

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION  
HELD AT OSHAKATI

APPEAL JUDGMENT

Case no: HC-NLD-CRI-APP-CAL-2019/00052

In the matter between:

**JOHANNES OBASANJO HAUKENA**

**APPELLANT**

**v**

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Haukena v S* (HC-NLD-CRI-APP-CAL-2019/00052) [2019] 145  
NAHCNLD (5 December 2019)

**Coram:** JANUARY J and SALIONGA J

**Heard on:** 8 October 2019

**Delivered:** 5 December 2019

**Flynote:** Convictions - Duplication - What constitutes - Two tests - single intent or same evidence - Fraud, forgery and uttering - money laundering - Applying the single intent test the conclusion is that the court a quo misdirected itself - In *casu* the appeal court found there was an improper duplication of convictions.

**Summary:** The appellant was charged with sixty three (63) counts of fraud, sixty three (63) alternative counts of theft and sixty three (63) counts of forgery, sixty three

(63) counts of uttering and one (1) count of money laundering. Appellant pleaded not guilty but made admissions in terms section 220 of the Criminal procedure Act 51 of 1977 in relation to the forgery and uttering charges. Appellant admitted that on the dates mentioned in column 1 of schedule 1 in the district of Eenhana, he unlawfully falsely and with intent to defraud and prejudice Old Mutual Namibia and or its respective representatives as listed in the charge sheet and or the policy holders as indicated in column 2 of schedule 1 of the charge sheet. The appellant forged the policy holders signatures and fraudulently inserted his own bank account number 8002197755 onto various zero interest loan disinvestment and plan savings benefits cancellation forms as reflected in column no 3 of schedule 1 of the charge sheet and then utilize this fraudulent or forged documents disinvestment forms and uttered or put off the aforesaid documents to Old Mutual Namibia Limited and or the representatives, therefore made a misrepresentation unlawfully and falsely on the dates as listed in column 1 of schedule 1 based on the policy holders' accounts as listed in column 2 of schedule 1 to Old Mutual Namibia or its representatives. Further admits that as a result of these misrepresentation money in the amount of one million six hundred and sixty-one thousand eight hundred and eighteen Namibian Dollars seventy five cents (N\$ 1661 818-75) were then paid into his personal account, account No. 8002197755.

Consequently on 19 September 2017, appellant made further admissions wherein he admitted all the elements of fraud. Which prompted the State to close its case without calling witnesses. The defence also closed its case and had no witness to call. After hearing the submissions by the State and the defence, the learned magistrate convicted the appellant of sixty three (63) counts of fraud, alternative sixty three (63) counts of theft and sixty three (63) counts of forgery, sixty three (63) counts of uttering and one (1) count of money laundering.

*Court held;* that whether you apply the single intent or same evidence test, the same conclusion would be reached i.e. that there is an improper duplication of convictions. The convictions of uttering were set aside. The court consequently had considered sentences afresh.

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## ORDER

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1. The appeal against convictions and sentences succeed;
2. The sixty-three (63) convictions of uttering are set aside and the sixty-three (63) counts of fraud and sixty-three (63) counts of forgery are confirmed;
3. The sentence imposed is set aside and substituted with the following sentence:

The convictions on counts of fraud and forgery are taken together for sentencing purposes and appellant/accused is sentenced to 15 years' imprisonment of which five years' imprisonment is suspended for five years on condition that the appellant/ accused is not convicted of the crime of fraud and /or forgery committed during the period of suspension;

4. The sentence is ante-dated to 20 November 2017.
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## JUDGMENT

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Salionga J (January J concurring):

[1] The appellant appeals against convictions and sentences on counts of fraud, forgery and uttering. He was charged with sixty three counts of fraud, alternatively sixty-three counts of theft, sixty three counts of forgery, sixty three counts of uttering and one count of money laundering. Appellant pleaded not guilty to all the charges on 22 August 2017 and made certain formal admissions pursuant to section 220 of the Criminal Procedure Act 51 of 1977. The matter was then remanded for trial.

[2] On the 19 September 2017 appellant made additional formal admissions which prompted the state to close its case. Without leading evidence appellant also closed his case on the same day. Convictions on counts of fraud, forgery and uttering were taken together and appellant was sentenced to 17 years and five years' imprisonment on a count of money laundering respectively.

[3] Dissatisfied with the convictions and sentences on counts mentioned above, appellant filed a notice of appeal within the prescribed time period. Mr Greyling appears for the appellant and Mr Pienaar represented the respondent.

[4] The grounds of appeal were as follows;

(a) The learned magistrate erred in fact and /or in law by finding appellant guilty of 63 counts of fraud separate from that of forgery and uttering, thereby duplicating convictions.

