



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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S v Boekhoud
(522/10) [2011] ZASCA 48 (30 March 2011)

Media Statement

Today the Supreme Court of Appeal (SCA) dismissed the application for leave to appeal by the Director of Public Prosecutions, South Africa against a decision of the South Gauteng High Court (Borchers J) in terms of which it had refused an application to reserve certain questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977.

Mr Boekhoud, along with four co-accused, was indicted on a main charge in terms of s 2 of the Prevention of Organised Crime Act 121 of 1998 (POCA) – offences relating to racketeering activities – and 54 other counts including a number of counts of theft, fraud, money laundering and contraventions of the provisions of the Mining Rights Act 20 of 1967. A number of alternative charges were also preferred against the respondent.

At the commencement of the trial Mr Boekhoud tendered a plea in terms of s 106 of the CPA. He averred that the court lacked jurisdiction on all but the main count of racketeering as s 2 of POCA provides that a person who commits any of the acts listed thereunder shall be guilty of the offence whether or not they were committed within the Republic.

Borchers J dealt with counsel for the State's submission that Mr Boekhoud was liable to be convicted on the basis of having formed a common purpose with his co-accused. The court thought that what was being sought was an extension of the extra-territorial jurisdiction and considered that there was no authority for the proposition.

The court below upheld Mr Boekhoud's plea of lack of jurisdiction, and recorded that the State had alleged that all the acts which constituted criminal conduct by Mr Boekhoud were performed by him outside the boundaries of South Africa. The State submitted that Borchers J had erred in this regard.

The State resorted to s 319 of the CPA in terms of which it applied to that court to reserve questions of law for the consideration by the court. It framed eight questions of law to be decided by the court. The first question, the court below held could not be the subject matter of a reserved question as it postulates that the learned judge had held that for a prosecution

of racketeering under POCA to succeed the racketeering act must have occurred with the borders of South Africa. The judge stated that she had made no such finding and the State did not persist in challenging the judge's refusal to reserve the question.

After considering the remaining questions the court below refused the application to reserve certain questions of law. The State applied for leave to appeal to the SCA which application was opposed by Mr Boekhoud.

The SCA held that whenever a question of law is reserved in terms of s 319 certainty must exist in regard to all of the facts to which the questions relate or on which the legal point hinges. So not only must the question be framed in such a way as to accurately express the legal point but there must also be certainty concerning the facts on which the legal point hinges. In its heads of argument the State submitted that it would ask the court below to look at all the evidence and all the acts of the accused as a whole at the end of the case and to then determine whether it had established common purpose. During argument before the SCA the State indicated that several counts would have to be revisited or abandoned as they had been framed with Mr Boekhoud's co-accused in mind. There was confusion in the State's summary of substantial facts, the further particulars supplied by it and heads of argument filed by it. It vacillated by seeking wrongly to have the attribution principle of common purpose applied so as to provide for extra-territorial jurisdiction and submitting that the acts were committed here so that the question of extra-territorial jurisdiction did not arise.

The SCA held that in relation to the points of law sought to be determined by way of reserved questions, the primary question that arose was as follows: to which specific counts did they apply? The other questions appear hereafter: Is common purpose still relied on to 'extend jurisdiction extra-territorially'? In respect on which particular acts was there a common purpose and in respect of which is there reliance placed on the provisions of POCA for the extension of jurisdiction extra-territorially? The last remaining question is which counts are to be revised or redrafted or withdrawn. The State was not precluded from redrafting its indictment and stating clearly the bases of its case against Mr Boekhoud.

The court noted that the State was sometimes inclined in high profile cases to adopt a scattergun approach and to draft numerous charges in an attempt to cover all bases thereby leading to a lack of focus and precision.

For these reasons the court held that there was no prospect of success and that the application for leave to appeal must fail.

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