

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES .

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

Case Number: A127/2013

In the matter between:

EDWIN RISIMATE MARINGA

First Appellant

DORAH MADISA

Second Appellant

and

THE STATE

Respondent

JUDGMENT

POTTERILL J

1. The appellants are appealing against the finding of the court *a quo* that there was no mis-joinder of the two appellants.
2. Although in the respondent's heads there was a submission that this ruling of the court *a quo* was not appealable, it was not argued and need not be addressed.
3. From the charge sheet the following common cause facts can be ascertained:
 - 3.1 Appellant 1 is accused 1 and appellant 2 is accused 4 charged with other accused.
 - 3.2 In total there are 399 counts.
 - 3.3 The counts can be categorised as follows:
 - 3.3.1 Counts 1-30 are fraud charges. Appellant 2 is charged with all the counts, but appellant 1 is not charged with counts 13, 28, 29 and 30.
 - 3.3.2 Counts 31-46 are the alternative to counts 1-30 and constitute theft. Appellant 1 is charged with all the counts, but appellant 2 is only charged with counts 31-41.
 - 3.3.3 Counts 47-70 relate to forgery. Appellant 1 is charged with all the counts but appellant 2 is not charged with any of the counts.

3.3.4 Counts 160-297 constitute uttering. Appellant 1 is charged with all the counts, but appellant 2 is not charged with any of the counts.

3.3.5 Counts 298-349 relate to corruption (giving) with not one of the appellants being charged with these counts.

3.3.6 Counts 350-374 set out corruption (giving) and counts 375-399 (receiving) with which none of the appellants are charged.

In summary thus the first appellant is charged with counts 1-297 and the second appellant with counts 1-12, 14-27 and 31-41 [in total 34 counts of fraud].

4. It is common cause that the relevant sections of the Criminal Procedure Act, Act 51 of 1977 (hereinafter referred to as "the Act") are sections 155, 156 and 157(1) which for ease of reference are set out hereunder.

Section 155 Persons implicated in same offence may be tried together

“(1) Any number of participants in the same offence may be tried together and any number of accessories after the same fact may be tried together or any number of participants in the

same offence and any number of accessories after that fact may be tried together, and each such participant and each such accessory may be charged at such trial with the relevant substantive offence alleged against him.

- (2) A receiver of property obtained by means of an offence shall for purposes of this section be deemed to be a participant in the offence in question.”

Section 156 Persons committing separate offences at same time and place may be tried together

“Any number of persons charged in respect of separate offences committed at the same place and at the same time or about the same time, may be charged and tried together in respect of such offences if the prosecutor informs the court that 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.”

Section 157(1) Joinder of accused and separation of trials

“An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led in respect of the charge in question.”

5. From the general preamble to the charge sheet the following facts are set out:

5.1 The City Council of Johannesburg (“COJ”) was the owner of fixed properties referred to in the schedule annexed to the charge sheet, which properties were managed on behalf of the COJ by the JPC.

5.2 The JPC and/or the COJ never passed any resolutions to sell or to alienate the said properties, never entered into any agreements of sale of any nature to sell the said properties to Eildoig Investments or any other person or entity and had no knowledge that the properties were being sold.

5.3 The state accordingly alleges that all documents relating to the sale and/or transfer of ownership of the properties referred to in the charge sheet purported to be signed by a representative or on behalf of the COJ or the JPC including but not limited to the following documents: sale agreements, resolutions of COJ or JPC, powers of attorney to transfer property, affidavits and applications in terms of section 68(1) of the Regulations under the Deeds Registries Act, 47 of 1937 are forged and fraudulent.

5.4 The accused did at all material times together and/or together with other persons act in the pursuance of a common purpose to commit the offences set out in the charge sheet in that the properties referred to in the charge sheet were identified and the properties were thereafter marketed and offered to the complainants. In offering the properties for sale to the complainants various misrepresentations were made to the complainants. These representations as set out in the relevant charges and the assurances provided to the buyers convinced and moved the buyers to enter into sale agreements to buy the properties from Eildoug Investments.

