IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 59/2009

In the matter between:

MOLEFE JOHN PILANE First Appellant

KOOS MOTSHEGOE Second Appellant

and

THE STATE Respondent

CRIMINAL APPEAL

HENDRICKS J; KGOELE J

DATE OF HEARING 20 AUGUST 2010

DATE OF JUDGMENT 17 SEPTEMBER 2010

COUNSEL FOR THE APPELLANTS : ADV KEMP J KEMP SC

COUNSEL FOR THE RESPONDENT: ADV L VAN NIEKERK

JUDGMENT

HENDRICKS J

[A] <u>Introduction</u>:-

[1] The First Appellant (accused number 1 in the court **a *quo)*** together with two fellow accused persons, stood trial in the Regional Court held at Mogwase on various counts of fraud, theft and corruption. At the close of the State case, Kobedi Pilane, (accused number 2 in the court **a *quo)*** was found not guilty and was discharged in terms of the provisions of Section 174 of the Criminal Procedure Act ("CPA"), on the two counts of theft preferred against him,

[2] The Second Appellant, Koos Motshagoe (who was accused number 3 in the court **a *quo),*** was, [together with the First Appellant] convicted on one count of theft (count 9). The First Appellant was convicted of one count of fraud (count 1) and thirty nine (39) counts of theft.

[3] Leave to appeal their convictions was refused by the trial court but was granted by this court on petition to the Judge President. Hence the present appeal.

[B] <u>Count 1 - Fraud</u>-

[4] For the sake of convenience, I intend to deal with the count of fraud (count 1) separately from the theft charges because it raises certain issues distinctly different from the theft charges. The evidence presented with regard to this count, though it has a bearing on the theft charges, are also distinctly different from the evidence presented in relation to the theft charges.

<u>The charge sheet on count 1 - Fraud</u>:-

[5] The charge on this count to which the First Appellant was called upon to plead reads thus:-

"COUNT1: FRAUD (IN RESPECT OF ACCUSED NO 1)

In that during the period 16 March 1998 and 03 September 1998 and at or near Rustenburg in the Regional Division of Rustenburg the Accused did unlawfully with intent to defraud and to the prejudice or potential prejudice of the Land and Agricultural Bank of South Africa and/or the Bakgatla-Ba-Kgafela Tribe give out and pretend to the Land and Agricultural Bank of South Africa in applications for loans for the respective amounts of R5 404 000-00, R2 500 000-00 and R4 970 000-00, that the Bakgatla-Ba-Kgafela trust and/or the Bakgatla-Ba-Kgafela Tribe will receive an annual net income ofR6 206 367-00 in royalties from mining.

Whereas the said Accused did by means of the aforesaid representation induce or attempt to induce the Land and Agricultural Bank of South Africa to approve and effect payment of such loans to the Bakgatla-Ba-Kgafela Tribe.

Whereas, when the Accused gave out and pretended as aforesaid he knew that in truth and in fact the Bakgatla-Ba-Kgafela trust and/or Bakgatla-Ba-Kgafela tribe will not receive an annual net income of R6 206 367-00 in royalties from mining."

[6] The State, after the completion of the evidence of Johnston, Stenvert and Strauss, applied for an amendment of count 1. It was not opposed and was granted. The amendment read that the accused gave out that the tribe will receive an annual income of R6 206 367 million and that he was duly authorized to act on behalf of the tribe whereas he knew that the tribe will not receive the annual net income of R6 206 367 million and/or that the accused was aware that he was not authorized to act on behalf of the tribe to enter into a loan agreement.

[7] The charge in its amended form introduced the second misrepresentation relating to authority. The original charge and terms of the misrepresentation

alleged, did not change in any respect. It still referred to annual. The charge sheet was not amended to reflect a misrepresentation by omission to disclose that the royalty payment had been ceded and payment was subject to fulfillment of a condition.

[8] After both the State and the defence submitted their closing arguments and immediately before judgment was delivered, the Regional Magistrate ***mero motu*** amended the charge sheet in respect of count 1 *"to bring it in line with the evidence tendered by the State"*.

[9] The Regional Magistrate deleted the State's averment that the Appellant acted without authority. He also deleted all references to **annual** in respect of the representation regarding the Tribe's net income. In essence, the amendment had the effect, that it nullified the amendment sought by the State.

[10] The reason for this amendment by the Regional Magistrate in terms of the provisions of Section 86 of the CPA, is to be found in the following passage from the judgment of the court ***a quo-***

> *"The pledge agreement was handed in as exhibit "N". the specific conditions of the pledge agreement which was signed by accused 1 was that the royalties were pledged as security for payment of the R11.15 million. The pledge further indicated or stipulated that the security shall constitute a continuing covering security. Paragraph 11 of the pledge stipulated that security shall remain in force until the registration of the mineral agreements.*
>
> *When the accused applied for the loans at Land Bank he was aware that mineral agreements were not registered yet.*
>
> *The Minister had not approved it. He had signed the pledge agreement and therefore knew that no royalties were due to the tribe as it was pledged as security to Anglo Platinum. He therefore misrepresented to Land Bank that the tribe would get an income of R6 million as royalties.*

It was argued that the State did not prove that the accused omitted to indicate that the royalties were ceded. The misrepresentation, however, is the fact that accused implied that an income will be due to the tribe. Accused had a duty to disclose the fact that the royalties were ceded which is found that he failed to do."

