Strydom, J.P.

***^ /Ob //₀***

EVIDENCE:

Evidence given at trial not in accordance with pleadings -such evidence only admissible if pleadings are amended accordingly - circumstances under which Court will allow amendment.

**CASE NO. I 449/94**

**IN THE HIGH COURT OF NAMIBIA**

**PLAINTIFF**

In the matter, between

**YOUNUS CACHALIA**

**t/a YOUNUS CACHALIA WHOLESALERS**

versus

**DEFENDANT**

**ANDREAS JOSEPH JOHANNES t/a CHECKERS**

**WHOLESALE & SUPERMARKET**

**CORAM: STRYDOM, J.P.**

Heard on: 1995.10.19 + 1996.03.07

Delivered on: 1996.06.10

**JUDGMENT**

**STRYDOM, J.P.:** The plaintiff, who is described in the

pleadings before Court as doing business as a wholesaler from Potgietersrus in the Republic of South Africa, issued summons against the defendant for payment of the amount of N$194 090.63 being in respect of goods sold and delivered, interest and costs.

The defendant, who is described as a businessman doing business at Oshakati, promptly entered appearance to defend the matter. This led to an application for a summary judgment by the plaintiff which was likewise opposed by the defendant. In an affidavit filed by the defendant he denied being indebted to the plaintiff in the amount claimed but admitted that he owed the plaintiff an amount of

N$6 568.55. Consequently summary judgment was granted in this amount and in regard to the balance of the plaintiff's claim the matter proceeded as an ordinary defended matter.

Because of very thorough Rule 37 discussions which resulted in a considerable confinement of the disputes between the parties, it is not necessary to analyse the pleadings extensively. As a result of the Rule 37 discussions plaintiff, at the start of the trial amended the amount claimed to N$136 218.15 after also deducting the summary judgment given in his favour in the amount of N$6 568.55.

In his plea, defendant admitted that he bought goods from the plaintiff in an amount of N$130 324.03. In respect of goods to the value of N$51 303.90 which were not delivered to him, the defendant received a credit note leaving a balance of N$79 027.30 which was fully paid by him. This payment also included the summary judgment amount of N$6 568.55 which was since then paid.

There is some discrepancy of N$7.00 in the calculations set out above but this was taken care of in the Rule 3 7 agreement and admissions by the parties.

Of greater importance are certain further particulars supplied by the plaintiff in terms of a request prepared by the defendant. I will refer later on more fully to this issue.

From documents placed before the Court it seems that the relationship between the parties goes back to July, 1992. The parties are further agreed that all goods sold and delivered by the plaintiff to the defendant up to the beginning of - November, 1992 were paid for by the defendant. This, so it seems, was sorted out by the parties in the Rule 3 7 conference. Goods ordered by defendant from plaintiff were so ordered in writing. The goods were thereafter despatched by rail or post from Potgietersrus to Tsumeb and from there they were transported by the railways by means of road carriers to Oshakati where the goods were delivered at the business premises of the defendant.

The issues in regard to which there are disputes between the parties are set out in the Rule 3 7 minutes which provide as follows:

> "1. The defendant admits that he placed all the orders for goods to be sold and delivered relied upon by the plaintiff except orders nos. 0447 to 0452 dated 28 October, 1992, which orders the plaintiff must prove.
>
> 2 . The parties are in agreement that only the following invoices are in dispute in the sense that defendant requires proof that the items specified on these invoices had been delivered.

| Invoice no. | Date | Amount |
|---|---|---|

| | | | | |
|---|---|---|---|---|
| 719 | 3/11/92 | 3/11/92 | N$29 | N$28048.37 |
| 720 | 3/11/92 | 3/11/92 | N$50 | N$17362.80 |
| 722 | 3/11/92 | 16/2/93 | N$27 | N$17974.61 |
| 724 | 16/2/93 | 10/9/93 | N$ 9 | N$ 5093.30 |
| 726 | 10/9/93 | 18/10/93 | N$ 5 | N$ 295.60 |
| 1069 | | | 804 | .49191.52 |
| 1070 | | | 496.13 | |
| 1654 | | | 629.57 | |
| 1655 | | | 695.86 | |
| 1761 | | | | |

The plaintiff admits that the defendant paid the full amount due tothe plaintiff in respect of the invoices for July 1992 to October 1992.

4. The parties are in agreement that the following credits were passed in favour of the defendant and that the following payments were made by the defendant and received by the plaintiff in respect of the invoices covering the period 3 November 1992 to 18 October 1993:

| | | | |
|---|---|---|---|
| 10/2/93 | Credit | N$ | 51 303 . 90 |
| 12/4/93 | Payment | N$ | 11 000 . 00 |
| 13/4/93 | Credit | N$ | 3 .2 9 |
| 28/4/93 | Payment | N$ | 15 000 . . 00 |
| 10/5/93 | Payment | N$ | 9 000 . , 00 |
| 12/6/93 | Payment | N$ | 10 000 . , 00 |
| 30/6/93 | Payment | N$ | 7 000 . , 00 |
| 10/7/93 | Payment | N$ | 8 000 , . 00 |
| 18/7/93 | Payment | N$ | **e** 500 , . 00 |
| 25/7/93 | Payment | N$ | 7 500 , . 00 |
| 3/9/93 | Payment | N$ | 5 000 00 . |
| 25/9/93 | Payment | N$ | 6 000 00 . |
| | | N$ | 136 307 19 . |

5. It is recorded that the amount of N$6 568.55 in respect of which summary judgment was granted against the defendant has already been paid by the defendant to the plaintiff and that the plaintiff's claim as set out in his declaration has been reduced by the said amount."

