REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Reportable

Case no: A217/2012

In the appeal of:

FRANSISCA MALAN Appellant

and

THE STATE Respondent

JUDGMENT: 30APRIL 2013

SchippersJ:

[1] This is an appeal against conviction. The appellant was the managing member of Cape Corporate Cleaning Services CC (“*the close corporation”),* a cleaning business which rendered services to MWEB on a month-to-month basis from September 2003 until September 2004 (“*the relevant period*”), and received the sum of R478 182.40. The close corporationwas required to register

for value added tax (VAT) under the Value Added Tax Act 89 of 1991 ("*the VAT Act*"), because it earned in excess of R300 000 per year over a period of 12 months – the statutory threshold for registration at the time.However, it failed to do so and also did not charge VAT on the services rendered to MWEB. These facts were common cause. The South African Revenue Services (SARS) got to know about the existence of the close corporation through a letter in the post informing it that the corporation was carrying on business, but had not registered for VAT.

[2] Pursuant to an investigation by SARS, the appellant wascharged in the Bellville Regional Court with seven counts of fraud (counts 1-7);one count of contraveningsection 58(c) of the VAT Act for failing to apply for registration of the close corporation under that Act (count 8);one count of fraud (count 9); one count of contravening section 75(1)(a) of the Income Tax Act 58 of 1962 ("*the Income Tax Act*") for not submitting income tax returns (count 10); and seven counts of contravening section 58(d) of the VAT Act for failing to submit VAT returns (counts 11-18).The appellant was convicted on all counts. The charges of fraud (counts 1-7 and 9) were taken together for the purpose of sentenceand the appellant was sentenced to a fine of R30 000 or 18 months' imprisonment and a further R10 000 or six months' imprisonment suspended for five years, on condition that she is not convicted of fraud committed during the period of suspension. On the charge of contravening section 58(c)of the VAT Act (count

8)the appellantwas sentenced to a fine of R300 or 30 days' imprisonment. She was also sentenced to a fine of R300 or 30 days' imprisonment for failing to submit income tax returns (count 10). The remaining charges of failing to submit VAT returns (counts 11-18) were also taken together for the purpose of sentence and the appellant was sentenced to a fine of R1000 or 90 days' imprisonment.

[3] The State adduced the evidence of Mr Gideon Kock ("*Kock*"), an inspector at the Criminal Investigation Unit of SARS; Ms. Hester Potgieter ("*Potgieter*"), an employee of SARS and Ms. Hazel Wickham ("*Wickham*"), a bookkeeper who previously rendered services to the appellant. Kock testified thathe obtained invoices issued by the close corporation to MWEB which showed that cleaning services were rendered to MWEB during the relevant period at R36 200 per month. He also obtained from MWEB, documents showing that over a period of 12 months, MWEB paid the sum of R471 182.40 to the close corporation, which exceeded the required threshold for registration as a VAT vendor under the VAT Act.Formerly another close corporation, Four Page 101 CC, of which the appellant was also a member, had rendered the cleaning services to MWEB in terms of a written contract. The close corporation took over those services under a month-to-month contract. The appellant registered the close corporation for VAT only in December 2004, after which VAT payments were made and VAT returns submitted to SARS. As

regards the failure to register for income tax and submit returns, Kock said that the close corporation should have registered for income tax for the year ending 28 February 2004. It did not so register or submit an income tax return for the 2004 tax year. He also said that the close corporation had registered for income tax in 2007, but had not submitted any return to SARS. Wickham testified that the appellant had outsourced the bookkeeping of the close corporation to her from September 2003 to about April 2004. When she saw one or two invoices issued by the close corporation to MWEB at the beginning of the services, she noted that no VAT had been charged and asked the appellant about this. The appellant told her that she had been advised that the close corporation did not need to register for VAT because it would not exceed the VAT limit at the time. Potgieter assisted Kock in the investigation and confirmed that the close corporation had submitted its VAT returns late. The appellant chose not to testify, did not call any witnesses and closed her case.

