IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. AR 931/2004

In the matter between:

Sayed Imitiaz Ahmed Essop **Appellant**

and

The State **Respondent**

J U D G M E N T

STEYN J et MARKS AJ

[1] We have had the benefit of reading the judgment prepared by our brother Gorven J in this matter. We are however respectfully unable to agree with his reasoning or the findings that support the order proposed by him. We cannot support the order for reasons that will follow hereunder:

[2] An objective analysis of the charge sheet, read with the preamble thereto is silent as to whether any prejudice was caused and to whom. In our view, the charge sheet is defective for want of an essential averment. In the light of the aforesaid it becomes necessary to deal with the elements of the said crime.

Fraud is defined as: "unlawfully making, with intent to defraud a misrepresentation which causes actual prejudice or which is potentially prejudicial to another".[1] (Emphasis added.) The elements of fraud that must be proved by the State are a misrepresentation, unlawfulness, the intent to defraud and prejudice, actual or potential.[2] Prejudice is required for the simple reason that some sort of harm needs to be caused and for purposes of the crime the harm is labelled as prejudice.[3] The importance of prejudice as an element of the crime being averred in the charge sheet has been emphasised by Cillié J in *S v Van Aswegen*[4]*:*

> "Die grondslag van benadeling synde 'n element van die misdryf bedrog lê by tjekbedrog daarin dat die klaer vanweë aanvaarding van die tjek as betaling werklik of potensieël in 'n swakker posisie is as wat hy sou wees indien hy nie die tjek as betaling aanvaar het nie. Dit is die nadeel wat in die klagstaat uiteengesit moet word en deur die beskuldigde in art 112 – verrigtinge erken moet word."

[3] On a procedural level it is required of the State to inform the accused of all the essential averments, and a charge sheet should contain all the essential allegations to be proved by the prosecution in order to sustain a guilty verdict.[5] Section 84 of the Criminal Procedure Act[6] reads as follows:

> "**Essentials of charge**
>
> (1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.
> (2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge."[7] (Emphasis added.)

---

[1] JRL Milton South African Law and Procedure 3rd Ed Vol 2 at 702. Also see J Burchell '*Principles of Criminal Law* 3rd Ed Juta (2005) at 833. Also see *S v Gardener and Another* 2011 (1) SACR 570 (SCA) para 29.
[2] See Joubert (2 ed) The Law of South Africa para 306 *et seq.*
[3] See *R v Kruse* 1946 AD 524 at 532.
[4] 1992 (2) SACR 487 (O) at 490b-d.
[5] See *S v Sewela* 2007 (1) SACR 123 (W).
[6] Hereinafter referred to as "the Act".
[7] See Du Toit et al Commentary on the Criminal Procedure Act loose leaf Revision Service 51 (Juta) 2013 at 14-14.

[4] The purpose of section 84 is to enable an accused person to consider whether the charge should be contested and what evidence to tender to challenge the averments contained in the charge sheet. Without sufficient information about the legal and factual basis, an accused is at a disadvantage to defend himself against the charge preferred against him.[8] The right to be duly informed of a charge is guaranteed in section 35(3)(a) of the Constitution of the Republic of South Africa, 1996, which reads:

> "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;"[9] (Emphasis added.)[10]

Gorven J in his judgment considers section 35(3)(a) to be no different from the requirement of "clear and unmistakable language" as stated in *Alexander.*[11] We disagree. In light of this view it is necessary to consider the right and the circumstances under which it would be violated. It goes without saying that any infringement would not be considered in the abstract but in having regard to the circumstances of each case.

[5] Precision in drafting charge sheets, especially in cases of fraud has long been recognised. In *S v Heller and Another*[12] the Court in placing reliance on *Alexander supra* stated it as follows:

> "What I have to decide is whether, in regard to the fraud charges, the State has at this stage of the trial adduced *prima facie* proof not merely that the

---

[8] See N Steytler "Constitutional Criminal Procedure – A commentary on the Constitution of the Republic of South Africa, 1996 Butterworths (1998) at 226.

