IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A94/22

In the matter between

FARIED VAN DER SCHYFF APPELLANT

AND

THE STATE RESPONDENT

Date of Hearing: 22 March 2023

Date of Judgment: 04 April 2023 (to be delivered via email to the respective counsel)

JUDGMENT

THULARE J

[1] This is an opposed appeal against the decision of the magistrate to grant appellant bail. The appellant is accused 1 of 9 accused. The State opposed the appeal primarily on two grounds. The first was the likelihood that the appellant would endanger the safety of the fiscus and that he will commit a schedule 1 offence as envisaged in section 60(4)(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA). The second was the likelihood that the appellant would undermine or joepardise the objectives or proper functioning of the criminal justice system including the bail system as envisaged in section 60(4) (d) of the CPA.

[2] The issue was whether the magistrate was wrong to refuse to grant the appellant to bail.

[3] The South African Revenue Services (SARS) identified linked corporate entities registered as Tax vendors and claimed VAT refunds, which refunds could not be substantiated. The entities were managed as car dealerships or businesses in the property or building industry and variously associated with members of the Modack family. These vendors followed a similar method of procedure which entailed the submission of false information via the e-filing system initially on VAT returns and subsequently on substantiating documentation. Once the bi-monthly VAT201 returns were submitted SARS would issue an automated request for substantiating information. Sometimes a revised return reflecting lesser refund amounts would be submitted and on other occasions a VAT schedule or invoices would be uploaded to substantiate. Many of these entities existed in name only and the only activity in the business bank accounts were the receipt of VAT refunds. In others there were some actual business dealings which were not nearly sufficient to justify the magnitude of the VAT expenses claimed.

[4] Where documents were submitted in support of VAT refunds claimed, the schedules or invoices contained false information. Many of the entities ostensibly had the primary purpose of obtain g VAT refunds. The aim of these scheme was to obtain VAT refunds from SARS to which the entities were not entitled. In some instances SARS paid out the refunds either based solely on the initial VAT201 submitted or on the substantiating documentation provided. In other instances the refunds were disallowed. Where the amounts were disallowed the vendors only pursued some but never with sufficiently verifiable documentation. Where the refunds were paid into the bank account of a particular VAT vendor the monies were quickly moved or transferred to various other accounts effectively concealing or disguising the source thereof. As a result of the scheme SARS faced potential prejudice in the amount of R219 352 743-00. SARS paid out some of the refunds claimed and suffered actual prejudice in the amount of R46 651 794-00.

[5] The State alleged that the appellant was one of the two kingpins essential to the success of the operation of the criminal syndicate which ran the scheme. He was largely responsible for the submission of the false VAT returns and supporting documentation. He traded as VDS Financial Services & Advisors. He was for a period registered with SARS as a tax practitioner and was appointed the tax

practitioner for most of the entities and provided financial services to the vendors involved. He was also registered as an e-filer in respect of most of the entities in the scheme and was responsible for the submission of most of the VAT201 returns and for uploading most of the invoices submitted to SARS.

[6] The appellant and his co-accused faced 711 charges. Counts 1 to 3 were alleged contraventions of the Prevention of Organised Crime Act 121 of 1998 (POCA) in relation to the management of and participation in the activities of the criminal enterprise. Counts 4 to 285 were offences in relation to the submission of false VAT returns to SARS to unlawfully claim VAT refunds. Counts 286 -645 were offences in relation to the preparation and submission of false invoices and/or schedules to substantiate the unlawfully claimed VAT refunds. Counts 646 to 695 were alleged contraventions of POCA arising from the cash flows distributing the unlawfully claimed VAT refunds which were paid out by SARS and counts 696 to 711 were alleged contraventions of section 6 of POCA arising from deposits made into the bank account of accused 9. The State alleged that the accused, including the appellant, were guilty of the crimes of racketeering, money laundering, fraud, forgery and uttering, contraventions of the Value-Added Tax Act, 1991 (Act No. 89 of 1991) and contraventions of the Tax Administration Act, 2011 (Act No. 28 of 2011).

