THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 497/10

In the matter between:

JOHANNES MAHLANGU — **1st Appellant**
EDWARD RAMETSI — **2nd Appellant**

and

THE STATE — **Respondent**

Neutral citation: M**ahlangu v The State (497/10) [2011] ZASCA 64 (1 April 2011)**

Coram: STREICHER, SHONGWE JJA and PETSE AJA

Heard: **18 MARCH 2011**

Delivered: **1 APRIL 2011**

Summary: Corruption – Interpretation of section 1(1)(b) of the Corruption Act 94 of 1992 – Interference by presiding officer during trial – different versions put by legal representative – Competence or the lack thereof of counsel – fairness of trial

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ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Blieden J and Saldulker J sitting as court of first instance).

The appeal against both conviction and sentence is dismissed.

JUDGMENT

SHONGWE JA (STREICHER JA and PETSE AJA concurring):

[1] The two appellants (Mahlangu and Rametsi) were convicted in the Regional Court, Johannesburg of a contravention of s 1(1)(b) read with s 3 of the Corruption Act 94 of 1992 (the Act).They were sentenced to 6 years' imprisonment, two years of which were suspended for a period of five years on condition that they were not convicted of corruption or extortion committed during the period of suspension. The magistrate refused leave to appeal. They petitioned the Judge President (South Gauteng High Court) where leave was granted. The court below (Blieden J & Saldulker J concurring) dismissed the appeal against conviction and sentence, however it granted leave to appeal to this Court.

[2] When granting leave to appeal the court below mentioned that counsel for the appellants raised a point which was not argued during the appeal. The point related to whether the statutory provisions had been proved or not and what the consequences thereof were. It also raised the possibility that the appellants may not have been properly represented at the trial and that the presiding magistrate may have misdirected himself in convicting them.

[3] The main grounds of appeal raised by the appellants are: (a) the state failed to prove the statutory requirements for the contravention of s 1(1)(b)(i) or (ii) of the Act; (b) the presiding magistrate entered the arena thereby interfering with the

proceedings to the prejudice of the appellants; (c) the legal representative of the first appellant was confused, incompetent and ill-prepared to the point of rendering the appellants' trial unfair; and (d) the presiding magistrate disregarded the cautionary rules applicable to a single witness and the evidence of a trap. Regarding sentence it was contended that the trial court misdirected itself when dealing with the seriousness of the offence and related mitigating factors.

[4] It is necessary to deal with the factual background. The state's case is that the complainant (Makhamba), a security guard, had shot and killed a suspected robber in self-defence and in defence of property in 1998. The second appellant (Rametsi) was the investigating officer in respect of this incident. The first appellant, (Mahlangu), also a police officer, usually accompanied Rametsi during his investigation of this matter. In November 2000 Rametsi and Mahlangu visited Makhamba at his place of employment seeking a statement regarding the shooting, which he gave. On this occasion the two police officers suggested that Makhamba should pay them a sum of R600 in order for them to withdraw the case. They further threatened to arrest and lock him up if he failed to pay them the money. He indicated that he did not have the money but that he would speak to his employer.

[5] Fearing arrest Makhamba approached his employer and informed him about the appellants' proposition. The employer, in turn, reported the matter to the Anti-Corruption Unit and requested an investigation. Makhamba was again approached by the appellants and also on one occasion by Rametsi alone. On that occasion he paid R50 to Rametsi, being all he could afford.

[6] An arrangement was made for the police officers to visit again in January 2001. This arrangement was communicated to the Anti-Corruption Unit which then prepared to set up a trap in order to arrest Rametsi and Mahlangu. The Anti-Corruption Unit officers met with Makhamba days before the day of the trap. On the morning of 25 January 2001 Inspector Mothudi of the Anti-Corruptioni Unit arrived at Makhamba's place of employment (a factory) accompanied by other police officers, all in plain clothing. They handed R600, which was made up of one hundred rand notes, to Makhamba. The arrangement was that he would give the money to Rametsi and Mahlangu and signal to them by taking his cap off after having handed

the money over to the appellants. They would then close in and arrest them. Some of the Anti Corruption Unit members were stationed inside and others outside the factory premises. Rametsi and Mahlangu arrived. They were met by Makhamba and entered the factory premises. Mahlangu left them inside the factory premises and returned to the vehicle they had arrived in. He got into the vehicle and waited.