[9] See *S v Lavhengha* 1996 (2) SACR (W) where Claasen J (Cameron J concurring) dealt with section 25(3)(b) of the interim Constitution of the Republic of South Africa, Act 200 of 1993 where he held at 482f-g that the right means that an accused must know the necessary particulars of the charge he has to meet and that the charge should be clear and unambiguous.

[10] See Art 6(3)(a) of the ECHR that reads as follows: "Everyone charged with a criminal offence has the following minimum rights:
(a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;"

[11] See para 13 of Gorven J's judgment.

[12] 1964 (1) SA 524 (T) at 535H.

> accused have committed fraud but have committed it in the manner alleged in the indictment, because precision in pleading and charging fraud is generally, and *a fortiori* in a case of this complexity and magnitude, essential (*R v Alexander,* 1936 AD 445)."

[6] In *Nesane v S*[13] the SCA dealt with the issue of essential averments, albeit in relation to the penalty provision, that was omitted from the charge sheet. Maya JA stated:

> "Section 35(3)(a) of the Constitution of the Republic of South Africa, 1996 grants an accused the right to be informed of a charge with sufficient detail to answer it. As to what the accused's ability to answer a charge entails, Cameron JA remarked as follows in *S v Legoa*:
>
> > '[U]nder the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the [Criminal Law Amendment Act of] 1997 … should be clearly set out in the charge sheet. … Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a vigilant examination of the relevant circumstances.'" (Original footnotes omitted.)

As recently as 2012 the SCA has repeated the earlier warnings issued in *Legoa*[14] and *Makatu*[15] that care be exercised in drafting and preparing charge sheet(s) and indictment(s) to ensure that they correctly reflect all the necessary averments.[16]

[7] In *S v Langa*[17] the majority of the Court recognised the principle that a fair trial demands that an accused has the requisite knowledge in sufficient time to make critical decisions which will bear on the outcome of the case as a whole.[18] It is for this very reason that a charge sheet ought to inform an accused with sufficient detail of the charge he or she should face. It should set forth the relevant elements of the crime that has been committed and the

[13] [2009] 1 All SA 464 (SCA).
[14] [2002] 4 All SA 373 (SCA).
[15] 2006 (2) SACR 582 (SCA).
[16] See *S v Mashinini* 2012 (1) SACR 604 (SCA) at 614b-c.
[17] 2010 (2) SACR 289 (KZP).
[18] See page 304e-f.

manner in which the offence was committed. *In casu* Gorven J finds that the appellant should have inferred that his conduct caused prejudice, and in doing so, he relies on *R v Jones and More*.[19] We disagree that a mere inference would suffice, since such inference would violate an accused person's constitutional right to a fair trial specifically section 35(3)(a).[20] What should be borne in mind is the development of our procedural law. In *S v Thobejane*[21] Marais J, as he then was, dealt with sufficient information in terms of the common law as follows:

> "At common law the accused, according to the principles of a fair trial, is entitled to sufficient information to:
>
> (a) Enable him to understand what the charge against him is and what conduct on his part is alleged to constitute an offence, and
> (b) Sufficient information to enable him to instruct his legal adviser and to prepare his defence (which in practice would largely overlap with (a) above), and
> (c) Insofar as the charge sheet and summary of facts supplied by the State is inadequate for the above purposes to such further disclosure or information that may be required to achieve such purposes."[22] (Emphasis added.)

What was considered just and fair in 1926, in all likelihood would not *per se* pass constitutional muster in 2014. In *Shabalala and Others v Attorney General of Transvaal and Another*[23] the Court dealt with an accused person's right to the information contained in the docket, Mahomed DP stated the following:

> "What a fair trial might require in a particular case depends on the circumstances. The simplicity of the case, either on the law or on the facts or both; the degree of particularity furnished in the indictment on the summary of substantial facts in terms of section 144 of the Criminal Procedure Act; the details of the charge read with such particulars."[24]

[19] 1926 AD 350.
[20] Also see *S v Fielies and Another* 2004 (4) BCLR 385 (C). *Mpando v S* [2004] 4 All SA 229 (C) and *S v Chauke* 1998 (1) SACR 354 (V).
[21] 1995 (1) SACR 329 (T)
[22] Ibid at 334d-e.
[23] 1996 (1) SA 725 (CC).
[24] Ibid at para 37.