[7] The State applied for, was opposed by the appellant but was granted leave to adduce further evidence relevant for the bail appeal. The evidence was that the appellant, whilst in custody at Pollsmoor Correctional Facility, was found in unauthorised possession of a cellphone in his cell on 1 September 2022. On 13 November 2022 the appellant was again found in unauthorised possession of a cellphone in his cell hidden in his towel. The State's case against appellant included offences which were largely committed by electronic means through which large funds were transferred electronically. A cellphone was susceptible to being used as a device to move funds or to commit further offences.

[8] Unauthorised possession of a cellphone in a cell within a prison facility enabled communication with others, which carried the risk of interfering with witnesses or the ongoing investigation of other criminal activities against the appellant. The very nature of the unauthorised possession within such facility is itself a security risk. The

cellphones found were being investigated in accordance with the provisions of the Cybercrimes Act, 2020, (Act No. 19 of 2020). The propensity to commit crime or disregard for the law whilst bail appeal proceedings are pending was a relevant factor for the court to consider.

[9] The appellant's testimony was that he was arrested at his home, a property owned by his wife to whom he is married according to Muslim rites. He and his wife owned two immovable properties. They paid R6000 per month to service a bond of about R800 000-00 on the one property. The other property was bought for about R650 000-00 and he used it to sponsor a drug rehabilitation centre. The appellant has children. The eldest is a daughter, two sons and one set of twins. He still maintained his daughter and her child. He also maintained his two sons and his twins. He did not live with the mother of the twins and paid about R3000-00 per month per child of maintenance for the children. He paid R6000-00 per month for the maintenance of one of his sons who was 18 years, who he had with his ex-wife who he also supported. He also maintained his current wife and her parents. He also had three permanent employees and a casual worker who depended on him.

[10] The appellant testified that he was self-employed providing a bookkeeping service. He testified that he was an accountant. His company name was VDS Financial Services and had been in operation for 18 years. The company was about 3 years at the address it used and had been at a previous address for about 10 years. His job entailed to bring books to trial balance. He did company tax, VAT, PAYE, UIF, Workmen's compensation. He was a registered tax practitioner about 3 or 4 years ago. He had a pending matter in the regional court and that was the reason he could not renew his registration as a tax practitioner. SARS made contact with him and indicated that he needed to be registered to practice as a tax practitioner. When he did not register SARS cancelled his registration as a tax practitioner.

[11 A registered tax practitioner could load up all their clients on their own profile and the practitioner was responsible for that profile. Once so registered and uploaded the tax practitioner could act on behalf of their clients. You attend to SARS for your clients. Without registration as tax practitioner he could not represent the client to

SARS. He is still doing tax as a bookkeeper. Clients brought to him their own profile, which included their login details and password and he would submit their returns on VAT, income tax and other related submissions to SARS with the permission of the tax payer through e-filing.

[12] He was not aware of what was happening in his business since his arrest. He kept files of various clients, one of whom was Mr Modack, the other alleged kingpin and accused number 2 in the case. He stopped working for Modack before Modack's files were taken. He informed SARS when Modack's files were taken from him, he told SARS. He also told SARS about his cellphone and computer. SARS gave back his cellphone and computer but not the files. The files were taken from him in 2015. The charges against him were speculative. The appellant did work for Groundbreaking, a non-profit organisation and did not get any compensation.

[13] In cross-examination the appellant initially said he had no previous convictions. It however emerged that he was convicted and sentenced for fraud and therefore had a previous conviction. When he was pressed to concede that he had a previous conviction which he did not disclose, the appellant suggested that he did not voluntarily plead guilty on that charge, but was told that because of justice he need to, to get over and done with the case. Under further cross-examination he admitted having a lawyer who represented him. He admitted to having pleaded guilty to the charge of fraud. He admitted to having been sentenced after his participation in those proceedings. He admitted that the sentence, on 4 March 2020, was a fine of R4000 or 12 months imprisonment which was wholly suspended for three years on condition that he was not convicted of fraud or similar offence committed during the period of suspension.

