



IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF
KWAZULU-NATAL

HELD AT DURBAN IN THE SCCC2 SITTING IN T COURT

CASE NO: 41 /353 / 2017

IN THE MATTER BETWEEN:

THE STATE

And

NOMAGUGU LUZULANE

ACCUSED ONE

JUDGMENT

G. Davis RM

[1] INTRODUCTION

The supreme law of the land is the constitution, and it prescribes the objects and duties of municipalities within the republic. In the context of the South African socio-economic landscape with its financial and poverty challenges those leading these municipalities carry an onerous responsibility. The accused was in the April of 2012, at the time of the events that led to her being charged in this matter the mayor of the Ingwe Municipality. She was a constitutional duty bearer.

[2] The constitution provides that the objects of local government are, as stipulated in section 152,

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;
- (d) to promote a safe and healthy environment.

Section 153 provides inter alia that a municipality must—

- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.

[3] In the context of a poor largely rural in nature municipality such as the Ingwe Municipality¹ the challenges faced by the municipality in providing services and assistance to those living within its jurisdiction is both important and onerous with many citizens at times becoming in need of social services assistance. Poverty is a widespread phenomenon.

[4] It is against this backdrop that the Ingwe Municipality along with other municipalities in KZN implemented operation Mbo which in the Ingwe Municipality was an outreach programme where needy persons or families were identified as persons in need of assistance and should have been pursuant to a proper supply chain management protocol supplied with food parcels by the municipality.

[5] Operation Mbo in the Ingwe Municipality was run through the office of the Municipal Mayor, ordinarily upon the recommendation of Ward Councillors indigent and/or needy persons and families would be identified as in need of intervention and the project would assist them by supplying them with food parcels. This process required the filing of documentation including ordinarily a motivation letter from the ward councillor, requests from the family for assistance, copies of identity documents and might include documents such as a death certificate if the need for intervention arose as a result of a death in the family that caused the absence of a breadwinner. After the completion of the compliance process there would be a handover of the food parcels to the needy families concerned.

[6] These would ordinarily be food parcels that one would expect to be to provide proper nutrition to a needy family for a period of time and normally consisted of parcels that contained basic foodstuffs such as inter-alia rice, maize, potatoes, vegetables, oil and bulk meat for example. Operation Mbo formed a part of ‘Special Projects’ within the municipality and as a result required a report in writing detailing where the handover took place, how many persons received the service and what occurred at the meeting. In the ordinary course the person in charge of Special Operations at the time was Bonisiwe Nkandi, she would be responsible for authorising the requisitions for each individual project.

[7] The States contention or at least my summation of the evidence is at the instance of the accused, Nomagugu Luzulane Operation Mbo was utilised by the accused, assisted by others at the Ingwe Municipality either by omission or by their acts to fraudulently obtain supplies and payment for various items to fund the funeral of the brother of Amos Zondi, a councillor in the area who some of the witnesses believed was in an intimate relationship with the accused. No food parcels were given to those persons listed in the operation instead the money approved for Operation Mbo was used to fund the funeral by paying the service providers. The accused denies any involvement in the procuring of funding in this matter at all.

[8] This culminated in the Mayor, the accused and the municipal manager, Mmabatho Brown being charged with fraud corruption and various other counts under MFMA.ⁱⁱ Charges were withdrawn against the Municipal manager on the 20th August 2018 and the state proceeded against the accused who at this time faced one count of fraud, alternatively theft, a count of corruption in contravention of section 3 (a) (i)) (aa) of the Prevention and Combating of Corrupt Activities Act, 12 of 2004 and a further three contraventions of the PFMA, namely contravening sections 173 (4) (a); 173 (4) (b) (c) and a contravention of section 173 (5) (f) of the aforesaid act. The corruption charge was withdrawn by the state at the commencement of the trial on the 24th day of May 2022 as a consequence of the offeror of the benefit having died. Her statement taken in the expectation of being a witness was later admitted into evidence in terms of section 3 (1) (c) of Act 45 of 1988.ⁱⁱⁱ

[9] The accused, 43 years of age at the time of her first appearance in the regional court has since the commencement of the trial being represented by Advocate Rai^{iv} and state advocate Ms Cole appeared for the State.^v At the

conclusion of the trial both parties submitted detailed heads of argument and the court notes its appreciation thereof.

