THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No. 248/11

THE STATE **Appellant**

and

ARTHUR TSHEPO MEJE **First Respondent**

EDWARD MQAHAYI **Second Respondent**

Neutral citation: *S v Meje* (248/11) [2011] ZASCA 127 (13 September 2011)
Coram: Mthiyane, Maya, Shongwe, Seriti JJA and Plasket AJA
Heard: 2 September 2011
Delivered: 13 September 2011

Summary: Criminal Procedure – territorial jurisdiction of court to be determined at date of commencement of proceedings – s 110 of Criminal Procedure Act 51 of 1977 vests territorial jurisdiction in a court in the absence of objection to jurisdiction.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Engelbrecht AJ and Vorster AJ sitting as a court of appeal):

(1) The appeal is upheld and the order of the court below is set aside.
(2) The respondents' convictions and sentences are re-instated.
(3) The matter is remitted to the court below for the appeal to proceed on the merits.

JUDGMENT

PLASKET AJA (MTHIYANE, MAYA, SHONGWE and SERITI JJA concurring)

[1] The respondents were convicted, in a regional court sitting in Pretoria, of five and 14 counts of fraud respectively. The first respondent was sentenced to seven years' imprisonment of which two years were conditionally suspended and the second respondent was sentenced to eight years' imprisonment of which two years were conditionally suspended. They appealed against both their convictions and sentences and when their appeals were heard in the North Gauteng High Court (Pretoria), the court (Engelbrecht AJ and Vorster AJ) raised the issue of whether the trial court had had jurisdiction to try the respondents. They duly found that it did not and set aside the respondents' convictions and sentences without dealing with the merits of the appeal.

[2] The sole issue in this appeal brought by the State[1] in terms of s 311 of the Criminal Procedure Act 51 of 1977 is whether the trial court had jurisdiction to try the respondents. It is clearly a question of law. The issue arose as a result of the restructuring of the regional court in the province of Gauteng after the date of the commission of the offences of which the respondents had been convicted but before the date on which they first appeared in the trial court.

[1] There was no appearance by or on behalf of the respondents although they were aware of the appeal and the date on which it was argued.

[3] According to the charge sheet the respondents had committed various acts of fraud during 1998 and 1999 'at or near Kagiso in the Regional Division of Gauteng'. They first appeared on 24 June 2004 in the regional court for that division sitting in Pretoria and were, as stated above, subsequently tried and sentenced in that court.

[4] At the time of the commission of the offences the Southern Transvaal Regional Division had territorial jurisdiction in respect of offences committed in Kagiso (in the magisterial district of Krugersdorp).[2] Later, however, the Regional Divisions of the Southern Transvaal and the Northern Transvaal were amalgamated into one regional division called the Regional Division of Gauteng with seats at 23 places including Pretoria. This occurred with effect from 1 April 2004.[3]

[5] The court below set aside the convictions and sentences of the respondents on two bases. The first was that as the offences were committed within the territorial jurisdiction of the erstwhile Regional Division of the Southern Transvaal, a court sitting in Pretoria, within the territorial jurisdiction of the erstwhile Regional Division of the Northern Transvaal, did not have jurisdiction to try the respondents. Secondly, it held that s 110 of the Criminal Procedure Act could not avail the State because it did not 'create substantive jurisdiction'. It appears to me that the logical conclusion of the reasoning of the court below is that no court could have tried the respondents as the only court that had jurisdiction had ceased to exist when the proceedings commenced.

[6] In my view – and for the reasons that follow – the court below erred in respect of both of the issues on which it relied.

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[2] Government Notices 641 and 642, promulgated in *Government Gazette* 7515 of 27 March 1981 created, out of the Transvaal Regional Division, the Regional Divisions of the Northern Transvaal and the Southern Transvaal respectively.
[3] Government Notice 219, *Government Gazette* 26091 of 27 February 2004.

[7] In the first instance, the court below found that the jurisdiction of a court to try an accused must be determined at the time the offence with which the accused is charged was committed. That is contrary to what this court found the position to be in *S v Mamase & another*.[4] Snyders JA held in that case that the 'jurisdiction of a court is determined at the stage that proceedings are commenced' and that, in terms of s 76(1) of the Criminal Procedure Act, proceedings commence when, as in this case in which the respondents were not summoned to court but were arrested, the charge sheet is lodged with the clerk of the court.[5]

[8] The respondents first appeared in court on 24 June 2004. They were first provided with the charge sheet on a date between their appearances on 5 October 2004 and 30 November 2004 because, on the latter date, it is recorded that they had confirmed that they had received both the docket and the charge sheet. While there is no record of when the charge sheet was lodged with the clerk of the court, it can be accepted that the earliest date on which this could have occurred was 24 June 2004. Consequently, the proceedings against the respondents commenced, at the earliest, on 24 June 2004. As at that date, one regional division, the Regional Division of Gauteng which had came into existence on 1 April 2004, had territorial jurisdiction over the entire province of Gauteng. As Kagiso falls within the province of Gauteng, any court of that Regional Division, including one sitting in Pretoria, had jurisdiction to try the respondents on charges of fraud.

