THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)
CASE NO: A 659/2010

In the matter between:

FLORIS LEWIES Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON : 1 APRIL 2011

SABA AJ

1. The appellant in this case was legally represented throughout the proceedings in the court a quo where he was convicted of two counts of fraud on 9 July 2010. He was sentenced to two years direct imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act 51 of 1977. The charges were taken together for purposes of sentence. The application for leave to appeal against his conviction and sentence were refused by the court. The appellant successfully petitioned this Court on 7 September 2010 and he now prosecutes the appeals against conviction and sentence.

2. After the perusal of the record, it appeared that the appellant had pleaded to one main count of fraud but was convicted of two counts of fraud. At the beginning of the hearing of this application, both counsels agreed that the conviction on two counts of fraud, instead of on the main count, was an irregularity on the part of the

magistrate. This court noted it as such on the record and the appeal proceeded against a conviction of the main count of fraud and against the sentence.

3. According to the charge sheet, the appellant is alleged to have made false representations to one Stefanus Theron and Sophia van Rooyen by taking monies (totalling R13 290, 00) and pretended to pay the money to an attorney who would represent them in their civil claims.

4. It is common cause that Christo Swarts introduced Theron to the appellant when Theron approached him looking for an attorney. It is also common cause that Theron and the appellant met each other after that and the appellant promised to find an attorney who would assist him with regard to a claim. It is common cause that the appellant asked Theron to provide an amount of R3000,00, saying it was required by the attorney for his services. It is also common cause that Theron gave the appellant a sum of R2 700,00.

The State case was based on the evidence of the following witnesses:

5. Stefanus Theron testified that the appellant told him that the attorney he arranged for him was in Cape Town but did not say who it was. Appellant later informed him that his case could not be dealt with in the magistrate Court as it involved a large sum of money and would have to be dealt with in the High Court. Theron was asked to provide a further amount of R300, 00 to the R2700, 00 he had given to him. He gave the appellant the R300, 00 and two weeks later the appellant asked for another R270,00 apparently for the registration of the case in the High court. Theron gave it to him. In March 2007, the appellant asked for another R3000,00 which he claimed was for the Compensation Commissioner's fees. He gave the appellant a sum of R2000,00 as he did not have the whole amount and the appellant agreed to lend him R1000,00 to make up for the R3000,00. Of the R1000,00, he only paid back R300,00. The appellant contacted him again about a medical report. He gave him a further R750,00

6. The appellant approached him again for further amount of R3000, 00 which he claimed was for the appointment of two consultants who would monitor the income of the farmer. He gave the appellant a sum of R1500 and van Rooyen gave him the other R1500,00 in the instalments of R600,00 and R900,00. He had previously

introduced van Rooyen to the appellant because she also wanted an attorney who would assist her with a claim. Van Rooyen gave the R600, 00 to Theron for him to pay it over to the appellant and the balance of R900,00 was later given to the appellant at the appellant's home by van Rooyen while she was in the company of Theron and her son Kerneels. He also testified that van Rooyen also paid the following amounts to the appellant, R3000,00 and a sum of R270,00.

7. He said he never received any receipts for the monies that he gave to the appellant. When he realised that nothing was happening about his case, he approached the appellant and made some enquiries. The appellant told him that the advocate handling his case had committed fraud and could not be found. Theron contacted his brother who is a member of the police service and they laid a charge against the appellant. The appellant later called him and asked him not to persue the case and offered to repay the amounts. He went to the appellant's place of employment, the Magistrate Court in Grabouw with Kerneels. The appellant gave him a sum of R50,00 for their taxi fare back home. According to Theron the appellant had never told him about any union or a Steedsman who was apparently going to represent him in the case. Had he done so, he would have contacted the union directly.

8. Van Rooyen testified that after she heard about the appellant from Theron she and Kerneels approached the appellant regarding the issue of an attorney. The appellant asked her to bring a sum of R3000. She withdrew the amount of R3000 there and then and gave it to the appellant in the presence of Kerneels and Theron. Some time after, the appellant phoned and said she needed to pay another R 270. She asked Kerneels and Theron to withdraw the money from the bank and pay it to the appellant. Theron later told her that they paid the money over to the appellant. Thereafter, the appellant again said he needed another R1050. She asked Kerneels to withdraw it and he gave it to appellant. She claimed she gave the amount of R900 to Theron to give to the appellant while she, Kernels and Theron were in the car at the appellants home. The appellant counted the money in front of the three of them. She said she never saw any Steedsman or the attorney apparently arranged by the appellant. She later heard from Theron that he had laid a criminal complaint against the appellant.

9. Kerneels confirmed that Theron introduced his mother to the appellant. The appellant had requested that his mother provide R3000,00 for the attorney's fees. He and his mother withdrew the R3000,00 and gave it to the appellant in the presence of Theron. After some time, Theron told him that the appellant wanted his mother to pay R1 500, 00 more for consultants who had to do an investigation about the income and expenditure of the owner of the Krabbefontein farm. At that stage, his mother worked at Hermanus so he and Theron went to her and told her about this R1 500, 00. His mother gave them R600, 00 because she did not have the full amount. He and Theron gave the appellant the R600, 00 in front of the Court building. On a particular Saturday he, Theron and his mother went to the appellant's house and gave him a sum of R900,00. They found him plastering his house with two other people. He said the appellant never told them about a Steedsman or lawyer Festus.