The minutes continued to set out certain agreed amendments to the pleadings regarding the amount now claimed by the Plaintiff and to which I have already referred. This agreement also addressed the discrepancy of N$7.00 in the plea: of the defendant to which I have referred earlier.

The parties, also by agreement, handed up a bundle of documents containing the statement, written orders, invoices and other documentation which are relevant to the disputes between the parties. A statement, contained on p. 2 of the bundle, reflects all the invoices, those in dispute and those not in dispute, as well as payments effected by the defendant. This statement shows a balance in favour of plaintiff of N$194 090.93 which is also the amount originally claimed by the plaintiff. From this amount must then be deducted a credit subsequently allowed by plaintiff in an amount of N$51 303.90 which then leaves a balance of N$142 786.73. From this amount must further be deducted the sum of N$6 568.55 for which summary judgment was granted to the plaintiff and which sum was in the meantime paid by the defendant. It is on the basis of the foregoing that the amended balance of N$136 218.18 is now claimed by the plaintiff.

It would be convenient at this stage to refer to an application to amend particularly the further particulars previously furnished by the plaintiff, and which application was made during the hearing of the matter after the plaintiff, Mr Cachalia, had completed his evidence and the matter was postponed for further continuation of the trial.

In a request for further particulars dated the 14th April, 1994 and addressed to the plaintiff's declaration, defendant in para. 1.1 of his request, asked the plaintiff to give particulars in regard to the contract of sale on which he relied. In his answer, dated 19 September, para. 1.1, plaintiff stated that he relied on various oral agreements concluded between the parties between the period October, 1992 to November, 1993 in terms whereof plaintiff sold and delivered to the defendant clothes and shoes. In para. 1.3 of defendant's request plaintiff was asked whether any goods were in fact delivered to the defendant. The reply to this request was in the affirmative. Then in paras. 1.6 and 1.7 of the request the plaintiff was asked to state who on behalf of the plaintiff delivered the said goods and who, on behalf of the defendant, received such goods. The plaintiff's answer to para. 1.6 was that the goods were delivered on his behalf by Transnet, Transnamib and the postal services. In regard to para. 1.7 plaintiff stated that the goods were received by defendant or employees in his employ. The way in which the answers were couched in regard to paras. 1.6 and 1.7 in my opinion constitute the railways and the postal services as the agents of the plaintiff. That being the case the plaintiff had to prove that delivery occurred to the defendant or his employees at Oshakati.

However when the plaintiff testified he stated that printed order forms containing inter alia the term that goods ordered by a purchaser would be delivered F.O.R at Potgietersrus, were signed by the defendant and that that was the agreement between the parties. This evidence constituted in my opinion the railways and postal services the agents of the defendant so that plaintiff only

needed to prove delivery of the goods to the railways or postal services at Potgietersrus.

Mr Geier, on behalf of the defendant, quite correctly objected to this evidence. Mr Coetzee, on behalf of the plaintiff, then argued that delivery was in dispute and that the plaintiff was consequently entitled to lead evidence in that respect. After short argument the Court ruled in favour of the plaintiff. The case then further proceeded on the basis of the agreement as testified to by the plaintiff and the plaintiff was also cross-examined on that basis.

After the case was postponed I again went through the pleadings and then came to the conclusion that the evidence given by the plaintiff in regard to delivery was not canvassed in the pleadings and should not have been admitted, at least not without amendment of the pleadings.

As a result of this conclusion I caused notice to be given to the parties to inform them that at the continuation of the trial the Court would require further arguments on the following two points, namely:

(1) Whether the plaintiff's case is, on the pleadings, based on delivery F.O.R; and

(2) If not, whether evidence in connection therewith would be admissible without amendment of the pleadings.

When the hearing started again on the 7th March, 1996, Mr Coetzee delivered a notice of amendment wherein para. 1.6 was substituted with a new paragraph which alleged that -

> "1.6 The goods were delivered free on rail, Potgietersrus or to the postal authorities at Potgietersrus, the risk for loss in transit in both instances being on the defendant."

To this was later added that -

> "The goods were so delivered by the plaintiff or employees in the employ of the plaintiff."

Paragraph 1.7 was substituted with the following new paragraph -

> "1.7 The goods were received on behalf of the defendant by Spoornet, at Potgietersrus, South Africa in respect of those consignments forwarded by rail and by the postal authorities at Potgietersrus in respect of the consignment forwarded by post."

Furthermore plaintiff also applied to supplement his answer in para. 1.1 of the particulars furnished by him by adding between the words "agreements" and "concluded" the words: "Alternatively agreements concluded partly in writing and partly orally."

Mr Geier opposed the application to amend and provided the Court with helpful heads of arguments. After argument I allowed the amendment subject to the plaintiff paying the wasted costs of the day and further subject to the plaintiff being recalled for further cross-examination on the issues raised in the amendments.