[7] In the factory premises Makhamba took out the money, counted it and tendered to hand it to Rametsi who declined to take it and advised him to take it to Mahlangu who was still inside the vehicle. Makhamba proceeded towards Mahlangu and handed the money to him. Makhamba then removed his cap giving a sign to the Anti-Corruption Unit officers confirming that he had handed the money over as discussed. Inspector Mothudi and other officers immediately approached Mahlangu. Mothudi produced his appointment card to identify himself but before he could arrest Mahlangu, Mahlangu sped off. Inspector Mothudi fired a shot at the vehicle's tyres but missed. As this was taking place Sergeant Robinson, also a member of the Anti-Corruptioni Unit, proceeded to arrest Rametsi who was still on the factory premises. Robinson had strategically placed himself in one of the offices where he had been observing events as they unfolded. Rametsi was later released. Mahlangu disappeared until he was arrested about two years later.

[8] The appellants denied that they ever suggested to Makhamba that he should pay them for having the case against him withdrawn. According to them the purpose of their visit on the day in question was to trace the firearm that had been used by Makhamba during the shooting incident Rametsi was invetigating. Rametsi testified that he went straight to Makhamba when he arrived at his workplace. He asked Makhamba for the firearm whereupon Makhamba left. He thought Makhamba was going to fetch the firearm. While waiting he heard a gunshot. The next thing that happened was that he was arrested by Robinson.

[9] Mahlangu testified that he was waiting in the vehicle when he suddenly saw two people running towards him. One was carrying a fire-arm. The window of the vehicle was half open. The person with the fire-arm pointed it at his neck and grabbed him by his clothes. The other person opened the door on the passenger side and tried to enter the vehicle. His upper body was inside the vehicle and he also

grabbed him. He says that he feared for his life and sped off. He thought these unknown people were going to rob or hijack him. Hence he decided to flee. He said shots were fired at him but he escaped with his life. He drove to Florida SAPS to lay a charge of attempted murder and attempted robbery. He proceeded to Lenasia to see Dr Khan and informed him of this incident and that he was shocked. He was then put on a drip to calm him down. He was off sick for seven days, returned to work and thereafter did not report for duty for more than a year until he was arrested.

[10] It is undisputed that the Anti-Corruptioni Unit officers, Mothudi in particular, went looking for Mahlangu at his station, Meadowlands, and at the Protea Magistrates' Court where Mahlangu was said to have gone to deliver a docket. Their efforts were all in vain. In his testimony Mahlangu said that during the period he was off sick he kept on visiting Meadowlands police station on a monthly basis but made no effort to contact the Anti-Corruptioni Unit, notwithstanding the fact that he was aware that they were looking for him. I now turn to deal with the grounds of appeal.

Whether the State had proved the statutory requirements for the contravention of s 1(1)(b)(i) and (ii) read with s 3 of the Act:

[11] Section 1(1)(b)(i) and (ii) reads as follows:

'1 Prohibition on offer or acceptance of benefits for commission of act in relation to certain powers or duties . . .

(b) upon whom any power has been conferred or who has been charged with any duty by virtue of any employment or the holding of any post or any relationship of agency or any law and who corruptly receives or obtains or agrees to receive or attempt to obtain any benefit of whatever nature which is not legally due, from any person, either for himself or for anyone else, with the intention –

(i) that he should commit or omit to do any act in relation to such power or duty, whether the giver or offeror of the benefit has the intention to influence the person upon whom such power has been conferred or who has been charged with such duty, so to act or not; or

(ii) to be rewarded for having committed or omitted to do any act constituting any excess of such power or any neglect of such duty, whether the giver or offeror of the benefit has the intention to reward the person upon whom such power has been conferred or who has been charged with such duty, so to act or not, shall be guilty of an offence.'

[12] The appellants contended that '[t]he power or duty to institute a prosecution and to terminate such prosecution, either by withdrawing charges or by stopping a prosecution falls . . . exclusively within the prerogative of the National Director of Public Prosecutions and those specifically appointed by the National Director'. They argued further that Makhamba was not charged and that he would not be charged therefore they could not have 'intended to withdraw a case or, for that matter, to arrest him.'