The evidence tendered in relation to count 1 -

[11] The evidence tendered on this charge was that the First Appellant made a misrepresentation on three occasions i.e. when the three applications for loans were made during March, June and September of 1998. The misrepresentation was that the tribe would annually receive an amount of R6 206 267-00 as net income from mining royalties as indeed the application form literally read. This misrepresentation was made to induce the granting of the loans and with intention to so deceive the Land and Agricultural Bank of South Africa ("the Land Bank").

[12] An analysis of the application forms indicates that no such misrepresentation have been made, that reading the applications as a whole, this misrepresentation could not have been made, that the representee, the Land Bank, was never under the impression that such representation was indeed made. The Land Bank never laid any charge of fraud or misrepresentation.

[13] This much was obvious from annexure "O", a document setting out the royalties which were still due to the tribe and which featured as an annexure to the first application made in **March 1998.** This reflected the amount of R6 206 267-00 as the accumulation of royalties for four years, two years past and two years still to come.

[14] The State witness, Stenvert conceded that he mistakenly reflected the amount of R6 206 267-00 as annual income well knowing that it was not.

[15] There was no attempt at all to deal, in the judgment of the court ***a quo,*** with the specific complaint of prejudice that counsel for the Appellants raised. The First Appellant did not conduct his case on the basis of the core of the State case being that he failed to inform the Land Bank that payment of the royalties was dependent on a condition and that the royalties were pledged.

[16] The defence did not contest such a case because it did not have to. It was not what the First Appellant had been charged with. There is no way that it was clear or established that the cross-examination of the State witnesses or the defence evidence would have been the same if the charge had indeed alleged what the First Appellant was eventually convicted of.

[17] The case thus alleged and made by the State was that the representation that the tribe would receive a yearly payment of R6 206 267-00 as mining royalties was false and induced three loans being granted to the tribe.

[18] There is no doubt that the case found to be made by the court is that, namely: a four year estimate of royalty income provided was conditionally pledged, that the First Appellant had a legal duty to disclose the pledge and its conditions, that he deliberately failed to do so to mislead the Land Bank and induce the loans and that this omission induced the granting and payment of the loans. This is a very different case to the one the First Appellant was charged. I presume that the defence would have planned and prepared how to deal with such a State case and how to challenge it, quite differently from how it did conduct their defence. In my view, the change in case is not a matter of detail or oversight, it is a completely different case.

[19] It need to be reiterated that of primary importance is the fact that the Land Bank did not lay any complaint that they were indeed defrauded as stated in the charge sheet. Equally important is also the fact that there was no evidence presented by the State to substantiate a finding that any misrepresentation was

made to the Land Bank that induced it to grant the loans when in fact, in the absence of such inducement by misrepresentation, the Land Bank would not have granted the loans. The evidence is very clear that the possible income from royalties was but one of the factors that were considered to evaluate the application and this was with regard to the ability of the tribe to repay the loan.

[20] Over and above this, it deserve mentioning that the employees of the Land Bank haphazardly went about with these applications for loans. Much criticism can be leveled against the way these employees conducted themselves in finalizing these loan applications.

[21] The evidence reveals that Stenvert conducted the interview with the First Appellant. From his evidence it is abundantly clear that the First Appellant did not misrepresent to him that the said royalties were pledged to Anglo American Platinum Corporation. Neither did he ask the First Appellant whether there is any pledge of the said royalties. Strauss who completed the loan application form for the second loan took the form completed by Stenvert and copied the information from it without having conducted an interview with the First Appellant. It cannot remotely be argued that the First Appellant misrepresented, at least to Strauss, which misrepresentation induced Strauss to the prejudice or potential prejudice of the Land Bank, to grant the loan.

[C] Section 86 of the CPA *vis-a-vis* Section 35 (3) of the Constitution:-

[22] Section 35 (3) of the Constitution of the Republic of South Africa Act 196 of 1996 provides as follows:-

"The well-established and fundamental fair trial requirement of the common law that an Accused person must be informed

clearly of what the Charges are that he is to meet so as to enable and direct him to do so, has been specifically recognized and made a constitutional imperative by the provisions of Section 35 (3) of the Constitution of the Republic of South Africa, 1996. Section 35 (3) reads:-

35. Arrested, detained and Accused persons.

.....

(3) Every Accused person has a right to a fair trial, which includes the right-

(a) to be informed of the Charge with sufficient detail to answer it;

(b) to have adequate time and facilities to prepare a Defence;

(i) to adduce and challenge evidence:

.....

[23] Section 86 of the CPA states :-

"86 *Court may order that charge be amended:-*

(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the

charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.

(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.

(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder."

[24] It is not difficult to understand what the legislature intended by enacting Section 86 of the CPA. In my view the legislature intended to cater for the situation where certain allegations or detail is inserted or omitted in a charge that can be deleted or inserted without bringing about any prejudice that an accused may or will suffer as a result of such amendment.

[25] Mr Kemp SC, on behalf of the First Appellant, contended that the effect of the amendment is that a new charge was created by the aforementioned amendment. Mrs van Niekerk, on behalf of the State submitted the contrary.