[10] On the 24th day of May 2022 the accused pleaded not guilty to all the charges, on count one she pleaded not guilty to a charge of fraud in that she denied that in the April of 2012 she misrepresented to the Ingwe Municipality that the service providers, Donnybrook Spar, Gobho Trading cc, Big D's Services and Classy Trade and investments were paid a total amount of R71 500-00 had performed approved services for an Operation Mbo initiative when she well knew that the services and goods requested from the service providers were not in fulfilment of any Operation Mbo initiative but for her own benefit, that the funds paid were for her own benefit and not for any Operation Mbo benefit and that the funds raised by the Operation Mbo initiative were used for her own benefit either directly or indirectly. She also pleaded not guilty to the alternative count of theft of R71 500 -00 from the Ingwe Municipality.

[11] In count three she pleaded not guilty to a charge of causing officials of the Municipality to circumvent Supply Chain Management legally binding protocols surrounding procurement in causing the Municipality to make payments of R71500-00 for services that were not for Operation Mbo. On count four she pleaded not guilty, she denied interfering with statutory functions of the accounting officer of the municipality in ensuring the awarding of an unlawful contract to Gobho Trading. In count five the accused pleaded not guilty to a charge of influencing the Municipal Manager to requisition food, catering and equipment for an Operation Mbo project when that was not the case.

[12] **EVIDENCE OUTLINE**

The state led a number of witnesses, including the current head of the Municipality, the previous municipal manager, Mmabatho Brown and various employees of the municipality including the former personal assistant of the accused mayor, Lindiwe Zuma. It is not necessary to detail all the names of those who testified in light of what is no longer in dispute, where the evidence of the various witnesses is germane to the determination of the issues it will be discussed in more detail.^{vi} It is not necessary to detail all the evidence as it is not in dispute that the manner in which the funds were raised was not in compliance with rules pertaining to Supply Chain Management and there is no suggestion that the payments made were used in payment of a genuine Operation Mbo

initiative. Much of the State evidence was led on this aspect but this is no longer in dispute, what is in dispute is the accused's role in this, if any.

[13] The State then sought to admit the statement of Ms. Magobolo the head of Gobha Trading who was now deceased. After leading the statement taker and after hearing argument the statement was in terms of was section 3 (1) (c) admitted. Thereafter the accused gave evidence in her defence. Detailed and thorough heads of argument/written argument were then submitted by the legal representatives of the State and the defence.

[14] There is no dispute in this matter that the noble goals of Operation Mbo to provide emergency food relief to those most in need were abused and that in this instance the funding and applications were a smokescreen for something else. Even the accused does not say that this was a legitimate funding approved and paid out in terms of the SCM principles applicable, protocols were not followed, proper paperwork was not completed, and the authorisations required were not necessarily obtained. Matters that should have been put out to tender were not.

[15] The accused's defence is simply that it was not her. This can best be seen by Advocate Rai's submission in his argument^{vii} that the key issues to be deliberated upon by the court is the events at the Donnybrook Spar on the 20th day of April 2012 and the funeral of the late brother of Amos Zondi. His submission is that the evidence of her involvement in any untoward activity on these occasions is simply unreliable as amongst other things it is made by persons with a desire to falsely implicate her.

Common Cause/facts not in dispute

[16] It is common cause that documentation was processed as an Operation Mbo exercise. It is common cause that Operation Mbo was run through the office of the Mayor, this does not mean that the Mayor would necessarily approve or handle any aspect of the particular operation. Indeed it is common cause that her signature or presence is not directly implicated in any transaction or document. It is in fact a breach of the MFMA should the mayor directly involve herself in Supply Chain Management protocols pertaining to procurement. As a direct result of the processing of this documentation an amount of R71 500-00 was approved for payment to the service providers.

[17] In respect of this R71 500-00 it was not utilised to achieve the goals of any Operation Mbo project, that the money spent did not benefit any of the persons listed on any documentation. No Operation Mbo handover of food parcels took place. It is not in dispute that the documentation and approvals are woefully inadequate, municipal officials signed off on the project without following the proper SCM procedures. In fact the events surrounding the approval and payment of this R71 500-00 are clearly fraudulent and the key issue for this court to decide is a simple one, was the Accused involved?. It is also common cause that the items brought from the Donnybrook Spar were items that would ordinarily be bought for catering for a function rather than for food parcels that would encompass staple food items.

THE ISSUE

[18] Was the accused as the mayor involved in this matter, was she involved in the mala-fide approvals of the procurement from the funds of the Operation Mbo in respect of the paperwork and authorisations, was she present at the Donnybrook Spar when goods were purchased that were self-evidently items brought for catering at a function rather than what would be bought for providing food parcels for those in need and in particular was she one of those choosing the items. Were the items then loaded into her motor-vehicle and driven from the Spar and finally were these items then used to cater for those attending ward Councillor Amos Zondi's brothers funeral. The State argues that the conclusion that the accused was involved and the main person behind this fraud is inevitable, Advocate Rai has argued that the evidence is compromised, the witnesses are compromised, the accused herself regards herself as a victim of a political conspiracy to get rid of her by her enemies in the same party.