[4] The appellant has not challenged her conviction on the charges of failing to submit VAT returns. Indeed, Mr. de la Harpe, who appeared for her,fairly conceded that she was rightly convicted on counts 11-18. However, the appellant contends that the magistrate erred in convicting her of fraud on counts 1-7 and 9, more specifically in that the State failed to prove a misrepresentation or intent to defraud. She also contends that the evidence required to prove the fraud charges (counts 1-7) is the same evidence required to prove the statutory

charge of failing to apply for registration of the close corporation under the VAT Act (count 8).

[5] The first question is whether, on the facts of this case, the appellant was properly convicted of fraud on counts 1-7 and 9. The charge sheet in relation to counts 1-7 states that the appellant unlawfully, falsely and with intent to defraud, expressly or impliedly, through words or conduct, represented to SARSessentially that: (1) the close corporation did not carry on business during the relevant period; (2) the appellant was not obliged to register the close corporation for the purpose of VAT; (3) the appellant or the close corporation was not obliged to submit VAT returns for the relevant period; (4) no taxable services were rendered by the close corporation during the relevant period; and (5) the appellant or the close corporation was not liable to SARS for VAT in the amount referred to in the charge sheet for the relevant period. The charge sheet goes on to state that through these false pretencesthe appellant induced SARS to accept, to its prejudice or potential prejudice, the representations in (1) to (5), whereas in truth and in fact, the appellant when making those representations, well knew that they were false; and that the appellant is thus guilty of fraud.The first alternative charge to counts 1-7 is theft. The State alleged that the appellant stole VAT in the sum of R65 965.51 from SARS. The second alternative charge is a contravention of section 58(d) read together with section 28(1)(a) and (b) of the VAT Act, namely that the appellant failed to submit

VAT 201 returns to SARS for the calculation of VAT in terms of section 16 of the VAT Act, or that she failed to pay over to SARS VAT in the sum of R65 965.51.

[6] On the fraud charge on count 9 the State alleges that the appellant represented to SARS that: (1) the income of the close corporation for the period of submission i.e. 9 July 2004, was less than the prescribed limit for liability for income tax determined by the Commissioner, SARS; (2) that the appellant was not obliged to register the close corporation as a taxpayer; (3) that a taxable amount of R202 224 was not received as gross income by the corporation in the 2004 income tax year; and (4) that the appellant and/or the close corporation were not liable to SARS for income tax. Through these false representations, the charge sheet goes on to state, the appellant induced SARS, to its prejudice or potential prejudice, to accept that the income of the close corporation was less than the prescribed limit for liability for income tax; that the appellant was not obliged to register the close corporation as a taxpayer; that the close corporation did not receive gross income in the sum of R202 224;andthat the appellant or the close corporation was not liable to SARS for income tax, whereas in truth and in fact, the appellant knew that the misrepresentations in (1) to (4) were false, and that the appellant is thus guilty of fraud.

[7] It is settled law that fraud is the unlawful making, with intent to defraud, of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.[1] The very first requisite for fraud is a misrepresentation – a perversion or distortion of the truth - the conduct element of the crime. In order to constitute a misrepresentation, the words spoken or written by the accused must be false. The question whether silence or non-disclosure is criminally fraudulent is not an easy one, as silence may well constitute civil fraud without constituting criminal fraud. The distinction lies mainly in the presence or absence of the necessary intention to defraud.[2]Moreover, there is no general duty owed to the world to speak the truth or to make disclosure. Such a duty arises in relation to particular people in specific circumstances.[3]The cases recognise that silence, non-disclosure or concealment of the facts may in certain circumstances amount to a fraudulent representation where the accused was under a legal duty to make disclosure but failed to do so.[4]

[8] The requirements for fraud in the case of non-disclosure of an existing fact were laid down by Trollip J (as he then was) in *Heller*,[5]and usefully summarized in *Burstein*,[6] as follows:

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1 Milton *South African Criminal Law and Procedure* Volume II(3rd ed 1996) at 702*;* Snyman *Criminal Law* (5th ed 2008) at 531.

2 *S v Burstein* 1978 (4) SA 602 (T) at 604H.

3 *Flaks v Sarne and Another* 1959 (1) SA 222 (T) at 226D.

4 *R v Larkins* 1934 AD 91 at 94; *S v Heller (2)* 1964 (1) 524 (W) at 537D-F; *S v Macdonald* 1982 (3) 220 (A) at 239H.

