THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 284/2017

In the matter between

TENGIMPILO MAQEBHULA **APPLICANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Maqebhula v The State* (284/17) [2018] ZASCA 010 (5 March 2018)

Coram: Ponnan, Willis and Mathopo JJA and Davis and Rogers AJJA

Heard: 16 February 2018

Delivered: 5 March 2018

Summary: Application for leave to appeal against dismissal by high court of petition for leave to appeal against conviction and sentence by regional court – relevant test whether applicant has reasonable prospects of success – no such prospects in present case.

ORDER

Application for leave to appeal from: The Eastern Cape Division, Grahamstown (Mbenenge J and Bacela J sitting as court of appeal against a decision of the Port Elizabeth Regional Court).

The application is dismissed.

JUDGMENT

Rogers AJA (Ponnan, Willis and Mathopo JJA and Davis AJA concurring)

[1] This is an application for leave to appeal which has been referred to open court for argument. On 6 February 2014 the applicant was convicted in the Port Elizabeth Regional Court on two counts of fraud and sentenced to a fine of R20 000 or, failing payment, two years' imprisonment, the counts being taken together for purposes of sentence. The applicant sought leave to appeal against conviction and sentence which the magistrate refused. A petition to the court a quo was dismissed. The applicant now applies for leave to appeal against the dismissal of the petition.

[2] The test we must apply is whether the applicant enjoys reasonable prospects of success, not whether an appeal would succeed.

[3] At the relevant time the accused, a lieutenant-colonel in the South African Police Service (SAPS), was the commanding officer of the Grahamstown Local Criminal Record Centre (LCRC). The charges of fraud arose from two trips he undertook in police vehicles, the first on Thursday and Friday 24-25 June 2010, the second on Saturday 12 February 2011. The applicant's superior officer was Brigadier Botha. The applicant made the prescribed application to Botha to use the vehicle for the June 2010 trip. He made no such application for the February 2011 trip.

[4] The first count alleged that during the period 22-25 June 2010 the applicant unlawfully, falsely and with the intention to defraud, represented to Botha and/or the SAPS that he had to testify in his official capacity in a criminal case in Cradock on 24 June 2010; that, while being under an obligation to do so, omitted to disclose that he did not attend the criminal case and/or would or did travel to certain other towns alleged in the preamble to the charge; and that, by means of the said misrepresentations, induced the SAPS – to its loss and prejudice – to grant him authorisation to use the vehicle for the purpose stated in the prescribed application.

[5] The second count alleged that on or about 12 February 2011 the applicant unlawfully, falsely and with the intention to defraud, failed to disclose to Botha and/or the SAPS that he undertook a trip with an official vehicle under circumstances where he had a duty to disclose such fact; and that, by means of the said misrepresentation, precluded the SAPS – to its loss and prejudice – from instituting legal action and/or disciplinary proceedings against him to recover the wasted funds of the trip.

[6] I shall deal with the two counts chronologically but mention that the events relating to the second trip were uncovered first and prompted the investigation which uncovered the events relating to the first trip.

[7] On 22 June 2010 the applicant applied to use a police vehicle to travel for official purposes via the shortest route from Grahamstown to Cradock on 24 June 2010, departing at 07:00 and returning at 17:00. The stated purpose was to attend court as a witness. The applicant attached to his application a subpoena purporting to show, by way of a handwritten annotation, that an earlier hearing to which he had been subpoenaed had been remanded to 24 June 2010. Botha approved the application.

[8] The evidence established that the applicant was subpoenaed to attend the Cradock case in May 2010. The investigating officer in the Cradock case testified that the handwritten date ‘24 June 2010’ was not his and that he had not told the applicant that the case had been remanded to that date or that he was required to

be present on that date. On the contrary, the case was remanded to 13 October 2010.

[9] The official vehicles are fitted with tracking systems which send SMS messages to the server every few minutes. This permits close monitoring of the vehicle's location, speed and distanced travelled. When the discovery of alleged irregularities in respect of the second trip led to an investigation of earlier trips, the tracking report for the vehicle used by the applicant on the first trip showed that shortly after 07:00 on 24 June 2010 the applicant left Grahamstown and travelled on the N2 through King William's Town to East London where he stopped in Church Street at 09:46. Within East London he travelled between several addresses and then headed back on the N2, leaving East London at 12:06 and arriving in King William's Town at 13:00. He spent about fifteen minutes there before returning to Garcia Street in East London. After stopping there for a few minutes, he headed north on the N6 through Queenstown to Cradock where he arrived at 17:49. He drove to several locations in Cradock before turning off the ignition for the night at 20:44. The applicant left Cradock early the next morning, arriving back in Grahamstown at 07:13.