[8] The details relating to the prejudice caused and to whom are important particulars and should have been furnished. In the present matter it was not once suggested to the appellant that his conduct caused prejudice to NFM actual or potential. Had that been brought to his attention, it is conceivable that he might have advanced evidence to disprove such fact. The appellant, despite having made certain admissions in terms of section 115(2)(b) of the Act, pertinently placed in issue that the presentation of a cheque requisition was an authorisation and that such presentations were without the knowledge of NFM. In paragraph 3 of his plea explanation he specifically denied that he made a misrepresentation to the complainant as alleged and denied that he acted wrongfully or unlawfully and committed the crime of fraud. The admissions therefore were qualified by paragraphs 2 and 3 of the section 115 statement. It has to be borne in mind that the risk of being prejudiced is real for the appellant if it is allowed that the element of prejudice be inferred, since the appellant no longer has the opportunity to adduce evidence to rebut the fact that the company did not suffer any prejudice.

[9] The purpose of a properly formulated charge sheet is to bring awareness and clarity as to what the State intends proving. When an accused has to infer from facts, he/she has to make a deduction which creates uncertainty. The law reports are testament to the fact that courts, at times, draw the wrong inferences from facts proved before them.[25] An accused should not have to figure out what challenges he faces, he should be informed.

[10] In *Rex v Jones and More*[26] Solomon JA at page 354 states the following:

> "In my opinion, however, it is not absolutely necessary to state expressly that there has been prejudice, but it is sufficient if, on the face of the indictment, it appears from the facts set out that the person to whom the false representations were made must have been prejudiced. For example, to take a simple illustration, an accused is charged with the crime of fraud in having sold a piece of glass as a diamond for the sum, say, of £100. It is perfectly clear in such a case that the person who paid the money must have suffered

[25] See all the cases relating to circumstantial evidence.
[26] 1926 AD at 350.

> loss, and it would be superfluous, therefore, to allege in the indictment that he had been prejudiced. But such an allegation is in my opinion required where it does not necessarily appear from the facts set forth in the indictment that there must have been prejudice. In other words, the indictment must contain an allegation, either express or implied, that there has been prejudice, and the absence of such an allegation would constitute a fatal defect in the indictment, for it would not disclose an offence." (Emphasis added)

Jones and More reflects the position pre 1994. The facts *in casu* are also distinguishable from *Jones.*[27] To put it in context the position was even pre 1994 that the State ought to have alleged prejudice and failing to do so would constitute a fatal defect in the indictment. Gorven J places reliance on *Jones and More* that the element of prejudice can be inferred or implied. Whilst we agree that technically such inference could be made, if there were sufficient facts stated in the indictment, we disagree that *in casu* there were sufficient facts to draw such inference, hence the State's desperate attempt to re-open its case.[28]

[11] In our view cases decided pre the constitutional order must be measured and weighed against the norms and guarantees afforded by the Constitution, since the Constitution puts a very high premium on the value of a fair trial.

[12] The charge sheet as it presently stands does not contain any allegation of prejudice (express or implied) and is clearly defective. In *S v Hugo*[29] in spite of the further particulars being furnished it has been held that an accused is entitled to be informed with at least a reasonable degree of clarity what case he has to meet. Such is especially true of an indictment alleging fraud. The Court found that an accused should not be left to speculate about an element of the crime. The *ratio* on page 540e-f is insightful:

---

[27] *Ibid.*
[28] See *R v Heyne and Others* 1956 (3) SA 604 (A) where the Court held that it is required that prejudice could be and not would be caused.
[29] 1976 (4) SA 536 (A).

> "An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet and this is especially true of an indictment in which fraud by misrepresentation is alleged. (Cf. *R v Alexander and Others* 1936 AD 445 at p. 457; *S v Heller and Another* 1964 (1) SA 524 (T) at p. 535H)." (Emphasis added.)

