THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Not reportable
Case no: 297/06

In the matter between:

BARRY STEPHEN HASLAM **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **CLOETE, CACHALIA JJA *et* THERON AJA**

Heard: **8 MARCH 2007**

Delivered: **28 MARCH 2007**

Summary: *Criminal law - Fraud – Adequacy of proof. State failed to prove the mechanics of the fraud therefore cannot impute intention to the appellant. Appellant's version reasonably possibly true.*

Neutral citation: This judgment may be cited as HASLAM v THE STATE [2007] SCA 33 RSA

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[1] The appellant, a senior and experienced banker, was charged with and convicted in the Magistrates' Court, Johannesburg, of ten counts of fraud and sentenced to ten years' imprisonment. His appeal to the Johannesburg High Court was dismissed. He now appeals to this court, with the appropriate leave, against his conviction and sentence.

[2] The evidence presented at the trial was in essence the following: The appellant was employed as a relationship manager by Nedcor Bank Limited (Nedcor) at its Fox Street branch. In that capacity he was responsible for the accounts of various clients. Until the end of September 1998, the appellant, in his capacity as relationship manager, had a mandate to approve credit facilities up to a limit of approximately R150 000. With effect from October 1998, the credit lending mandate of all relationship managers was withdrawn. All credit applications had to be channelled to the credit department for investigation, consideration and approval.

[3] The appellant was, inter alia, responsible for the accounts of Moonstar Commerce & Industry (Pty) Ltd (Moonstar) and Emperor Fisher International (Emperor Fisher), the latter company being owned by Mr Zhang (Zhang). Mr Theuns Botha (Botha) was the managing director and sole shareholder of Moonstar and for a period assisted in the management of Emperor Fisher. Both companies were involved in importing raw materials and goods from China into South Africa.

[4] During 1999, Botha, on behalf of Moonstar, applied to Nedcor for credit in the form of letters of credit. According to the evidence, a letter of credit is an

irrevocable and autonomous payment instrument issued by a bank which is particularly favoured for use in international transactions as a payment mechanism by importers of foreign goods. Once a letter of credit has been issued an independent contract is established between the issuing bank and the foreign beneficiary in terms of which the bank is obliged to make payment in accordance with the letter of credit. Global Business Centre (Global), a unit within Nedcor, was primarily concerned with the processing and issuing of letters of credit.

[5] Moonstar's applications for letters of credit were submitted to the appellant and it is common cause that the appellant signed the credit application forms at the bottom right corner in the space marked 'approved (relationship/credit officer's signature)'. He also inserted his signature number on seven of the forms and his relationship number on a few others. Either number would enable an employee of Nedcor to determine the appellant's position within the bank using the bank's computer network.

[6] During the period January 1999 to June 1999, ten letters of credit (which form the subject of the ten counts of fraud) were issued by Global in favour of Moonstar. At least three of these letters of credit were for the benefit and use of Emperor Fisher.

[7] Snyman, a credit manager in the employ of Nedcor, who had managed the credit portfolio of the appellant's clients, testified about the bank's procedure in respect of applications for letters of credit. Snyman said that the appellant, in his capacity as relationship manager, would receive such applications and submit

each application, together with a motivation, to the credit department. In the absence of a motivation, Snyman would return the application to the appellant. It is common cause that the appellant had not attached motivations to any of the ten application forms under consideration.

[8] It is further common cause that the application forms in respect of the letters of credit had not been presented to and approved by the credit department prior to being issued by Global. At the time, the personnel at Global were unaware of the withdrawal of relationship managers' credit mandate despite the fact that such withdrawal had been well publicized within Nedcor. Global, accepting that the applications met Nedcor's credit requirements, issued the letters of credit applied for. It is common cause that Nedcor's risk in respect of the letters of credit, was not secured.

[9] Moonstar's account with Nedcor went into overdraft. It was unable to pay its debts, including the debt to Nedcor which arose in consequence of Nedcor making payment pursuant to the letters of credit. Moonstar was liquidated on 25 January 2000. Nedcor suffered considerable financial loss, the actual amount of which was not proved.

[10] Central to the state's case is the appellant's signature on the ten applications for letters of credit. The evidence presented by the state sought to show that by signing the applications next to the word 'approved', the appellant effectively placed himself in the position of a *bona fide* credit manager and by implication, misrepresented to Global that he had the mandate to approve letters of credit and that he had completed all the functions and duties of a credit

manager. In this manner the signing of the letters of credit by the appellant constituted a misrepresentation which Global, to the prejudice of Nedcor, had acted upon.