5 *Heller* n 4 at 537D-F.

6 *Burstein* n 2 at 604H-605B.

"(a) a duty, to disclose the particular fact;

(b) awilful breach of this duty under such circumstances as to equate the non-disclosure with a representation of the non-existence of that fact;

(c) an intention to defraud which involves

(i) knowledge of the particular fact;

(ii) awareness and appreciation of the existence of the duty to disclose;

(iii) deliberate refraining from disclosure in order to deceive and induce the representee to act to its prejudice or potential prejudice;

(d) actual or potential prejudice of the representee."[7]

[9] The question then arises whether the appellant expressly or impliedly, through words or conduct, represented to SARS,essentially thatthe close corporation did not carry on business and was thus not liable for VAT. The magistrate answered this question affirmatively. After considering the alleged misrepresentations by the appellant to SARS regarding counts 1-7, the magistrateformed the view that there was a duty on the appellant to disclose to SARS the existence of the close corporation. This duty, the magistrate said, arose from the following circumstances, not individually, but taken together: (1) the appellant had arranged the registration of the close corporation with CIPRO and nothing prevented her from doing other duties related to the corporation; (2)she had deposited money received from MWEB into her bank account which indicated a strong connection between her and the close corporation;(3)the appellant was a business woman and a member of the close corporation who was expected to know the ins-and-outs of the business world;

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[7] Cited with approval in *S v Gardener and Another* 2011 (1) SACR 570 (SCA) para 30.

(4)although the application for registration as a VAT vendor was submitted on 9 December 2004, it was applicable to adate which had already passed; (5) the appellant had been advised that she should register for VAT but chose not to follow that advice; (6)the terms of the corporation's contract with MWEBwere the same as those between MWEB and a previous close corporation of which the appellant was a member and which had been registered for VAT; and(7) the appellant took steps to deregister for VAT and the registered person is cited as the appellant or the close corporation. The magistrate went on to find that the only reasonable inference to be drawn from the proven facts is that the appellant did not want SARS to know about the existence of the close corporation in order to evade VAT; and that the State had proved beyond a reasonable doubt that the appellant had the requisite intent in respect of counts 1-7.

[10] In my view, the magistrate erred. The State did not prove a criminal fraudulent non-disclosure and none of the factors listed by the magistrateis evidence of such non-disclosure. On first principles, a misrepresentation involves a bilateral and not a unilateral act. The appellant made no representation to SARS. On the contrary,Kock's evidencepoints the other way – SARS did not even know about the appellant's existence, and an entity carrying on business must notify SARS that it is doing so.

[11] As already stated, a duty to disclose arises in relation to particular people in particular circumstances. Such a duty may derive from various sources, for example, by statute, such as the provisions governing company prospectuses;[8] the express or implied terms of a contract;[9] and the existence of a fiduciary relationship between the parties, for example, a director and his company.[10]These examples make two things clear. First, it is difficult, if not impossible to impute a duty to disclose in circumstances where there is no interaction or relationship between the accused and the complainant, or where there have been no direct dealings between them. Thus in *Heller*, the State relied upon the fiduciary relationship between a director and his company for the duty of disclosure.[11] Likewise, in *Brande*, a case in which the accused fraudulently submitted entries to newspaper crossword puzzle competitions where he dishonestly obtained knowledge of the official solutions to the competitions and submitted prize winning entries on the basis of such knowledge, the court held that a contract came into existence between the newspaper company and any person who submitted an entry. The parties to a contract warrant the absence of bad faith and there was a duty to disclose in that case, because the accused knew that the newspaper company had accepted the entry in the belief that it was an honest entry.[12]Secondly, non-disclosure cannot

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8 *S v Judin* 1969 (4) SA 425 (A); section 100 of the Companies Act 71 of 2008.
9 *S v Brande and Another*1979 (3) SA 371 (D).
10 *Heller*n 4.
11 *Heller* n 4 at 537F; *Gardener* n 7 paras 37 and 38.
12 *Brande* n 9 at 382A-B.

constitute fraud unless the circumstances are such as to equate such non-disclosure with a positive representation, though it may be implied.[13]

[12] The magistrate equated the appellant's failure to register for VAT with a positive implied representation to SARS that the close corporation did not exist and did not trade. But the appellant made no such representation to SARS – she failed to apply to SARS to register the close corporation for VAT, pure and simple. Otherwise viewed, it would mean,for example, that an unlicensed driver found driving a motor vehicle is guilty of fraud, because she is representing to the licensing authority that she has a licence and is in fact authorized to drive the vehicle. Similarly, a trader or bottle store owner who carries on business without the requisite licence would be guilty of fraud. Such an approach, in my opinion, would take fraudulent concealment in criminal law to new and far horizons.