[10] It is common cause that the applicant did not testify in Cradock on 24 June 2010 and that the court did not sit at all during that week. The applicant's version was that at the hearing in May the case was provisionally remanded to 24 June 2010 because of the accused's ill-health and that his arrangement with the prosecutor was that he would phone the prosecutor (whose name he could not recall) on 23 June to check whether the case was running. He claimed to have done so and to have been told that the case was not proceeding. He testified that he then phoned Botha to say that although he was no longer needed as a witness in Cradock, he still needed to go there to fetch a docket. Botha, he alleged, gave him the go-ahead.

[11] The applicant testified that he arranged with his colleague in Cradock to leave the docket at the police station because he might only get there late; and that while in Cradock he went to the charge office to collect the docket. He said that he also drove to various locations in Cradock to trace witnesses in connection with a civil

case where a W/O Senekal was suing him and the state. (This was not something he claimed to have mentioned to Botha as a purpose of the trip.) When asked where he slept in Cradock, he could not remember. He confirmed that he had friends in Cradock but could not remember whether he spent the night with one of them.

[12] In regard to his visits to King William's Town and East London (which he likewise did not claim to have mentioned to Botha), his evidence was that the Grahamstown LCRC needed certain fingerprinting supplies (ninhydrin and superglue) which, after phoning around, he could only source from the LCRC in East London; and that he needed to deliver various papers to the King William's Town police station.

[13] The applicant's version about phoning Botha for an oral variation first emerged during the applicant's evidence. The State successfully applied to reopen its case to call Botha. The latter denied having received the alleged call. He testified that he would not have authorised a trip for the purposes claimed by the applicant as there were closer police stations which could have supplied the materials and because officers from the Grahamstown LCRC regularly visited the large LCRC in Port Elizabeth.

[14] Even on the applicant's version, he did not have authority to travel to East London or to extend the trip into a second day. The applicant's actual trip was about three times longer than a direct journey from Grahamstown to Cradock. In any event, there is no prospect that another court will find the applicant's version to be reasonably possibly true. Since on his version he knew on 22 June that the Cradock case might not run on 24 June, it made absolutely no sense to make the application to Botha without first finding out whether the Cradock case was proceeding. He could have phoned the prosecutor on 21 or 22 June, before lodging his application. Furthermore, if – as he claimed – he had several reasons, and not one, for visiting Cradock, one would have expected him to mention the other reasons (fetching the docket; tracing witnesses) in his application for authority, particularly since he knew that his commitment as a witness might fall away.

[15] The magistrate, who saw and heard the witnesses, believed Botha and disbelieved the applicant. A reading of the record does not suggest any basis on which an appeal court might interfere with this finding. On the contrary, the applicant was a poor witness.

[16] His version of the lengthy trip undertaken supposedly to obtain minuscule supplies of ninhydrin and superglue is ludicrous. Furthermore, there were material discrepancies between the version put to the state witness Lt-Col Muller and the version the applicant subsequently gave. What was put to Muller was that when the applicant arrived at East London he discovered that his colleague, W/O Bengo, could only supply him with the superglue, not the ninhydrin, and that he thus sourced the ninhydrin from the LCRC in Queenstown. When he testified, however, he claimed to have obtained both materials from Bengo in East London, and that was also the evidence of Bengo whom the defence called as a witness. There was, however, a discrepancy between the applicant's testimony and that of Bengo: the applicant claimed to have taken delivery of the materials in Church Street near the Oxford Street police station whereas Bengo alleged that the hand-over occurred outside the Cambridge police station in Garcia Street.

[17] The detailed tracking information is not reconcilable with the applicant's account. His version was that the recorded stopping of his vehicle in Church Street at 09:46 was the occasion when Bengo supplied him with the ninhydrin and superglue. Although the police station was in Oxford Street, there was, he said, no parking available there, so his colleague met him briefly in Church Street. The tracking report, however, shows that he spent an hour at this location and the related Google image indicates that the place where he stopped in Church Street was some distance from Oxford Street.