My reasons for allowing the amendments and particularly the amendment regarding F.O.R. delivery were that that would allow a

proper ventilation of the real issues between the parties so that justice may be done between them. (See Trans Drakensburg Bank (Under Judicial Management) v Combined Engineering (Ptv) Ltd & Another. 1967(3) SA 632 (D & CWL) at p. 638). Also, because of my earlier ruling, the issue was canvassed and cross-examination was directed thereto by Mr Geier. Furthermore, from documentation placed before the Court it was clear that in those instances where the plaintiff's printed order forms were used and which were signed by the defendant, such orders contained a F.O.R. delivery clause. It was also clear from the evidence that the railage of goods despatched by plaintiff to defendant were also paid by the defendant. Because of these clear indications which were proved other than by word of mouth of the plaintiff I was satisfied that the amendments covered a genuine and real issue between the parties.

The only possible prejudice which the defendant could in my opinion have suffered as a result of the allowing of this amendment, was that Mr Geier was perhaps not fully prepared at the time he cross-examined the plaintiff on this issue. To exclude any possible prejudice in this regard the amendment was allowed subject to the recalling of the plaintiff. As a result of the amendments the matter stood down from the 7th March to the 8th March. This was by agreement between the parties.

When the matter continued on the 8th Mr Geier filed an amended plea and the plaintiff again took the stand and was further cross-examined by Mr Geier. The only regard in which the amended plea differed from the original plea was that defendant denied the F.O.R. delivery term and pleaded that it was an oral,

alternatively an implied and further alternatively a tacit term of the agreement between the parties that delivery of the goods sold had to be effected by the plaintiff at the business premises of the defendant.

The only witnesses that testified were the plaintiff and the defendant. Because of the Rule 37 admissions the Court is only called upon to consider and decide three distinct orders and deliveries as reflected in the invoices which were allegedly sent to the defendant. In regard to the order set out on order forms 0447 to 0452 the Court must also decide whether this order was in fact placed by the defendant. The goods ordered by these order forms were reflected in invoice nos. 719, 720, 721, 722, 723, 724, 725 and 726.

According to the evidence of the plaintiff he did business with various clients in Namibia. This business was mostly done through a representative who would visit the various clients and obtain written orders from such clients. These orders were then sent to the plaintiff's wholesale business in Potgietersrus where the orders were made up and despatched to the client by rail or by post, presumably depending on the bulk of the order. Goods despatched by rail were packed in containers. According to the plaintiff goods despatched by rail were delivered free on rail at Potgietersrus Station. Clients were to pay for such railage. Transit insurance was taken out by the plaintiff in respect of such goods for and on behalf of the client and the client's account was then debited with the cost of such insurance. This is clearly reflected in the various invoices. See invoice nos. 719 to 726. The railage was similarly debited to the account

of the defendant. See invoice no. 8 07 for an amount of R6 240.00.

The goods containing this specific order of the defendant were packed in three containers and despatched by rail to the defendant. See in this regard items 22, 22/1 and 22/2 of the bundle of agreed documents.

In regard to the placing of the order the plaintiff testified that after doing business through a representative he decided to come to Namibia and to meet some of the clients. In regard to orders 0447 to 0452 and dated the 28 October, 1992 the plaintiff testified that he paid a personal visit to the business of the defendant. He further testified that he personally completed the order forms and that such orders were placed by the defendant and were completed in the presence of the defendant. He further said that because it was one composite order he did not regard it necessary to obtain the defendant's signature at the end of each page but only asked him to sign on the last page of the order, which he then did. See order form 0453. At this stage it is perhaps useful to state that defendant admitted his signature on the order form 0453 and admitted that he ordered the goods as set out in this order form.

Plaintiff further testified that after the goods were sent to defendant he received a fax from Checkers Wholesaler, i.e. the business of the defendant, stating that defendant had not received all the goods ordered and setting out particulars of the goods so missing. (See in this regard items 24 to 24/6) . On going through this list of items plaintiff then

identified which items were set out in which invoice. These items were so identified by writing in the invoice number on the defendant's fax indicating thereby which of the lost goods appear on which invoice. From this it is clear that goods appearing on all the invoices were affected. It now also became clear that these goods were all packed in one of the three containers despatched to the defendant. A claim for the missing goods was instituted and defendant's account was credited with an amount of R51 303.90.

When defendant testified he stated that the F.O.R. condition on the printed order forms was never explained to him. He admitted however that it was explained to him that he would be liable to pay for the insurance as well as the railage. It seems to me unlikely in the circumstances that the defendant was not aware of this condition set out on the order forms or what it meant. The business of the defendant being in Oshakati and bearing in mind the merchandise in which the defendant was dealing would, to some extent, have necessitated that goods be ordered from places outside Oshakati and had to be transported to the place of business of the defendant. It furthermore seems to me highly unlikely that it was explained to defendant that he was responsible for the insurance, which is one of the conditions contained in the form, and that the other condition, namely that the goods would be delivered F.O.R. at Potgietersrus, was not also brought to his attention, more so because it was also explained to him that he would be responsible to pay the railage. The fact that he was

responsible for the insurance clearly signifies that he also carried the risk of any losses in transit which was brought about by the- agreement that the goods would be delivered F.O.R. at Potgietersrus. This condition was also set out directly above the signature of the defendant and it could hardly have been missed by him.