[26] Having regard to what the Regional Magistrate stated in his judgment, it is abundantly clear that the misrepresentation was premised on the fact that the First Appellant omitted to state that the royalties, as any income for the tribe, was pledged to Anglo American Platinum Corporation.

[27] The First Appellant was not charged with the fact that he failed to disclose to the Land Bank that the royalties due to the tribe was indeed pledged. It goes without saying that it is indeed prejudicial to an accused person to be subjected to an amendment to a charge that has the effect of changing the substance thereof immediately prior to judgment being delivered in order to secure a conviction. More so, it is unfair when the accused is not given an opportunity to respond thereto.

[28] In my view, this amounts to trial by ambush which must be discouraged at all costs.

<u>See</u>:- **<u>Moloi & Others vs Min of Justice and Others</u>**

case number CCT 78/09, where the Constitutional Court held:-

> *"[20] The question whether an accused person has been prejudiced by a defective charge in the proper conduct of his or her case speaks to the fairness of the trial. Section 35 (3) (a) of the Constitution guarantees every accused person the right to a fair trial which includes the right to be informed of the charge with sufficient detail to answer it and the warranty to be presumed innocent until proven guilty.*
>
> *[21] Whether the applicants were afforded a fair trial is dependent, amongst other requirements, upon the competence of the charge on which they were convicted. ...*
>
> *[22] ... The applicants' complaint does raise important constitutional issues on whether they have been afforded a fair trial within the meaning of section 35 (3) of the Constitution. The question whether the applicants have been adequately informed of the charges they were to face as required by section 35 (3) (a) of the Constitution entails, amongst other things, a construction of section 86 and in particular of section 86 (4) of the CPA in the light of the fair trial rights entrenched in the Constitution. ..."*

[29] It should also be mentioned that as late as 03 August 2010 (16 calendar days before the hearing of this appeal) the State filed a *"notice of application for amendment of count 1"*. Though this planned application for amendment was abandoned by the State in its heads of argument, it illustrates the manner in which the State went about with the prosecution of this case.

[30] Suffice to say that, even at this late stage an amendment by the State would not have been favourably considered. In this regard I can do no better than to quote from the judgment of the Supreme Court of Appeal namely **S A Metal & Machinery Co (Ptv) Ltd vs The State,** case no 398/09 delivered on 28 May 2010, where Bosielo JA states:-

> *"[16] ... To allow an amendment at this stage [on appeal] would cause very real prejudice, and would be subversive of the notion of a fair trial as embodied in Section 35 (3) (a) and (i) of the Constitution. The amendment is consequently refused."*

[D] The theft charges -

Money from the Land Bank loans -

[31] The money received in the form of loans from Land Bank was used for, or on behalf of the tribe, as testified to by the First Appellant. There is no evidence to the contrary. In fact, on the State's own version, Mr Van den Berg testified that it was the practice in the tribe that the First Appellant (as Chief) would use his own money to pay for tribal expenses and then reimburse himself for such expenses. In fact, the self said Mr Van den Berg was also part of this practice

and he was in charge of one of the projects of the tribe, to wit the Dwaalboom farming project.

[32] As an example, Mr Van den Berg testified that salaries for the employees who worked on these farms were in the region of R50 000 per month. The tribe experienced cash flow problems from time to time and the First Appellant as well as himself would use their own money or borrow money from other persons or entities in order to pay the employees their salaries. When money becomes available, they would reimburse themselves and the persons or entities from which they borrowed money.

[33] As stated, Mr Van den Berg was an active participant in this practice. As to why he was excluded from being prosecuted, no reason could be advanced by Mrs van Niekerk. This is particularly important because if the First Appellant (as Chief) was authorized to act for and on behalf of the tribe, the same cannot be said about Mr Van den Berg. In fact, no such evidence was presented. To crown it all, large sums of money (e.g. R464 000-00) were deposited in the personal bank account of Mr Van den Berg, which he allegedly used for the farming operations for and on behalf of the tribe, without properly accounting therefore.

[34] If he is then exonerated from any wrongdoing, surely the same should apply to the First Appellant. Sight should not be lost of the fact that Mr Van den Berg was not called as a witness in terms of the provisions of Section 204 of the CPA. Though it may be open to the State (Director of Public Prosecutions) to decide who to prosecute and who not, it clearly begs an answer as to why Mr Van den Berg, who did even more transactions and in whose personal account large sums of money were deposited, should be exempted and not the First Appellant.

[35] The First Appellant was convicted of thirty nine (39) charges of theft of monies of the tribe. These charges related to amounts of monies paid to the First

Appellant or to others which the State contended should not have been paid. The payments of these amounts were not disputed by the Appellants (including the Second Appellant on count 9).

[36] The State led evidence that the amounts covered by these counts were paid by various persons and from tribe / trust accounts to the First Appellant or to other parties. Mr Strydom, the forensic auditor, also referred to documents indicating that subsequent to the receipt of various amounts by the First Appellant, monies were paid from the First Appellant's accounts for items such as phone bills, etc. These aspects were not in dispute. An analysis of the evidence presented by the State reveals that no pertinent evidence of the unlawfulness of the First Appellant's dealings with the monies of the tribe / trust, or of his intention to unlawfully appropriate such monies for himself, was presented.