(b) The learned magistrate erred and /or misdirected himself in law and in fact in over-emphasizing the seriousness of the offence at the expense of the appellant's personal circumstances.

[5] In the main heads of argument, Mr Pienaar counsel for the state conceded that insofar as the appeal against convictions is concerned there is improper duplication of convictions. However on the 9 September 2019, the respondent filed a supplementary heads of argument, departing from the initial concession he made earlier. According to Mr Pienaar the supplementary heads were based on the research done and were only meant to assist the court on whether or not there was duplication of convictions. In no way they were submitted to advance the respondent's case. I am indebted to counsel for the well-researched document submitted.

[6] The schedules are annexed for a better understanding of this judgment. The particulars on the counts of fraud are that:

The accused is guilty of the crime of fraud in that upon or about the dates mentioned in column 1 of schedule 1 and at or near Eenhana in the district of Eenhana, the accused did unlawfully, falsely and with intent to defraud, misrepresented to Old Mutual Namibia Ltd or its representatives and/or Ina Joy Tshiteta and/or Shindodi Kondjashili that policy holders mentioned in column 2 of schedule 1 had applied and/or completed, signed and/or submitted the zero interest loan/investment and

plan/savings benefit cancellation forms on their Max Pure Investment policies, bearing policy number mentioned in column 3 of schedule 1 whereas in truth and in fact the accused well knew that the policy holders did not and never applied and/or completed/signed and/or submitted the zero interest loan/disinvestment and plan/savings benefits cancellation forms, on their policies bearing policy numbers mentioned in column 3 of schedule 1; that the bank Windhoek account no 8002197755 cheque account belongs to himself and does not belong to any of the policy holders mentioned in column 2 of schedule 1; that he completed, signed and submitted the disinvestment cancellation forms of the policy holders mentioned in column 2 of schedule 1 supra; that he wrote his own bank account on each and every disinvestment cancellation forms mentioned in column 2 of schedule 1 and wrote his own bank account number; he was not entitled to complete, sign and submit the disinvestment cancellation forms on behalf of any of the policy holders mentioned in column 2 of schedule 1 and he was not entitled to receive and use the amount of money reflected in column 4 of schedule 1 for his own private use.

[7] The counts of forgery are that:

The accused is guilty of the crime of forgery in that upon or about the dates mentioned in column 1 of schedule 1 and at or near Eenhana in the district of Eenhana, the accused did wrongfully, falsely and with intent to defraud, and to the prejudice of Old Mutual Namibia Ltd or the representatives of Old Mutual Namibia Ltd /and or Ina Joy Tshiteta and/or Shindodi Kondjashili that policy holders mentioned in column 2 of schedule 1 forged an instrument in writing to wit the zero interest loan disinvestment and plan savings benefits cancellation forms of policy holders mentioned in column 2 of schedule 1, bearing policy numbers reflected in column 3 of schedule 1, by forging the policy holders' signatures ,inserting his own bank account number 8002197755 on such forms in order to fraudulently obtain the amounts of money reflected in column 4 of schedule 1 from Old Mutual Namibia Ltd and/or the representatives of Old Mutual Namibia Ltd and/ or Ina Joy Tshiteta and or Shindodi Kondjashili and /or policy holders mentioned in column 2 of schedule 1.

[8] The counts of uttering are that:

The accused is guilty of the crime of uttering in that upon or about the dates mentioned in column 1 of schedule 1 and at or near Eenhana in the district of Eenhana, the accused did wrongfully, falsely and with intent to defraud, and to the prejudice of Old Mutual Namibia Ltd or the representatives of Old Mutual Namibia Ltd and/or Ina Joy Tshiteta and or Shindodi Kondjashili that policy holders mentioned in column 2 of schedule 1 offer, utter and put off the forged documents described in the preceding counts 64-126 supra to Old Mutual Namibia Ltd and the representatives and/or Ina Joy Tshiteta and or Shindodi Kondjashili, he the accused when he so offered, uttered and put off the aforesaid instrument well knowing that the documents have been forged.

[9] On whether or not there was duplication in the matter before us I would refer to *S v Gaseb* 2000 NR 139 (SC), where O'Linn AJA at p159 E-I when approved the judgement in *S v Seibeb & S v Eixab*, stated that:

"There is no single test. This is so because there are a large variety of offences and each has its own peculiar set of fact which might give rise to borderline cases and therefore to difficulties. The tests which have been developed are merely practical guidelines in the nature of questions which may be asked by the Court in order to establish whether duplication has occurred or not. These questions are not necessarily decisive. See *S v Grobler en'n Ander, R v Kuzwayo* 1960 (1) SA 340 (A).