Mr Geier argued that the fact that the plaintiff claimed for the missing goods and in one instance, although according to plaintiff's evidence the risk of loss was on the defendant, paid for the box of tissues which got lost, showed that the F.O.R. condition did not form part of the agreement between the parties. That, so counsel argued, was also the reason why the pleadings originally were not based on this condition. The first part of the argument loses sight of the fact that it was agreed between the parties that defendant would pay for the insurance of the goods in transit. This was also admitted by defendant. Defendant, on the one occasion when a claim was instituted, also received the benefit of the claim because of the credit note passed in his favour. It is therefore not possible to draw from plaintiff's dealings of the matter, the inference sought for by Mr Geier. Plaintiff also explained fully the way and the reasons why he dealt with the matter in the way he did. I accept such explanation. The plaintiff also explained why he, instead of instituting a claim, paid for the box of tissues which got lost. He explained that it would have cost him R2.00 to institute a claim for R3.00, which was just not a business proposition. The third point argued by Mr Geier is of greater importance. However, it seems to me that what plaintiff wanted to convey to the Court when he gave evidence, was that where the conditions

under which he contracted with a buyer were in writing and signed it should not really be necessary for him to bring that to the attention of his legal representative. The plaintiff, also under cross-examination, was adamant that the conditions contained in the written order forms were the conditions on which he contracted to sell and deliver goods to defendant.

In the circumstances I find, on a balance of probabilities that the defendant contracted with the plaintiff to deliver the goods ordered subject to the conditions set out in plaintiff's order form and that his acceptance thereof was signified by him signing such documents.

Bearing in mind the admissions made by the defendant, when he gave evidence, in regard to the disputed orders set out in paragraph 1 of the Rule 37 minutes, namely No. 0447 to 0452 which are reflected in invoices 719 to 726, it is not necessary to decide the issue of delivery. In this regard the defendant, when giving evidence, admitted that he received and accepted a credit in his favour, passed by the plaintiff in an amount of N$51 303.90 in respect of goods lost in transit. A reading of item 24 to 24/5, of the bundle of documents, which emanated from the defendant, showed that he claimed for goods which formed part of all the invoices executed as a result of the disputed orders 0447 to 0452. This also included goods set out in invoices 719, 720, 722, 724 and 726 which are now disputed. (See para. 2 of the Rule 37 minutes) . This claim therefore carried with it the admission that the goods, as set out in the order forms, were in fact ordered and accepted and that in regard to those goods not received a claim was now lodged. During his cross-examination this

was precisely what was testified to by the defendant. The defendant therefore accepted that what was reflected in the disputed invoices 719, 720, 722, 724 and 726 was delivered to him and that, in respect of such goods reflected therein, what he did not receive he put in a claim and was credited therefore.

I am mindful thereof that the defendant denied that the faxes set out in items 24 to 24/6 was sent by him or anybody on his behalf. As these documents, together with the one sent by plaintiff, item 25/1, formed the basis on which the defendant's claim was calculated, which calculation was accepted by him, I find that these documents, 24 to 24/6, were sent by him or somebody on his behalf. In the circumstances defendant is therefore liable to pay the plaintiff the amounts set out in invoices 719, 720, 722, 724 and 72 6.

Although not necessary for my conclusion above I must however also refer to other inconsistencies in the evidence of the defendant regarding this part of plaintiff's claim. It is so that the disputed order consisted of seven separate pages and that each page provided for a signature at the foot thereof. It is also so that the signature of the defendant only appeared on the last page. How this came about was explained by the plaintiff. He testified that at the time when he took the order from the defendant he had already been' doing business with the defendant for some time. As this was one order he did not think it necessary for the defendant to sign each page and only required him to sign the last page. Defendant however stated that he did not sign the six previous pages because the plaintiff, when the defendant, for example, ordered five items of a particular merchandise the

plaintiff would then write down 500. Bearing in mind the evidence of the defendant and the fact that, when he put in his claim, he seemingly did so without any objection, I have no hesitation in accepting the version of the plaintiff.

The second disputed claim concerns the goods reflected in invoices 1069 and 1070 dated the 16 February, 1993. The goods reflected in these two invoices form part of a bigger order placed by the defendant on the 9th and 10th February, 1993. See the bundle of documents, items 28 to 28/9. The goods so ordered are reflected in invoices dated the 16th February, 1993 and numbered consecutively from 1067 to 1073.

The order forms, items 28 to 28/9 of the bundle, are not the usual printed order forms of the plaintiff. Plaintiff testified that from time to time his representatives ran out of printed forms and that they then used other stationery to write up the orders. Consequently the stationery so used did not contain the printed conditions concerning the payment of insurance and that delivery would take place F.O.R. at Potgietersrus. Plaintiff however testified that all orders placed with him were subject to these conditions. It was further pointed out that also in respect of these orders the defendant paid the insurance and also the railage. However the representative who took the order and who could testify whether it was agreed that this order would also be subject to these conditions was not called to testify.

Defendant denied in general that orders were subject to the F.O.R. condition. It is so that defendant paid the insurance and railage. It may be that because of the plaintiff's stance, that all orders

to him were subject to these conditions, accepted that it was so agreed between his agent and the defendant and he therefor debited defendant with these costs. Defendant accepted the fact that he was to pay for these costs and further testified that he in fact paid therefore. These facts alone, cannot in the light of defendant's denial and the absence of any direct evidence, i.e. documentary evidence or oral evidence to that effect by the person who took the order from defendant, tip the scales in plaintiff's favour in regard to the F.O.R. condition. In the result I have come to the conclusion that the onus was on plaintiff to prove delivery at Oshakati of the goods as reflected on invoices 1069 to 1070.