[18] The tracking report also shows that after stopping in Church Street for an hour, the applicant drove to the Cambridge police station in Garcia Street where he spent a further 45 minutes. According to the applicant, he needed to get crime intelligence there whereas Bengo claimed that this was where he met the applicant briefly to hand over the fingerprinting materials.

[19] In regard to the papers he supposedly needed to deliver in King William's Town, there was no reason for him not to have delivered them on his way to East London if his version of the reason for the visit were the truth. It made no sense, on his version, for him to drive through King William's Town to East London and then back to King William's Town and then back again to East London.

[20] His version as to what he did in Cradock is also not credible. He claims to have needed to fetch a docket there. However there was unchallenged evidence from the State that according to the tracking report he did not stop at any Cradock police stations.

[21] In my view, therefore, the applicant has no prospects of success in respect of the first count.

[22] As I have mentioned, the applicant did not seek authority for the second trip. The circumstances in which it was discovered are these. On Friday 11 February 2011 W/O van Staden used the vehicle for official purposes. When he arrived back in Grahamstown he filled the tank and returned the keys and logbook to the applicant. On the Monday morning Van Staden accompanied W/O de Klerk on an intended trip in the same vehicle. When, shortly after leaving the police yard, De Klerk stopped at a garage to buy petrol, Van Staden expressed surprise because he had left the vehicle with a full tank. They checked the logbook. No weekend trip was reflected and the odometer reading purported to show that the vehicle had only travelled three kilometres since Van Staden parked it on the Friday.

[23] When the tracking report for the vehicle was retrieved, it revealed the following (it is common cause that the applicant was the driver). On Saturday 12 February 2011 the applicant departed from Grahamstown at 11:12. He drove north on the R350 to Bedford, then east on the R63 through Cookhouse to Somerset East where he stopped for about three minutes. He then retraced his course on the R63 through Cookhouse and Bedford where, instead of turning south onto the R352 back to Grahamstown, he carried on through Bedford and Adelaide to Fort Beaufort where he stopped for a couple of minutes before driving south on the R67 back to Grahamstown where he arrived at 15:05. The total distance covered was 351 km.

[24] The applicant's explanation was that he needed to verify the northern point of a sketch plan at a location just east of Cookhouse. Because it was a very busy period, he was unable to get to this during the week. He drove to Somerset East to buy something to eat and drink. In cross-examination it was pointed out to him that the tracking report did not indicate that the vehicle had stopped in the vicinity of Cookhouse after he returned from Somerset East and he was invited to explain this apparent inconsistency with his version. His reply was that he had not switched off the ignition when checking his sketch plan because it had only taken a minute or two. By this stage, I should mention, an expert called by the State had testified that if the car was stationary with the engine idling, the tracking report would not show that the vehicle had stopped unless it was stationary for two successive SMS signals. Asked why he had not bought something to eat in Cookhouse, he said the outlets there were more expensive than the Spar at Somerset East.

[25] The applicant's explanation for the trip was undoubtedly false; and if it was false, that could only be because the true purpose of the trip was unrelated to police business. On the applicant's version, he travelled an extra 50 km (25 km each way) just to buy some takeaway food and drink at a supposedly cheaper price. This is an absurd story. And why would the applicant not have switched off the ignition when finalising his sketch plan, even if he only needed a few minutes? His version was plainly tailored to meet the problem raised by the tracking report.

[26] Even so, his version fell far short of meeting the difficulties created by the tracking report. The version put to the State witnesses was that to reach the location of the sketch plan he had needed to travel about ten minutes on a dirt road off the R63. The tracking report showed no such deviation. The SMS signals were generally only one or two minutes apart (the longest interval was three minutes) and showed the vehicle at all times on the R63. The tracking report recorded that he was driving at an average speed of around 120 km/h when returning from Somerset East to Cookhouse and that this leg of the trip took 13 minutes. The distance between Somerset East and Cookhouse is about 25 km, which, at a speed of around 120 km/h, would take 12½ minutes. This shows that he did not stop at all between Somerset East and Cookhouse.

