

REPUBLIC OF NAMIBIA



NOT REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 07/2019

In the matter between:

**THE STATE**

and

**ISAK SERFONTEIN**

**Neutral citation:** *S v Serfontein* (CC 07/2019) [2019] NAHCMD 01 (17 January 2020)

**Coram:** LIEBENBERG, J

**Heard:** 23 – 27 September 2019; 12 November 2019

**Delivered:** 17 January 2020

**Flynote:** Criminal Procedure – Single witness evidence – Court to follow cautious approach especially when single witness is an accomplice – To reduce such risk court is to look for corroborating reliable evidence from other witnesses – Single witness stood nothing to gain as the matter against her has been finalised – Furthermore her evidence is corroborated by state

witnesses – Court satisfied that evidence of the single witness (also being an accomplice) is the truth and reliable.

Criminal Procedure – Evaluation of evidence – Accused's defence is that of having no knowledge of proceeds of unlawful activities deposited into his bank account – Whether that defence is reasonably true – When considering accused's version against proved evidence accused had access to information contained in bank statements over a substantial period of time – Accused's defence not reasonably true.

Criminal Law – Accused charge with 31 counts of fraud – Accused's involvement commenced after proceeds of unlawful activities deposited into his bank account – Misrepresentation to complainant made by another and not accused – Accused cannot be charged with fraud neither alternative count of theft by false pretence – Theft a continuing crime – Conviction on second alternative count of theft proper in the circumstance.

Criminal Law – Accused charged with one count of contravening s 6(a), (b) and (c) of the Prevention of Organised Crime Act 29 of 2004 (POCA) – Particulars of charge also incorporating elements of fraud patched together with the provisions of sections 4, 5 and 6 of POCA – The provisions of different sections under POCA cannot be intertwined – State to decide which offence to charge accused for – State subsequently amended charge to a contravention of s 4(b)(i) of the Act.

**Summary:** Accused and his former wife were jointly charged with 34 counts of fraud and one count for contravening s 6(a), (b) and (c) of the Prevention of Organised Crime Act 29 of 2004 (POCA). The wife having pleaded guilty and the accused not guilty, a separation of trials was ordered. She was duly convicted and sentenced on 34 counts of fraud and one count of money-laundering. The undisputed facts are that she syphoned large sums of money from her employer's account and deposited the proceeds of her unlawful activities into the account of the accused. The accused in this matter pleaded not guilty to all the counts and in his defence stated that he had no knowledge

of his former wife's illegal activities as she operated his internet banking account and also made all the deposits into his account.

*Held*, that, when considering single evidence a court should approach such evidence with caution especially if the key witness was an accomplice who may try to shift the blame onto the accused and extricate herself. However, such risk would be reduced if the single evidence of a witness is corroborated by other reliable evidence. Witness in this instance stood nothing to gain by falsely implicating the accused, thus reducing the risk.

*Held*, further that, when considering the accused's version against the proved evidence, it shows that the accused did access his bank account on various occasions and therefore familiarised himself with the information contained in his bank statement.

*Held*, further that, the accused was not directly involved in the misrepresentation of the complainant, therefore he could not be convicted of fraud, but rather on the second alternative of theft.

*Held*, further that, the provisions of sections 4, 5 and 6 of POCA create separate and distinct offences and cannot be intertwined, therefore the State has to decide which offence to charge the accused for.

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## ORDER

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Counts 3 – 34:

Main and 1<sup>st</sup> Alternative: Not guilty and discharged.

2<sup>nd</sup> Alternative: Theft – Guilty.

Count 35:

Contravening s 4(b)(i) of the Prevention of Organised Crime Act 29 of 2004 – Money-laundering: Guilty.

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## JUDGMENT

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LIEBENBERG J:

### *Introduction*

**[1]** The accused and his former wife, Stephanie Serfontein (hereafter referred to as 'Stephanie'), were jointly charged with 34 counts of fraud<sup>1</sup> and one count in contravention of s 6(a), (b) and (c) of the Prevention of Organised Crime Act 29 of 2004 (POCA).<sup>2</sup> Having pleaded guilty to the fraud charges Stephanie was convicted as charged and the 34 counts taken together, sentenced to 13 years' imprisonment of which 5 years' imprisonment were suspended on condition of good behaviour. She was sentenced to a further five years' imprisonment on count 35 for money-laundering in contravention of s 6 of POCA. The sentences were ordered to be served concurrently. This led to a separation of trials in terms of s 157(2) of the Criminal Procedure Act 51 of 1977 (hereinafter the CPA) and the accused currently appearing before a differently constituted court, though indicted on the same counts except for counts 1 and 2 having been withdrawn against him.

