IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, GRAHAMSTOWN)

CASE NO: CA&R 49/08
DATE HEARD: 22/09/2010
DATE DELIVERED: 12/10/2010

In the matter between

LIONEL DUDLEY JACOBS **Appellant**

Vs

THE STATE **Respondent**

JUDGMENT

PICKERING J:

The appellant appeared in the Regional Court, Port Elizabeth, charged with nine counts and various alternatives thereto. At the conclusion of the State case he was acquitted on counts 2, 3, 5, 7, 8 and 9. His application for discharge in respect of counts 1, 4, and 6 was dismissed.

At the conclusion of the trial he was convicted on count 1 of the theft of an amount of R7 368,00, and was sentenced to a fine of R4 000,00, or 2 years imprisonment, together with a further period of 3 years imprisonment the whole of which was suspended for four years on certain conditions.

On count 4 he was convicted of failing to submit a statement of affairs to the Master of the High Court in contravention of section 137(c) of the Insolvency Act no 24 of 1936, and was sentenced to a wholly suspended sentence of six months imprisonment.

On count 6 he was convicted of fraud and was sentenced to a fine of R2000,00, or one year imprisonment together with a further two years imprisonment wholly suspended for four years.

He appeals now against his convictions only.

At all material times appellant was practising as an advocate in Port Elizabeth. It appears from the evidence that he shared offices with another advocate who was practising in similar circumstances, one Bruce Bok. They appeared to have had some sort of symbiotic relationship whereby they exchanged clients and whereby appellant, who had been provisionally sequestrated on 17 October 2001, used Bok's cheque account. It appears that appellant, who had no bookkeeper, did not keep any proper books of account and that monies that were paid in to him by clients for certain purposes were paid into Bok's account from time to time. By appellant's own admission neither his nor Bok's accounting "*was up to standard but we had some idea of who paid in what*".

It is common cause that neither appellant nor Bok were members of one of the constituent Bars of the General Council of the Bar and that, contrary to the rules regulating the professional conduct of those Bars, they accepted instructions directly from the public.

In de Freitas and Another v Society of Advocates of Natal and Another 2001 (3) SA 750 (SCA) it was held that such conduct was unprofessional. In this regard Hefer ACJ stated as follows at 758F – G (para 11):

> "*There is, moreover, a more obvious reason why an advocate should not perform the functions of an attorney. It is that, unlike attorneys, advocates are not required to keep trust accounts. In terms of the Attorneys Act 53 of 1979 every attorney shall open and keep a separate trust banking account and deposit therein money held or received by him on account of any person. No amount standing to the credit of such an account shall be regarded as forming part of the assets of the practitioner or may be attached on behalf of any of his creditors; and, equally importantly, any shortfall in the account may, in proper circumstances, be recovered from the Fidelity Fund. A client who does not employ an attorney and instructs an advocate directly does not have the same protection or any protection at all.*"

In a separate concurring judgment Cameron JA referred at paragraph 13 page 764H – I to "*the real and substantial danger to the public that would result if advocates were permitted to handle public money, whether by dealing with a client's money or even by taking deposits on fees in advance.*"

That judgment was delivered on 9 March 2001 and, in my view, appellant could hardly not have been aware thereof. Nearly a year later, however, he was still practising without regard for the referral rule. In so doing he was guilty of unprofessional conduct. The facts of this matter, relating in particular to count 1 thereof, are a striking illustration of the undesirability of an advocate practising contrary to the referral rule and the principles laid down in the de Freitas case *supra*. Appellant, however, is not charged with such unprofessional conduct and accordingly no more need or should be said about it.

An issue relating to the regional magistrate's alleged failure to comply with the provisions of section 151 of Act 51 of 1977 was argued before us by appellant who represented himself both at the trial and at the hearing of the appeal. In my view, appellant's submissions in this regard were without merit. The appellant was at all times fully aware of his right to testify and to adduce evidence on behalf of the defence. It is clear that no prejudice whatsoever was occasioned to appellant by the regional magistrate's failure strictly to comply with the aforesaid provisions by not affording him the opportunity to indicate what evidence he intended to adduce in his defence.

