Case no. A169/08

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
1/04/10 DATE SIGNATURE

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS Applicant

1/4/2010

and

WILLIAM SCHREIBER Respondent

JUDGMENT

LEGODI J

This is an application for leave to appeal against the decision of this court, in terms of which the convictions and sentences imposed on the respondent on several counts of fraud were on appeal set aside. The matter was further remitted to the trial court to resume *de novo*.

As a brief background, the respondent initially appeared in the Pretoria Regional court on 33 counts of contravening section 59 (1)(a) of the Value Added Tax Act 89 of 1991.

He was convicted of the 33 charges based on his plea of guilty or admissions made in terms of section 112 of Act 51 of 1977 and was sentenced to five years imprisonment. He was further ordered to compensate the South African Revenue Services in the amount of R491 470.65 in terms of section 300 of Act 51 of 1977.

At the hearing of the appeal, counsel for the respondent took the view that the respondent was charged as a representative of various corporate entities specified in the charge sheet and that, therefore, the only sentences that should have been imposed was a fine as envisaged in section 332(2)(b) of Act 51 of 1977.

It therefore became contentious during the appeal whether or not the respondent was charged in his representative capacity, the state contending that the respondent was charged in his personal capacity.

This court having found that the respondent was charged in his representative capacity, set aside both convictions and sentences as there had been no authorisation as required in terms of section 332(2)(a).

It is against this finding that the application for leave to appeal is now being sought. Leave to appeal is being sought by the state in terms of section 311 which entitles the state to appeal only on a question of law.

The grounds of appeal are:

"2.1 Does the fact that the State referred in its charge sheet to the companies of whom the respondent was a director when he committed the crimes, warrant the inference that the State intended to charge only the companies in question?

2.2 Does the fact that section 332(5) of Act 51 of 1977 has been found to be unconstitutional prohibit the State from prosecuting a director, member or a servant of a corporate body in his personal capacity for crimes that he committed?

2.3 Is a court of appeal at liberty to quash a charge sheet where the procedure prescribed in section 85 and 86 of the Criminal Procedure Act, Act 51 of 1997, was not followed during the trial in the court a quo?

2.4 May a court of appeal remit a matter for a single trial to be held where the respondent is cited in his representative capacity on behalf of several corporate bodies that committed different offences at different times? (See section 156 of Act 51 of 1977 and S v Van Wyk en Andere 1994(1) SACR 183 (NC)

2.5

2.5.1 Does a court of appeal have inherent powers of review to rule on the validity of a charge sheet? (See Hira and Another v Booysen and Another 1992 (4) SA 86 (A) at 94A to 94A)

2.5.2 May an appellant during the course of argument raise a new ground of appeal not covered in his notice of appeal or in his heads of argument? (See Magistrate Court Rule 67(1) and S V Maritz 1994(1) SACR 456 (T) at 458G).

2.5.3 *May a court of appeal deal with a new ground of appeal, if the magistrate was not afforded an opportunity to furnish additional reasons as prescribed by the Magistrates' Courts rule 67(7), and where the State was not afforded the opportunity to raise an objection thereto? (See S v Zulu 2003(2) SACR 22 (SCA) at 25E and S v Nel 1987(4) SA 276(O) 279F-I).*

2.6 *May a court of appeal order a retrial where all the parties do not agree thereto? (See S v Balatseng 2005 (2) SACR 28 (BD) at 22).*

The first ground of appeal set out in "2.1" above, raises the issue whether this is a factual or legal ground of appeal. If a factual ground of appeal, the state would not be entitled to invoke the provisions of section 311.

I do not think that another court might find differently from the finding by this court, that the respondent was charged in his representative capacity particularly having regard to the preamble in the charge sheet as quoted in the main judgment. This was a factual finding

The state should therefore be found not entitled to appeal based on the ground raised in paragraph 2.1 quoted earlier in this judgment. The fact that a factual conclusion results in rendering the plea of guilty invalid in terms of section 332(2)(a), does not justify appeal on a question of law.

It is not contended that charging a person in a representative capacity, requires a plea of guilty to be accompanied by an authorisation and that without an authorisation from a corporate body concerned, the plea becomes invalid.