**[2]** The accused pleaded not guilty to all counts and in amplification of his plea offered a plea explanation in terms of s 115 of the CPA, - setting out the basis of his defence. It is specifically denied in respect of all counts that he

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<sup>1</sup> In the 1<sup>st</sup> Alternative – Theft by False Pretence;  
In the 2<sup>nd</sup> Alternative – Theft.

<sup>2</sup> 'Section 6 Acquisition, possession or use of proceeds of unlawful activities

Any person who-

- (a) acquires;
- (b) uses;
- (c) has possession of; or
- (d) brings into, or takes out of, Namibia,

property and who knows or ought reasonably to have known that it is or forms part of the proceeds of unlawful activities commits the offence of money laundering.'

acted with common purpose with Stephanie when committing fraud, or that he affected payments referred to in column 'H' of the indictment from his savings account at Nedbank. He further stated that he was wrongly brought under the impression by Stephanie that she had started a new business where lubricants are sold to mines; he accordingly allowed her to use his bank account for purposes of that business. He believed her when she explained that she did not want her employer, Ferrodrill (Pty) Ltd Namibia (Ferrodrill) to become aware of her running a business on the side. The accused further made several formal admissions which significantly curtailed trial proceedings.

*Facts not in dispute*

**[3]** It is common ground that during the period extending from December 2009 up to July 2012 Stephanie was employed by Ferrodrill as the Office Administrator and as such responsible for the uploading of payments of the company creditors onto the Bank Windhoek payment system. Once authorised by the Managing Director, Mr Rheeder van Wyk, payment would automatically be released (by the system), summarily crediting the creditor's account. The banking details of the creditors were already uploaded onto the system but could be changed unilaterally and without authorisation by Stephanie. This enabled her to change the banking details of two creditor accounts, to wit, Omina Supplies and Navachab Mine (Navachab), affecting payments into the saving accounts of her daughter Janine Goosen and the accused instead. Upon receipt of invoices from these two creditors, Stephanie reproduced same but inflated the amounts. The total sum of N\$17 617 781.44 was diverted to the two savings accounts in this way. Subsequent thereto electronic transfers of funds (EFT's) were made to the creditors, settling the actual amount reflected in the invoice submitted to Ferrodrill for payment. Though the actual prejudice suffered by Ferrodrill amounts to N\$4 253 013.50, the accused was charged with the lesser sum of N\$4 038 691.90, excluding the amounts reflected in counts 1 and 2 which were withdrawn. The accused admits that he and Stephanie expended the money that remained in the account.<sup>3</sup>

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<sup>3</sup> Exhibit 'C' para 7.11.

**[4]** Also not in dispute is that the accused was married to Stephanie but that she had left the common home in March 2011 where after they divorced in November of the same year. Despite the breakup, funds continued being paid into the accused's savings account from where electronic transfers were made to the creditors. This continued until Stephanie's arrest on the 23<sup>rd</sup> of July 2012.

#### *State's Case*

**[5]** Stephanie testified that shortly after their marriage in March 2006 she and the accused were in serious financial trouble due to several failed business ventures of the accused in the past. For purposes of this judgment there is no need to deal with her evidence in this regard in any detail. Suffice it to say that at some stage the bank revoked their bond and sold the house while her car was repossessed. A truck and trailer bought and financed by Scania and used in the accused's transport business were also repossessed due to non-payment. In 2009 they filed for bankruptcy but this did not materialise.<sup>4</sup> At the time of their arrest the accused's independent income was minimal and irregular, deriving from him acting as a 'transport broker' against payment of a brokerage fee. According to Stephanie this was merely a front as they were actually living off her salary and the money syphoned from Ferrodrill. She said the morning after her arrest she made a detailed statement to the police and, from the outset, admitted that she and the accused were both involved. Her implicating the accused is therefore not an afterthought, but shows consistency in her version.