[27] The applicant's counsel submitted that her client in his evidence had not been sure whether he had checked the sketch plan before or after stopping at Somerset East. If he had stopped to check the plan before rather than afterwards, this would account – so the argument went – for the fact that his trip from Cookhouse to Somerset East took 20 minutes as opposed to the 12½ minutes which the return trip took. This argument, however, is incompatible with the tracking report. Although the applicant only turned off the ignition in Somerset East 20 minutes after leaving Cookhouse, he arrived in Somerset East within 11 minutes and then spent another 9 minutes driving around the town at a slow speed, consistent with someone looking for an address. He certainly could not have spent any time deviating to a location near Cookhouse. Apart from the matter of timing, the tracking report does not show that he turned off the R63 on his way to Somerset East.

[28] The applicant also ran into difficulty when confronted with the two case numbers he specified in his exculpatory statement as being the case numbers to which the sketch plan related. One was a Cookhouse case, the other a Somerset East case. He wrote the statement by hand and gave it to a secretary to type. The Cookhouse case mentioned by him was a murder case where the accused was sentenced on 21 January 2010, ie before the applicant's trip. The Somerset East case was a business robbery. The applicant claimed that the typist had made a mistake with the Somerset East case and that the correct case was actually another Cookhouse case. The notion that the secretary mis-typed 'Somerset East' where the applicant had written 'Cookhouse' and that she had also got the case number completely wrong is bizarre, particularly since there were no other typing errors in this document and that there was in fact a Somerset East case with the numbers typed by the secretary.

[29] In short, neither of the cases mentioned by the applicant in his exculpatory statement were the cases for which the sketch plan was supposedly needed. His version ultimately was that the sketch plan actually related to a Cookhouse stock theft case. The sketch plan he purportedly produced on 13 February 2011 in relation to the stock theft case has all the appearances of a bogus computer-generated document without any meaningful features.

[30] Another fact which tells against the applicant is that if the purpose of the trip was solely to check a sketch plan in the vicinity of Cookhouse, he would have returned to Grahamstown by the same route he got to Cookhouse, namely on the R350. Yet instead of turning south onto the R350 at Bedford, he travelled a considerably longer distance on the R63 to Fort Beaufort where he stopped for a minute or two before heading south onto the R67.

[31] When one adds, to all of the above, that despite the journey of 351 km the odometer reading changed by only three kilometres, one can arrive at no other conclusion than that the applicant undertook a private journey but arranged for the odometer to be disconnected or reversed to conceal this fact, an operation which, according to the State's evidence, would not have been difficult for one who knew what to do. Nobody else could plausibly have fiddled with the odometer; and it is fanciful beyond all reason to suppose that the odometer coincidently malfunctioned on the very weekend the applicant made unauthorized use of the vehicle.

[32] The applicant denied that an officer of his rank was obliged to seek authorisation for the official use of vehicles. Botha's evidence, supported by documents, established the contrary beyond doubt. It was argued on the applicant's behalf that the regional court should not have had regard to Botha's evidence concerning the need for authorisation because this part of the applicant's defence had been foreshadowed in the cross-examination of the State witnesses. While this is so, no objection was taken when Botha was led on the rules relating to authorisation. On the contrary, he was cross-examined thereon. After Botha's evidence the magistrate afforded the applicant an opportunity to reopen his case which was declined.

[33] The applicant's counsel submitted that because Botha's evidence indicated that the applicant would not have needed authorisation for a trip taken within the Grahamstown LCRC's service area, the state needed to prove that Somerset East was not within the Grahamstown LCRC's service area. However it was never the applicant's case that he had not needed authorisation because he only travelled within his own service area. Moreover, we know that the applicant on this trip travelled to Fort Beaufort. De Klerk's unchallenged testimony was that there was an

LCRC at Fort Beaufort, so the latter town could not have been within the Grahamstown LCRC's jurisdiction. In any event, jurisdiction would only matter if it were reasonably possibly true that the applicant was using the vehicle for official police business; the applicant was not permitted, even within his service area, to use the vehicle for private purposes.

