IN THE HIGH COURT OF SOUTH AFRICA

[EASTERN CAPE DIVISION: MAKHANDA]

CASE NO. CA&R139/2022

In the matter between:

SAVE OUR SOULS SECURITY SERVICES (PTY) LTD	First Appellant
MASIBULELE DONALD STURU PASIYA	Second Appellant
and	
THE STATE	Respondent

JUDGMENT

JOLWANA J:

Introduction

[1] The appellants were charged with 130 counts relating to the alleged contraventions of certain pieces of tax legislation. They were acquitted on the main count of theft but were convicted on the alternative counts. Appellant no.1's (SOS)'s sentence was postponed for five years in terms of *Section 297(1)(a)(ii)* of the *Criminal*

Procedure Act 51 of 1977 (the *CPA*). The second appellant (Mr Pasiya) was sentenced to an effective term of five years direct imprisonment. The appeal is against both conviction and sentence.

The Charges

[2] The charges on which SOS and Mr Pasiya were convicted and sentenced as aforesaid had as their *fons et origo* in alleged contraventions of certain tax laws, more particularly, their alleged contravention of the *Value Added Tax 59 of 1991* for their failure to pay Value Added Tax (VAT) in respect of counts 1 to 33 to the *South Africa Revenue Services (SARS).* Counts 34 to 51 concerned the alleged contraventions of certain provisions of the *Income Tax Act 58 of 1962* it being alleged that whereas the two appellants were liable to pay remuneration to the employees of SOS, they failed to deduct or withhold from the said remuneration employees' tax commonly known as *Pay As You Earn (PAYE)* and pay it to SARS. Counts 52 to 103 concerned the alleged contravention of certain provisions of the *Skills Development Act 97 of 1998.* It was alleged that the appellants failed to pay certain amounts being the *Skills Development Levies (SDL)* to SARS. In respect of counts 104 to 130 the appellants were charged with the alleged contraventions of the *Unemployment Insurance Contributions Act 4 of 2002*. It was alleged that they failed to pay certain amounts in respect of the *Unemployment Insurance Fund* contributions (the *UIF*) to SARS. The details in respect of each count being the dates, the tax periods and the amount involved in respect of each count were tabulated and individualised in schedules attached to the charge sheet.

[3] The prosecutor explained before the appellants were asked to plead that it was basically being alleged that they failed to make the said payments although the relevant tax returns were submitted. On the alternative charges, the prosecutor explained that it was alleged that the because the appellants had failed to pay monies to SARS, those monies were therefore stolen and were the property of SARS. However, as the prosecutor read the individual counts to the appellants, he

on several occasions, explained that the main counts were theft of monies and the alternative charges were the contraventions of the specific provisions of the various pieces of taxation legislation referred to earlier. It was also explained that Mr Pasiya was being charged as an accomplice to the crimes committed by SOS. It was specifically alleged that he unlawfully and intentionally engaged in conduct whereby he furthered the commission of the said crimes by SOS by facilitating, assisting, or encouraging the commission of the said crimes, giving advice concerning their commission or making it possible for SOS to commit the said crimes.

The plea and plea explanation

[4] The appellants tendered a plea of not guilty. A very detailed statement in terms of *Section 115 of the CPA* (the plea explanation) was read into the record. I consider it necessary to highlight some of the essential features of the said plea explanation. In essence, it was contended that Mr Pasiya was, at all times relevant to the charge sheet, a co-director of SOS together with the erstwhile accused no.3 (Mr Mfingwana). Mr Pasiya was responsible for managing the affairs of SOS. In that regard he employed financial managers to assist him with matters relating to the financial affairs of SOS including its tax affairs. It was contended that failure to pay monies in respect of VAT, PAYE, SDL or UIF constituted a debt owed to SARS and does not constitute theft. It was denied that Mr Pasiya had the requisite intention to appropriate any amounts that may be due to SARS. It was denied, in any event, that SOS was indebted to SARS in the amounts mentioned in the charge sheet and that such amounts were unreliable and flawed.

[5] In respect of VAT, it was contended that any liability would have been due to insufficient funds to pay VAT for the relevant periods as in many instances the revenue generated by SOS was not even sufficient to cover its daily operational expenses. It was further contended that the alleged amounts were not conciliable with the official notice issued by SARS known as VAT 3 on 15 February 2006 which

was three months before the charges were preferred against the appellants. The said VAT 3 notice was attached as annexure A to the plea explanation. It was contended that the VAT 3 notice was an official document issued by SARS informing SOS about the extent of its indebtedness to it and the periods to which the debt related. The VAT 3 notice had not been amended or withdrawn by SARS. The comparison between the VAT 3 notice and the charge sheet revealed irreconcilable and material discrepancies in the amounts and tax periods.

[6] Furthermore, in respect of counts 1 to 11 which related to VAT periods between 03/1998 and 11/2000 the VAT 3 notice reflected that the VAT affairs of SOS were in order. There were also discrepancies between the amounts in the charge sheet and the VAT 3 notice and in some instances the returns in respect of counts 12, 13, 14,16, 17, 19, 21, 22, 25, 33, 34, 26, 27, 28. It was therefore contended that the amounts said to be owing needed to be evaluated in light of the unreliable data concerning the indebtedness of SOS.

[7] In respect of the employees' tax or PAYE charges for the alleged *Income Tax Act* contraventions which were about the failure to deduct or withhold the said amounts reflected in the charge sheet and pay them to SARS, it was contended that SARS issued an EMP3(u) notice to SOS on 01 February 2006 which was a notice of outstanding tax returns and payments in respect of employees' tax. The copy of the said notice was attached as annexure B to the plea explanation. That notice had not been withdrawn. There were material differences between the information in the charge sheet compared to the information in the EMP3 (u) notice. In terms of the EMP3 (u) notice, SOS was required to submit returns and make payments in respect of the periods starting in May 2002 as at February 2006. However, SOS was being charged for the alleged contravention of *paragraph 30 of schedule 4 of the Income Tax Act* for the period 01/99 to March 2002. During that period SARS' own version showed that there was no outstanding amount due to it if regard is had to the EMP3 (u) notice. Counts 34 to 40 fell outside the period in terms of

which returns and payments were due. According to the EMP3 (u) notice the periods in which any amounts would have been due would start from September 2003. In respect of counts 41 and 42 there were discrepancies in respect of the amounts due for October 2003 and September 2003 between the charge sheet and the EMP3 (u) notice.

The evidence of the state

[8] The State called its first witness, Ms Pillay. Her evidence was that she was a team leader for criminal investigations and prosecution section of SARS having been in the employ of SARS for 15 years. Her job was to investigate various VAT vendors and taxpayers who were suspected of committing offences in terms of the *VAT Act* and the *Income Tax Act*. She was the investigating officer of this matter. She received a report from their collections division that SOS submitted VAT 201 and EMP 201 returns that were incomplete. The report indicated that the VAT returns and the EMP 201 returns were submitted without payment which would have incorporated PAYE, UIF and SDL. In the process of the investigation, her branch manager, Ms Perks, interviewed Mr Pasiya in her presence.