[13] It follows that if SARS was unaware of the existence of the close corporation, as the evidence indeed shows, then it could not in any way have been deceived or induced to act or abstain, to its prejudice or potential prejudice. Intention to defraud, which Snyman explains as, "*the intention to*

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[13] *Brande* n 9 at 383C.

induce somebody to embark on a course of action prejudicial to herself as a result of the misrepresentation",[14] is thus lacking.[15]

[14] I therefore conclude that the State did not prove that the appellant had the requisite intention to defraud SARS and for this reason also, the appellant's conviction on counts 1-7 cannot stand.

[15] What remains then, is whether a conviction on either of the alternative charges to counts 1-7, is competent. The first alternative charge is theft and the only issue is whether the appellant had the requisite *mens rea*. It was common ground that the close corporation had not charged VAT on the invoices issued to MWEB. This, however, does not exclude *mens rea*. In terms of section 64(1) read with the definition of "*vendor*" in section 1 of the VAT Act, the cost of the services to MWEB is deemed to include VAT. In fact, this was Kock's evidence. The question then is: did the appellant know that the cost to MWEB, which she intended to be a VAT-free price would by law be deemed to include VAT? In my view to this question must be answered negatively for three reasons. First, there is no evidence that the appellant knew that any price charged to MWEB would be deemed to include VAT. Secondly, Kock testified

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[14] Snyman*op cit* n 1 at 531-532; *Gardener* n 7 paras 31 and 32.

[15] De Wet and Swanepoel *Strafreg* (4de uitg 1985) at 404 put the required *mens rea* as follows:

> "*Verder moet die beskuldigde se opsetookslaan op die handeling van die misleide tot synadeel. Die beskuldigde moet dusvoorsien dat die misleidedeur die misleiding tot 'n handelingbeweegsal word, en dat die handeling tot synadeelsalstrek.*"

that the appellant did not withhold any money payable to SARS. And thirdly Kock said that thecontract with MWEB was a month-to-month contract and that in the circumstances, the appellant would not have known that it was going to run for 12 months. Accordingly, a conviction on the first alternative count of theft must fail for want of *mens rea*.

[16] The second alternative charge appears to be a duplication of charges 11 – 18. It basically states that the appellant is guilty of contravening section 58(d) read with section 28(1)(a) and (b) of the VAT Act in that she failed to submit VAT 201 returns on behalf of the close corporation, or failed to calculate VAT due to SARS. Section 58(d) provides inter alia that any person who fails to comply with the provisions of section 28(1) shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 24 months. In terms of section 28(1), a vendor is required, within the periods specified in that section, to furnish the Commissioner with a return reflecting the information required for the purpose of the calculation of tax, and to calculate the amounts of such tax and pay the tax payable to the Commissioner or calculate the amount of any refund due to the vendor. Charges 11-18 also state that the appellant is guilty of contravening section 58(d) read with sections 1, 16, 28(1)(a) and (2), and 46(a) and 48 of the VAT Act, in that she failed to submit VAT 201 returns to the Commissioner containing the information for the calculation of tax in terms of section 16 of the VAT Act. These charges are in

essence the same as the second alternative charge to counts 1-7. The provisions of section 28(1)(a) have already been outlined above. The remaining provisions of the VAT Act referred to in counts 11-18 do not change the nature of the charge – the failure to submit VAT returns.[16] For these reasons, I consider that a conviction on the second alternative charge to counts 1-7 would not be competent.

[17] I turn now to consider the charge of fraud on count 9. The same considerations regarding fraudulent concealment and lack of intent to defraud apply to that charge. The conviction of fraud on count 9 is therefore not sustainable. In the circumstances, it is hardly surprising that the lawgiver has created the statutory offence of failing to submit an income tax return.[17] In my view, the appellant was rightly convicted onthat charge (count 10).

