THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20116/2014
Reportable

In the matter between:

RESIMATE EDWIN MARINGA **FIRST APPELLANT**

DORAH MADISHA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Maringa v The State* (20116/2014) [2015] ZASCA 28 (23 March 2015)

Coram: Navsa ADP, Leach and Willis JJA and Schoeman and Meyer AJJA

Heard: **11 March 2015**

Delivered: **23 March 2015**

Summary: Section 155 and s 156 of the Criminal Procedure Act 51 of 1977—whether separation of trials is mandatory where accused do not all face the same charges but where the State alleges a common purpose to defraud and there is a great deal of overlap – to be decided on consideration of prejudice.

ORDER

On appeal from: Gauteng Division, Pretoria (Potterill J and Bam AJ sitting as court of appeal):

1 The appeal is dismissed.

JUDGMENT

Schoeman AJA (Navsa ADP, Leach and Willis JJA and Meyer AJA CONCURRING)

[1] Seven accused were arraigned in the regional court in Pretoria facing a total of 399 charges which included fraud, forgery, uttering and corruption. The first and second appellants were accused 1 and accused 4 respectively. The first appellant was charged with all of the counts, barring those counts relating to the corruption charges. The second appellant was charged with 34 counts of fraud. Before any of the accused pleaded, the two appellants objected to being charged together with their five co-accused. Their objection was premised on the supposition that it was contrary to the provisions of ss 155 and 156 of the Criminal Procedure Act, 51 of 1977 (CPA) to charge them together with the other co-accused where they did not all face the same charges. The application

was dismissed by the magistrate and a subsequent appeal to the North Gauteng High Court was also unsuccessful. The court below, without considering s 16(1)*(b*) of the Superior Courts Act 10 of 2013 (the Act), granted leave to appeal.

Leave to appeal.

[2] The Act commenced on 23 August 2013. In terms of s 16(1)*(b)* of the said Act 'an appeal against any decision of a Division on an appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal.'

[3] Section 17(3) of the Act provides that:

'(3) An application for special leave to appeal under section 16 (1) *(b)* may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after the decision sought to be appealed against, or such longer period as may on good cause be allowed, and the provisions of subsection (2)*(c)* to *(f)* shall apply with the changes required by the context.'

[4] The appellants applied to the court below for leave to appeal on 23 September 2013. By that time the Act was in force and the transitional provisions in s 52 of the Act were not applicable as the proceedings were not pending. Judgment on appeal was delivered on 17 September 2013 and the application for leave to appeal was filed on 23 September 2013. The court below granted leave to appeal to the SCA on 18 October 2013.

[5] It is clear from this timeline that it was not competent to apply to the North Gauteng High Court for leave to appeal. The latter court was sitting as a court of appeal and therefore, in terms of s 16 (1)*(b)* of the

Superior Courts Act this court is the court to which an application for special leave to appeal should have been directed.

[6] The jurisdictional basis for an appeal to this court was thus absent.[1] Subsequently, on the date of the hearing of this appeal, counsel for the appellants, having been apprised by us of the applicable provisions, applied for special leave to appeal to this court. Counsel for the State did not oppose the application. Special leave to appeal was granted. I proceed to deal with the merits, beginning with the background facts.

Background

[7] The broad outline of the State's case, as is evident from the charge sheet and the substantial summary of facts, underpinning the charges is as follows. The first appellant was an attorney, practicing in Johannesburg, while the second appellant was an employee of the City of Johannesburg. The City of Joburg Property Company (Pty) Ltd (JPC), was a company wholly owned by the Johannesburg Metropolitan Municipality (JMM). JPC managed and controlled property owned by the JMM. The JMM was the owner of all the properties mentioned in the charge sheet. During the period January 2010 to March 2010 the JMM at no time had the intention to sell the properties mentioned in the charge sheet, did not pass any resolutions to sell or alienate the said properties and did not enter into any agreement of sale of the properties with any entity, including the company, Eildoug Investments (Pty) Ltd (Eildoug). First appellant, so it was alleged, devised a fraudulent scheme in terms of which Eildoug, de facto controlled by him, would ostensibly buy the properties of the JMM and immediately sell the properties to other unsuspecting and innocent persons or entities.

[1] *Pharmaceutical Society of South Africa & others v Tshabalala-Msimang &another NNO; New Clicks South Africa (Pty) Ltd v Minister of Health* 2005 (3) SA 238 para 22.

[8] The State's case was expressly that the seven accused acted in pursuance of a common purpose in that the relevant properties were identified, information on the properties collected and thereafter marketed. Some of the buyers were reassured as to the legitimacy of the transactions and the possibility of the properties being rezoned. It was alleged Peet Viljoen (Viljoen), an attorney, and the second accused, completed the transfer documents and subsequently the properties were transferred from the JMM to Eildoug and then simultaneously transferred to the unsuspecting purchasers of the properties.

