THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 103/2014

Reportable

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE **APPELLANT**

and

MOHAMED SHAKIEL PARKER **RESPONDENT**

Neutral citation:	*Director of Public Prosecutions, Western Cape v Parker* (103/14) [2014] ZASCA 223 (12 December 2014).
Coram:	Brand, Shongwe, Leach, Pillay et Willis JJA
Heard:	**21 November 2014**
Delivered:	**12 December 2014**

Summary: Criminal law – failure to pay value-added tax in terms of Value-Added Tax Act 89 of 1991 – charged with common law theft – whether relationship between registered vendor and South African Revenue Service is a trustee relationship.

ORDER

On appeal from: Western Cape High Court, Cape Town (Dlodlo J and Van Staden AJ sitting as court of appeal):

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

Pillay JA (Brand, Shongwe, Leach et Willis concurring):

[1] Step-in-Time Supermarket CC (the CC), a registered Value-Added Tax (VAT) vendor and the respondent, its sole representative were charged in the regional court, Belville, Western Cape with a number of counts under the Income Tax Act 58 of 1962 (the Income Tax Act) and the Value-Added Tax Act 89 of 1991 (the Act) respectively. Apart from these they were charged with sixteen counts of (common law) theft of money allegedly collected in respect of VAT. The charges under the Act related to the CC's failure to submit VAT returns under s 28(1)(*a*) of the Act between the period February 2001 to February 2006, while the theft charges were based on the CC's failure to pay VAT over the same period. The charge sheet alleged, however, that all sixteen crimes of theft were committed on 23 October 2006, that being the date upon which the VAT returns for the CC were eventually filed.

[2] The CC and the respondent pleaded guilty to all the charges and were duly convicted after the respondent submitted a written plea in terms of s 112 of the

Criminal Procedure Act 51 of 1977 (the CPA) on behalf of both. The magistrate for purposes of sentence grouped the convictions and sentenced the respondent as follows:

(a) On counts 1 to 6 (ie the charges under the Income Tax Act) : A fine of R 3000 or 18 months' imprisonment suspended for four years on condition that he is not convicted of contravening s 75(1)*(a)* of the Income Tax Act, committed during the period of suspension;

(b) On counts 7 to 37 (ie the charges under the Act): A fine of R 10 000 or 2 years' imprisonment suspended for four years on condition that he is not convicted of contravening s 58(*d*) of the Act, committed during the period of suspension;

(c) On counts 44 to 60 (ie the sixteen charges of common law theft): 5 years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act.

Since the CC did not appeal, it is not necessary to set out the sentences imposed on it.

[3] The trial court granted the respondent leave to appeal against the sentence imposed in respect of the theft, ie 5 years' imprisonment in terms of s 276(1)*(i)* of the CPA, to the Western Cape High Court, Cape Town. Prior to the scheduled hearing of the appeal, both the appellant and respondent were, however, requested by the court below to prepare and argue the following:

'1. Should the appellant have been charged with theft (counts 44 to 66) in view of the judgment in AJC Olivier v Die Staat. [ie *AJC Olivier v Die Staat* (A153/2005)(22 September 2006).]

2. On what basis can the matter under consideration be distinguished from that matter.

3. Was the said unreported judgment of Olivier disclosed to the legal representatives of the appellant prior to the pleas in terms of Section 112 of the Criminal Procedure Act?

4. Does this court have the inherent jurisdiction to set aside this conviction, based on the authority of Olivier's case.'

In consequence, the respondent, as appellant, successfully applied to the regional court for leave to appeal against the convictions for theft. It is common cause that the respondent, representing the CC, did not pay VAT to the South African Revenue Service (SARS).

[4] The court below (per Dlodlo J and Van Staden AJ), held that the respondent did not commit theft of the VAT, essentially on the basis that the money in question belonged to the vendor and not the commissioner of SARS. The convictions for theft (counts 44 to 60) were consequently set aside together with the sentence in terms of s 276(1)*(i)* of the CPA. The court below also referred to other aspects in its judgment but it is not necessary to deal with those herein.

[5] The appellant (the State) requested this court to decide the following legal question:

'Whether a VAT vendor who has misappropriated an amount of VAT which it has collected on behalf of SARS can be charged, with the common law crime of theft.'

At the hearing before us counsel for the State was asked about the underlying reason for the appeal. The motivation for the question arose from the fact that a failure to pay VAT is a statutory crime under s 28(1)(*b*) read with s 58 of the Act which is punishable with a sentence of two years' imprisonment. Counsel for the State then explained that the reason why it approached the court was because the penalty and punishment prescribed by the Act were too lenient for certain cases of misappropriation of VAT. It follows that a conviction for theft would pave the way for sterner sanctions and that is what the prosecuting authority sought.