[9] The purpose of the interview was to advise Mr Pasiya that SARS had concluded the investigation against SOS and its directors in respect of the VAT 201 and EMP 201 returns submitted to SARS without payment. As a registered taxpayer for VAT and PAYE, SOS had an obligation to make the full payment which should accompany the returns when they were submitted to SARS. There were, therefore, offences in terms of *the VAT Act, Income TAX Act*, the *UIF Act* and the *SDL Act.* The interview was also intended to provide Mr Pasiya an opportunity to explain how it occurred that tax returns were submitted without payment. Mr Pasiya said that he did not want to discuss the matter without legal representation as he was a lay person. He also requested a letter setting out the charges. Those documents were provided to an employee of SOS called Francis together with minutes of the meeting and a letter indicating the charges Mr Pasiya would face.

[10] Ms Pillay explained that a person or entity registered for VAT has an obligation, as an agent of SARS, to calculate VAT owing on a monthly, bi-monthly, or six-monthly basis. In the case of SOS it was on a bi-monthly basis. It is a self-assessment tax. This meant that the taxpayer collected the VAT paid directly to him and was required to pay it to SARS. It is the vendor who works out its tax liability to SARS and pays it immediately with the VAT returns. The PAYE is also a self-assessment tax in which the owner of the business would calculate the PAYE that is owed, the UIF and the SDL and pay it over to SARS. The SDL was also collected on an agency basis at one percent of an employee's salary. The UIF is two percent of the wages. Returns were submitted for SOS and most of them were signed by Mr Pasiya.

[11] Ms Pillay explained that she had computer-printouts for VAT returns that were submitted. SARS had a policy of destroying tax returns that were older than 5 years and as a result, the original returns could not be located. The original returns that were submitted were captured on the SARS data base. Some of the returns were completed and submitted by Mr Pasiya but others were completed and submitted by an administrator in the employ of SOS. Counsel for Mr Pasiya placed on record that as far as the original returns were concerned, they could be handed up. However, he had problems with the submission of the computer- printouts of the returns without the originals. Accordingly, these could be submitted provisionally on the basis that they were going to be proved through relevant expert evidence confirming that they came from the SARS system. The prosecutor indicated that in respect of counts 1 to 18 there were computer-printouts. They were therefore provisionally admitted and marked exhibit C1-C18. The returns from count 19 to count 33 were originals and were marked exhibit D1 to D15 being original VAT 201 returns.

[12] The case was then rolled over to the following day, the 19 March 2013 and the court record reflects that the trial indeed resumed on that day. It also indicates a faulty recording resulting in the proceedings of the 19 March 2013 not being part of the record. Thereafter the proceedings resumed on 11 November 2013 with the prosecutor indicating that the matter was postponed for cross-examination. This means that a large portion of Ms Pillay's evidence-in-chief is not part of the appeal record. I deal with the issue of the incompleteness of the trial record later in this judgment.

[13] Under cross-examination, the statement made by Ms Pillay in which she recommended that criminal charges be preferred against the appellants was handed up and marked exhibit E. Ms Pillay testified that as an investigator she had recommended possible charges of theft in her statement. She confirmed that her role was that of investigating, she was not involved in raising the assessments, in the collection of the outstanding debts or in how the debt against SOS was pursued as she did not conduct the collections. Her functions as an investigator would depend on the information gathered by various departments such as the collections, assessments, and the audit departments. She explained that Ms Perks, whom she had mentioned during her evidence-in-chief, no longer worked for SARS. She attended the meetings Ms Perks had with Mr Pasiya, in particular, the meeting of 5 April 2005 to which she had invited Mr Pasiya. He was not provided with an agenda regarding what the meeting entailed. In that meeting it was herself, Ms Perks and Ms Wood who was the debt collector. Mr Pasiya was told that there were criminal investigations that were being pursued against SOS and himself and in that context he indicated his desire to seek legal advice. In respect of counts 1 to 8 she testified that she could not confirm that the amounts emanated from tax returns that were submitted to SARS.

[14] Ms Pillay confirmed that VAT is declared on the invoices issued by a vendor. SOS would issue an invoice to a supplier. SOS would issue invoices to its clients during

a particular period and such invoices would be declared. SOS would collect the invoices which it would claim as input tax. Calculations, that is output VAT minus input VAT gives the self-assessment liability for that period. SOS would then be required to pay the balance as VAT for that month. She confirmed that vendors that are registered on an invoice basis do issue invoices to their clients. When they have not been paid sometimes, they are still required to pay VAT. Often vendors would experience cash flow problems and those vendors would end up having a debt to SARS. The collections department would require arrangements to be made for the payment of the debt. She refused to comment on the proposition put to her that not in all cases is it that a vendor refused to pay when they could. She confirmed that SOS was registered on an invoice basis.

[15] It was put to her that during certain periods that form part of the charge sheet, SOS paid the taxes due. She said that she did not know if there were payments made by SOS during the period of investigation. It was further put to her that an accounting exercise should have to be undertaken to determine whether a taxpayer refused to pay a particular amount or whether the taxpayer was unable to pay before a conclusion of a refusal to pay was made. She confirmed that an accounting analysis would have to be conducted to make such a determination. She confirmed that she did not do an analysis. It was further put to Ms Pillay that, such an accounting exercise would require the person who is doing the analysis to check the bank statements of the entity over the period when the taxes were due. She confirmed that the debt collection division would be required do that.

[16] Ms Pillay confirmed that a reference to bank statements to determine the liquidity of the business and determining whether there is ability to pay or not could be done but she would not confirm if that exercise was done in this matter. She explained that in respect of PAYE the employer deducts a certain portion from an employee's salary and pays it over as PAYE, UIF and SDL to SARS. This is done every month. She confirmed that if there are sufficient funds to pay all the salaries of all the

employees per month, calculations would be done for PAYE, SDL and UIF. It was put to her that the returns showed very little PAYE and higher SDL and UIF because most security guards who were employees of the business fell below the PAYE threshold. She testified that she was not able to comment on that as she did not scrutinize the earning capacity in the industry or that of SOS. It was further put to her that even in respect of PAYE the same exercise, as with the VAT analysis referred to earlier, would need to be undertaken to determine if the entity had funds from which it could pay the salaries and make deductions.

[17] It was put to her that the entity sometimes had to borrow money to finance the salaries of its employees to which she glibly responded that the entity should obtain an overdraft from the bank. It was put to Ms Pillay that SOS had cash flow problems which she could not confirm or deny this as she did not do the analysis. It was put to her that financial statements would show that SOS ran at a loss for a long period of time. Finally, it was put to her that the failure to pay either VAT, PAYE, SDL or UIF was largely due to cash flow difficulties to which she responded that she did not do a cash flow analysis as she did not feel it was a necessary part of the investigation.

