

REPUBLIC OF SOUTH AFRICA



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

Case Number: A255/2018

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO
1/12/2022

DATE

SIGNATURE

In the matter between:

**MOKHESENG
APPELLANT**

JOHANNES

OUPA

AND

STATE

RESPONDENT

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *Case Lines* and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 1 December 2022.

OSTHUIZEN-SENEKAL AJ (JORDAAN AJ concurring)

Introduction

- [1] The appellant, Mr Johannes Oupa Mokheseng appeared in the Regional Court Soweto on a charge of fraud. The following averments were contained in the charge against the appellant, in that he unlawfully, falsely and with the intent to defraud and to the prejudice of Ms Mnyandu pretended to Brigadier Ndebele that Ms Mnyandu was unsuccessful or not recommended following interviews conducted at Actonville Police Station to be employed by the South African Police Services (“SAPS”), whereas in fact, the appellant knew that he amended the list of successful or recommended candidates by deleting the name of Ms Mnyandu and including the name of Mr Bucibo on the said list.
- [2] The appellant who was legally represented pleaded not guilty on 17 March 2016. He was subsequently, on 25 January 2016 convicted on the charge of fraud, and sentenced to three (3) years imprisonment which was wholly suspended for a period of five years on certain conditions.
- [3] On the same day, the *court a quo* granted the appellant leave to appeal against the conviction and sentence imposed.
- [4] Notwithstanding the lapse of the five-year suspended period, the appellant argued the even though the appeal is *moot*, mootness is not an absolute bar to the justifiability of disputes in the appeal.¹ Counsel for the appellant further argued that the outcome of the appeal against the conviction may have practical effect on the appellant, specifically with reference to his criminal record status and therefore, the appeal should be heard against the conviction.
- [5] Furthermore, the appellant sought condonation for the late filing of the heads of argument. The appellant provided a reasonably satisfactory explanation for the delay

¹ *Commissioner: South African Revenue Service and Another v Alves* (A19412019) 2020 ZAFSHC 123 (27 Jul 2020)

and it is in the interests of justice that this Court grants condonation in respect of the late filing of the appellant's heads of argument.

Grounds of Appeal

[6] Succinctly, the appellant appeals his conviction on the following grounds:

1. That the magistrate erred and misdirected himself in finding that the stated proved its case beyond reasonable doubt.
2. That the magistrate did not approach the evidence of the single witness, Brigadier Ndebele with the necessary caution. The evidence of the single witness was not satisfactory and reliable.
3. The magistrate erred in finding that the appellant's version was improbable.

Background

[7] The appellant's conviction has its genesis in events which occurred on 15 February 2013. Ms Mnyandu, the complainant testified that since 2009 she was working as a police reservist at the Zonkesizwe Police Station, and on 13 February 2013 she was invited to an interview for permanent employment in the SAPS. She attended the interview on 15 February 2013 at Actonville SAPS. A few days after the interview she was instructed to attend a medical consultation and according to the complainant that was an indication that she was successful in her application. However, she was never contacted to finalise her employment contract. At a later stage, she was informed that she was shortlisted for the post, but her name was replaced by a person named C.T Bucibo.

[8] Ms Alwal, testified that at the time of the incident, she was employed as a Human Resources clerk by the SAPS stationed at Actonville. On instruction of Colonel Jonck, the station commander, she attended the interviews scheduled for 15 February 2013, and her duties were to keep the minutes and to record the scores of the panel regarding the individuals being interviewed. According to Ms Alwal, the interview panel consisted of the following persons; Brigadier Ndebele, the chairperson, Colonel Jonck, Colonel Modiba, Captain Mokheseng (the appellant), Mr Naidoo and herself. Ms Alwal confirmed that 43 applicants were interviewed for 11 posts advertised. Ms

Mnyandu, the complainant, was candidate 31 and Mr Bucibo candidate 15. (See exhibit “A”).

- [9] On Monday, 18 February 2013, Ms Alwal was instructed by Brigadier Ndebele to compile and type a list of the 11 candidates who scored the highest scores during the interviews. She was instructed to hand the typed list, the minutes of the meeting and the interview forms of the successful candidates to the appellant, in order for him to deliver the documents to her for signing. Ms Alwal compiled the list as requested, see exhibit “B” whereafter she handed all the documents to the appellant.
- [10] The appellant returned to the office about 10-15 minutes later, informing her that Brigadier Ndebele did not sign the documents. The appellant requested all the interview forms and not only those pertaining to the 11 successful candidates. The said interview forms were in a box on her desk and she handed it to the appellant, after which she left the office.
- [11] Ms Alwal testified that at a later stage she met with the investigating officer in the matter, during the investigation of the case she was shown exhibit “C”, a document sign by Brigadier Ndebele. She stated that exhibit “C” was not compiled by her and that the name of Ms Mnyandu, a successful candidate did not appear on exhibit “C”. She testified that the name of Mr Bucibo was included in exhibit “C”. Ms Alwal testified the Mr Bucibo was not one of the top 11 candidates to be recommended for appointment, however, Ms Mnyandu was. The witness confirmed the correctness of exhibit “D”, her hand written notes and summary regarding the scoring of the candidates, which confirmed that Ms Mnyandu was scored 24 and Mr Bucibo 14. She stated that the scoring on the document was changed in regard to Mr Bucibo.
- [12] Colonel Jonck testified that he was employed by the SAPS and the Station Commander at Actonville Police Station. He further confirmed that he was a member of the interviewing panel concerned in this matter. He confirmed that 43 candidates were interviewed for 11 posts advertised for entry level constables. According to his testimony the candidates with the highest scores were to be recommended for appointment.