[14] The appellant's explanation of why he was not worried that he was now arraigned for charges which included fraud, with a sword of a suspended sentence hanging over his head, was that he did not know that the previous conviction would come up now. His explanation as to why he did not inform his attorney of his previous conviction was that he thought that matter was done and it was over. The State put to him that he was either indifferent about fraud and that he would just perpetrate it in any way and not mindful of the consequences or he chose not to take

the court into his confidence and disclose his previous conviction as he was statutorily obliged to do. The previous conviction involved the licensing of a vehicle for a car hire business, City Car Rental, which his wife ran.

[15] The appellant also had what he called ‘shelf CC’s”. These are close corporations that he registered, and part of the service he delivered was that if somebody needed a cc then that person could buy that ‘shelf cc’ from him. He also intended utilising some to tender with government. He had three such cc’s and two co-operations. The names of the shelf cc’s were Ocean breexe, X-Mart and FN Interiors. These shelf cc’s had not done any business. The appellant was just drawing up to trial balance people’s books. He was able to draw up financials but that was what accountant did. He sometimes drew up financials. He did that as a bookkeeper. He did not submit the financials that he drew for clients to SARS because he was not qualified to do that. He was qualified as a bookkeeper but not as an accountant. He did not have an explanation as to why in his evidence in chief he had told the court that he was an accountant.

[16] It also came to light during cross-examination that the pending matter in the regional court also related to tax related fraud in respect of VAT and it was about 61 charges. The appellant thought the other person, and not him, was responsible for the charges in that matter. The appellant’s business provided services to clients which included VAT, company tax, personal tax, UIF, workmen’s compensation and financials. According to the appellant, what qualified him to provide tax services to clients and to submit the returns on the client’s behalf was the client themselves. If the client gave permission to submit the return on its behalf on its own profile then he could do it. He was however aware that there were limitations to what he was permitted to prepare and he was aware that there was a limitation that he may not prepare financial statements for the purposes of submission to SARS. If it was a client’s profile and the client gave permission to submit a return, he submitted the return.

[17] The permission from the client to do the tax was by word to mouth, orally only and there was nothing in writing. To his knowledge one did not need a power of attorney to submit tax returns on behalf of a client and that power was only needed if

there was a dispute or a VAT audit. All that you needed was a log on details including a password of the client. Through VDS Financial Services he provided a tax service, compiling tax returns to clients for which the clients paid. This included drawing up income and expenses, losses and profits. He got information from the client and captured that information on a spreadsheet. He would then use that information to prepare a VAT return and submit the VAT201. If the client is happy with the VAT 201's result, he then submitted the VAT201 on e-filing to SARS. He submitted using the client's profile. That is done before the 25th of the month. Some clients would be present when he submitted, some not. The client had access to what he submitted if they logged on to e-fling. Clients who would be present when he did their returns were Frozen Fairy, The Biscuit Factory, Pikkies, Fairy Designs and Exotic Taste. This was because he physically went to the premises of these clients to do their returns.

[18] The applicant said that he had been informed by SARS about 18 years ago that to be a tax practitioner he needed to be registered, and that registration was renewable. Once registered you could do tax returns on behalf of clients. He was so registered until around 2017 or 2018. He applied to SARS, through the National Accounting Board to renew his registration as a tax practitioner in 2018 but it was not renewed. This was because two of the requirement he did not meet, which was that he had to have a tax clearance certificate and have no pending tax cases. When he informed SARS that he did not meet the requirements of the National Accounting Board, SARS told him that he could not be a tax practitioner. SARS, through Mr Benjamin de Klerk, told him that he could not practice with his old tax practitioner number and that he may not act or conduct services as a tax practitioner if he was not registered. SARS also told him that failing to register as a tax practitioner could constitute a criminal offence of he provided the services and was not registered.

