



IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA

Case No.: C.A. & R 35/2021

Date Heard: 16 February 2022

Date Delivered: 1 March 2022

In the matter between:

BONGINKOSI DYAF TA

Appellant

and

THE STATE

Respondent

JUDGMENT

EKSTEEN J:

[1] The appellant, Mr Dyafta, was a taxi operator and member of the WESTA Taxi Association (WESTA) in Gqeberha. He was charged in the regional court for Port Elizabeth with one count of fraud, alternatively theft in the amount of R130 806,46, and was convicted of fraud. He was sentenced to three years imprisonment, which was wholly suspended for five years, and, in addition, he was ordered to repay the amount of R130 806,46 to the Nelson Mandela Bay Municipality (NMBM) in monthly instalments of

R3 000.00 each. The appeal against the conviction only is with leave granted on petition to the Judge President of this court.

[2] The prosecution stems from the endeavours of the NMBM to introduce a bus rapid transport system to the route running from Summerstrand to Greenacres and Motherwell (the route). During 2010, when Gqeberha had been a venue for the World Cup soccer event, the NMBM acquired a fleet of buses which it intended to utilise in the city after the event. They wanted to deploy some of these buses on the route. In order to promote commuter demand for the use of the buses the NMBM had negotiated with the taxi industry to remove 60 privately operated taxis from the route.

[3] Two taxi associations, including WESTA, operated on the route. An agreement had eventually been reached to launch a pilot project which was intended, initially, to run for approximately one year. The scheme involved the surrender by 60 taxi owners of their vehicles, to be held in a safe storage facility provided by the NMBM, and their operating licences in respect of such vehicles for the duration of the project. The operating licences would be handed to Kyoscan (Pty) Ltd (Kyoscan) for safekeeping. Kyoscan was a vehicle established by the taxi associations in order to administer the scheme on behalf of the individual taxi operators who participated in the scheme. In exchange for the surrender of their vehicles to the safe storage facility, and their operating licences to Kyoscan, the NMBM would pay to each taxi operator an amount of R6 500.00 per month as compensation.

[4] In order to facilitate the implementation of the pilot project Axios (Pty) Ltd (Axios) had been contracted to receive the vehicles, on behalf of Kyoscan, in safe storage on a property provided by the NMBM. On a Saturday in February 2013 Axios received the vehicles, and took possession thereof, together with supporting documentation of the owners. Mr Ncana, an employee of Axios, was in control of the procedure. A number of assistants, including Mr Dyafta, representing WESTA, were present and assisted him. Mr Ncana did not physically count the vehicles received, but he did have documentation in respect of 60 vehicles at the end of the day. It is common ground that, in fact, only 59 vehicles had been surrendered.

[5] Mr Rockman was the chief executive officer of Kyoscan. He concluded a written agreement (the contract), on behalf of Kyoscan, with each of the affected taxi owners. The contract provided the foundation for the prosecution in the regional court and I shall revert to the material terms of the contract.

[6] In terms of the contract Kyoscan was appointed as the agent for each affected taxi owner. Mr Dyafta, too, signed the contract. The circumstances giving rise to the signature of the contract by Mr Dyafta was hotly contested at the trial. Mr Rockman, on behalf of Kyoscan, contended that he had, at all material times, been unaware that only 59 vehicles had been surrendered and believed that 60 vehicles had been taken into storage, including Mr Dyafta's vehicle. On 22 February 2013¹ Mr Rockman and Mr Dyafta signed the contract. Mr Rockman said that prior to signature Mr Dyafta confirmed to him that his

¹ There is a dispute between the parties as to the actual date of signature, however, nothing turns on it.

vehicle had in fact been surrendered to Axios, and the contract was concluded on that basis. At all material times thereafter, Mr Rockman said, he acted on this assurance.

[7] Mr Dyafta, on the other hand, said that both he and Mr Rockman knew that there were only 59 vehicles in safe storage. He accordingly suggested to Mr Rockman that he was prepared to surrender his vehicle so as to make up the 60 vehicles which were required for the pilot project. Mr Rockman, he said, was agreeable, subject to the approval of the taxi association, which was duly obtained, and he approached Mr Ncala to permit his vehicle to be taken into the safe storage facility. Whilst there is some dispute relating to the content and time of the discussions with Mr Ncala, it was common ground that Mr Dyafta called him on numerous occasions to try to admit an additional vehicle to the safe storage. However, this never occurred.

[8] Thus, during April 2013, Mr Dyafta said, he addressed a letter to Mr Qoko, the chief operating officer of Kyoscan, who reported directly to Mr Rockman. Mr Qoko testified for Mr Dyafta and confirmed receipt of the letter. It recorded:

“I decided to write this letter to report this matter to your attention, seeking your intervention, if allowed.

In the wake of Pilot Project around February 2013, I picked then up that there were 59 Vehicles instead of 60 at that time which I informed Mr. Rockman of that, including my intentions to add my vehicle (verbally). He recommended that I follow procedures by contacting the Chairperson of my Primary Cooperative.

I then contacted my NEW Primary Cooperative Board Chairperson (Mr Faltein), to inform him of my findings and intention to add my vehicle, but he recommended that I contact the representatives of Norwich Taxi Association. ... and I did so, after that they agreed that it was fine for them if I add my vehicle.

I then contacted Axios Consulting (Lukhanyo Ncana) the company that was running the process of handing in of the motor vehicle.

He responded clearly that its fine for the vehicle to be added but the challenge he was facing was that the storage was locked to bring it at the time, due to that reason the best way would be to park the motor vehicle and make sure that it is not operating and I've done so. He promised to keep me up to date for an opportunity to tow the vehicle to the storage ...” (Sic)

[9] As I have said, there was a dispute between Mr Ncala and Mr Dyafta in respect of the content of their conversations, but, by virtue of the conclusion to which I have come, it is not necessary to address those differences. What is significant, however, is that Mr Qoko confirmed receipt of the letter and said that he handed it to Mr Rockman. Mr Rockman denied this.

[10] During November 2013 Mr Dyafta approached WESTA, complaining that he had been unable to get his vehicle admitted to the safe keeping facility. He appealed to the association to assist him. Mr Mbali, the then secretary of WESTA, confirmed this and minutes of the meeting of the association where the issue had been discussed were handed in as corroboration. Again, Mr Rockman denied any knowledge thereof and he contended that he first learnt in June 2014 that there were only 59 vehicles in the safe storage facility and that Mr Dyafta's vehicle had not been surrendered. Thus, he, acting for Kyoscan, had rendered invoices to the NMBM each month for payment in respect of

60 taxi owners, including Mr Dyafta, and money was paid into Mr Dyafta's account each month as compensation.²

[11] Against this background the charges were brought against Mr Dyafta. The magistrate believed Mr Rockman, who made a favourable impression upon him, and he accepted his evidence. By contrast, he considered Mr Dyafta to be an unsatisfactory witness and alluded, during his judgment, to various pertinent shortcomings in the evidence of Mr Dyafta. I shall revert to these findings.

[12] I turn to the charge. The material portion of the charge sheet recorded as follows:

“... Accused is guilty of **Fraud alternatively theft** as set out below.

FRAUD read with section 94 of Act 51 of 1977

In that, on 22 February 2013 and at Port Elizabeth in the Regional Division of the Eastern Cape, the Accused unlawfully, falsely and with the intention to defraud: gave out and pretended to NMBM and/or Kyoscan and/or Gregory Rockman that:

- he has complied in all respects with the conditions to participate in the project, including that he had already handed in his taxi, Toyota Hi Ace ... at the NMBM storage facilities; and
- that he had the fullest intention to adhere to the conditions as prescribed in the contract for the duration of the period that the project will run

(and after the contract had been signed and during the period until June 2014)

² The pilot project was extended beyond the period of one year, which was initially intended.

Failed to disclose, in circumstances that the Accused had a legal duty to disclose, that

- his taxi vehicle had not been handed in and was not kept in safe storage and that he therefore was not compliant with the conditions prescribed in the contract: and

The Accused did by means of the aforesaid false pretences, induce NMBM and/or Kyoscan and/or Gregory Rockman, to their (NMBM and/or Kyoscan) loss, (actual or potential), to sign a contract with the Accused that entitled him to receive monthly payments and/or to accept during the aforesaid period that the Accused was and remained fully compliant with the conditions of the project and to make monthly payments to the Accused, in total the amount of R130 806-45 in his ABSA banking account

Whereas in truth and in fact, the Accused, when he gave out and pretended as aforesaid, knew that:

- he did NOT hand in his taxi vehicle at the designated NMBM storage facilities; and
- he did NOT hand in his taxi permit and/or operator license and certificate of registration as prescribed by the contract; and
- he had no intention to adhere to the conditions as prescribed in the contract; and
- he was not entitled to be reimbursed and the R130 806,45 received into his ABSA account was not due to him.”

[13] Two features of the charge require emphasis. First, it relied on a misrepresentation made to either the NMBM or to Kyoscan and Rockman. Second, it was founded both on a representation made on 22 February 2013, at the signature of the contract, and a non-disclosure which occurred thereafter and endured until June 2014.

[14] Before I turn to consider Mr Dyafta's defence to the charge it is necessary to revert to the contract. As I have said, the taxi associations established Kyoscan as a vehicle to administer the pilot project on behalf of the taxi owners.

[15] Paragraph 4 of the contract set out the background to the agreement. The relevant portions thereof, for purposes of the current debate, recorded:

“4.2 The NMBM intends to enter into long term contracts with the present public transport operators.

...

...

4.5 It was therefore agreed between the parties that, for the duration of the Pilot Project, the Affected Taxi Operators ... will deliver their Affected Vehicles and Affected Operating Licences to Kyoscan for safe keeping at the Safe Storage Premises.

4.6 The NMBM has acknowledged that these Affected Taxi Operators will suffer a loss of revenue as a consequence and has accordingly agreed to compensate the Affected Taxi Operators in an agreed monthly net amount for the duration of the Pilot Project.

4.7 The Affected Taxi Operators being members of the Affected Primary Co-operatives have resolved to appoint Kyoscan as their agent to receive, administer and distribute the compensation payments on their behalf subject to certain terms and conditions.”

[16] The signatories acknowledged that the contract would be of no force and effect until such time as the compensation agreement between Kyoscan and the NMBM,

including all its “conditions preceding”, have been fulfilled. Paragraph 6 of the contract then recorded the following provisions:

“6. **APPOINTMENT OF KYOSCAN AS LAWFUL AGENT**

The Principal [Mr Dyafta] hereby nominates, constitutes and appoints Kyoscan to be his true and lawful agent and to give effect to the following on his behalf:

- 6.1 To enter into the Compensation Agreement with the NMBM;
- 6.2 To accept the compensation payment in the amount as reflected hereunder from the NMBM on his behalf;
- ...
- 6.4 To take into its possession the Affected Vehicle of the Principal into safe storage at the Safe Storage Premises.
- ...”

[17] The contract proceeded further that the appointment of Kyoscan as agent of the principal was “subject to the terms and conditions set out herein below”. The conditions for compensation were recorded in paragraph 8 and the material portion provided:

“8. By his signature hereto, the Principal accepts, without reserve the following conditions and undertakes to abide by same:

...

8.2 The Principal's Affected Vehicle, together with the Principal's Affected Operator Licence, Certificate of Registration ..., must be handed to Kyoscan as a preceding condition and entitlement to compensation for loss of revenue."

[18] Finally, paragraph 9.5 of the agreement stipulated that:

"As of the Commencement Date, Kyoscan will submit the necessary invoices for compensation payments to the NMBM, subject to the terms and conditions agreed to in the Compensation Agreement".

[19] At the commencement of the trial Mr Dyafta made certain formal admissions. First, he admitted that he signed the contract with Kyoscan and that his motor vehicle was not taken into storage.³ Second, he acknowledged that he did receive monthly payments in terms of the agreement, which had been deposited into his bank account. Third, he admitted that he had received the sum of R130 806,45 in total. Whilst he did not admit that he had failed to hand in his operator licence, the evidence of Mr Rockman that he did not do so was unchallenged.

[20] The thrust of Mr Dyafta's defence, in the prosecution and in the appeal, was that Mr Rockman, and therefore Kyoscan, were at all times aware of the fact that his vehicle had not been taken into storage, and he thus contended that he had made no misrepresentation to Mr Rockman at the time of signature of the agreement or at any time thereafter.

³ He recorded his unsuccessful endeavours to have his vehicle admitted to safe storage.

[21] As adumbrated earlier, the magistrate believed Mr Rockman and, it would seem, therefore dismissed the version of Mr Dyafta. In doing so, I think that he erred. In criminal proceedings there is no onus on an accused and the question to be addressed is whether his version is reasonably possibly true. Even where the presiding officer does not believe the accused, his version may still, objectively, be reasonably possibly true. Whilst the criticisms of the magistrate in respect of the evidence of Mr Dyafta were largely justified, there was also independent evidence of Mr Dyafta's endeavours to have his vehicle admitted to the safe storage premises, commencing shortly after the signature of the contract. The magistrate does not appear to have considered the support that this evidence lent to his version of the circumstances under which the contract came to be signed. This leads, ineluctably, to the conclusion that the magistrate ought to have found that it is reasonably possible that at the time of the signature of the agreement, or at any time thereafter, Mr Dyafta made no misrepresentation to Mr Rockman.

[22] The contract records an undertaking to hand over the vehicle after signature of the agreement. I accept that fraud charges are often based on what an accused has represented or promised in regard to some future conduct. Where an accused makes a promise to do something in the future, he represents at the time of making it, that he intends to keep his promise. If, at the time of making the promise he has no intention of keeping it, he misrepresents an existing state of affairs, namely the state of his mind. For the reasons set out earlier, if one accepts, as I have found that one must, that Mr Dyafta's version is reasonably possibly true, this is not such a case. The evidence is indicative of a reasonable possibility that he intended, at the time, to keep his promise.

