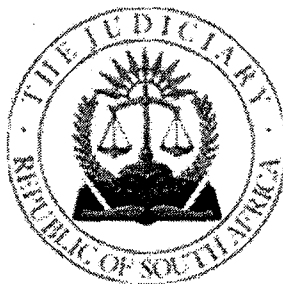


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

CASE NUMBER: A 48/2017

SIGNATURE

DATE

In the matter between:

LUDICK, PAUL

Appellant

and

THE STATE

Respondent

 JUDGMENT

WINDELL J.**Introduction**

[1] The appellant stood accused in the Regional Court in Germiston on a charge of theft, alternatively contravention of S 102(1)(f) of the Administration of Estates Act, Act 65 of 1965.

[2] On 2 September 2015 the appellant was found guilty of theft and acquitted on the alternative charge. He was sentenced to a fine of R 3000 or six months imprisonment.

[3] Leave to appeal the conviction was refused by the court a quo. The appellant is before this court after leave to appeal the conviction was granted on petition.

[4] The record has certain omissions. There was apparently an attempt to reconstruct the record. I am satisfied that the defects in the record are not so serious that a proper consideration of this appeal is not possible and the nature of the issues to be decided on appeal can be properly considered despite the defects.¹

[5] The State alleged that the appellant stole an Ebner piano with a piano chair, the property or in the lawful possession of the complainant, Louls Koekemoer during the period 21 December 2014 to 8 January 2015. In the *alternative* charge it was alleged that the appellant as the appointed Executor in the estate of the late Orpha Philidia Koekemoer ("the deceased"), willfully distributed property of the estate otherwise than in accordance with the Will. The deceased was the complainant's mother.

[6] The only issue in this appeal is whether the appellant unlawfully disposed of the Ebner Piano and the Piano Chair

Background

[7] It is common cause that the appellant had been residing in the deceased's house since March 2014. He was caring for the deceased's son (St Elmo) who had cancer, until he passed away and the appellant assisted the deceased with the cremation of

¹ *S v Chabedi* 2005 (1) SACR 415 (SCA) at [5]- [6]

her late son. After the deceased's son passed away, the appellant remained in the house of the deceased because she had asked him to stay there. He was caring for her until she passed away on 21 December 2014. About two weeks before her passing, the deceased had informed the appellant that she had appointed him as her executor. The deceased also entrusted the appellant with her "AVBOB" card and it appears that after her death the appellant, despite protestations by the complainant, attended to the necessary and had the deceased cremated.

[8] It is common cause that the deceased had deposed to a will wherein the complainant was bequeathed the deceased's immovable and moveable items in the house. In the will the appellant was nominated as the executor and was also left a substantial amount of money.

[9] It became clear during the trial that the complainant is very unhappy about the contents of the deceased's will and the will currently forms the subject matter of pending litigation.

Theft of the piano

[10] It is common cause that the appellant, after the death of the deceased disposed of the deceased's Ebner piano and a piano chair. The appellant testified that he disposed of the piano and the piano chair, because he was requested by the deceased to donate the piano and the piano chair to an Old Age Home approximately two weeks before she died. He explained that after she passed he *"phoned somebody, one of the contacts in the book, the little black book because she had a book with numbers in it they came and they fetched the piano. I*

helped the ... load the piano on the ... it was only a ... one person, elderly guy with blondish hair. He came with a trailer and a white car ... and I helped him put in on the ... on his trailer and he went off with it." The respondent submitted that there was no instruction from the deceased to the appellant to donate the piano and its chair. The existence of the oral instruction to donate was an afterthought.

[11] The complainant confronted the appellant about the piano a day after he had given it away. It is undisputed evidence that the appellant then told the complainant that the deceased had instructed him to donate the piano to the Old Age Home. The appellant also conveyed the same version to the police who later investigated the matter. The appellant's explanation is clearly not an afterthought. His version was consistent and there is no evidence to contradict that of the appellant.