[18] The next witness for the State was Gail Dawn Wood (Ms Wood). Her evidence was that she was employed by SARS for 34 years at the time of her testimony and a team member in debt management. Her job was to recover outstanding debt from a taxpayer. The taxpayer would submit tax returns. They would receive a debt analysis book from their head office. A case would be allocated to a team member who would start the recovery process. She would first acquaint herself with the background of the tax type of the entity concerned and ascertain if all outstanding returns on all tax types have been submitted. Thereafter, a brief investigation into assets and liabilities of the taxpayer would follow before the taxpayer was contacted. In this case she contacted Mr Pasiya as he was the public officer of SOS.

[19] They have data capturers who load information into their system which is obtained from the tax returns that have been submitted by the taxpayers. Sometimes the person in debt management would pick up an error or incorrect spelling on the captured returns which is then verified through the original tax returns. There could be a case where an incorrect amount was captured by the data capturer resulting in an inconsistency between the original return and the information in the system. After a period of three years, a tax return becomes prescribed and therefore unavailable. In those situations, information is extracted from the system by obtaining a computer-printout. They would verify the correctness of the information on the computer-printout if an objection from the taxpayer is received and such objection must be lodged within three years whereafter the amounts on the system are deemed to be correct.

[20] In dealing with this case, she mostly spoke to Mr Pasiya but sometimes would leave a message with a person responsible for tax returns in Mr Pasiya's absence. She contacted Mr Pasiya and demanded payment and he requested to enter into an arrangement to settle the debt between 2003 and 2006. On each of the numerous occasions, Mr Pasiya failed to adhere to the arrangements. He had agreed that an amount would be paid towards the settlement of the debt. She dealt with him or SOS's in-house bookkeeper and administrator. They had numerous meetings with Mr Pasiya at the premises of SOS in East London. He was usually present with his bookkeeper except for one occasion when Mr Pasiya did not attend. The meetings were held to encourage payment of the outstanding debts. The criminal investigator, Ms Pillay, was also present when SARS instituted the criminal case. Mr Pasiya would request to pay a lower instalment. At one stage he offered to pay R50 000.00 per month which he then increased to R150 000.00 but SARS rejected these offers because they were too low based on the debt owing and the financial position of the company. Mr Pasiya paid erratically, for

instance, at one stage he paid R150 000.00 for three months and then reneged on the agreement.

[21] Ms Wood was referred to exhibit C1 to C18 which were computer-printouts of the returns that had been submitted. She indicated that those documents were retrieved either by herself or Ms Pillay. She explained that the documents related to VAT which is a self-assessed tax. The original returns were destroyed after the three-year period elapsed as after three years the taxpayer may no longer object. The prosecutor indicated to the court that in respect of the SDL tax returns and the UIF, the original tax returns were available, but the relevant investigator was on leave and that those original returns would be submitted later. Accordingly, copies thereof were provisionally accepted as Exhibit F. Thereafter the State concluded Ms Wood's evidence-in-chief.

[22] Under cross-examination, Ms Wood confirmed that she was still in the debt management section of SARS and also did accounts management which is the reconciliation and correction of accounts. She is a specialist team member in debt management. She confirmed that besides debt collection, which is where she worked, there is also an investigations department, where Ms Pillay was positioned, and their functions are different. She confirmed that there is also the audit department, an assessing department and portfolio maintenance department whose functions are also different to hers. There is also return maintenance which is also different from the portfolio maintenance and data capturers would fall under portfolio and return maintenance. Data capturers would capture data as and when they receive the returns. She only dealt with the information as captured on the system on the assumption that the information was correctly captured. She had heard about capturing errors. Unless somebody showed that no mistakes were made during capturing, she could not vouch for the correctness of the information captured.

[23] She testified that she started interacting with Mr Pasiya around 2003 and held meetings with him. However, Mr Pasiya could not attend the meeting on 26 November 2003. There was a meeting on 3 December 2003 but Mr Pasiya excused himself for that meeting and said that discussions could be held with a company representative named Zuki. Mr Mfingwana was in Mthatha. Zuki was the administrator and Mr Pasiya had confirmed that she was responsible for completing and filing tax returns with SARS. A certain Mr Phakathi was the accountant. Ms Wood testified that she kept minutes of the meetings. There was a meeting on 24 November 2003 which was attended by Mr le Roux who was the auditor from Port Elizabeth, Japie Shawnna and Kwesi Kwishi Babawa. Mr Pasiya sent apologies for that meeting. A further meeting took place on 3 December 2003 as agreed on 24 November 2003 with the accountant and Mr Pasiya. On 25 November 2003 Mr Pasiya and Zuki were present. On 3 December 2003 she was to meet Zuki and collect the returns but an extension was granted until the 10 December 2003 to prepare the returns as they were not completed.

[24] The next meeting on 22 January 2004 was attended by Mr Pasiya and Zuki. Thereafter the next meeting was on 15 June 2004. Mr Pasiya called a meeting for the 27 July 2004 which was attended by him and one Bob. Another meeting was convened on 5 August 2004 which was also attended by Mr Pasiya and Bob. In 2005 meetings were arranged with the audit section. She was asked to attend to any tax or assessment issue that may arise. However, she did not have minutes of those meetings. On 11 October 2006 there was a final meeting that was called to try and facilitate the settlement of SOS's debts. That meeting was attended by a Mr Davidson who was an audit manager from Port Elizabeth, Mr Tshokoro who was an ADR consultant from their head office and Gertie Pauls who was her colleague. Mr Pasiya and his attorney failed to attend.

[25] I pause now to comment briefly on the state of the record. The record of the proceedings of the trial indicates that on 03 April 2004 the trial adjourned at 13h51

with the matter being postponed. It is not clear to which date. However, the record ends on 03 April 2014 at page 190. When it resumes on 10 July 2014 it resumes at page 97. It is unclear if there were trial proceedings that took place and were recorded from page 1 to page 96. This uncertainty is most concerning.

[26] Ms Wood further testified that she did not have the minutes of the meeting of 05 April 2005. She had minutes from November 2003 and April 2004. She said that on 02 April 2004 Mr Pasiya requested a tax clearance certificate by means of a letter but was advised that a tax clearance certificate would not be issued but there was no meeting. She never met Mr Pasiya on 5 April 2004. As far as 5 April 2005 was concerned, she made a mistake when she mentioned that date. She meant 5 April 2004. She went on to say that her letter dated 5 April 2005 to Mr Pasiya should be in Ms Pillay's file. She was handed a copy of her letter dated 5 April 2004 which dealt with the issue of the tax clearance which she signed despite her evidence that she did not deal with tax clearances.

