**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 611/2013

In the matter between:

**MUVHUSO CALVIN NDWAMBI** **APPELLANT**

**and**

**THE STATE** **RESPONDENT**

**Neutral Citation:** *Ndwambi v The State* 611/2013 [2015] ZASCA 59 (31 March 2015)

**Coram:** Navsa ADP, Leach and Willis JJA and Schoeman and Meyer AJJA

**Heard:** **11 March 2015**

**Delivered:** **31 March 2015**

**Summary:** Criminal Law – fraud – whether intent to deceive and prejudice proved – appellant correctly convicted of fraud.

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**ORDER**

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**On appeal from:** Free State High Court, Bloemfontein (Van Zyl and Moloi JJ sitting as court of appeal):
'The appeal is dismissed.'

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**JUDGMENT**

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**Meyer AJA (Navsa ADP and Leach JA and Schoeman AJA concurring)**

[1] Arising from an incident that occurred on 29 October 2003 at the Shell Ultra City, Kroonstad where a fake rhinoceroses (rhino) horn was sold in a police trap for R350 000, the appellant, Mr Muvhuso Calvin Ndwambi, and a co-accused were convicted in the Regional Court, Kroonstad of the crime of fraud committed in the course of the police trap. The appellant was found to have been complicit in the transaction. He was sentenced to six years' imprisonment. The appellant appealed unsuccessfully to the Free State High Court against his conviction and sentence. The court a quo, however, granted him leave to appeal to this Court against both.

[2] The appellant contends in this court that the proven facts as found by the trial court did not establish all the elements of the crime of fraud. The evidence did not, he contends, prove either the required intent to deceive, which is an aspect of the element of intent to defraud, or the element of prejudice.

[3] Inspector Oberholzer, who was attached to the Bloemfontein Diamond and Gold branch of the South African Police Service (SAPS), received information from an informer that the appellant's co-accused wished to sell a rhino horn. This prompted the police to set a trap at 11h00 on 29 October 2003 at the Shell Ultra City,

Kroonstad (the filling station). Captain Oertel, who was attached to the same branch of the SAPS, was in command of the police action. He and Inspector de Klerk, also a member of the same branch, went to the petrol station ahead of Oberholzer and the informer to observe and assist Oberholzer in the action. Upon their arrival they observed the appellant sitting in the driver's seat of a red Volkswagen Golf motor vehicle (the car) parked in the parking area of the petrol station and his co-accused sitting next to him.

[4] When Oberholzer and the informer arrived, Oberholzer too observed the car in the parking area but the appellant and his co-accused were at that stage standing behind it. They parked next to the car. The appellant's co-accused walked to the driver's side of Oberholzer's vehicle and he was introduced to her as the prospective buyer of the rhino horn. She fetched a wrapped article from between the seats in the front of the car and then climbed into the rear of Oberholzer's vehicle and informed him that it was the rhino horn. He unwrapped the article and it appeared to him to be real rhino horn. She told him that the rhino horn originated from Mozambique, that it belonged to the appellant and that the asking price was the sum of R350 000. Oberholzer requested her to call the appellant so that he could discuss the transaction with him, but she refused, saying that the appellant was observing the surroundings to ensure that everything was in order. Her statement that the appellant was observing accorded with what appeared to Oertel and De Klerk. Oberholzer and the appellant's co-accused agreed to the asking price of R350 000.

[5] Oberholzer gave a pre-arranged signal to his colleagues who then approached the appellant and his co-accused. Oertel introduced himself and the police officers to the appellant's co-accused and he arrested her. Oberholzer and De Klerk approached the appellant. They introduced themselves to him and Oberholzer arrested him. He immediately denied that he knew his co-accused and said that he had only given her a lift from a nearby bridge to the petrol station. De Klerk's search of the car revealed that the appellant was a police officer: his police identification card, service pistol and police dockets were found. A few works of art belonging to the appellant's co-accused were also found in the boot of the car.

[6] The appellant's co-accused conducted an arts and craft's business at Hartbeespoortdam. The appellant testified that he had been introduced to her during

June/July 2003 because she had required transport for the conveyance of her works of art from Johannesburg to Brits. Since then at her instance he had transported her on 3 occasions to Brits. His co-accused, however, denied that he had ever transported her anywhere before 29 October 2003. She, according to the appellant, had telephoned him early during the morning of 29 October 2003, while he was at home in Kagiso, and requested him to transport her to Kroonstad where she was scheduled to meet a client. According to the appellant he was on official duty that day but had decided not to go to work because he was tired. He contradicted himself by also testifying that he stayed off duty because he was ill. The appellant acceded to the request to transport his co-accused to Kroonstad. He had driven from Kagiso to the Hillbrow Police station where he was stationed. That was where they had agreed to meet. His co-accused had a few works of art and a plastic bag with her but he could not see what it contained and did not ask about it. She had directed him to Kroonstad and to where he should park at the filling station. They had got out of the car but he merely stood around viewing the surroundings. He denied any complicity in the transaction and testified that he had been very surprised when the police officers arrived, arrested him and searched the car. He had seen the rhino horn for the first time at the police station, after his arrest.

