THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

Case no: 425/08

No precedential significance

JACOBUS LOUIS BOTHA **Appellant**

and

THE STATE **Respondent**

Neutral citation: ***Botha v S*** **[2009] ZASCA 125 (29 September 2009)**

CORAM: **NAVSA and LEWIS JJA and LEACH AJA**

HEARD: **9 September 2009**
DELIVERED: **30 September 2009**

SUMMARY: Minor inaccuracies in charge sheet not sufficient to find that accused did not know what case he had to meet: copies of documents admissible as best evidence: appellant convicted on 69 charges of fraud, one of forgery and one of uttering: appeal upheld only to extent of changing one conviction to convictions on all charges: sentence of 12 years' imprisonment confirmed.

ORDER

On appeal from: North Gauteng High Court (Preller and Motata JJ sitting as a full bench on appeal).

1 The appeal is successful only to the extent that the substitution by the high court of convictions on 69 charges of fraud with a conviction on one charge of fraud is set aside.

2 The order of the high court is altered to read as follows:

'(a) Save that the conviction on charge 72 is set aside, the appeal is dismissed.

(b) The appeal against sentence is upheld. The sentence is set aside and replaced with a sentence of twelve years' imprisonment.

(c) This sentence is deemed to have commenced on 15 November 2001.'

JUDGMENT

LEWIS JA (NAVSA JA AND LEACH AJA CONCURRING)

[1] The appellant, Mr J L Botha, practised as an attorney in Potgietersrus (now Mokopane). On 8 November 2001 he was convicted in the Regional Court, Pietersburg (now Polokwane), on 69 counts of fraud, two counts of forgery and one count of uttering. He was sentenced in November 2001 to a total period of 29 years' imprisonment, several sentences to run concurrently such that the effective sentence amounted to 18 years' imprisonment. Botha had pleaded not guilty to all the charges. He appealed against all the convictions and sentences to the North Gauteng High Court.

[2] The appeal was heard by the full bench (Preller and Motata JJ) on 29 November 2004 and was effectively dismissed on 7 March 2007, save that the high court substituted for the 69 counts of fraud only one charge of fraud, apparently assuming it could do so; upheld the appeal against one charge of forgery and dismissed the appeal in respect of one charge of forgery and one of uttering. The effective period of imprisonment was reduced to 12 years. Leave to appeal against conviction and sentence was given by this court. This is effectively an appeal against the conviction on charges 1 to 71.

[3] Both Botha and the State agree that the combination of 69 counts by the high court into one was impermissible and that an accused is entitled to be either acquitted or convicted in respect of every charge laid against him or her. Section 106(4) of the Criminal Procedure Act 51 of 1977 provides that an accused who pleads to a charge is entitled to 'demand that he be acquitted or convicted'.

[4] Botha was not granted bail pending appeal and by the time this appeal was heard he had been released from prison on parole.

[5] The 69 charges of fraud were alleged in the charge sheet to have been committed over a period from October 1996 to May 1999. In respect of counts 1 to 63, the charges were that on the dates set out in a schedule to the charge sheet, and at Pietersburg, Botha, in the name of various business entities also set out in the schedule, wrongfully, falsely and with the intention to defraud,

presented returns to the South African Revenue Service (SARS) claiming repayment of Value Added Tax paid to suppliers, also listed in the schedule, based on false invoices. The amounts claimed were also set out in the schedule. In misrepresenting that the VAT returns were true, the State alleged, Botha had prejudiced SARS which had accepted the returns as correct and paid the amounts set out in the schedule, for the benefit of Botha.

[6] Counts 64 to 69 were of the same nature save that it was alleged that the offences were committed in Klerksdorp. All the charges of fraud were brought on the basis that Botha was instrumental in the creation of false invoices for goods or materials supplied to one of the entities over which he had control; that he had drafted tax returns claiming VAT refunds which would be signed by a member of his staff in the legal practice as the 'bookkeeper' (though in fact not one of those who signed was a bookkeeper or knew anything about the books); that he would ensure the submission of the returns to SARS; and that SARS would make the refunds to the entity claiming, to its prejudice. A number of entities and suppliers were involved. None of the VAT 201 returns was signed by Botha himself.

