REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: A401/11
DPP REF NO: JAP 2011/126

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

12/12/2013
DATE

SIGNATURE

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS
SOUTH GAUTENG Appellant

and

IVAN DON VAN DER LINDE Respondent

J U D G M E N T

MBHA, J:

[1] The Director of Public Prosecutions, South Gauteng (the appellant) appeals in terms of s 310 of the Criminal Procedure Act 51 of 1977 (the Act), against the finding of the Regional Court, Germiston made on 9 March 2011,

in terms of which the respondent (the accused in the court *a quo*) was acquitted in terms of s 174 of the Act. The respondent opposes the appeal on the grounds, firstly, that the evidence led by the prosecution at the close of the State case, was such that no reasonable court could convict the accused on it; secondly, s 310 providing for the re-trial of an accused, is unconstitutional as it flouts s 35 (3)(m) of the Constitution of South Africa, 1996, and thirdly, that the Stated case filed by the learned magistrate, does not comply with the provisions of s 310 read with rules 66 and 67 of the Magistrates' Court Rules.

[2] The background facts and chronology of the matter can be summarized as follows:

2.1 The respondent was charged in the Regional Court, Germiston with 255 counts of fraud, read with the provisions of s 51(2) of Act 105 of 1997, alternatively with contravening s 59(1)(a) of the Value Added Tax Act 89 of 1991 (the VAT Act), by making false entries in Value Added Tax returns (vat returns).

2.2 The respondent who was legally represented throughout his trial, first by Adv Van Eck and later by Adv Roets, pleaded not guilty to all the main and alternative counts. No plea-explanation nor any formal admissions were made and consequently, the State bore the *onus* to prove all the elements of the crimes with which the respondent was charged.

2.3 The State averred that the respondent conspired and planned with other persons to defraud the South African Receiver of Revenue (SARS) on an ongoing basis by fraudulently claiming VAT refunds. It was further alleged that the respondent fraudulently submitted through his accounting firm Ivan van der Linde and Associates, false vat returns in respect of four entities namely Andel Tru CC t/a Trans Lebombo Exports; Siani Trade (Pty) Ltd, Limoges Impex Trading CC and Allied Charcoal CC (the four entities), amounting to R30 638 719.88 and that R29 093 169.29 was paid out by SARS.

2.4 The State adduced the *viva voce* evidence of nine witnesses. In addition, voluminous documentary evidence in the form of VAT registration documents, VAT returns, suppliers' invoices, customs and excise documents, bank statements and so forth was tendered as proof of the commission of the crimes. On 9 March 2011 and at the close of the State case, the respondent applied for and was granted a discharge in terms of s 174 of the Act.

2.5 The appellant noted his intention to appeal within 20 days as required by Rule 67(9) of the Magistrates' Court Rules and also requested the learned magistrate to state a case as required by Rule 67(11). The learned magistrate duly submitted his reasons on 18 August 2011 but the appellant wrote back to him stating

that these did not comply with Rule 67(12)(b). On 21 September 2011 the learned magistrate furnished a Stated case with which the appellant was satisfied that it was now compliant with Rule 67.

2.6 On 28 May 2013 the appeal served before Moshidi and Coppin JJ in this division but was struck from the roll as *inter alia*, the record was incomplete and the learned magistrate had not fully complied with s 310 of the Act. The complete record was subsequently obtained and submitted to the learned magistrate who later submitted his response under a notice "*Compliance with section 310 of Act 51 of 1977 and Rule 67(12(b) Act 32 of 1944*". The appellant submits accordingly, that the complete record is before the court and that the learned magistrate's Stated case complies with Rule 67.

THE MAGISTRATE'S REASONS FOR THE DISCHARGE OF THE ACCUSED IN TERMS OF S 174 OF THE ACT

[3] The learned magistrate ruled, during the cross-examination Mr Van der Merwe, the prosecution's main witness, that this witness' evidence which had been provisionally admitted previously, was inadmissible. As such all further evidence from him was, so the learned magistrate found, inconclusive and of no assistance. The learned magistrate also found that the State had not, for some unexplained reasons, produced original documents and had totally

relied on copies which the learned magistrate called "*unexplained secondary evidence*", which was unacceptable, to prove its case.

[4] In the Stated case the learned magistrate replied that he found that the evidence proved that the respondent was involved with other people in a VAT fraud scheme, that the respondent claimed R30 638 719.88 from SARS using the four entities, and that the respondent shared the proceeds of the scam with the people with whom he was involved in the scam. The learned magistrate also explained that there were two main reasons for granting the discharge of the respondent, namely, the witness Van der Merwe's evidence, was inadmissible as it was hearsay evidence, and that the documentary exhibits tendered were ruled inadmissible for being copies rather than original documents.