**[6]** Because their lifestyle had significantly improved and the accused questioned her on how that was possible in view of their dire situation, Stephanie told the accused already in December 2009 that she was stealing from Ferrodrill. He thereafter encouraged her to continue doing so and they

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<sup>4</sup> Government Gazette No. 4203 dated 30 January 2009 – NOTICE OF SURRENDER OF DEBTOR'S ESTATE.

agreed to use his savings account with Nedbank as conduit to facilitate payment of the invoices submitted by the creditors. She explained that because the amounts for transfer of funds exceeded the limit on the accused's account at the time, it was required of him to physically visit the bank and raise the limit; this was done on one or two occasions. She provided the accused with the banking details of Navachab as a creditor, which he uploaded onto his laptop. She further informed the accused that during the transfer of funds to Navachab, he had to insert Ferrodrill as reference. She would provide him with the amount to be transferred where after the accused did the actual transfer online by way of internet banking. At no stage did she make any of the transfers herself as she had no access to his bank account.

**[7]** As already mentioned, Stephanie continued using the accused's account for deposits even after their separation and divorce. With regards to the accused dividing the money between them, she said this arrangement was agreed on after they separated and is evident from the periodical transfer of funds made into her account by the accused. This was to keep up his personal lifestyle after their separation. When she wanted to bring an end to her fraudulent scheme, he threatened to expose her and put the blame on her; she believed him. At some stage he threatened to do her and her children physical harm if she were to stop. This compelled her to continue.

**[8]** Countering the accused's assertion that she had told him that the extra income was generated from her private business by selling lubricants to the mine, Stephanie explained that on the scale she embezzled funds, she would have required a warehouse and staff; there would also have been a paper trail. Neither would it have been necessary for her to continue working for a paltry salary of N\$7 500 per month if her business was that lucrative. I pause to observe that the accused disputed the need for these extras. I will return to this aspect of the evidence later.

**[9]** Under cross-examination Stephanie disputed that she had access to the accused's Nedbank account and reasoned that if that was indeed the case, how could the cash withdrawals of substantial amounts by the accused be explained? The accused either transferred money into her account or handed her substantial amounts in cash. She said the money was paid into his account and he would execute her instructions as she did not have access to his account. According to her this came about because he all along knew the money was unlawfully obtained and that his bank account was used to hide the proceeds. After they separated she would prepare a spreadsheet for the benefit of the accused, reflecting the deposits and the amounts to be transferred to Navachab.

**[10]** Mr Samuel Zambwe, the Forensics Manager of Nedbank, testified to the procedures followed when the accused opened a savings account with Nedbank in September 2009 and simultaneously applied for internet banking. The accused was the only authorised person to operate on the account and the only user with a password. It is common cause that the accused created and uploaded his own password. Although the system allowed for joint account holders with each having his/her own password, no application was made to that effect. There was thus only one internet banking user on the account, namely the accused.

**[11]** Bundles of bank documents handed into evidence by agreement and admitted by the accused in terms of s 220 of the CPA essentially proved that during the electronic transfers made in respect of counts 3 – 34, the profile credentials used during the login were that of the accused; that his password was used and that there was just one registered user for purposes of online banking.<sup>5</sup> Further admissions were made as reflected in a bundle of printouts of debit/credit transactions on the accused's account<sup>6</sup> with regards to 32 electronic deposits made from the account of Ferrodrill into the savings account of the accused and 31 electronic transfers made from his account to

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<sup>5</sup> Exhibit 'O'.

<sup>6</sup> Exhibit 'P'.



Navachab and one (1) to Omina Supplies. These transactions were made via internet banking, using the profile credentials of the accused.

**[12]** In cross-examination Mr Zambwe explained that although it would not constitute a criminal offence if a user gives his/her profile credentials to a spouse, this is discouraged by the bank and clients would be doing it at their own risk.

#### *Defence case*

**[13]** The accused was the only witness testifying in his defence. Whilst still married to Stephanie the accused in December 2009 realised that she started buying luxury items and he could not figure out where the money came from as they, according to him, did not have 'a lot of money'. When he asked her, she explained that she had started a business where she sold lubricants to mines in Namibia who placed their orders with her and she would deliver via the supplier directly to the mine. He said her role would be that of a facilitator which did not require of her to have a warehouse, equipment or staff. He believed her when she said this was a tender previously awarded to Ferrodrill which she took over; also that she could supply at a cheaper price. It was agreed that, as Stephanie was not allowed to run her private business whilst employed at Ferrodrill and the use of her own bank account likely to raise suspicion if used for her business, she would use the accused's savings account. He then provided her with his bank credentials, giving her full access to his account.