- [13] Brigadier Ndebele testified that she was employed by the SAPS and during 2013 she was the Cluster Commander in Benoni. Brigadier Ndebele testified that Actonville, Benoni, Crystal Park, Daveyton, Ethwathwa and Putfontein police stations were under her control. She confirmed that on 15 February 2013 she was the chairperson of the interview panel for entry level candidates to be appointed in the SAPS.
- [14] The witness stated that when she received the list of the candidates to be interview, she noticed that the names of candidates/reservists under her command were not included on the list, as a result she instructed Colonel Jonck to enquire from the provincial recruitment office as to the reasons for the none inclusion of candidates/reservists in her cluster. She confirmed that as a cluster head there was nothing untoward for her to make enquiries and or to include names of candidates on the list. Following her enquiries, names of candidates from Actonville and Daveyton Police Stations were included in the interview shortlist which led to the number of interviews to be conducted to increase to 56.
- [15] Brigadier Ndebele confirmed her signature on exhibit "C", the amended list, she stated that she signed the document on 19 February 2013 after it was handed to her by the appellant. She further confirmed that she did not verify the details and names included in the list, because the scoring sheets were not attached to exhibit "C".
- [16] The witness vehemently denied the allegation that she instructed the appellant to delete Ms Mnyando's name and to include Mr Bucibo's name as one of the 11 recommended candidates to be appointed.
- [17] Brigadier Ndebele stated that during the interviews she did enquire from Mr Bucibo if she knew him, because he looked familiar, and he told the interview panel that he once, 2009, worked with Brigadier Ndebele in Meadowlands, Soweto, when he was part of a task team under her command.
- [18] The witness further stated that according to the secretary's notes she scored Mr Bucibo 14 and the appellant scored him 24, which was the high score. She scored Ms Mnyandu 24.

- [19] During cross examination Brigadier Ndebele conceded that she did not carry out her duties properly, because she signed the document referred to the Provincial Commissioner, exhibit “C” without verifying the information contained therein as correct.
- [20] Colonel Isaacs testified that he was employed by the SAPS, attached to the Provincial Task Team and the investigating officer in the matter. The witness gave evidence regarding the policy document of the SAPS which sets out the requirements for candidates applying for appointment within the SAPS. (See exhibit “F”)
- [21] Captain Mokheseng, the appellant testified that he was employed by the SAPS and stationed at Actonville at the time of the incident. He confirmed that he was a member of the interviewing panel in this matter. In essence his evidence corroborated that of the state witnesses regarding what transpired before, during and following the interviews conducted on 15 February 2013.
- [22] The appellant stated that the on 19 February 2013, the secretary compiled a list of the candidates acquiring the highest scores during the interviews. The document was handed to him in order for him to deliver it to Brigadier Ndebele to attach her signature thereto. After handing the document to Brigadier Ndebele she instructed him to include Mr Bucibo’s name on the list.
- [23] The appellant testified that on his return to the Actonville Police Station, he amended the list of recommended candidates as instructed by Brigadier Ndebele. He deleted the name of Ms Mnyandu and included the name of Mr Bucibo. He also typed the amended document because the secretary was busy with other duties. The document was returned to Brigadier Ndebele, and she attached her signature to the document. The appellant stated that he forwarded the signed document to the Provincial Office Johannesburg.
- [24] The appellant testified that he complied with the instruction of Brigadier Ndebele, because she was a senior officer and furthermore, he did not consider the instruction to

be unlawful. He based his views on the National Instruction 6/2005, which states the following at [10.6]:

“The fact that the candidate was listed as having obtained the highest score in the interview or was recommended for the appointment, does not establish any right on the part of the candidate to be appointed to the vacant post or any other post.”

Evaluation

[25] The powers of a court of appeal to interfere with the findings of fact of a trial court are limited. In the absence of any misdirection the trial court’s conclusion, including its acceptance of a witness’ evidence is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness’ evidence – a reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional circumstances that the court of appeal will be entitled to interfere with a trial courts evaluation of oral testimony.²

[26] In the present matter the *court a quo* carefully evaluated the evidence of the witnesses for the state and could reach no other conclusion, but that the appellant committed fraud in that he deleted the name of Ms Mnyandu and inserted the name of Mr Bucibo on the correspondence to be forwarded to the SAPS Provincial Office after interviews were conducted at the Actonville SAPS on 15 February 2013.

