THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 600/09

OSCAR NZIMANDE Appellant

and

THE STATE Respondent

Neutral citation:	*Nzimande v The State* (600/09) [2010] ZASCA 80 (28 May 2010)
Coram:	MPATI P, PONNAN JA and GRIESEL AJA
Heard:	17 May 2010
Delivered:	28 May 2010
Summary:	Appeal by the State in terms of s 310 of the Criminal Procedure Act 51 of 1977 against the appellant's acquittal on 197 counts of fraud – Whether the magistrate's finding that misrepresentations made by the appellant to the Legal Aid Board were not made intentionally but rather negligently was a finding of fact or of law – Whether as a result of this the State had a right to appeal in terms of the above section.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (R D Claassen and Prinsloo JJ, sitting as court of appeal):

1. The appeal is upheld.

2. The order of the high court is set aside and replaced with the following:

   'The appeal is struck off the roll.'

JUDGMENT

GRIESEL AJA (MPATI P AND PONNAN JA concurring):

[1] The appellant was charged in the regional court for Northern Transvaal, Pretoria with 197 counts of fraud. He was acquitted on all of the charges. The State, contending that the acquittal of the appellant was based on a question of law, accordingly requested the magistrate, in terms of s 310(1) of the Criminal Procedure Act 51 of 1977 ('the Act'), 'to state a case for the consideration of the [high court] having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law'. The State thereupon lodged an appeal

against the acquittals in terms of s 310(2) of the Act. The high court upheld the appeal, set aside the acquittals in respect of some of the charges and substituted in its stead convictions on those charges.[1] It thereupon remitted the matter to the trial court for the imposition of sentence. With leave granted by the high court, the appellant now appeals to this court against that order.

[2] The appellant, a qualified attorney practising in Pinetown, KwaZulu-Natal, received and accepted instructions from the Legal Aid Board ('the LAB') to appear on behalf of accused persons in a large number of criminal cases. The charges against the appellant arose from claims submitted by him to the LAB in respect of professional services rendered by his firm in those cases. The charges fall into seven separate categories, of which only three are relevant to this appeal. These were formulated as follows in the charge sheet:

> Category AA – submitting claims for attending court for a specific period of time where the objective facts indicate that the appellant or relevant member of his firm could not have appeared on the exact times and for the exact duration as indicated on his claims;

[1] The judgment of the high court has been reported: *S v Nzimande* 2007 (2) SACR 391 (T).

Category CC – submitting claims for court attendances by him or the relevant member of his firm in which the days on the claims do not concur with the actual court appearances; and

Category EE – submitting claims where the charge sheets clearly show that the appellant or the relevant members of his firm were either absent or that no legal representative was present on the specific days.

[3] The evidence in the trial court was largely common cause and uncontested. The appellant readily conceded that certain irregularities had been committed with regard to the claims submitted to the LAB and that misrepresentations had been made in the process. His defence was that such misrepresentations had not occurred intentionally; in other words, he claimed to have lacked the requisite intention to defraud. The evidence revealed that the management and administration of the appellant's practice was severely deficient. The thrust of the appellant's defence was that to the extent that he may have made representations to the LAB he had done so negligently rather than intentionally.

[4] The magistrate evaluated the evidence as well as the applicable case law and concluded as follows:

'There were various irregularities. The accused did not apply proper bookkeeping practices, that is clear from the evidence before me. It is clear that wrong dates were given or were attached in certain claims. That is clear. It is clear that the accused had

no control, proper control over his practice and that is for the Law Society to deal with. But whether he had the intention to defraud I am unable to say. All that I can say is that there was gross negligence and the accused is acquitted on all counts.'

The judgment of the high court

[5] In the high court, the parties were agreed – and the court also found – that the case as stated by the magistrate in response to the request by the State was defective and did not comply with the requirements of the Act.[2] The high court decided, nevertheless, to deal with the matter on the basis of the question as formulated by the State, namely whether the facts found proved by the magistrate constituted gross negligence only, or whether they justified a finding of *dolus* in the form of, at least, *dolus eventualis*.[3] (The question whether or not the high court was justified in dealing with the matter on this basis is not an issue that we need to consider in this instance.)