[18] In view of the conclusion to which I have come, it is unnecessary to consider in any detail, the second ground of appeal, namely that there is an improper splitting of charges, more specifically that the evidence required to prove the fraud charges (counts 1-7) necessarily involves proof of the statutory

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16 Section 28(2) of the VAT Act provides inter alia that every vendor shall within the period allowed by subsection (1) furnish the return referred to in that subsection. Section 46(a) states inter alia that a natural person who is a resident of the Republic responsible for the duties imposed by the VAT Act on any company, shall be its public officer.

17 Section 75(1) of the Income Tax Act reads as follows:
"*Any person who –*
(a) *fails or neglects to furnish, file or submit any return or document as and when required by or under this Act; … shall be guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 24 months*".

charge of failing to apply for registration of the close corporation as a vendor under the VAT Act (count 8). It suffices to say that the appellant was properly convicted of contravening section 58(c) of the VAT Act for failing to register as a VAT vendor, because the total value of taxable supplies made by the close corporation exceeded the then applicable threshold.

[19] As regards sentence, it appears that the rather light sentences on counts 8 (the failure to register as a VAT vendor) and 11-18 (the failure to submit VAT returns) were imposed because the appellant had been convicted of the main counts of fraud. Given that the convictions of fraud on counts 1-7 fall to be set aside, the sentences on counts 8 and 11-18, to my mind, are inappropriate. The legal representatives of the parties were accordingly advised that the Court considered increasing the sentences imposed by the trial court on counts 8 and 11-18, and were granted an opportunity to make written submissions and to indicate whether they wished to address the Court regarding sentence.

[20] Mr de la Harpe made further written submissions on behalf of the appellant in which he outlined the following facts. The appellant is 46 years old, a first offender and suffered emotional stress due to personal difficulties which influenced her ability to function at the time of the commission of the offences. This case has been hanging over the appellant's head for some eight years. The appellant co-operated with SARS and has paid all amounts

outstanding and penalties. The appellant has suffered financially and emotionally as a result of this case. Ms Booysen, on behalf of the State, submitted that the sentences imposed in respect of counts 8 and 11-18 are lenient, having regard to the following facts. The appellant was aware that she had to register for VAT and failed to submit VAT returns over an extended period of time. Both legal representatives indicated that they did not wish to address the court orally.

[21] It is trite that punishment is pre-eminently a matter for the discretion of the trial court and that a sentence should only be altered if that discretion has not been judicially and properly exercised, more specifically if the sentence is vitiated by a misdirection or is disturbingly inappropriate.[18] In my view, the sentences imposed on counts 8 and 11-18 are disturbingly inappropriate and an increase in those sentences is justified.

[22] In the result, I would make the following order:

> (1) The appeal against the conviction on counts 1-7 and 9 is upheld.
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> (2) The conviction and sentence on counts 1-7 and 9 are set aside.

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[18] *S v Rabie* 1975 (4) SA 855 (A) at 857D-F.

(3) The conviction and sentence on count10 are confirmed.

(4) The sentences on counts 8 and 11-18 are set aside and replaced with the following sentences:

(a) On count 8 the appellant is sentenced to a fine of fifteen thousand Rands (R15 000.00) or four(4) months' imprisonment;

(b) Counts 11-18,are taken together for the purpose of sentence and the appellant is sentenced to a fine of fifteen thousand Rands (R15 000.00) or four (4) months' imprisonment.

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SCHIPPERSJ

I agree.Itis so ordered.

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NDITA J

***Coram*:**	**NDITA *et* SCHIPPERS JJ**
Judgment:	**SCHIPPERS J**
Counsel for the Appellant:	**Mr De La Harpe**
Instructed by :	**Milton *De La Harpe Attorneys***

Ref: Mr. M De La Harpe
Tel: 021 4699701

Counsel for Respondent:	**Adv. H Booysen**
Instructed by :	***National Prosecuting Authority*** **115 Buitengracht Street,** **Cape Town** **Tel: 021 487 7000**
I **Dates of hearing:**	**01 February 2013**
Date of judgment:	**30 April 2013**