I turn then to consider the respective counts in respect of which appellant was convicted.

Count 1

The complainant on this count, Mr. Thysse, was a builder. It appears from his evidence that during or about November 2001 certain of his workers laid complaints against him with the Industrial Bargaining Council. In consequence Mr. Thysse decided to seek legal advice. He proceeded to

consult with appellant. Appellant quoted him a professional fee of R2 000,00 to which Mr. Thysse agreed. It is common cause that from time to time Mr. Thysse paid certain amounts to appellant commencing on 25 November 2001. The amounts were as follows:

"*25 November 2001 – R1 004,00*
26 November 2001 – R4 650,00
4 December 2001 – R4 032,00
4 December 2001 – R1 918,00
14 December 2001 – R2 000,00
22 January 2002 – R372,00"

In total therefore he paid to appellant the amount of R13 976,00. The purpose of such payments was to enable appellant to negotiate with the Bargaining Council concerning the workers' complaints and to pay to that Council such amounts as were eventually agreed upon. It is common cause, however, that the Bargaining Council refused to accept such lesser amounts as were tendered on behalf of Mr. Thysse by appellant, and that none of the money was in the event paid over to the Council by appellant.

It is further common cause that all the money paid by Mr. Thysse to appellant was paid by appellant into Bok's account. In this regard appellant conceded in his evidence that his and Bok's financial relationship was "*very unusual*", "*very unorthodox*" and "*totally unprofessional*." He added that "*all the money that we collected in, there was a mixture of the monies and I am in full agreement of the criticism, it was not administered correctly.* Asked how he managed to keep track of moneys that were paid to him in the absence of any proper books of account he stated that Bok "*would draft us a statement of account at the end of the month more or less just to say what is our expenses and so forth.*" It was put to him by the regional magistrate that the money paid to him by Mr. Thysse was in effect trust money. He conceded to this proposition in the following passage:

"*Q The fact remains if you receive money on behalf of somebody*

else you should keep it in a trust account.

A *Yes.*

Q *And you cannot use it.*

A *This is correct.*

Q *Except for the purpose wherefore it has been paid to.*

A *I am in full agreement.*

Q *And it was not done in this case.*

A *It was not done and unfortunately I could not bank at that stage because my estate was provisionally sequestrated. So the bank froze all my accounts.*"

At some stage Mr. Thysse lost patience with the lack of progress and accordingly, on 4 February 2002, terminated appellant's mandate. On the same date appellant advised Mr. Thysse in writing that he would refund to him the moneys which had not been paid over to the Council. He did not do so, however. Mr. Thysse then again demanded repayment and on 14 February 2002 appellant wrote to him stating that "*on instructions of your agent, Mrs. D. Septoe, I will now draw up a statement of account and refund you all monies which was not disbursed on your behalf within 10 working days.*" (Exhibit FF3) On 15 February 2002 appellant addressed a letter to the Department of Labour stating that Mr. Thysse had terminated his mandate and that he would refund all non-disbursed monies to him directly after drawing up his statement of account. On 21 February 2002 an amount of R4608,00 was paid by appellant to Mrs. Septoe as a refund for Mr. and Mrs. Thysse. (Exhibit AAA).

According to Mr. Thysse the remaining money owing to him was not refunded and he accordingly laid a charge of theft against appellant with the police. This charge elicited an aggrieved response from appellant. By letter dated 5 March 2002 (Exhibit LL) he emphatically denied that he had stolen any monies belonging to Mr. Thysse and advised the police, *inter alia*, that he had responded to Mr. Thysse's agent, Mrs. Septoe, "*by saying that all monies not disbursed on Mr. Thysse's behalf will be refunded, after a statement of my account has been drawn up.*"

On 11 March 2002 Mr. Thysse and his wife addressed a letter to appellant

headed "*Apologie brief*". In this letter Mr. Thysse apologised for having laid a charge of theft against appellant and stated, *inter alia*, that "*in ons hopeloos- en roekeloosheid het ons maar net gedoen wat ons dink die regte prosedures was. Ek en my vrou vra u nederig om verskoning vir die ongerief wat u deurgemaak as gevolg van die polisie se intrede.*" (Exhibit KK)

Mr. Thysse stated that he wrote this letter at the instance of appellant in order to facilitate the return of his money. Despite this, according to him, he received no further repayments, leaving an outstanding balance owing to him of R7 368,00.

