

SOUTH AFRICA / JUDGMENT

Potgieter v S (A46/2024) [2024] ZAGPPHC 1148 (7 November 2024)

[2024] ZAGPPHC 1148**COURT**

North Gauteng High Court, Pretoria

BEFORE

B Neukircher, NCJ Mncube

CASE / FILE NUMBER

A46/2024

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG DIVISION,****PRETORIA****Case****No. A46 / 2024****(1)****REPORTABLE: NO****(2)****OF INTEREST TO OTHER JUDGES: NO****(3)****REVISED: YES****DATE:**

7/11/2024

SIGNATURE

In

the matter between:

JOHAN

POTGIETER

Appellant

and

THE

STATE

Respondent

JUDGMENT

NEUKIRCHER, J

- [1] The appellant was charged with one count of fraud, alternatively theft, amounting to R775 968-48 in the Regional Court, Springs. Given that the amount exceeded R500 000-00, the charge was to be read with s51(2)(a) of the Criminal Law Amendment Act 105 of 1997, which provides for a minimum sentence of 15 years upon conviction.
- [2] On 10 May 2023 the appellant was convicted and later sentenced to seven years' imprisonment.
- [3] This appeal lies against conviction and sentence with leave of this court granted on petition.

The Charge

- [4] At the outset, it must be pointed out that although a single charge of fraud was proffered, in actual fact the evidence clearly demonstrated that the complaint related to seven separate incidents. In respect of each incident, the amount in question never exceeded R100 000-00. Therefore:
- a) the appellant was incorrectly charged with a single count of fraud;
 - b) the amount was incorrect; and
 - c) Act 105 of 1992 was not applicable.
- [5] The appellant correctly raised this as an issue on appeal. Given that he was found guilty as charged and Act 105 of 1997 was incorrectly

considered and applied, the court a quo materially misdirected itself.[1]

- [6] In Van der Walt, Moseneke J held:

“ . . . [I]n my view . . . a statutory provision creating a criminal offence or a penalty clause should be interpreted restrictively. Its scope of application should not be extended beyond the ordinary meaning of its language. R v Ackerman 1931 OPD 69. If a penal stipulation lends itself to a reasonable or less onerous interpretation, the court should adopt that construction.” The learned Judge continued:

‘In my view the words “any offence . . . of fraud or theft . . .” in Schedule 2 are not open to ambiguity. They relate to a conviction on an offence, that is a single offence, which involves one or more amounts exceeding the prescribed threshold of R500,000. The usage of the word “amounts” in Schedule 2 does not detract from the appropriateness of this construction. The lawgiver sought to cover continuous or repetitive acts of theft or fraud, closely connected in time, place and context and perpetrated with a single intent, but within the confines of one offence. Otherwise, it would be permissible to trigger the minimum sentence provisions by adding together an unrelated motley of fraud or theft charges spun over any period of time, relating to diverse contexts, bound together only by the sum total of the amounts charged in the same trial.

That would be untenable. Consequently, the provisions of section 51(2)(a) of Act 105 of 1997 are not applicable to a person convicted of multiple counts of theft or fraud, where none of the convictions, taken alone, exceeds the prescribed threshold. The court a quo was not entitled, as a matter of law, to apply the provisions of Part II of Schedule 2 of Act 105 of 1997 to any of the convictions of the appellant.”

[7] The State correctly conceded this point.

[8] Thus it is clear that, if the conviction stands, the sentence must be reconsidered.

Ad conviction

[9] “Fraud” has been identified as “the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.”[2] The elements are:

- a) a misrepresentation;
- b) prejudice or potential prejudice;
- c) unlawfulness and
- d) intent.

[10] It was common cause in this appeal that the issue was whether the State has proven, beyond reasonable doubt, that appellant had formed the requisite intent.

The

facts

[11] The appellant was the sole member of JC All Tech CC (the CC) which was registered in 2006. The CC employed only one other person and that was Cherise van der Westhuizen (van der Westhuizen) who was tasked with the administrative functions of the CC.

[12] The CC operated mainly in the agricultural market and supplied agricultural lime to crop farmers, and traded in diesel and lubricants.

[13] During ± September 2014 one Shaun Powel of CIM Chemicals (Pty) Ltd contacted the appellant with a view to expanding CIM’s business. CIM would supply the CC with ammonium sulphate and the CC would then sell this product on to its standing customers in the agricultural market. As a result of these negotiations, CIM extended the CC a line of credit with which the CC would purchase the ammonium sulphate from CIM to on-sell to its customers.

