IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: A84/2006

DATE: 24 AUGUST 2007

In the matter between:

JACK CHRISTOFFEL KROG LATEGAN — APPLICANT

versus

THE STATE — RESPONDENT

JUDGMENT

DAVIS, J

The appellant was convicted on 10 October 2005 in the regional court, George, on two counts of fraud and one of issuing of false documentation.

On 11 October 2005 he was sentenced thus: on the first count of fraud, together with the issuing of false documentation, a term of imprisonment of five years in terms of section 276(1)(I) of the Criminal Procedure Act 51 of 1977; and on the second count of fraud a term of imprisonment of three years, which was totally suspended for a period of four years on certain conditions.

The appellant has now come to this court on appeal, both against conviction and sentence. Notwithstanding the lack of clarity with regard to the notice of appeal, the hearing before this Court took place on the basis that both conviction and sentence should be examined.

The case against appellant was based essentially on evidence of a complainant, Mr Jacobus van Antwerp and a representative of the local Receiver of Revenue, Mr Wickus Groenewald.

Mr Van Antwerp testified that the appellant had acted as his bookkeeper for a welding business. During August 1998 he reached an agreement with appellant regarding the purchase of steel. The purchase was designed to produce a profit for both parties upon the sale of the purchased steel. According to Van Antwerp's testimony, the only cash requirement demanded of appellant in order to secure the acquisition of steel for the proposed transaction was that Van Antwerp should pay an amount of R257 171,61 which appellant claimed was required for the purposes of the VAT liability pursuant to the purchase of the steel. The cheque was made out on 13 August 1998 to J J Beleggings BK a close corporation of which appellant was the member.

Mr Van Antwerp was asked about a BTW201 form dated 28 September 1998 which reflected an input tax credit in the amount of some R253 000 in favour of his business (the exact sum was blurred on the document which was made available to the Court). Mr Van Antwerp testified that he could not understand the contents of this document. Nevertheless, after a reconciliation of liabilities with the Receiver of Revenue, an amount of some R80 000,00 was paid by the Receiver into his account, that is presumably after a reduction of VAT already owed by Van Antwerp to the Receiver prior to the "conclusion" of the steel transaction. Later, the Receiver, having investigated the steel transaction, demanded a repayment of VAT from Van Antwerp. Accordingly Van Antwerp was required to pay an amount of more than R300 000, which represented an accrued VAT liability after the impugned transaction was reconsidered and the input tax credit pursuant thereto reversed, together with interest on that liability.

Van Antwerp also testified about the transaction of the purchase of the steel. He told the Court:-

> "Ek kan nie sê dat dit was 'n egte transaksie nie. Ek dra geen insae daarvan nie. Ek het geen insae gehad met die mense wat gekontak was of daar

> mense gekontak was nie. So ek kan nie sê nie. Ek het geen kennis daarvan nie."

Mr Wickus Groenewald then testified. He worked for the Receiver of Revenue, George, and dealt with VAT audits. His suspicion about the impugned steel transaction was raised when he examined the VAT201 form dated 28 January 1999 submitted by appellant on behalf of Jack en Jane Beleggings BK, which reflected a VAT liability of some R268,57 on a transaction of more than two million rand. As he stated in his testimony:

> "Hoekom gaan 'n ou oor die twee miljoen rand se transaksie doen om R2 000 wins maak op die ou einde van die dag? So wat ek hierna gedoen het, ek het bewyse gevra, want as JJ Beleggings BK staal verkoop, dan moes hy dit tog ten eerste aangekoop het voor hy dit kan verkoop."

Upon examination of the range of invoices supplied by appellant, it became clear to Groenewald, after investigation, that each of these supplies, none of the transactions claimed by appellant actually had taken place. As he told the Court:

> "Van daardie stadium het ons besef - okay,

> aangesien daardie transaksies nooit plaasgevind het nie, kon JJ Beleggings nie staal gelewer aan mnr Van Antwerp nie. So die geld wat aan mnr Van Antwerp wat toegestaan is van R262 000 is 'n fiktiewe transaksie en daardie geld is terugbetaal en op daardie stadium het mnr Van Antwerp vir ons geld verskuld."

Mr Groenewald investigated all the allegations made by appellant with regard to purchases of steel, which had been set out in a letter generated from appellant's attorneys, Raubenheimer, on 28 October 1998. In this letter the writer said, *inter alia*:

> "Ons bevestig voorts namens mnr Lategan volgens instruksies dat 80% van die staal alreeds namens die verkopers aan ander staalverskaffers, Suid Kaap ... verkoop is, wat 10% wins insluit."

