

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: AR119/P

In the matter between:

JAN HENDRIK LOTZ

APPELLANT

and

THE STATE

DEFENDANT

ORDER

On appeal from: Newcastle District Court (sitting as court of first instance):

1. The appeal is upheld.
2. The appellant's conviction and sentence are set aside.

JUDGMENT

MOSSOP J:

[1] The appellant is an employee of Alrette Rentals CC, which trades as Avo Car Rentals (Avo). It has its place of business in Boksburg, Gauteng, where the appellant is employed as a manager. As its trading name suggests, Avo is in the business of renting out motor vehicles. On 1 July 2019, the appellant was convicted in the Newcastle district court of contravening section 50(1) of the National Land Transport Act 5 of 2009 (the Act). The State alleged that the appellant personally operated a public transport service vehicle upon a public road without holding the necessary permit or operating licence or, in the case of a special vehicle, a temporary permit issued in terms of section 20 of the Road Traffic Act 74 of 1977. The appellant was sentenced to a fine of R15 000 or, in default of payment, to undergo ten months' imprisonment.

[2] The appellant sought leave to appeal from the court that convicted and sentenced him, but such leave was refused. He was, however, granted leave to appeal against his conviction and sentence after petitioning the Judge President of this Division. On appeal, the appellant was represented by Mr Osborne and the State by Mr Sindane. Both are thanked for their helpful submissions.

[3] Most of the facts of this matter are not seriously in dispute. While Avo rents out motor vehicles, it also from time to time provides a passenger service to clients. In this instance, Avo agreed to transport four British hunters from O. R. Tambo International Airport to a hunting lodge near Dundee, KwaZulu-Natal. The vehicle that was used for this purpose was a Toyota Quantum motor vehicle (the motor vehicle) that is registered in the name of Avo. On 16 March 2019 on the N11, a public road within the province of KwaZulu-Natal, a road traffic official, Mr Clinton Clayton (Mr Clayton), pulled the motor vehicle over. The driver of the motor vehicle was a Mr Zamabuthle Dladla (Mr Dladla), an employee of Avo. Mr Clayton called for Mr Dladla to exhibit to him the necessary permits. While Mr Dladla had an operator's permit and a public driving permit, he was not in possession of a document referred to as a 'charter permit'.¹ Mr Dladla was, as a consequence, directed by Mr Clayton to

¹ The concept of charter services is dealt with in section 67 of the Act. There is no reference to this section in the charge sheet.

take the hunters to the hunting lodge and then to deliver the motor vehicle to the Newcastle pound.

[4] All of that is common cause. Where the versions diverge is what happened next. The State alleges that after the motor vehicle was delivered to the pound, the next day Mr Dladla and the appellant were present at the Ingogo Police Station. The appellant on the other hand, states that Mr Dladla returned to Johannesburg and reported the matter to him. After communicating with a Mr Ngema, described as being Mr Clayton's superior, the appellant and Mr Dladla travelled down to the Ingogo Police station on a mutually convenient date. Nothing, however, turns on this difference.

[5] The starting point of this appeal must be the charge sheet. It records that the accused is Jan Hendrik Lotz, the appellant, a South African citizen, aged 40, who was on bail and was arrested on 10 April 2019. That date would tend to establish that the appellant's version of when he went to the Ingogo Police Station must be correct, given that the offence was allegedly committed on 16 March 2019. There is no suggestion in the charge sheet that the appellant is charged in a representative capacity on behalf of Avo. Indeed, there is no mention of Avo at all in the charge sheet. He was thus charged in his personal capacity.

[6] The charge sheet further goes on to describe the main count, being the count upon which the appellant was found guilty, as follows:

'The Accused is guilty of the offence of contravening Section 50(1) read with sections 1, 124, 126 and 127 of act 05/2009.

In That [sic] upon or about 16 day of March 2019 the said accused did unlawfully operate a road public transport service vehicle to wit to FG76MHGP Quantum upon a public road to wit N11 Ingogo Road in the District of Newcastle without holding the necessary permit of [sic] operating licence or in the case of a special combi a temporary permit issued in terms of section 20 of R. T. A. Act 74/1977.

Not having one/or not necessary one to operate in the area where caught.'

[7] Section 50(1) of the Act reads as follows:

'No person may operate a road-based public transport service, unless he or she is the holder of an operating licence or a permit, subject to sections 47, 48 and 49, issued for the vehicle concerned in terms of this Act.'

Sections 47, 48 and 49 referred to in section 50 relate to transitional provisions dealing with the rationalisation of certain types of transport services. They appear to have no relevance to the charge that the appellant faced.