[27] She testified that the decision to decline issuing SOS a tax clearance certificate was made by herself and her senior manager, Mr Slabbert or Mrs van Huysteen. The letter dated 5 April 2005 was handed up as an exhibit and marked G. She testified that her final answer was that there was no meeting on 5 April 2005. If it had taken place, she would have had a copy of the record of it in her file. She further explained that there were some records of her dealings with Mr Pasiya which she did not bring to court. When minutes of the meeting of the 5 April 2005 were given to her, she again changed her evidence to acknowledge that such a meeting which she attended with criminal investigations did take place. It was Mr Pasiya, the branch manager of criminal investigations Jenny Perks, herself and the investigator Ms Pillay who attended it. She signed the minutes on 07 April 2005 but they were drafted by Ms Pillay. The minutes of that meeting were handed in and marked exhibit H.

[28] As part of the debt collection process, at some stage she requested bank statements of SOS and its financial statements. Based thereon, she would have known who the debtors of SOS were. She confirmed that SARS has the power to appoint any person as a third party to collect any money due to SOS and to pay the taxes of SOS. She confirmed that there was nothing that prevented her from appointing the conveyancers who transferred SOS's property which had been attached and sold at the instance of its preferent creditor, Business Partners. She confirmed that if she had done so SARS would have obtained the proceeds of sale of SOS's property in which they were trading. She confirmed that SOS did declare an amount of R1 241 507.00 which was owed to SOS by third parties to SARS, but she pointed out that the declaration was incomplete as it had a lot of errors. The declaration was handed up as an exhibit I. They disregarded the declaration of debtors because there was no proof and the declaration was not properly completed. She however, confirmed that the appointment of the relevant third party to collect SOS's debt could have been used by SARS to recover the money owed to SOS.

[29] Ms Wood testified that the *Asset Forfeiture Unit (*AFU*)* investigated SOS and attached Mr Pasiya's assets including shares. Various other items were attached and there was money held in the trust account of the AFU. She could not dispute that the only reason AFU attached Mr Pasiya's assets was because of the same charges that the criminal case related to. She confirmed that she knew that Mr Pasiya and his wife's assets were attached by AFU. It was put to her that the assets of Mr Pasiya's co-director in SOS were not attached. It was also put to her that the reason why the debt collection process was not followed was to frustrate Mr Pasiya by attaching his personal assets. She responded that SOS owed SARS and SARS was entitled to exercise all their powers to recover the debt. She confirmed that during her discussions with Mr Pasiya, he always expressed his willingness to pay and offered to make certain payments.

[30] The financial statements of SOS for 1999, 2000, 2002, 2003 and 2004 were handed up and marked as exhibits J, K, L, M and N. After being taken through those financial statements, Ms Wood confirmed that the directors of SOS were not paid huge amounts. She could not dispute that those financial statements were submitted to SARS together with the returns as tax returns were received by a different department to hers. She confirmed that other than the amounts disclosed as directors' or members' fees in the financial statements of SOS, she was aware that Mr Pasiya was an executive member of the South African Football Association and drawing a salary. They were aware of Mr Pasiya's other sources of income to meet his lifestyle. It was put to Ms Wood that some of the charges against Mr Pasiya were theft charges in respect of VAT, PAYE, UIF and SDL amounts that were not paid to SARS and she confirmed that she was aware of that. The prosecutor then put on record that the State would submit that some of the theft charges were not substantiated but that some of them would be substantiated by the evidence.

[31] In re-examination, Ms Wood's evidence regarding the original tax returns was that some of the SARS employees who captured the returns in this case were no longer working for SARS or were deceased. They were, however, able to tell from the system exactly who dealt with the returns in terms of capturing them on the system. She further confirmed that SARS kept the original tax returns for five years but the ones captured in the computer system remain and are not deleted. For the period of May 1998 through to July 2002 there were five SARS employees that were involved. Four of those five employees were no longer in the employ of SARS. In respect of most of the returns that were captured, the relevant employee was still at SARS. That person could still remember capturing the information on the SARS computer system through her personal ID that each employee is given when they are employed. Although she had not spoken to that employee that was still at SARS, the human resource department informed her that, that employee was Ms Thobeka Monica Majokweni and that she was based at the SARS Mthatha office.

[32] On further questioning from appellants' counsel, Ms Wood testified that after five years, tax returns were shredded. However, if the information was still relevant to a case that was proceeding, those returns would not be destroyed until the case was finalised. She has access to those policies. She was further asked for the basis of her evidence that the person who captured the returns in this matter would still remember that she captured the returns. She confirmed that she understood that the question was directed at her state of mind. She explained that her reasons for saying that the person who captured the returns in this matter would remember without even accessing the computer system, was because, as she put it, "Mr Pasiya is a well-known taxpayer to the office of SARS". She confirmed that she knew Ms Majokweni but had not discussed the case with her. Upon the defence concluding their further questioning, the witness was excused. The State thereafter closed its case without calling any further witnesses.

[33] After the State closed its case on 11 July 2014 counsel for the appellants indicated his intention to apply for the discharge of Mr Pasiya in terms of section 174 of the CPA[1].The prosecutor on the other hand indicated his intention to prepare and submit his heads of argument in respect of an application for the admission of computer-generated evidence. As a result of the two contemplated applications, on 11 July 2014 the case postponed to the 14, 15 and 16 October 2014 to enable both the State and the defence to prepare for their respective applications. Nonetheless, the next court record starts on 1 July 2015 with the State indicating that it had closed its case "the last time". I can only assume that the last time could be any date starting on the 14 October 2014 to the 16 October 2014. When the proceedings resumed on 1 July 2015, the defence commenced with an application for the discharge of Mr Pasiya in terms of *Section 174 of the CPA* and his legal representative addressed the court in respect of that application. The record does not indicate what became of the application for the admission of the computer-

[1] Section 174 provides that: If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

generated evidence. I will revert to this issue when I deal with the state of the record of the proceedings in the court *a quo*. After hearing submissions on the defence's application for the discharge of Mr Pasiya, the matter was adjourned to 5 July 2015, for the court's ruling regarding the application on which date the court refused the application for the discharge whereupon the defence closed its case.

The judgment a quo

[34] Following the defence's closure of the case for the appellants, the prosecutor and the defence addressed the court on the merits of the case. In its judgment the court *a quo*, at paragraph 27 of its judgment concluded with a finding that it accepted the computer-generated printouts formally as exhibit C and F respectively. It went on to say that it was satisfied that the State proved beyond reasonable doubt that the appellants failed to comply with the provisions of the VAT, PAYE, SDL and UIF Acts. Thereafter, the court convicted Mr Pasiya as follows:

"*The main count of theft counts 1 to 130 both accused are found NOT GUILTY on the alternative counts 1 to 130 both accused are found GUILTY*".

The court pronounced on the guilt of the appellants almost as a forgone conclusion making no real analysis of the evidence or explicit reasoning for its finding. This makes it difficult to discern from the judgment, the actual basis for the conviction.

