional Court held:

'The right to remain silent has application at different stages of a criminal prosecution. An arrested person is entitled to remain silent and may not be compelled to make any confession or admission that could be used in evidence against that person. It arises again at the trial stage when an accused has the right to be presumed innocent, to remain silent, and not to testify during the proceedings. 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* [1998 (2) SACR 493 (CC)], 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 destroy the fundamental nature of our adversarial system of criminal justice.'"

[33] The appellant's reliance on cases such as *R v Blom* and *S v Reddy* was misplaced.⁶ These cases dealt with convictions based on circumstantial evidence. The

⁵ *S v Boesak* 2001 (1) SA 912 (CC) para 24.

⁶ *R v Blom* 1939 AD 188; *S v Reddy and Others* 1996 (2) SACR 1 (A).

present case is based on direct evidence – the submission of invoices based upon the usage of the RAV4 and the testimony of the State witnesses.

[34] The State submitted that it had produced sufficient evidence to demonstrate that the appellant, in submitting the claims for the RAV4 from December 2008 to March 2009, whilst he knowingly used the Cadillac, amounted to fraud. The version that appellant had borrowed the RAV4 from Ms Phiri and used it in each and every instance that he was on an official trip, was not repeated under oath – despite the fact that it was denied by the State witnesses, and was contrary to the version put up in the October letter.

[35] In *Ndwambi v The State*,⁷ Navsa ADP referred to *R v Dyonta*,⁸ where the accused were convicted of fraud, in that they falsely pretended to a Mr Potgieter that certain stones were diamonds in order to induce the buyer to pay a certain price for the stones. The accused had been arrested immediately after they had handed the stones to Mr Potgieter who, although he had pretended to be buying, had no intention of buying them. Navsa DJP, citing *Dyonta*, stated as follows:⁹

‘Wessels CJ, in delivering the unanimous judgment of the court, reaffirmed the law as laid down in two previous judgments of this court, thus (at 57):

“If the misrepresentation is one which in the ordinary course is capable of deceiving a person, and thus enabling the accused to achieve his object, the fact that the person to whom the representation is made has knowledge or a special state of mind which effectually protects him from all danger of prejudice does not entitle the accused to say that the false representation was not calculated to prejudice.”

And, in answering the point of law in favour of the State, he concluded as follows (at 57):

“The law looks at the matter from the point of view of the deceiver. If he intended to deceive, it is immaterial whether the person to be deceived is actually deceived or whether his prejudice is only potential.”

[36] The trial court gave the appellant the benefit of the doubt in acquitting him on counts 9-14, but found, in respect of counts 15-18, that the appellant had claimed for official trips using the particulars of the RAV4 while the vehicle was no longer in his

⁷ *Ndwambi v S* [2015] ZASCA 59; 2016 (2) SACR 195 (SCA).

⁸ *R v Dyonta and Another* 1935 AD 52.

⁹ Fn 7 above para 20.

possession. From the October letter, it is clear that the appellant admitted that he was using the two vehicles interchangeably; but the State showed, through its witnesses, that this was not possible after November 2008 as, from that date, the sale of the RAV4 to Ms Phiri was complete – as was the sale of the Cadillac to the appellant. It is also noteworthy that the appellant's counsel put to Mr Makamela that the RAV4 vehicle was sold to Ms Phiri in September 2008. As found by the trial court, '[n]o explanation is provided in the letter that he borrowed the RAV4 vehicle from accused 3 for the period December 2008 to March 2009'.

[37] It is clear that both the trial court and the full court applied the principles crystallised in *S v Van der Meyden*¹⁰ in analysing the evidence adduced by the State, which the appellant chose not to rebut, as well as the October letter which formed the basis of the exculpatory evidence in favour of the appellant in relation to counts 9-14. In analysing the evidence as such, the trial court and full court correctly found that the benefit of the doubt only related to counts 9-14 and that, in terms of the principles applicable to fraud, potential prejudice is sufficient to satisfy the requirements of the offence of fraud. Whether the defrauded party would ultimately have suffered the prejudice anyway, is irrelevant.¹¹ In any event, there is actual prejudice: the appellant was compensated on a scale to which he had no entitlement, thereby adversely affecting the Department financially.

[38] The State accordingly contended that the act on the part of the appellant, in submitting the claims for official trips utilising the particulars of the RAV4 whilst he knew that the vehicle that he utilised for the trips was the Cadillac, amounted to an act of fraud. The prejudice suffered by the Department was that, during the period December 2008 to March 2009, it overpaid the appellant an amount of around R3 768.25.

[39] The State's evidence was that the appellant had sold the RAV4, and that he owned, and was observed using, the Cadillac exclusively since at least November 2008. The key question is whether that amounts to *prima facie* proof of the fraud. If so (and I agree that it does), then in exercising his right to silence, the *prima facie* case

¹⁰ *S v Van der Meyden* 1999 (2) SACR 447 (W).

¹¹ See *S v Kruger* 1961 (4) SA 816 (A); *Ndwambi* (fn 6 above).

was not challenged, leading to his conviction. That he put a version that he borrowed the RAV4 from time to time, after November 2008, is not evidence and was not conceded by the State's witnesses. Hence, the appellant was at risk of conviction, absent his taking the stand. Thus, the appellant's submissions that the State had failed to produce evidence which proved that his conduct was actually and/or potentially detrimental to the administration of justice, does not amount to a defence at all.

Count 21

[40] On the count of defeating or obstructing the course of justice, it was common cause that the appellant had reduced the fine of Mr Mudau from R1 000 to R700, prior to the matter being heard in court, and after the prosecutor had refused to reduce this fine.