In regard to these two invoices defendant testified that he had never set eyes on invoices 1069 and 1070 until they were shown to him by his legal representatives during his preparation for trial. He furthermore testified that all the goods he received corresponded to the five other invoices he received from plaintiff, i.e. invoices 1067, 1068, 1071, 1072 and 1073. If this were so then it would have been an- easy matter for the defendant to show, by comparing the written order forms with the invoices, that the goods reflected on invoices 1069 and 1070 were never ordered by him. No such attempt was made by defendant notwithstanding evidence by the plaintiff that the goods so ordered were in fact delivered.

In this regard it is,- in my opinion, of significance that invoices 1069 and 1070 form part of one composite order and that, in regard to the sequence of numbering they followed and fit into the numbering of the other invoices which reflected this order. As

it is these invoices are not at the beginning or end of the batch where it would have been easy to add them to the other invoices.

The plaintiff also testified that defendant's order was packed into 12 cartons and sent to him by rail. Defendant at no stage informed him that he did not receive all the goods ordered by him. Reference was further made by the plaintiff to a consignment note, item 31, whereby these goods were railed to the defendant. Furthermore a delivery sheet of Transnamib, item 38(1), shows that 12 cartons of goods were delivered to the defendant at Oshakati. It was acknowledged by defendant that he in fact received these 12 cartons with their contents. Defendant's claim that he never received invoices 1069 and 1070 is also refuted by a letter written by one Stuart Green, the bookkeeper of the defendant, dated 21 May, 1993, wherein an attempt was made

to reconcile purchases and payments. In this document reference was made to invoices numbered 1069 and 1070 and the amounts of these invoices namely N$17 362.80 and N$9 974.61. See also pa. 2 of the Rule 37 minutes.

On all the evidence I am satisfied that the plaintiff proved on a balance of probabilities that the goods reflected in invoices 1069 and 1070 were delivered to the plaintiff at Oshakati and that he is therefore liable to pay therefore.

The last group of disputed invoices are numbers 1654, 1655 and 1761. The goods set out in invoices 1654 and 1655 were ordered per written order forms nos. 2857 and 2858. The fact that the goods were ordered by the defendant is not in dispute. Invoice 1761 only

reflects the railage costs concerning the goods ordered. The goods ordered were reflected on the printed order forms of the plaintiff containing the conditions that the goods were to be delivered F.O.R. Potgietersrus and that transit insurance would be for the buyer's account. Both order forms were signed by the defendant personally. In this regard delivery of the goods ordered was subject to the F.O.R. condition and consequently plaintiff was only required to prove that the goods were delivered F.O.R. Potgietersrus.

Defendant when he testified stated that at the time when he ordered these goods he was in arrears with his payments to the plaintiff. As a result thereof he was informed by the plaintiff that the latter would not execute the order. Consequently, so it was testified by the defendant, his order was never carried out and the goods were never delivered to him.

I think that Mr Coetzee was correct when he submitted that bearing in mind the evidence given by defendant, the actual allegations made by defendant were that plaintiff fraudulently used his signed orders to concoct a claim against him. It is however also clear, as was admitted by defendant, that he never informed his legal representatives of the actual reasons why he maintained that this particular order was never executed.

However, according to the plaintiff, the order was executed and the goods contained in three parcels. Plaintiff further testified that when a consignment note is made out the numbers of the relevant invoices are indicated on such note. Plaintiff further testified that items 33 and 33/1 constitute proof that these

parcels were in fact sent to defendant by rail. Item 33 is the account of Spoornet for the railage of the parcels. This statement also reflected the invoice numbers 1654 and 1655. From the above evidence it is in my opinion clear that the reason given by the defendant as to why he did not receive the goods ordered by him, cannot be correct. This reason, so it seems to me, was also somewhat of an afterthought to attempt to explain why he did not institute a claim or at least inform the plaintiff that he did not receive the ordered goods. I am satisfied that also in this regard, the plaintiff, in accordance with his agreement with the defendant, delivered the goods ordered by the defendant.

The defendant, when he gave evidence, relied mainly on the information set out in the schedule attached to his affidavit when he opposed the summary judgment proceedings. During cross-examination the defendant frequently referred to this schedule to back up his denials, or to prove the correctness of his testimony. However Mr Coetzee amply demonstrated that the schedule was in many respects incorrect and incomplete and that it could not be seen as a true reflection of the various transactions between the parties.

In the result I am satisfied that the plaintiff has proved his claim against the defendant and that he is therefore entitled to judgment as claimed.

STRYDOM, JUDGE PRESIDENT

There shall therefore be judgment for the plaintiff in the amount of N$136 218.18 together with interest a tempore morae and costs. In regard to the amendments allowed by the Court it was ordered that the plaintiff pays the wasted costs thereof.

ON BEHALF OF THE PLAINTIFF: MR G S COETZEE

Instructed by: Lorentz & Bone

| | |
|---|---|
| ON BEHALF OF THE DEFENDANT: | MR H GEIER |
| Instructed by: | Gideon Kirsten |

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**CASE NO. CC**

**IN THE HIGH COURT OF NAMIBIA**

**In the matter between:**

**THE STATE**

versus **ACCUSED NO. 1**

**R E A STROWITZKI** **ACCUSED NO. 2**

**B A BOCK**

**CORAM:** **O'LINN, J.**

Heard on: 23, 24, 30/09/1993; 28 + 30/03/1994;
6, 7, 8, 18, 19, 20, 22, 25 - 29/04/1994;
10, 11 + 13/5/1994;
16, 17, 20 - 24, 27 - 30/06/1994;
1, 2, 6, 8, 9, 12 - 15/12/1994;
6 - 8, 12 - 16/06/1995;