All this proved to be false after Groenewald's investigation by way of contact with the various steel manufacturers in question.

The essential basis of appellant's testimony was that Van Antwerp had encountered difficulties with regard to his tax liability, both for income tax and VAT. Appellant was the bookkeeper for complainant's business and he therefore testified that he consulted with the chartered accountant, Mr Jan Verkuil, whom he claimed was an expert on these matters and who advised him that in order to deal with this VAT problem, appellant should advise his client, Van Antwerp, to purchase a considerable amount of steel, presumably in order to then obtain a large input tax credit. The exact fashion as to how this was to solve the problem of an accrued liability was never properly explained by appellant. When I put this point to Mr De Villiers, who represented the appellant in court this morning, he properly conceded that the only way in which this transaction could have come to the aid of Van Antwerp's VAT liability was by way of an illegal transaction. There would appear to be no basis by which this kind of transaction could have solved an earlier problem of an accrued VAT liability insofar as Van Antwerp's business was concerned.

Pursuant, however, to the advice which he claimed to have received, appellant testified that he came into contact with a Mr Kia Strydom and Mr Gavin Brown. He negotiated with these two gentlemen in order to effect a purchase and then almost simultaneous sale of steel in order to obtain a profit of some 10% on the purchase price. As appellant testified:

> "Ek het my bestellings telefonies by hulle geplaas en het gesê ek soek 1, 8 miljoen rand staal, waarna hulle vir my gesê het, "Ek het dit. Kom kry jou fakture en kom dat ons die fynere detail rondom die kommissie en die aflewering en waarborge in detail kan bespreek hier."

He insisted that the amount of R257 000 which he received from Van Antwerp was a deposit which was required for the acquisition of the 1, 8 million rand of steel.

In analysing the various transactions, the magistrate postulated three particular scenarios which could be gleaned from the facts:

> "Drie scenario's is moontlik as ek moet spekuleer dat die beskuldigde as boekhouer aangebied het om mnr Van Antwerp te help met sy probleme rondom BTW tekort deur middel van staal te koop en die verkoop teen 'n wins en ontvang die aanvanklike bedrag vanaf mnr Van Antwerp hetsy as BTW of as 'n deposito of as kommissie, maar dat hy daarna deur betrokke agente mislei was. Dit is 'n moontlikheid wat ondersoek moet word. In die lig van die getuienis in geheel is die Hof egter van

oordeel dat daar nie so 'n misleiding deur agente kon gewees het nie en dat dit nie 'n redelike moontlikheid is nie. Daar is die moontlikheid dat die beskuldigde en mnr Van Antwerp ooreengekom het om 'n fiktiewe transaksie te skep ten einde mnr Van Antwerp uit sy verknorsing by die Ontvanger te bring. Hier kom mnr Van Antwerp die betrokke insit terugeis, hy self sou niks verloor het nie en die beskuldigde kon, volgens mnr Groenewald, nie die transaksie verklaar het nie en dit kon stil-stil in die niet verdwyn het, en dat toe die Ontvanger wel snuf in die neus kry en mnr Van Antwerp aanspreek, hy besluit het om weer op sy beurt die skuld op die beskuldigde te plaas en dit is 'n moontlikheid. In dié verband, is die skrywes wat die beskuldigde en sy prokureur aan mnr Van Antwerp bestel het vreemd, maar is daar sekere aanduidings waarom dit te gedoen kon gewees het, selfs in hierdie scenario. En laaste scenario is soos reeds gesê, daar mag seker meer bestaan waar die beskuldigde vir Van Antwerp en die Ontvanger bedrieg, nooit bedoel om staal aan te koop nie. Hier staan die beskuldigde 'n wins te maak van R257000 ongeveer en daar kon later 'n rede uitgedink word of die staal verkoop is teen 'n

> wins of nie, selfs as hierdie aangewend word en as 'n persentasie van wins aangebied word, dan daar is nog steeds oor R100 000,00 of altans 'n bedrag van 'n hele paar duisend rand te maak deur 'n persoon wat op hierdie wyse homself kon verryk. Hoe dit ook al sy, in al hierdie scenario's blyk die beskuldigde die persoon te wees wat die meeste baat sou vind."

In argument, Mr De Villiers submitted that, although the appellant conceded that he knew that the input tax credit claimed on behalf of Van Antwerp had been effected with false invoices pursuant to a false VAT claim and pursuant to a false VAT210 form on 20 January 1999, these actions had not been taken with the intention to defraud the Receiver. Mr De Villiers submitted that the appellant, upon the advice of Verkuil, had attempted to conclude a second transaction with Iscor in order to resolve the problem after he had discovered that his contacts, Strydom and Brown, had failed to live up to their alleged promise. Appellant had been assured, according to his testimony, by Verkuil, that this transaction was lawful.

He testified further that JJ Beleggings operated on a six month invoice basis for VAT purposes. Appellant testified further that the false invoices could have been rectified were the Iscor transaction to have been concluded. This, according to appellant, is the basis of the advice that he had received from Verkuil, a man who never testified in the case.

I should also add that there was no evidence of any kind, other than the say-so of the appellant, that an Iscor transaction had been contemplated as being a substitute for the earlier transaction with Strydom and Brown.

It was therefore submitted that when the input tax credit being claimed on behalf of Van Antwerp, appellant acted on the basis that there had been a *bona fide* transaction concluded by Strydom and it had never been an intention on the part of appellant to defraud the Revenue. He sought to classify this case as an action of a good Samaritan who sought to help his friend out of a VAT difficulty.

With regard to the two VAT charges, it is clear that on examining the respective VAT201 forms, the one completed by appellant on 28 January 1999 in particular (relating to charge 2), this purports to represent that there had been a sale on the previous purchase of steel products. This state of affairs was manifestly incorrect. Knowing full well that this transaction was a fictitious one, the originator of the transaction perpetrated a fraud upon the revenue. Similarly, by the completion of the VAT form 201 on behalf of Van Antwerp, appellant created a situation whereby there would have been an immediate loss of some R253 000,00 in revenue as a result of an input tax credit to which Van Antwerp was not entitled for the transaction had never taken place and appellant knew that full well.

In my view, the magistrate correctly rejected appellant's version. It was patently absurd. The initial transactions as set out in the invoices were a fiction. Verkuil was never called as a witness, there was never any substantiation of the so-called advice which he had given. On no reasonable inference could there be, because the transactions as proposed could never have been legal. The representations made about the sale of steel was therefore a fictitious creation on behalf of the appellant. There is no way in which a further transaction of steel as outlined by the appellant could have resolved the claim difficulty with regard to VAT as allegedly encountered by Van Antwerp. It would indeed have been interesting as to how the so-called expert, Verkuil, would have testified in the legal basis transaction had he been called as a witness.

The irresistible inference to be drawn from the evidence is that appellant obtained a cheque from Van Antwerp which he had intended to pocketing. Van Antwerp would have been placed in a neutral position were he to have secured the input tax credit, would have been perhaps none the wiser. The magistrate was therefore correct in rejecting the version put up appellant as being completely improbable. On both counts it is clear that the forms had been filled in on the basis of a transaction which the appellant knew would not have taken place.

The various invoices and other documentation which appellant was forced to produce in order to substantiate the transactions after inquiry by Groenewald were also clearly false documentation, because there is no evidence to suggest that the transaction indeed was concluded.

Mr De Villiers also submitted that there had been a duplication of charges and that it was common cause that there had been one transaction to purchase steel or at least a fictitious one. It was clear from the evidence of Mr Groenewald that fictitious invoices had been generated long after the completion of the VAT201 (Exhibit I). An offence of generating fictitious documentation certainly took certainty from the initial claim of an input tax credit in order to defraud the Revenue. The two charges themselves took place at separate times. Charge 2 had to do with a VAT claim in respect of the appellant's business. Charge 3 had to do with the attempt to gain an input tax credit on behalf of Van Antwerp. In my view, these three charges stood separately and independently of each other in terms of the test for duplication, and accordingly that particular argument on the part of Mr De Villiers stands to be rejected.

Turning to the question of punishment, Mr De Villiers submitted that a charge of fraud of the kind of which appellant had been convicted would be more appropriate to punishment in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977, or alternatively a suspended term of imprisonment. I disagree. VAT fraud appears to be an increasing phenomenon, certainly given the number of cases which now have come before this Court. This set of transactions is a calculated attempt by appellant to utilise the VAT system for his own personal gain. VAT is a system which, although simple in its conception, does depend on taxpayers revealing a significant of integrity in order to ensure that the system continues to generate the revenue much needed by the State. This kind of crime deserves a strict censure. The manner in which the magistrate sentenced the accused does not stand to be interfered with on the basis that it stands test for interference by an appellate court. That is, there is no justification for a trial court to impose a sentence either properly or unreasonably. To the contrary, in my view it is an appropriate sentence, given the circumstances of this case.

Accordingly, I would <u>DISMISS</u> the appeal on both conviction and sentence.

I agree.

MOTALA, J

It is so ordered.

DAVIS, J