[7] It is not necessary to refer in any detail to the evidence of the appellant's co-accused. She, in turn, attempted to shift the blame to the appellant. She had travelled to the garage, she testified, to meet a client who was interested in buying her works of art. The appellant had taken her there in order to sell his rhino horn to the same client, who was also interested in buying a rhino horn for display in his bar. The client had asked her to find him someone who would sell a rhino horn to him and the appellant was introduced to her as a person wishing to sell one. Hence their journey together to Kroonstad. She saw the rhino horn for the first time when it was shown to her at court.

[8] The appellant's counsel conceded that the trial court correctly rejected the evidence of the appellant and that of his co-accused. That concession was correctly made. The appellant's exculpatory version was so wholly improbable as to be plainly untruthful and palpably false. I do not propose to go into all the unsatisfactory

features to his evidence referred to by the trial court in its well-reasoned judgment. I need only highlight a few matters which go to show the untruthfulness of his account.

[9] The appellant's version that his co-accused, on the occasions mentioned by him, would have travelled with her works of art from Hartbeespoortdam to Johannesburg in order for him to then transport her from Johannesburg to Brits is wholly improbable. Hartbeespoortdam is much closer to Brits than Johannesburg is to Brits. Furthermore, the unavoidable inference is that the appellant and his co-accused had not gone to the filling station in order for the appellant to sell works of art to a prospective buyer. The appellant's co-accused did not have any works of art with her when she got into Oberholzer's vehicle in order to negotiate the sale. She only took along with her what appeared to have been a rhino horn. The works of art were found in the boot of the car immediately after their arrest. The fake rhino horn was the only object found in Oberholzer's vehicle.

[10] But the matter goes further. The evidence relating to contact between their respective cell phones revealed 32 calls from the appellant's cell phone to that of his co-accused and 38 calls from her cell phone to his during the period 22-29 October 2003. The appellant was unable to proffer any plausible explanation for the constant contact between their respective cell phones in the days running up to their attendance at the petrol station. Also, the appellant's denial to the police officers at the time of his arrest that he did not know his co-accused is palpably false. That is what prompted the police to obtain the records relating to their cell phones. Clearly, that evidence was obtained in order to refute the appellant's version at the time of his arrest that he did not know the appellant and that he had merely given her a lift from a nearby bridge to the petrol station.

[11] The trial court's assessment of all the evidence, its adverse credibility findings relating to the appellant and his co-accused and its rejection of their evidence cannot be assailed nor can its favourable credibility findings concerning the three State witnesses – Oertel, Oberholzer and De Klerk. The accounts of the State witnesses were satisfactory and accord with the probabilities. They corroborated each other in material respects. A reading of the record leaves not the slightest doubt that all of the State evidence was honest and accurate.

[12] It is common cause that the article sold was a mere imitation of a rhino horn. The trial court did not convict the appellant and his co-accused of the statutory offence of contravening s 14(2), read with ss 1, 11, 12, 40-42 and Schedule 3 of the Nature Conservation Ordinance 8 of 1969 (FS), with which they were charged in the alternative. Criminal liability, in terms of the provisions of the Ordinance, is imposed inter alia for the unauthorised possession, conveyance, buying and selling of 'any product from any part of the body of a wild or exotic animal of a species specified in Schedule 3'. A rhino is so specified.

[13] This brings me to the appellant's first contention that the proven facts as found by the trial court did not establish the element of intent to defraud, and in particular the aspect of intent to deceive. Intent to defraud has two principal aspects: intention to deceive and intention to induce a person to alter or abstain from altering his or her legal position. The intention to defraud can be with direct intent or by *dolus eventualis*. (See JRL Milton *South African Criminal Law and Procedure* Vol II 3rd Ed at 730.)

[14] The *locus classicus*, as was pointed out by Prof Milton, at 731, in regard to intent to deceive is *Derry v Peek* (1889) 14 App Cas 337, at 374, in which Lord Herschell said that-

'. . . fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in the truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth.'

[15] *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T), at 101E-I, is also apposite. There Stegmann J said the following regarding fraud by *dolus eventualis*:

'The essence of fraud involving *dolus eventualis* appears to be the deceit practised by the representor in suggesting that to be true which he knows may not be true. He knowingly exposes the representee to a risk (that the representation may be false) and deceitfully leaves the representee ignorant of his exposure to that risk.

Any such case of fraud by *dolus eventualis* may, I think, be analysed further to disclose another fraud underlying and accompanying the first. When anyone makes a representation of fact whilst not knowing whether his representation is true or false, he

thereby actually makes two distinct representations of fact. The first represents as fact that which he does not know to be either true or false. The second is a misrepresentation of fact relating to his own state of mind: it is a representation (usually implied) that he has an honest belief in the truth of the first representation. Such second representation is one that he knows to be false, and it therefore establishes a case of fraud by *dolus directus* simultaneously with the fraud by *dolus eventualis* relating to the first representation.'

[16] The appellant found himself on the horns of a dilemma at his criminal trial: saying that he honestly believed the imitation was real could potentially have exposed him to conviction of attempt on the alternative statutory charge (compare eg JM Burchell *South African Criminal Law and Procedure* Vol I 3rd Ed at 351 et seq); whilst saying that he did not hold such belief, would have exposed him to a conviction of fraud. Instead, he falsely distanced himself from the transaction. He denied knowledge of what was contained in the bag or wrapping that his co-accused carried to Oberholzer's vehicle and he testified that to his knowledge his co-accused was going to meet a client in connection with her works of art. His evidence and that of his co-accused having been rejected left the trial court without the benefit of credible evidence from either of them and, with only the State evidence to determine their respective guilt or innocence of the charges they faced. It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt if a prima facie case has been established and the accused fails to gainsay it. (See *S v Boesak* 2000 (1) SACR 633; [2000] ZASCA 24(SCA), paras 46-47.)