[34] The applicant's counsel criticised the magistrate for emphasising the alleged disconnection of the odometer, submitting that the charge in respect of the second count did not allege that the applicant's misrepresentation lay in the false odometer reading. She also drew attention to the fact that the non-disclosure alleged in the charge sheet was not a failure, in advance, to disclose the proposed trip but the failure, after the event, to disclose that it had been undertaken. Her submissions regarding the content of the charge are correct, although the preamble to the charge highlighted the fact that the odometer reading had only changed by three kilometres and this circumstance was fully canvassed in the evidence. During the course of oral argument, she furthermore seemed to suggest that this count contained insufficient particularity, as required by s 84 of the Criminal Procedure Act 51 of 1977 (CPA).

[35] Be that as it may, I do not consider that the formulation of the charge holds out any prospect of success for the applicant because the conviction is sustainable on the basis alleged, namely the applicant's failure, after the event, to disclose the trip. As a senior officer subject to the rules relating to the use of official vehicles, he was under a duty to disclose his proposed use of the vehicle and to do so by way of the prescribed application. Having failed to do so, he was under a duty, afterwards, to disclose that he had used the vehicle and to seek ex post facto ratification. Because of this duty, his silence constituted a misrepresentation by omission that he had not used the vehicle. The disconnection of the odometer is simply a piece of evidence in the overall picture of dishonesty. Moreover, the count is certainly not amenable to quashing for want of particularity and the applicant, who had the benefit of legal representation, could have requested further particulars in terms of s 87 of the CPA.

[36] The applicant's counsel argued that it was not proved beyond reasonable doubt that the applicant's failure to notify Botha or the SAPS was an omission

attributable to fraudulent intent. She referred us to *S v Gardener & another* 2011 (4) SA 79 (SCA) where Heher JA in the context of the facts of that particular case, identified nine factors which influenced the conclusion as to whether or not the appellants had the intention to defraud the company of which they were directors (para 35). In regard to the third factor – the opportunity to disclose – she pointed out that the applicant's evidence was that when he was confronted on the Monday morning he had not yet got round to filling in the logbook, that the logbook was then seized, and that it was only many months later that he was asked for an explanation. For various reasons this argument has no prospects of success. Since the applicant's evidence about the trip was undoubtedly false, the only possible inference is that he had no intention of ever disclosing the trip. His non-completion of the logbook was not negligent tardiness but a deliberate decision. He had ample opportunity of making disclosure, both by completing the logbook and by tendering his explanation as soon as it emerged that there was something suspicious. He chose not to do so, only responding when formally charged.

[37] The same applies to the first factor in *Gardener*, on which counsel also relied, namely '[w]hat had to be disclosed, not so much as a requirement of law, but rather as a matter of pragmatism'. Once it is concluded that the applicant's explanation for the trip was false and that its true purpose was unrelated to official police business, there can be no doubt that as a matter of pragmatism he was under a duty to disclose it and that his failure to do so was fraudulent. On the facts of the present case, none of the other factors enumerated in *Gardener* would lead to a conclusion favouring the applicant.

[38] I should mention that at the trial the defence sought to establish that race relations at the Grahamstown LCRC were tense and that the applicant was being victimised by white colleagues. We are unable on the record to form a view on the legitimacy of this complaint but I am satisfied that it has no bearing on the present application. A racially motivated campaign against the applicant would only be relevant if it tended to show that evidence given against him was dishonest or fabricated. In the present case, enquiries into the applicant's conduct were not part of a campaign against him; they were fortuitously prompted by the experiences of Van Staden and De Klerk on 11 and 14 February 2011. They did not know what the

tracking report would say. They did not know that the applicant had used the vehicle over the weekend. The applicant's guilt was primarily established by the tracking information (the content of which was largely confirmed by the applicant himself), the absence of proper applications for authorisation and his hopeless attempts to explain his movements.

[39] Finally, and in regard to sentence, this was a matter for the trial court. The applicant would need to persuade an appeal court that there was a material misdirection or that the sentence was shockingly severe. I do not think he has reasonable prospects of demonstrating any such thing. Corruption and financial dishonesty are rife in this country, sadly also in organs of state. The cases which are prosecuted are the tip of the iceberg. Heavy sentences are warranted; and the higher the position held, the more exemplary should the sentences be.

[40] The application is dismissed.

OL Rogers
Acting Judge of Appeal

APPEARANCES

For Applicant	L Crouse Instructed by Legal Aid, Port Elizabeth c/o Legal Aid, Bloemfontein
For Respondent	T van Zyl Specialised Crime Unit, Eastern Cape, c/o National Prosecuting Authority, Bloemfontein