10. The appellant then testified that in February 2007 he met Theron through Christo Swarts. Theron told him that he wanted an attorney to oppose an eviction application against him. He spoke to an advocate Festus who told him that he did not have time to do the case. He then spoke to a Steedsman who was representing farm workers in a Union. He gave Steedsman, Theron's phone number. Some time after that, Theron informed him that he was supposed to meet Steedsman in front of the "711" shop but Steedsman did not turn up. Theron gave him a sum of R2 700,00 and asked him to give it to Steedsman. He said Steedsman had charged R3000,00 for the case but he did not have the full amount so Theron asked him to lend him the R300,00. He did so and he gave the R3000,00 to Steedsman. He later heard from Christo that Theron wanted his R2700,00 back. He asked Theron to come and see him regarding the money and also offered to give him R50 for taxi fare. He told Theron that since he is the person who took the money from him, he would give it back as he felt responsible. Theron thereafter came to him with his brother. They were rude to him and threatened to lay a charge against him. He denied having any dealings with van Rooyen or taking money from her. He stated that he did not have the contact details of either van Rooyen or Theron and only contacted them through Christo. He could not recall which Union, Steedsman belonged to. He also denied that he was given any money by van Rooyen or Theron. He only recalled seeing them driving past his house and that they had only greeted one another.

11. In the appeal, the counsel for the appellant argued that because of the contradictions in the versions of the witnesses and the manner in which the court had posed questions to the appellant, this court should come to a different conclusion, further that and that the sentence imposed by the magistrate is shockingly inappropriate. The counsel for the state argued that the magistrate was correct in accepting the version of the state as the contradictions were not material.

12. This court is mindful that a trial court's findings of fact and credibility are presumed to be correct as the trial court has the advantage of seeing and hearing the witnesses and is in a far better position to determine their credibility. See **Dhlumayo and another** 1948 (2) SA 677 (A) at 705. Also **Francis** 1991 SACR 198 (A) at 204C-F. In **S v Hadebe** 1997 (2) SACR 641 (SCA) at 645e-f, the following was said:

> "In the absence of demonstrable and material misdirection by the trial court, its findings are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong".

13. The record shows that the magistrate considered the contradictions in the evidence of the state witnesses, especially in relation to the amounts given to the appellant, but found them not to be material. Despite the contradictions, he found Theron to be a credible witness and accepted van Rooyen's evidence despite the fact that she was not certain about the amounts she had paid or had asked her son to pay over to the appellant. He also found Maska's evidence to have been corroborated on material aspects by both Theron and van Rooyen.

14. The Supreme Court of Appeal when considering the question of discrepancies between a witnesses evidence and prior statements in **S v Mafaladiso 2003(1) SACR 583** stated as follows:

> "The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language differences and cultural differences between the witness and the person taking down the statement which can

stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that, not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which effect of the contradictions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions- and the quality of the explanations- and the connection between the contradictions and the rest of the witness' evidence".

15. That case appropriately addresses the concerns raised by Mr Hanekom who appeared on behalf of the appellant with regard to the contradictions in the versions of the state witnesses. If one considers the level of the witnesses' education and sophistication(especially Sophie van Rooyen who left school at standard two), their farms background, they would hardly be in a position to give the details of the amounts in the same manner as more sophisticated witnesses. It is highly unlikely that such witnesses would also have made up all the details surrounding the payments of these amounts to the appellant. The record does not indicate any motive on their part to falsely implicate the appellant. The most important question to consider is whether the truth had been told by these witnesses. From the record there appears to be no reason for suspecting that Theron and Masak had used van Rooyen's money for their own benefit. Further, I am also satisfied that the magistrate did not unduly descend into the arena, as the counsel for the appellant suggested. The case of **S v Owies 2009(2) SACR 107 at page 112 para H –** I, referred to by Mr Hanekom is distinguishable from this case as in that matter the magistrate had taken over the cross-examination of the witnesses completely. That is not the case here. According to the record, the magistrate asked questions clarify matters that were not clear from the testimony of the witnesses and that did not amount to cross-examination. From a careful perusal of the record, I am satisfied that the magistrate was justified in finding accepting the version of the State witnesses and rejecting the appellant's version as not being reasonably possibly true. The magistrate, however, was clearly wrong in convicting the appellant on two counts of fraud. The magistrate should have convicted the appellant on the main count of fraud relating to eight instances mentioned in the annexure to the charge sheet.

16. From the record, it is clear that in imposing the sentence of two years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977, the magistrate took into account the personal circumstances of the appellant, the interests of society as well as the seriousness of the offence without overemphasizing any of the factors. He also took into account that the offence was carefully planned, which is of serious concern especially when taking into account the fact that the victims were merely farm workers who did not earn much. Infact, Theron was not even employed when these huge amounts were taken from him. The unfortunate part of it all is that the victims did not achieve what they wanted to when they approached the appellant. It was argued that the appellant has already served two months of the sentence and is now left with another two months to serve if the appeal is not successful. I find the sentence imposed by the magistrate to have been lenient and therefore, do not find any reason for interfering with it

17. In the result the following order is proposed

(1) The magistrate's order is substituted with the following order

(a) The accused is convicted on the main count of fraud

(2) The appeal against sentence is dismissed and the sentence of the magistrate is confirmed.

SABA, AJ

I concur and it is so ordered.

SALDANHA, J