[19] The evidence given in the trial on these issues is the following, Lindiwe Zuma the Personal Assistant was aware of a meeting between the municipal manager and the accused, after which she was given a list of names that formed part of this Operation Mbo, tellingly the normal documentation did not accompany the list of names. Notwithstanding this she did the requisition that was then approved by the municipal manager and she sent the Order form to the Donnybrook Spar. Unusually as normally the families listed would collect their parcels from the Spar she was instructed by the municipal manager and the Mayor to go to the Spar to collect the parcels. She was accompanied by Bonisiwe Nkandi.

[20] At her arrival at the Spar the Mayor was present, which was unusual, she was in the company of a woman known as Mrs Magobolo. The items were being collected by Magobolo and placed in the accused's Fortuner motor-vehicle. The goods collected were not those that would ordinarily form part of a food pack for those in need but contained luxury items. She was aware that it was wrong but she merely followed instructions, a refrain that was repeated on numerous occasions during the trial.

[21] Bonisiwe Nkandi was the youth officer in charge of special projects. She was instructed by the accused to go to the Spar and she travelled with Zuma to the Spar in a municipal vehicle. She confirmed that the items purchased were not items that ordinarily made up the contents of the food parcels and that it was the Mayor who told her to pack the goods in the car. She further confirmed that no report was ever made in respect of the operation as should be the norm.

[22] Bonisiwe Nkandi also told the court that the accused had requested her to request a tent and sound system for a funeral that was taking place at Sandanezwe on 21 April 2012 and that the funeral was for the brother of the accused's boyfriend. Many of the documents contain the reference as being at Sandanezwe which is the place where the funeral of Amos Zondi's brother in fact took place. Mildred Gumede a cleaner at the municipality testified that she attended the funeral that was held at the Zondi homestead and that the deceased was the brother of Amos Zondi, a ward councillor at the time. She also assisted in catering at the funeral and was transported to the funeral by the mayor whose car was driven by Thulani Sabelo who the accused later confirmed was her driver.

[23] Mmabatho Brown the former municipal manager testified as an accomplice witness and was advised of the provisions of section 204 of the CPA. It is quite clear from the evidence of a number of the witnesses that they might have also been similarly warned. She confirmed that the accused as the mayor would have nothing to do with the municipalities finance as she was the political head of the municipality. She stated that the request by the Mayor in respect of this Operation Mbo came from the accused as a memo that has seemingly disappeared. She approved this on the basis of this memo without supporting documentation which was fairly obviously irregular.

[24] Brown also told the court that the accused was involved in a relationship with Amon Zondi and that the funeral of his brother took place at Sandanezwe in the April of 2012. She admitted that the documentation was irregular and incomplete but nonetheless she approved the payment. After the event the mayor had indicated to her that the event was a success but never provided her with a written report as required. Sometime later she heard that the operation Mbo did not in fact take place, when she met with the accused the accused told her that she had started at operation Mbo and thereafter proceeded to the funeral. She acknowledged that she should have properly investigated the matter especially as the documentation was so compromised along with the failure to follow ordinary Operation Mbo procedures.

[25] The current Municipal Manager is Nkosiyezwe Vezi who supplied the documentation to the Hawks when they conducted their investigation, he was alerted to the possible fraud when he noticed the inadequacy of the information. Cezu a supply chain manager told the court about the deviations in the matter and that some of the items should have gone out to tender, in particular the amount of R50 000. It is not in issue that the payments were irregular, in fact it is common cause that the payments made in this way are irregular, in fact it is not in issue that many people are actually culpable in allowing for the irregular expenditure.

[26] Following upon the evidence of the then Investigating officer Colonel Du Plooy the court admitted the witness statement of the deceased Zithilele Magobolo as evidence in terms of section 3 (1) (c) of Act 45 of 1988. The key aspects of her statement relevant to these charges are:-

1. She knew the accused as the mayor, they lived in the same area.
2. She was told by the accused to quote for catering for 500 people at R100 per person.
3. On 20 April she was advised by the accused to be present at the Donnybrook Spar.
4. She watched while municipal officials collected groceries.
5. The accused advised her that the groceries were for the catering the next day.
6. The accused told her that Amos Zondi's brother had died and that she was required to cook the next day.
7. The accused sent a vehicle to collect her and she cooked for the guests at the funeral using some of her pots.
8. She supplied an invoice and was told to head the invoice "Operation Mbo at Sandenezwe," this appears on the invoice.