[14] The product was not available in small quantities – purchases were made per ton with a maximum average load of 34 tons.

[15] What would happen was –

- a) customers would contact the appellant and place an order^[3];
- b) the order would be completed in a booklet form in triplicate and in sequential order;
- c) the customer would sign for the order;
- d) once the customer placed an order, the appellant would contact CIM via a call to Powell to confirm the quantity of the order and the availability of the product;
- e) on occasion, the CC would forego step (d) supra and would place the order via e-mail to CIM;
- f) Once CIM received that order, within a day or two, CIM would send the CC an OPCH (or order) number - initially, only one OPCH number would be given by CIM no matter how large the order: to explain this - let's say the CC received ten orders from ten different customers, it would place one order with CIM for 340 tons of product. Bearing in mind the load was 34 tons each, ten trucks would be required to collect the product. Despite ten trucks collecting, CIM would only give one OPCH number. Thus at that time, the OPCH number was in respect of the entire order placed;
- g) after a time ($\pm$ 2017) this changed and CIM would give a separate OPCH number per load which would be emailed by CIM to the CC. As appellant states
"... but it was always the same, it was just a typed e-mail with all these numbers listed on the e-mail";
- h) thus, from $\pm$ 2017, each load would be given its own OPCH number;
- i) the collection requests, which reflected the OPCH numbers, were completed by van der Westhuizen.

[16] The product would be collected in one of three ways:

- a) either the customer would collect the product; or
- b) the customer would arrange for a sub-contractor to collect the product; or
- c) the appellant would use sub-contractors to collect the product and then deliver to the client.

[17] So the manner in which the order was placed, collected and delivered was the following:

- a) once CIM sent the OPCH numbers, van der Westhuizen would complete a collection request document;
- b) this collection request would reflect not only the OPCH number, but the information of the truck^[4] that will be used to collect;
- c) the form is then sent by e-mail by van der Westhuizen to CIM or its sister company Protea Chemicals and to Impala Platinum - which is the point of collection;

- d) at the point of collection (ie at Impala) Impala signs off on the collection. Interestingly, according to Ms Mabena from Platinum, the OPCH number was not required by Platinum to complete the order. Thus it appears that this was an internal process put in place by CIM. But, whatever the case, it was not disputed that JC All Tech never received the signed collection request documents. Instead, they would wait for the invoice from CIM and then appellant would have to also request the dispatch advice from CIM;
- e) the dispatch advice was used to link the truck and load amount to a specific customer's order - without the dispatch advice the appellant could not link the invoice received from CIM to the order placed by JC All Tech and, ultimately, the customer's order;[5]
- f) the dispatch advice was neither completed by appellant nor signed by him;
- g) the problem arose when CMI failed to issue prompt invoices to JC All Tech - on average it would take two to four weeks for CIM to issue the invoices and then another two to three weeks to send the dispatch advice.

[18] All are result of the inefficiencies of the entire chain, and more especially the delay by CIM in sending the invoice and dispatch

advices to JC All Tech, on approximately 30 to 40[6] occasions collections were duplicated.

[19] The appellant explained this as follows:

"Well what will happen at JC All Tech, is that our client, or customer, will inform us of a truck-X that is loading for today. An hour later we will be informed that for whatever reason, the truck will not be able to load, we need to replace that truck with, with the next one that is able to load, and once that has happened, we will then send through a new collection request on the same OPC number with the different detail of the truck, to Impala and Protea per email, as it was always done. That email will only differ in one way, is that we will say please replace the previous collection request on that order number with the new one that was just sent, and then, because the...and then I also phoned Grace, and my apologies I cannot remember her surname now, Grace from Impala. I will then also telephonically phone her, once that email has been sent through to her, to confirm that she has received that, and that she has taken knowledge of that."

[20] But the glitch came into this entire process because, according to Grace Mabena of Impala, Impala does not work on an OPCH number for collection.

[21] Thus, despite appellant calling ahead to replace the truck/driver it would appear that at every link in the chain there was a potential breach and miscommunication which resulted in the admitted duplications.

[22] What is important is that at no stage was any evidence presented that appellant himself either completed any of the documents (other than his own direct customer's order) or that he emailed orders to CIM or that he signed off on any orders - this includes the collection documents. Van der Westhuizen was also not called to verify any of the chain of events within JC All Tech. Given that all the states witnesses had no knowledge of the inner

workings of JC All Tech, this crucial evidence was never led to establish the requisite element of intent.