[13] The common cause evidence is that Mahlangu and Rametsi are police officers who have the power to investigate a criminal complaint. They, therefore, have been charged with a duty to investigate alleged criminal offences, in this case the shooting incident involving Makhamba. The allegation is that they demanded money from Makhamba for them to withdraw the case. Makhamba had by that time not been charged with an offence. 'Withdrawal of the case' could therefore only have been intended to mean and could only have been understood to mean 'termination of the investigation'. The termination of the case is an act 'in relation' to a duty with which the appellants had been charged. It follows that, if the evidence of the state is accepted, all the statutory requirements for a contravention of s 1(1)(b)(i) have been proved.

The trial magistrate entered the arena and aligned himself with the state

[14] The appellants contended that the trial magistrate had entered the arena in an impermissible way and that he had aligned himself with the sate against the appellants. In this regard the appellants relied on the questions put by the trial magistrate to the witness Muvhango and to Mahlangu.

[15] Mr Muvhango is a senior police officer in the police force. He testified that on 25 January 2001 he was on duty at the Meadowlands Police Station and that the appellants were under his command. Inspector Mothudi came to his offices and informed him that he had arrested Rametsi on a corruption charge and that Mahlangu was in the company of Rametsi at the time but that he had fled with the State's money. Muvhango telephoned Mahlangu who told him that he was at the Protea Court and was placing a case on the roll. When asked whether he was with

Rametsi he did not give an answer. He did not tell Muvhango what had happened at Makamba's workplace. According to the police records Mahlangu was booked off sick on 25 January 2001, resumed duties on 28 January 2001 until 6 February 2001 when he was booked off sick again. From then onwards Mahlangu was absent for a long period but Muvhango could find no record of that. The magistrate questioned Muvhango about the records and also about the action he took, knowing that the anti corruption unit was looking for Mahlangu. In doing so the magistrate showed frustration at the fact that the police were not able to produce records showing when Mahlangu returned to work. The magistrate also indicated that he was critical about the action taken by Muvhango in respect of the fact that the Anti Corruption Unit was looking for Mahlangu.

[16] In my view the questioning by the magistrate could not have given the impression that the magistrate had aligned himself with the state case against the appellants. His frustration with the police had nothing to do with the question whether the appellants were guilty or not and could not have given the impression that he was biased and that the appellants were not being given a fair trial.

[17] The magistrate intervened during the prosecutor's cross-examination of Mahlangu much more than was necessary. At one stage he got confused between the incident in question and another incident mentioned by Mahlangu. He would have done much better had he rather concentrated on the answers given to the prosecutor than his own questioning. In general the magistrate was asking questions clarifying the reason why Mahlangu was absent from work for almost two years after the attempt to arrest him, why he did not contact the Anti Corruption Unit when he learnt that it was not an attempted hijacking that he had fled from and why he had to accompany Rametsi when he went to see Makhamba. He showed some scepticism about Mahlangu's evidence that he merely accompanied Rametsi as a driver and at one stage he effectively cross-examined Mahlangu about the alleged damage to his vehicle. His questioning in this regard occupies approximately one and a half pages of the record.

[18] I seriously considered whether the questioning by the magistrate could have given the impression to a reasonable person that the magistrate was not impartial

and that the appellants were not getting a fair trial. I came to the conclusion that that was not the case. In this regard I refer to *S v Basson* 2007(1) SACR 566 (CC) para 30 -31 where the Constitutional Court again stated that there is a presumption in our law against partiality of a judicial officer and referred with approval to a statement by Cory J on behalf of the Supreme Court of Canada to the effect that the threshold for a finding of real or perceived bias is high.

The attorney representing the first appellant was confused, incompetent and ill-prepared to the extent of rendering the appellant's trial unfair

[19] In this regard the appellants mainly relied on the fact that Mahlangu's attorney at the trial put different versions to witnesses. When it was pointed out to appellants' counsel that different versions could have been given to the attorney by Mahlangu, the point was not taken any further.