[17] The appellant's co-accused represented to Oberholzer that the item she was offering for sale was a rhino horn and that it originated from Mozambique. The asking price for what had been expressly represented to be a rhino horn was R350 000. The representation, it is common cause, was false. The prima facie inference, unless gainsaid by credible and reliable evidence, is that the false representation had been made knowingly, or without belief in its truth in the sense described in *Derry*, or without knowledge whether it was true or false but knowingly exposing Oberholzer or the State to a risk that it may be false and deceitfully leaving him ignorant of the exposure. Any suggestion that they did not know that the representation was false lacks a factual foundation and would therefore amount to impermissible speculation or conjecture. It lay exclusively within the power of the appellant and his co-accused to show what the true facts were but they failed to give

an acceptable explanation. The prima facie inference became conclusive in the absence of rebuttal.

[18] The other requisite, which it is contended had not been proved by the State was prejudice, actual or potential. The appellant contends that because the State's evidence was to the effect that the police had no intention to pay for the rhino horn there could be no prejudice. This contention, however, ignores the longstanding principle that the law looks at the matter from the point of view of the deceiver and not the deceived.

[19] The accused in *R v Dyonta & another* 1935 AD 52 were convicted of fraud in that they falsely pretended to a Mr Potgieter that certain stones were diamonds in order to induce him to pay a certain price for the stones. The accused had been arrested immediately after they had handed the stones to Potgieter who, although he had pretended to be buying, had no intention of buying them. He had informed the police of the proposed sale and they were accordingly on hand when the delivery took place. The matter came before this court on a question of law reserved at the request of the State: whether there could be a conviction for fraud when the person to whom the representation was made at no stage intended to act on the representation.

[20] Wessels CJ, in delivering the unanimous judgment of the court, reaffirmed the law as laid down in two previous judgments of this court, thus (at 57):

'If the misrepresentation is one which in the ordinary course is capable of deceiving a person, and thus enabling the accused to achieve his object, the fact that the person to whom the representation is made has knowledge or a special state of mind which effectually protects him from all danger of prejudice does not entitle the accused to say that the false representation was not calculated to prejudice.'

And, in answering the point of law in favour of the State, he concluded as follows (at 57):

'The law looks at the matter from the point of view of the deceiver. If he intended to deceive, it is immaterial whether the person to be deceived is actually deceived or whether his prejudice is only potential.'

[21] This approach has been consistently followed over more than eighty years. In *S v Mngqibisa* 2008 (1) SACR 92; [2007] ZASCA 119 (SCA), para 9, Mlambo JA said this:

'Further clarification regarding the nature of the false representation came in *R v Kruse* 1946 AD 524 at 533 where the court stated that

> " . . . if the false representation is of such a nature as, in the ordinary course of things, to be likely to prejudice the complainant, the accused cannot successfully contend that the crime of fraud is not established because the Crown has failed to prove that the false representation induced the complainant to part with his property."

This approach has consistently been followed over the years. See *R v Dyonta and Another* 1935 AD 52 at 57; *R v Heyne and Others* 1956 (3) SA 604 (A) at 622; *S v Kruger and Another* 1961 (4) SA 816 (A) at I 832D - E; and *S v Friedman* (1)1996 (1) SACR 181 (W).'

(Also see *S v Brown* 2015 (1) SACR 211; [2014] ZASCA 217 (SCA), para 118.)

[22] In the present case, an intention to deceive was proved. It was calculated to prejudice. Objectively, some risk of harm could have been caused. It need not be financial or proprietary or necessarily even to the person it was addressed (see *R v Heyne & others* 1956 (3) SA 604 (A), at 622F). In assessing prejudice it is significant to note that even though the transaction in question involved fake rhino horn it must indubitably be so that transactions of this kind contribute to the illegal trade in rhino horn, which we as a country must all be concerned about. The appellant was thus rightly convicted of fraud.

[23] As to sentence: although the appeal was also directed against sentence, counsel for the appellant and for the State are ad idem that the sentence of six years' imprisonment is appropriate. I agree. In sentencing the appellant the trial court exercised its discretion judicially and the sentence does not induce a sense of shock (see *S v De Jager* 1965 (2) SA 616 (A) at 628H-629B). All the relevant factors and circumstances were well considered and duly taken into account by the trial court. When the reprehensibility of the conduct is assessed as well as the intention to deceive it is important to bear in mind that one is dealing with a policeman who was supposed to be on official duty at the time. Interference with the imposed sentence is, therefore, not warranted.

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

'The appeal is dismissed.'