That any outstanding balance was owing to Mr. Thysse was, however, disputed by appellant. In cross-examining Mr. Thysse appellant put to him that he, Mr. Thysse, was experiencing problems with at least two of his workers who lived across the road from him and who were demanding their money from him. Mr. Thysse accordingly requested an amount of R8 000,00 from appellant in order to pay off these workers. Appellant, out of the goodness of his heart, agreed to assist Mr. Thysse by lending him this amount. Appellant accordingly approached his neighbour, a retired airline captain, for a loan of R8 000,00. Although appellant had put to Mr. Thysse that he had made this approach during October or November it became common cause that it was in fact during December. The neighbour agreed to assist him with a loan of R8 000,00 provided that he be repaid the amount of R8 500,00, the R500,00 being in respect of commission. I interpose to state that in due course the neighbour, Mr. Hippert, testified and confirmed that he had indeed been approached for a loan of R8 000,00 by appellant and that he had agreed thereto. He had given appellant a cheque in the amount of R8 000,00 on 11 December. Because appellant had been provisionally sequestrated and could not write out cheques appellant arranged with Bok for repayment of the amount of R8 500,00. This was repaid to Hippert by Bok on 19 December 2001.

In his evidence appellant reiterated what he had put to Mr. Thysse. He stated that after receipt of the neighbour's cheque he had sent his secretary, Myrtle

Kramer, to the bank in order to cash it. She returned with the sum of R8 000,00 in cash. Upon her return appellant personally handed over the cash in her presence to Mr. and Mrs. Thysse who had been waiting at his offices. He then instructed Kramer to "*make sure they sign for it".* He conceded that no receipt or acknowledgment of debt had ever been issued in respect of this transaction. Taxed under cross-examination with his failure to have ensured that Kramer followed his instructions he stated that "*one is sometimes negligent, I am human, I make mistakes.*" He insisted, however, that he had told Kramer to issue the requisite receipt or acknowledgment of debt and stated that she was in effect to blame for having failed to do so. In all the circumstances, so he said, he had in fact overpaid Mr. Thysse an amount of R632,00. Under further cross-examination as to the circumstances in which the money had allegedly been handed over to Mr. and Mrs. Thysse, appellant contradicted his earlier evidence that he had personally handed it to them. He now stated that he had told Kramer to hand the money to them once she had negotiated the cheque. He himself left for New Brighton only returning late in the day. He presumed that she had done so during the course of the late afternoon or the following morning. He confirmed having made a statement to the police (Exhibit VVV) on 20 December 2002 in which he had alleged that he had "*refunded*" Mr. Thysse the amount of R7 000,00. He stated that his reference to the amount of R7 000,00 had been made in error because of the lapse of time.

In his evidence Mr. Thysse denied that they had been given the amount of R8 000,00 as alleged by appellant. In response to this denial appellant stated that he would then ask Bruce Bok about it when the latter was called to testify. Mr. Thysse also alluded under cross-examination to appellant having borrowed an amount of R7 000,00 from Mrs. Thysse. According to him, his wife went to collect this money from appellant's offices and was given a cheque which, when she presented it for payment at Standard Bank, "*het gehop."* His evidence in this regard was extremely confusing and unclear, the confusion being compounded by the fact that certain parts thereof were described in the transcript of the record as being "*indistinct.*"

In any event, his averments in this regard were denied by appellant.

Mrs. Thysse also denied in no uncertain terms having been paid R8 000,00 by appellant, demanding to know, in that case, where the receipt was. She did not refer in her evidence to any loan of R7 000,00 having been made by her to appellant or to any alleged repayment thereof by appellant by cheque. She was not questioned in this regard by either the prosecutor or appellant. She stated that the only amount which had been paid by appellant was the sum of R4 608,00.