[11] The appellant testified that he had appended his signature to the documents simply to allow the applications to be processed by the credit department and that Snyman would have disregarded his (appellant's) signature for purposes of the department's decision, as the credit decision was that of Snyman alone. The appellant stated that he did not intend to bypass the credit department. According to the appellant his workload had increased tremendously in consequence of the withdrawal of his credit lending mandate. Post October 1998 he was required to motivate each and every application for credit. In respect of applications for specialist products, such as letters of credit, he would simply ensure that these were put into the system in order to be processed by the relevant department. It was in fact his burdensome workload which prompted him to seek alternate employment. It is common cause that the appellant resigned on 25 May 1999 and left the employ of Nedcor on 25 June 1999 to take up a position with Standard Charter Bank.

[12] The trial court considered the evidence presented by the state sufficient to justify the conviction of the appellant. The appellant's version was found to be inherently improbable. In support of this finding as to the improbability of the appellant's version, the trial court stated that it could not accept that an experienced banker such as the appellant would 'have just rubber stamped' Moonstar's applications for letters of credit. The trial court criticised the

appellant for failing to attach a motivation to the application forms or a note indicating that he had not considered the merits of each application. The trial court concluded that the appellant, by appending his signature to the application forms, had intended to induce Global to believe that Nedcor's normal credit lending requirements had been complied with.

[13] On appeal, the high court also found the appellant's version 'unacceptable'. The high court further found that the credit department had been by-passed, and that the appellant 'did not direct the applications' through the appropriate channels 'in all probability with the intention to circumvent' the bank's credit procedure. It is these findings which the appellant takes issue with in this appeal.

[14] The crime of fraud consists of unlawfully, and with intent to defraud, making a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.[1] It is alleged in the charge that the appellant unlawfully and fraudulently misrepresented that:

(a) he had authority to approve applications for letters of credit; and/or

(b) he had complied with Nedcor's normal lending requirements in approving the letters of credit; and/or

(c) he had acted within his lending mandate; and/or

(d) there were sufficient facilities and/or security in place to ensure repayment of the letters of credit; and/or

[1] See *S v Campbell* 1991 (1) SACR 503 (NM) at 505b-c and JRL Milton *South African Criminal Law and Procedure* Vol 2, 3 ed (1996) p 702.

(e) he had acted within the normal scope of his duties by approving the letters of credit.

In this matter, it is difficult to appreciate how the state could succeed in proving the guilt of the appellant without showing that:

(a) the appellant was involved in a course of conduct which, to his knowledge, would and did involve the making of a false representation to Global; and

(b) the appellant had knowledge that Global was unaware of the change in the credit mandate system and would have issued the letters of credit on the basis of his signature alone.

[15] I turn now to consider whether the bypassing of the credit department was brought about in consequence of any deliberate and intentional act or omission on the part of the appellant. The only person who could explain how the documents ended up with Global was Ms Huey Botha, the wife of Botha, who had been employed by Nedcor as a foreign representative. In that capacity she acted as translator/facilitator for the bank's Chinese speaking clients. According to her testimony she either received the application forms directly from the appellant or they were left in her office. This is in stark contrast to the appellant's testimony that the application forms were dispatched to Ms Botha via the bank's internal messenger system. Ms Botha said that once she received the application forms it was her responsibility to deliver them to Global. The procedure she adopted does not accord with the procedure testified to by Snyman and the appellant. According to Snyman and the appellant the normal

procedure was that the applications were to go from the relationship manager to the credit department.

[16] It is necessary to record that the trial court made adverse credibility findings against the Bothas. It considered Botha to be a fairly convincing witness but one who had only partially told the truth. The trial court adopted the view that it could rely on Botha's evidence only where it was corroborated or not in dispute. It however found Ms Botha to be a 'very bad witness' and concluded that 'very little evidential weight' could be attached to her testimony.