[7] No purpose would be served in describing each charge and the entities involved. Suffice it to say that there were some eight businesses that allegedly made the claims for VAT refunds over the two year period and five suppliers whose tax invoices were involved. An example suffices. The first charge was that on 31 October 1996, in the tax period October 1996, a return was submitted by 'L Botha Praktyk' (Botha's legal practice) claiming two amounts

– R22 000 and R20 844.47 – in respect of VAT payments that had been made to ‘Primaforce’. (The invoices used in support of the claims were those of Bosveld Automotive Centre trading as ‘Primaforce Exhausts Potgietersrus’, and reflected work done on ‘swaar voertuie’ (heavy vehicles such as trucks).) The other charges follow the same pattern.

[8] The evidence of the State before the trial court comprised the testimony of a tax inspector from SARS, Mr A J Vogel, former business associates of Botha and several former employees in his practice, all of whom gave evidence on their role, at the instance of Botha, in the submission of the VAT returns or the creation of false invoices. The State produced either the original returns (VAT 201 forms) or copies, VAT input lists, and invoices or copies of them. Botha did not give evidence in his own defence.

[9] The defences before the trial court and the arguments on appeal are that the charge sheet was defective in that the correct name of every entity which made claims is not given; that Botha’s share or involvement in it is not correctly stated; that the evidence is largely circumstantial (this is, however, really an attack on the authenticity and admissibility of the documentary evidence, to which I shall return); and that some of the witnesses were not credible, especially since two of them had been convicted of fraud for some of the offences with which Botha was charged, and were warned against self-incrimination as witnesses in terms of s 204 of the Criminal Procedure Act, as was one other witness who had not been prosecuted.

[10] Much was made also about the fact that several documents on which the State relied had been found by Vogel on his desk, and that he did not know who had put them there (a matter to which I shall return). The gravamen of the defence was, however, that Botha did not know what case he had to meet since the charge sheet was inaccurate in many respects. It was argued thus that he had not had a fair trial.

[11] It is of course true that an accused is entitled to know exactly what charges he or she has to meet, and that a conviction on the basis of a different charge that has not been made, either initially or through an amendment during the course of the trial, would be unfair: *S v Rosenthal* 1980 (1) SA 65 (A) at 89D-H. In this case, however, the State did not seek or gain a conviction on any charge not set out in the charge sheet, including the schedules, itself. Botha's argument that the schedule was inaccurate in certain respects does not go to the substance of the charges. It goes to the information in the charge sheet which was not actually necessary (such as the membership of some of the entities that made the VAT returns). Moreover the charge sheet, including the schedules, can in my view be easily read and understood. Thus the contention that he did not know what case he had to meet cannot be accepted.

[12] It should be stated also that during the course of the trial, which extended over a lengthy period, Botha's legal representative did not ever assert that Botha did not know what case he had to meet. The witnesses were all cross examined at length and it is apparent that Botha knew exactly what

the charges were. He and his legal representative had access to all the documents that underlay the charges. The defence had also requested, and been given, further particulars for the purpose of pleading and preparing for trial.

[13] Because of the use of many documents and the related oral evidence, not generally led in any particular order, the appeal record is not a model of clarity. Before the hearing this court requested counsel for Botha and the State to provide schedules indicating which documents in the record were used as evidence in respect of each charge, whether they were original or copies, and whether they were regarded as admissible or were contested. A postponement of the hearing was granted to allow counsel the required time to provide the schedules requested. The State provided a schedule timeously. Botha's counsel produced three volumes on the morning of the hearing. We have worked thus on the schedule provided by the State which has been checked against the record. The schedule demonstrates that there was both documentary and oral evidence in respect of every charge. I shall revert to the issue whether copies of documents suffice.

[14] I shall not deal with the oral evidence in any detail, nor even mention all the witnesses: no oral evidence was led for the defence, and the extensive cross-examination of each witness by Botha's legal representative did not reveal any substantive flaw in the State's evidence. The trial court found that the witnesses were credible and those who were warned in terms of s 204 of the Act had given satisfactory evidence. There was no argument on appeal

that the evidence was not credible – only that it was circumstantial. That in itself is hardly a flaw. But in any event, as the ensuing discussion will show, it is untrue that the evidence was mainly circumstantial. A host of witnesses testified and identified documents which they said they had signed or completed on Botha's instructions. These documents are referred to in the charge sheet.