[35] There are numerous other problems with the court *a quo's* judgment. I do not intend to enumerate or discuss all of them. Nonetheless, the following are worthy

of examination in some detail to illustrate some of the serious misdirections committed by the court *a quo*. To highlight one of the many misdirections, at paragraph 13.2 of its judgment, the court referred to the case of *Parker*[2] in which the Supreme Court of Appeal said:

"*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 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 (s169 of the 2011 Act) and even institute sequestration, liquidation, or winding-up proceedings, as the case may be (s177 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."*

[36] The magistrate thereafter stated the following in her judgment:

"This Court therefore concluded in the Section 174 ruling that theft is a competent charge in the case at hand."

[2] Director of public Prosecutions, Western Cape v Parker 2015 (4) SA 28 (SCA); 2015 (2) SACR 109 (SCA) para 9.

This is simply incorrect as the court *a quo* made no such finding in its *section 174* ruling even on a cursory reading thereof. On the contrary the court *a quo*, said:

> *"The second issue relates to VAT, PAYE, SDL and UIF amounts as constitute (sic) a debt to the State and failure to pay such amount due does not amount to theft. Case law was provided to me by Mr Pistorius confirmed the submissions made by him, that the common law charge of theft is* ***not*** *a competent charge in the case at a hand".*

[37] How the same court in its verdict could say that it had concluded in its *section 174* ruling that theft is a competent charge when it failed to say so and, in fact said the direct opposite, is difficult to understand. Whatever the reason was for the court to express itself in that manner, it is clear that in doing so a serious misdirection resulted, culminating in the conviction being rendered suspect. Furthermore, the alternative counts from count 1 to 130 were all common law theft charges according to some of the prosecutor's explanations when he read the charges to the appellants. To make matters worse, while the *Parker* case dealt specifically with VAT related charges, the fact of the matter is that the court *a quo* referred to "VAT, PAYE, SDL and UIF" in its *section 174* ruling. If that understanding of the charges as read to the appellants is correct, the court should have acquitted the appellants on the alternative theft charges which it failed to do. It then went on to convict the appellants on the very alternative charges from 1 to 130. As the prosecutor clearly conveyed different things at different times during the reading of the charges, in my view this amounts to a serious miscarriage of justice. A further indication that the court *a quo* did not refuse the *section174 di*scharge application based on the alternative theft charges is contained in the ruling:

"*Now referring to this case, provides for liability on behalf of the vendor, and can thus not persuade this Court on the matter in hand*."

This shows quite clearly that the court was no longer dealing with the alternative theft charges but with the statutory offences at this stage of *section 174* ruling.

[38] Once the court pronounced itself on the alternative theft charges, it is trite that it thereafter became *functus officio*. It could not recant what it had said in the *section 174* application especially as regards the discharge of the appellants. Once the court *a quo* found that some or all of the charges were incompetent, it had no other choice but to acquit the accused at least on those charges. It could not wait to see how argument would unfold and later convict the accused on those charges which were found to be incompetent. It follows that the alternative theft charges should not have featured at all during the final verdict, yet the court convicted the appellant on the alternative charges. This was a serious misdirection.

[39] In respect of the admission of computer-generated tax returns, the court admitted those returns allegedly based on *section 220 (1)* of the *CPA.* During the trial there was an objection to their admission into the evidence which led to those documents being provisionally admitted. The court *a quo* did not deal with any of the provisionally admitted documents during the trial. It was for the State to satisfy the court that the documents should be finally admitted, possibly after leading appropriate evidence in support thereof. There is no indication from the record that these provisionally admitted documents were ever dealt with by the State again before its case was closed. This was despite the evidence Ms Woods gave about one of the witnesses being still within SARS and therefore available to testify. The State failed to apply for the admission thereof in terms of *Section 220 of the CPA* or any other legal basis. It was during judgment that the court, after analysing the provisions of *Section 220(1)* of the *CPA* said:

"The documents constituted best evidence which could be obtained and should not be rejected merely on the ground that the documents were not in original form".

[40] Firstly, *section 220* of *CPA* does not have any subsections whatsoever. Secondly, it provides that:

> "*[a]n accused or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceedings and any such admission shall be sufficient proof of such fact*".

In its judgment where the court mentions *section 220* on at least three occasions, the court was referring to the computer-generated evidence. There was a specific objection to the admission of the computer-printouts of the returns, not an admission. On the record of the trial proceedings, at no stage were those computer-printouts of the returns admitted by or on behalf of the appellants. This is a very serious misdirection upon which the court proceeded to convict the appellants. Whilst it is not for this court to speculate on what exactly the court *a quo* could have been referring to regarding the admission of the evidence in question, the comments do not seem to relate to a *section 220* admission. This is yet a further illustration of the endless comedy of errors which amounted to serious misdirections by the court *a quo*.

[41] The real issue is not whether those returns could have been admitted in terms of the provisions of the CPA or any other legislation, but rather the court's duty to ensure that the accused's' rights to a fair trial were not undermined by evidence being incorrectly considered during the final judgment. This strikes at the core of the right to a fair trial. In his grounds of appeal, the appellant raises the provisions of *subsections 15(3)* and *(4)* of the *Electronic Communications and Transactions Act 25 of 2002 (the ECTA*)[3]. The court did not even mention this Act in its judgment.

[3] 1. Section 15 of the ECTA provides

[42] It was incumbent upon the State to move an application for the admission of the electronic tax returns relying on whatever legal basis or provisions of any legislation it deemed appropriate including the provisions of the ECTA. The defence would then have been afforded an opportunity to consider its position after hearing the State's application for their admission and act accordingly. The court would have been required to make a ruling at that stage prior to the State closing its case. The computer-generated tax returns would have, on their successful admission, become part of the States's case.

[43] Depending on the court's ruling, the defence would have been in a position, taking into account the totality of the evidence, to either lead evidence or close its case. The admission of the evidence of the data messages in the form of the computer-generated tax returns would have clearly influenced the conduct of the defence case. In my view, without being pedantic, what was required of the court represented the broader principle of a fair trial procedure and the elimination of any whiff of a trial by ambush. The admission of these documents during the delivery of the finding of the guilt of the accused was, in my view, unfair and undermined the appellant's right to a fair trial.

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(1) In any proceedings, the rules of the evidence must not be applied so as to deny the admissibility of a data message, in evidence –
    (a) on the mere grounds that it is constituted by a data message; or
    (b) if it is the best evidence that the person adding it could reasonably be expected to obtain, on the grounds that it is not in its original form.
(2) Information in the form of a data message must be given due evidential weight.
(3) In assessing the evidential weight of a data message, regard must be had to –
    (a) the reliability of the manner in which the data manage was generated, stored or communicated;
    (b) the reliability of the manner in which the integrity of data message was maintained;
    (c) the manner in which its originator was identified; and
    (d) any other relevant factor.
(4) A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.