**[14]** The accused also had a debit card. He said though he was the only person having access thereto, he did give Stephanie the PIN code when using his card for purchases. As the daily limit on cash withdrawals was N\$1 000, he was required to withdraw larger amounts at the cashier. This was normally done on the instruction of Stephanie when substantive cash withdrawals of N\$10 000 and N\$20 000 were made; the bulk of which was handed to her. He confirmed that this arrangement continued even after they separated in March/April 2011 and that she allowed him to continue using the

money for his personal benefit. The accused is not clear from whom he heard – the police or Stephanie herself – that the moneys paid into his account were the proceeds of a fraudulent scheme run by Stephanie. This was only in July 2012.

**[15]** On 29 September 2011 the accused opened an account with First National Bank (FNB) at the Maerua Branch. He explained the reason being to separate his personal income from income generated from his transport broker business. It should be noted that this is the first time that he deemed a separation of income necessary. Prior thereto and during all his earlier business ventures, he had been using his personal bank account (savings) as the business account.

**[16]** Copies of his bank account for the period 29 October 2011 until 21 July 2012 reflect substantial deposits made into the FNB account and referenced as 'Salary', totalling N\$278 793.22. Cash withdrawals, debit card transactions and internet payments were virtually made on a daily basis and to such an extent that within two days after Stephanie's arrest, the amount of N\$10 558.67 were withdrawn, leaving a closing balance of N\$65.

**[17]** When asked to explain the salary that he so earned and where he was employed, the accused said that the money came from Ferrodrill and that he told Stephanie that he should be paid a salary. She thereafter transferred the money into his account. He was however unable to explain who decided on the salary he were to receive, as the amounts differed from one month to the next. On the accused's own evidence it is evident that moneys paid into his FNB account mainly derived from the deposits made by Ferrodrill.

#### *Evaluation of evidence*

**[18]** According to the accused, on average he earned N\$10 000 per month for the period 2009 – 2012 from his business ventures. The accused's evidence is confirmation that the couple experienced serious financial problems, mainly due to these unsuccessful business ventures. Though

maintaining that he generated an income from his transport broker business, it is evident that it could not have covered the debt accumulated during that period as, for some months, there was no income. To this end it corroborates Stephanie's evidence when she explained how she was the one contacted by the creditors for payment of their debt. Payments only became possible after she generated extra income from her fraudulent scheme starting in October 2009. The significance of this evidence is to demonstrate that the couple was unable to maintain a decent lifestyle. Against this backdrop, the accused's assertion that there were adequate resources and thus no need for Stephanie to steal, has a somewhat hollow ring to it. They were in dire need of additional income and according to Stephanie this prompted her to start stealing from her employer.

**[19]** What is further evident is that both benefitted from the proceeds of the crime – even after they got divorced. Prior to the first Ferrodrill deposit made into the accused's accounts, substantial amounts had been transferred between 24 September and 09 December 2009 from the account of Janine Goosen into the accused's account totalling, N\$146 000. Transfers were also made into the account of his brother during this period. It is not disputed that Stephanie operated the account of Janine and made these transfers. The spreadsheet prepared by Stephanie<sup>7</sup> clearly paints a picture where the accused became dependent on the money deposited into his account throughout the whole period. According to him Stephanie continued making these payments out of her own and not at his insistence.

**[20]** What the amounts paid into the accused's account show is that he already received substantial amounts into his account even before the first Ferrodrill deposit was made on 18 December 2009. The accused claims that he only became aware of these deposits made into his account during early December 2009. He advanced the further explanation that he only received his bank statements quarterly by mail. The accused's purported ignorance

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<sup>7</sup> Exhibit 'L'.

stands in sharp contrast with his bank statements<sup>8</sup> reflecting that several cash withdrawals were made at the cashier inside the bank during that period; withdrawals that could only have been made by the accused himself. Whilst doing so, he familiarised himself with the balance in the account before withdrawing cash amounts ranging between N\$3 000 and N\$6 000 at a time. This much the accused admitted.