[15] The evidence led at the trial tells the story of how the alleged frauds were perpetrated. Vogel, who gave evidence first, was a tax inspector in SARS. While doing random checks on VAT returns he chanced on a return from an entity known as Olbo (Pty) Ltd, which seemed to him to be suspicious. He arranged a tax inspection with Botha who was registered as the representative of Olbo. Vogel and a colleague met Botha at a hotel in Potgietersrus. He also went to the premises of Olbo but could not establish what sort of business it ran. He subsequently arranged with members of the South African Police Services to do further inspections at Botha's offices and at his home.

[16] Vogel and police working with him found several copies of VAT returns and of tax invoices on these inspections, and he requested Botha to send him other documents relating to the VAT claims of a number of businesses in which Botha had some involvement. Shortly after that, on returning to the SARS offices one day, he found a pile of documents on his desk which related to the businesses in which Botha was involved, including his legal practice, and he and the police pursued their investigation of the VAT claims

and payments made. Botha has questioned the provenance of the documents that Vogel found on his desk. Vogel's response to questioning in this regard was that he did not know how they had got there and by whom they were delivered. But one cannot escape the compelling inference that they came from Botha himself since he had been asked to provide further documents to Vogel, and since, as I have said, witnesses testified about their roles in the creation of all the documents in question on Botha's instructions.

[17] Vogel also testified about meetings that he had with a Mr K H Dauth and a Mr S Louwrens, both of whom also gave evidence. Vogel obtained statements from them as to their complicity with Botha in making false invoices. Dauth and Louwrens were also charged with fraud and forgery respectively, and both had pleaded guilty and been convicted and sentenced. (They were warned in terms of s 204 of the Act.) The essence of the evidence was that Louwrens and Dauth, among others, had been requested to invoice other businesses by Botha. Louwrens asserted that he had believed that the invoices were genuine and that he had been misled by Botha. Botha had in fact arranged for a business in Louwrens's name to be registered as a VAT vendor. For his part in creating false tax invoices Louwrens was charged with six counts of forgery. He pleaded guilty and was sentenced to five years' imprisonment followed by correctional supervision in terms of s 276(1)(i) of the Act.

[18] Dauth acknowledged that he knew that what he was doing was wrong, but said that he had, at the time in question, been an alcoholic and was

dependent on Botha. His business, Prima Force, had ceased to trade; he was in dire financial straits and he had been willing to create false invoices for work done to vehicles, and for other purposes, at the request of Botha. The invoices underpinning the first charge, described above, were written by Dauth, who knew that they were false, but was willing to assist Botha in what he was told were bookkeeping arrangements. For his role, Dauth was charged with 74 counts of forgery. He pleaded guilty and was sentenced to seven years' imprisonment which was suspended for four years.

[19] The other witness warned in terms of s 204 was Ms C F Peuckert, who was employed in Botha's practice. She too had given a statement to Vogel about the false returns she had signed on Botha's instructions. She had spent several days, after Vogel first began investigating Botha, sorting out papers, compiling files of invoices, and typing 'input lists' for VAT refunds, all from material that had been given to her by Botha. Peuckert testified that she had been instructed by Botha to take the computer on which she worked home and to destroy the data on it. She had, however, copied files from the computer to stiffie disks and handed them to the police.

[20] Peuckert also testified that Botha had gone to Namibia, apparently with the intention of evading a trial, and had summoned her to meet him there on the pretext that she too might be charged and should leave the country. She had indeed gone to Namibia but returned to South Africa when she realized that Botha's reason for summoning her was to continue a sexual relationship with her and not to protect her from prosecution.

[21] Another employee in the practice, Mrs Smith (Engelbrecht when she gave evidence) testified that she had filled out tax invoices on Botha's instructions (all on the same day) in respect of a business known as Basson and Sons, and had also signed VAT returns in the capacity as bookkeeper although she was not one.

[22] Charges 70 and 71 (the trial court did not convict Botha in respect of charge 73, and the high court upheld Botha's appeal on charge 72) are for forgery and uttering respectively. They relate to an attorney, whose tax invoice book Botha allegedly took when on a visit to Van Niekerk's offices. Van Niekerk's testimony and documents adduced by the State showed that invoice pages were removed from the book, and filled in by Botha, reflecting payments payable to him for work done for a number of clients, none of which was genuine. The invoices were found in Botha's offices. Only one invoice was sent to SARS, however, hence the one conviction for uttering and two for forgery.

