THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 75/07
REPORTABLE

In the matter between:

ABNER MNGQIBISA **APPELLANT**

v

THE STATE **RESPONDENT**

Before: Brand, Mlambo et Combrinck JJA

Heard: 6 September 2007

Delivered: 27 September 2007

Summary: Criminal law – fraud – appellant making false representation to an employee of the complainant – subsequently he stated correct facts to another employee – initial statement calculated to prejudice complainant.

Neutral citation: This judgment may be referred to as *Mngqibisa v The State* [2007] SCA 119 (RSA)

MLAMBO JA

[1] The appellant was the insured under a short term motor vehicle insurance policy underwritten by Auto and General (Pty) Ltd in respect of his Fiat Uno. In terms of the policy the appellant and his then fiancée, Aura Thandeka Magagula (now his wife), were the designated drivers of the Uno even though his wife was at the time the holder of a learner driver's license. The policy provided that additional excess was payable, in the event of a claim, where the driver at the time was in possession of a learner driver's licence. As fate would have it, the Uno, driven at the time by the appellant's wife, was involved in a collision with a truck on the N4 motorway between Ngodwana and Waterval Boven, Mpumalanga Province.

[2] After lodging a claim the appellant, during a telephone conversation with Derek Fabian Jefta, an employee of Hotline Administrative Services (Pty) Ltd, informed Jefta that he was driving the Uno at the time of the collision. Hotline Administrative Services (Pty) Ltd was contracted by Auto and General to manage and administer claims, on its behalf and Jefta's responsibility was to receive and process claims from policy holders. In a subsequent telephone discussion with Hendrik van Staden, a claims assessor also employed by Hotline Administrative Services, the appellant informed the latter that his wife was in fact the driver at the time of the collision.

[3] The claim, assessed at R37 000 was never paid out, after it was verified that the appellant's wife was the driver and that she was in possession of a learner driver's licence. Moreover, as a consequence of his misstatement to Jefta the appellant was charged on one count of fraud. According to the charge sheet the indictment was that he made the false

representation to Jefta, well knowing that it was false and he thereby caused potential prejudice to Hotline Administrative Services and/or Auto and General, in that the latter may have been induced to pay out under the policy on the basis that the statement was true.

[4] In the ensuing trial in the Pretoria Specialized Commercial Crimes Court the appellant was convicted but the imposition of sentence was postponed for a period of five years in terms of s 297(1)(a)(ii) of the Criminal Procedure Act 51 of 1977, as amended. An appeal against the conviction was dismissed by the Pretoria High Court (Mabesele and Van Zyl AJJ). The high court however granted him leave to pursue the current appeal in this court.

[5] In convicting the appellant the trial court found that the appellant, despite his denial, had in fact misrepresented to Jefta that he was the driver whilst he was well aware that he was not. The trial court also found that Hotline Services and/or Auto and General had been exposed to potential prejudice in that they could have received a lesser excess. This resulted from the provision in the policy that in the event of the driver being in possession of a learner driver's licence only, the excess would be greater.

[6] It is prudent to consider the origins and development of potential prejudice as an element of the offence of fraud. An examination of the early authorities reveals that the concept of potential prejudice was by no means unanimous. Judicial opinion favoured an approach that required proof of actual prejudice to found a conviction. In *R v Poley* (1878) 1 Buchanan 49 at 50 the following is stated:

'In this case, that there was criminal intention, there appears to me to be little doubt; but

there is a further requisite, namely, an actual prejudice occasioned to a third person. Simple lies, when the foregoing requisites are wanting, are not within the cognizance of the criminal law.'

See also *Queen v Brandford* (1889) 7 S.C. 169 at 173-174 and *Queen v Ntshanga* (17 CCJ) 280 at 281.

[7] The first authoritative judicial espousal of potential prejudice is found in *R v Moolchund* (1902) 23 NLR 76. There, Mason J, after an examination of the early authorities formulated the concept in the following terms:

'We are therefore satisfied that where all the requisites of the crime are present, except the actual happening of the contemplated or intended injury or prejudice the falsifier is liable to be punished for the *crimen falsi*. It would be monstrous, we think, if because a person's wicked machinations have been defeated, or unsuccessful, on account of the intervention of some third person, or the occurrence of some event beyond his control, or because his misrepresentations were not believed or were not acted upon, that he should escape the penalty of the law.' (at 81)

[8] This exposition of the law was embraced in subsequent cases such as *R v Jolosa* 1903 TS 694 at 698 where the court stated:

'It would be indeed monstrous that if a man forged a cheque and presented it at the bank, and the bank did not cash it, he should not be guilty of the crime of falsity because no one had been injured. All the elements of the crime of forgery would in such a case be present. The act would be one calculated and intended to prejudice a third person, and that, in my opinion, by Roman-Dutch law would be sufficient without proof of actual prejudice to such person.'

[9] 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* 1935 AD 52 at 57; *R v Heyne* 1956 (3) SA 604 (A) at 622; *S v Kruger* 1961 (4) SA 816 (A) at 832D-E and *S v Friedman* (1) 1996 (1) SACR 181 (W). It is with this treatise of the law that I revert to the case before us.

[10] Appellant's counsel submitted that when the appellant informed Jefta that he was the driver, he had no wilful intent to deceive. Counsel advanced two bases for this submission. Relying on certain statements made by the appellant in the course of lodging his claim with the insurance company, he submitted, in the first place, that because the appellant was a passenger in the Uno and was giving instructions to his wife, he considered himself to be the driver. There is no merit in this submission. The appellant is an educated person and could never have been under any illusion that he could be described as the driver. Therefore, his statement that he was the driver was, to his knowledge, misleading.

[11] The second basis advanced by counsel was that, according to the appellant, as a fact it made no difference whether he or his wife was the driver. This relates to the appellant's version based on the policy that he and his wife were the designated drivers and that in the event of the Uno being damaged whilst being driven by either of them, Auto and General would pay. This submission is also without merit. Even if Auto and

General was liable irrespective of who the driver was, the argument flounders on the simple fact that a higher excess was payable if the driver of the Uno at the time of the collision was in possession of a learner driver's licence only.

[12] I am therefore satisfied that potential prejudice was shown on the facts before us which was neither too remote nor fanciful (see eg *R v Seabe* 1927 AD 28 at 34). It is of no assistance to the appellant that he subsequently told the truth. Potential prejudice is occasioned at the time of making the false representation and this must be determined on the facts of each case (see eg *S v Kruger supra* at 828A-B). The appellant was therefore correctly convicted of fraud.

[13] I must however point out that the reliance by the trial court and the court *a quo* on the alleged second misrepresentation by the appellant that he was present in the Uno at the time of the collision, was misdirected as the charge sheet did not go that far. It was in fact not necessary to consider that statement as the appellant was clearly guilty on the representation he made to Jefta.

[14] The appeal therefore falls to be dismissed.

D MLAMBO
JUDGE OF APPEAL

CONCUR:
BRAND JA

COMBRINCK JA