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PA Meyer

Acting Judge of Appeal

**Willis JA (dissenting)**

[25] Having read the judgment of Meyer AJA, I regret that I am unable to agree that the magistrate and the high court hearing the first appeal correctly found that the appellant was guilty of fraud. I should have found the appellant guilty of an attempt to contravene s 14 (2) of the Nature Conservation Ordinance 8 of 1969 and made an appropriate adjustment to sentence. The contravention of the Ordinance was alleged as an alternative count. This section reads as follows:

'(14) (2) Except under authority of a permit which may be issued by the Administrator, no person shall-

*(a)* possess, convey, buy, sell, grant, exchange, process or manufacture any product from any part of the body of a wild or exotic animal of a species specified in Schedule 3;

*(b)* sell any such processed part or product; or

*(c)* possess any processed part of product of a rhino horn.'

Schedule 3 includes 'all rhinoceroses'.

Section 40 provides for a penalty and shall be guilty of an offence as follows:

'(1) Any person who-

(a) contravenes or fails to comply with a provision of section 2 (3), 7, 14 (2), 15 *(a)*, 16 *(a)* or 33;

**...**

shall be guilty of an offence and liable upon conviction –

(i) In the case of an offence referred to in paragraph (a), to a fine not exceeding R 100 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;

**...**'

The question of prejudice or potential prejudice as an element of fraud, took up much space in counsel's heads and some time was spent hearing argument on this point

during the hearing of the appeal. This issue also provided the main reason why the high court granted special leave to appeal to this court. Following *R v Heyne*[1] I agree with Meyer AJA that at least potential prejudice has been established in this case. This aspect therefore need not detain me.

[26] Concerning the alternative charge, after setting out the facts, the high court said:

'Voortspruitend uit voormelde, in besonder die feit dat die voorwerp 'n nagemaakte renosterhoring was, kon daar uiteraard nie 'n skuldigbevinding op die alternatiewe aanklag wees nie.'

This may be translated as follows:

'Arising from the above, in particular the fact that the item in question was a fake rhinoceros horn, there could not, in the nature of things, be a conviction on the alternative count.' (My translation.)

I shall revert to the issue of the alternative count later. I accept, however, that the appellant cannot be found guilty of dealing in rhinoceros (rhino) horn.

[27] In his judgment the magistrate said:

'Beskudigde 1 het duidelik die wanvoorstelling gedoen deur voor te gee dat dit 'n egte Renosterhoring is. Die ander elemente is ek tevrede, naamlik wederregtelikheid, kousale verband, potensiële nadeel en opset is teenwoordig. Beskuldigde 2 het baie duidelik saamgewerk met beskuldigde 1. Hy het haar al die pad vervoer vanaf Johannesburg na Kroontad. Hy het observasie gehou, terwyl sy die transaksie moes afhandel. Uit die staanspoor het sy ook vir die Staatsgetuie gesê dat hulle twee saam in die ding was, maar dat sy die onderhandelinge behartig. Dit is volgens die Staatsgetuies wie se weergawe deur die Hof aanvaar is. Sy hele houding en optrede is duidelik dat hy sou deel in die opbrengs en ek is tevrede dat hy as medepligtige net so skuldig soos beskudigde 1 is.'

This may be translated as follows:

'Accused 1 clearly made the misrepresentation by claiming that this was a genuine rhinoceros horn. I am satisfied that the other elements, namely, unlawfulness, causal connection, potential prejudice and intention were present. Accused 2 clearly worked together with accused 1. He transported her all the way from Johannesburg to Kroonstad. He kept watch while she concluded the transaction. From the outset, she [accused 1] said to the State witnesses that the two of them were working together in the matter but that she

[1] *R v Heyne & others* 1956 (3) SA 604 (A) at, esp at 622E-F. See also *The State v Kruger & another* 1961 (4) SA 816 (A) at 833B-C.

took care of the negotiations. This is according to the version of the State witnesses, which I accept. His [accused 2's] entire conduct and actions clearly show that he would share in the proceeds and I am satisfied that he, as an accomplice, was just as guilty as accused 1.'
This passage was referred to by the high court with approval.

[28] I accept that:
(i) The appellant worked together with accused 1 in the transaction; and
(ii) He transported her from Johannesburg to Kroonstad; and
(iii) He kept watch for her during the transaction with the police officers; and
(iv) Accused 1 told the police from the outset that she and the appellant worked together even though she took care of the negotiations;
(v) The appellant would share in the proceeds of the crime; and that he was an accomplice to a crime.
I am also of the opinion that the totality of the evidence compels the conclusion that the appellant could not reasonably have believed that he was involved in something other than a 'rhino horn' transaction. In other words, he could not have believed, for example, that he was dealing in drugs, the illegal diamond trade or something completely lawful. My difference of conclusion from Meyer AJA on this point is therefore a narrow one. My point of departure from the magistrate, the high court and my colleagues is that I do not accept that it was proven, beyond a reasonable doubt, that he was an accomplice to the crime of fraud, even though he clearly was an accomplice to some kind of crime or another. To come to the conclusion that the appellant is guilty of fraud, one must draw inferences that I do not think can be justified in this case.

[29] I agree that in her evidence in the witness box, accused 1 made accused 2 out to be a dealer. I accept that the appellant was a poor witness and that his version cannot be accepted.