9. She did not know what operation Mbo was, she believed she was cooking for an ANC funeral.
10. She confirmed that the accused assisted in the catering exercise at the funeral thus confirming the evidence of the cleaner Mildred Gumede.

[26] There are other aspects to the statement including an explanation of her making a R50 000 payment being the proceeds of the invoice to the accused in order to secure future catering contracts, it is however not in my view not necessary for the court to go into this in any detail as the corruption charge was withdrawn, the 10 points listed above deal with the issue as to the accused's involvement in the procuring of the items at the Donnybrook Spar and the events of the funeral.

[27] That is a summary of the evidence for the State and it is an appropriate juncture in this judgment to give full reasons as to why the court admitted the statement of the deceased Mrs Magobolo.

REASONS FOR ADMISSION OF THE STATEMENT OF MRS MAGOBOLO

[28] The State sought under section 3(1)(c) of the Law of Evidence Amendment Act (Hearsay Act), to admit the statement of Ms Magobolo, who died before the trial commenced. She would have testified under the provisions of section 204 of Act 51 of 1977.

[29] The State brought an application in terms of section 3(1) (c) of the Hearsay Act to admit Ms Magobolo's statement. This statement was taken by Colonel Du Plooy. The defence opposed the admission of the statement but this Court admitted the statement and held that in the exercise of my judicial discretion that the interests of justice demand the admission of the hearsay evidence of the deceased witness Ms Magobolo.

[29] Recently the Constitutional Court in *S v Kapa*^{viii} reiterated the criteria that the trial court must take into account when adjudicating applications pertaining to admissibility of statements that constitute hearsay. Section 3(4) of the Hearsay Act defines hearsay as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence".

[30] The legislation provides:-

Section 3(1)(c) of the Hearsay Act states:

“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—

(c) the court, having regard to—

- (i) the nature of the proceedings;
- (ii) the nature of the evidence;
- (iii) the purpose for which the evidence is tendered;
- (iv) the probative value of the evidence;
- (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
- (vi) any prejudice to a party which the admission of such evidence might entail; and
- (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.”

[31] The right to a fair trial enshrined in section 35(3) of the Constitution encompasses various fundamental rights, including the right to remain silent, and to adduce and challenge evidence. In *Molimi*^{ix}, the constitutional Court described the right to a fair trial as follows:

“The right to a fair trial . . . ‘has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime’. . . . More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy

[32] Section 35(3)(i) of the Constitution guarantees the right to adduce and challenge evidence. **In *Ndhlovu*^x, the Supreme Court of Appeal clarified that section 35(3)(i) does not create an automatic right to cross-examine. The Supreme Court of Appeal said that^{xi}:**

“The Bill of Rights does not guarantee an entitlement to subject all evidence to cross examination. What it contains is the right (subject to limitation in terms

of section 36) to ‘challenge evidence’. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed. Put differently, where the interests of justice require that the hearsay statement be admitted, the right to ‘challenge evidence’ does not encompass the right to cross-examine the original declarant.”

[33] There are instances, such as the present case, where challenging evidence through cross-examination is impossible. In such circumstances, the notions of basic justice and fairness demand that the admission of hearsay evidence in criminal proceedings is done with caution, having regard to all the factors in the statutory test for the admission of hearsay and the **overriding consideration of the interests of justice**. [my emphasis] This is particularly so where the decision on admission of the hearsay evidence is likely to play a decisive role in whether the accused is convicted or acquitted.

[34] The general proposition is that hearsay evidence is inadmissible, unless the court is of the opinion that it is in the interests of justice for it to be admitted, taking into account the factors referred to in section 3(1)(c)(i) to (vii). The Supreme Court of Appeal in *Ndhlovu*^{xii} held that section 3(1)(c)’s criteria – must be “interpreted in accordance with the values of the Constitution and the ‘norms of the objective value system’ it embodies” – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of accused

[35] It is more likely that hearsay evidence will be admitted in civil proceedings than in criminal proceedings – this is “because of [the] presumption of innocence, and the courts’ intuitive reluctance to permit the untested evidence to be used against the accused in a criminal case”. The nature of these proceedings in this matter, namely a criminal trial ordinarily militates against admission.