**[21]** On a question why he did not detect these deposits made over a period of three and a half months, he explained that he was not interested in internet banking and never logged onto his account. His evidence on this score again stands in sharp contrast with the printout of logins and numerous transactions made on the accused's account during this period.<sup>9</sup> According to him this was all done by Stephanie as he claimed not to have understood 'these things' (internet banking). Later during cross-examination he qualified this to say that he only had limited knowledge of the procedure and struggled, but managed. It is common cause that after the accused and Stephanie separated, he occasionally operated his bank account through internet banking.<sup>10</sup> Notwithstanding, he disputes personally making any electronic transfers to Navachab during the relevant period. It is further the accused's evidence that he did notice large amounts deposited into his account by Ferrodrill and the subsequent transfer of funds to Navachab. He explained that he did not question Stephanie about it as she had earlier explained to him about her business and it being successful.

**[22]** What the accused on his own version was unable to explain is how Navachab who *ordered* lubricants from Stephanie and delivered directly to them by the supplier, could be *credited* instead of having to pay for the goods ordered. In this scenario they (Navachab and Omina) were *debtors* of Stephanie and could therefore not have been *creditors* of large sums of money transferred to their account. As the accused rightly remarked, this did

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<sup>8</sup> Exhibit 'J 3'.

<sup>9</sup> Exhibit 'O'.

<sup>10</sup> This is supported by the fact that from July 2012 until 2014 the accused operated his account online by himself.

not make sense. Furthermore, he knew from his bank statement that Ferrodrill was the depositor of these large sums of money.

**[23]** In re-examination the accused said that the mines (Navachab) paid the money into his bank account, from where the supplier(s) were paid. That contradicts his earlier evidence and is neither supported by his bank statements. Absent from his bank statements is proof that any payments were made into his account by Navachab; neither were any payments made to the so-called supplier(s) in Windhoek. This gives a further twist to the accused's version on what he believed was a plausible explanation for the moneys deposited into his account.

**[24]** It was argued on the accused's behalf that Stephanie, as a witness for the state, was a self-confessed fraudster with the ability of making a good impression on the court. Counsel conceded that she indeed made a good impression during the presentation of her evidence. However, her evidence had to be evaluated as that of a single witness, hence the court had to follow a cautious approach in its assessment when deciding whether or not the accused acted hand in glove with Stephanie when syphoning money from Ferrodrill. It was submitted that Stephanie's evidence was not truthful and credible in all material respects while the accused's version when weighed against the totality of evidence adduced, is reasonably true. The state, it was said, did not succeed in proving its case against the accused beyond reasonable doubt; despite the fact that the court might find his version suspicious.

**[25]** Counsel for the accused further contended that the accused was a reasonable good witness and never contradicted himself or admitted having perused his bank account to satisfy himself from where his account had been credited. Also that the accused maintained his position that he was never informed by Stephanie of the true facts as to how she defrauded Ferrodrill.

Lastly, it was argued that the court cannot reasonably infer from the accused's bank statements that he must have appreciated that the money deposited into his account came from Ferrodrill.

**[26]** An essential aspect of the accused's defence is that during cross-examination of Stephanie, counsel made imputations to the effect that, as far as the accused is concerned, Stephanie has a history of dishonesty and on diverse occasions in the past lost her employment as a result thereof. In some instances it involved substantial amounts of money.

**[27]** Against this background, it seems strange and almost disquieting why it did not raise any suspicion with the accused when he noticed a material improvement in their lifestyle and questioned Stephanie about it. Equally alarming, he blindly accepted her explanation and launched no investigation of his own to satisfy himself of the veracity of the explanation. This exercise could be readily achieved by simply consulting his bank statements; something he claims not to have done for a period of two years and eight months. He did not give any explanation as to why he did not look into the matter. It inevitably creates the impression that the accused tried to distance himself from information reflected in his bank statements, either when he went to the bank to facilitate certain transactions on his account, alternatively, when withdrawing money at the ATM or even when his bank statements were mailed to him every three months.

**[28]** The accused's evidence in this regard is further contradictory to formal admissions made by him in terms of s 220 of the CPA when he admitted in para 7.12 of the plea explanation that 32 inflated payments were made from Ferrodrill's account into his account during the relevant period. Although the admissions are qualified at the outset when stating that the accused has no personal knowledge of the facts, the totality of the evidence shows otherwise and is consistent with the state's reasoning that, in order for the accused to have made these admissions, the facts had to be within his personal knowledge.