In *Hugo, supra,* at 542A-D:

> "True, in other passages in his evidence he indicated that other factors induced him to invest in the company. It is not necessary to analyse his evidence in detail. It is sufficient to say that the probabilities are that had the allegation been clearly made in the charge that it was represented to him by appellant that the company or the business was financially sound, and that this induced him to invest money therein, the issue would have been more thoroughly investigated than it was. Indeed, the appellant might well have elected to give evidence if that allegation had been clearly made in the charge. It must be remembered that the appellant, who neither testified himself nor led any evidence at all, pleaded guilty in respect of the first alternative charge under some of the counts and might well have considered that the case against him in respect of counts 2 and 5, of which he was acquitted, were so weak that he need not enter the witness-box. This left only counts 6 and 7 and the real possibility cannot safely be excluded that had the representation upon which the State now so strongly relies been made in the charge, his counsel might have advised him of the need to answer such allegation from the witness-box. The potentiality of serious prejudice to the appellant if evidence were to be considered in respect of the allegation not made in the charge is, in the circumstances of this case, manifest."

[13] In *Rex v Alexander and Others*[30] it was stated:

> "The purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him." (Emphasis added.)

[14] In *Moloi and Others v Minister of Justice and Constitutional Development and Others,*[31] it was held at para 20:

> "[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

[30] 1936 AD 445 at 447.
[31] 2010 (2) SACR 78 (CC).

> 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."

[15] Mr Wolmarans, appearing on behalf of the appellant, in his written heads and his oral submissions in court argued that the charge sheet was defective for want of one of the essential elements i.e. prejudice (actual or potential). Further that this failure was brought to the attention of the prosecutor when the application for a discharge in terms of section 174 of the Act was launched at the close of the State's case. Mr Wolmarans quite correctly, in our view, argued that the State could not rely on the application of section 88 of the Act since they failed to launch an application to amend the defect in the charge sheet in terms of section 86(1) of the Act in the Court *a quo*. He conceded that an amendment to cure a defect in the charge sheet can be done at the time of the appeal being heard, provided that such amendment does not prejudice the appellant. Mr Cook, acting on behalf of the respondent, argued that in the event of the Court not finding that "prejudice" can be inferred: the application for amendment of the charge sheet submitted in his original heads of argument still stands. Mr Cook conceded that in drafting the charge sheet and preamble there was an error in that the allegation of prejudice (actual or potential) were omitted. He applied to amend the charge sheet on appeal by the insertion of the words "to its actual or potential prejudice" into the charge. It has been submitted on behalf of the respondent that if the charge is amended, it will read:

> "The accused is guilty of the crime of Fraud, in that upon or about the date, as amended in column of Schedule "A" and at or near Jacobs in the Regional Division of KwaZulu-Natal the accused wrongly, unlawfully and with intent to defraud, misrepresent to the persons mentioned in column 5 and/or Non-Ferrous Metal Works SA (Pty) Ltd to its actual or potential prejudice, that the amount of monies in column 2 of Schedule "A" was due and payable to "Overseas Freight Carriers" and did then and there induce the said persons mentioned in column 5 of Schedule "A" and/or F Mahomed and/or Non-Ferrous Metal Works SA (Pty) Ltd, draw cheques as described in column 4 for the amounts as mentioned in column 2 of Schedule "A" in favour of "Overseas Freight Carriers."[32]

[32] See respondent's Heads of Argument at page 2.

[16] It is trite that a court of Appeal may amend a charge in terms of section 86(1) read with subsection 309(3) and 304(2)(c)(iv) of the Act to grant an amendment, which the trial court could have granted before judgment.[33] The amendment to the charge however must not amount to a substitution of another charge[34] and further will only be granted where there would be no *possible* prejudice to the appellant. This clear distinction was succinctly stated by Gorven J in *S v Motha*:[35]

> "The test is therefore whether the suggested amended charge differs from the existing one to such an extent that it amounts to another charge."

If an amendment is compliant on the test set out above, it may be granted at the stage of the appeal being heard. There is however an additional consideration and that is that an amendment will only be granted where no possible prejudice could result to the accused.[36] Whether prejudice will exist is essentially determined by asking whether the defence would have remained exactly the same.[37]

[17] In *Landsdown and Campbell*, South African Criminal Law and Procedure[38] it is stated:

> "The power upon appeal or review to exercise a right to amend a charge will be very sparingly exercised, and only in cases where no possible prejudice could result to the accused from the adoption of that course." (Footnotes omitted.)