[44] A further illustration vitiating the fairness of the trial is how the court *a quo* dealt with the issue of the computer-generated printouts, more particularly, the court during judgment said:

> *"Mr Pistorius submitted that no evidence whatever was led that accused no.2 facilitated assisted, encouraged, or advised accused no.1 or furthered the commission of any crime or offence. From the documentary evidence provided it is clear that accused no.2 completed some of the VAT 201 returns, he attended meetings with SARS officials, and he requested Tax Clearance Certificates on behalf of accused no.1. The submission in the plea explanation and version put to the said witnesses was that accused no.2 was assisted by financial managers in dealing with the tax affairs of accused no.1, not that he was not in any fashion involved in the financial administration of the company. Findings: This court accepts the computer-generated printouts formally as Exhibit C and F respectively. The court is satisfied that the State proved beyond reasonable doubt that the accused failed to comply with the provisions of the VAT, PAYE, SDL and UIF Acts Order: The main count of theft counts 1 to 130, both accused found NOT GUILTY on the alternative counts 1 to 130 both accused are found GUILTY."* (My emphasis).

[45] Nowhere in its judgment did the court explain which returns were completed by Mr Pasiya and which ones were not. It failed to address the issue of the financial managers or other employees of SOS, whom it was common cause, did complete and submit some of the tax returns. There was no evidence given by any of the State witnesses detailing the returns that Mr Pasiya personally completed. Furthermore, the judgment is silent regarding the returns that were not completed by the appellant. There is no evidence indicating who completed those returns, the person's position in the company or the basis upon which Mr Pasiya was found guilty relating to the submission of the returns completed by other persons.

[46] Regard must be had to the charges that were read to Mr Pasiya and the fact that before the prosecutor put the charges to him, he explained the basis upon which he was being charged as follows:

"No.2 is cited in his personal capacity as an accomplice to the crimes committed by accused no.[1] as set but in counts 1 to 130 of the foregoing Annexures, in that he unlawfully and intentionally engaged in conduct whereby he furthered the commission of the crimes committed by accused no.1 by facilitating, assisting or encouraging the commission of the said crimes giving advice concerning their commission or making it possible for accused no.1 to commit them.

…

Your Worship 1 to 33 is a common law charge of theft in that he failed to pay to SARS the amounts mentioned in counts 1 to 33 and then annexure B also the same counts 1 to 33 is the statutory contravention of failure to pay the Value Added Tax Your Worship. Your Worship it reads as follows, he is guilty of contravening subsection 58(d) read with section 1, 5(1), 28(1) and 28(2) of the Value Added Tax 89 of 1991 as amended. In that the accused did upon the dates mentioned in Column A of Schedule1 and at the offices of the South African Revenue Services in the district of East London fail to pay the Value Added Tax mentioned in Column C which were in respect of the periods mentioned in Column B."

[47] After reading the details of each of counts 1 to 33, the prosecutor went on to explain that the alternative to those counts was the actual contravention of the VAT Act for the VAT that Mr Pasiya failed to pay. Thereafter, he read the main counts in respect of counts 34 to 51 after which he explained that the alternative counts were based on the allegation that whilst SOS was the employer of people, it failed to deduct money from their wages and pay it to SARS. In respect of counts 52 to 103, again after reading the main counts, the prosecutor explained that the alternative to counts 52 to 103 was that as the employer, SOS was required in terms of the *Skills Development Act* to deduct monies and pay those monies to the SARS. He went on to read the main counts in respect of counts104 to 130 after

which he said that the State was also alleging that he is guilty of contravening *section 17(1) (a)* read with *section 5(2), section 8(1)* and of the *Unemployment Insurance Contributions Act 4 of 2002.*

[48] It appears that the appellants were found guilty on the alternative counts which it now seems were the statutory contraventions of the various pieces of legislation. However, the prosecutor's understanding of which charges were the main charges and which ones were the alternative charges seems to have changed several times and he appears to have been confused or at least uncertain. Just before he put the charges to the accused, the prosecutor explained that the State was alleging that the appellants failed to comply with the Tax Acts in that they failed to make the necessary payments although the returns were submitted, alternatively, "*the state was alleging that as the accused failed to pay, those monies were stolen which were the property of SARS*". Confusion clearly arose between the main and the alternative charges. Put differently, it is uncertain as to which of the two possible scenarios embodied in the charges the appellant was ultimately convicted upon as the prosecutor said different things at different times when reading the charges. This is hugely concerning as it could potentially have negated the appellant's ability to answer to the charges and challenge the evidence.

[49] In its judgment, the court failed to indicate the tax period in respect of the amounts that were not paid to SARS. There was no evidence by either of the two State witnesses indicating that the invoiced amount for that tax period in respect of VAT was in fact received by SOS and not paid over to SARS. In respect of the PAYE, SDL and UIF there is no indication or evidence of any deductions having been made from any employee by SOS which was not paid over to SARS. Hence, it is difficult to relate the charges to the alleged conduct of the appellants. The offences on which the appellants had been charged at the time that the State closed its case, seemed to have been that tax returns were submitted, and they were not accompanied by a payment. This was inconsistent with the charges which did not

relate to the completion of tax returns that were submitted without payment. The charges related to monies that were deducted and not paid over to SARS or in the case of VAT, that the monies would have been received from SOS's clients and not paid over to SARS. The judgment of the court *a quo* does not explain the basis of the conviction on any of the charges.

[50] Ultimately, the appellants were convicted with no clear indication in the judgment of the evidence forming the basis of the conviction. The issue of Mr Pasiya having the requisite *mens rea* to commit the offences cannot even arise until the evidence establishing his guilt has been presented. Significantly, he was not charged with having failed to pay the amounts referred to in those counts. He was informed that he:

"*intentionally engaged in conduct whereby he furthered the commission of the crimes committed by SOS by facilitating, assisting or encouraging the commission of the said crimes, giving advice concerning their commission or making it possible for SOS to commit them*"

The judgment, however, is silent on the actions that the appellant allegedly took or how this manifested into an intention sufficient to draw the inference recorded in the judgment. It appears to have been common cause that he personally completed some of the tax returns but it is unclear exactly which of these returns were completed by the appellant.

[51] Although the appellant was the director of SOS, the commission of the offence was based on him personally completing the tax returns. It is a mystery as to how he could have committed an offence relating to tax returns completed and submitted by other employees. The judgment is silent on this issue and demonstrates a

failure to analyse the evidence adequately or at all thus bringing into question whether the State proved its case beyond a reasonable doubt.

[52] The State had initially indicated that it, *inter alia,* relied on *section 332(5)* which reads:

> *"When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom, and shall on conviction be personally liable to punishment therefor".*

[53] After it was brought to the attention of the court that in *Coetzee's case,*[4] *section 332 (5)* of the *CPA* was declared unconstitutional by the Constitutional Court, this appears to have thrown the State's case into utter disarray and confusion, resulting in a knee-jerk reaction as the prosecutor sought to rely on the common law crime of theft. The fact that the prosecutor seemed unaware of the declaration of invalidity of *section 332(5*), is most disconcerting and, at the very least, demanded that he reconsider the State's position based on the available evidence. It was incumbent upon him to satisfy himself that *prima facie* he would be able to discharge the onus of proving the guilt of the appellants beyond reasonable doubt without reliance on *section 332 (5).*

[54] The State persisted with the evidence of two witnesses and the tax returns that it had. Their evidence did little more than explain that the tax returns were submitted without payment, something that was not in dispute. They testified regarding

[4] S v Coetzee and Others 1997 (1) SACR 379 (CC).

numerous meetings they had with Mr Pasiya in which undertakings to pay were made, which was not in dispute. The reality is that none of this evidence came close to proving the commission of any criminal offence. Significantly, on Ms Wood's own version, some monies were paid but it is not clear from the evidence for which period or tax types these monies were allocated.