Mrs. Septoe also evinced no knowledge of such payment having been made and stated that had this been the case Mr. Thysse would have informed her thereof. She too stated that the only amount received from appellant was that of R4 608,00 paid on 21 February 2002.

Appellant's secretary, Ms. Kramer, who testified on behalf of the State, stated under cross-examination by appellant, that she recalled having been sent to Standard Bank at some stage in order to cash a cheque in the amount of R8 000,00. She stated that having cashed the cheque she handed the money over to appellant. No-one else was present when she did so. Her evidence proceeded as follows:

> "*Q* *I am going to put it to you that that R8 000,00 was given to Mr. and Mrs. Thysse after Adv. Bok left to go to Uitenhage. And that you had to make sure that there was some sort of acknowledgment.*
> *A* *I do not know about that.*
> *Q* *You do not know about it now or do you dispute it?*
> *A* *I do not know about it. I know about the money but I do not know that I had to give money for this to Mr. Thysse.*"

Bruce Bok also testified on behalf of the State. He stated that he knew Mr. and Mrs. Thysse. He was asked in his evidence in chief whether he had any knowledge of the amount of R8 000,00 allegedly paid over to them by

appellant to which he replied that "*ek dra geen kennis daarvan.*" Surprisingly, in the light of his averments that Bok was aware of the purpose of the loan, appellant did not ask him any questions concerning this issue. In his own evidence appellant reiterated that Bok knew that he had borrowed the money to lend to Mr. Thysse. He conceded under cross-examination that this was an important issue which should have been canvassed with Bok and indicated his intention to apply to the regional magistrate for Bok to be recalled in order to enable him to put the averment to him. In the event he decided not to request Bok's recall stating that he was satisfied that it was not necessary.

That then was the relevant evidence in respect of this count.

In the case of theft of money a distinction must be drawn between trust money and debtor-creditor money. Money handed from one person to another, not as payment for goods purchased or a loan, but to be used by the latter for the benefit or advantage of the former is called "*trust*" money. It is "*trust*" money "*because the person handing over money trusts the recipient (the* 'trustee'*) to deal with the money according to the instructions of the giver.*" Burchell: Principles of Criminal Law 3rd Ed at page 800.

It is not in dispute in the present matter that the money paid by Mr. Thysse to appellant was trust money. It was paid to appellant on the specific understanding that he would pay it over to the Bargaining Council on behalf of Mr. Thysse.

As was stated in S v Boesak 2000 (1) SACR 633 (SCA) at para 99, the principles relating to the theft of trust moneys apply "*where a person entrusted with money for purpose A uses such money for purpose B or appropriates its for his own use.*"

If, however, the trustee at the time of his appropriation of the money has sufficient funds available to cover the amount expended he does not commit theft. If there is no risk because the trustee has an "*equivalent liquid fund*" the expenditure is not a breach of trust and is accordingly not theft. See R v

Wessels 1939 TPD 313 where the following is stated in the head note:

> "*When an agent collects money on behalf of a principal and it is not a condition of his agency that he should pay over to his principal the identical coins collected, then he does not commit the offence of theft if he uses such monies for his own purposes, so long as he has a fund at his disposal on which he can draw to pay his principal at all times, and an agreement with an institution such as a bank that a bank will allow an overdraft constitutes such fund, provided the agreement definitely binds the bank and does not leave the matter in the latter's discretion, e.g. to stop the overdraft without notice.*"

In such a case the agent can use the money for his own purposes but if he does not at all times thereafter have available sufficient money or an equivalent liquid fund from which he can pay his principal the full amount due to the principal, he commits theft.

It is conceded, correctly, by appellant that if the regional magistrate was correct in rejecting his allegation concerning the payment of the amount of R8 000,00 to Mr. Thysse, his appeal against the conviction on this count must fail as he did not have an equivalent liquid fund from which he could have repaid Mr. Thysse the full amount paid to him by the latter. The question of whether appellant was correctly convicted of theft on this count has therefore resolved itself into a determination of whether or not appellant's evidence that he paid the sum of R8 000,00 to Mr. Thysse in the circumstances as alleged by him can reasonably possibly be true.

Although the regional magistrate made no specific finding with regard to Hippert's evidence it must be accepted that appellant did indeed borrow the sum of R8 000,00 from Mr. Hippert on 11 December 2001 and that Hippert was repaid the amount of R8 500,00 by Bok on 19 December 2001.

The regional magistrate found, as is indeed borne out by a reading of the record, that neither Mr. nor Mrs. Thysse were impressive witnesses. Mr.

Thysse in particular contradicted himself in a number of respects. The regional magistrate found further, however, that, having regard to the inherent probabilities of the matter, appellant's version that he had paid the sum of R8 000,00 to Mr. Thysse was false. In my view this conclusion cannot be faulted. Not only was appellant himself an extremely poor witness, given to verbosity and evasiveness but also, having regard to the totality of the evidence led on this count, the probabilities overwhelmingly support the conclusion that his evidence cannot reasonably possibly be true. In my view the regional magistrate was clearly correct in finding that the State had proved the guilt of appellant beyond reasonable doubt.

It appears from the evidence that Thysse was unknown to appellant prior to his first consultation with him during November 2001. He had no personal relationship with appellant whatsoever. His interaction with appellant on a professional level was extremely limited. Appellant himself at the time was an unrehabilitated insolvent. He had no cheque account. He had no money. Despite this, according to him, he was prepared out of the goodness of his heart to borrow money at a premium of R500,00 in order to lend it to Mr. Thysse. That he would have done so to assist a virtual stranger is, in my view, in all the circumstances utterly improbable. Of equal improbability is that Mr. Thysse should not only have requested the money from appellant a week after having paid him the sum of R5 950,00 on 4 December 2001 in order to resolve his problems with his workers, but that he should also have then paid appellant the further sum of R2 000,00 on 14 December 2001, a mere three days later.

Apart from this there are a number of unsatisfactory features in appellant's evidence. His version as to the manner in which the money was handed over to Mr. and Mrs. Thysse was contradictory in material respects as set out above. Neither version received corroboration from the evidence of Ms. Kramer. It is hardly conceivable, in my view, that if Ms. Kramer had handed over the money herself or if she had been present when such a large sum of cash was handed over she would have no recollection thereof. Appellant contended in evidence and in his submissions before us that she was

motivated not to assist him by reason of her bitterness at having lost her employment with him when he closed his practice and left Port Elizabeth. She denied that this was so and, in our view, the suggestion that she was in these circumstances motivated to in effect commit perjury borders on the fanciful.

Furthermore, despite appellant having issued a receipt in respect of the smaller amounts paid to him by Mr. Thysse he, on his version, neglected to ensure that Kramer issued a receipt in respect of the amount of R8 000,00. Thereafter, in subsequent correspondence addressed to Septoe, appellant made no reference whatsoever to the alleged loan. Instead, on 21 February 2002, he repaid to Mr. Thysse the sum of R4 608,00, resulting, on his version, in an overpayment to the Thysses of R632,00. Far from making any attempt to reclaim this sum he instead advised the police on 5 March 2002 that "*all monies not disbursed on Mr. Thysse's behalf will be refunded after a statement of my account has been drawn up.*" Once again it is hardly conceivable that had he in fact paid the sum of R8 000,00 to Mr. Thysse on 11 December 2001 he would not thereafter have alluded thereto immediately upon being pressed for repayment and threatened with prosecution instead of mentioning the alleged payment for the first time in December 2002. It is also quite improbable that a year later he would have been confused as to the amount paid by him to the Thysses. It is in any event, quite improbable that Mr. Thysse would have charged appellant during March 2002 with the theft of his money if in fact nothing was due to him.