[37] This is unsurprising in that the State premised the prosecution of all counts on the monies involved being dealt with strictly in accordance with the dictates of Section 11 of the Bophuthatswana Traditional Authorities Act, Act 23 of 1978, as a matter of legal obligation.

[38] Section 11 provides:-

> *"[11] [1] The President shall cause to be opened in the office of every magistrate, in respect of each tribal authority an account into which shall be paid such amounts as are hereinafter specified and from which all expenditure incurred in connection with any matter within the power of the tribal authority concerned shall be met: Provided that the President may on such conditions as he may deem fit and subject to any regulations, transfer any such account or any portion thereof to the tribal authority concerned.*
>
> *[2] There shall be paid into the account of the tribal authority-*

[a] all fees and charges which according to the laws and custom of the tribe are payable to the tribal authority;

[b] all amounts from any property of the tribal authority;

[c] any donations made by any person for the benefit of the tribal authority;

[d] all other amounts derived from any source whatsoever for the benefit of the tribal authority including amounts payable to the tribal authority which the National Assembly may grant for the purpose.

[3] Where there are two or more tribes in the areas of tribal authority, the President may, subject to the provisions of any regulations, order that a separate account be opened for such tribe or two or more such tribes jointly or for any other purpose and determine what amounts, payable into or paid from the account of that tribal authority, shall be created to or debited against such account.

[4][a] The President may, with consent of the Tribal Authority concerned, invest moneys standing to the credit of a tribal authority which are not required for immediate use or as a reasonable balance for current expenditure on call or short-term deposit at any bank or other financial institution registered in or outside the Republic of such extent and subject to such terms and conditions as the President may determine.

[b] The President may delegate the power conferred on him by subsection (1) to the minister of Finance."

In my view, it is not necessary that a trust of a company conduct business in accordance with Section 11 when the monies in question are not provided by the State but involve a commercial concern.

[39] It was then in essence the State's case that the First Appellant could not, if for example he used R50 000-00 of his money for wages paid to the tribe / companies / trusts' employees and R1 000-00 for cell phone calls made on

behalf of the tribe / companies / trusts, pay himself back the amounts by a withdrawal of payment of R51 000-00 from the trusts' coffers. The tribe / companies / trusts' coffers were only accessible through a section 11 account and required certain procedures prescribed by the State to be complied with. The very fact of the First Appellant not following these dictates and procedures, so it was submitted on behalf of the State, evidenced sufficiently in itself the unlawful appropriation of these monies.

[40] The First Appellant's version was that he had, on various occasions paid monies relating to expenditure for which the tribe was ultimately responsible from his funds and that such monies were required and used especially in respect of the Dwaalboom project. Cost items included salaries, day wages, vehicle repairs, fuel, telephone calls, travel costs, fencing expenditure, the purchase of cattle, etc. Mostly the First Appellant was reimbursed, but he on occasion, also got money upfront. There was thus no unlawful appropriation or intention to steal. If this version was reasonably possibly true, even if the court did not believe it, the First Appellant could not be convicted.

[41] The State also never took serious issue with the First Appellant's evidence that he was in overall charge of the finances of the trust / tribe and could deal with these as he considered expedient or convenient and that he had a broad mandate in this respect. It is this evidence which distinguishes this matter from cases where a person entrusted with funds of another, is not entitled to such funds and does not have power to deal as he deems fit, with it.

[42] The evidence of the State witness, Frans Van den Berg ("Van den Berg") is another insurmountable obstacle to a conviction of the First Appellant on the theft charges. Van den Berg was very much involved in and managed the business of the trust / tribe during at least 1998. He in particular, dealt with the income and expenditure of the tribe and also acted for the tribe. His evidence was presented by the State, accepted by the court and he was found to be a credible witness.

[43] Van den Berg testified that the tribe moved monies between its accounts due to cash flow crises and he saw nothing wrong with it. He himself paid some costs out of his pocket to meet business expenses of the tribe which were later reimbursed by the tribe. This practice also occurred in respect of the First Appellant.

[44] No such transactions testified to by Van den Berg in respect of the Appellant were identified by the State, save a R 5 000-00 salary payment of an employee mechanic which he sought from the tribe in the Labour Law institutions. This instance simply proves that the practice which the First Appellant and Van den Berg testified to did exist.

[45] In cross-examination, Van den Berg stated that there were many expenses for seed, diesel etc. In response to whether he had paid for tribe expenses in respect of the tribe's farms out of his own pocket to be reimbursed later, he said he did so and volunteered *"Dieselfde het die Chief [First Appellant] ook gedoen op 'n stadium"* and said that the First Appellant was then subsequently reimbursed.

[46] He also confirmed a continuous wage bill of some R50 000-00 per month for more than 40 employees. The evidence of Van den Berg was accepted by the court. He confirmed that the First Appellant acted exactly in the manner as the defence raised. In addition, the defence witness, Victor Rammutla, testified to obtaining cash monies from the First Appellant and the shop to pay for farm expenses. It was not put to him that he was lying on this aspect and no adverse findings were made against him.