[6] In the high court counsel for the respondent (the present appellant), in resisting the State's appeal, argued that, inasmuch as all the facts were common cause, the magistrate had to determine, by way of inference from the facts, whether those facts constituted the relevant offence. Counsel accordingly submitted that this entailed a factual finding. The high court made short shrift of this argument:

'This argument simply cannot stand. It is only logical that any inference to be drawn (from common-cause facts) is a matter of *legal reasoning* to determine whether such facts constitute (*in casu*) an offence. Surely that can only be done by considering the

---

[2] Judgment paras 8–12.
[3] Para 13.2.

legal requirements of the offence. In the result therefore this issue can only be a *legal question*.'[4]

[7] Counsel for the appellant further submitted that before the question of law could become pertinent, a finding first had to be made as to the appellant's state of mind, ie whether he had no honest belief in the estimations. In this regard, the high court held as follows:

'The answer to this is quite simple. It is common cause that the guidelines of the Legal Aid Board (LAB) do not provide for estimates. It requires exact times of court attendances, at least within 15 minutes. Most of [the appellant's] "estimates" for attending to simple postponements were between one to two or more hours. There is no way in the world that an *estimate* can ever be said to be an exact time. [Counsel for the appellant] urged upon the Court that the State did not prove that his estimates were false, in fact they could have been correct. That is not the question. The respondent knew that the LAB requires exact times. (His knowledge of the LAB's rules is common cause.) Therefore it is only logical that, if he gives an estimate, he knows that it is not accurate, therefore to my mind he *knowingly* makes a false representation. Therefore the question of the State not having proved his state of mind is without merit. The respondent himself gave the answer to that.'[5]

[8] The court pointed out that most of the evidence led by the State was not contested. The real dispute, it held, 'centred not so much on the respondent's acts and deeds as such, but on his *mental state*, ie whether *dolus* in any of its forms was present and proved'.[6] In that regard, the court reasoned as follows:

---

[4] Para 15.
[5] Para 16.
[6] Para 12.

'The final question to be answered is the legal question as to whether the common-cause facts actually constitute the crime of fraud, whether by *dolus directus* or *dolus eventualis*. The magistrate found as a fact that [appellant] was *grossly negligent*. In light of my views set out above regarding the nature of [appellant's] estimates, there is no way that it can be said that [appellant] did not *know* that his representations as to time were inaccurate. Simply as a lawyer he must know that *estimates* and *exact times* are not the same. I have no doubt that, on the facts as found by the magistrate, [appellant] not only knew that the estimates were not correct (ie false), and that the LAB required exact times, but he wilfully persisted in his operations. To my mind his operation constituted wilful deceit by him. The magistrate actually found that he was "almost 100% sure that [appellant] was using the system to his advantage". (I think one should read "abusing".) This clearly illustrates the point. One cannot put it more simply or elegantly than that.'[7]

[9] Based on this reasoning, the high court concluded '. . . that, as a matter of law, the magistrate should have found [appellant] guilty on all those charges where he estimated his times for attending to cases on behalf of the LAB'.[8]

Question of law or fact?

[10] On appeal to this court, counsel for the appellant assailed the reasoning of the high court, submitting that the appeal, being an appeal on a question of fact, should not have been entertained by it. For the reasons that follow, I agree with that submission.

---

[7] Para 17.
[8] Para 18.

[11] In *S v Petro Louise Enterprises (Pty) Ltd and others*[9] (a case referred to in the judgment of the high court, but in a different context)[10] it was argued by counsel for the State that the question whether a given inference was the only reasonable inference to be drawn from certain facts, was a question of law – essentially the same argument that was addressed to the high court in this instance. The State's argument was rejected by the court (per Botha J, Van Dyk AJ concurring) in the following passage:

'I am unable to accept counsel's widely-based and generalised proposition that in all cases the question whether a particular inference is the only reasonable possible inference to be drawn from a given set of facts is a question of law. To accede to the proposition in such general terms would, I consider, open the door to the possibility of large numbers of appeals being brought under sec. 104 of [the Magistrates' Courts] Act 32 of 1944, contrary to the limited scope of that section which I conceive the Legislature contemplated. One example of those possibilities that were canvassed during the argument will suffice. Suppose that an accused is charged with an offence of which a specific intent is an element, e.g. assault with the intent to do grievous bodily harm. On the evidence, the magistrate finds that such intent is not the only reasonable inference to be drawn from the facts, and consequently he convicts the accused of common assault. I cannot for one moment imagine that the Attorney-General will have a right of appeal upon the footing that an intent to do grievous bodily harm was the only reasonable inference to be drawn from the facts.'[11]

---

[9] 1978 (1) SA 271 (T).
[10] In para 10 of the judgment.
[11] At 280B–E.