**[29]** Besides the evidence of Stephanie to the effect that the accused personally operated his bank account by way of internet banking, the evidence undoubtedly established that the accused during the relevant time accessed his bank documents and statements either physically, or electronically. Given the large sums deposited and withdrawn from the account, it seems unconceivable that he did not have any interest to peruse his bank statement, even if unable to do so through internet banking; which was not the case.

**[30]** For the accused not to have observed that Ferrodrill on 32 occasions deposited considerable amounts into his account, seems highly improbable. In view of him already back then harbouring feelings of distrust towards Stephanie, it would have required only one entry reflecting the name Ferrodrill as depositor to have set off the alarm bells in his mind. This however never happened. The question is: *Why?*

**[31]** For determination is whether the accused's defence of ignorance as to the origin of this money is reasonably possibly true namely, that he accepted the explanation advanced by Stephanie. Although he at first said that she was awarded the tender, he changed course in cross-examination to say that it was not on tender but 'rather considered a lucrative client for her business'. This only came about upon realising that tenders are usually advertised.

**[32]** Stephanie's evidence that it would have been impossible for her to run a business of that nature on the side without a premises and employees to physically handle and execute the orders and delivery, was not challenged during cross-examination. To this end her views were shared by Mr van Wyk who was familiar with that field of business. The accused's counter argument that Stephanie did not require a business site or staff because she had an arrangement with the suppliers to deliver directly to the clients (Navachab and Omina), was only disclosed during the accused's testimony and not before.

**[33]** It is an established principle of our law that the opposing party is under a duty 'when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character'.<sup>11</sup> The accused's explanation in this regard falls flat in light of his concession during cross-examination (alluded to earlier in the judgement) that the mines would have been debtors of Stephanie's business and not creditors. Accordingly, there could be no truth in the accused's explanation on this score. There is no plausible explanation by the accused or independent evidence supporting his version (not to say that he is under any duty to provide such evidence).

**[34]** A material discrepancy in the accused's evidence relates to the monthly transfer of funds into his FNB account referenced as a salary deposit. He was clearly unable to come up with any satisfactory explanation in this regard and again passed the buck to Stephanie. Similarly, this was not put to her whilst in the witness-box to afford her the opportunity to explain and defend her character. Quite surprising, there is nothing on the documents before court showing that Stephanie also paid herself a salary every month; neither was it raised with her during her testimony.

**[35]** It is against this background that the state argues that this is confirmation of the original arrangement between the accused persons and subsequent threats by the accused to do her harm. It was submitted that, had it not been for the threats, Stephanie could readily have reverted to transferring the money into Janine's account over which she had control.

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<sup>11</sup> *The President of the Republic of South Africa and Others v South African Rugby Football Union and Others*, 2001 (1) SA 1 (CC) at 37A-B).



These conclusions tend to support the version of Stephanie that the accused was solely in charge of his account.

**[36]** When considering the single evidence of Stephanie as regards the involvement of the accused in the commission of the alleged offences, the court must follow a cautious approach. Moreover, because she is also an accomplice who has intimate knowledge of the crimes committed and therefore able to shift the blame onto the accused and extricate herself from the commission of the crime, thereby reducing her blameworthiness. To reduce the risk involved in her evidence is to look for corroboration in other reliable evidence.<sup>12</sup> The court in *S v Tuzembeho*<sup>13</sup> on the evidence of an accomplice said that corroboration is merely one indicator required to show that the evidence of the accomplice is trustworthy; there could be other indicators to show trustworthiness. The totality of these indicators are referred to collectively as the cautionary rules.

**[37]** When applying these principles to the evidence of Stephanie, it is key to bear in mind that she at no stage during her testimony tried to extricate herself from the commission of any of the 34 counts of fraud emanating from the scheme she developed to syphon money away from Ferrodrill. She furthermore stood nothing to gain from testifying for the state as, by then, she had already been sentenced and a serving prisoner. There was thus no hope of clemency in exchange for her testimony. What appears to be significantly relevant with the assessment of Stephanie's evidence is that, upon her arrest she immediately admitted to defrauding the company and explained her *modus operandi* to Mr van Wyk who, until then, was unable to expose her; neither could the auditors of the company. Sequential thereto she made a statement to the police which culminated in her tendering pleas of guilty on the indicted charges. Her evidence that her version remained consistent throughout, was not challenged; except perhaps for defence counsel's belated submission that in mitigation of sentence she claimed to have received a lesser amount from the proceeds than what she actually received. It should

<sup>12</sup> *S v Gurirab and Others*, 2008 (1) NR 316 (SC).

