THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 894/2023

In the matter between:

SESHIN NARAIDU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Naraidu v The State* (894/2023) [2024] ZASCA 139 (16 October 2024)

Coram: MOKGOHLOA, SMITH and UNTERHALTER JJA and MJALI and DIPPENAAR AJJA

Heard: 16 August 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 16 October 2024.

Summary: Criminal law – Tax practitioner – claim for a refund under the Value-Added Tax Act 89 of 1991 (the VAT Act) – fraud – intent to defraud – knowledge of the fictious claim – statutory charges under s 59(1) of the VAT Act and s 269(6) of the Tax Administration Act 28 of 2011 – validity of the statutory charges.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mabesele and Kumalo 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 order:

'(a) The appeal is upheld.

(b) The conviction of Mr Naraidu and sentence imposed upon him by the Regional Court, Gauteng under case no 41/337/14 is set aside, and it is ordered that Mr Naraidu is acquitted of all the charges brought against him.'

JUDGMENT

Unterhalter JA (Mokgohloa and Smith JJA and Mjali and Dippenaar AJJA concurring):

[1] The appellant, Mr Naraidu, a tax practitioner, was, together with two other accused, charged with three counts of fraud, and three alternative charges under the Value-Added Tax Act 89 of 1991 (the VAT Act) read with s 269(9) of the Tax Administration Act 28 of 2011 (the TAA). The charges, in essence, alleged that Serghony's Shoes Fashion CC (SSF and the first accused), together with its sole member, Mr Mbom (the second accused) and Mr Naraidu (the third accused) unlawfully, and with intent to defraud, misrepresented to the South African Revenue Service (SARS) that SSF had incurred expenses and was entitled to refunds under the VAT Act, knowing that SSF was not entitled to any such refunds and that the information submitted to SARS was false. This caused prejudice, actual or potential, to SARS.

[2] The trial proceeded in the Regional Court, Gauteng (the regional court). Mr Mbom and Mr Naraidu were convicted on the three counts of fraud. Mr Mbom did not return to court for sentencing, and has not been arrested. Mr Naraidu was sentenced to six years of imprisonment without an option of a fine. Mr Naraidu appealed to the high court in respect of his conviction. The high court (per Mabesele *et* Kumalo JJ) dismissed the appeal. It found that the regional court had correctly found that Mr Naraidu was aware that the documents submitted to SARS supporting the claim for the VAT refund were false. With special leave, Mr Naraidu appeals to this Court.

[3] A number of issues are not contested in this appeal. First, there was clear evidence that the documents submitted to SARS to support the claim of SSF for a VAT refund were false, and the claim constituted a misrepresentation. The investigation undertaken by SARS, the evidence of which was led at trial, revealed that the invoices that were submitted to SARS in support of the claim for the VAT refund were fictitious. The refund sought was substantial, amounting to R2 748 037.51.

[4] Second, it is a plain that filings were made by SSF on 14 September 2013, and again on 25 September 2013, on the e-filing system used by SARS, for a VAT refund. These were rejected. Mr Naraidu, on 28 October 2013, wrote an email to SARS, on behalf of SSF, as a tax practitioner, to query the delay in payment of the refund. The relevant portion of the email reads as follows:

‘Documents were submitted in the branch office. Which is thus being lost. I had to resubmit the documents again. Every time I call I get told it is in the process. But no one at SARS can tell me where in the process it is exactly.’

On 27 November 2013, Mr Naraidu again wrote to SARS on behalf of SSF:

'I want to query on the delay for the VAT refund for period 2013/07 and 2013/09. Are there supporting documents that's required? Does the bank detail need to be updated? I have followed up at the call centre and sent a PCC request, with still no success. Please assist, client is frustrated. I don't know what excuse to give the client anymore.'

On 3 December 2013, Mr Naraidu wrote once more to SARS on behalf of SSF, as follows:

'I want to query on the delay for the VAT refund for the periods 2013/07 and 2013/09. Supporting documents have being submitted, bank detail are correct and valid? I have followed up at the call centre and sent a PCC request, with still no success. According to the SARS e-filing the audits for both periods have been finalised as per the refund dashboard. Please assist, client is frustrated. I don't know what excuse to give the client anymore.'

[5] The regional magistrate found that Mr Naraidu acted with Mr Mbom in 'a premeditated plan to defraud SARS'. The high court agreed. It reasoned that the enquiries directed by Mr Naraidu to SARS concerning the VAT refund due to SSF meant that he had 'insight of the fraudulent supporting documents'. Both courts thus rejected the version advanced by Mr Naraidu, at trial, that he was merely making enquiries of SARS on behalf of SSF.

[6] The evidence led at the trial showed that Mr Mbom, the sole member of SSF, had registered SSF as a VAT vendor, and Mr Mbom was registered to use the e-filing system of SARS on behalf of SSF. The bank account of SSF reflected no business transactions, yet SSF was seeking a sizeable VAT refund. The findings of the regional court that Mr Mbom was guilty of fraud are incontestable. Mr Mbom's flight from a final reckoning before the regional court suggests that he shared this view. The issue for us is whether the state discharged its onus of proof to show that Mr Naraidu was complicit in Mr Mbom's fraudulent scheme to use SSF to make fraudulent claims upon SARS for a VAT refund.

