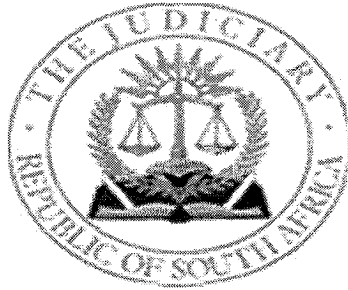


**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

- (1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO  
(3) REVISED.

**CASE NO: A232/2017**

29/10/18

Date

ML TWALA

In the matter between:

**DU PLESSIS: JOHANNES CHRISTOPHER**

**APPELLANT**

**AND**

**THE STATE**

**RESPONDENT**

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**JUDGMENT**

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**TWALA J**

- [1] The central issue in this appeal is whether a director of a company can be held criminally liable for the acts or omissions of the company which are an offence punishable by law. The appellant, a financial director of a company, was on the 24<sup>th</sup> of March 2015 convicted on ten (10) counts of contravening section 58(d) read with sections 1,7 and 28(1) of the Value Added Tax Act, 89 of 1991("The Act").
- [2] It is common cause that the appellant, an accountant, was appointed financial director of ECE Property Holding CC (ECE) in July 2007. It is not in dispute that ECE failed to submit vat returns and to make payment of value added tax ("Vat") money over to South African Revenue Service amounting to R138 593.03 for the period as it appears on schedule A to the charge sheet. It is further not in dispute that the appellant was initially employed as the accountant of ECE before he was appointed the financial director.
- [3] It is trite law that the burden 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.
- [4] In the case of **S v Jackson 1998 (1) SACR 470 (SCA) at 476** the court stated as follows:
- "Burden is on the State to prove the guilt of an accused beyond reasonable doubt, no more and no less. The evidence in a particular case may call for a cautionary approach, but that is a far cry from the application of a general cautionary rule."*
- [5] In the case of **S v Ntsele 1998 (2) SACR 178 (SCA)** Eksteen AJA (as then he was) stated the following:

*“Prove guilt beyond reasonable doubt – not beyond a shadow of doubt – if only remote possibility in his favour which can be dismissed with the sentence ‘of course it is possible, but not in the least probable’, the case is proved beyond reasonable doubt.”*

- [6] In the case of **Shackell v S 2001 (4) ALL SA 279 (SCA)** Brand AJA (as then he was) stated the following:

*“A Court does not have to be convinced that every detail of an accused’s version is true. If the accused’s version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused’s version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”*

- [7] Section 332(5) of the Criminal Procedure Act, 51 of 1977 (“the CPA”) provides as follows:

*“When an offence has been committed, whether by the performance of any act or by failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor.”*

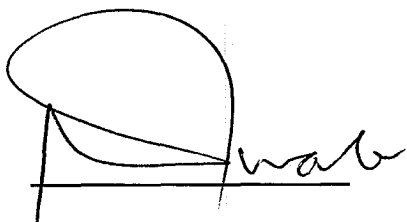
- [8] I find myself in disagreement with counsel for the appellant in the contention that a director of a company can be held liable joint and severally with the company only in civil matters. Section 332(5) of the CPA specifically provides for the director or servant of the corporate body to be found guilty where certain acts were not performed or were performed on behalf of the corporate body whilst the said person was a director or servant of the corporate body. The appellant was during the periods mentioned in the charge sheet an employee and then became a director of ECE.
- [9] I am unable to agree with counsel for the appellant that it was impossible for the appellant to perform or to submit the vat returns and to make payment of the vat amount due to the South African Revenue Service for it is only his co-director who had the authority to authorise such payments. It is on record that the company did receive moneys due to SARS, but the directors decided to utilise that money to pay other pressing debts with the understanding that SARS will be paid at a later stage.
- [10] The question that begs to be asked is what a reasonable financial director in the circumstances of the appellant would have done. It is on record that the appellant, although not paying the vat over to SARS, he did not remonstrate with his co-directors and resigned from the ECE because he was prevented from performing certain of his duties but continued to receive his salary. He was comfortable with the arrangement that SARS will be paid at a later stage and to continue negotiating alternative payment arrangements with SARS. In my view, this is an internal arrangement amongst the directors of ECE and cannot be said to be an impossibility of performance on the part of the appellant. It cannot therefore be a bar or defence to criminal liability in terms of section 332(5) of the CPA.
- [11] I do not agree with the submission by counsel for the appellant that the conviction on count 1 should be set aside since the offence was committed in April 2007

before the appellant took his position as financial director in July 2007. According to the record, the uncontroverted testimony of Mr Pretorius for the State is that the vat return for April 2007 was submitted by the appellant. It is my considered view therefore that the appellant was the servant or employee of ECE in April 2007 before he was appointed as its financial director July 2007. The appellant therefore falls within the ambit of section 332(5) of the CPA as stated above and therefore cannot escape criminal liability together with ECE which he worked for.

[12] It is my considered view therefore that one cannot falter the Court a quo in finding the appellant guilty on all ten (10) counts sine the State did prove its case against the appellant beyond reasonable doubt. In the result, I am of the view that the appeal falls to be dismissed.

[13] In the circumstances, I make the following order:

The appeal is dismissed.

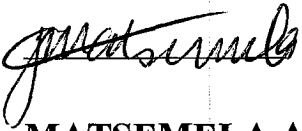
A handwritten signature in black ink, appearing to read 'Twala J', is written over a horizontal line.

**TWALA J**

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION**

I agree.



**MATSEMELA AJ**

**ACTING JUDGE OF THE HIGH COURT OF  
SOUTH AFRICA, GAUTENG LOCAL DIVISION**

**Date of hearing: 18 October 2018**

**Date of Judgment: 29 October 2018**

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