[27] The appellant’s counsel argued that the evidence of the single witness, Brigadier Ndebele was unreliable and that the *court a quo* erred in placing reliance thereon. The respondent conceded the fact that Brigadier Ndebele was not an impressive witness and that her demeanour in court indicated her irritation and discontent especially during cross examination by the defence. However, the respondent argued that her evidence was supported by the documents handed in during the trial.

[28] The *court a quo* correctly stated during its judgment that the appellant formally admitted that he substituted the name of Ms Mnyandu, the complainant, with the name

² *S v Francis* 1991 (1) SACR 198 (A).

of Mr Bucibo on the list of candidates recommended for appointment as officers in the SAPS. Accordingly, the main issue to be decided on was whether the appellant had the intention to defraud and prejudice Ms Mnyandu.

[29] It was further, evident from the judgment that Brigadier Ndebele, the single witness, was ‘extremely reluctant to answer certain questions, particularly those suggesting that she did not properly execute her official duties’. However, the *court a quo* said the following;

“Her testimony is in fact a clear example of the repeated warnings of the Supreme Court of Appeal that triers of fact should be cautious not to make findings of credibility based purely on demeanor since it is best a tricky horse to ride. After the charges against her had been withdrawn she was already reluctant to even make a witness statement in spite of knowing what the defence of the accused actually was. Of course, that in itself is rather suspicious. Her repeated and hackneyed same long answers to certain questions proves clearly that she was afraid to say anything that might implicate her in the commissioning of the offence.

Her answers to a large extent are clearly something she has rehearsed in her mind beforehand after following her lawyer’s legal advice. She is obviously afraid she might again be charged and have to go through the same trauma she did earlier. The record will reflect the objections by Mr Lawrence Hodes [SC]: ‘how his client who is actually a high-ranking police officer, was arrested and belittled in the eyes of her colleagues’... Naturally her conduct in the witness stand is not favourable, but does not warrant rejection of her evidence.”

[30] The abovementioned reasoning and comments made by the magistrate, are a strong indication that the court *a quo* carefully and extensively scrutinised the evidence of Brigadier Ndebele, the single witness. We can find no reason to interfere with the *court a quo*’s reasoning and acceptance of Brigadier Ndebele’s evidence.

[31] The appellant stated that he acted on an instruction by his senior, Brigadier Ndebele to substitute Ms Mnyando’s name on the list of recommended candidates with that of Mr Bucibo. The version was rejected by the *court a quo* as being improbable and the following aspects were highlighted;

1. It is highly unlikely that Brigadier Ndebele would instruct a lower ranking officer to amend the list of candidates recommended, because she would have

anticipated that he would testify if being charged either during a disciplinary hearing or during criminal proceedings.

2. If Brigadier Ndebele favoured Mr Bucibo to be appointed following the interview, she would never have enquired from him why he looked familiar to her.
3. It was improbable that the appellant did not know that the request by Brigadier Ndebele was unlawful. The appellant testified that he has been employed by the SAPS for 27 years, he was promoted to Captain and was serving at the Human Resources Department of the SAPS. Furthermore, the appellant was well aware of the procedures pertaining to interviews and recommendations of candidates to be appointed. The explanations provided by the appellant for his actions is unpersuasive. If one accepts his version, it clearly would defeat the purpose of applying for a post and being interviewed by a panel. The appellant without any doubt attempted to justify his actions by referring to the Human Resource Policy Guides of the SAPS, wherein it stated that even though a candidate being recommended following the interview process, the candidate was not guaranteed to be appointed. Why would the appellant refer to the policy, when there was no need to bring this aspect to the table, because he testified, he acted on a lawful instruction of his senior, Brigadier Ndebele.

[32] It is important to note that the appellant during his testimony stated that Brigadier Ndebele instructed the interview panel that preference must be given to candidates from the sector under her command. This was never put to Brigadier Ndebele during her testimony. Furthermore, this allegation could have been established during the investigation of the matter, and it could have been confirmed by Ms Alwal, Colonel Jonck and the investigation officer.

[33] It is common cause that the scoring sheets of the unsuccessful candidates completed by the panel were lost. Ms Alwal testified that the appellant collected these score sheets from her on 19 February 2013, after she handed him the typed document to be signed by Brigadier Ndebele. The *court a quo* correctly found that the reason for the appellant

to collect the scoring sheets of unsuccessful candidates from Ms Alwal, was to conceal his fraudulent actions.

[34] The appellant admitted that he typed the amended document, exhibit “C”. This in itself seemed dubious. He explained his actions in this regard by stating, the secretary, Ms Alwal was busy and therefore he typed the amended document. The appellant never informed Ms Alwal of the instruction by Brigadier Ndebele. His explanations regarding these questions were implausible.

[35] The judgment by the *court a quo* was properly motivated given the totality of the evidence presented by the state. In the circumstances, on the evidence considered as a whole, we are of the view that the *court a quo* correctly convicted the appellant on the count of fraud.

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

1. The late delivery of the appellant’s heads of argument is condoned.
2. The appeal against the conviction is dismissed.

**CSP OOSTHUIZEN-SENEKAL
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree and it is so ordered

**M JORDAAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

DATE OF HEARING:

28 November 2022

DATE JUDGMENT DELIVERED:

1 December 2022

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