[36] The probative value of the evidence

The Supreme Court of Appeal in *Ndhlovu* defined “probative value” in the following terms; “Probative value’ means value for purposes of proof. This means not only, ‘what will the hearsay evidence prove if admitted’ but ‘will it do so reliably?’” **In the present case, the guarantees of reliability are**

high. The most compelling justification for admitting the hearsay in the present case is the numerous pointers to its truthfulness and in its corroboration by numerous witnesses in the matter.

[42] The enquiry also encompasses the extent to which the evidence is considered to be reliable as well as the exercise of balancing the probative value of the evidence against its prejudicial effect. Mrs Magobolo’s statement must be weighed against the prejudice occasioned to the accused person, if admitted. I must accept that the mere fact that evidence strengthens the prosecution’s case does not render it prejudicial to an accused.

[43] *Ndhlovu* states^{xiii}; **“A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute ‘prejudice’ Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent’s case warrants its admission, since its omission would run counter to the interests of justice.”**

[44] However, the Court in *Ndhlovu* emphasised that—

“prejudice is always present when hearsay is admitted. It must be weighed against the reliability of the hearsay in deciding whether, despite the inevitable prejudice, the interests of justice require its admission^{xiv}.”

[45] The prejudice occasioned to the accused by the admission of Ms Magobolo’s statement is not insignificant, – it is not however the only evidence or indeed the most decisive pointer to the accused’s guilt. There is other evidence on record of the accused’s role, both the direct evidence of witnesses at the Spar store in Donnybrook and her presence at the funeral. There is evidence of her involvement in the deviation from the supply chain management processes and the presence of Ms Magobolo at the Spar by other witnesses. The evidence contained in the Hearsay statement other than the part of the corrupt payment is corroborated supported and buttressed by other evidence on record that overwhelmingly suggests that it was reliable.

[46] As the majority said in *Kapa*; “It bears emphasis that the fact that the evidence in question evidently strengthens the prosecution’s case does not

render the evidence prejudicial to an accused. In this regard, the Supreme Court of Appeal in *Ndhlovu* held:

“The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. *A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute ‘prejudice’*. Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent’s case warrants its admission, since its omission would run counter to the interests of justice.^{xv}”

[47] Whereas there can hardly be any doubt that the accused is being substantially prejudiced by the admission of the statement as he is deprived of the opportunity to cross examine Magobolo but that is not the only consideration – the Court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence. This question is with respect answered overwhelmingly in favour of the State. A consideration of the 10 points listed in this judgment that are contained in the statement of Mrs Magabolo are without exception supported by the documents or the viva-voce evidence of other witnesses.

[48] The overriding criterion is always whether the interests of justice warrant the reception of the hearsay evidence. In this regard Majiedt J writing for the majority reiterated that; “It is a well-established principle that a trial court’s decision must be based on the totality of evidence available to the court.^{xvi}” On a conspectus of all the evidence led in the matter that this court was of the view that the interests of justice demanded the admission of the deceased’s statement notwithstanding the fact that she would have testified as an accomplice witness. It is noteworthy that the only aspects of her statement that are not supported by extraneous evidence are in connection with the corrupt payment to the accused by the leaving of the money in her vehicle which does not form part of any charge against the accused. The evidence although hearsay is reliable and should in the interests of justice be admitted.

[49] The Supreme Court of Appeal in *Ndhlovu*^{xvii} considered whether the admission of hearsay evidence in itself violates the constitutional right to challenge evidence as entrenched in section 35(3)(i) of the Constitution and, consequently, the right to a fair trial. The Court held that the criteria in section 3(1)(c) – which must be “interpreted in accordance with the values of the Constitution and the ‘norms of the objective value system’ it embodies” – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of an accused. .^{xviii}”

[50] Consequently their being so many pointers to the truth of the averments in the affidavit of the late Mrs Magobolo, large amounts of corroboration not only in the viva voce evidence of some of the witnesses but also in the documents used to secure payment that the evidence should be admitted. It provides further evidence that the operation Mbo at the instance of the accused was used to cater for the funeral and not for any legitimate operation Mbo. Further that the accused was instrumental in the use of these funds for purposes other than any legitimate operation Mbo. Accordingly the court admitted the statement in terms of section 3 (1) (c) of the ‘Hearsay Act.’

The defence evidence

[51] The accused denies any untoward behaviour in respect of the funeral of Amos Zondi’s brother. She attended the funeral as a VIP guest and played no other role at the funeral. She denied having any relationship with Amos Zondi other than a purely professional relationship.

