

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

Case No: CC 9/2018

THE STATE

v

CHARLES WINSTON MANALE**Neutral citation:** *S v Manale* (CC 9/2018) [2019] NAHCMD 29 (20 February 2019)**Coram:** USIKU, J**Heard:** 23 October 2019**Delivered:** 20 February 2019

Flynote: Criminal Law – Fraud – Accused having hatched a plan to defraud his employer through a manipulation of the requests and payment system – Accused further charged with the contravention of section 6 (a) (b) and (c) as read with section 11 of the Prevention of Organised Crime Act 29 of 2004 as amended – Splitting of charges – Accused having defrauded his employer by transferring the money into third party's account and later re-transferring same into his personal account, thereby disguising or concealing their source, movement and ownership, whereafter using the proceeds to purchase a motor vehicle for himself – Also making himself guilty of money-laundering in contravention of section 6 (a) (b) and (c) of Act 29 of 2004 as amended – Each offence involving different actions and criminal intent – State entitled to prosecute all such offences in a single prosecution in terms of section 83 of the Criminal Procedure Act – Such not constituting an improper splitting of charges nor leading to duplication of convictions.

Summary: The accused was arraigned on 147 counts of fraud to which he tendered a plea of guilty and was found guilty as charged. Accused was also charged on the 148th count with contravening section 6 (a) (b) and (c) of the Prevention of Organised Crime Act 29 of 2004 to which he pleaded not guilty. The state did not call witnesses to testify but submitted several documents in support of the allegations. The defence also did not lead any evidence on that count.

Both the State and defence proceeded to submit. It was the State's contention that accused be convicted on a charge of money laundering, as the two offences involved different actions and different criminal intent. It was further submitted by the state that the framing of a charge which included both the common law offence of fraud and money-laundering in terms of POCA as its underlying predicates did not in itself occasion an unfair trial. The defence argued the opposite.

Accused was convicted on his own plea of guilty on the 147 counts of fraud, having made misrepresentations, knowingly that such misrepresentations were false in order to acquire the money from his employer for his own benefit.

Accused having disguised or concealed the money's origin, its movement and ownership amounted to money-laundering in terms of section 6 (a) (b) and (c) of Act 29 of 2004, thereby making himself guilty of contravening that of Act 29 of 2004 as amended.

ORDER

1. Counts 1 - 147 of Fraud – Guilty.
 2. Count 148 - The offence of money laundering in terms of section 6 (a) (b) and (c) read with section 11 of the Prevention of Organised Crime Act 29 of 2004 as amended – Guilty
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JUDGMENT

USIKU J:

[1] The accused appeared before court charged with 147 counts of fraud as per schedule 1 and 2 to the indictment, to which he tendered a plea of guilty and was subsequently found guilty as pleaded. Accused pleaded not guilty in respect of count 148, in contravention of section 6 (a) (b) and (c) read with section 11 of the Prevention of Organised Crime Act 29 of 2004 as amended.

[2] The relevant particulars of counts 1 – 147 are that the accused was employed by Standard Bank as a Senior Estate and Trust officer in the department of Standard Bank Executors and Trustees, and was responsible amongst other things, for the supervision of the estate and trust officers whose duties was to receive requests for payment from beneficiaries and after verification, to load such requests on the system for approval and authorisation of payment by the accused.

[3] From January 2011, the accused, hatched a plan to defraud the estate accounts through a manipulation of the requests and payment system, by making phony requests from the implicated Estate Accounts and then authorising payment of proceeds into one Kauko Daniel Nehale's Standard Bank account number: 140790012 from January 2011 until August 2013 and thereafter the death of Kauko Daniel Nehale and during the period from September 2013 up to December 2015, the transfer payments were made directly into his personal bank account number: 62249023136 held at First National Bank of Namibia Limited.

[4] In facilitating such payments the account the accused gave out and pretended that such payments had been legitimate requests for payment by the intended beneficiaries yet in actual fact the payments in question had not been requested by the legitimate beneficiaries to the implicated Estate accounts and were being loaded to be paid into Kauho Daniel Nehale and the accused's personal account number: 62249023136, totalling the sum of N\$5 055 563-15 which amount the accused misappropriated.

[5] When the accused took into his possession and put such monies to his personal use, he well knew that such amounts were proceeds of unlawful activities thereby making himself liable for money laundering.