[12] The appellant's evidence is that he did not see the will until after the death of the deceased, and then only saw it when the deceased's attorney offices reopened around 18 January 2015. Except for the complainant's evidence that he thought that the appellant had sight of the will before the deceased *died*, there is no evidence to contradict this crucial part of the appellant's testimony. The court *a quo* in my view correctly accepted that the appellant only became aware of the will after the piano was disposed of.

[13] Much debate was made in the evidence about the deceased's telephone book, referred to as the "black book". This was a book that the deceased kept and which contained telephone numbers. The appellant, making use of the book, phoned a telephone number, made contact with a person whose telephone number appeared in the book, ascertained that such person would have been from the Old Age Home

and donated the piano and piano chair to the Old Age Home. This person was unknown to the appellant, and the appellant could not remember the number, and required the black book in order to contact the said person in order to request him to return the piano. The magistrate found that the black book was irrelevant. She is clearly mistaken. The black book is most relevant as it supports the appellant's version. It shows that the appellant did not know exactly who the person was who he had contacted and that he required the black book for the telephone number of such person in order to request him to return the piano. This he was able to do and the piano was returned. His evidence in this regard was also supported by the investigating officer.

[14] The complainant alleged that the piano that was returned was not his mother's but was a replacement piano. The appellant disputed that the piano was a replacement piano, but stated that it was the same piano that he had donated following the instructions received from the deceased. The magistrate, in assessing the evidence accepted the appellant's version that it was the same piano that was returned and rejected the evidence of the complainant.

Conclusion

[15] It is trite that the onus rests on the State to prove an intention to steal (*animus furtiva*) beyond reasonable doubt.² In *S v Boesak*³ it was held as follows:

'Theft, in substance, consists of the unlawful and intentional appropriation of the property of another (S v Visagie 1991 (1) SA 177 (A) at 181I). The intent to steal (animus furandi) is

² *S v Luther* 1962(3) SA 506 A; *S v Qumbella* 1966(4) SA 356 A; *S v Hartanyi* 1980(3) SA 613 T.

³ 2000 (3) SA 381 (SCA) at para.[97].

present where a person (1) intentionally effects an appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing that the property is capable of being stolen, and (4) knowing that he is acting unlawfully in taking it (Milton South African Criminal Law and Procedure vol II 3rd ed at 616).'

[16] It is trite that the State must prove its case beyond reasonable doubt and if the appellant's version is reasonable possibly true he is entitled to an acquittal. The court must apply its mind not only to the merits or demerits of the State and defence witnesses, but also to the probabilities of the case.

[17] The court a quo did not deal with the essential elements of theft. It should have been clear to the magistrate after hearing the evidence that the intention to steal and the element of wrongfulness ("wederegtelikheidsbewussyn") were in dispute. The question the court a quo should have asked in the circumstances is the following: Did the appellant know that he was acting unlawfully in disposing of the piano? The court a quo gave no reasoning for her finding but merely stated the following:

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The court was left to determine the unlawfulness of these actions by the accused

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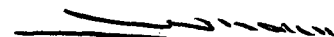
The state proved unlawfulness beyond reasonable doubt and the accused should not have disposed of the asset after the death of the deceased.

Intention in this regard was proved beyond reasonable doubt.

[18] The magistrate failed to critically analyze the evidence and misdirected herself in the application of the law to the facts. A court of appeal will only interfere if the court *a quo* has misdirected itself materially on either the facts or the law. She specifically found that the appellant only had sight of the will after the attorney's offices reopened after the December holidays. The appellant's evidence that he gave the piano away on the instructions of the deceased stands uncontested. The uncontested evidence does not prove that theft was committed. The State therefore failed to prove that the appellant had the necessary intention to steal the piano. The appellant's version is reasonably possibly true and he should have been acquitted.

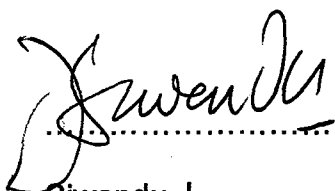
[19] In the result the following order is made:

1. The appeal is upheld.
2. The conviction and sentence is set aside.



Windell J

I agree



Siwendu J