IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, BISHO)

Reportable

CASE NO: 2/2006

DATE DELIVERED: 3.4.2013

In the matter between

THE STATE **Plaintiff**

And

MILILE MARTIN MPAMBANSO **Defendant**

JUDGMENT

NEPGEN, J:

[1] After upholding the accused's plea, on counts 185 to 221, in terms of Section 106 (1)(f) of the Criminal Procedure Act, No 51 of 1977 (the CPA) on 25 October 2006, the trial of this matter was only due to commence on 29 August 2011. The reasons for the delay are not presently relevant. On that date I was requested to determine the plea of no jurisdiction in respect of the six counts on which the accused had pleaded not guilty and had also pleaded that this court has no jurisdiction to try the offence with which he was charged on each of those counts (referred to as a dual plea in the judgment handed down on 25 October 2006). After hearing evidence it was apparent that the plea of no jurisdiction had to be upheld. This was in fact conceded by counsel for the State. An appropriate order was accordingly made.

[2] The matter then proceeded. A detailed written plea explanation was handed in as exhibit "B". The contents of the plea explanation were confirmed by the accused. It would not be out of line to say that thereafter the trial stuttered along. There were numerous adjournments and associated delays, some at the instance of the State and others at the instance of the defence.

Eventually, however, the State concluded leading its evidence and closed its case. After an adjournment in order to enable the accused to consider his position, the accused closed his case without leading any evidence. The matter was then again postponed for argument. During the course of the trial counsel for the State had indicated that the State was not proceeding on 11 of the charges of fraud nor the corresponding charges of theft. At a later stage the theft charges were also abandoned. The result is that at the conclusion of the evidence the accused faced 54 separate charges of fraud.

[3] Argument in this matter commenced on 5 September 2012. On the following day, before the conclusion of the argument on conviction on behalf of the State, counsel for the State sought an amendment to the charge sheet. The amendment sought still refers to the original counts 1 to 92, but what is envisaged by the amendment is the combination of the individual counts of fraud into one single count of fraud. I do not propose to set out the indictment in the form in which it presently is, nor do I propose to set out in detail the alterations that are now sought. Suffice it to say that on each of the separate counts of fraud the indictment alleges that on a specific date and in respect of certain persons, referred to as beneficiaries, the accused had committed fraud in respect of specified amounts. What the State now wishes to allege is that during the period between August 2002 and May 2004 and on divers occasions (being the same occasions and in respect of the same beneficiaries and also the same amounts) the accused committed fraud. The defence has objected to the amendment.

[4] The amendment is sought in terms of Section 86 (1) of the CPA. This subsection reads as follows:

> "(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it

> considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend."

[5] In the present instance it would appear that the proposed amendment is sought because the State considers that there is an error in the charge. This is quite apparent from what is stated in the heads of argument handed up on behalf of the State, namely it has been realised "that there is a defect/error in charges 1-92".

[6] The grounds upon which the defence has objected to the application for an amendment are that the State has not brought itself within the provisions of Section 86 of the CPA; that that which is sought by the State amounts to a substitution of the charge rather than an amendment; that the proposed amendment will result in irremediable prejudice to the accused in his defence; and that the proposed amendment will infringe the accused's rights to a fair trial.

[7] As mentioned earlier, it appears that the State contends that there is an error in the charge. That error, as I understand the argument presented on behalf of the State, relates to the answer to the question whether the State has proved on which of the particular counts set out in the indictment the accused has committed any of the offences with which he has been charged. In <u>S v Barketts Transport (Edms) Bpk en 'n Ander</u> , 1988 (1) SA 157 (AD) it was held, at 162 D, that the words "any other error in the charge" in the

context in which those words are used in Section 86(1) of the CPA have to be interpreted with regard to the *eiusdem generis* rule so that it referred to a defect in the charge which was similar to the sort of defects listed earlier in the subsection. This was stated in the context of a discussion as to whether or not the substitution of one offence for another is permissible, which it was held not to be. In the Barketts Transport, case, *supra* it was stated in conclusion that the first question that must be answered with every application for an amendment to a charge sheet is whether the proposed amendment is in fact an amendment in terms of Section 86 (1) of the CPA.

[8] I have already mentioned that it is contended on behalf of the defence that what is sought in this matter amounts to a substitution of the original charges and not merely an amendment. In support of the arguments advanced in this regard I was referred to a number of cases, with particular reliance being placed on S v Kruger en Andere, 1989 (1) SA 785 (AD). In Williams and Another vs Janse Van Rensburg and Others (4), 1989 (4) SA 979 (CPD) Williamson, J, after referring to certain passages in the judgment in Kruger's case, *supra*, said the following at 982 F;

> "I have quoted at some length from this case because it illustrates so clearly the operation of two considerations. Firstly, it makes the point that in judging whether or not a proposed change amounts to an amendment or a substitution one must have regard to the real substance of what it is proposed to do and not be beguiled by the form in which it may be dressed up. The real flesh and bones are more important than the clothes with which they may be covered.
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> In the second place it is pointed out that the decision as to whether a proposed change is either an amendment or a substitution is a value judgment in which it is sometimes difficult in practice to draw the line between the two concepts. The touchstone by which that judgment is

> to be governed is whether the proposed "amended" charge differs so substantially from the original that in essence it is a different charge."