Delivered on 1 - 4 , 7 - 11, 15/08/1995;
1, 8, 12 - 15/12/1995;
14/02/1996;
29/04/1996

1996/07/15

**JUDGMENT**

**O'LINN, J.**: In view of the fact that this judgment is of considerable length, I have divided it into sections as follows:

**SECTION A:** INTRODUCTION

**SECTION B:** THE PLEA EXPLANATIONS OF THE ACCUSED

**SECTION C:** THE ISSUES WHICH WERE COMMON CAUSE AT THE END
**SECTION D:** WHAT WAS IN DISPUTE AT THE END OF THE TRIAL
**SECTION E:** THE THREE LEGS OF THE STROWITZKI DEFENCE
**SECTION F:** THE DEFENCE OF THE ALLEGED SPECIAL AGREEMENT
**SECTION G:** THE SO-CALLED CONSTITUTIONAL DEFENCE
**SECTION H:**
DID ACCUSED NO. 2, MR B6CK HAVE KNOWLEDGE OF
THE FALSENESS OF THE CLAIMS
SUBMITTED BY
OF THE TRIAL

STROWITZKI, ACCUSED NO.

1? **SECTION** A;

**INTRODUCTION:**

The accused are:

(3) Reinhardt Eugen August Strowitzki, a 3 8 year old male person of German nationality.

(4) Berend Albert Bock, a 41 year old male of Namibian nationality.

The accused will hereinafter for the sake of convenience, be referred to respectively as Strowitzki and Bock.

The indictment put to accused but as amended subsequently, reads that accused are guilty of the crimes of:

**"FRAUD**

**ALTERNATIVELY**

**THEFT**

CHARGES 1 - 1 3 0

In that, upon or about or between 16th August, 1991 and 3 0th April, 1992 and at or near Windhoek in the district of Windhoek the said accused did wrongfully, unlawfully, falsely and with intent to defraud give out and pretend to the Government of the Republic of Namibia (the State), the Ministry of Finance (Department of State Revenue and/or Directorate of Customs and Excise) , and/or Standard Bank Limited that -

(5) the persons and/or businesses set out in column 1 of the Schedule were entitled to submit claims for the refund of excise duty and fuel levy;

(6) such persons and/or businesses in fact submitted claims for such refunds;

(7) such persons and/or businesses were entitled to be refunded for the amounts set out in column 2 of the Schedule; and/or

(8) accused 1 was entitled to receive and/or deposit the cheques issued for such refunds in his bank account and thereafter was entitled to the funds generated by such deposits, and did then and there by means of the said false pretences induce the Government of the Republic of Namibia (the State), the Ministry of Finance (Department of State Revenue and/or Directorate of Customs and Excise) and/or Standard Bank Limited to their actual or potential loss and prejudice to -

(9) accept the claims as valid claims;

(10) to issue cheques to the persons and/or businesses in column 1 of the Schedule for the amounts set out in column 2 of the Schedule and/or

(11) to accept that accused 1 was entitled to deposit the said cheques in this bank account and therefor was entitled to the funds generated by the said deposits.

Whereas in truth and in fact the accused when they so gave out and pretended as aforesaid well knew that the claims were false and that they were not entitled to the cheques and thus the accused did commit the crime of fraud.

ALTERNATIVE CHARGES TO CHARGES 1 - 1 3 0

In that, upon or about or between 16th August, 1991 and 3 0th April, 1992 and at or near Windhoek in the district of Windhoek the accused did wrongfully and unlawfully steal the amounts set out in column 2 of the Schedule the property of or in the lawful possession of the Government of the Republic of Namibia (the State), the Ministry of Finance (Department of State Revenue and/or Directorate of Customs

and Excise) *and/or Hermanns Kasper.*

*The summary* of substantial *facts* in terms of section *144(3) of* the Criminal Procedure Act, 51 of 1977, elaborates on the State case as follows:

> "Certain users of diesel fuel in Namibia qualify for a rebate of 18 cents per litre of diesel bought. If a bulk supplier of fuel sells diesel to such a user for the normal price less the 18 cents per litre, or if such a user buys diesel from a supplier without the 18 cents *being deducted, they* may claim the rebate *from* the Ministry of Finance of the Government of the Republic of Namibia. The Department of State Revenue and since July *1991,* the Directorate of Customs and Excise, receives, *processes, approves* and *pays* out these claims.
>
> During the period 16 August *1991 to* 30 April 1992 *Accused 1 submitted* 130 false claims for the refund of excise duty and fuel levy. *This he* did by using the names of the persons and businesses set out in Column 1 of the Schedule. *Accused 2* was in charge of the office dealing with these claims and approved the claims *whereafter* 130 cheques with a total value of R2 461 958.60 were issued.
>
> The amount of each separate cheque is set out in Column 2 of the Schedule next to the relevant name used by accused 1 when submitting the claim.
>
> *Accused 1 deposited* all these cheques except those mentioned in *charges* 37, 41, 48, 50, 55, 63, 67, 80, 96, 105, 107, 116, 120 and 130 in his personal bank account. The funds so generated were inter *alia* used by the accused to *finance* a partnership between them, to invest for their own account and to buy *property* and shares."

The list of witnesses attached to the summary includes names of all the representatives of firms and individual whose names the alleged fraudulent claims for diesel refunds, were submitted.

The indictment was supplemented before plea with exrequests for further particulars. The further particulars and copies of relevant documents on *which* the State intended to rely, were provided to both accused before plea.