[18] In *S v F*[39] Trengrove J (as he then was) stated:

---

[33] See *S v Kruger en Andere* 1989 (1) SA 785 (A); *S v Kuse* 1990 (1) SACR 191 (E).
[34] See *S v Motha* 2012 (1) SACR 451 (KZP).
[35] See *S v Motha supra* para 10.
[36] *Ibid* at page 455-456.
[37] See *R v Naidoo* 1948 (4) SA 69 (N) at 72 and *S v Pillay and Others* 1975 (1) SA 919 (N) at 922D-E.
[38] Vol 5 Juta (1982) at 223.
[39] 1975 (3) SA 167 (T) at 170G-H.

> "On appeal the court would accede to an application for an amendment of a charge only if it was satisfied that there was not reasonable doubt that the appellant would not be prejudiced."

In the present matter before us there can be no question of substitution. A clear reading of the amendment that is sought relates to the same charge of fraud.

[19] The State seeks to include an essential element of the charge of fraud. The cardinal question is whether it would be prejudicial to the appellant to allow this amendment on appeal. Counsel for the appellant submitted that the amendment should have been sought by the State in the court *a quo*. The learned regional magistrate was in a far better position to decide whether there could be prejudice and abate any potential prejudice. An amendment to the charge sheet normally involves the exercise of a discretion on the part of the trial court. Although it is possible for an appeal court to amend the charge on appeal it is not simply a matter of this court substituting its discretion for that of the magistrate. It is interesting to note that this defect in the charge sheet was not only brought to the Magistrate's attention in the application of a discharge in terms of section 174 of the Act at the close of the State's case, but obviously was also brought to the attention of the prosecutor dealing with the case. At that stage, the prosecutor should have made the application to amend the charge sheet in terms of section 86(1) of the Act. The learned magistrate would then have exercised this discretion judicially to determine any prejudice actual or potential to the defence.

[20] To allow an amendment given the circumstances of this case would lead to an injustice. The State had ample opportunity to cure the defect and elected not to do so. The proceedings should not be validated by allowing an amendment that would cause real or potential prejudice as envisaged by section 86(4) of the Act to the appellant.

[21] In *Ngumbela v S*[40] the Court held:

> "In terms of section 86(1) the amendment of a charge involves the exercise of a discretion on the part of the trial court. Amendment on appeal is not simply a matter of the court substituting its discretion for that of the Magistrate.
>
> The court of appeal must effect the amendment to the charge which the Magistrate ought to have effected, but in quite different circumstances and with fewer procedural powers that the Magistrate had to abate the potential prejudice to the accused."

In our view the approach followed in *Ngumbela* is a sound approach. It would be extremely prejudicial to the appellant *in casu* to effect the amendment to the charge sheet.

[22] This procedural irregularity is however not the end of this appeal. It is necessary to deal with the merits, since Gorven J dealt with it in his judgment. Gorven J states that when Ms Leibowitz (hereinafter referred to as Leibowitz) queried the payment of Vat to OFC, the Appellant had told her that OFC was paying Vat to SARS on behalf of NFM (see para 19 of Gorven J's judgment). The record however reflects that this was not her evidence. Her evidence was that she had queried this, however the Shipping Clerk (not the appellant) had told her that OFC paid the Vat to SARS on the complainants behalf.[41] The record reads:

> "Who told you now that this is what was happening with regard to Overseas Freight Carriers.
>
> - The shipping clerk came back to me after having discussed it with the accused."[42]

[23] In paragraph 28 of Gorven J's judgment emphasis is placed on the fact that appellant had not raised this fictitious entity of Overseas Freight Carriers at

[40] 2008 JOL 21934 (E).
[41] See page 17.
[42] See page 17 lines 16 to 18.

the disciplinary inquiry. At the time when Leibowitz was cross-examined, she stated that she could not recall whether this fictitious entity was raised at the disciplinary inquiry, and she was not sure.[43] Leibowitz's evidence was in our view wholly unreliable. It is correct that she was not recalled for the new counsel to cross-examine her, *ex facie* the record it was not necessary to recall her, as her evidence was in stark contrast with the evidence of the managing director of OFC, Mr Lazarus (hereinafter referred to as Lazarus).