[23] That, however, is not the end of the matter. As I have said, the charge did not rely only on a misrepresentation made to Kyoscan or to Mr Rockman. It proceeded, too, on a misrepresentation made to the NMBM. It is common cause that the NMBM were at all material times unaware of the fact that Mr Dyafta's vehicle was not in storage. In this regard, as I have explained, Kyoscan's function was to administer the pilot project on behalf of the taxi operators. Mr Dyafta mandated Kyoscan, as from the commencement date of the pilot project, to submit the necessary invoices for compensation payments to the NMBM, subject to the terms and conditions agreed to in the compensation agreement.⁴ The conditions for compensation required his vehicle to be handed to Kyoscan "as a preceding condition" for entitlement to compensation for loss of revenue⁵.

[24] That brings me to a consideration of the requirements for fraud. The essential elements of fraud are; (a) unlawfully; (b) making a misrepresentation; (c) causing; (d) prejudice; (e) with the intent to defraud.⁶ As adumbrated earlier, the charge sheet relied on the fact that after the contract had been signed, and during the period until June 2014, Mr Dyafta had failed to disclose that his taxi had not been surrendered and was not in safe storage and that he was not compliant with the conditions prescribed in the contract. It was the State's case that he did therefore, by false pretences, induce the NMBM to their loss to accept during the said period that he had remained fully compliant with the conditions of the project.

⁴ Clause 6.1, 6.2 and 9.5 of the contract

⁵ Clause 8.2 of the contract

⁶ *South African Criminal Law and Procedure*, Volume II at p. 707

[25] In *Harper*⁷ the accused was convicted of fraud in the following circumstances:

In order to induce the complainant to lend him money for a year, he expressed to the complainant his honest belief that he had adequate security for the loan. The complainant accordingly lent him the money. Subsequently, the accused discovered that his security was no longer safe. The complainant still thought that it was, and the accused knew that the complainant was under this impression. He nevertheless allowed a year to pass without informing the complainant of the changed circumstances. At the end of the year he went insolvent and the complainant was unable to recover his money. The court concluded that the accused was under a legal duty to inform the complainant of the changed circumstances relating to security.

[26] The principle laid down in *Harper* finds application in the present case.⁸ Whatever the reason for Mr Dyafta's vehicle not being surrendered to the safekeeping premises, he knew, on the undisputed evidence, as confirmed by his signature to the contract, that the surrender of his vehicle and his operating licence to safekeeping was a precondition for payment. It is therefore not reasonably possible that he might have believed that he was entitled to the compensation. He knew, too, as stipulated in the contract, that Kyoscan had been mandated to, and would, deliver invoices monthly to the NMBM for payment to him. He received payments monthly knowing that his vehicle was not in the safekeeping facility. His endeavours to have his vehicle admitted in order to qualify for the payment are indicative of his knowledge that he could not qualify for payment unless his vehicle

⁷ *S v Harper* 1981 (2) SA 638 (D)

⁸ See also *S v Western Areas Ltd and Others* 2004 (4) SA 591 (W)

had been surrendered. The representations made to the NMBM by Kyoscan were made in terms of the mandate given to them by Mr Dyafta. The fact that Mr Rockman may also have known that he was not entitled to payment cannot redound to his benefit. The monthly invoices, which were duly paid, caused a loss (prejudice) in the amount of R130 806,45 to the NMBM. Upon receipt of the first monthly payment a legal obligation arose for Mr Dyafta to inform the NMBM that he had not complied with the contract and that he did not qualify for the monthly payments. By his continued silence he caused the NMBM to be misled as to the true facts, which caused them to continue payments to their detriment. The conviction for fraud was therefore correct.

[27] Had I concluded differently, I would in any event have found Mr Dyafta guilty of theft on the alternative count.⁹

[28] In the result, the appeal is dismissed.

J W EKSTEEN

JUDGE OF THE HIGH COURT

⁹ See *S v Graham* 1975 (3) SA 569 (A); *Nissan South Africa (Pty) Ltd v Marnitz NO and Others (Stand 186 Aeroport (Pty) Ltd Intervening)*[2004] ZASCA 98; [2006] 4 All SA 120 (SCA) at 127B-C

MATEBESE AJ:

I agree.

Z Z MATEBESE

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Mr M T Solani instructed by Legal Aid, Makhanda

For Respondent: Adv W J de Villiers instructed by National Director of Public
Prosecutions, Makhanda