[6] The Court having found the accused guilty as pleaded on the counts of fraud 1 – 147. The state handed in several documents as part of the case. Those were:-

- (1) The statement in terms of section 220 of the Criminal Procedure Act 51 of 1977 Exhibit "A".
- (2) A Statement in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977 Exhibit "B".
- (3) A Statement in terms of section 115 of the Criminal Procedure Act 51 of 1977 Exhibit "C".
- (4) The Summary of Substantial facts Exhibit "D".
- (5) The State's Pre-Trial memorandum Exhibit "E".
- (6) Accused's Reply to State's Pre-Trial Memorandum Exhibit "F".
- (7) A bank Statement of Bernard Eksteen Exhibit "G".
- (8) A bank Statement of Charles Manale Exhibit "H".
- (9) A bank Statement of Nehale Kauko Daniel Exhibit "J".
- (10) Statement by Norbert H Zimmermann in respect of the car bought by the accused Exhibit "K".

The defence did not object to the handing in of the aforementioned documents.

[7] The particulars of count 148 are that accused at all material time knew that such money was or ought to reasonably have known that such money formed part of the proceeds of his unlawful activities as defined in terms of section 6 (a) (b) and (c) read with section 1, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004.

[8] Having tendered a plea of not guilty to count 148 which related to the offence of money laundering, the state ought to have led evidence prove all the essential elements of the crime charged. However, the state relied on the statements already handed in respect of the admission in terms of section 220 of the Criminal Procedure Act 51 of 1977, Exhibit "C" and closed its case thereafter. The defence also closed its case in respect of count 148 relating to money laundering.

[9] Ms Moyo who appeared for the state submitted that there was no single intent, also that the two offences had their own peculiar elements in that in order to prove that fraud had been committed, one only has to prove a misrepresentation whereas in a case of money laundering one has to prove the disguising of the unlawful origin of property.

[10] Furthermore, one has to perform any other act in connection with that property whether it is performed independently or in concert with any other person, which transaction or act has or is likely to have the effect of concealing or disguising the nature, origin, source, location, disposition or movement of the property for its ownership, or any interest which anyone may have in respect of that property.

[11] It is now common cause that the accused in this case had made misrepresentation in respect of counts 1 – 147. His aim having been to obtain the money. Subsequently to the misrepresentation, the money was transferred into third party's accounts from which he proceeded to re-transfer the money into his personal account, thereby disguising its origin.

[12] Accused did not transfer the money into his personal account immediately. Having re-transferred the money into his personal account, to which he had access, he started to withdraw the money as his own from which he bought the vehicle from Zimmermann garage, as a result of his criminal activities. Accused knew that the

money he had used to buy the vehicle forms part of the proceeds of unlawful activities. The money in the amount of N\$5 055 563-15 was not legitimately earned by him, but obtained through fraud to which accused have admitted.

[13] In order to determine whether the offence of money laundering had been committed the State is burdened to prove that the accused had acquired the money, or had used it or it was found in his/her possession, whilst knowing at the time that they were proceeds of an unlawful conduct. Accused did admit to fraud in respect of counts 1 – 147 respectively.

[14] Furthermore, the POCA offences under section 6 of the Act do not stand on themselves, they need predicate offences. In relation to money laundering the property in question (which is the money) must be derived from unlawful activities (fraud) which could have taken place anywhere at any time. The individual obtaining the property in question does not have to be the same person who committed the underlying unlawful activity that generated the proceeds derived, received directly or indirectly as a result of any unlawful activity carried out by any person.

[15] It is further common cause that the proceeds which is the money defrauded from Standard Bank must in some way be the consequence of an unlawful activity which is the fraud. Thus there was some form of a consequential relation between the fraud and the unlawful activity of money-laundering. Proceeds of unlawful activities has been defined as a benefit, reward that was derived, received or retained in connection with or as a result of any unlawful actions, and it include any property representing property so derived.

[16] The accused herein knew of the criminal source of the money which is through fraud committed by him, having transferred the money into different third party's accounts before it found its way into his own personal account, which was meant to conceal its origin. If with regard to the issue to splitting of charges. Such term is no longer appropriate in law and courts are more concerned with the duplication of convictions.

[17] There is no need for the single test to be used when determining whether there has been a duplication of convictions. That is so because there are a large variety of offences and each has its own peculiar set of facts which might give rise to borderline cases and therefore to difficulties. The tests which have been developed are said to be more practical guidelines in the nature of questions which may be asked by the Court in order to establish whether a duplication has occurred or not. Those questions are not necessarily decisive.