[30] It is, however, trite that the fact that the accused is an unsatisfactory - even a lying witness – does not necessarily justify the conclusion of his guilt.[2] Care must be exercised in not drawing an inference of guilt merely because he was lying.[3]

[2] See for example *S v Mtsweni* 1985 (1) SA 590 (A) at 593I-594D; *S v Steynberg* 1983 (3) SA 140 (A) at 146A -148D; *R v Mlambo* 1957 (4) SA 727 (A) at 738B-D and *Goodrich v Goodrich* 1946 AD 390.
[3] See for example *Mtsweni, supra.*

Ultimately, guilt is about the inferences that, as a matter of logic, may be drawn.[4] Inference must carefully be distinguished from conjecture or speculation.[5]

[31] I do not see the relevance of Meyer AJA's reliance on *S v Boesak.*[6] In that case it was said that:

'If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. *Whether such a conclusion is justified will depend on the weight of the evidence*.'[7] (Emphasis added.)

In this case the appellant, unlike Boesak, did give evidence in court. In any event, the weight of evidence in this case does not justify the conclusion that the appellant was guilty of fraud. Despite the appellant's lies and accused 1 having said that the appellant was the 'dealer' in rhino horn, I do not think it can safely be concluded that the appellant either knew of the falsity of representations which accused 1 made to the police about the horn or that he knew it was a fake.[8] In any event, it has been trite since *R v Ncanana*[9] that the evidence of a co-accused should be treated with caution.[10] In my opinion, in a case such as this, corroboration of accused 1's evidence on the directly relevant issue of his state of knowledge was needed before any inference as to his guilt on the count of fraud could be made.[11]

[32] The major difficulty for the State in this case is that the fake rhino horn was of a superlatively good quality. It was so good, in fact, that it was only the day after the arrest had been effected, when the object had been sent to the forensic laboratories, that the scandal of the imitation was laid bare for all to see. There were, no doubt, some red faces. The photographs handed in to court as exhibits tell a story. Made of synthetic fibre, the fake horn, as traded, looked indistinguishable from the real thing. When it was sawn through near the tip, it became apparent that it had even been

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[4] Ibid.
[5] See for example *Caswell v Powell Duffryn Associated Collieries* [1939] 3 All ER 722 at 733, referred to with approval in *S v Essack & another* 1974 (1) SA 1 (A) at 16D and *Mtsweni* at 593F.
[6] *S v Boesak* 2001 (1) SA 912 (CC).
[7] Para 24.
[8] I use the word 'knew' in this judgment both in the direct sense (dolus directus) and the constructive sense (dolus eventualis) in that the appellant must have forseen the possibility that the rhino horn may have been a fake but was nevertheless content to proceed with the transaction on that basis. I deal with the question of dolus eventualis more fully later in the body of this judgment.
[9] *R v Ncanana* 1948 (4) SA 399 (A).
[10] At 405-6.
[11] See *S v Dladla* 1980 (1) SA 526 (A) at 529A-530A and *S v Johannes* 1980 (1) SA 531 (A) at 532H-533H.

stuffed with paper and sawdust – presumably so that it would not sound hollow when handled and so that the weight would appear to be authentic.

[33] Inspector Oberholzer was one of the police officers involved in the setting up of the trap and effecting the arrest of the two accused. He had 20 years of experience as a police officer, 15 of which were in the diamond and gold division and six in the combatting of crime relating to threatened species. He said at the time when he first saw the horn it looked 'definitief eg' ('definitely genuine or authentic' – my translation).

[34] Although the evidence was that the appellant had been a police officer, there was no evidence that he was any kind of expert in what may constitute a rhino horn. Indeed, he said he worked in the section of the police dealing with murder and robbery and denied any knowledge of dealing in endangered species of animals. This was not disputed by the State.

[35] As was said in *R v Blom*:[12]

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(1) The proved facts should be such that they exclude every reasonable inference save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn was correct.'[13]

*Blom* was referred to in *S v Mtsweni*, which, as I have already indicated, related, in turn, to the inferences to be drawn in a situation that may include the fact that the accused was lying.[14] Applying *Blom*, it cannot in my opinion be concluded, beyond reasonable doubt, that the appellant either knew that the item traded as rhino horn was a fake or that he did not.[15] All that may safely be concluded is that he intentionally, and aware of the likely unlawfulness of his conduct, took part in dealing in an item which subsequently turned out to be fake. Of what – if anything – does this make him guilty?

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[12] *R v Blom* 1939 AD 188

[13] At 202-203.

[14] *S v Mtsweni* 1985 (1) SA 590 (A) at 593H.

[15] Lest the point be lost, I repeat what I have said earlier that I use the word 'knew' both in the direct sense (dolus directus) and in the constructive sense (dolus eventualis) that the appellant must have foreseen the possibility that the rhino horn may have been a fake but was nevertheless content to proceed with the transaction on that basis.

[36] Section 256 of the Criminal Procedure Act 51 of 1977 (the CPA) provides that where the evidence does not prove the commission of the offence with which an accused person has been charged but proves the attempt to commit it, he or she may be found guilty of an attempt to commit the offence. The section reads as follows:

'If the evidence in criminal proceedings does not prove the commission of the offence charged but proves an attempt to commit the offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.'

[37] In this case one must be wary of the trap of circuitous reasoning. This was the reasoning adopted by appellant's counsel. It goes like this: it cannot be proved that the appellant knew that the rhino horn was a fake and therefore he cannot be guilty of fraud but it also cannot be proven that he did not know that it was a fake and therefore he cannot be convicted of an attempt to sell rhino horn. The universe of possible options of what the appellant thought the object to be is limited to two: either he thought it was rhino horn or he did not. It must be one of these two and, therefore, if it cannot safely be concluded that he thought it was not rhino horn, it can at least safely be concluded that he thought that it was indeed rhino horn and therefore, in my opinion, that he was guilty of the lesser offence of an attempt to contravene the ordinance.