There is, further, the failure by appellant to cross-examine Bok on the issue central to his defence, namely, Bok's alleged knowledge of the purpose of the loan of R8 000,00 from Hippert. At the time Bok was called as a witness Kramer had already testified and had failed to corroborate appellant's version. On appellant's version Bok was then the one person (other than appellant's wife) who had knowledge of the purpose of the loan and who could confirm that the money had been borrowed in order to be paid over to Mr. Thysse. When Bok professed no knowledge of the purpose of the loan, however, appellant, who cross-examined most of the State witnesses at exhaustive and

inordinate length, failed to address a single question to him in this regard. Despite his later concession that this was an important omission on his part he declined the opportunity to have Bok recalled. In my view the inference is inescapable that in appellant's opinion Bok's evidence on this aspect would have reflected adversely on appellant's credibility.

In his submissions before us appellant made much of Mr. Thysse's hearsay evidence concerning the alleged loan to appellant by his wife of R7 000,00 and the dishonoured cheque. The thrust of his submission, if I understood it correctly, was that this evidence established that Mrs. Thysse had indeed been to his offices where she had been paid the amount of R8 000,00 by appellant (although on his version Mr. Thysse had mistakenly referred to the amount as being R7 000,00) and had fabricated the story of the loan and the dishonoured cheque as a subterfuge in order to exact more money from appellant.

The immediate difficulty with this submission is that it was never put to Mr. Thysse by appellant that such had been his intention. This issue was also never canvassed with Mrs. Thysse by appellant when he cross-examined her. The existence or otherwise of a dishonoured cheque could easily have been clarified by banking records which appellant could have provided had he so wished, but did not. In my view, in all the circumstances, this evidence takes the matter no further and can safely be ignored. Appellant's reliance upon it at this stage is, in my view, no more than opportunistic.

In all the circumstances I am satisfied that the guilt of appellant was proved beyond reasonable doubt and that his appeal against conviction on this count must accordingly fail.

Count 4

It is common cause that appellant was provisionally sequestrated by order of the South East Cape Local Division High Court on 17 October 2001. This order was served on appellant on 22 October 2001. On 5 December 2001

Deborah van Rooyen was appointed as trustee of appellant's estate. A final order of sequestration was granted by the South East Cape Local Division on 12 December 2001. There is no evidence on record as to when, if ever, this final order was served on appellant.

Much time and energy was expended at the trial in an attempt to establish whether or not appellant had communicated with his trustee, Deborah van Rooyen, after receiving certain documentation from her, and as to what exactly had transpired in this regard between the two of them. In the light of the provisions of the relevant sections of the Insolvency Act, these issues were in fact irrelevant.

Section 137(c) provides as follows:

> "*Any person shall be guilty of an offence and liable to imprisonment for a period not exceeding one year –*
>
> *(a) …*
>
> *(b) …*
>
> *(c) if he contravenes or fails to comply with the provisions of section sixteen, or of sub-section (3), (4) or (12) of section twenty-three unless he proves that he had a reasonable excuse for such contravention or failure.*"

Section 16(1) provides as follows:

> "*The Registrar of the Court granting a final order of sequestration … shall without delay cause a copy thereof to be served by the Deputy Sheriff, in the manner provided by the Rules of Court, on the insolvent concerned …*"

Section 16(2)(b) provides that an insolvent upon whom a copy of such order has been served shall –

> "*(a) …*
>
> *(b) within 7 days of such service lodge, in duplicate, with the Master*

> *a statement of his affairs as at the date of the sequestration order …*"

Sub-sections (3), (4) and (12) of section 23 are not relevant.

It appears from the argument which was presented by the prosecutor, Mr. Kroon, during the course of the trial as well as on appeal, that he was under the impression, because of the definition of "*sequestration order*" in the Insolvency Act, that service of the provisional order of sequestration was sufficient in order to bring the case within the ambit of section 137(c). "*Sequestration order*" is defined in section 1 of the Insolvency Act as meaning "*any order of Court whereby an estate is sequestrated and includes a provisional order, when it is not been set aside*." It is quite clear, however, that both Mr. Kroon and the Regional magistrate misconstrued the import of the provisions of section 16 which I have set out above. In his judgment the magistrate merely states as follows:

> "*Die trustee het 'n verklaring afgelê dat daar 'n versuim was om so 'n vermoënstaat in te handing. Beskuldigde het insolvent geword ongeveer Desember 2001. Tot en met 6 Februarie 2003 is geen vermoënstaat by die Meester van die Hooggeregshof in gedien nie. Die wet plaas 'n verpligting op die beskuldigde om so 'n vermoënstaat by die Meester in te dien. Beskuldgde erken dat hy die vorm reeds in Januarie ontvang het, dit moes al lankal ingehandig gewees het. Beskuldigde was uiters nalatig oor die kwessie wat sy regte en sy verpligtinge was. Sy optrede grens aan roekeloosheid. Selfs al het hy so 'n staat in gedien in Januarie is die betrokke artikel steeds oortree. Dit is genoegsaam vir 'n skuldigbevinding op die klagte.*"

The form to which the Regional magistrate was referring was a form allegedly sent to him by the trustee. It had nothing to do with service of the final order of sequestration.

It is, in my view, abundantly clear that in order for a conviction to follow upon a

charge such as that confronting the accused it was essential for the State to have proved that the final order of sequestration had indeed been served upon the appellant and that he had failed to deliver his statement of affairs to the Master within seven days of such service. Should any authority be required for so clear a position then reference may be made to R v Jordaan 1956(4) SA 94 (T) where, at 99B – D the following was stated:

> "*The fourth count alleged a contravention of sec. 137 (c) read with sec. 16 (1) (b) of the Insolvency Act. This count alleged a failure to lodge with the Master a statement of the insolvent's affairs in duplicate within a period of seven days of the service of the order of sequestration. The final order of sequestration was granted on the 22nd October, 1953. It is alleged that it was served on him on the 21st November, 1953, and that he ought to have delivered his statement of affairs in duplicate within seven days after the latter date. The argument on this count was that there was no proof of service such as is required by the Act. Sec. 16 (1) (b) provides that*:
>
> > 'a final order of sequestration shall be served upon the insolvent concerned in the manner provided by the Rules of the Court which made that order, and when the order has been served upon the insolvent, he shall within seven days of such service lodge with the Master a statement of his affairs in duplicate . . .'
>
> *It is therefore essential for the Crown to prove that the final order of sequestration has been served upon the applicant in a manner provided by the Rules of the Court which made that order. The Court which made the order was this Court and the final order had therefore to be served in a manner provided by the Rules of this Court. … The facts here were that the necessary statement of affairs was sent to the Master more than seven days after the 21st November, but in order to obtain a conviction on this count it was clearly necessary for the Crown to prove that there had been service in terms of the Rules of Court, the date of that service and failure to lodge with the Master the statement of his affairs within seven days of such service - that is service in the*

manner provided by the Rules of Court. The Crown failed to prove these necessary facts and therefore there ought not to have been a conviction on count 4."

Similarly, in the present case, the State failed to prove the necessary fact of service of the final order and, in the circumstances, the Regional magistrate erred in convicting the appellant on this count.

Count 6

On this count the appellant was convicted of fraud. The gravamen of the charge against appellant appears from the charge sheet, namely:

"*Whereas the accused had a legal duty to disclose the fact that he had previously been declared insolvent, when applying for credit or obtaining a loan of money or obtaining goods or services on credit and whereas the accused, being an unrehabilitated insolvent, did on or about 5 December 2001 … unlawfully, falsely and with intent to defraud gave out, and pretended expressly or impliedly, to Priscilla Mary-Ann Vermaak, or Cape Paving Supplies CC that he had not been declared insolvent and/or that he was financially in a position to pay for goods or services which Priscilla Mary-Ann Vermaak or Cape Paving Supplies CC supplied and the accused, to the prejudice or the potential prejudice of Priscilla Mary-Ann Vermaak or Cape Paving Supplies CC induced them to grant him credit and/or to supply him with goods or services to the value of R3 600,00 well-knowing that he had been declared insolvent and/or that he was not financially in a position to pay for such goods or services.*"

The alternative to this charge was one of having contravened section 137(a) of the Insolvency Act by obtaining credit to an amount exceeding R20,00 from Vermaak or Cape Paving Supplies CC without previously informing them that he was insolvent.