[7] Both the high court and the regional court placed much emphasis upon the emails that Mr Naraidu sent to SARS. I have set out the relevant content of these emails. They convey two matters of importance. First, that Mr Naraidu had resubmitted the documents to SARS supporting the claim by SSF for a VAT refund, and hence had sight of these documents. Second, that, in order to do so, Mr Naraidu must have had access to the SARS e-filing system, since he records that he resubmitted the documents. The SARS' witnesses called by the State could not say who had lodged the claim on the e-filing system, but, Mr Naraidu's emails indicate that he had access to the system and had, at the very least, resubmitted the documents.

[8] Mr Naraidu's evidence at his trial was as follows. He had worked for SARS. In October 2013, he was a financial adviser for Liberty Life, an insurance and financial services company. A client had given Mr Naraidu a referral list to call persons there listed to try to sell Liberty policies. On the list was a person described by Mr Naraidu as the owner of SSF. This person was described by Mr Naraidu in the vaguest of terms as a 'white guy', and not Mr Mbom. I shall call this person 'the presumed owner'. They met, Mr Naraidu testified, at the Dross restaurant in Midrand in October 2013. The presumed owner showed Mr Naraidu his driver's licence and the registration papers of SSF. The presumed owner then sought the assistance of Mr Naraidu, as a tax practitioner, to pursue a VAT refund claim, on behalf of SSF, with SARS. Mr Naraidu agreed to do so. Of the emails that he then wrote to SARS, Mr Naraidu had this to say:

'I have just said that I had no knowledge of what was happening. I was enquiring and hoping the client once it was resolved would sign a policy . . . that is how I ran my Liberty business.'

Mr Naraidu's version was thus that he wrote the emails to prompt SARS to pay the VAT refund, but that he had no knowledge of the basis upon which the claim was

made. His incentive was to assist the presumed owner in order to sell him a Liberty policy.

[9] There is a great deal that is unsatisfactory about Mr Naraidu's evidence. How he came to be retained; that he was, on his own version, willing to engage SARS on behalf of a client he knew next to nothing about; that he took an instruction without any proper mandate; and then pursue a claim in ignorance of the claim that was being made – all of this suggests a reckless disregard for his duties as a tax practitioner. But that is not the charge he was facing. The question is whether he made himself party to the fraud that Mr Mbom perpetrated upon SARS. And the primary evidence relied upon by the State to make that case were the emails sent to SARS by Mr Naraidu on behalf of SSF.

[10] What then do the emails establish? As I have explained, they convey that Mr Naraidu had the documents used in support of the claim of SSF for a VAT refund, and that he had resubmitted these documents to SARS. Mr Naraidu denied that he did so. The SARS witnesses were unable to say who had accessed the e-filing system to make the claims on behalf of SSF. But, even if Mr Naraidu must be held to what he wrote in the emails, it does not follow that because he resubmitted the documents in support of the claim, he had any knowledge that these documents were fictitious invoices and that the claim was fraudulent. There was no direct evidence of this. It was the investigations undertaken by SARS that uncovered the fraud. This was done by verifying whether there were true sales that the invoices purported to record. There were not. But there was no evidence that Mr Naraidu knew this to be so. It cannot be inferred that. because he submitted the documents on behalf of SSF, he thereby represented that they recorded transactions that supported the VAT refund, knowing that they were fictious. Once that is so, the State failed to prove beyond reasonable doubt that Mr Naraidu had the intent to defraud SARS.

[11] That Mr Naraidu acted recklessly is plainly the case. He lent his efforts to secure the payment of a fraudulent claim. But absent proof beyond reasonable doubt that he knew the claim to be fraudulent, he cannot be said to have made himself party to the fraud. There is an absence of proof that Mr Naraidu had the intention required to be guilty of fraud. His conviction on the charges of common law fraud is thus unsafe, and must be set aside.

[12] Little attention was given by counsel to the alternative statutory charges. The charge sheet described these as contravening s 59(1)*(d)* read with ss 1, 20, 23, 28 of the VAT Act, as amended, read with s 269(6) of the TAA. These charges entail some complexity because s 59 of the VAT Act was repealed by s 271 of the TAA. However, s 269(6) of the TAA permits of the prosecution of statutory offences, repealed by this enactment, if they were committed before the commencement of the TAA. The TAA commenced on 1 October 2012. The statutory offences with which Mr Naraidu was charged are alleged to have occurred in 2013 and 2014. It is thus doubtful that these statutory charges are valid in law. But as these matters did not arise for decision in the regional court or in the high court, and were not dealt with before us, it suffices to observe that the statutory charges brought against Mr Naraidu all allege an intent, on his part, to secure a refund to which SFF was not entitled. For the reasons given, while Mr Naraidu sought to secure a refund for SFF, the State did not discharge its onus to prove that he intended to do so knowing that SFF was not entitled to the refund. Mr Naraidu thus cannot be convicted on the alternative statutory charges.

[13] In the result, the conviction of Mr Naraidu cannot stand. His appeal is upheld, the order of the high court must be set aside, and Mr Naraidu is acquitted of the charges against him.

[14] The following order is made:

1 The appeal is upheld.

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

‘(a) The appeal is upheld.

(b) The conviction of Mr Naraidu, and sentence imposed upon him, by the Regional Court, Gauteng under case no 41/337/14 is set aside, and it is ordered that Mr Naraidu is acquitted of all the charges brought against him.’

_____

D N UNTERHALTER

JUDGE OF APPEAL

Appearances

For the appellant:	Adv M Witz
	Riaan Louw Attorneys, Kempton Park
	Michael Du Plessis Attorneys, Bloemfontein
For the respondent:	Adv L Jobo
Instructed by:	Director of Public Prosecutions, Johannesburg
	Director of Public Prosecutions, Bloemfontein.