[38] In this regard, the reasoning of Didcott and Wilson JJ in *S v Dube*[16] is instructive. In that case the accused had been charged with alleged possession of a machine gun and ten rounds of live ammunition that its magazine contained, in the case of each, without the requisite permit, and thus to have contravened ss 32(1)(*a)* and 32(1)*(e),* read with s 39(1)*(h)* of the then applicable Arms and Ammunition Act 75 of 1969. The firearm in question was a pistol, known as a 'Stetchkin'. It was of Russian origin and had a calibre of nine millimetres. The accused admitted possession of the firearm but claimed that he did not know of its potential for automatic or sustained fire and, accordingly, that it was a machine gun. The magistrate disbelieved him and, relying on circumstantial evidence, concluded that the accused must, indeed, have known that the firearm was a machine gun. He convicted the accused as charged. On appeal, Didcott J, with whom Wilson J

[16] *S v Dube* 1994 (2) SACR 130 (N).

concurred, found: 'That the appellant knew the pistol to be capable of automatic fire was not, I believe, established'.[17] The court set aside the conviction for possession of a machine gun and substituted it with a conviction of possession of a 'plain firearm'. In other words, the court, even though it could not be certain that the mental element of the accused's state of mind was that he thought the firearm was not a machine gun, it accepted that he at least thought it was a 'plain firearm' because only one of two options was possible and the less serious one was therefore the safer one to conclude.

[39] As this is a minority judgment and the issue of an intricate and technical nature I shall, however, deal more fully with which of the two options – that is, whether the appellant should be found guilty of fraud or an attempted contravention of the ordinance - is to apply. In *Dube* the court referred to *S v Hlomza*[18] in which Corbett JA, delivering the unanimous judgment of this court said:

'The true enquiry, as is indicated by the authorities quoted above, is whether or not the appellant knew that possession or dealing in the tablets in question was or might possibly be, unlawful, irrespective of whether he knew what law was being contravened and what the precise provisions of the law might be'.

The appellant in that case had been charged with possession of methaqualone. Corbett JA referred to *S v Magidson*[19] with approval, where Ackermann J, with Gordon J concurring had found that knowledge may be inferred by reference to *dolus eventualis.*[20] Corbett JA found that:

'It seems very likely that appellant, living in the milieu which he did, would have been aware that there was such a thing as an illegal drug trade and that certain types of tablets were the subject matter of such trading.'[21]

What is relevant here is that, although it was not proven that the accused knew that he was dealing in methaqualone, it was proven that he knew he was dealing in tablets, the trade of which was prohibited. That situation is different from one where a person thinks he is dealing in a prohibited object but in fact is not. I am mindful of the potential pitfalls in reasoning by analogy – the presumptions of similarity may not be justified – but reference thereto by way of intellectual construction is recognised

[17] At 133*h*.
[18] *S v Hlomza* 1987 (1) SA 25 (A) at 32F.
[19] *S v Magidson* 1984 (3) SA 825 (T).
[20] *Magidson* at 830A-B; *Hlomza* at 32B-C.
[21] At 32I.

by no less than *The Oxford Dictionary* as a useful tool.[22] The situation here – in contrast to *Magidson* – is comparable to the drug dealer who thinks he is dealing in prohibited drugs, but is in fact dealing in tablets that are not prohibited – such as, for example, a placebo.

[40] In *Magidson,* Ackermann and Gordon JJ confirmed a conviction of unlawful possession of imitation banknotes in contravention of s 21*(d)*, read with s 21*(c)* of the Reserve Bank Act 29 of 1944. They referred with approval to the judgment of Marais J in *S v White*[23] in which he found that the accused could not be found guilty on the main count (which related to deception and forgery) because it was not proven that the accused had the intention to defraud but merely that he had the intention to possess the imitation banknotes.[24] The accused was convicted on the alternative count, which related to possession.[25]

[41] The facts in the case before us are somewhat different. It can neither be found that the appellant knew that he was dealing in fake rhino horn nor that he knew he was making a false representation.

[42] It is not 'any old' knowledge of unlawfulness that is sufficient to prove guilt. I do not understand Corbett JA, in *Hlomza*, to have said or even implied that this is so. It would amount to a re-instatement of the doctrine of *versari in re illicata*. [26] That is inconceivable. The doctrine was made inapplicable in South Africa after protracted debate by this court over a number of years.