[8] The prosecution of the appellant, as Mr Osborne pointed out in his heads of argument, appears to have been conducted without any reference to the provisions of section 332 of the Criminal Procedure Act 51 of 1977 (the CPA). The significance of section 332 is that it permits liability to be visited upon a corporate body for criminal conduct, despite its physical inability to think and act. To effect such a prosecution, section 332(2) reads, in part, as follows:

'In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question.'

[9] The section contemplates that both the corporate body and the employee may be charged. Section 332(2)(d) of the CPA provides as follows:

'the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5).'

² Section 332(5) has, however, been found by the Constitutional Court to be inconsistent with the Constitution of the Republic of South Africa Act 200 of 1993 and consequently invalid and of no force or effect: *S v Coetzee* 1997 (3) SACR 379 (CC).

[10] The qualification that the person must be cited in the charge sheet as a representative of the corporate body is of singular significance. While the warm bodied accused is dealt with as if he had personally committed the offence committed by the corporate body, any conviction that follows is the conviction of the corporate body and not the warm bodied accused, unless he is also charged and convicted in his personal capacity.

[11] It is trite law that the burden in any prosecution is on the State to prove the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version and acquit the accused.³

[12] From the facts that are common cause, certain difficulties for the State immediately become apparent:

(a) firstly, the appellant at no stage personally operated a vehicle in breach of the Act. He was not the owner of the business, nor was he the owner of the motor vehicle nor was he the driver thereof. He was not even in the province of KwaZulu-Natal when the offence was allegedly committed. There was thus no evidence to demonstrate that the appellant personally conducted the service that the State finds offensive and contrary to the law. He was consequently not required to possess a charter permit and he could not be convicted of not having one. While it is so that in evidence the appellant appears to have admitted that Avo did not comply with the prescripts of the law concerning charter services, that admission was of no significance in the prosecution of the appellant;

(b) secondly, the appellant was never charged in his capacity as a representative of Avo. He ought to have been cited in his name as a representative of Avo but was not. The failure to include those words meant that he was cited in his personal capacity. The consequence of that, ultimately, was that he personally acquired a criminal conviction. As Mr Cornelius du Plessis (Mr du Plessis), the true proxy of Avo, who testified for the appellant at his trial explained, what had happened had come

³ *S v Jackson* 1998 (1) SACR 470 (SCA) at 476; *Shackell v S* 2001 (4) All SA 279 (SCA).

‘ . . . as a big shock and I felt sick to this day when I heard that it might be a criminal that the person will get a criminal record. It is still a shock to me ...’; and

(c) thirdly, while this may not have immediately been obvious, there are no sections 124, 126 and 127 to the Act, all of which were apparently relied upon by the State in the prosecution of the appellant, and which were therefore mentioned in the charge sheet. The last section in the Act is section 96. What sections the State relied upon are therefore not known.⁴

[13] Given these difficulties, the guilt of the appellant was not established by the State, and he should not have been convicted in his personal capacity. The question of whether the appellant was authorised to appear on behalf of Avo at the trial, which enjoyed some attention at the trial, ultimately is of no significance since Avo was never charged. Even if Avo had itself been prosecuted, which it was not, the appellant was not the proxy of that corporate body. Mr du Plessis unequivocally stated, regarding a document that authorised the appellant to ‘handle all the issues related the vehicles [sic] in the company name’, that

‘I am the proxy of the company and the vehicle.’

[14] While it is possible that Avo may have been guilty of operating without a charter permit, although I prefer to express no definite view on the matter, it is not possible to substitute Avo for the appellant on appeal.⁵

[15] In its heads of argument, which were delivered out of time, the State, correctly in my view, took the view that the conviction of the appellant could not be defended and conceded the appeal.

[16] Accordingly, the appeal must succeed. I would accordingly propose the following order:

1. The appeal is upheld.

⁴ As Mr Osborne further pointed out, the charge sheet also did not mention a penalty provision that was relied upon. However, see in this regard *S v Seleke* 1976 (1) SA 675 (TPD).

⁵ *S v Erasmus* 1970 (4) SA 378 (RA); *R v Reylink* 1947 (4) SA 312 (C).

2. The appellant's conviction and sentence are set aside.

MOSSOP J

I agree and it is so ordered

KOEN J

APPEARANCES

Counsel for the plaintiffs : Mr B. S. Osborne
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Counsel for the defendant : Mr. E. X. Sindane
Instructed by : Director of Public Prosecutions
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Date of Hearing : 26 August 2022
Date of Judgment : 26 August 2022