[4]

Both accused pleaded not guilty to all the charges.

The State was represented *initially by* Mr *Rossouw* and subsequently by Mr Small. Accused no. 1, Strowitzki, was represented by Mr Geier, on instructions of the Directorate of Legal Aid *which* meant that the Namibian Government financed his defence. Accused no. 2, Bock, was represented by Mr Botes.

SECTION B: THE PLEA EXPLANATIONS OF THE ACCUSED:

1. Strowitzki:

1.1 Strowitzki's original plea explanation dated 15th April, 1994 reads as *follows:*

> "1. I am the abovementioned Accused No 1 in this matter. I have read the charge sheet *which* has *also* been explained to me and I *accordingly* understand the *charges* levelled against me fully.
>
> (12) I *wish to* plead not guilty to these charges.
>
> (13) The basis of my defence is as *follows:*

3.1 Subject to what is set out herein below, I admit that my *banking* account with number 042692911 with Standard Bank, Ausspannplatz, Windhoek was credited with the amounts set out in column 2 of the schedule to the *charge* sheet with the exceptions of the amounts referred to in the schedule under numbers 13, 37, 41, 48, 50, 55, 63, 67, 80, 96, 105, 107, 116, 120 and 130 as well as the

cheques reflected in those charges.

(14) I also admit that some of the funds which were paid into my account were used in order to procure the investments with Syfrets, Cape Town, the Board of Executors, Cape Town, the Board of Executors, Johannesburg, the Board of Executors, Durban and the Board of Executors, Pietermaritzburg.

(15) I also admit that I bought a townhouse in Klein Windhoek from F C Brand as well as a townhouse in Walvis Bay.

(16) R60 000,00 was put as my contribution into a partnership named National Car Rental/Autovermietung which existed between my son and myself.

I do aver however that I was entitled to receive the payments set out in the schedule annexed to the charge sheet as a result of the following agreement which I had with the Government of Namibia:

(17) During the period June/July 1991 I entered into an agreement with a representative of the Government of Namibia.

(18) The said agreement was to the effect that I would have to supply foreign currency to the Government of Namibia which currency would then have to be deposited into designated bank accounts overseas to be at the disposal of the Government.

(19) I would have to supply the Government with either German Marks and/or Swiss Franks at an agreed exchange rate of approximately three Rand for one German Mark and/or Swiss Frank.

(20) I undertook to channel the rand equivalent in German Mark or Swiss Frank as worked out with reference to this exchange rate into designated banking accounts after South African Rands had been deposited into my banking account and once the relevant deposits had been cleared.

(21) In accordance with this agreement, monies set out in the schedule to the charge sheet were deposited into my banking account.

(22) In accordance with my obligations I then from time to time arranged that the relevant amounts of foreign currency-would be transferred into the said designated accounts overseas.

(23) I believed at all times that my actions were legal and in terms of a contract which I had entered into with the Government of Namibia.

(24) I accordingly deny that when I acted as aforesaid, I was acting:

(25) unlawfully;

(26) with the intent to defraud;

(27) making a misrepresentation; which caused prejudice.

7. With reference to the alternative charge of theft, I wish to submit respectfully that by the same token I did not have the intent to steal when I dealt with the monies so coming into my possession. I did not believe that such contrectatio was unlawful."

(28) On 29th April, 1994, accused no. 1 supplemented his explanation of plea with an extensive list of admissions relating to the receipt and conversion of the Government cheques.

(29) In sum, his various explanations of plea amounted to the following:

> He admitted that he had received the Government cheques issued for fuel levy refunds and paid these, with a few exceptions, into his banking accounts and converted the proceeds to his own use. He however denied that he had submitted any of the alleged false claims. In general terms he stated that the cheques he received were due to him because of an official secret agreement he had

as set out supra.

Bock's original plea explanation dated 22nd Ap 1994 reads as follows:

"1.

I am Accused No. 2 in this matter.

2.

I am charged with 13 0 counts of fraud, alternatively theft.

3.

I have pleaded not-guilty to all the said charges against me.

4.

I however in terms of Section 220 of the Criminal Procedure Act, Act 51 of 1977, wish to place the following admission on record, to wit:

4.1 I admit that I during the relevant period as alleged in the charge sheet was employed by the Ministry of Finance in the Customs and Excise section as a Senior Customs and Excise Officer.

5.

I however wish to state that during the relevant period as set out in the charge sheet, I conducted my task in respect of my employment to the best of my ability and at all times bona fide.

6.

I therefore deny that I perpetrated any fraudulent act as alleged in the charge sheet or any theft of money during such period.

7.

I accordingly deny any and all of the wrongful and unlawful acts alleged in both the main count and alternative count."

2.2 Bock's additional plea explanation dated 28th April, 1994 reads as follows:

"1.

I am Accused No. 2 in this matter.

2.

I already have pleaded not-guilty to all the charges alleged against me.

3.

In amplification of my written statement in terms of Section 115 of the Criminal Procedure Act, Act 51 of 1977, as amended, and as a direct result of further documentation supplied by the State, I wish to enter the following further formal admissions in terms of Section 220 of the Criminal Procedure Act, Act 51 of 1977, to wit:

(30) I admit that the original claim forms contained in the further particulars supplied by the State as Annexures "A 1.1" to "A 13 0.1" have been received by the Department of Finance for processing during the period alleged in the charge sheet.

(31) I admit that I, during the processing of the said claims, initialled the original claim forms referred to in Annexure "A" annexed hereto.