[43] The previous applicability of this doctrine was perhaps most famously set out in South Africa in *R v Wallendorf & others*[27] as follows:

'(I)t must be noted that there may be a guilty mind even though there is an absence of any intention knowingly to do the act which is prohibited by law. In many cases it is sufficient if the accused intended to commit a crime, even though it were different from that with which he is charged. Indeed, it has been held by many Judges that the mere fact that the accused

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[22] See for example *The Oxford Dictionary 6 ed (2007)*.
[23] *S v White* 1973 (4) SA 174 (W).
[24] At 178A-D.
[25] Ibid.
[26] Commonly known among lawyers simply as 'the versari doctrine', the maxim is more fully expressed as *versari in reillicata imputantur omnia sequuntur ex delicto* – those who engage in unlawful acts are held liable in law for all wrongs that arise therefrom. See for example *S v Van Der Mescht* 1962 (1) SA 521 (A) and *S v Bernardus* 1965 (3) SA 287 (A). The translation is my own.
[27] *R v Wallendorf & others* 1920 AD 383.

wilfully did something which he knew to be morally wrong supplies the *mens rea* which is necessary to commit a crime.'[28]

In *S v Van Der Mescht*,[29]after an extensive analysis of the authorities, Steyn CJ criticised this passage found in *Wallendorf*.[30]

Following *Van Der Mescht*, the *versari* doctrine was decisively rejected as having no place in our law in *S v Bernardus*.[31]

The dolus – or more accurately the *dolo malo*– even if 'eventualis' must relate to the specific act in question. Just as in *Hlomza* the dolus had to relate to illegal trade in drugs, and in *Magdison* and *White* to possession of false or reproduced bank notes, so too must the dolus in this case relate to the making of a false representation. It is also not sufficient that the dolus is an intention to deal unlawfully in the trade of rhino horn, in order to secure a conviction on the main count.

[44] In *S v Dougherty*[32] the court alluded to the fact that dolus means something more than mere unqualified intention and that the expression in our common law authorities that a crime must be committed *dolo malo* conveys a sense of 'evil' intention – that is to say an intention, coupled with an awareness of knowledge of the wrongfulness of the act.[33] I think the German word 'Unrechtbewusstsein' referred to by Professor JC De Wet in his *Strafreg* captures this concept very well.[34]

[45] Before one can find that a person knew of the wrongfulness of his act of fraud, one must first be able to find that he knew not only that the representation had been made but also that it was false. In this case, as far as dolus directus is concerned, I do not think it can be concluded, beyond a reasonable doubt, that the appellant knew either that he was an accomplice to a false representation being made or that he knew that the horn was fake. Upon a consideration of whether dolus eventualis is present, I do not think that it has been proven that the appellant foresaw that a false representation might be made in regard to the sale of a rhino horn that was a fake or even that he foresaw the possibility that a fake rhino horn might be sold.

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[28] At 394.
[29] *S v Van Der Mescht* 1962 (1) SA 521 (A).
[30] At 534H.
[31] *S v Bernardus* 1965 (3) SA 287 (A) at 298A-299H and 300H.
[32] *S v Dougherty* 2003 (4) SA 229 (W).
[33] Paras 35-37. This judgment was referred to with approval in this court in *S v Mkhize* (16/2013) [2014] ZASCA 52 (14 April 2014).
[34] See *S v Dougherty* (supra) para 35 and J C De Wet and H L Swanepoel *Strafreg* 4 ed (1985) at 137.

[46] In *S v P*[35] and *S v Du Preez*[36] it was made clear that when it comes to dolus eventualis the enquiry is not what the appellant ought to have foreseen but what he did foresee.[37] When considering the crime of fraud, the objectivity with which the issue of potential prejudice is viewed 'in the ordinary nature of things' - as set out in *R v Kruse*[38]and followed in *Heyne*[39] - must not be confused with the test as to the subjective intention of an accused person when it comes to dolus. The subjective intent to conceal or pervert the truth remains an essential element of fraud.[40]

[47] I therefore do not see the relevance of *Ex parte Lebowa Development Corporation Ltd*[41] upon which Meyer AJA has relied. As Meyer AJA has noted, Stegmann J said:

'The essence of fraud involving *dolus eventualis* appears to be the deceit practised by the representor in suggesting that to be true *which he knows may not be true*. He *knowingly* exposes the representee to a risk (that the representation may be false) and deceitfully leaves the representee ignorant of exposure to that risk.' (Emphasis added.)

In the case before us, I do not think it can be concluded, beyond reasonable doubt, that the appellant knew that it may not be true that the item in question was indeed a genuine rhino horn.

[48] I am strengthened in my thinking that the appellant was wrongly convicted of fraud by reference to further cases dealing with imitations of the real thing. In *Magdison* the high court hearing the appeal agreed with the magistrate that 'the reproductions were made on cheap paper which would on inspection, sight, touch and handling not easily mislead even an ignorant or illiterate person'.[42] That situation was very different from the one with which we now have to contend: the fake rhino horn was a most convincing imitation.

[49] Similarly in *White*, Marais J said:

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[35] *S v P* 1972 (3) SA 412 (A).
[36] *S v Du Preez* 1972 (4) SA 584 (A).
[37] *S v P* at 416 et seq; *S v Du Preez* at 588H.
[38] *R v Kruse* 1946 AD 524 at 533.
[39] *R v Heyne* (supra) at 622G.
[40] *R v Davies* 1928 AD 165 at 170; *R y Myers* 1948 (1) SA 375 (A) at 382-4 and *Gollach & Gomperts (1967) (Pty) Ltd & others v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 926E. Reference to *Gollach & Gomperts v Universal Mills* has been more recently made with approval in this court in *Rowe v Rowe* 1997 (4) SA 160 (SCA) at 166B.
[41] *Ex parte Lebowa Development Corporation Ltd* 1989 (3) SA 71 (T).
[42] At 828B-C.