[6] In contending that the court below had erred in answering the question stated in the negative, the State argued that the court started out on the wrong premise by asking whether SARS became the owner of that money. In collecting VAT, so the State's argument went, the VAT vendor acts as an agent for SARS. It follows, so the argument proceeded, that a VAT vendor who uses VAT for purposes other than to pay to the Commissioner misappropriates those funds and is therefore guilty of theft, despite the fact that the vendor may be the owner of that money.

[7] In support of this contention, the State sought to rely on those decisions of this court which provide authority for the following propositions: Where X holds money in trust on Y's behalf or receives money from Y with instructions that it be used for a specific purpose and X misappropriates that money by using it for a different purpose, X commits theft of the money. In these types of cases the rule that one cannot steal one's own money is no bar to a conviction. Y, according to these decisions, has a special interest or property in the money. However, unless X is obliged to keep the money in a separate account, he does not commit theft if, at the time he uses the money for a different purpose, he has at his disposal a liquid fund large enough to enable him to repay it (see eg *S v Gathercole* 1964 (1) SA 21 (A) at 25; *S v Visagie* 1991 (1) SA 177 (A) at 182-183; *S v Boesak* 2000 (1) SACR 633 (SCA) paras 96 and 99).

[8] In support of the proposition that the VAT vendor who collected VAT is in a position of trust *vis-à-vis* SARS with regard to that money, the State sought to rely on the following:

(a) The provisions of s 7(1) of the Act which reads:

'Imposition of value-added tax

(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as the value-added tax –

(*a*) On the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;

(*b*) . . .

(*c*) . . .

calculated at the rate of 14 per cent on the value of the supply concerned or the importation . . .'

(b) The statements in *Metcash Trading Ltd v Commissioner, South African Revenue Service* 2001 (1) SA 1109 (CC) paras 15 and 17 that 'vendors are entrusted with a number of important duties in relation to VAT' and that 'vendors are in a sense involuntary tax-collectors'.

(c) The decision of this court in *Estate Agency Affairs Board v McLaggan* 2005 (4) SA 531 (SCA).

[9] I do not believe, however, that s 7(1) of the Act either expressly or impliedly creates a relationship of trust. On the contrary, it is clear to me that the relationship created by the Act is one of a debtor and his creditor. At the time the respondent was charged, s 40 of the Act was still in operation. That section pertinently described VAT 'when it becomes due or is payable' as a 'debit to the State'. In addition the section provided for SARS to civilly sue a vendor for outstanding VAT together with the 10 per cent penalty (and interest) provided for in s 39. Section 40 has since been repealed by the Tax Administration Act 28 of 2011 (the 2011 Act) which similarly makes provision for SARS to recover money due to it by way of litigation (see

chapters 11 and 12 of the Tax Administration Act). Consequently it is clear that the Act provides for a debtor-creditor relationship as between the vendor and SARS. The procedures allow the commissioner to resort to litigation in order to recover tax debts (s 169 of the 2011 Act) and even institute sequestration, liquidation or winding-up proceedings, as the case may be (s 177 of the 2011 Act). Therefore should a vendor fail to pay any tax, penalty or interest, (when it is due and payable) the commissioner is entitled to sue the vendor for payment. The vendor can also, simultaneously, be charged in terms of s 58 of the Act for failing to comply with the Act. Significantly, the offences referred to in s 58 are confined to non-compliance with the Act and do not include common law theft.

[10] The argument based on *Metcash* misconstrued and quotes out of context the comments made by Kriegler J. What Kriegler J said in para 15, after broadly discussing what the Act compels the registered vendor to do in calculating and paying VAT, was that 'In the result vendors are entrusted with a number of important duties in relation to VAT'. In this sense 'entrusted' might very well be replaced with 'burdened with'. In other words the vendor is expected to comply with various sections of the Act which serve to safeguard the operation thereof and minimise the effects of its weaknesses. The learned judge certainly did not suggest that a trust relationship or one resembling that as between a trustee and a beneficiary of a trust, had been created. Second, counsel for the appellant misconceives the import of the *Metcash* decision in citing the judgment as authority for the proposition that VAT vendors are involuntary tax-collectors on behalf of SARS, and are therefore in a position of trust and would commit theft if they appropriate such collected VAT for uses other than to submit it to SARS. What the learned judge in fact said at para 17

is 'that vendors are in a sense involuntary tax-collectors'. The omission to consider the phrase 'in a sense' has far reaching consequences which give a totally different meaning to what the learned judge intended. It is clear that he did not classify VAT vendors as official tax-collectors but explained that 'in a sense' they could be described in this way. All the learned judge was conveying is that VAT is payable on every sale and that details of the manner of calculation of VAT, the timetable for periodic payment and the amount to be paid are statutorily controlled and it is left for the vendor to ensure compliance therewith. This is quite different from imposing the status of a formal tax-collector or a trustee of SARS on a registered vendor.