[12] In *Magmoed v Janse van Rensburg & others*[12] Corbett CJ (writing for a unanimous court) quoted the above passage from *Petro Louise Enterprises* and expressed his 'full and respectful agreement' with the analysis.[13] In the course of his judgment, the learned Chief Justice also said the following:

'[I]n my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.'[14]

And further:

'[T]he fact that in a particular case the prosecution relies upon inference to prove the agreement to accomplish a common aim does not make the question as to whether the prosecution succeeded in establishing this inference beyond a reasonable doubt one of law. As was often pointed out in the field of income tax appeals on a question of law, facts may be classified as primary, ie those facts which are directly established by the evidence, and secondary, ie those facts which are established by way of inference from the primary facts . . . . I have no doubt that an inference drawn from proven facts that the accused had by agreement formed a common purpose which embraced, say, the possibility of an unlawful killing is an inference of fact, and not one of law. It is a secondary fact. *It is seldom in a case of murder that there is direct evidence of the perpetrator's actual state of mind. Consequently, whether the unlawful killing was accompanied by* dolus *in one of its forms on his part is normally a matter of inference from the primary facts. Clearly this is an inference of fact and any question as to whether the trial Court correctly decided this issue is a question of fact.* I can see no difference between this and the issue, also to be determined by inference, as to whether a number of accused formed a common

---

[12] 1993 (1) SA 777 (A); 1993 (1) SACR 67 (A) – the infamous *Trojan horse* case.
[13] At 809A (SA); 95*a* (SACR).
[14] At 808A–B (SA); 94*c*–*d* (SACR).

purpose which embraced both an unlawful killing and *dolus* in one of its forms. It is true that the legal consequences of a common purpose may be said to fall within the sphere of a rule of law, but in a case such as this the rule itself and its scope are not in issue. What is in issue is the factual foundation for the application of the rule. That is a question of fact.'[15]
(My emphasis.)

[13] The principles so lucidly articulated in *Petro Louise Enterprises* and in *Magmoed* have subsequently received the express imprimatur of the Constitutional Court in *S v Basson*[16] and are dispositive of the present appeal. The question for decision in the present case was whether, on the facts found proven, the State had established that the appellant had made the misrepresentations with the necessary intention (*dolus*); in other words, to use the terminology of Corbett CJ in *Magmoed*, the question was whether the evidence established one of the 'ingredients' of fraud where there was no dispute as to what those ingredients were. This required an inference to be drawn from the primary facts already found. Based on the passages quoted above, it is clear that the inference so drawn is a secondary fact; it is *not* a question of law. Thus, the true complaint of the State was not that the magistrate had committed any error of law, but that he had drawn an incorrect inference from the facts. Judging from the evidence as well as the judgment of the high court, this complaint may well be valid – an issue on which we do not have to make a finding. Suffice it to say that such error (if it was one) was one of fact, which did not confer upon the State the right to appeal against the

[15] At 810H–811D (SA); 96*f–i* (SACR) (other case references omitted).
[16] 2005 (1) SA 171 (CC) paras 46–49.

acquittal of the appellant.[17] It follows that the high court had no jurisdiction to entertain the appeal, which fell to be struck off the roll.

Order

[14] In the result, I make the following order:

1. The appeal is upheld.

2. The order of the high court is set aside and replaced with the following:
'The appeal is struck off the roll.'

B M GRIESEL
Acting Judge of Appeal

[17] Cf *S v Coetzee* 1977 (4) SA 539 (A) at 544H–545A.

APPEARANCES:

FOR APPELLANT:	M R Hellens SC
Instructed by:	Johan van Zyl Attorneys, Pretoria Symington & De Kok, Bloemfontein
FOR RESPONDENT:	J M Ferreira L S Mabitle
Instructed by:	The Director of Public Prosecutions, Pretoria and Bloemfontein