[52] She played no direct role in Operation Mbo in the sense that she was not responsible for requisitioning of supplies, this was done by members of the municipality some of whom would be assigned to her office. She met with stakeholders such as councillors and they would decide what needed to be done in respect of emergency relief. Her involvement was limited to meetings with the Municipal Manager and that was mainly to deal with budgetary considerations. She maintains in a common refrain in matters such as this is that she could not interfere with the financial running of the municipality she could not have procured this funding. Of course the issue is notwithstanding the fact that she ought not to involve herself in any financial procurement issues did she use her position as the mayor to ensure that these funds were irregularly made available to pay service providers for services at the funeral rather than for a legitimate Operation Mbo project.

[53] During the cross examination of the witnesses it was suggested that the accused had an alibi for the collection of supplies from the Donnybrook Spar in that she was attending a meeting at Bulwer. During her evidence she stated that she might have been at the Spar at some time during that day on returning from the meeting at Bulwer but was adamant that she did not participate in the purchasing of these items at the Spar nor did she witness same.

[54] She admitted knowing the late Mrs Magobolo and confirmed that she often saw her at ANC meetings where she was often part of the catering services provided. She denied the allegations made against her by Mrs Magobolo.

[55] It was only during her evidence that it emerged with finality that there was an agreement that no legitimate Operation Mbo took place but she was adamant that she was not involved and that there was no issue with the funeral at Amos Zondi's residence. She suggested that the items may have been re-directed to another function held at the same time, this pertained to Ms. Cezu, this was not put to Ms. Cezu when she gave evidence.

[56] She believes that there was a conspiracy to falsely implicate her in these offences and that this conspiracy was led by Mr Vezi who sought better remuneration. Although she is unable to pinpoint why some of the witnesses, in particular her former personal assistant and Mrs Magobolo would lie to the court she is adamant that they are lying. That in summary is the evidence before the court.

Onus and Burden of Proof

[57] The court when evaluating the evidence must consider the totality of the evidence in order to decide whether or not the guilt of the accused has been proved beyond reasonable doubt. It is trite law that the burden of proof rests on the State to prove the guilt of the accused beyond a reasonable doubt.

[58] The approach is that the onus rests upon the State to prove the accused's guilt beyond a reasonable doubt and the corollary of that is that if the accused's

version in the light of all the evidence on record is reasonably possibly true and an innocent explanation then he is entitled to an acquittal.

[59] It suffices if he gives an explanation, even if the court does not believe him, if it is reasonably possible true, then he is entitled to an acquittal; In the matter of *S v Van Der Meyden*^{xix} it was held that:

"The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent^{xx}. These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. **In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence.** [MY EMPHASIS] Evidence must be evaluated in light of all the evidence and not compartmentalised.

EVALUATION

[60] Counsel for the accused in his argument has subjected the evidence of the state to a searing analysis, pointing out the unsatisfactory evidence of many of the state witnesses particularly those involved in the procurement process at the municipality. He, with respect, correctly points out that the conduct of some of the witnesses either made them party to the fraud or at least fell foul of the provisions of the PFMA. Of course when one works for a municipality and you turn a blind eye to procurement abuses such as this on the basis of deference to political authority you then facilitate abuse and irregular expenditure, even fraud and you thereby fail as a constitutional duty bearer. Much of the evidence of Brown and even the accused's personal assistant seen in isolation is found to be wanting but the sheer magnitude of the totality of the evidence and the various pieces of evidence paint a compelling mosaic.

[61] In *Sithole*^{xxi} the Supreme Court of Appeal reiterated that a court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might

be true. The correct approach is set out in the following passage from *Mosephi and others v R LAC* (1980 – 1984) 57 at 59 F-H:

‘The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees’

[62] This is precisely the case here, some of the witnesses in isolation may be found wanting and can correctly be criticised but the number of instances of corroboration not only from the viva-voce evidence of some of the witnesses but also from the numerous documents handed in that substantiate the evidence of those witnesses whose credibility is being impugned. This can be seen in the numerous forms referring to the event happening at Sandanezwe which is the area of the funeral. The evidence when considered in its totality reveals that the Mayor accused’s footprint is everywhere in this transaction.

[63] The evidence contained in the admitted statement of Mrs Magobolo clearly indicates this and that she was told to append the words Operation Mbo Sandanezwe to her invoice for payment. In truth although the witnesses in their individual capacities the sheer weight of the evidence and its corroboration on every aspect indicates that the truth of the accused’s involvement in the funds being sourced from Operation Mbo is inevitable. Similarly the evidence of the accused’s presence is overwhelming, not only do three witnesses place her on the scene her own indecisiveness on the point is indicative of her version being prone to padding. Whereas in isolation much criticism might be levied against the evidence of individual witnesses seen in its totality a clear thread of the accused’s involvement is plain to see.