It does not matter whether the parties during trial raised the issue or not. If on record, particularly if the charge sheet is clear in respect of the representative capacity under which the respondent was charged, the intention of the parties or their understanding during trial becomes immaterial.

The other grounds of appeal raised are in my view without merit. Put it this way, the state in the court a quo had to prove beyond reasonable doubt that the appellant had been charged in his personal capacity and that therefore the provisions of section 332(2)(a) were not applicable to the respondent. The charge sheet is the starting point, secondly, the admissions in terms of section 112 plea.

Now, during the discussions in this application for leave to appeal, counsel for the state conceded that the charge sheet as drafted with its preamble is cumbersome and confusing. The slightest doubt of certainty whether the respondent was charged in his representative capacity or not, should be sufficient to justify the setting aside of the guilty finding.

Attempts to want to rely on the plea of guilty which is couched in the first person, would not in itself remove the doubt and I do not think that another court might find differently in this regard.

Ground 2.2 is attributed to what was stated in paragraph 6 of the main judgment. The suggestion was that the effect of what is stated in paragraph 6 is that the state would be prohibited from charging a director, member or a servant of a corporate body in his or her personal capacity for crimes that he committed.

Subsections 4 and 5 had nothing to do with the question as posed in paragraph 2.2 of the grounds of appeal. What the court meant in paragraph 6 of its main judgment is that the state cannot invoke the presumption as it was intended in subsections 4 and 5. Clearly, this has nothing to do with whether the state can charge an employee or director of a corporate body in his or her personal capacity. However, if one does so, it has to be clear from the charge sheet that it is the individual that is being charged in his or her personal capacity and not as it was in the instant case.

Grounds 2.3 and 2.5.1 have the same effect. Again, the state seems to have missed the point. The decision taken by this court on appeal did not amount to review on the validity of the charge sheet or quashing thereof. It is the convictions and sentences imposed that had been set aside.

It is the validity of the plea and the verdict thereof that had been quashed and not the charge sheet itself. I therefore do not think that another court might find substance in grounds 2.3 and 2.5.1

Ground 2.4 is apparently with reference to section 156 of the Criminal Procedure Act. The section provides that any number of persons charged in respect of separate offences committed at the same place, and at the same time or at about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that such evidence admissible at the trial of one of such persons, will in his opinion also be admissible as evidence at the trial of any other such person or such persons.

I am unable to understand what relevance the provisions of section 156 have to the present appeal. Section 156 is aimed at avoiding multiplicity of trials based on more or less the same set of facts or evidence.

This court remitted the matter to start afresh in the court aquo. How the state decides to charge the respondent if it so proceeds with the trial was not of concern to this court on appeal. Whether it charges the respondent in his personal capacity or representative capacity or both, is for the state to decide as *dominis litis*.

The question raised in paragraph 2.4 was therefore of no relevance during the appeal, neither it is now and I do not think that another court might find differently.

Grounds 2.5.2 and 2.5.3 are somewhat related. They all relate to the necessity to afford a court against whose decision is challenged, the opportunity to make comments. The court of appeal has inherent powers of review, where is it found that proceedings in the lower courts did not accord with justice. Whilst it is a good practice to require comments before a decision of a lower court is upset, where it is clear on record that the proceedings were not in accordance with the law or reference to the magistrate would serve no purpose, there is nothing wrong in dealing with the matter there and then.

The trial court in my view, could not add anything to the Preamble. His understanding or that of the defence and the state would have been immaterial, especially having regard to the finding by this court that by virtue of the preamble the respondent was charged in his representative capacity which finding invoked the provisions of section

332(2)(a). I therefore do not think that another court may find anything wrong in this court's exercise of inherent powers in terms of section 304.

Regarding ground 2.6, I can only say that a court does not have to be dictated by the wishes of the parties or disagreement between the parties. There could not have been any other appropriate order than to remit the matter to start *de novo*. For example, this is fortified by the fact that, during the discussion in this application, counsel for the state indicated that the state is still in a position to proceed with the matter afresh if it so wishes.

In conclusion, I would therefore dismiss the application for leave to appeal.

M F LEGODI
JUDGE OF THE HIGH COURT

I, agree, IT IS SO ORDERED

C P RABIE
JUDGE OF THE HIGH COURT

Heard on: Monday 08 March 2010
Date of judgment: