Lom Business Solutions t/a Set LK Transcribers//

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 134/06

DATE: 2007-10-15

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 14th APRIL 2008 SIGNATURE

In the matter between

THE STATE

and

BOEKHOUD & 5 OTHERS Accused

J U D G M E N T

SALDULKER J:

[1] The applicant, accused 2, Kevin Naidoo has applied for leave to appeal against a judgment of this court, dismissing an application for a ruling that a misjoinder exists, in respect of the counts enumerated in his Notice of Objection (Notice) dated 26 September 2007 which includes counts 27, 29,and 51 of the amended indictment. The state has opposed

the application.

[2] Accused 2's contention has been that it is irregular and impermissible to join him with accused 1 in an indictment which included counts with which he has not been charged. Accused 1 and 2 have been charged with 55 counts in a detailed indictment setting out the relevant counts, the alternative charges and the second alternative charges. However, both accused have been charged with the main counts of money laundering, racketeering, theft and fraud.

10

[3] Mr Hodes for the applicant argued that this court erred in not finding that a misjoinder exists in respect of the counts as set out in the Notice on the following basis:

3.1 The word, "same" in Section 155 of the Criminal Procedure Act 51 of 1977 (CPA) could not be given an extended meaning like "similar". Section 155 of CPA was applicable only when various persons are charged together with the same offence and that in *casu* accused 2 was not charged in respect of the counts enumerated in the Notice. Mr Hodes
20 submitted that Section 155 of the CPA must be interpreted restrictively. The afrikaans text of this section read as follows: "persone betrokke by dieselfde misdryf". Hence the language of the section was clear and unambiguous.

3.2 The case of *S v Stellios Orphanou and 6 Others* (an unreported judgment of Leveson J delivered on 18th October 1985 (WLD)) was not distinguishable from the case of accused 2. Accused 7 in Stellios Orphanou (supra) was not charged with one of the main counts which was public violence. The judgment in *S v Ramgobin and Others* 1986 (1) SALR 68 was applicable to accused 2's case;

[4] In addition, he contended that the two cases: S *v Dos Santos and Others* (an unreported judgment of Le Grange AJ delivered on 8th June 2006 (CPD)) and *S v Eyssen* (an unreported judgment of Veldhuizen J delivered on 22nd March 2007 (CPD)) were relevant on the issue of misjoinder.

[5] Mr Hodes submitted that the State's contention that this matter is not appealable and that no prejudice exists for accused 2 if this court's ruling should stand is based on faulty premises. This matter was certainly appealable in that it has had a final effect on accused 2. Should the court's ruling be allowed to stand, the State's case against accused 1 and 2 will then proceed in respect of all the counts set out in the indictment, including the counts that he is objecting to on the grounds of misjoinder. Furthermore, accused 2 would have to endure a trial for at least a year or two in respect of which he will spend time and money and also sit through a trial in respect of which there are at least 20 additional counts with which he has not been charged with accused 1. Potential prejudice exists for accused 2 if the trial continues against himself and

accused 1.

[6] The applicant has relied on *S v Western Areas Limited and Others*, 2005 (1) SACR 441 (SCA) for the proposition that appeals are permissible in matters such as the present. Ms le Roux led by Mr de Villiers for the State has argued that in the Western Areas case (supra), the applicant could not show that the objection that the charge did not disclose an offence, was justiciable in the Supreme Court of Appeal before the hearing was concluded. For this reason, the matter was then struck from the roll. The Supreme Court of Appeal ruled that it was only matters that were clearly appealable that could be referred to the Supreme Court of Appeal (SCA). Ms Le Roux argued that this case was not appealable and that as was held in the Western Areas case, in some cases "when the interests of justice" so required, an objection of the nature in question "could be heard out of the ordinary sequence". Further which matters are appealable and which not, would depend on the merits of each case.

[7] The State contended that should the charges under Section 2(1)(b) and 6 of the Prevention of Organised Crime Act No 21 of 1998 (POCA) remain against accused 1, this would cause no prejudice to accused 2 as the evidence that is to be tendered in respect of counts 1 and 4 would prove a contravention of Sections 2(1)(b) and 6 of POCA.

[8] Furthermore, the State submits that in terms of Section 319 of the

CPA the finding of this court is also not appealable. In terms of Section 319(2) of the CPA the grounds upon which an objection to an indictment is taken shall be deemed to be a question of law and as such, can only be appealed at the end of the trial.

[9] In S *v De Beer and Another* 2006 (2) SACR 554 (SCA) the absence of jurisdiction in terms of Section 106(f) of the CPA was raised. It was held that a ruling by the court *a quo* on jurisdiction was final in effect and that such a matter was therefore appealable before the conclusion of the trial. The State argued that the decision in the De Beer case was clearly an exception, since in that case it would have led to prejudice for the accused. The State has contended that the case for accused 2 was clearly distinguishable from the De Beer's case. Accused 2 would suffer no prejudice should the trial proceed without first adjudicating the question of misjoinder at the SCA level.

[10] In *S v Western Areas Limited* (supra) and at paragraph [20] at page 441 at 451B-D, it was stated that *"The appealability decisions of this Court are based on the 'salutary general rule that appeals are not entertained piece meal'. Appeals are generally, precluded before final determination of a case unless the judicial pronouncement sought to be appealed against, whether referred to as a judgment, order, ruling, decision or declaration, has three attributes: First it must be final in effect. That means it must not be susceptible of alteration by the court appealed from. Second, it must be definitive of the rights of the parties, for*

example, because it grants definitive and distinct relief. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed. Clearly, whether these criteria are met, does not depend on judicial discretion".

[11] In my view the decision of this Court that no misjoinder exists has had a final effect on accused 2. It is definitive of accused 2's rights. The result of which is that the State's case against accused 1 and 2 would then proceed on all the counts set out in the indictment including those that accused 2 has objected to. The result is that although it is an interlocutory matter, it is of final effect. It is therefore clearly appealable. In the Western Area's case (supra) at 453F-G page 453 paragraph [28], it was stated that *"It need hardly be said that what the interests of justice require depends on the facts of each particular case".* And at 453D-E, *"It is surely not in the interest of justice to submit an accused person to the strain, expense and restrictions of a lengthy criminal trial if that can be avoided, in appropriate circumstances, by allowing an appeal to be pursued out of the ordinary sequence and so obviating the trial or substantially shortening it".*

[12] The State submits that this court correctly applied a 'purposive' approach in the interpretation of the word, "same", as it was required to do in the interests of justice. In my view this approach may be viewed differently by another court which may come to a different finding.

[13] The accused in this matter, accused 1, 2 and 5 have been charged with all the main counts which include counts 1 and 2, theft and fraud, and contravening Section 4(a) of POCA. The purpose of POCA is *inter alia* to introduce measures to combat organised crime, money laundering and criminal gang activities; to prohibit certain activities relating to racketeering activities; to provide for the prohibition of money laundering, to provide for the recovery of the proceeds of unlawful activities; and for the civil forfeiture of criminal property that has been used to commit an offence.

10

[14] The preamble to POCA *inter alia* reads as follows: "and whereas organised crime, money laundering and criminal gang activities, both individually and collectively present a danger to public order and safety and economic stability and have the potential to inflict social damage, and whereas the South African Common Law and Statutory Law fail to deal effectively with organised crime, money laundering and criminal gang activities and also fail to keep pace with international measures, aimed at dealing effectively with organised crime, money laundering and criminal gang activities; and bearing in mind that it is usually very difficult to prove
20 the direct involvement of organised crime leaders in particular areas because they do not perform the actual criminal activities themselves, it is necessary to criminalise the management of, and related conduct in connection with enterprises which are involved in a pattern of racketeering activity".

[15] Section 155 of the CPA provides for a joining together of accused persons in respect of the same offence. In terms of Section 156 of the CPA, when a prosecutor informs a court that evidence admissible at the trial of one such person, in his opinion, may be admissible at the trial of any other person, then a number of accused may be charged together with separate offences committed at the same time and place.

[16] Furthermore, three or more accused could, (as the State alleges occurred in this case) be charged with contravening the provisions of the CPA and POCA with regard to theft or fraud or money laundering and racketeering charges, the crimes having been committed in different locations, some in South Africa, some elsewhere, e.g. Europe or the United Kingdom, and all of the accused having the common intention to commit the offence of theft or fraud, but from different locations. Does this mean that the three accused cannot be charged with all of those offences jointly, merely because their conduct in relation to each of those offences was different and because they were not in the same place at the time of the commission of each activity, even though their actions were directed at a common goal for their mutual benefit? Does this also mean that Section 156(1) of the CPA would not be applicable if only some are charged with theft and others are charged with fraud? Does that mean that they cannot be charged jointly? The legislature could not have intended that the State conduct three different trials at different locations in situations like this. In my view these are some of the vexed questions

that should be adjudicated upon by a higher court.

[17] The date of the commencement of POCA is 21 January 1999. It is therefore a fairly new Act raising pertinent issues in connection with money laundering and racketeering activities, both on a local and international level. The provisions of POCA govern crimes committed in South Africa and elsewhere and as such there may be "tensions" between the provisions of the Criminal Procedure Act and the provisions of POCA. Bearing this in mind, this court gave an extended meaning to the word, "same place", as contained in Section 156(1) of the CPA

[18] The State has relied on the two cases of *S v Dos Santos* and Others (supra) and *S v Eyssen* (supra) to indicate that several accused have stood trial together where they have been charged jointly in an indictment with separate racketeering acts under Section 2(1)(e) of POCA. Veldhuizen J held at page 103 in *S v Eyssen* that "Even though an accused's convictions may fall within the definition of "pattern of racketeering activity", Section 2(1)(e) of POCA further requires that the conduct constituting the convictions must be causally connected to the "enterprise affairs...".

[19] In essence the State's case before me is built on the theft of unwrought precious metals by accused 2 and the selling of same to accused 1 for the benefit of the enterprise and its members through a pattern of racketeering acts. In this case accused 1 is in the United

Kingdom and accused 2 is in South Africa, thus they are in two different locations but their conduct is causally connected to the affairs of the enterprise.

[20] At page 106 of Eyssen's judgment (supra) the learned judge states that "Section 6 also seeks to penalize the conduct of persons after the property becomes part of the proceeds of unlawful activities. The section is not aimed at the person who initially committed the crime causing the property to become the proceeds of unlawful activities". In my view the provisions of POCA envisage that accused persons may either be charged jointly or individually at different locations for performing acts which were aimed at promoting or contributing towards a pattern of racketeering activities for the benefit of an enterprise.

[21] The question is whether accused 1 and 2 should be charged together in an indictment, where their individual actions, though causally connected are committed at different locations, differ in respect of the commission of the offence, and their individual conduct becomes an issue in so far as the provisions of POCA and CPA are concerned.

[22] Section 173 of the Constitution of the Republic of South Africa Act 108 of 1996 reads as follows: "The Constitutional Court, the Supreme Court of Appeal and the High Courts have the inherent power to protect and regulate their own process and to develop the Common Law taking into account the interests of justice".

[23] In my view POCA did not alter the common law doctrines of common purpose and conspiracy. The law relating to conspiracy still stands. What POCA did, was to enable the State to charge an accused person who has been charged on a main count, with separate racketeering acts in the alternative as it did in this case. Sections 2(1)(e) and 2 (1) (g) of POCA gave the State the right to charge different accused with separate acts in one indictment. In this sense the dictum in Ramgobin's case (supra) becomes irrelevant and Stellois Orphanou's case (supra) distinguishable from the case of accused 2. This court placed no reliance on *S v Ramgobin* (supra) which was followed by Leveson J in Stellios Orphanou.

[24] Applicant's counsel has argued that there is a reasonable prospect of another court finding that Stellios Orphanou (supra) is not distinguishable from the case at hand and that *S v Ramgobin* is indeed applicable and that a misjoinder exists between accused 1 and 2. Both the Stellios Orphanou and Ramgobin's cases were decided before POCA was enacted and therefore there is much to be said about developing the jurisprudence in respect of the provisions of POCA.

[25] The issues raised by Mr Hodes cannot wait for determination after the conclusion of the trial. It is clear from the indictment that the trial will be a lengthy one, and will be extended to a material degree. I am mindful of the view expressed in the Western Areas case, at 452g-h that *"Resort to a higher court during proceedings can result in delay, fragmentation of the*

process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen, had the process been left to run its ordinary course". However, in this instance the trial against accused 2 has not yet commenced.

[26] In my view, accused 2 will suffer potential prejudice if he is subjected to a long drawn out trial before the issue of misjoinder is adjudicated upon. It is in the interest of justice that accused 2 be allowed to exercise his right of appeal against the finding of this court on the misjoinder issue and that this issue be decided before the trial commences.

[27] In the result I find that there is a reasonable prospect of another court coming to a different conclusion on the issue of misjoinder.

[28] I make the following order:

28.1 The application for leave to appeal by accused 2 against the judgment of this court that no misjoinder exists in respect of the counts enumerated in his Notice of Objection dated 26th September 2007, which include counts 27, 29,and 51 succeeds;

28.2 Accused 2 is granted leave to appeal to the Full Bench of the Witwatersrand Local Division against the judgment of this court.

---oOo---