SECTION 174 OF THE CPA

[5] This section provides that "*If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty*".

[6] It is trite law that the words '*no evidence*' in the section, have been interpreted to mean no evidence upon which a reasonable man acting

carefully may convict[1]. It is also established practice that a trial court has to consider the entire body of evidence to decide on the issues in dispute and in doing so, it has to formulate common cause facts, consider probabilities and credibility (where this is permissible) to decide whether the required *onus* has been discharged. This obviously requires that the entire body of evidence, in this case all evidence led up to close of the State's case to be considered by the court.

[7] In my view, although the learned magistrate correctly identified the correct test applicable under the section, he lamentably failed to apply it considering the common cause facts and other facts that were proven in the case. The following undisputed evidence and common cause facts should have been considered by the court *a quo* when the application was made for the discharge of the respondent in terms of the section:

7.1 That the four entities were registered for VAT and that their VAT numbers were correctly reflected in the indictments.

7.2 That VAT registration documents of each of the four entities were submitted when these entities applied for VAT registration.

7.3 That the respondent's firm I D van der Linde and Associates was the accounting officer of the said four entities during the

[1] *S v Khanyapa* 1979 (1) SA 824 (A) at 838; *S v Mpetha & Others* 1983 (4) SA 262 (C) at 263H; *S v Agliotti* 2011 (2) SACR 437 (GSJ) at 257.

period the entities claimed for and received fraudulent VAT refunds.

7.3 That J M Nkosi (sole member of Andeltru CC) died on 27 September 2001 and despite Nkosi's death, Andeltru kept on claiming VAT refunds years after his death and the respondent, in his capacity as sole member of SPI Brokers, received cheque payments, as a result of fraudulent VAT refunds, purportedly from J M Nkosi, acting on behalf of Andeltru CC.

7.4 That suppliers' invoices and other export documents submitted by ID van der Linde and Associates in support of the VAT refunds, were all forged.

7.5 The unchallenged evidence of Van der Merwe and Du Toit confirmed that the respondent received the proceeds of the fraudulent VAT refunds. This evidence is corroborated by the objective evidence, namely bank statements and the evidence of Francillon.

7.6 Andeltru's cheque books, which is real evidence and which was found on 29 August 2008, 6 years after Nkosi's death, at the respondent's house, confirms that the respondent received very large sums of money from Andeltru, thus supporting Van der Merwe, Du Toit's and Francillon's evidence. Exhibit EE contains blank cheques pre-signed by J M Nkosi which thus made it easy

for the respondent to issue cheques to himself, thus channelling the proceeds of the fraudulent VAT refunds, most of which was then paid into his SPI Brokers' bank account. This evidence was unchallenged and in fact explains why the court in its Stated case found that the respondent and others shared the proceeds of the fraudulent VAT refunds.

7.7 Van der Merwe's evidence that none of the four entities existed and that he could not find any of their physical addresses was unchallenged.

7.8 Importantly, the evidence of Van der Merwe, Francillon and Du Toit that the respondent signed all but 8 VAT returns which were used to claim fraudulent refunds. Francillon in fact identified the respondent's signature on the VAT returns. This evidence was simply met with a bare denial. Likewise, Francillon's detailed evidence that the respondent forged the suppliers' invoices and what her role was in the scheme to defraud SARS, was only met with a bare denial by the respondent.

[8] Although the learned magistrate found that the respondent was involved in a scam by submitting fraudulent VAT refund claims of R30 638 719.88, as explained in his Stated case, I find it most surprising that these findings are not part of his judgment. In my view, it defies common sense and

logical how then was the learned magistrate able to grant a discharge in terms of s 174 of the Act under these circumstances.

[9] I accordingly find that on a proper application of s 174, the discharge of the respondent in light of these findings is highly irregular and based on an improper application of the law, resulting in a grave miscarriage of justice.

[10] The finding of the learned magistrate also falls to be set aside on other grounds, where he, in my view, committed grave misdirections and irregularities in the conduct of the trial. Van der Merwe's evidence regarding the discussions he had with the suppliers, namely that the suppliers had told him that they never knew the respondent and nor had they ever supplied goods to the four entities, was by its nature hearsay. The appellant therefore requested the court *a quo* to provisionally allow such evidence until the owners or employees of these suppliers themselves testify, as provided for by s 3(3) of Act 45 of 1988. The court allowed this evidence provisionally provided these witnesses later testified. Before the prosecution was however allowed to present the evidence of the said suppliers, the respondent brought an application to have Van der Merwe's evidence regarding his interaction with the suppliers scrapped from the record on the basis that Van der Merwe could not remember the names of the persons he spoke to. Despite protestation by the appellant at the patently pre-mature application, the court *a quo*, surprisingly, allowed this evidence to be scrapped from the record. However, after Van der Merwe's testimony, the suppliers testified and confirmed that the suppliers' invoices were false and that they were

interviewed by personnel from SARS. As such their evidence became common cause, and any hearsay impediment on their evidence thus fell away.