With regard to this count as well a great deal of fruitless time and energy was expended on pursuing a conviction against appellant when it had, by the conclusion of the aforesaid Vermaak's evidence, become quite clear that no conviction could properly follow.

In her evidence Ms. Vermaak testified that she had dealt with the appellant on a number of previous occasions. On each of these occasions goods had been ordered by appellant either personally or through his secretary. It had been the invariable practice that appellant would, before delivery of the goods to him, pay for such goods either by way of cash or by credit card. If appellant paid by cheque she would not cause the goods to be delivered until such time as the cheque had been cleared by the bank. With regard to the incident giving rise to appellant's conviction, Ms. Vermaak stated that she received a telephone call from appellant's secretary ordering 5 000 bricks to the value of R3 600,00. Appellant was to "*pop past*" to pay. She duly telefaxed the order through to the supplier of the bricks and they were in due course delivered to appellant. Considerable evidence was led as to whether or not Ms. Vermaak was aware of the fact that appellant had been provisionally sequestrated when, on 5 December 2001, she dealt with him. A great deal of evidence was also led concerning purported attempts by appellant through the good offices of Bruce Bok to make payment in respect of these bricks.

In the view that I take of the matter it is not necessary to determine any of these issues.

In S v Clifford 1976(1) SA 695 (AD) the following was stated at 701C – E:

> "*Having regard to these various decisions, I am of the opinion that, in general, an insolvent 'obtains credit', within the meaning of these words in sec. 137 (a) of the Insolvency Act, where he enters into a transaction with another person in terms whereof such other person entrusts the insolvent with his property upon an undertaking by the insolvent to pay or (in the case of a loan) repay a sum of money at some time substantially in the future. The concept underlying the*

section is that the other person would presumably not have parted with his property on those terms had he known of the insolvency. This is not intended to be a closely defined or an exhaustive statement of the position. There may be other cases of obtaining credit which would not fall within its terms…"

See too: Reyneke v Wetsgenootskap van die Kaap die Goeie Hoop 1994 (1) SA 359 at 365.

In her evidence Vermaak stated, *inter alia*, as follows:

"*The owner of our company because he was getting upset as well because I was as basically stressed out about this amount because I did something which is … I should not have sent bricks out without getting payment …*"

Under cross-examination she was asked the following question:

"*Q* *You said I did something I should have send out, not have send out bricks without receiving the money. Did you say that?*

A *Ja.*"

It was further put to her that had appellant given her a cheque in payment she would not have caused the bricks to be delivered until such time as the cheque had been cleared. She confirmed that this was so.

Finally, the following question was put to her:

"*Q* *I also put it to you that in terms of your own evidence that you made a mistake. Some or another the bricks went out which is against your policy as you indicated to the Honourable Court without having been paid for. You made a mistake by allowing that bricks to go out without being paid for. It was an error on your part. (sic)*

A It is an error I do agree with you."

The Regional magistrate made no reference whatsoever to these passages in the evidence of Ms. Vermaak. He dealt at some length with the issue as to whether or not Ms. Vermaak had been aware of appellant's insolvent status and having found that appellant had failed to disclose such status to her he then stated as follows:

> "*Die goedere is op krediet teen normale besigheidspraktyk by die betrokke besigheid verkry deurdat die regsplig wat op beskuldigde gerus het nie uitgevoer is nie.*"

His finding in this regard runs entirely counter to the evidence of Ms. Vermaak and cannot be supported. There is, quite simply, no evidence that appellant induced Vermaak to grant him credit. In these circumstances appellant is entitled to his acquittal on this count.

Conclusion

In the circumstances the following order will issue:

1. The appeal against conviction on count 1 fails and the conviction and sentence of appellant on this count are confirmed.

2. The appeal against the convictions on counts 4 and 6 respectively succeeds and the convictions and sentences on these counts are set aside.

3. The Registrar is directed to deliver a copy of this judgment to the Secretary of the Eastern Cape Society of Advocates.

_____
J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

_____

E. REVELAS
JUDGE OF THE HIGH COURT

Appearing on behalf of appellant: In person

Appearing on behalf of respondent: Adv. L. Kroon