[9] These transactions, so the State said, necessitated the completion of deeds of transfer and the forgery of documents to enable such transfers. For Eildoug to buy the said properties, the following documents had to be forged and were fraudulent: the sale agreements, the resolutions of the JPC and the JMM, powers of attorney to transfer property, affidavits and applications in terms of s 68(1) of the Regulations under the Deeds Registries Act, 47 of 1937. Transfer duty receipts or exemption certificates were obtained by bribing an official in the South African Revenue Service. Furthermore, the deeds were submitted to The Deeds Office, Pretoria where accused number 7, who was there employed, executed the deeds of transfer and was paid R5000 per registration.

[10] The State's case against the first appellant, as previously stated, was that he was the person who devised the scheme to defraud innocent purchasers of properties of which the JMM is the owner. He was the person who instructed a certain Mr Africa to collect relevant information about the properties. He met with Viljoen, also an attorney, who completed the necessary transfer documents and he forged, or instructed

others to forge the necessary signatures on the documents. Where the forged documents had to be commissioned, the first appellant directed people to firms of attorneys before whom the affidavits were attested and he provided the funds for obtaining clearance certificates that were needed to effect transfer of the properties. The State alleged that the value of the money collected by the sale of the properties and paid to the first appellant was R10,16 million.

[11] The second appellant's involvement concerned properties ostensibly transferred from the JMM to Eildoug and sold by Eildoug to Zambrotti Investments 31 (Pty) Ltd. The State alleged that on 25 February 2010 Zambrotti bought six properties for R12 million from Eildoug, but Mr Sulliman, a director of Zambrotti, required confirmation that the properties would be rezoned. The second appellant wrote a letter on the letterhead of JPC that the properties had been transferred to Eildoug and all internal requirements had been complied with and that there were no objections to the rezoning of the properties. Mr Sulliman, on behalf of Zambrotti, entered into further sale agreements that were offered to him by Viljoen. Mr Sulliman requested a meeting with the second appellant when the further agreements were concluded. At this meeting the second appellant confirmed the validity of the transfers and confirmed that correct procedures had been followed. The second appellant, thereafter, in writing, again confirmed the validity of the transactions and the fact that there were no objections to the rezoning of the properties.

[12] The appellants argued that it is improper to charge the appellants with their co-accused as they were not all charged with the same offences (s 155 of the CPA). The charges faced by the appellants and their co-

accused are the following, as was set out in the judgment of the court below:

(a) Counts 1-30 are fraud charges. The first appellant is charged with all the counts, but the second appellant is not charged with counts 13, 28, 29 and 30.

(b) Counts 31-46 are alternative charges of theft to counts 1-30. The first appellant is charged with all the counts, but the second appellant is only charged with counts 31-41.

(c) Counts 47-70 are charges of forgery. The first appellant is charged with all the counts but the second appellant is not charged with any of the counts.

(d) Counts 160-297 are charges of uttering. The first appellant is charged with all the counts, but the second appellant is not charged with these counts.

(e) Counts 298-349 are charges of corruption (giving) with none of the appellants being charged with these counts.

(f) Counts 350-374 are charges of corruption (giving); and

(g) Counts 375-399 are charges of corruption (receiving) with which the appellants are not charged.

The first appellant therefore does not face 100 charges of corruption, be it giving or receiving and the second appellant only faces 34 charges of fraud. This, it was submitted, is contrary to the provisions of s 155 and 156 of the CPA, and it was accordingly impermissible and irregular to charge the appellants with the other accused.

Sections 155 and 156 of the Criminal Procedure Act.

[13] Section 155 of the Criminal Procedure Act provides:

‘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.’

While s 156 provides as follows.

‘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 at 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.’

[14] The purpose of ss 155 and 156 is to avoid a multiplicity of trials where there are a number of accused. This is where essentially the same evidence on behalf of the prosecution is led on charges faced by all the accused.[2] It is to avoid prejudice to both the accused and the prosecution.

[15] The trial court exercises a discretion to decide whether to allow a trial to proceed or order a separation of trials. The way this discretion has to be exercised has been set out in *S v Ntuli & others*: [3]

‘In exercising its discretion the trial Court has to weigh up the likelihood of prejudice to the applicant accused resulting from a joint trial against the likelihood of prejudice to the other accused or the State if their trials are

[2]E du Toit et al *Commentary on the Criminal Procedure Act* Service Edition 52 (2014) at 22-44.
[3]*S v Ntuli & others* 1978 (2) SA 69 (A) at 73.

separated, and decide whether or not, in the interests of justice, a separation of trials should be granted. "Prejudice" there means prejudice in the sense that no injustice should be caused to the party concerned, including the State…. The weight to be given to each of the relevant factors in the adjudication of this issue is for the trial Court to assess in the exercise of its discretion.'

