



REPUBLIC OF SOUTH AFRICA

SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***Dos Santos and another v The State
(726/07) [2010] ZASCA 73 (27 May 2010)***

Media Statement

Today the Supreme Court of Appeal (SCA) delivered judgment in the appeals of Tony Dos Santos and Derick Mbatha against their convictions and sentences by the Cape High Court. Each had been convicted of dealing in unpolished diamonds in contravention of s 21 of the Diamonds Act. In addition the former had been convicted of one count of racketeering in terms of the Prevention of Organised Crime Act (POCA). The SCA found that each had been convicted for contravening the wrong section of the Diamonds Act. It accordingly altered Mr Dos Santos' five convictions from that of contravening s 21 of the Act to convictions for contravening s 20 and Mr Mbatha's one conviction to that of contravening s 19. Mr Dos Santos' appeal against the effective sentence of 10 years' imprisonment imposed upon him by the High Court also failed. Mr Mbatha, who was sentenced by the high court to a fine of R20 000 or imprisonment for a term of 4 years, half of which was conditionally suspended, did succeed in his appeal against sentence to the limited extent that the term of imprisonment of four years was set aside and in its stead was substituted a term of imprisonment for one year.

Mr Dos Santos lived in Port Nolloth, where he managed and operated a business enterprise called Tony's Auto Spares. Port Nolloth, notwithstanding its relatively small community of approximately 12 000 residents and some 220 businesses had become, so the evidence suggested, a hotbed of illicit diamond dealing and related activity. Because of the corrupting and generally corrosive influence that with time becomes all too pervasive in such communities, a task team of the now disbanded Directorate of Special Operations commonly known as the Scorpions, was established to counter the proliferation of diamond dealing syndicates that had began flourish in that general geographical location. Mr Dos Santos had become the focus of that particular task team. The task team had sought and obtained from the Judge designated in terms of the Interception and Monitoring Prohibition Act, an order authorising a surveillance operation at Tony's Auto Spares. The task team secreted a pinhole camera in the building housing Tony's Auto Spares and from it video images and audio feed was transmitted by radio link, in real time, to a house approximately one-and-half kilometres away, where some members of the task team, in addition to recording what was being

transmitted onto video tapes, viewed the live feed on a monitor and maintained a log in which they made contemporaneous notes of what they had witnessed and heard as it unfolded. Unbeknown to the task team, Mr Dos Santos had also attracted the attention of a unit of the SAPS. That unit, acting on a search warrant that had been issued by the Regional Court President of the Cape Regional Division, conducted a search on 22 February 2003 of Tony's Auto Spares and the adjoining residential unit that was housed under the same roof. During the course of the evening of 4 July 2003 the task team armed with separate warrants conducted a search of the same premises and on the next day, Mr Dos Santos' home which was also situated in Port Nolloth. Both searches yielded in all some 177 unpolished diamonds to the value of approximately R2m, cash to the tune of R55 000 and diamond dealing paraphernalia such as loupes, scales, tweezers and pieces of paper with diagrammatic representations of diamonds and calculations on them. Mr Mbatha, who had come to be identified in consequence of the surveillance of the first appellant as one of the alleged role players in the illicit diamond trafficking enterprise, was arrested approximately one year after the first appellant on 3 June 2004.

The two appellants were indicted together with seven others in the Cape High Court on a host of statutory convictions. The hypothesis advanced by the State was that each of the accused to different degrees was a party to a pattern of racketeering activity. A protracted trial ensued in the Cape High Court. In all some 27 witnesses testified for the State. The evidence included the direct evidence of Tim Basson, who had been in Mr Dos Santos' employ for seven years prior to his arrest, and his brother Aubrey. Both of them testified about Mr Dos Santos' involvement in illicit diamond dealing. Each of the brothers Basson after having been schooled by Mr Dos Santos had been involved in purchasing unpolished diamonds on his behalf. Both had been convicted and sentenced in separate trials for their involvement in the criminal enterprise. The high court, as also the SCA, recognised that as accomplices their evidence had to be treated with caution but that the exercise of caution must not be allowed to displace common sense. The Bassons corroborated each other. There was moreover other evidence such as the items that were seized, the incident log, the video tapes and the evidence of the various police officers and expert witnesses. On behalf of Dos Santos it was submitted that the evidence secured pursuant to the warrant fell to be excluded in terms of s 35(5) of the Constitution. The argument was that the warrant suffered a technical defect in that the regional magistrate who had issued it was not a magistrate as defined for that purpose. The SCA held that the constitutional principle of a fair trial required fairness to an accused as also to the public as represented by the State. In this case, so the SCA reasoned, the investigating team did not act in flagrant disregard of Mr Dos Santos's constitutional rights. On the contrary they sought judicial authority for their conduct. To exclude the evidence, so the SCA reasoned, simply because the wrong magistrate had been inadvertently approached would not conduce to a fair trial and would run counter to the spirit and purport of the Constitution.

In the view of the SCA there was an entire body of evidence that operated against both appellants. All of that evidence certainly called for an answer. Yet neither appellant testified or called any evidence in his defence. The SCA accordingly concluded that the evidence was so strong that the judge in the court below must inevitably have convicted the appellants of the charges in terms of the Diamonds Act. In respect of the POCA conviction, the SCA found that the evidence adduced by the State established that the first appellant had conducted an illegal diamond dealing enterprise. Tony's Auto Spares which was managed by Mr Dos Santos, and at which most of the illicit diamond transactions had occurred, had both a legitimate as well as an illegitimate face. The SCA was thus satisfied that Mr Dos Santos was correctly convicted on that charge as well. In reaching that conclusion, the SCA held that as the POCA conviction required the satisfaction of an additional requirement, it did not constitute an improper splitting of charges resulting in a duplication of convictions. Finally, in respect of Mr Mbatha's sentence the SCA held that the sentences imposed upon both appellants was grossly divergent. The sentence imposed upon Mr Mbatha was thus disturbingly inappropriate warranting appellate interference.

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