[17] In my view, the principal deficiency in the state's case is its failure to establish the mechanics of the fraud. If the state is unable to prove the mechanics of the fraud - how the application forms got from the appellant to Global, without being channelled through the credit department - on what basis can it be found that that was the consequence intended by the appellant? There is no evidence to suggest that the appellant knew that Ms Botha would not follow standard procedure and instead deliver the application forms directly to Global. There is in fact evidence to suggest the contrary. Ms Botha testified that the appellant had not given her specific instructions regarding the application forms. Botha's testimony is that the appellant had advised him (Botha) that the applications for letters of credit would follow the bank's normal procedures. On the evidence it cannot be found that the appellant intended to or took any steps, whether by action or inaction, to cause any of the applications for letters of credit to bypass the credit department and the contrary finding by the high court in paragraph [13] above cannot be supported.

[18] I turn to the second issue, namely, whether the appellant knew that Global was unaware of the change in the credit mandate system. The appellant's uncontested evidence is that he had never been to Global's premises and that he was not known by the personnel at Global. This evidence was confirmed by the staff at Global. It is common cause that the withdrawal of the credit mandate of relationship managers was well publicized within Nedcor. It is surprising that Global, which is not an independent entity, but a division within Nedcor, was unaware of the changes in the bank's credit policy. There is not a shred of evidence to support a finding that the appellant knew or could safely have assumed that Global was oblivious of the change.

[19] It is trite that in a criminal matter the state must establish the guilt of the accused beyond reasonable doubt and that where the explanation of the accused is reasonably possibly true, then an accused is entitled to be acquitted. In *S v Shackell*[2] after restating the standard of proof in criminal matters, Brand AJA stated that it is permissible for a court to test an accused's version against the probabilities but hastened to caution that an accused's version 'cannot be rejected merely because it is improbable; *it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true*.' (Emphasis added.) The appellant gave an account as to why he had appended his signature to the application forms and although it may be contended that this was not the norm or the most practical way of

[2] 2001 (4) SA 1 (SCA) para 30.

ensuring that the applications were processed, or even that the appellant may have been negligent, it is not possible, from that evidence, together with the evidence led by the state, to make the quantum leap in logic, as did the magistrate, that by signing the application forms, the appellant had 'intended to pretend to Global that credit vetting was done'.

[20] I turn now to consider the evidence relating to 'gifts', 'a job application' and 'a trip to China', all of which, according to the trial court, were circumstantial factors, pointing towards the guilt of the appellant. The appellant's evidence was that he had received gifts from Zhang, such as wine and royal jelly which were all below the value of R500 and in terms of the bank's policy did not have to be declared. Botha was not in a position to dispute this and there is no reason to believe that the appellant was being untruthful. Botha in his evidence suggested that the appellant had received cash from Zhang (R5000 per month). This evidence was also disputed by the appellant. Zhang was not called as a witness and in the view of the approach adopted by the magistrate, Botha's uncorroborated evidence has to be disregarded.

[21] The appellant did not make a 'job application' to either Moonstar or Emperor Fisher. According to the evidence, Botha had made an offer to the appellant *after* the latter had indicated his intention to leave the employ of Nedcor and *after* the appellant had signed the first letter of credit application form. It is in any event extremely improbable that the appellant with his credentials would have considered for a moment taking up employment with either of the companies, and the suggestion that he may have been induced by

the offer of employment to commit the frauds is so far fetched that it may be rejected out of hand.

[22] It is common cause that after resigning from the employ of Nedcor, the appellant accompanied Botha, Zhang and certain other delegates, one of whom was a high ranking official from the National African Chamber of Commerce and Industry (Nafcoc), on a trip to China. It is also common cause that Botha paid for the air tickets. The importance of the trip to China was overstated by both the trial and high court. First, the appellant, by reason of his expertise in the banking industry, was invited to be a member of the delegation. Secondly, the trip occurred subsequent to the appellant leaving Nedcor. Thirdly, upon the appellant discovering that Botha had misrepresented to their Chinese counterparts that the appellant was still employed by Nedcor, he immediately cut short his trip to China. This response, on the part of the appellant, does not support the high court's finding of the existence of a 'special relationship' between Botha and the appellant.

[23] In my view, there is nothing improbable in the explanation put forward by the appellant. It seems improbable that the appellant, a senior, highly respected and sought after banker, would, for no apparent personal gain (apart from the negligible gifts already mentioned) put his successful banking career on the line for a simple and unsophisticated series of frauds, which could and should easily have been detected.

[24] The appeal succeeds and the appellant's convictions and sentences are set aside.

L V Theron

Acting Judge of Appeal

CONCUR:

CLOETE JA

CACHALIA JA