[64] Advocate Rai has argued that there is no evidence linking the funding obtained to the funeral of Amos Zondi's brother is in my view not sustainable. The evidence of the Mildred Gumede, Magobolo's statement and the repeated noting of the area in the documents are suggestive that any other conclusion is simply impossible. Mrs Magobolo's evidence and indeed that of the other witnesses present at the Spar of the goods being taken by the accused on the day before the funeral and Magobolo cooking for the funeral make the conclusion that the items bought at the Donnybrook Spar were cooked or utilised at the funeral of Amos Zondi's funeral irresistible. It is indeed the only reasonable inference that can be drawn that excludes all other reasonably possible inferences and is consistent with all the evidence on record.

[65] Indeed as the evidence became overwhelming subtle changes emerged in the evidence of the accused, alibi averments became I might have been present at the Spar but did not see anything untoward happening. Her belated attempt to raise the 'conspiracy' defence is nonsensical in the context of this matter, she would blame people for concocting this version to falsely implicate her long after she has exited the scene of the crime so to speak, and at the time of the concoction of the story those alleged to have concocted the story had no benefit to gain. The political conspiracy argument is patently false and I find it to be so.

[66] Some of the witnesses can correctly be criticised, Brown a section 204 witness clearly minimised her role and fairly obviously played a role in ensuring the wishes of the accused were realised. Similarly the workers within the municipality had to have known what was going on was irregular and probably were under an employee's duty to intervene, effectively assisted the attainment of the scheme by doing nothing. This is not acceptable and impacts upon their evidence but their evidence is not relied upon in its own, documentary evidence supports their viva-voce evidence. The evidence of all the witnesses as buttressed by the admitted statement of Mrs Magabolo in the circumstances makes the conclusion of complicity simply irresistible. The accused maintains that she had nothing to do with the fraudulent use of Operation Mbo yet her footprints are everywhere, her Personal Assistant confirms her involvement, her Municipal Manager confirms the role she played, no fewer than four witnesses place her actively participating with the selection and collection of goods at the Donnybrook Spar and the placing of those items in her vehicle is corroborated by different witnesses.

[67] The documentation and Order forms refer to the place of the Operation Mbo being Sandanezwe, the funeral was held at this area, indeed the admitted Hearsay evidence along with the evidence of the cleaner Mildred Gumede is dispositive of the accused's version. She is lying when she says she merely attended the funeral as a VIP.

[68] The Supreme Court of Appeal reminds us in *S v Mavinini*^{xxii}:

‘It is sometimes said that proof beyond reasonable doubt requires the decision-maker to have 'moral certainty' of the guilt of the accused. Though the notion of 'moral certainty' has been criticised as importing potential confusion in jury trials, it may be helpful in providing a contrast with mathematical or logical or 'complete' certainty. It comes down to this: even if there is some measure of doubt, the decision-maker must be prepared not only to take moral responsibility on the evidence and inferences for convicting the accused, but to vouch that the integrity of the system that has produced the conviction - in our case, the rules of evidence interpreted within the precepts of the Bill of Rights - remains intact. Differently put, subjective moral satisfaction of guilt is not enough: it must be subjective satisfaction attained through proper application of the rules of the system.’

[69] I borrow from the reasoning in *Mavanini*; “In evaluating the evidence of the witness I concluded as follows:

‘In assessing the evidence, all of it must be considered, that is the state witnesses and the defence witnesses. Any witness taken in isolation may not meet the required standard of proof but when his or her evidence is considered collectively as part of the mosaic a different picture can and often emerge. That is what has transpired here. Assessed and judged individually it is unlikely that it can safely be stated that any state witnesses has established the guilt of the accused beyond reasonable doubt but collectively, together with that part of the accused's testimony which is not in conflict with the state case, a picture has emerged which fits like a hand into a glove enabling the court to find with the requisite degree of certainty whether the accused was involved in the final conduct.’

[70] With respect any other finding on a conspectus of the totality of the evidence is inherently improbable and I find it to be false, I am satisfied that the accused's denials of being involved in the fraudulent abuse of Operation Mbo to

illegally procure funds for the payment of Almon Zondi's brother is false beyond a reasonable doubt.

FACTS FOUND PROVED

[71] Operation Mbo fell under the auspices of the office of the Mayor. The accused as the Mayor of Ingwe was the political head of the municipality. She was not allowed to involve herself in supply chain management issues such as procurement.

[72] Operation Mbo was a programme that provided relief to the most challenged members of the community and in Ingwe Municipality this manifested in the identification of those in need, the following of SCM principles and then the supply of food parcels.