[55] In contending that the State had failed to prove the guilt of Mr Pasiya beyond a reasonable doubt, counsel for the appellants relied, *inter alia*, on *Van der Meyden*[5] in which Nugent J explained the onus of proof that the State must discharge with reference to the evidence and the consequential acquittal of an accused where it is not discharged. He said:

"The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent. These are not separate and independent tests, the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being a logical corollary of the other."

[56] The prosecutor seemingly oversimplified the issue to be whether Mr Pasiya paid all the monies that he was required to pay in terms of the tax returns that were submitted on behalf of SOS. On the contrary, Mr Pasiya's case, as gleaned from his plea explanation and the version put to the two State witnesses, was that there were times when payment was not made, notwithstanding that the tax returns were submitted on behalf of SOS. Even if there was no plea explanation or a version

[5] S v Van der Meyden 1999 (1) SACR 447 (WLD) at 44paras f-g.

put to State witnesses, the onus remained on the State to prove the appellants guilty. In *Van der Meyden*[6] the court went on to say:

> *"Purely as a matter of logic, the prosecution evidence does not need to be rejected in order to conclude that there is a reasonable possibility that the accused might be innocent. But what is required in order to reach that conclusion is at least the equivalent possibility that the incriminating evidence might not be true. Evidence which incriminates the accused, and evidence which exculpates him, cannot both be true – there is not even a possibility that both might be true – the one is possibly true only if there is an equivalent possibility that the other is untrue. There will be cases where the State evidence is so convincing and conclusive as to exclude the reasonable possibility that the accused might be innocent, no matter that his evidence might suggest the contrary when viewed in isolation."*

[57] Regrettably, in this case the State seems to have approached its case as a *fait accompli* as to the guilt of the appellants. Consequently, the State failed to address the comprehensive and detailed plea explanation with its annexures and ignored the version put on behalf of the appellants to the State witnesses. Curiously, the State even ignored its own documents which were attached to the plea explanation despite SARS ostensibly being the author thereof. The insurmountable problem is that the State failed to establish the guilt of the appellants, premising its case on the assumption that as tax returns were submitted and not accompanied by payments, the appellants were liable in both the civil and criminal sense until they could demonstrate and prove that they had paid the amounts due. This ignores the salutary principle of our law that the onus of proof in a criminal case falls squarely on the State, with an accused person having no obligation to convince or persuade the trial court of anything. Any suggestion to the contrary runs parallel to our very rich jurisprudence.[7]

[6] Note 3 supra at page 449 c-d.
[7] S v Jochews 1991 (1) SACR 208

[58] I must emphasize that the standard of proof as it relates to criminal cases remains constant despite the essence of the charge being the failure to pay an amount that has been assessed by SARS as being due and payable or in respect of which tax returns had been submitted. Furthermore, before there can be a misappropriation of monies collected on behalf of SARS, those monies must have been collected and received. I fail to understand how it can be said that a VAT vendor misappropriated funds that were never received. SOS needed to have collected VAT from its customers or clients before it could be said that those monies were misappropriated. SARS could have easily ascertained, as a fact, whether SOS was paid by its clients by cross-referencing and comparing transactions between those clients and SOS's bank accounts, which it failed to do. The State was required to prove that salaries had been paid to employees and PAYE, SDL and UIF had been deducted from the wages of SOS employees and not paid over to SARS. In my view, reliance could not be placed solely on the tax returns to establish this evidence. Despite SARS having unlimited access to bank statements, these were never analysed by either Ms Pillay who investigated the matter or checked by the prosecutor. No evidence showing monies in respect of VAT having been received by SOS or monies that included a VAT portion was presented in court. Furthermore, no evidence of any employees having been paid their salaries or deductions having been made from their salaries in respect of PAYE, SDL and UIF was tendered. There was even a possibility that the employees were not paid their salaries during certain tax periods which was a version put to the State witnesses. In that situation, I fail to see how PAYE, SDL and UIF could have been deducted. On reading the judgment of the court *a quo*, the basis upon which the appellants were found guilty is simply inscrutable.

The record of trial proceedings.

[59] The controversy of the incomplete record deserves consideration. It is common cause that the record of the trial proceedings in the court *a quo* is unquestionably incomplete. The missing parts of the record are detailed in an affidavit that was deposed to by the appellants' attorney in respect of an application which was filed in this Court on notice of motion. The application sought condonation for the appellants' late filing of the heads of argument caused by the appellants' numerous attempts to obtain a complete record. This application was not opposed nor was the incompleteness of the record and the various attempts to obtain the missing portions of the thereof, including some documents and exhibits, contested.

[60] In that affidavit the following details in respect of the missing record, documents and exhibits are stated:

1. *The evidence of the first state witness, Ms Pillay in respect of the proceedings of the 19 March 2013 are not part of the record. This was Ms Pillay's portion of her evidence in chief. It appears that those proceedings could not be transcribed because of a faulty recording machine. On 26 November 2015 the case was postponed to the 5 April 2016 to deal with an application in terms of section 18 of POCA. There is no recording of the said application and the documents that were apparently delivered to the magistrate. On 26 October 2016 the court made a ruling with reference to section 18(3) of POCA. The court also ordered the State in terms of section 21 of POCA to tender a statement contemplated in section 21(1)(A) of POCA. On 31 July 2017 an application in terms of section 304A of the CPA was made for a special review. Judgment was reserved. There is no transcript of those proceedings and the judgment or ruling. On 24 July 2018 there was an application in terms of section 18(1) of POCA for a confiscation order. There is no record of that application. At page 409 of volume 3 of the record reference is made to a rescission application in respect of an order appointing a curator. It appears from the record that the issue of the*

deregistration of SOS on 16 July 2010 was raised. The record refers to annexure B to that application. On 24 July 2018 the court made a ruling with reference to certain documents that needed to be filed.