[24] The record shows that there was never any Duplicate Freight Payments, also that VAT was not required to be paid. The fictitious documents were made to cover up fraud committed by the company to customs officials. It is because of this evidence that we find ourselves unable to agree with the factual finding of Gorven J in paragraph 18. Lazarus' conceded that no VAT was due to SARS. These were not duplicate freight payments but fictitious payments. It appears that the problem arose when the company had reclaimed the VAT from SARS that they had not paid to SARS.

[25] Mr Mahomed's evidence did not assist the State's case either. The only part that the State could rely on is that he was told to take the cheques to Bev or give them to the appellant. Much reliance is placed on this fact by Gorven J. In our view not much depends on it. It is common cause that there was a scheme. In fact Mahomed's evidence seems to rather corroborate the evidence of the appellant that there were schemes and systems in place that enabled NFM to defraud custom officials.

Lazarus' evidence was problematic and it failed to support the State's case on any level. His evidence suggests that he was told by Leibowitz about the misrepresentations after she conducted her own investigations. His evidence in a nutshell was that he was not part of any scheme and he denied that he or

[43] See page 96 lines 12 to 17.

any other directors had given the appellant or others in the shipping department authority to cut corners or create false documentation to obtain custom clearance for export or import. When confronted during cross-examination his standard answers were "I don't know; can't remember; repeat the question, and what are you implying?" It was put during cross-examination that there were irregularities and illegalities being perpetrated by the company in respect of the import of goods so as to benefit the company.

[26] What is disturbing is that when he was initially cross-examined about why the directors would sign the cheques to pay OFC on the requisitions concerning VAT payments, Lazarus could not answer and relied on his ignorance within the shipping division. After the weekend when his cross-examination continued, he seemed to have a far better recollection and indicated he signed the cheques as he believed that OFC would pay the VAT owing to the Receiver of Revenue.[44] His recollection improved over the weekend and so did his knowledge. That much can be gleaned from the record.

[27] In paragraph 29 of Gorven J's judgment he places great reliance on the fact that Lazarus was never cross-examined about Brivick. The record reflects that Lazarus was extensively cross-examined on this very aspect.[45] In paragraph 27 of Gorven J's judgment he criticises the appellant's version as being inconsistent and evasive, and relies on one excerpt from the cross-examination. When one has a closer look at this excerpt it is important to note that the appellant was being cross-examined on the knowledge on his part in defrauding the Receiver of Revenue which was not the charge he faced. He was never charged with an offence of defrauding SARS.[46] This line of questioning was objected to by counsel, correctly so, as he was never charged for defrauding the Receiver of Revenue.[47] The learned magistrate

[44] See page 317 of the record.
[45] See pages 306-310 of the record.
[46] See page 376 of the record.
[47] See page 376 of the record.

quite correctly stopped this line of questioning.[48] The judgment does not reflect that the appellant was inconsistent in his version. Having read the record the criticism against Leibowitz and Lazarus far outweighs any criticism levelled at the appellant's evidence. An accused is under no obligation, where the *onus* is on the State, to convince the Court of the truthfulness of any explanation which he or she may tender.[49]

[28] The appellant was criticised by Gorven J for not raising his defence at the disciplinary inquiry. The proceedings of the disciplinary inquiry were never placed before the trial court (correctly in our view). The only mention of this not being raised was when Leibowitz was re-examined by the prosecutor and asked whether this was the first time she had heard about the setting up of OFC, to which she replied "yes".[50] The learned Regional magistrate was alive to the fact that Leibowitz was biased and that she believed that the appellant was guilty of fraud. He was not misdirected in this regard since the record bears testimony to her bias.