[9] On behalf of the State it was contended that the only change that is being sought is that the former counts would now be combined and comprise a single count. None of the allegations in the original indictment relating to the actual commission of the specific acts complained of would be altered. These contentions cannot be disputed. To this extent the present matter differs substantially from Kruger's case, *supra*, which was relied upon by the defence. Despite this, I have some difficulty in appreciating how it can be said that an alteration to an indictment to allow a single charge in the place of a series of charges does not amount to a substitution. For example, had the accused been faced with a single charge from the outset, would he have been able to have raised a plea in terms of Section 106 (1) (f) of the CPA ? However, because of the view I take of this matter it is not necessary to come to any final decision in this regard.

[10] It is quite clear from the provisions of Section 86 (1) of the CPA that the discretion conferred upon a court to order an amendment to the charge can only be made if the court "considers that the making of the relevant amendment will not prejudice the accused in his defence". In S v Ndaba, 2003 (1) SACR 364 (W) it was held by Labe, J at 384 f (para[117]), after stating that what was intended by prejudice was that the accused should have been prejudiced in the conduct of his defence by the granting of the amendment, that the onus was on the State to prove the absence of prejudice to the accused. In support of this statement Labe, J referred to R v Alexander

and others, 1936 AD 445 at 460 – 1; and R v Bruins, 1944 AD 131 at 134 -5. It is not stated in either of these cases, at the passages mentioned, in express terms that the onus is on the State to prove the absence of prejudice. However, it appears to be quite clear from the discussion of the facts of each case that the court approached the matter on the basis that the State had to show that the accused had not been prejudiced. Those cases did also not deal with the situation as contemplated in Section 86 (1) of the CPA, but with legislative enactments that were in the same terms as the provisions of Section 86 (4) of the CPA, which provides that the fact that a charge is not amended shall not affect the validity of the proceedings thereunder, unless the court refuses to allow an amendment which has been sought in terms of Section 86 of the CPA. However, insofar as Section 86 (4) of the CPA is concerned, this matter has now been decided upon by the constitutional court. In Moloi v Minister for Justice and Constitutional Development, 2010 (5) BCLR 497 (CC) the following was stated by The Court at 505 C (para [19]);

> "Section 86 (4) on the other hand provides that even if the charge is not amended, the proceedings based on the defective charge may nevertheless remain valid. However, the question is whether section 86 (4) may be invoked if the accused may be prejudiced by an amendment not having been made. Pre-constitutional judicial authority suggests not. Whether the accused may be so prejudiced is dependent upon the facts of each case. What is cardinal, however, is that prejudice, actual or potential, will always exist unless it can be established that the defence or response of the accused person would have remained exactly the same had the State amended the charge."

[11] The statement that prejudice will always exist "unless it can be established that the defence or response of the accused person would have remained exactly the same" is, in my view, a clear indication that the onus

must rest on the State to establish that the defence or response would have remained the same, which is tantamount to saying that the onus would be on the State to prove the absence of prejudice. It can clearly not be expected of an accused to establish that his defence or response would have remained the same.

[12] Once it is accepted that the onus is on the State to establish the absence of prejudice before Section 86 (4) of the CPA can be in invoked, there can be no basis whatsoever for holding that a different situation pertains in the case of an amendment under Section 86 (1) of the CPA. Before an amendment can be granted under that subsection a court must be satisfied that the accused would not be prejudiced in his defence. In my view the onus must be on the State to establish the absence of such prejudice to the satisfaction of the court.

[13] I am quite unable to state that the accused will not be prejudiced in his defence if the amendment sought by the State is granted. All the State witnesses have been cross-examined. Certain of the aspects of the evidence of some of them were not challenged. I cannot say that this would have been the case if the accused had faced one charge formulated as the State now seeks the indictment to read. The accused also closed his case without testifying or leading any evidence. I am unable to say that he would have done so in any event. It is true that a lengthy plea explanation was furnished at the outset of the matter and that the proposed amended charge contains all the allegations in the original indictment. However, the State has not

established that the accused would not have conducted his defence differently if he had originally only been charged with one count of fraud. The State has therefore not succeeded in establishing the absence of prejudice to the accused and consequently the amendment sought cannot be granted.

[14] The application for an amendment to the charge sheet is refused.

J J NEPGEN
JUDGE OF THE HIGH COURT