[11] The State's reliance upon *Estate Agency Affairs Board v McLaggan* was also wrong. This case related to the cancellation of McLaggan's fidelity fund certificate. The element of dishonesty was of importance on appeal not to determine whether or not he was guilty of theft, but rather to determine whether McLaggan's fidelity fund certificate should indeed lapse by reason of dishonesty. And, importantly, he was in fact charged in terms of s 58 of the Act regarding the non-payment of VAT and not with common law theft. The submission made by the State on the strength of this case that the respondent's misappropriation of VAT was seen as dishonest and therefore it amounted to theft, is clearly misplaced.

[12] During argument counsel for the State had difficulty in indicating when exactly the vendor should be regarded as having misappropriated the money which had been collected as VAT. At one stage she contended that it was on the 25th day of the month following that period, when the net amount of VAT becomes due and payable in terms of s 28(1)(*b*) of the Act. But that only tells us when the vendor's liability

arises. At that stage the vendor's position would be no different from eg the tax payer whose assessment for income tax had been made (see eg *Metcash* para 16). Even counsel for the State baulked at the suggestion that this taxpayer would be guilty of theft if it uses the assessed amount for a purpose other than to pay its assessed income tax. This proposition is clearly in line with the allegation in the charge sheet that the respondent had committed theft in respect of the net amounts that were reflected in the VAT returns of the CC which were eventually filed on 23 October 2006. But this contention raised problems of its own. First, it would mean that the vendor who files a return steals from SARS while one who does not will not be guilty of theft. Secondly, since VAT is calculated on an invoice basis it could mean that the vendor had stolen VAT which it had not yet received.

[13] Confronted with these difficulties, counsel for the State then changed tack by suggesting that the relationship of trust arises every time the vendor collects VAT and uses that money for purposes other than paying it over to SARS. This proposition again created problems of its own as is shown by the following example. If the vendor sells an article for R100 together with R14 VAT it would, on counsel's argument, be guilty of theft of the R14 if it uses it for another purpose, unless it has a liquid fund to enable him to repay. The fact that on the next day his indebtedness is cancelled out by input tax would make no difference. Neither would the fact that it would be able to pay whatever VAT becomes payable on the 25th day of the month following the tax period.

[14] In the light of this example, the concept of a trust relationship between the vendor and SARS which forms the bedrock of the State's argument is clearly

unsustainable. The answer to these difficulties suggested by counsel, namely that the Director of Public Prosecutions would never charge the vendor under the circumstances contemplated in the example, provides no answer at all to the question whether a crime has been committed. The law cannot depend on whether or not the DPP decides to enforce it.

[15] It is clear that the Act is a scheme with its own directives, processes and penalties. The relationship it creates between SARS and the registered vendor is sui generis – one with its own peculiar nature. The Act does not confer on the vendor the status of a trustee or an agent of SARS. If it did, the vendor would either have to keep separate books of account or alternatively, would have to be sufficiently liquid at any given time in order to cover the outstanding VAT. The Act makes no provision for this situation nor does it seek to compel a vendor to keep separate books of account in respect of VAT.

[16] To find that the Act creates a trust relationship (in whatever form) would require an innovative approach. The Act, in particular s 58, does not incorporate theft as an offence. If the State wants the legislature to do so, or if the sentences provided for in s 58 are found to be inadequate, the obvious solution is to approach the Legislature. For the courts to extend the crime of theft to resolve the State's difficulties, would be contrary to the principle of *nullum crimen, nulla poena sine praevia lege poenali* (without a law, no charge is possible).

[17] For these reasons the question of law as formulated by the State must therefore be answered in the negative. In the event the appeal against the judgment

of the court a quo must fail. This brings me to the question of costs. Section 311(2) of the Criminal Procedure Act provides that, in dismissing an appeal of this kind, the court may order the State to pay the costs which the respondent may have incurred in opposing the appeal. The respondent in this matter had a clear interest in the outcome of the appeal. Moreover, I believe that in all the circumstances a costs order which includes the costs of two counsel, is justified.

[18] Accordingly, the appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

R PILLAY
JUDGE OF APPEAL

APPEARANCES:

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