[41] The appellant submitted that the State had failed to produce evidence that proved that the appellant's conduct was actually, or potentially, detrimental to the administration of justice. The full court referred to CR Snyman's *Criminal Law* where the elements of the offence of defeating or obstructing the course of justice 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'.¹²

[42] The evidence on this count was tendered by Mr Mudau, who was issued with a written notice to appear in court for committing a traffic offence. He was fined R1 000. He took the notice to the prosecutor to request a reduction. The prosecutor refused to reduce the amount and wrote the words 'rejected' across the notice. His official stamp was placed on the notice. Mr Mudau, who was an employee of MBS (which was a co-accused in the trial) then took the written notice to the appellant, who reduced the fine to R700.

[43] The full court found that it could be assumed that the appellant, as a senior magistrate and the judicial head of the Magistrate's Court of Dzanani, was aware of the procedure laid down in s 56 of the CPA, read with ss 57, 57A and s 55 of thereof.¹³

¹² CR Snyman *Criminal Law* 6 ed (2014) at 237. There is now a newer edition, but the definition remains the same – see CR Snyman *Criminal Law* 7ed (2021) at 292.

¹³ The legislation has subsequently been amended, but in view of the decision to which I have come, it is not necessary to analyse the relevant provisions of the section or the amendment.

[44] In terms of s 57(6), no provision of s 57 is to be construed as preventing the public prosecutor from reducing an admission of guilt fine on good cause shown in writing. Section 57(8) of the CPA, provides that when an admission of guilt fine is paid at a police station or a local authority in terms of subsection (3), the summons or written notice is surrendered under subsection (5) and thereafter it is forwarded to the clerk of the magistrates court, which has such jurisdiction, and the clerk shall thereafter enter the essential particulars of such summons or written notice 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.

[45] Section 57(9) provides that the judicial officer presiding at the court 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), may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course.

[46] The full court found that it follows from the provisions of s 57(6) and (9) of the CPA, that a magistrate has no powers to reduce a traffic fine as the appellant did in this case. These powers rest only with the prosecutor. The magistrate can only act in terms of s 57(9). Thus, the full court found that the trial court's findings that the conduct of the appellant was irregular could not be faulted.

[47] The appellant submitted that there was no evidence led in the trial court to prove, or even conclusively infer, that the appellant's conduct in reducing the traffic fine amount was intended to defeat the ends of justice at all. It was further contended that the ends of justice were served in that the State was still paid R700, and Mr Mudau was convicted on the admission of guilt. Furthermore, it was contended that there was no evidence led by the State indicating that the appellant's conduct in reducing the traffic fine upon request, was unlawful, and therefore it cannot be said that the crime of defeating or obstructing the ends of justice was committed.

[48] The appellant's conduct was *ultra vires*. The recourse which should have been taken, the appellant submitted, was a review in terms of Rule 53 of the Uniform Rules of Court, instead of a criminal prosecution. The appellant thus submitted that the lower courts erroneously ' . . . conflated inferred ethical blameworthiness and probable questionable conduct with the sterner test of criminal blameworthiness'.

[49] According to Mr Makamela, pre-2008, when an admission of guilt was paid by the person who had been issued a traffic fine, the person would either pay it at the magistrate's court or at a police station. Then, the original of the summons and/or written notice would be sent to the relevant magistrate's court. Makamela stated that at a time after 2008, due to the conflicts between the departments, traffic officers would keep the written notice and the person charged would pay them; but they would only bring them to court on the appearance date, or on the date reflected in the notice. After the payment, the clerk of the criminal court would bring the written notice to a magistrate, who confirms and signs the written notice. However, after some time in 2008, Makamela stated, one cannot take the ticket from the traffic department to a magistrate to reduce it before the court date, as that is the job of the prosecutors.

[50] Evidence was given by the State witnesses in regard to a meeting held in respect of which the question was whether a magistrate would be allowed to reduce a notice in regard to a traffic offence before an appearance in court. At the meeting, it was resolved that only the prosecutor could do this.

[51] The minutes of this meeting, which appears to have taken place in June or July 2009, were compiled by Mr Makamela who took them to the appellant. At the meeting, the appellant stated that in terms of s 342A of the CPA he was entitled to reduce the fine before it was brought to court. In the meeting, Mr Makamela ascertained that the appellant had already reduced Mr Mudau's ticket before he was scheduled to appear in court.

[52] In my view, the evidence regarding the meeting and the decisions taken thereafter created some confusion. The submissions of the appellant that he was entitled to do what he did; casts doubt upon the element of intent to defeat the ends of justice. Thus, on this count, I would uphold the appeal and set aside the conviction.

Conclusion

[53] In failing to testify, the appellant did not answer the *prima facie* case against him, and he ran the risk of that proof becoming conclusive proof, as there was nothing to gainsay the version of the State.¹⁴ The evidence produced by the State proved, beyond reasonable doubt, that fraud was committed and that the appellant was correctly convicted on counts 15-18. However, the charge of defeating or obstructing the course of justice in respect of count 21 was not proved beyond a reasonable doubt and should be set aside.

[54] In the result, the following order is made:

- 1 The appeal against the convictions on counts 15-18 is dismissed.
- 2 The appeal against the conviction on count 21 is upheld and the conviction is set aside.

S E WEINER
ACTING JUDGE OF APPEAL

¹⁴ *S v Chabalala* 2003 (1) SACR 134 (SCA).

Appearances:

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Instructed by:

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Instructed by:

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