5.5 The properties had to be transferred from the COJ to Eildoug Investments and simultaneously from Eildoug to the companies as set out in column 4 of schedule 3. In order to effect the transfers the accused had to forge several documents.

5.6 The required transfer duty receipts or exemptions certificates required from the South African Revenue Services before the transfer could take place was acquired by accused 2, 3, and 6 in a corrupt and dishonest way in that an official of SARS was paid R50 per certificate.

5.7 The deeds of transfer were submitted to the Deeds Office Pretoria and the deeds of transfer were executed by accused no 7 in a dishonest and fraudulent manner.

5.8 Once it was discovered by the COJ and the JPC that the properties were transferred various High Court applications were launched by the COJ and JPC to have the fraudulent transfers reversed.

6. In the summary of the substantial facts the alleged role of the first appellant (accused no 1) is set out as follows:

- 6.1 The state alleges that the first appellant was the designer of the scheme;
- 6.2 He instructed a certain Mr. Africa to obtain all relevant information about the properties;
- 6.3 He was introduced by accused no 5 to accused no 2 and they had various meetings behind closed doors;
- 6.4 On the instruction of the first appellant Mr. Africa signed all the transfer documents for the transfer from the COJ to Eildoug Investments.
- 6.5 Once the transfer documents for the fraudulent transfer between the COJ were drafted it was sent to the first appellant and he forged or instructed the forgery of the signature of Miss Botes and/or Miss Mazibuku on the documents.

6.6 Where the forged documents needed to be commissioned he instructed either Africa or other members of his staff to go to the particular attorneys to have the documents commissioned.

6.7 He provided the money to buy the clearance certificates in terms of section 118 of the Local Government Municipal Systems Act, 32 of 2000, from a man named Ben Douglas.

6.8 The first appellant received the amount of R10,160,000-00.

7. The alleged role of the second appellant (accused no 4) is set out in the summary of substantial facts as follows:

7.1 Mr. Suliman, who acted on behalf of Zamien Investments 45 and Zambrotti Investments 31 had reservations about whether the properties could be rezoned. This concern of Mr. Suliman was so serious that it was addressed in addendums to the original agreements. According to the addendums the final 50 % of the payment only became payable 48 hours after the rezoning certificates were obtained.

7.2A letter signed by the second appellant was handed to Mr. Suliman in which it was confirmed that the properties referred to in counts 1-6 were transferred to Eildoug and that all internal requirements had been complied with. This letter further confirmed that there was no objection

against the rezoning of the properties on condition that approximately 60 % of the properties remained zoned as public open space and the developer maintained and secured the property.

7.3 Mr. Suliman requested a meeting with the second appellant. This meeting was arranged by accused no 2 for the 17th of March 2010. At the meeting which took place in the offices of the COJ the second appellant confirmed the validity of the transfers. Mr. Suliman was also provided with various letters confirming this.

7.4 It is accordingly the state's contention that the successful completion of the crimes all depended on the actions of the second appellant.

8. It was argued on behalf of the appellants that the court *a quo* erred because it is irregular and impermissible and not in compliance with the provisions of the Criminal Procedure Act to charge the first and second appellants together with the co-accused in the same charge sheet in circumstances where the first and second appellants are not charged with all the charges that the remaining accused are charged with. Reliance for this argument was found in *Du Toit and Others, Commentary on Criminal Procedure Act* pp22-44:

"In *S v Naidoo* 2009 (2) SACR 674 (GSJ) the court considered the cases of *Chewe (supra)*, *Makganje (supra)*, *S v Ramgobien and Others* 1986 (1)