[47] Van den Berg testified that just for one crop of seeds and diesel the costs could easily be R750 000-00. The findings are that the Appellant stole just over R600 000-00 in total over 5 years (he, in response, says he was funded or

refunded that amount). In addition, Strvdom, the auditor, stated that he could not find the salary documents of the Dwaalboom project. The common cause evidence of the State and defence was that there were usually more than 40 workers and a monthly wage bill in excess of R50 000-00 in that regard.

[48] The documents further show that there was, for the period of a year, no money available and no movement of money on the accounts which covered farm expenses. One may question where the money came from to pay for especially salaries, electricity, diesel and repairs etc., especially during the period which covers counts 2 - 7, if not as testified, from ***inter alia*** the pocket of the First Appellant and where is the record of repayments to him?

[49] It is self-evident that the tribe in respect of the Dwaalboom project had continuous monthly expenditure to maintain the farming operations. During the period of more than 12 months between 1997 and November 2008, no money came into the trust's coffers which were overdrawn. The question arises as to where did the funding for this come from?

[50] It is standard practice to call the victim of a theft to testify that the stolen item(s) were taken without his consent so as to establish the unlawfulness of the taking. No-one (except John Pilane, with whose evidence I will deal later) who could remotely speak on behalf of the tribe was called to say, with any degree of certainty, in respect of any amount allegedly stolen, that same was an unlawful ***contrectatio.*** Indeed, no evidence was led that the rather haphazard accounting between the First Appellant (as Chief) and the tribe had anything but the blessing of the tribe. The tribal council members did not lay a complaint nor testified to that effect.

[51] The court ***a quo*** found that the First Appellant was a lying witness in that:-

a] he lied about telling the Land Bank officials about the pledge to Anglo American Platinum Corporation;

b] he lied about the reason for utilizing Van den Berg's and other accounts so as to use these to effect payment to himself;

c] he lied about the existence of a file of the expenses which cover the accounts, which lie was demonstrated by the failure to put each expense in detail to Van den Berg in connection to each payment.

[52] These findings are in my view not justified. The State pertinently led the evidence that Van den Berg's account was utilized for farm expenses because the other account in which the monies could have been paid was overdrawn. The State cannot present a contrary argument based on documents never put to Van den Berg who testified as follows:-

> *"En het u toestemming gegee dat die geld na u rekening oorbetaal kon word? — Dis korrek, Edelagbare.*
> *Nou vir wat se doel was dit gedoen? — Edelagbare, oris moes aangegaan het met produksie weer, ons, op die plase self en daar was nog uitgawes en op daardie rede was die rekening by die Allied Bank oortrokke gewees.*
> *Goed, die rekening was oortrokke. En nog? — Dis by Allied Bank. Dit is 'n - daarom het ons dit op my rekening inbetaal en daarvanaf kon ons weer salarisse betaal het en aangegaan het.*
> *Nou hoe het u geweet dat die Allied Bankrekening oortrokke was? — Ek het state opgestel vir Chief op 'n maandelikse basis en ek het presies geweet wat die bedrae is wat oortrokke was."*

[53] Van den Berg further stated, in respect of the Lank Bank loans:-

> *7s u bewus van Land Bank wat lenings toegestaan het aan die stam? — Dis korrek, ja. Ek weet daarvan. Van wat se lening is u bewus? — Edelagbare, daar was 'n_ produksielening sover ek kan onthou, was die een. Wat gebeur het, ABSA en Allied het baie hoe rentekoerse gehad.*

En Chief het gaan beding vir 'n beter rentekoers by Land Bank.

En toe? — Die lening is toegestaan. Bate van die krediteure is betaal op daardie stadium. En daar was geld gewees vir produksie om weer te kon aangaan."

[54] The court **a *quo's*** rejection of the significance of the Van den Berg's evidence as to why amounts were transferred to his account and then amounts paid to the First Appellant and other creditors of the tribe / trust, constitutes a misdirection. Van den Berg's clear evidence is that he knew exactly what the position was in respect of the various accounts. Van den Berg testified that he did not find it at all odd that monies were transferred into his account.

[55] Van den Berg thus clearly testified that the arrangement whereby monies of the tribe were paid into his account was a proper and above board one. No one suggested to him otherwise. In the judgment, the court **a *quo*** construed this arrangement as part of a grand scheme by the Appellants to steal money from the tribe. There is no justification for this in view of the State witness Van den Berg's evidence.

Onus placed on the First Appellant -

[56] The court **a *quo*** held that the First Appellant had an evidentiary burden to rebut the evidence of the State. It is not clear what the First Appellant had to rebut. The State's evidence was not to the effect that the First Appellant appropriated and stole the monies covered by these counts. The evidence was that he received these monies and these formed part of his funds which he expended. Where an accused is entitled to be paid from these monies, there is no onus placed on him to prove his innocence.

[57] The First Appellant was in overall charge of the financial dealings and transactions of monies of the tribe. The forensic evidence of Mr Strydom did not establish any dishonest appropriation of these amounts. His evidence was

simply to the effect that he cannot say whether the First Appellant was entitled to the monies received or not. All that Mr Strydom said was that there was not a proper system of accounting in place and that from his perspective one should deal with such matters so as to have a proper system in place and be able to supply documentary proof of the reasons for and purposes of the various amounts transferred to the First Appellant. This much is confirmed by Van den Berg who stated that there was a lack of experience and expertise on the part of the trust in dealing with business matters.