- [23] Interestingly, the appellant admitted that duplications took place. He also admitted that during the end of November/beginning of December 2017 he received a call from Sean Powell of CIM regarding the duplicated loads that had occurred during approximately October 2017. Their discussion was to the effect that they “must try to make sure it does not happen again”.
- [24] But appellant also explained that, at that time, when he was notified of the duplicated load, after receiving the invoice and dispatch advice, and confirming that the customer had collected a duplicate load, payment was made to CIM. This was never disputed.
- [25] But during approximately April 2018[7] the duplications had occurred again and a meeting took place between appellant, Shaun Powell and Sean McKenzie[8] to discuss the duplications and payments. This was during May/June
2018. McKenzie testified that, at that time, appellant told them he was not aware of the duplications and that “he took a week or two to investigate, and subsequently came back and confirmed that the collections had happened.”
- [26] What was also not disputed by either McKenzie or Powell is that, after the May/June 2018 meeting with appellant, CIM suspended JC All Tech’s credit, launched a liquidation application against it and obtained a final liquidation order during September
2018. That this put pay to the appellant either recovering JC All Tech’s debts, or paying CIM for the duplicated loads. However, it must be stated that nothing stopped CIM from lodging a claim with the liquidator. The evidence was also not disputed that the liquidators never attempted to recover the monies for the duplicated loads from the customers who had benefitted from this.
- [27] Thus, the point to the above is that the seven invoices went unpaid not because appellant intended to defraud CIM, but because JC All Tech by then was placed in liquidation and payment was taken out of appellant’s hands. It was never placed in dispute that all JC All Tech’s documents, including those relevant to these charges, had been given by appellant to the liquidator who was also not called to give evidence.
- [28] The important facts to consider regarding the issue if intent are that:
- a) Brett Gait of CIM confirmed that the documentation (ie invoices and dispatch advices) were sent late to JC All Tech;
 - b) Ms Mabena, the Dispatch Administrator at Impala Refineries, conceded that appellant would not have known that a load had been duplicated if he did not have the relevant documents (which we now know was received two to four weeks after the load was collected);

- c) Sean Mckenzie conceded that past duplicate loads had been paid by appellant following his investigation and that before payment could be made on the outstanding seven invoices, JC All Tech was liquidated.

[29] In convicting the appellant the court a quo correctly found that a holistic approach to the evidence was required[9]:

“The correct approach is to weigh up all the elements which point towards the guilt of the accused against these which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and,

having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused’s guilt.”

[30] I must take some issue with the court a quo’s finding that the State’s witnesses[10] all corroborated each other that the appellant had previously sent duplicated collection requests and had been warned that this should not happen again: there is no evidence to show his personal hand in the former. In fact, the evidence is that he only found out ex post facto.

[31] But the court materially misdirected itself in rejecting the appellant’s defence as not being reasonably possibly true, in the face of all the evidence which clearly showed that it was.

[32] Bearing in mind that the onus is on the State to prove its case beyond reasonable doubt, in my view it failed to do so. In my view it failed to prove that the appellant formed the requisite intent to commit fraud, alternatively, theft and, at the end of the argument, the State indeed conceded this.

[33] Therefore, for all the reasons set out supra, the appeal must succeed.

Order

[34] The following order is made:

- 1) The Appeal succeeds.
- 2) The conviction and sentence are set aside.

B NEUKIRCHER

JUDGE OF THE HIGH COURT

I agree

NCJ MNCUBE

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 7 November 2024

For the Appellant : Adv M Van Wyngaard Instructed by

: Matsemela, Krauses & Ngubeni Inc Attorneys For the Respondent : Adv VG Khosa Instructed by

: Office of the Director of Public Prosecutions Matter heard on : 22 October 2024

Judgment

date : 7 November 2024

[1] Van der Walt v S 2003 (2) All SA 587 (T); Evans v S (171/2022)

[2023] ZASCA 123 (26 September 2023)

[2] CR Snyman; Criminal Law; 5th ed; p531

[3] Sometimes he would go out to the customers and the order would be completed at that time

[4] Which includes the driver's name, the driver's identity number and the vehicle registration number

[5] The exhibits used at trial to prove the chain of events were of poor quality and very difficult to make out

[6] According to the appellant

[7] The period from which these charges stem

[8] The managing director of CIM at the time

[9] S v Chabalala 2003 (1) SACR 134 (SCA) para 15

[10] From CIM – Mr Gait, Mr McKenzie and Mr Bradley

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