SA 68 (N) and *S v Stellios Orphanou and 6 Others* Unreported WLD case 18 October 1985, and concluded at (paragraph 11) that those four cases were authority for the proposition that where there is no connection either in time, space or fact between the charges facing a and b it is irregular and impermissible that such persons be tried together in respect of offences which each is not implicated. The reason for this lies in the potential for prejudice: an accused could spend weeks in court while evidence affecting his or her co-accused was dealt with, which had nothing whatsoever to do with the objecting accused and the charges faced by him or her, merely because on other counts he was charged with an offence in which his co-accused was connected” (paragraph 12). In the present case said Blieden J, there was no possibility that any of the accused run the risk of being in the situation that any evidence led would not be relevant to the case he had to meet (paragraph 20).”

It was also argued that the regional magistrate erred in not distinguishing *S v Naidoo* from the present case as the *Naidoo* matter related only to offences in terms of the Prevention of Organised Crime Act, 121 of 1998 [“POCA”]. It was further submitted that the regional magistrate erred in holding that the prejudice to the prosecution outweighed the prejudice that the two appellants would suffer. It was also argued that a presiding officer has no discretion when interpreting

section 156 of the Criminal Procedure Act because section 156 expresses that no such discretion exists.

9. On behalf of the respondent it was argued that there was no misdirection by the regional magistrate. It was argued as stated in the charge sheet that all the accused acted in the execution of a common purpose. This common purpose was namely to commit fraud by selling properties belonging to the City of Johannesburg to unsuspecting victims in a fraudulent way. It is true that the second appellant was not involved in all the transactions, but as far as the first appellant was concerned it is alleged that he was in fact the initiator of the scheme. From the charge sheet as well as the summary of the substantial facts it is clear that every individual fulfilled a certain role in completing the common purpose. The state conceded that there is no evidence that the appellants were part of the corruption allegedly committed, but the corruption was still a vital requirement to fulfil the common purpose to defraud. It was also argued that the evidence that will prove the case against the first and second appellant will also be admissible against the other accused and at the same time prove the case against the other accused. The evidence will simply go further and also prove the other charges against these accused. It was also argued that if there were to be a separation of trials then some of the evidence led in the first trial may be inadmissible at the second trial. It was also submitted that the prejudice

to the state, the complainants and the witnesses who will have to testify twice as well as the costs involved far outweighs the prejudice to the two appellants before court. The prejudice to the state is that the matter will be presented on a piecemeal basis before different courts and the state will never be in a position to put the complete picture before a particular court. This was submitted will lead to an injustice. It was argued that the magistrate exercised his discretion judicially and correctly in referring to the matter of *S v Naidoo (supra)*. Although in the *Naidoo* matter the charges all related to POCA in the present matter the state alleges that the appellants committed the offences of fraud with a common purpose. The evidence of the witnesses that will testify on the forgery, uttering and corruption charges will at the same time also prove the various allegations made in the fraud charges against the two appellants.

10. *In casu* the appellants are charged with their co-accused on not all of the counts with the corruption charges, being the biggest bone of contention. It was argued that because they are not charged with those counts there is non-compliance with section 156 in that those charges cannot be linked in time and place to the other counts and therefore there is a misjoinder. Section 156 cannot be interpreted so restrictively. Section 156 goes further and makes a joint trial possible even when the charges do not entirely flow from the same facts, but there is nevertheless evidence which implicates more than one of the accused,

although not all at the same time; there need however to be a common purpose. Section 156 accordingly permits the state to charge different accused on different counts. The effect thereof is that it is not necessary that each and every accused on one indictment must face exactly the same charges. Section 156 does however set out two requirements:

- (1) that the offences must be committed (“at the same place and at the same time or at about the same time”);
- (2) the prosecution must inform the court that the evidence admissible in the trial of one of the charged persons will also be admissible as evidence at the trial of any of the other charged persons.