[11] The fact that the court *a quo* ruled the provisionally admitted hearsay evidence, admitted in terms of s 3(3) of the Law of Evidence Amendment Act, 45 of 1988 inadmissible, before allowing the appellant the opportunity to call those witnesses upon whose credibility the hearsay evidence rested, is irregular and resulted in a grave miscarriage. Even more disturbing is the fact that the learned magistrate entertained this application and ruled Van der Merwe's testimony to be inadmissible, during this witness' cross-examination only, and not even after he had completed his evidence. Even more strange is the fact that after the learned magistrate had made his aforesaid ruling, he allowed the respondent's counsel to continue cross-examining Van der Merwe on his visit and interview with the suppliers. In so doing, the learned magistrate went against a well-established practice namely, that rulings on the admissibility of (hitherto provisionally) evidence, must be made on the close of the plaintiff's and/or the State's case, as the case can be,[2] and upon a consideration of all the evidence led by the State.[3]

THE LEARNED MAGISTRATE'S DISREGARD OF ALL DOCUMENTARY EXHIBITS BECAUSE SOME OF THE EXHIBITS WERE "*COPIES*"

[2] *Giesecke & Devrient Southern Africa (Pty) Ltd v Minister of Safety and Security* 2012 (2) SA 137 (SCA) at para [24]; *S v Molimi* 2008 (2) SACR 76 at para [17]; *S v Ndhlovu and others* 2002 (2) SACR 325 at para [18].
[3] *Naude and another v S* 2010 (3) ZASCA 138; *S v Van der Meyden* 1999 (1) SACR 447 (W).

[12] A document may be documentary in nature, or may be real evidence or a combination therefor. However, the learned magistrate arbitrarily rejected all exhibits, without considering which exhibits may be real evidence, rather than documentary. Furthermore, the learned magistrate stated that no valid reasons were advanced by the State why originals were never produced and why reliance was placed on what he termed to be unexplained secondary evidence. In my view, the learned magistrate erred and misdirected himself by his failure to apply the relevant principles of the law to the respective exhibits by brushing aside all exhibits as "*copies*". This irregularity was amplified as *viva voce* evidence were tendered by the various State witnesses regarding all the exhibits. All exhibits were thus authenticated.

[13] The learned magistrate failed to identify any of the exhibits as private, public or official documents. His total rejection of all exhibits under these circumstances amounted to a miscarriage of justice, as the requirements for the admissibility of each type of document varies. For example, some documentary exhibits were tendered in terms of statutory provisions like sections 235 and 236 of the Act, where originality is not a requirement. Some exhibits filed do qualify as originals, such as computer printouts, invoices faxed through which quality as duplicate originals and so forth. The learned magistrate thus failed to consider the duplicate original exhibits that were tendered during the trial. He was also ignorant to the fact that a party may prove the contents of a document by other means than producing the original. Furthermore, the learned magistrate completely omitted to apply the provisions of the Electronic Communications and Transactions Act, 25 of

2002 (the ECT Act) which in my view is applicable to almost half of the charges faced by the respondent, resulting in a gross miscarriage of justice.

[14] Importantly, the Supreme Court of Appeal has ruled [4] that where it is not practicable to use original documents, the use of copies is permissible. Where copies are used in these circumstances, and where authenticity was proven by evidence, as has happened in this case, the evidence becomes the best evidence.

[15] The learned magistrate seems to have either overlooked or simply forgot that proper explanations were furnished why originals were not produced. Firstly, it was put on record that the originals of copies filed were available for inspection. Adv Van Eck who initially represented the respondent, made no objection to the use of copies. Secondly, witnesses Van der Merwe and Du Toit testified regarding the use of copies where the original was unavailable. Thirdly, Du Toit testified that some SARS documents (originals) are destroyed after five (5) years, but that the data captured from destroyed documents remains on the SARS data system. An acceptable and valid reason was thus furnished as to why it was impossible to produce the originals.

[16] As *viva voce* evidence was presented relating to the exhibits, the appellant authenticated each document. As such the learned magistrate

[4] *Botha v S* 2009 ZASCA 125, at paragraph [27].

committed a gross irregularity by not considering each individual exhibit that was tendered.