<sup>13</sup> 1993 NR 134 (HC).

however be borne in mind that she was not convicted and sentenced on any lesser amount, but the full amount as per the indictment. As with the evidence of the single witness, the evidence of an accomplice need not be completely free from defects, provided the court in the end is satisfied that the truth has been told.

**[38]** As far as the evidence of Stephanie implicates the accused, the gist thereof is that from the outset the accused was involved after she let him in on the details of the fraudulent scheme she was running. She backed her evidence with the bank statements of herself, her daughter and that of the accused, explaining the direct involvement of the accused as regards the distribution of the proceeds. To this end, the evidence of Mr Zambwe, the Nedbank forensic manager's evidence corroborates Stephanie's version that she did not have access to the accused's account by way of internet banking, or otherwise. This evidence not only corroborates Stephanie's version, but also militates against the accused's lack of knowledge regarding internet banking and transactions effected on his account.

**[39]** Contrary to the beliefs of counsel for the defence, Stephanie testified in an honest and forthright manner. She was consistent throughout and appeared confident when questioned in cross-examination; neither did she contradict herself in any material respect. As shown in the preceding paragraphs, her evidence is largely corroborated by the evidence of Mr Zambwe and documents received into evidence. For the afore-mentioned reasons and guided by the court's approach followed in *S v HN*,<sup>14</sup> I am satisfied, despite the cautionary rules applicable to her evidence, that Stephanie told the truth and that her evidence is credible and reliable.

**[40]** Next I turn to consider the accused's defence in light of the evidence as a whole and whether it is reasonably true. What is required of the court is to

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<sup>14</sup> 2010 (2) NR 429 (HC) at 443E-F.

decide on the strength of all the evidence adduced whether there exists no reasonable doubt that the accused committed the offences for which he stands charged. The Supreme Court in *S v Homses*<sup>15</sup> cited with approval the dictum from *R v Mlambo*<sup>16</sup> where at 738B it is stated:

‘An accused’s claim to the benefit of a doubt when it might be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.’

**[41]** The accused’s defence in this instance amounts to nothing more than a blunt denial of the offences charged, claiming not to have known that monies paid into his account and from which he benefitted, were the proceeds of unlawful activities committed by Stephanie. Besides the evidence of Stephanie which directly implicates the accused, there is no evidence in support of the accused’s version.

**[42]** When considering the accused’s version against the proved facts – including his own admissions – it is evident that the accused indeed accessed his bank account and was able to operate the system. This is contradictory to his defence of ignorance and has all the makings of an afterthought.

**[43]** The accused’s evidence is further riddled with inconsistencies pertaining to his beliefs in respect of the legality of the source of the income and the sharing of the funds even after he and Stephanie separated and later got divorced. The manner in which the accused assumed ownership of funds deposited into his account and benefitted from, is inconsistent with that of a person who has had no interest in what was going on in his account.

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<sup>15</sup> (SA12-2014) [2016] NASC (8 June 2016).

<sup>16</sup> 1957 (4) SA 727 (AD).

**[44]** For the afore-stated reasons it seems inescapable to come to the conclusion that the defence of the accused is not reasonable possible and falls to be rejected as false where in conflict with that of the state witnesses. I am accordingly satisfied that it had been established that upon learning the origin of the funds deposited into his bank account, the accused from the outset acted hand in glove with Stephanie to pay the rightful creditors and assumed joint ownership of the remaining funds in his account.

*The main and alternative counts: Counts 3 – 34*

**[45]** What the evidence of Stephanie established is that the accused's involvement only started *after* the proceeds of her fraudulent scheme were paid into the accused's bank account. Misrepresentations were made only by Stephanie when inflating the invoices of Ferrodrill's creditors in which the accused played no part. Although he benefitted from the proceeds of these fraudulent transactions, he was not directly and personally involved in making any misrepresentation to Ferrodrill. Though state counsel submitted that the accused encouraged Stephanie to continue with the fraudulent scheme, it was in the end conceded that the accused at no stage personally made any misrepresentation to Ferrodrill and could therefore not be convicted on the main count of fraud, or the first alternative to counts 3 – 34 i.e. theft by false pretence. It was submitted that a conviction on the second alternative of theft on the said counts would be proper.