[19] For the 18 years of the business of VDS he was the one submitting the tax returns on behalf of the clients. Captured it on the e-filing system. The other staff members at VDS capture information that is needed to go onto the e-filing. There was no documentation for the permission of the client to use the client's profile and there was no documentation for his authorisation or that of the client. Every permission was oral. He had provided tax services until around March 2021. He

prepared the returns. He never told his clients that he was not authorised to do their returns on his profile and that is why he was doing it on the client's profile. He initially used an invoice program and a manual invoice system until the search and seizure was conducted by SARS at his offices in 2015, and from then on he only used manual invoices. Before the search about 70% of his clients paid by electronic bank transfer and about 30% paid cash. This was the position even after the seizure.

[20] VDS was not registered as an employer and as a result he did not deduct PAYE from its employees who should be registered. He intended to register and backdate the liability for PAYE with the two-year period that VDS was behind in registering as an employer. The appellant conceded that the amounts given in his evidence as the earnings of VDS employees was double the amounts given for each of them in the employment contract handed in during his evidence-in-chief. According to him the increases in their income were not recorded. The appellant himself has not paid provisional tax, according to him because he had a dispute with SARS about his personal tax. It related to his objection in respect of his assessment for the years 2016, 2017 and 2018 and it could include prior to 20165 as well. According to him SARS raises the assessment on whatever went into his bank account and did not distinguish between his business income and expenses and his personal income. He had not submitted his returns for 2019. His returns were prepared but not submitted as he waited for the outcome of his assessment.

[21] The appellant also sold cars. SARS raised issues in their assessment of amounts in an FNB account into which his income was paid, whilst the cheque account was in his wife's name. According to him he used his wife' cheque account as his business account. He did not open a bank account because he did not see the need for it. VDS operated a Thyme bank account. Some of the money from his client went into that account and some of the clients paid into his wife's account. The payments through his wife's account were in the main debit orders and fixed fee monthly payments over a period of time. This was the position for about the past 14 years. His wife had a business and a savings account and clients used her business account for payments. His wife did not have any business. VDS did not have a business account with any of the four major banks. He did not have a bank account with any of the major banks. VDS turnover was about R60 000-00 per month. He

paid overheads and was left with about R20 000-00 monthly. The two properties that he paid the bonds for were registered in his wife's names. There were clients who paid him, but also provided some grocery items to him, like meat and vegetables. These were Right Meat Market, Economic Meats and vegetables would be from a client who was a street vendor, Gapie, in Athlone.

[22] He also ran a SWIFT Registrar business which was a platform to register a company. In other words, he registered companies on behalf of other people. He had a portal where he had registered himself as a member of the CIPC. He could register a name for a company. He could do amendments. He could do share certificates. He could add people or remove them and could do minutes for any changes that needed to be done. He did not have the authorisation from the Companies and Intellectual Property Commission (CIPC) to do what he was doing. He earned about R5000-00 per month from this venture. It was not income derived from his business so according to him it was not taxable. It was an income which he did not have to disclose to SARS. This he knew because he worked for SARS from 1992 to 1999 when he resigned. The income was invoiced through VDS. He started at procurement in SARS, worked at the cash office and then went to the VAT department and also in registration and ended up at VAT and Company Tax Collections Unit. He went to all the three courses offered to SARS employees, commonly known as IB1, IB2, IB3 and IB4. He did all SARS courses on Income Tax and on VAT, IT and PAYE. He was skilled to prepare tax returns, to read a VAT return and what needed to be done on a VAT return and on IT returns and PAYE obligations. He worked in the department of finance as a revenue clerk from 1 June 1992 to 2 October 1994 and was promoted the senior revenue clerk worked in that capacity until 31 March 1996. The department of finance transferred to SARS and from 1 April 1996 to 1 March 1997 with him in the same post. From 1 April 1997 to 1 December 1999 he was senior revenue clerk. He resigned in December 1999. He resigned because he wanted to establish his own business, which he did, which was VDS.