[17] In my view, the fact that the objection to the use of copies was only raised for the very first time in the heads of argument of the respondent, amounted to a trial by ambush which resulted in an unfair trial. Not only did the respondent consent to the use of copies, but several witnesses were called and were even heavily cross-examined on these documents. More than two years after the trial commenced and only after the case for the prosecution was closed, did the respondent raise an objection to the filing of copies in the place of originals. In my view such an objection is indicative of *mala fides*, and indeed fallacious and should have been refused by the learned magistrate.

[18] In light of my findings the appeal by the Director of Public Prosecutions, South Gauteng, in terms of section 310 of the Act, must succeed.

DOES S 310 OF THE ACT FLOUT THE PROVISIONS OF S 35(3)(m) OF THE CONSTITUTION?

[19] The respondent contends that s 310 of the Act violates his right to protection against double jeopardy, as contained in s 35(3)(m) of the Constitution, which provides that every accused person has a right to a fair trial which includes the right "*... not to be tried for an offence in respect of an*

act or omission for which that person has previously been either acquitted or convicted".

[20] In my view, the respondent's reliance on s 35(3)(m) of the Constitution is misconceived. It bears mention that the respondent was discharged at the close of the State's case in terms of s 174 of the Act. The respondent has neither testified nor adduced any evidence at all. Upholding the appeal filed in terms of s 310 merely has the effect that the trial must continue further after the close of the State case. The respondent will choose to either testify or to close his case without testifying. It follows there is no subjection of the respondent to any so-called double jeopardy.

[21] Mr Roets, appearing for the respondent, argued strenuously that it was time that the State should not be allowed to appeal against any acquittal of an accused, even on a question of law as provided by s 310 of the Act. I do not agree. Firstly, experience has shown that a gross miscarriage of justice can occur where an accused person, who is accused of having committed gravely serious offences, can manage to escape due punishment where a court has erred on a question of law. Thus the Supreme Court of Appeal has held[5] that where a trial court has erred on a question of law, the possibility of double jeopardy does not arise and that, there will be a serious miscarriage of justice should a proper trial not ensue. Importantly, the court emphasized that it is not only the accused whose interests must be protected by the criminal justice system, but that there must be fairness to the public, represented by the State

[5] *Director of Public Prosecutions, Transvaal v Mtshweni* 2007 (2) SACR 217 at paragraph [32].

as well. There must be fairness, the court held, to the victims of the crime and their families. Secondly, the Constitutional Court ruled[6] that in circumstances, where a re-trial does not give rise to double jeopardy, the re-trial will not amount to an unfair trial in violation of s 35(3)(m) of the Constitution. Thirdly, there has been calls, justified in my view, that the time has come that the State should not only be allowed to appeal on a question of law but that this right to appeal should be extended to the facts and merits as well.[7] The facts of this case, where the learned magistrate misapplied the law and committed irregularities in the conduct of the trial, resulting in the unjustified discharge of the respondent, is a case in point.

[22] Lastly, the point raised that the learned magistrate's Stated case does not qualify with the provisions of s 310 of the Act, read with Rules 66 and 67 of the Magistrate's Court Rules, is without merit. Save for the contention that the learned magistrate's reasons are convoluted and ambiguous, it has not been shown specifically in which respect is the Stated case not compliant with the relevant provisions. In my view the learned magistrate adequately stated the questions of law he applied (albeit wrongly) and the reasons therefore. In my view he followed to the letter all the prescribed statutory provisions in setting out his Stated case.

[23] I am in total agreement with the appellant that in light of the fact that the learned magistrate has made findings on the credibility of the witness

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[6] *S v Basson* 2004 (1) SACR 285 (CC) at paragraph [66].
[7] *Jonnhy Carter v The State* Case No CA & R 37/2013 (27 September 2013 (unreported)); Recommendation of the South African Law Commission – Project 73 (November 2000) Chapter 1 at 67 para 5.31.

Francillon, and also considering the gravity of the misdirections he committed as I have detailed above, the matter should not be remitted back to him, but should rather commence *de novo* before a different magistrate.

[24] I accordingly make the following order:

1. The appeal lodged by the Director of Public Prosecutions, South Gauteng, in terms of s 310 of the Criminal Procedure Act 51 of 1977 is upheld.

2. It is ordered that the trial of the respondent should commence *de novo* before a different magistrate.

3. It is further ordered that a copy of this judgment should be furnished to the Magistrates' Commission.

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

L MDALANA
ACTING JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPELANT	: M R OOSTHUIZEN
COUNSEL FOR THE RESPONDENT	: F ROETS
DATE OF HEARING	: 7 NOVEMBER 2013
DATE OF JUDGMENT	: 12 DECEMBER 2013