**[46]** What must be decided next is whether the accused is guilty of the second alternative, namely theft. The elements of the offence of theft are:

- (a) an act of appropriation;
- (b) in respect of a certain type of property;
- (c) which takes place unlawfully; and
- (d) intentionally.<sup>17</sup>

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<sup>17</sup> C R Snyman: Criminal Law (Sixth Edition) at 576.

[47] The rule is that theft is a continuing crime and continues to be committed as long as the stolen property remains in the possession of the thief or somebody who has participated in the theft, or somebody who acts on behalf of such person.<sup>18</sup> In the present instance the accused appropriated funds deposited into his bank account by Stephanie, funds he well knew were the proceeds of unlawful activity. That the accused had the intention to permanently deprive Ferrodrill from their property (money) is evinced by the manner in which these funds were used and disposed of by the accused. These actions by the accused satisfy all the elements of the offence of theft by facts which had duly been established. Hence, the accused cannot escape conviction of the offence of theft in respect of counts 3 – 34.

#### *Count 35*

[48] In this count the accused is charged with the offence of money-laundering in contravention of s 6 of POCA. At the outset it must be said that the particulars of the charge formulated against the accused is a far cry from the provisions of s 6 for which the accused stands charged, but is rather a patching together of the elements of the predicate offence of fraud with the provisions of sections 4, 5 and 6 of POCA, all in one. Whereas the offence of money-laundering under s 6 concerns the proceeds of unlawful activities which, in this instance, derived from the fraudulent activities by Stephanie, I find the prosecution's decision to rehash the particulars of the predicate offence under a charge of money-laundering incomprehensible as these are two separate and distinguishable offences.<sup>19</sup> The particulars of the charge neither follow the wording of the offence defined in s 6, creating the offence. In terms of s 84(3) of the CPA the prosecution may incorporate the same wording when formulating the charge. The charge is cast in the widest of terms possible and alleges that the fraudulent scheme facilitated the accused person(s) to 'gain acquisition, possession, retention, control and use of the

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<sup>18</sup> Ibid at 500.

<sup>19</sup> *State v Henock and 8 Other cases*, (unreported) (CR 86/2019) [2019] NAHCMD 466 (11 November 2019).

sums of money depicted ... in the indictment for their personal benefit' and, by so doing, *misappropriated* a total sum of N\$4 253 013.50.

[49] The 'retention' and 'control' of the proceeds of unlawful activities on behalf of another person to the benefit of such person, is a contravention under s 5 of POCA, for which the accused was not charged. The provisions of different sections under POCA cannot be intertwined to patch together an offence that is not provided for in the Act; the state must decide which offence had been committed by the accused and formulate the charge accordingly so that the accused knows the case he has to meet. See: *Henock (supra)* at para 44.

[50] Whilst the evidence in this instance clearly established that the accused and Stephanie acted in concert to *disguise* the proceeds of the latter's fraudulent scheme from which they acquired the sum of more than N\$4 million, the state, realising at the eleventh hour that the accused was charged under the wrong section of POCA, made application to amend the charge in count 35 by substituting it with a contravention of s 4(b)(i). The defence did not oppose the application and leave was granted to amend the charge accordingly.

[51] There can be no doubt that the arrangement between the accused and Stephanie to utilise his savings account with Nedbank was done in order to disguise the origin of the proceeds of the crime, followed up by subsequent transfers of funds into various other accounts, including the FNB account held in the name of the accused. These further acts committed by the accused constituted a separate offence from the predicate offence of theft (as far as he is concerned) namely, money-laundering in contravention of s 4 of POCA.

*Conclusion*

[52] For the afore-stated reasons, I am satisfied that the state proved the indicted offences (as amended) beyond reasonable doubt and that the accused cannot escape conviction.

[53] In the result, the court finds as follows:

Counts 3 – 34:

Main and 1<sup>st</sup> Alternative: Not guilty and discharged.

2<sup>nd</sup> Alternative: Theft – Guilty.

Count 35:

Contravening s 4(b)(i) of the Prevention of Organised Crime Act 29 of 2004 –  
Money-laundering: Guilty.

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JC LIEBENBERG  
JUDGE

APPEARANCES

STATE

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ACCUSED

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