[29] The following comments were made by the learned magistrate on the evidence of Lazarus:

> "Sydney was one kind of person when led by the prosecutrix. He answered her questions very well. He was another person when he was cross-examined. There was (sic) a number of occasions when he failed to answer very simply questions. He repeatedly asked that some questions be repeated for him. In some of these he would ask that they be rephrased. He was not an impressive witness."[51]

The record shows that Lazarus was a poor witness and the learned magistrate rightly tried to find some type of corroboration for his version. Where the learned magistrate erred was in finding such corroboration in the evidence of Leibowitz. He failed to mention which part of Lazarus' evidence

[48] See page 377 of the record lines 7 to 13.
[49] See *Ngobeni v S infra* para 27.
[50] See page 104 of the record, lines 11 to 14.
[51] See record page 456 line 25 and 457 lines 1 to 5.

could have been corroborated by Leibowitz whose evidence in turn was shown to have been unreliable. This brings us to the point whether the learned magistrate could have found the appellant guilty on his own version, in that he acted on his own without any mandate or instruction from management. The fact that the requisitions and authorisations for the cheques were not solely done by the appellant himself did not detract from the conclusion that appellant although he might have been acting with others did so for his sole benefit. There was no evidence tendered to indicate what happened to the monies that were paid in the account of OFC. The only person who explains this is the appellant who used to sign these cheques at the instruction of Sharma, the accountant, who had set up the bank account initially. Sharma, despite being a crucial witness, was never called by the State. There was some desperate attempt to re-open the State's case for this purpose before judgment and after the parties had already addressed the trial court on the merits of the case. This was disallowed by the magistrate.

[30] The learned magistrate was misdirected when he found that in all those counts which involved the requisitions and authorisations by others, to be similar fact evidence. This was a clear misdirection on the part of the learned magistrate since there was no basis to do so.

[31] No evidence whatsoever was tendered by the State relating to the bank account of OFC of which the appellant was the sole signatory. His defence was raised right at the outset and repeated during cross-examination that the accountant Sharma set up this bank account. All the State needed to do was to submit the documentation from the bank as to the address that the statements were being sent to and also the transactions on that account. The reluctance of the State in presenting such essential documentation or calling further witnesses should to our mind have led the trial court to have drawn a negative inference. The version of the appellant given the circumstances was not so improbable that it cannot be reasonably possibly true, especially the contention that the money was ploughed back into the company. The State

not only failed to aver prejudice but failed to establish beyond a reasonable doubt that the accused committed the offences charged with and in the manner alleged by the State.

[32] It was submitted in argument that the evidence disclosed that the appellant did not sign all of the requisitions. This is in contradiction with his formal admissions. The respondent has now conceded in its supplementary heads of argument that, because it was not proved that the appellant signed the requisitions in counts 5, 6, 19, 34, 36, 37, 46, 48, 49, 63, 64, 66, 67 and 68, the convictions in respect of those counts should be set aside. The respondent, seemingly, doubts the convictions on the aforesaid counts. Despite this concession, Gorven J remains convinced that the appellant was correctly convicted on all the counts, including those requisitions not signed by him.

[33] Lastly, this appeal took a long time to reach finality. The record was received in 2004 at the High Court and the record was still incomplete on 18 September 2012 when an order had to be issued that it be fully reconstructed. We don't have to decide on this issue of delay, except to repeat what was said by the SCA in the minority judgment of *Ngobeni v S:*[52]

> "I must say something about this case taking so long to reach finality. It is said that the Registrar of the trial and court *a quo* delayed in the preparation of the record to be placed before the appeal court. It is highly undesirable and unacceptable to inordinately delay the preparation of a record. This kind of delay gives credence to the adage that justice delayed is justice denied. It must be avoided at all cost."

[34] In the premise, the application to amend the particulars is dismissed. It follows that the charge sheet remains defective and does not disclose an essential averment to the charge of fraud. The convictions and sentence must be set aside.

---

[52] [2014] ZASCA 59 (2 May 2014) at para 14.

[35] Accordingly for the aforesaid reasons, we are of the opinion that the convictions cannot be sustained. The following is the order of this Court:

(a) The appeal is upheld.

(b) The following verdict is substituted for that of the Court *a quo*:

"The accused is acquitted on counts 1 to 69."

…….. ……

STEYN J and MARKS AJ

Appeal heard on :	7 March 2014
Counsel for the appellant :	Advocate JWB Wolmarans
Instructed by :	Justice Centre, Pietermaritzburg
Counsel for the respondent :	Advocate IP Cooke
Instructed by :	Director of Public Prosecutions, Pietermaritzburg
Judgment handed down on :	23 May 2014