[9] In the second instance, the court below erred in its application of s 110 of the Criminal Procedure Act. This section provides:

'(1) Where an accused does not plead that the court has no jurisdiction and it at any stage-

(a) after the accused has pleaded a plea of guilty or of not guilty; or

(b) where the accused has pleaded any other plea and the court has determined such plea against the accused,

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[4] *S v Mamase & another* 2010 (1) SACR 121 (SCA).
[5] Para 12.

appears that the court in question does not have jurisdiction, the court shall for the purposes of this Act be deemed to have jurisdiction in respect of the offence in question.

(2) Where an accused pleads that the court in question has no jurisdiction and the plea is upheld, the court shall adjourn the case to the court having jurisdiction.'

[10] In *S v Pale & 'n ander*[6] this court set out the purpose and effect of s 110 and, in so doing, stated in terms that it was intended precisely for cases such as the present (on the court below's assumption that the trial court had no territorial jurisdiction). In that case Viviers JA held:[7]

'Artikel 110 is hoofsaaklik bedoel om voorsiening te maak vir die geval waar 'n bepaalde hof wel jurisdiksie het om die misdaad waarvan die beskuldigde aangekla word, te bereg, maar die verkeerde hof is vanweë een of ander jurisdiksionele feit *soos bv dat die misdaad buite die hof se regsgebied gepleeg is.* Die artikel skep nie substantiewe jurisdiksie nie en kan nie aan 'n landdros 'n groter jurisdiksie verleen as wat hy regtens het nie. Dit verleen bv nie regsbevoegdheid aan 'n landdros om 'n saak te verhoor wat hy ingevolge art 89 van die Wet op Landdroshowe nie mag verhoor nie, al betwis 'n beskuldigde nie die regsbevoegdheid van die hof nie. . . . So ook kan art 110 nie jurisdiksie verleen aan 'n hof om 'n misdaad wat in 'n ander land gepleeg is, te bereg nie. *Artikel 110 verleen wel territoriale jurisdiksie aan 'n hof wat dit nie gehad het nie, suiwer op grond van die beskuldigde se stilswyende aanvaarding daarvan, deurdat hy die verhoor laat voortgaan sonder om die punt te opper wanneer hy pleit*'. (Emphasis added)

[11] Regrettably, it appears that the distinction between the concepts of substantive jurisdiction – the jurisdiction, in this case, to try accused charged with fraud – and territorial jurisdiction eluded the court below. Section 110 does not confer substantive jurisdiction on a court but, in the absence of a plea of absence of jurisdiction,[8] it may acquire territorial jurisdiction it otherwise does not have.

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[6] *S v Pale & 'n ander* 1995 (1) SACR 595 (A).

[7] At 598d-h. (References omitted.) See too Etienne Du Toit, Frederick J De Jager, Andrew Paizes, Andrew St Quintin Skeen and Steph van der Merwe *Commentary on the Criminal Procedure Act* 16-1 (service issue 45, 2010).

[8] Criminal Procedure Act, s 106(1)(f).

[12] As a result of the above, I am of the view that the appeal must succeed. Section 311(1)(a) of the Criminal Procedure Act empowers this court, when it upholds an appeal by the State from a high court sitting as a court of appeal, to 're-instate the conviction, sentence or order of the lower court appealed from, either in its original form or in such a modified form as the said Appellate Division may consider desirable'. The convictions and sentences of the respondents must obviously be re-instated in their original form but their appeals have not been heard on the merits. While s 311 does not explicitly provide that this court may remit a matter to the appeal court of first instance, it was held in *Attorney-General (Transvaal) v Steenkamp*[9] (dealing with a predecessor of s 311) that in circumstances such as these the matter could be remitted as 'it could hardly have been the intention of the Legislature that, where the order of this Court does not finally dispose of the issues raised in the first Court of Appeal, some of those issues must … be left hanging in the air'.

[13] The following order is made.

(1) The appeal is upheld and the order of the court below is set aside.

(2) The respondents' convictions and sentences are re-instated.

(3) The matter is remitted to the court below for the appeal to proceed on the merits.

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C PLASKET

Acting Judge of Appeal

[9] *Attorney-General (Transvaal) v Steenkamp* 1954 (1) SA 351 (A) at 357F-G.

APPEARANCES

APPELLANT:	J M Ferreira (with him K Malapane)
	Office of the Director of Public Prosecutions, Pretoria
RESPONDENTS:	No appearance