The utmost commonly used tests are the single evidence and the same evidence test. Where a person commits two acts of which standing alone would be criminal but does so with a single intent and both acts are necessary to carry out that intent then he ought only to be indicted for or convicted of one offence because the two acts constitute one criminal transaction. See *R v Sabuyi* 1905 TS 170 at 171. This is the single intent test. If the evidence requisite to prove one criminal act necessary to prove one criminal act is complete without the other both acts agree to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter the two acts are separate criminal offences. See Landsdown and Campbell South African Criminal law and Procedure vol V at 229, 230 and cases cited. This is the same evidence test.' Both tests or one or other of them may be applied and in determining which or whether both tests or one or other of them

may be applied and in determining which or whether both should be used was up to the particular court to decide depending to the facts of the case...”

[10] Ebrahim J in *S v Radebe* 2006 (2) SACR 604 held that; ‘the question to be asked is not whether the appellant has been charged with the same offence twice but whether the appellant has been convicted and sentenced twice for the same offence.’

[11] Snyman<sup>1</sup> defines fraud at page 531 as: ‘The unlawful and intentional making of a misrepresentation which causes actual prejudices or which is potentially prejudicial to another. He further defines forgery at page 540 as the unlawful and intentional making a false document to the actual or potential prejudice of another.’ Whilst defining uttering at page 543 as ‘unlawfully and intentionally passing off a false document to the actual or potential prejudice of another.’

[12] Appellant in the present case, admitted to have, forged and uttered the forged documents with the sole purpose of defrauding Old Mutual and/or its policy holders or its representatives. In doing that he fraudulently completed the investment forms, falsifying the signatures of policy holders onto investment forms, inserted his own bank account details misrepresenting that of policy holders on these investment forms and submitted same for payments well knowing that they were false and with the knowledge that they would result in actual or potential prejudice to the complainants. As a result of his fraudulent activities all the amounts indicated in column 4 were paid out to him.

[13] It is indisputable that the appellant committed three separate and distinguishable offences. The appellant when he forged and submitted the forged documents had a single intent to defraud in order to be paid the money. Applying the single intent test in the instant matter, it becomes apparent that the convictions on fraud, forgery and uttering were a misdirection. Therefore in our view the respondent’s concession was properly made. The convictions and sentences of the

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<sup>1</sup> *Criminal law* 5<sup>th</sup> ed 2008

more serious offences of fraud and forgery stand and that of uttering has to be set aside.

### Ad Sentence

[14] The court a quo had taken the convictions in all counts together for sentencing purposes. Such sentences would not be appropriate in light of the court's finding. In this regard the appeal court has the power to either remit the matter to the learned magistrate for sentencing afresh in the alternative consider an appropriate sentence.

[15] We are satisfied that sufficient factors were placed on record by his counsel from the bar and found it appropriate to consider the sentence afresh. That the appellant is a first offender who was convicted on his own admissions. He is a sole breadwinner not only to his four minor children and their mothers but also to his own mother. His children aged from four to thirteen years. He is 39 years old and unmarried. The fact that he intended to plead guilty on a fraud charge was a sign of showing remorse for his ill deeds.

[16] However on the other hand the offences he was convicted of were serious and prevalent. The appellant was a selfish employee who designed to enrich himself. No way was it stated that appellant had some financial difficulties of a sort. He was in a position of trust and his conduct was a gross breach of the trust the company had placed on him. The business suffered a huge loss of a considerable amount of N\$ 1.6 million, which was not recovered to date. The fact that the offence was committed over a period of time 'without detection is also an aggravating factor that weighs heavily against his personal circumstances.<sup>2</sup>

[17] Having considered the crime, the offender and the interest of society; the objectives of punishment; the mitigating and aggravating factors and the period the

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<sup>2</sup> *S v Sadler* 2000 (1) SACR 331 (SCA) at page 335G.



appellant has served the court finds that a custodial sentence is indeed appropriate in the circumstances.

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

1. The appeal against convictions and sentences succeed;
2. The sixty-three (63) convictions of uttering are set aside and the sixty-three (63) counts of fraud and sixty-three (63) counts of forgery are confirmed;
3. The sentence imposed is set aside and substituted with the following sentence:

The convictions on counts of fraud and forgery are taken together for sentencing purposes and appellant/accused is sentenced to 15 years' imprisonment of which five years' imprisonment is suspended for five years on condition that the appellant/accused is not convicted of the crime of fraud and/or forgery committed during the period of suspension;

4. The sentence is ante-dated to 20 November 2017.

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J T SALIONGA  
JUDGE

I agree,

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H C JANUARY

Appearances:

For the Appellant:

Mr P Greyling  
Of Greyling & Associates, Oshakati

For the Respondent:

Mr J Pienaar  
Office of the Prosecutor General, Oshakati