Whether the trial court disregarded the cautionary rules applicable to single witnesses and to evidence of a trap:

[20] The appellants contended that the trial court as well as the court below disregarded the cautionary rules applicable to single witnesses and traps. The trial court was further criticized for the way it dealt with credibility and probability issues.

[21] Section 208 of the Criminal Procedure Act 51 of 1977 provides that:

> 'An accused may be convicted of any offence on the single evidence of any competent witness.'

The court can base its finding on the evidence of a single witness as long as such evidence is substantially satisfactory in every material respect or if there is corroboration. The said corroboration need not necessarily link the accused to the crime (See *S v Hlongwa* 1991 (1) SACR 583 (A), *Stevens v S* [2005] 1 All SA 1 (SCA) para 17 and *S v Artman* 1968 (3) SA 339 (A) at 341A-B).

[22] Makhamba was a single witness in respect of the offer made to him to withdraw the case against payment of R600 but his evidence as to events surrounding the handing over of the money was corroborated in all material respects

by Robinson, Mothudi and Motau another member of the Anti Corruption Unit.
Corroboration is also to be found in the improbability of the appellants' version.
Rametsi and Mahlangu had been to see Makhamba more than once. Rametsi's explanation is that he was looking for the fire-arm used in the shooting by Makhamba. Makhamba had informed Rametsi that the fire-arm was no longer available because he had been robbed of it. Rametsi and Mahlangu had no business to visit Makhamba again as the investigation of the shooting incident should have been closed. All the necessary potential witnesses' statements had been obtained. The state's version is that Rametsi and Mahlangu came to Makhamba on 25 January 2001 after they had agreed that the R600, which they demanded, would be available on that day. The appellants' version that they came to look for the fire-arm is untenable and was found to be a lie and rejected.

[23] The magistrate may not have pertinently used the phrases 'cautionary rule'; and 'evidence of a trap' but did caution himself that '[t]he court must consider the evidence in it's totality. The court must consider the probabilities and improbabilities of both the state case as well as the defence case. The court must consider the credibility of all witnesses. In addition thereto the court must also consider whether the state has succeeded in proving the guilt of each of the two accused separately and (inaudible) from each other'.
It is, therefore, disingenuous to argue that the trial court disregarded the cautionary rules applicable to single witnesses and traps. The magistrate considered the conspectus of the evidence and weighed the pros and cons and made a judiciously considered judgment.

[24] Certain discrepancies in the evidence of Makhamba were highlighted but these were not material discrepancies considering also that the incident occurred about 7 years before the trial. The trial court was satisfied, correctly so, that the state witnesses corroborated each other in all material aspects. The trial court found the explanation by both appellants to be improbable and correctly rejected it as false. 'An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered'. (See *R v Dhlumayo* 1948 (2) SA 677(A) at

678) I have considered the conspectus of the evidence and the findings of the magistrate and the court below, I am not satisfied that the appellants succeeded in showing this court that the verdict of the trial court and the court below were wrong. The appeal against conviction cannot stand.

Sentence

[25] I now turn to the issue of the sentence. It is trite that corruption is a serious offence especially when committed by police officers. These are the people appointed to protect society and enforce the law. Counsel for the appellants did not refer to a specific misdirection by the trial court which would persuade us to interfere with the sentence. He pointed out that the administration of justice could not have suffered any prejudice by the actions of the appellants. The trial court stated, correctly, that the fact that the amount paid was relatively small should not be over-emphasized.

[26] In my judgment, the sentence imposed is not unreasonable. Makhamba was persistently asked to pay up, the appellants persist with a baseless denial and do not display any remorse. The money was not recovered because Mahlangu fled with it. Corruption has plagued the moral fibre of our society to an extent that to some it is a way of life. There is a very loud outcry from all corners of society against corruption which nowadays seems fashionable. Some even go as far as stating that corruption is rendering the state dysfunctional. It is the courts that must implement the penalties imposed by the legislature. It is also the courts that must ensure that justice is not only done but also seen to be done. The trial court considered all the aggravating and mitigating factors and came to the conclusion that an effective imprisonment of 4 years was appropriate. In the circumstances of this case, I agree.

[27] The appeal against both conviction and sentence is dismissed.

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J SHONGWE
Judge of Appeal

APPEARANCES:

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