[23] VDS was never registered as a VAT vendor because it never reached the threshold of VAT. He had matric, studied but did not complete at Tygerberg College and then had courses at SARS. Since 2018 he did not have any audit queries except

for one or two. He had about 100 clients for which he submitted tax returns. It was not SARS that told him that he did not need any written document to indicate that he was submitting the returns on behalf of his clients for a fee. The cross-examination was in November 2021 and he had submitted his last tax returns for his clients in September 2021 for a fee. He had submitted the last income tax returns for clients for a fee in July 2021, when the tax season opened. He had also submitted PAYE returns for clients in September 2021. It is the same services he had provided when he was acting as a registered tax practitioner. The nature of the services that he rendered to his clients did not change, despite the warning from SARS that he was not a tax practitioner.

[24] A court hearing a bail appeal shall not set aside the decision against which the appeal was brought Unless such court was satisfied that the decision was wrong [Section 65(4) of the CPA].

[25] The appellant was dishonest about his previous conviction. He was warned that he had a duty to disclose his previous convictions if any in the bail application and was warned that failure to do so constituted a punishable offence. Initially the appellant lied and said he had no previous convictions. When confronted about it, he tried to trivialise the nature of the previous conviction. The appellant had shown to have utter disregard for the law. It did not weigh in his mind that he had a previous conviction for fraud. He had a pending case for tax and did not qualify to practice as a tax practitioner. SARS told him that he could not practice as a tax practitioner. He was aware that providing services that he did without being registered constituted a criminal offence on its own.

[26] The relationship of the appellant with subjecting himself to authority, in particular the authority of institutions of the State is very disturbing. Institutions of the State are the machinery which gives South Africa its identity, which keeps South Africa working, safe, secure, intact and in authority as well as able to provide for those who live in it. The biggest problem with the appellant is that he overrated his intelligence and his being clever has become his own liability and downfall. His capacity to intellectually engage has led to a position where he reasons himself into being the enemy of the truth and a danger to society. According to him, it is clients who submit

their information to VDS and it is clients who provide the login details including password on e-filing and it is the client's profiles that are worked on and therefore it is clients, and not VDS, that submit the returns. VDS showed clients how to submit the returns. The business, VDS, cannot do what it does without him because none of its employees are able to provide tax services without him or his instructions.

[27] He never told his clients that he could not do their returns on his own profile because he did not have the requisite qualification as a tax practitioner. He did not inform his clients that he was not qualified to act as a tax practitioner and that he was not registered as a tax practitioner to submit their returns. The appellant knew since 2016, from SARS, that he needed to be registered as a tax practitioner to render a service which he was providing through VDS. He was advised that he was committing a criminal offence. He simply ignored the requirements of the law and proceeded to render the service without advising his clients that he was not legally allowed to render the service which he did. Under false pretences, he submitted the client's returns on their behalf to SARS. He pretended to clients that he was in law entitled to render the service, and pretended to SARS that it was the client themselves who were submitting the returns.

[28] For five years the appellant simply disregarded the law and charged clients for a service which in law he did not qualify to render and was not allowed to render. The appellant knew that he was acting in contravention of the tax provisions, that it was a criminal offence to do so, yet he continued regardless. The appellant was not an accountant and could not in law sign off financial statements. The evidence suggests that the appellant gave out to his clients that he could provide auditing services when in law he could not. Because of appellant's own conduct, many of his clients seemed to be under an impression that he could legally assist them with financial statements and auditing services. It appears that the appellant led his clients to believe that he could assist them to be tax compliant through the services that he gave out that he could render. The appellant's clients are implicated taxpayers in a scheme to defraud SARS of millions of rands. The extent of the client's own conscious and willing participation in the scheme would be understood at trial.