[18] The two commonly used tests are the single evidence and same evidence test. A person may commit two acts of which each, standing alone, would be criminal, but does so with a single intent and both acts are necessary to carry out that intent, then he ought only to be indicted for, or convicted of, one offence because the two acts constitute one criminal transaction. That is the single intent test. However, if the evidence requisite to prove one criminal act necessarily involves proof of another criminal act, both acts are to be considered as one transaction for the purpose of a criminal transaction. But if the evidence necessary to prove one criminal act is complete without the other criminal act being brought into the matter, the two acts are separate offences.

[19] In the present case the accused had to hatch a plan to defraud. The proceeds of his fraud were subsequently disguised and used in the offence of money laundering so that they lose their origin form. That was done in order to make them assume some form of legitimacy. In truth, it is not possible to think away the fraud when determining the offence of money laundering in this case.

[20] It has been submitted by the defence that in applying and determining which test to be used, the Court must apply common sense and its sense of fair play. Fraud is indeed a common law offence whilst money laundering is a statutory offence created by statute. It's therefore important to consider the intention of the legislature when it enacted Act 29 of 2004, which is the Prevention of Organised Crime Act. The reason why such an Act was enacted could only have been as a result in the increase of organised crime and because punishment for common law crimes was found wanting.

[21] Furthermore, our present day-law, gives the state very wide authorisation when it comes to the number of charges which it may bring against an accused. Thus section 83 of the Criminal Procedure Act 51 of 1977 provides:

'If by reason of any uncertainty as to the facts which can be proved or if for any other reason it is doubtful which of several offences is constituted by the facts which can be proven, the accused may be charged with the commission of all or any of such offences, and any number of such charges may be tried at once, or the accused may be charged in the alternative with the commission of any number of such offence.' (Underlining for my own emphasis)

[22] In essence the state has wide powers to charge any person with the commission of any offence, whether by common or statutory laws. This Court is alive to the principle of double jeopardy which demands that an accused should not be punished twice for the same crime, however, such cannot be said in the present case.

[23] Fraud and money laundering are two separate offences in that whilst fraud involves the making of a false representation which is potentially prejudicial to another, money laundering is concerned with the conduct of disguising the actual source of illegitimate funds or properties, which one tries to make it look legitimate. As alluded to the accused herein firstly did not transfer the money into his personal account, but into Daniel Kauko Nehale's bank account as shown in Exhibit "J" which is a Standard Bank Statement extract of Nehale. Only to re-transfer the money into his own account upon the latter's demise.

[24] Furthermore, transferring some of the funds into another account held by one Bernard M Eksteen, at First National Bank from which he started to make withdrawals at ATM as confirmed by Eksteen's First National Bank account statement extract Exhibit "G". Accused had no relationship with either of the two.

[25] It is not always the case that fraud would involve money laundering. In order to prove the offence of money laundering there must be proceeds having been

realised from one's criminal conduct and the manner in which the accused thereafter start to deal with such proceeds of crime.

[26] It has been further submitted that in the absence of any jurisprudence relating to the offences enacted by the legislature in terms of section 3 of the Prevention of Organised Crime, authorities from the South African Jurisdiction are persuasive. In the matter of *S v De Vries and Others*¹, an accused was found guilty of both theft and money laundering, where an offence under section 2(1) of POCA was held to be clearly separate and discrete from its underlying predicate offence. In this case, no unfair trial was held to have occurred. I too share the same sentiments in the case before Court, accused had acquired the funds unlawfully, and dealt with them as if they were lawfully acquired, and thereby disguised or concealed their origin by re-transferring the funds into his own personal account from which he started to deal with the funds by buying a vehicle from Zimmermann garage. I am satisfied that a case of money laundering had been proven beyond reasonable doubt and that there was no improper splitting of charges.

[27] Accordingly accused is convicted with the offence of money laundering in terms of section 6 (a) (b) and (c) read with section 11 of the Prevention of Organised Crime Act 29 of 2004 as amended.

[28] In the result, the following order is made:

1. Counts 1 - 147 of Fraud – Guilty.
2. Count 148 - The offence of money laundering in terms of section 6 (a) (b) and (c) read with section 11 of the Prevention of Organised Crime Act 29 of 2004 as amended – Guilty

D N USIKU
Judge

¹ 2012 (1) SACR 186 (SCA).

APPEARANCES:

STATE: Ms Moyo
Office of the Prosecutor-General, Windhoek

ACCUSED: Mr Wessels
Instructed by Directorate of Legal Aid, Windhoek