[16] *R v Heyne &others* [4] was a matter where three companies and 15 natural persons were charged with fraud committed over a period of two and a half years. There, the case against the accused was that the accused consistenly over the said period, had acted in concert, created books and documents containing false entries and misleading omissions in order to deceive the police and auditors. It was held that:

'… [P]ractical considerations must decide whether it is permissible to charge a person with a course of conduct when what he has done consists, not of an unbroken spell of uniform behaviour, … , but of a series of closely following similar acts,…. Those considerations require that in a proper case a planned course of fraudulent conduct may be charged as a single crime of fraud, even if it might also be possible to analyse it into a series of separate frauds. . . . It is true that the period was a very long one and it appeared from the Crown case that *not all the accused persons could have been associated with the course of conduct over the whole period of its existence*. But that was not a sufficient reason for holding that they could not be charged upon a fraudulent course of conduct if they acted in concert to make a systematic series of false representations. Where the participations of several collaborators have not covered precisely the same period, particulars may be necessary to inform them of the extent of their alleged participation, but the Crown would not be precluded from charging them together on a course of conduct basis. In each case it is necessary to decide whether there has been prejudice to the accused; in the present case there has been none.' [5] (My emphasis)

[4] *R v Heyne &others* 1956 (3) 604 (A). *Heyne* did not refer to ss 327 and 328 of the Criminal Procedure Act 56 of 1955, the precursors of ss 155 and 156 of the CPA.
[5] *Heyne* 616G-617B.

[17] Counsel for the appellants, inter alia, referred us to *S v Ramgobin* [6] as authority for the proposition that it is not permitted to charge different accused in the same trial where they do not all face the same charges. I am of the view that *Ramgobin* does not support his contentions. In *Ramagobin* the indictment against the 16 accused comprised a main count of treason, allegedly committed from 1980 to 1985, plus five alternative counts. All the accused were joined in the main count and two of the alternative counts but only some of the accused were joined in the other alternative counts. The state in that instance did not rely on the provisions of s 156 of the CPA, as the alleged acts were not committed at the same place, or the same time, or at about the same time.[7] It was argued that the joinder of the accused with each other in one count of treason was not permissible as there were a number of different acts, widely differing in time and place of committal by the various accused. The court found that the '. . . [P]ractice, therefore of charging a series of acts committed by different accused at different times over a period in pursuance of one overall plan or design as one offence, notwithstanding that each such act could form the subject of a separate charge, is well-established in our law, and rests on Appellate Division authority.'[8] The court held that joinder of all the accused in one indictment on the treason charge was competent and not irregular. This is no authority for the proposition that each accused had to be charged with every offence in the indictment.

[18] In *S v Naidoo* [9] the appellant was the second of two remaining accused charged with theft, fraud and various statutory offences and contravening sections of the Prevention of Organised Crime Act 121 of

[6] *S v Ramgobin & others* 1986 (1) SA 68 (N).
[7] *Ramgobin* at 75D.
[8] *S v Ramgobin* at 79G.
[9] *S v Naidoo* 2009 (2) SACR 674 (GSJ).

1998. Prior to the start of the trial the appellant brought an application claiming misjoinder as he had not been charged with all the charges levied at accused one. The application was dismissed and on appeal to the full bench of the court, the appeal was dismissed. The court held that:

'For each of the main counts, and the alternatives thereto, there is only one set of facts which might result in a conviction on the main counts or on one of the alternatives. What is clear is that in relation to each count, or alternative thereto, the evidence relied upon by the prosecution relates to the ongoing, continuing or repeated participation of each of the accused, and in particular accused 1 and the appellant in the illegal rackets in which they are all participants. 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 or the individual counts on which accused 1 has been charged in the alternative.'[10]

[19] It is clear from the charge sheet that the alleged offences were committed within a period of two months and were therefore committed at about the same time and place and were furthermore in furtherance of a common purpose. The charge sheet enunciated it. The scheme was designed to fraudulantly sell property belonging to the JMM and to transfer those properties to buyers in order for the accused to collect the proceeds of such sales. In order to succesfully effect such transfers it was necessary for officials in SARS and the Deeds Office to co-operate in the furtherance of the common purpose, otherwise the properties could not be transferred and registered. These officials were bribed and therefore the corruption charges are part and parcel of the overall design of the scheme. There is a whole mosaic of evidence that will be necessary to prove the scheme and the participation of the various accused in its different facets.

[10] *Naidoo* para 18.

[20] The only prejudice to the appellants that was mentioned by counsel was that the appellants would have to sit through a trial while evidence would be presented that would not relate to charges they faced. In my view, the prejudice is exaggerated in that the corruption and other charges are but a part of the scheme that will proved. On the other hand, if separation is ordered, the State will suffer prejudice. There will have to be three separate trials (for the two appellants can then not be tried together) where the same witnesses will have to testify about the same facts. This is inimical to the interests of the State and against the principle that there should not be a multiplicity of trials relating to essentially the same facts and body of evidence. The prejudice, asserted by the appellants, is in the greater scheme of things, minimal.

[21] Furthermore, the magistrate exercised his discretion in refusing a separation of the trials and there has been no indication why such discretion has not been exercised judicially.

[22] For the above reasons the following order is made.

The appeal is dismissed.

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I SCHOEMAN

ACTING JUDGE OF APPEAL

APPEARANCES

For Appellant:	M M Hodes Instructed by: I Mabunda Attorneys, c/o M L Kekana Inc, Silverton, Pretoria Symington & De Kok, Bloemfontein
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