[29] After a search and seizure at VDS offices the appellant changed from a computer program to a manual invoice system. VDS was not registered as an employer and as such he did not deduct and pay PAYE for the qualifying employees. The income of VDS and his personal income went into his wife's business account, when his wife did not conduct any business. He did not have an account with any bank in his own name even though he had a business and earned an income. All these are milestones pointing towards the dishonesty of the appellant and fortified the strength of the State case, which suggests that the appellant was a kingpin in a scheme which was designed to defraud the State through fraudulent submission of tax returns wherein SARS paid out refunds claimed and suffered actual prejudice of R46 651 794-00 and SARS faced potential prejudice in the amount of R219 352 743-00. Criminal convictions, a sentence which was suspended on conditions intended to help him correct his behaviour, did not mitigate his propensity to disregard the law against written advice from SARS. The fear that if released on bail, he will commit further offences, and that bail conditions would be helpful, was well founded.

[30] These past conducts of the appellant were indicators that there was a likelihood that the appellant, if released on bail, will undermine or jeopardise the objectives of the proper functioning of the criminal justice system including the bail system [*S v Olatunji* 2020 JDR 0402 (GJ); *S v Donatus* 2014 JDR 1103 (ECG)]. The appellant's personal circumstances did not outweigh the risk that his release on bail posed to the safety of the fiscus, and society as well as the likelihood of undermining or jeopardising the objectives or the proper functioning of the criminal justice system including the bail system.

[31] It is common knowledge that the working class in South Africa, including up to Public Office Bearers, legitimately complained that their income and the buying power of their remuneration has over the years been reduced by inflation and the inability of their employers, including the State, to give inflation-related annual increases. Many workers look at their salary advices, especially their tax deductions, with a heavy heart. It is against this background that the looting of public offers has become such a worrying factor. The looting of public coffers has become a threat to the democratic project.

[32] My office demands of me the brevity to say that the looting of public funds, actual and perceived, has singularly now called into question the moral authority of the leader of the construction of a democratic and constitutional State, to still lead the nation to an ideal South Africa, by those who historically and genuinely trusted its leadership without any questions asked. The looting is the greatest question mark on the capacity to lead South Africa, hovering over the current leadership of the State, and require resolute attention. As the allegations against the appellant showed, the looting happens even outside the machinery of the State administrative machinery. It seems to me, with the prevalence of these cases by private individuals and juristic entities, that for some, submitting tax returns to defraud the Republic of South Africa out of millions of rands is a thriving multi-million business. The time has arrived for the State to have a focused intelligence and inspectorate unit either within SARS or within the greater State security cluster dedicated to save the Republic's money from national and foreign fraud and laundering monetary vultures. Our guardians must guard our money. It is the responsibility of the Judiciary, the conscience of this nation, to draw a line for those who demonstrate the likelihood that their release back into society on bail will endanger the safety of our fiscus and other members of our society.

[33] The clarion call from our nation is clear, let them warm up in yellow overalls awaiting trial and after a fair trial, if convicted, be in orange overalls in prison where they belong. The appellant posed a significant threat to society and the country's fiscus with his destructive attitude and conduct. His access to login details and passwords of tax payers, at their own instance and request, because of how the appellant postured himself, made the public vulnerable to incorrect information submitted to SARS on their behalf, when he pretended to SARS that he was the actual taxpayer. The release of the appellant on bail would, in my view, seriously undermine and erode the confidence of the right thinking members of society in our criminal justice system [*S v Siwela* 2010 JDR 1471 (SCA) at p 10] and will cause questions to be asked about the legitimacy of our courts to speak justice.

[34] I am not persuaded that the magistrate was wrong. For these reasons I make the following order.

The appeal is dismissed.

DM THULARE

JUDGE OF THE HIGH COURT