2. *On 28 November 2017 there was a postponement to the 31 January 2018. The proceedings of the 31 January 2018 are not part of the record. On 2 October 2018 a forfeiture application was dealt with in respect of which certain documents were to be provided to the court. The matter was postponed to the 19 October 2018 for judgment. There is no record of all those proceedings or judgment. The trial court exhibit bundle is incomplete in that exhibit B which is a plea explanation refers to annexures A, B and C respectively. All those annexures to the plea explanation do not form part of the exhibit bundle or the record. The annual financial statements for the year ended 29 February 2004 which is exhibit N has a page 12 missing. This is not an exhaustive list of the missing portions of the record, documents and some of the exhibits that were presented to the court a quo. In respect of the affidavit filed in this Court referred to above there is reference to correspondence in the form of email exchanges and letters to the registrar, counsel for the State and the clerk of the criminal court. It appears that attempts were made by counsel for State, Mr Mahamba and Mr Van Breda, appellants' attorney to see the magistrate for the assistance she could give regarding the missing portions of the record. That also did not yield to the denied results.*

[61] When the appeal was heard by this Court, we raised our concerns about the state of the record with Mr Mahamba who, incidentally, was the prosecutor in the trial court and involved in the applications and interlocutory applications that were made in the court *a quo*. Our main concern was that in the State's heads of argument, the issue of the incompleteness of the record was not dealt with and in fact, was completely ignored despite it being raised pertinently in the appellants' heads of argument. Mr Mahamba shockingly responded that he did not deal with

the issue of the incompleteness of the record because it was not raised as one of the grounds of appeal. Counsel for the appellants completed his submissions whereafter the tea adjournment was taken. When Mr Mahamba, counsel for the State, commenced with his submissions, we were dumbfounded by the revelation that he had never received the appellants' heads of argument. This was particularly disturbing considering that Mr Mahamba had not only been a prosecutor for a very long time but that he had been involved in this case as a prosecutor since it commenced in 2013.

[62] Before the proceedings commenced, both counsel came to Judges' chambers to introduce themselves. Thereafter they returned to court together where they were together in court waiting for the proceedings to start. There was a tea adjournment and thereafter the proceedings resumed. It was only at this juncture that counsel for the State mentioned for the first time that he had not received the appellants' heads of argument. It transpired that the heads of argument had been filed and received by the local office of the *National Prosecuting Authority (the NPA)* on 30 October 2023, some three weeks before the hearing of this matter. Mr Mahamba only signed the respondent's notice of filing of its heads of argument on 12 November 2023. Mr Mahamba confirmed that he never went to the local office of the NPA in Makhanda nor did he phone anyone there to enquire about the heads of argument which he was aware would have been served there. Furthermore, he failed to call the appellants' attorneys to enquire about their heads of argument. To say that we were aghast when Mr Mahamba then sought a postponement of the proceedings, "*to get the heads so that I can make a proper reply and research the authorities*", is an under-statement. This was an atrocious handling of the matter, revealing an appalling cavalier attitude and lack of respect for the court process. Considering all the circumstances, including that this matter has been on the court roll in the court *a quo* for a period exceeding 10 years, we refused the application for postponement and the hearing of the appeal continued.

[63] It was common cause, and indeed conceded by Mr Mahamba, that the record was incomplete. There was a myriad of correspondence exchanged between himself and the appellants' attorneys dealing with that issue in which it was pointed out which parts of the record and the specifics of the documents that were missing from the record. Nonetheless, he then argued that despite the huge chunks of the record that were missing, including a portion of Ms Pillay's evidence-in-chief, that the record was sufficient for the Court to adjudicate upon, what he called, the real issues. He explained that the appellants were charged with failing to pay tax and levies. It deserves mention that the appeal had been set down for hearing by counsel for State despite protestations from the appellants' attorneys regarding the incompleteness of the record. Significantly, even on the date of the hearing, counsel for the State never expressed a desire for the matter not to proceed in order that he may deal with the possibility of a reconstruction of the record.

[64] Counsel for the appellants submitted that the reconstruction of the record was impossible. This was because the matter took fourteen years or so in the trial court with numerous changes in legal representation for the appellants making any attempt to reconstruct the record well-nigh impossible. The court was referred to *Phakane*[8] in which *Zondo J*, as he then was, expressed himself thus:

"The failure of the state to furnish an adequate record of the trial proceedings or a record that reflects Ms Manamela's full evidence before the trial court, in circumstances in which the missing evidence cannot be reconstructed, has the effect of rendering the applicant's right to a fair appeal nugatory or illusory. Even before the advent of democracy, the law was that, in such a case, the conviction and sentence or the entire trial proceedings had to be set aside. In S v Joubert the then appellate division of the Supreme Court of Appeal said:

[8] S v Phakane 2018 (1) SACR 300 (CC) at page 310 f – h.

'If during a trial anything happens which results in prejudice to an accused of such a nature that there has been a failure of justice, the conviction cannot stand. It seems to me that if something happens, affecting the appeal, as happened in this case, which makes a just hearing of the appeal impossible, through no fault on the part of the appellant, then likewise the appellant is prejudiced, and there may be a failure of justice. If this failure cannot be rectified, as in this case, it seems to me that the conviction cannot stand because it cannot be said that there has not been a failure of justice.'"

[65] In all the circumstances, it is apparent that the reconstruction of the record is clearly impossible. I am of the view that the absence of the huge portions of the record which include some of the State witnesses' evidence-in-chief, certain exhibits and other crucial documents, the appellants' right to a fair appeal process has been irredeemably compromised and the right to a fair trial, which includes a fair appeal process, had been infringed. This must lead to the quashing of the trial proceedings.

[66] The Constitutional Court expressed itself in this regard in *Phakane*[9] where the court said:

"In light of all the above I conclude that the full court was wrong to hold that the applicant's right to a fair appeal entrenched in s35(3) of the Constitution had not been infringed by the state's failure to ensure that an adequate record of his trial proceedings was available for his appeal. In my view, his right to a fair appeal has been so compromised that his appeal could not be fairly determined. That being the case, the proper remedy is to set aside the trial proceedings in their entirety."

[9] Note 7 supra at page 311 d – e

I may mention that no submissions were forthcoming by counsel for the State that the trial record could still be reconstructed. He adopted the approach that it was possible to adjudicate the issues with the incomplete record without explaining how that could be possible in the circumstances. It is unfortunate that a matter of this nature was so abominably mishandled by the State. Worse still were the unfortunate misdirections by the court *a quo,* unequivocally suggesting that the conviction of the appellants seemed to have been a pre-determined outcome for reasons that may never be known. These miscarriages of justice offend the principle of fair trial jurisprudence which dates to the time even before the advent of our constitutional democracy most, if not all of which have been entrenched in *Section 35 of the Constitution.* Therefore the appeal must succeed.

[67] In the result the following order is made:

1. The appeal is upheld.
2. The conviction and sentence are set aside.

_____

M.S. JOLWANA

JUDGE OF THE HIGH COURT

I agree,

_____

S.A COLLETT

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	*Adv R. Liddell*
Instructed by	:	Changfoot Van Breda Attorneys c/o Netteltons Attorneys 118A High Street Makhanda
Counsel for the Respondent	:	*Adv Mahamba*
Instructed by	:	Office of the Deputy Director of Public Prosecutions Makhanda
Date heard	:	22 November 2023
Date judgment delivered	:	01 February 2024