[73] In April 2012 the accused used her influence to secure funding of R71500 for a fraudulent Operation Mbo exercise. She was aided and abetted by the Municipal Manager and by the non-intervention and opposition by municipal workers.

[74] The accused attended at Spar and instead of the money secured being used for the provision of food parcels the money was used with the direct involvement of the accused to select items that were to be used to cater for an event.

[75] The event was the funeral of ward Councillor Zondi's brother in Sandanezwe. Operation Mbo not only paid for the catering supplies of R10 000 but also for R11500 for sound equipment and tent hire.

[76] R50 000 was paid to Gobha Trading, it is not necessary for the purposes of this judgment to decide whether or not that money was returned to the accused as a gratuitous payment.

[77] The amount of R71500 was defrauded from the Ingwe Municipality. The accused arranged and assisted Mrs Magobolo in the cooking and preparation of the food for the funeral.

[78] Without authority the municipality at the behest of the accused funded the funeral of the deceased Zondi, the ward councillors brother.

PROVEN FACTS APPLIED TO THE CHARGES

[79] The proven facts clearly disclose that the accused both by her deeds and those that she acted with misrepresented to the Ingwe Municipality that R71500 was required for an Operation Mbo project in the April of 2012 when in fact no such Operation Mbo existed, that the money was to be used for the accused's own personal benefit and in particular to fund the funeral of a ward councillors brother. The complainant suffered actual prejudice in the amount of R71500, the accused is guilty as charged on count one.

[80] Counts 3-5 are contravention of the MFMA, the accused as the Mayor of the municipality is governed by this act. The evidence clearly discloses that the accused influenced officials of the municipality including the Municipal Manager to circumvent SCM policy and procedures to irregularly procure items for the funeral. As a direct result a patently irregular award was made that was unlawful and in contravention of section 173 (5) (f), 173 (4) (b) and 173 (4) (b) of the MFMA.

JUDGMENT ORDER

- [81] 1. On count one the accused is guilty of fraud with the actual prejudice being R71 500.00
2. Count two was withdrawn-corruption; accepting a benefit.
3. Count three, the accused is guilty of a contravention of section 173 (4) (a) of the MFMA 56 of 2003
4. Count four, the accused is guilty of a contravention of section 173 (4) (b) (c) of the MFMA 56 of 2003
5. Count five, the accused is guilty of contravening section 173 (5) (f) of the MFMA, 56 of 2003

Garth Davis-Regional Magistrate
14 July 2023

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- ⁱ The name has changed, now the Dr Nkosazana-Dlamini Municipality.
- ⁱⁱ Municipal Finance Management Act, 56 of 2003.
- ⁱⁱⁱ Law of Evidence Amendment Act, 45 of 1988- Hearsay Act
- ^{iv} Advocate Rai instructed by attorney, Mr P Naicker.
- ^v Ms. Cole has emigrated, prosecution in the interim has been taken over by Advocate Luckan.
- ^{vi} The witnesses include N. Vezi, Mmabatho Brown the MM, Lindiwe Zuma, Bonisiwe Nkandi, Andisiwe Macingwana, Mildred Gumede, Alfred Zondi, Ms Cezu, Colonel Du Plooy,
- ^{vii} [2] of Defence Heads of Argument.
- ^{viii} *Kapa v S* (CCT 292/21) [2023] ZACC 1; 2023 (4) BCLR 370 (CC); 2023 (1) SACR 583 (CC) (24 January 2023)
- ^{ix} *S v Molimi* **[2008] ZACC 2**; **2008 (3) SA 608** (CC); **2008 (5) BCLR 451** (CC) at para 42.
- ^x *S v Ndhlovu* **[2002] ZASCA 70**; **2002 (6) SA 305** (SCA)
- ^{xi} Paragraph 24
- ^{xii} Ndhlovu supra at [24] and [16]
- ^{xiii} *Ndhlovu* above n 3 at para 50
- ^{xiv} [49] Ndhlovu Supra
- ^{xv} [50] Ndhlovu Supra
- ^{xvi} *Kapa* Supra [104]
- ^{xvii} *Ndhlovu* above at para 16.
- ^{xviii} Ndhlovu [24] Supra also see [50]
- ^{xix} **1999 (2) SA 79** (WLD) at 80H-81C
- ^{xx} see, for example, *R v Difford* **1937 AD 370** especially at 373, 383
- ^{xxi} *Sithole v S* (868/11) [2011] ZASCA 85
- ^{xxii} *S v Mavinini* **2009 (1) SACR 523** (SCA) para 26.