[23] Botha's signature did not appear on any of the documents adduced by the State, although some had been partially completed by him. But in my view, the evidence that he instructed other people to fill in false tax invoices and submit signed VAT returns to SARS, to its prejudice and for his benefit, is overwhelming. There are documents that support each charge, and the State witnesses testified as to who filled in tax invoices, completed VAT 201 returns, and the reasons for doing so: Botha had instructed them so to do.

[24] Moreover, the documents speak for themselves in so far as falsity is concerned. No explanation was proffered as to why Prima Force, for example, would do extensive and costly work on trucks for an attorney's practice. Nor was there an explanation why a furniture dealer (Basson and Sons) sold wild animals to a farm on land that could not be traced. These are random examples of the kinds of claims that were made on Botha's instructions.

[25] The input tax statements generated in Botha's office also tell a story. Again, a random example illustrates this: for the period December 1996 to January 1997, the claims for repayment of VAT in respect of Botha's practice each amounted to less than R30 (some for just 98 cents) except for two – claims in respect of moneys paid to Bosveld Automotive Centre (Prima Force), one for repayment of R23 000 (the charge for the work being R187 285.71) and the other for R24 179.33 (the charge for the work by Bosveld Automotive Centre being R196 888.83).

[26] And as the trial court said, Botha chose his people well: he ensured that those whom he requested to fill in tax invoices or sign VAT returns were in some way dependent on him: friends who were in dire economic straits like Dauth, and employees who would obey his instructions without demur. Another significant aspect is that all the businesses dealt with each other, rendering or receiving goods and services. And several individuals, like Louwrens, were involved in different capacities in several of the transactions that facilitated the frauds. The pattern repeated itself with different friends and

different employees, but in every case it was Botha who orchestrated the making of false representations to SARS with intent to defraud, to their prejudice and to his benefit.

[27] For each charge the State adduced documentary proof, sometimes the original documents and sometimes copies. Botha's legal representative in the trial argued at length that no reliance could be placed on copies. But no evidence was adduced by him to show that they were not authentic copies. And since many of the documents were computer-generated it cannot be said that the documents were not the originals. While clearly it is preferable for original documents to be produced as evidence, where this is not possible or practicable, there is no reason, in the absence of countervailing evidence as to its lack of authenticity, not to accept it as the best evidence available. Moreover, several witnesses testified as to the handwriting on various documents – whether their own or Botha's – and none of this evidence was countered. I see no reason not to accept the authenticity of the copies of tax returns or invoices introduced in evidence by the State.

[28] The argument for Botha on appeal was thus reduced to one that he did not know what case he had to meet at the trial. As I have said, that is plainly not the case. He would have known from the charge sheet exactly when and where each fraud was allegedly committed, which entities were involved and the sums involved. He had provided many of the documents himself and had filled in parts of some. The oral evidence of those who had been instrumental in committing the frauds also came as no surprise to him for they had made

statements to the police at the outset of the investigation and all this evidence was disclosed to him. That the State made inaccurate statements as to the nature of a business entity (whether it was a close corporation or a company, for example) or as to the interests in the various entities, is irrelevant. All the elements of the frauds committed by Botha – unlawfully making false representations with the intent to deceive, to the prejudice of SARS – were alleged and proved beyond reasonable doubt.

[29] In my view Botha was correctly convicted on 71 charges by the trial court. The high court's judgment on appeal must thus be set aside. That leaves the question of sentence. Botha does not appeal against the sentence imposed by the high court, effectively twelve years' imprisonment, and the State has not argued strenuously that the reduction to 12 years' imprisonment was unjustified.

[30] In the circumstances it is not improper to impose only one sentence in respect of all the convictions, and since there is no appeal against it, it should be left as it stands.

[31]

1 The appeal is successful only to the extent that the substitution by the high court of convictions on 69 charges of fraud with a conviction on one charge of fraud is set aside.

2 The order of the high court is altered to read as follows:

‘(a) Save that the conviction on charge 72 is set aside, the appeal is dismissed.

(b) The appeal against sentence is upheld. The sentence is set aside and replaced with a sentence of twelve years’ imprisonment.

(c) This sentence is deemed to have commenced on 15 November 2001.’

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C H Lewis

Judge of Appeal

APPEARANCES:

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For Respondent:		J H T Schutte
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