Substantively the charges are linked in time, or about the same time, i.e. a period of January 2010 to 24 March 2010. The corruption charges form part of a chronological link without which a court will not be privy to a full picture of the common purpose. The corruption charges relate to the bribes that were paid to the SARS official to obtain the fraudulent tax exemption certificates. The other set of corruption charges relate to the money that was paid to the Deeds official to process the registration of the properties. The corruption charges were an essential part and the very essence to committing the fraud which the accused are standing trial for.

11.A broad contextual approach should be adopted. The purpose of the section is to prevent the repetition of evidence. Section 156 goes further than section 155 and makes a joint trial possible also when the charges do not entirely flow from the same facts but there is nevertheless evidence which in the view of the prosecutor implicates more than one of the accused although not all at the same time. The test is that there need be a common purpose. In Hiemstra's *Criminal Procedure* on page 22-34 the writer comments as follows:

"An in depth study of joinder appears in *S v Ramgoben* 1986 (1) SA 68 (N). It is confirmed that it is permissible to charge all the accused jointly with a series of acts, committed by different persons at different times over a period of time in fulfilment of an all-embracing plan, as one offence, even though each act could found a separate charge."

The full bench in the Naidoo matter found that it would be irregular and impermissible that persons be tried together in respect of offences in which each and everyone is not implicated but with the important proviso where there is no question, either in time, space or fact between the charges (paragraph 11). In paragraph 12 of the judgment the court distinguished the matters from *Chewe*, *Ramgobin*, *Makanje* and *Stellios* because in these matters "the various co-

accused were charged with various offences some of which could not be linked to all of them in time or by act of participation”.

In the Naidoo matter the court did not have to rely on the requisites of section 156 because each and every one of the accused were charged with a main charge of contravention of section 2(1)(e) of POCA. The court thus found that there was no risk of being in a situation that any of the evidence led will not be relevant to the case the accused had to meet (paragraph 20).

“Despite the fact that the nature of the part played by each accused could be different from that of another accused, the evidence would remain the same to prove the conspiracy between them all the individual counts on which accused 1 has been charged in the alternative” (paragraph 18)

The court *a quo* was thus correct in following the *Naidoo* matter (*supra*).

12. When a group of people allegedly have a common purpose to achieve an unlawful goal and each has a different role to play in achieving this goal it is inevitable that due to the separate acts of the accused some evidence would not

pertain to each and every accused before a court. The context within which the statute is interpreted must also include the constitutional values i.e. the appellants must be afforded a fair trial. The court *a quo* was thus correct in weighing up the prejudice which the state would suffer *vis-à-vis* the appellants. Appellant 1 is only facing 297 of the 399 charges and appellant 4 only 34 of the 399 counts. The bulk of the counts that they are not facing are the corruption charges. The magistrate was correct that they will suffer prejudice in that there will be evidence presented pertaining to the corruption which does not require an answer from them. The magistrate did not misdirect himself in finding that despite the appellants having to sit through such evidence the prejudice to the state in conducting the trial in any other manner outweighed the prejudice to the appellants. The practical result is that two courts will have evidence before them not in chronological and logical order, the trials would be duplicated at great costs with the state being at risk that there is a possibility that the accused may raise that they are in the second trial being prosecuted on the same set of facts and that certain evidence will not be admissible in separate trials.

13. I accordingly make the following finding:

13.1 The appeal must be dismissed.

13.2 The two appellants before the court *a quo* are correctly joined on the charge sheet.

S. POTTERILL

JUDGE OF THE HIGH COURT

I agree

C. CAMBANIS

ACTING JUDGE OF THE HIGH COURT

CASE NO: A127/13

HEARD ON: 10 September 2013

FOR THE 1st and 2nd APPELLANTS: ADV. M.M. HODES SC

INSTRUCTED BY: Isaac Mabunda Attorneys

FOR THE RESPONDENT: ADV. A.G.J. VAN RENSBURG

INSTRUCTED BY: Director of Public Prosecutions

DATE OF JUDGMENT: 17 September 2013