[58] The First Appellant testified in February 2007, some years after the transactions he was expected to deal with, in his evidence. The court ***a quo*** convicted the First Appellant, in essence, because he could not, in 2007 and 2008 come up with detailed invoices and explanations for each amount, as opposed to general testimony as to the nature of the expenditure which the payments in issue covered for the period 1998 to 2002. Despite the express disavowal hereof by the court ***a quo,*** its reasoning and the major premises of each conviction, placed an onus to provide details of his explanation, on the First Appellant.

[59] This much is also clear from the following passage in the judgment of the court ***a quo-***

> *"When considering the accused's evidence in the context of all the evidence it is not placing an onus on him to prove his innocence. If the evidence tendered by the State is of such a nature that it calls for an answer and accused decided to give evidence, that evidence must be considered also in the totality of all the evidence.*
>
> *It is already indicated the accused had an evidentiary burden to rebut the evidence tendered by the State and it could easily have been done just by handing in the documents he referred to. So the only inference the court can come to is that this file does not exist and the accused is not truthful in this regard."*

[60] The court ***a quo*** further concluded:-

> *"Also, in respect of counts 2, 4 to 7, 13 to 33 and 36 to 44 and 45, the State had proved beyond reasonable doubt that accused 1 received the amounts mentioned. And because the accused can (not) be believed as to why he received these amounts, his version how the money was spent is found to be not reasonably possibly true and the State therefore also proved these counts beyond reasonable doubt."*

("not" was obviously omitted.)

[61] The court ***a quo*** thus held that because the First Appellant had lied in attempting to explain the detail of the expenditure for the benefit of the tribe, his explanation could not be taken into account as establishing a reasonable possibility that it was true. This is impermissible reasoning which undermines the onus on the State.

[62] The court, in effect held that the failure to put to the State witnesses, the precise reason for each payment explicitly backed with an invoice of what each expense was for, strengthened the finding of the untruthfulness of the First Appellant. The First Appellant's own record which was not a detailed one as he testified, took the matter no further than his testimony did. If the latter was self-serving, so was his record.

[63] The First Appellant did not have the specific invoices and the nominal complainant, the tribe, clearly had this in so far as it was not seized by the police and the then Scorpions. The court ***a quo*** simply and despite its rhetoric to the contrary, placed an onus on the First Appellant to prove his innocence, not by ***viva voce*** evidence, but backed by specific invoices going back some 10 years from when he testified. This in the face of the State and defence witnesses whose testimony had not been rejected, that supported the First Appellant's

version.

[E] The evidence relating the theft charges -

[64] The charges relating to theft of monies of the tribe on which the First Appellant was convicted, were grouped as counts 2, 4 - 7, 9, 11 - 13, 14 - 33, 36 - 44 and 45. These groupings of charges are convenient in that the grouped charges have an association as to the alleged facts of the group. I will now deal with the evidence relating to the various groups of charges.

Counts 2-7:-

[65] Counts 2 to 7 related to the amounts of money that had been paid by the State witness, namely Van den Berg to the First Appellant or to other accounts. On count 3 dealing with theft of an amount of R163 351-00, it was alleged that the First Appellant had stolen this money that had belonged to the tribe. The evidence had shown clearly that Van den Berg had used funds which had been transferred from the Bakgatla-Ba-Kgafela tribal account to his personal account for the purchase of a Caravelle motor vehicle for the use of the tribe. The cheque had been made payable to the motor vehicle business that sold the vehicle. This was indeed also the evidence of Van den Berg. The Appellant was acquitted on this count at the end of the case by the court ***a quo.***

[66] However, in respect of count 6, for example, where Van den Berg testified that he had paid over an amount of R31 008-35 to Amalgamated Beverage Industries in order to pay for a soft drinks account which the First Appellant explained had accrued as a debt in respect of a tuck-shop being operated on the Dwaalboom farm on behalf of the tribe, the First Appellant was convicted. This explanation was rejected by the court **a *quo*** despite the fact that the cheque had been made out to Amalgamated Beverage Industries and Van den Berg

(testifying on behalf of the State) having testified to the existence of the tuck-shop. There is no factual basis which conceivably supports the conviction on count 6.

[67] Similarly in respect of the rest of the counts (2, 4, 5 &7), the First Appellant was convicted of theft solely on the basis that there was evidence that Van den Berg transferred various amounts of money from his account into the First Appellant's or paid certain other debts. This was done because the First Appellant's version could not be believed because he was found to be a liar. There is no evidence whatsoever that was tendered on behalf of the State that showed beyond a reasonable doubt that the First Appellant had intended to steal these monies or subsequently misappropriated these amounts of money.

[68] The only relevant witness in this regard was again Mr Strydom the author of the Forensic Audit Report. Mr Strydom's evidence only provided proof of the fact that the amounts referred to in these counts were indeed paid by Van den Berg to the First Appellant and others, which was not in dispute. His evidence provides no proof of theft.

[69] In fact, at the end of his cross-examination, Mr Strydom stated categorically that he was unable to say that these monies had not been used for farming operations, nor did his evidence provide any other source for meeting the obvious farming expenses. These payments (counts 2-7) occurred during the period that there were no monies available and no movement of money in the account which serviced those expenses.

Count 9

[70] The defence version was that the monies were paid in respect of monies owed by the tribe, more particularly in respect of a game count done by the

witness Bekker's son, who was never called as a witness despite being available to the State.

[71] Bekker Senior accepted that the tribe owed money in respect of the game count for the helicopter services at a cost of R18 000-00 which he, Bekker Senior, had paid. Bekker described Savanna Lime, the company into which account the monies were paid by Mehtar, as his company. This debt was to be paid by game that the Bekkers would be allowed to hunt for on the tribe's farm, but which never materialized. The debt then obviously still existed. The R90 000-00 Savanna Lime issued summons for based on a loan, was claimed from the tribe as well as from the First Appellant.

[72] The simple point is that the tribe owed money in respect of the game count and / or the loan and that Bekker Senior stated that this debt had not been paid by the Bekkers hunting game to the amount owed. Bekker Senior had also already sued the First Appellant and the tribe for R90 000-00 on the basis of a loan, when Mr Mehtar made the payment. Unless Mr Mehtar paid the monies for the express purpose of meeting the First Appellant's individual debt and personal account as opposed to the debt(s) owed by the tribe and made such a specific payment on the instructions of Second Appellant (Accused 3) on orders from the First Appellant, there could not be any case of theft against the Appellants at all.

[73] It is in this regard that the following clear misdirections of the court ***a quo*** take on decisive importance. The judgment firstly contains a clear misdirection in respect of the evidence of the Second Appellant. The court a ***quo*** *held:-*

> *"In respect of count 45 he (the Appellant) testified that this amount was a refund for expenditure he incurred on behalf ofDwaalboom farms.*
>
> *Accused 3 testified in respect of count 9. According to him there was a request that Mr Bekker Junior should assist with the counting of game and that eventually there was a dispute as to the amount payable for the counting of the game. He*

> *requested that the R10 000-00 should be paid to by Mr Meta into the account of Savanna Lime in the name of accused no 1 . He indicated that accused 1 was not involved in these discussions."*

[74] The Second Appellant did not testify that the R10 000-00 should be paid in the name of the First Appellant. Nor did Mr Mehtar testify that as the court ***a quo*** understood it:-

> *"Abdullah Meta testified in respect of count 9. He deposited an amount of R10 000-00 into the account of Savanna Lime and it was paid in the name of accused 1. He testified that this was done at the request of accused no 3. This amount of R10 000-00 was due because he wanted to hunt on the property of the tribe."*

Mr Mehtar was never asked to pay the R10 000-00 in the name of First Appellant or to note that on the deposit slip. That was not the evidence.

[75] The extent to which these misdirections affected the court ***a quos*** reasoning is evident from the following passage in the judgment refusing leave to appeal on this count:-

> 7/**7** *respect of count 9 which involves both the Applicants, money was paid into as account of Accused 1".* (sic)

That was not the evidence of the defence nor the State.

[76] The Second Appellant's version was thus that monies (R10 000-00) were owing by Mr Mehtar to the tribe as part of its game farming project and that money was owed by the tribe to Savanna Lime in connection with a game count. Mr Bekker Senior confirmed this indebtedness existed even if he did not pursue it in court. The Second Appellant thus asked Mr Mehtar to pay the amount into the Savanna Lime account to meet this debt. Whether he told Mr Mehtar of the precise reason for the request was not clear. How, given the aforesaid evidence,

the two Appellants could be convicted of the theft of the tribe's money, especially the R10 000-00 paid by Mr Mehtar, is difficult to comprehend.

[77] It is even more difficult to comprehend why the Second Appellant should not have asked Mr Mehtar to pay in respect of what Savanna Lime claimed as a debt owing to them in a summons also by the tribe. On what basis was he to discern that the payment of the R10 000-00 was not for a debt of the tribe? The convictions on this count cannot be sustained. Suspicion does not equate to proof especially not to proof beyond reasonable doubt.

Counts 11 - 13,14 - 44 (excluding counts 34 and 35):-

[78] Counts 11 to 13 were theft charges relating to three amounts of R15 000-00, R10 000-00 and R5 000-00 which had allegedly been borrowed from Stoney Lime (Pty) Limited in order to pay the wages of the farm workers. The First Appellant had been charged for three counts of theft relating to these amounts the allegation being that the First Appellant had stolen these monies *"belonging to the Bakgatla-Ba-Kgafela tribe or monies which were in their lawful possession"*.

[79] The only evidence in respect of these three counts was tendered by Mr Gerrit Young, a Director of Stoney Lime (Pty) Limited. He testified that he was approached by the First Appellant and Kobedi Pilane (Accused 2 in the court ***a*** quo) for loans to pay the wages. He also testified that he had been aware of the fact that the tribe / trust habitually had difficulties to pay for wages because of cash-flow problems. He testified that he granted these loans in order to improve the relationship between his company and the tribe.

[80] There is no evidence that had been tendered by the State which indicated that the loans had not been used for the intended purposes. In fact if one has

regard to Mr Gerrit Young's evidence read together with that of Mr Van den Berg a strong inference can be drawn that the money had indeed been used for that purpose. The payments coincided with the end of the month when wages/salaries are likely due as Mr Young testified and there is no evidence to suggest that wages for the tribe during this period had been paid from a different source.