'Nou moet ek sê dat daar een belangkrike feit is wat ten gunste van die beskudigde tel wat motief betref, en dit is dat die afdrukke wat gemaak is, gemaak is op afrolpapier, dit wil sê goedkoop papier, wat self deur 'n onkundigde of ongeletterde persoon nie maklik by aanraking en beskouing en hantering aangesien sou gewees het vir papier waarop 'n R10-noot gedruk is nie. Ons is almal bekend met die soort papier waaarop ons banknote gedruk is. Dit is papier wat hard voorkom, glad, en wat 'n baie sterk geluid maak indien dit gevou of gekreukel word. Die papier waarop hierde afdrukke voor die Hof is – etlike honderde van hulle – beantwoord nie daardie beskrywing nie. Dit is die sterkste punt wat ten gunste van die beskuldigde tel wat sy motief betref'.[43]

This may be translated as follows:

'Now I must say that there is one important fact that operates in favour of the accused insofar as dolus is concerned, and that is that the paper upon which the reproductions were made is ordinary printing paper, that is to say cheap paper which, in itself cannot easily be confused, even by an ignorant or uneducated person with the paper upon which a R10 note is printed, when it is touched, looked at or manipulated. We are all familiar with the kind of paper upon which our banknotes are printed. It is paper which feels hard and smooth and which makes a very loud noise when it is folded or crumpled. The paper on which these reproductions are before the Court – several hundred of them – does not satisfy that description. This is the strongest point that operates in favour of the accused insofar as his intention is concerned.' (My translation.)

[50] In *White,* the court referred with approval to *S v Bell*[44] in which Miller J, with Caney J concurring, said albeit in the context of forgery rather than fraud:

'The vital question in this case is whether the State discharged the *onus* of proving that the appellant made the false document in question *with fraudulent intent*. If the appellant did not act as he did with intent to defraud, or if he was not proved to have had that intent, *to whatever other consequences his conduct may expose him, he was not guilty of the crime of forgery,* for an intention to defraud is a necessary ingredient of that crime.' [45] (My emphasis.)

Forgery and fraud are both closely related crimes, having similar requisites as to intention.[46]

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[43] At 175G-H.
[44] In *White* at 177E. *S v Bell* 1963 (2) SA 335 (N).
[45] At 337B.
[46] See *R v Hyams* 1927 AD 35.

[51] The facts of this case are distinguishable from those in *S v Campbell*[47]upon which the high court relied in confirming the conviction. In *Campbell* the accused had sold zirconia to the police, claiming they were diamonds. His own version of events was that he had been dealing in zirconia. *Campbell* therefore does not assist the State in this case. Similar considerations apply to a consideration of *R v Dyonta & another*[48] upon which the high court and Meyer AJA have relied. In *Dyonta,* this court dismissed the appeal against a finding by Tindall J who had said: 'The onus, of course, lay on the Crown to prove that the accused knew that the stones were not diamonds.'[49] Tindall J, referring to the evidence that the stones were obviously not diamonds and that the accused had claimed to have a knowledge of diamonds, found that the onus had been discharged by the Crown.[50] Tindall J referred to *R v Makokosa & another*[51] – which was concerned with dealing in fake diamonds – where the point about the onus was emphasised.

[52] In *Dube,* Didcott J referred with approval to *S v Kantor*[52]in which Beadle CJ said:

'To take another example: I assume from what was said by *SCHREINER,* JA, in the passage quoted, that to deal unlawfully in brass in the genuine belief that I was a "precious" metal, say gold, is an attempt to contravene a statute making it an offence to deal unlawfully in "precious" metals, notwithstanding the fact that brass is not a "precious" metal, and notwithstanding the fact that the accused's criminal purpose was thus impossible of attainment.'[53]

This example by Beadle J, with whom Macdonald AJP and Macaulay AJA concurred, seems to me to be directly in point and singularly analogous. Once again, I am mindful of the caution that must be applied in reasoning by analogy.

[53] The judgment of Schreiner JA to which Beadle CJ referred was *R v Davies & another*.[54] *Dube* also refers thereto.[55]

The passage in *Davies* to which both *Kanto*r and *Dube* referred is the following:

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[47] *S v Campbell* 1991 (1) SACR 503 (Nm).
[48] *R v Dyonta & another* 1935 AD 52.
[49] At 54.
[50] Ibid.
[51] *R v Makokosa & another* 1927 TPD 107.
[52] *R v Kantor* 1969 (1) SA 457 (RAD).
[53] At 460B-D.
[54] *R v Davies & another* 1956 (3) SA 52 (A).
[55] At 128B.

'To sum up, then, it seems that on principle the fact that an accused's criminal purpose cannot be achieved, whether because the means are, in the existing or in all conceivable circumstances, inadequate, or because the object is, in the existing or in all conceivable circumstances unattainable, does not prevent his endeavour from amounting to an attempt.'[56]

[54] It therefore seems to me that the correct conviction of the appellant should be one of attempt to commit the statutory offence of dealing in rhino horn in respect of which he was charged in the alternative (s 14(2) of Ordinance 8 of 1969 (Nature Conservation Ordinance). Obviously, the different conviction would result in a different sentence but as I am in the minority, no useful purpose would be served by setting out what I should consider an appropriate sentence, in all the circumstances, would be. I should have upheld the appeal against both conviction and sentence.

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NP Willis

Judge of Appeal

[56] At 64A-B.

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