[81] Despite this and despite the wording of the charge in respect of these three counts the First Appellant was convicted of having stolen money which *"allegedly belonged to the Bakgatla-Ba-Kaafela tribe or monies which were in their possession"*. There was no evidence that indicated that the money belonged to the tribe or it had been in its possession. To the contrary, there was clear evidence that this money belonged to Stoney Lime (Pty) Limited and had been advanced as a loan to pay the wages of persons working for the trust. This being so, the money, in law, neither belonged to the Bakgatla-Ba-Kgafela tribe nor had it been in their lawful possession and theft was simply ruled out.

[82] The auditor Mr Strvdom accepted that the employees had to be paid and he clearly had no record of such payments from the section 11 account of the tribe (from that account the administrative employees were paid with State funds). Someone paid the employees and the farm expenses. That is implicitly recognized by Mr Strvdom and expressly by Mr Van den Berg and Mr Young. There is every reason to accept that the First Appellant paid such wages, but there is in any event no reason why that explanation is not reasonably possibly true.

[83] Counts 14-44 (excluding 34 and 35) relate to payments made from the tribe's funds to the First Appellant; some R211 000-00, spread over 5 years (1997 - 2002), which the First Appellant testified he used for tribal expenses or to recoup outlay for tribal expenses. It is also the same with count 45.

[84] The First Appellant testified that he used the monies received as detailed

under each of these counts to make payments on behalf of the tribe or to reimburse him for payments made when the tribe's account did not have funds or funds were immediately needed or it was simply convenient for him to pay. The State led no specific evidence on these counts, save Mr Strydom's. What is said about Mr Strydom's evidence ***supra*** applies ***mutatis mutandis*** to these counts.

[85] Earlier on in this judgment, I mentioned the fact that there was no actual complainants on all these charges. I did so, not ignoring the evidence of John Matlapeng Pilane because I intended to deal separately and distinctly with his evidence. The evidence of this witness can be succinctly summarized as follows.-

- he is not a member of the tribal council, but of the Royal Family, and he allege to be the complainant in this case against the Appellants. He attended tribal resolution meetings, which the community were invited to;

- the Dwaalboom farms belonged to the tribe and therefore income generated from the Dwaalboom farms belonged to the tribe;
- the proceeds from the Dwaalboom farms operations were not deposited into the tribe's section 11 account, and that he also wasn't aware whether it had been deposited into the tribal account at Mogwase;
- neither the First Appellant (as Chief), or any other member of the tribe had the right to use tribal money, belonging to the tribe, without the tribe's permission;

- the tribe had the right to receive a report on the Dwaalboom operations which never happened;

- that he only heard at a later stage that a trust had been registered for the tribe and that this was not known to the tribe at large;

- after it was put to the witness that money emanated from the

> Dwaalboom farms were normally deposited into the trust account for the Dwaalboom farms operations, he stated that that information never reflected in the records of the tribe which were shown to the tribe.

[86] Though this witness stated that he is the complainant in this matter and that he laid criminal charges against the Appellants, he does not have any personal knowledge of the Land Bank loans (count 1) but only hearsay evidence that he could present. He had never worked in the Tribal Offices and could not share any light on the section 11 account procedure. He is also not an expert on tribal affairs.

[87] No specific evidence was tendered by the State through this witness, with regard to the theft charges. It is evident that based on rumours that circulated within the tribe, this witness accused the First Respondent of maladministration and complained about him to the Premier and in turn complained about the First Appellant and the Premier to the President. It is not at all difficult to detect bias on the part of this witness towards in particular the First Appellant.

[88] Of critical importance however, is the fact that this witness did not testify with any degree of certainty that as a complainant (as he allege he is) money was stolen from him or the tribe. The general nature and terms of his evidence leaves much to be desired as a complainant. In fact, his evidence did not take the State case any further.

[F] Conclusion -

[89] In my view, the State did not succeed in proving the guilt of the Appellants beyond reasonable doubt. Much criticism can be leveled against the manner in which the First Appellant as the person in charge of the tribes' money,

administered it.

[90] There is great suspicion that funds may have been misappropriated in the process but there is no proof beyond reasonable doubt to that effect. As correctly alluded to by Mr Kemp SC in his heads of argument on behalf of the Appellants, *"suspicion does not equate to proof*.

[91] In particular, having accepted the evidence tendered by the State through Mr van den Berg as a credible witness, the court ***a quo*** should have found that that was the practice in the running of the affairs of the tribe. That being the situation, the court ***a quo*** should have given the benefit of the doubt to the Appellants and should have acquitted them on all counts.

[G] Sentence-

[92] It follows automatically that if the appeal against the convictions is upheld, the sentences imposed must also be set aside.

[H] Order

[93] Consequently, the following order is made:-

[i] The appeal succeeds.

[ii] The convictions and sentences of both Appellants are set aside.

I agree.

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree

A M KGOELE
JUDGE OF THE HIGH COURT

ATTORNEYS FOR THE APPELLANTS: MOTHULOE ATTORNEYS
c/o SM MOOKELETSI ATTORNEYS