(32) I also admit that I checked the claims referred to in Annexure "B" and signed same as having been checked by myself.

(33) I furthermore admit that the cheques contained in the new further particulars supplied by the State were issued by the Department of Finance in respect of the respective claims."

2.3 In sum, accused no. 2's defence can be summarised as follows:

Accused no. 2 received the claims, and initialled it as having been received and checked by him in most of the claims relevant to the charge. He authorized the cheques. He however denied that he knew the claims submitted were false and insisted that he acted bona fide in all cases. He declined to say however from whom he received the applications and to whom the cheques were delivered.

**SECTION C: THE ISSUES WHICH WERE COMMON CAUSE AT THE END OF THE TRIAL:**

1. Issues affecting both accused:

1.1 All the claims submitted in respect of counts 1 - 13 0 were fraudulent inter alia in that:

the purported firms and individuals did not authorize Strowitzki or any other person to submit such claims on their behalf;

insofar as their purported signatures appeared on some written authorities, these are forgeries in most, if not all cases;

neither Strowitzki nor Bock nor any other person had any authority to pay the Government cheques purporting to the diesel levy refunds, into the banking accounts of Strowitzki and to be converted by Strowitzki or Bock to their own use;

all the particulars of alleged purchases and use of diesel fuel filed in support of the claims were false;

accused no. 1 was never a registered diesel supplier or user;

the Ministry suffered prejudice in the amount of N$2 461 958.60 by issuing cheques for diesel levy refunds in regard to these false claims;

the actual prejudice was N$2 319 408.19 and the potential prejudice N$142 550.41. The potential prejudice was in respect of cheques issued but not yet paid into Strowitzki's banking account or where it was paid in but payment was stopped by the Government.

2. Issues relating; more particularly to Strowitzki's defence:

2.1 The agreement alleged by Strowitzki to have been entered into with one Schmidt on behalf of the Namibian Government was an oral agreement and at no stage reduced to writing.

(34) The alleged agreement did not provide that Strowitzki would submit claims for diesel levy-refunds to the Government of Namibia.

(35) It was never part of the agreement that Strowitzki would submit false claims to obtain payment in Namibia.

(36) Strowitzki did not call Schmidt as a witness and could at no stage provide any particulars to make it possible to trace Schmidt.

(37) Strowitzki did not know whether the said Schmidt held any post in the Government.

(38) The name Schmidt was not disclosed to the police, the State or any other person before the trial; the name was not

mentioned in the application by Strowitzki before pleading, for an order for "permanently quashing and permanently staying the criminal proceedings" against the accused on the ground that the accused could not have a fair trial; the name of Schmidt was not mentioned in any of the written plea explanations by Strowitzki. This notwithstanding the fact that Strowitzki as well as Bock mentioned other names to the investigating officer and the fact that the Court in the aforesaid pre-trial constitutional application, during argument as well as in the course of the judgment, pointed out the vagueness of -the alleged agreement, and in particular, the defect that Strowitzki could not supply the name or names of the person or persons who negotiated with him on behalf of the Government and such person's position or status in the Government hierarchy. In Strowitzki's founding affidavit in par. 61, Strowitzki said under oath:

> "I informed counsel that I could not at this stage identify or trace the relevant government official with whom the said agreement had been concluded and that, as a result of this, the most important way of proving this agreement was evidential material found overseas . . . ." (My emphasis added).

See judgment: The State v Strowitzki & Bock, 1995(1) BCLR, 12 (Nm) at 38 G - 39 H.

The name Schmidt was mentioned for the first time later in Strowitzki's evidence after one of his diaries was produced in Court and the name "Schmidt" appeared in that diary, but without any indication of the context and connotation.

SECTION D: WHAT WAS IN DISPUTE AT THE END OF THE TRIAL:

1. In regard to Strowitzki, accused no. 1:

1.1 Whether or not he completed and/or submitted the aforesaid false claims and false authorities.

(39) Whether or not the agreement alleged by Strowitzki was ever entered into and if so, its effect on the mens rea of Strowitzki.

(40) The so-called constitutional application based on the allegation that the accused did not have a fair trial.

2. In respect to Bock, accused no. 2:

The only issue in dispute between the State and Bock is whether or not Bock had knowledge of the falsity of the claims. Bock's stand in his evidence was that he received the applications from Strowitzki and in several cases personally handed the cheques to Strowitzki, including other documents such as a new application form. In the light of his great respect for Strowitzki, he never suspected anything wrong with the claims and acted bona fide throughout.

**SECTION E: THE THREE LEGS OF THE STROWITZKI DEFENCE:**

1. Whether or not Strowitzki submitted the aforesaid false claims:

1.1 The investigating officer, Van Vuuren, testified that he found amongst the documents in Strowitzki's filing system, inter alia: photocopies of the claims submitted without the official part completed; applications in some

cases, such as Autoland, to register as supplier of diesel and notification to Autoland of registration; the relevant cheque counterfoils indicating clearly to whom the cheques were made payable and that those cheques were in respect of fuel levy refunds; the "index" in the index book of accused, Exhibit "F", found in his filing system in which he had entries corresponding to

the purported claimants, e.g. AUTOLAND-FIN MIN-DIESEL, BOCKMUHL-FIN-MIN-DIESEL, DELMONTE-FIN MIN-DIESEL, EBRECHT-FIN-MIN-DIESEL, HARTOBON-FIN MIN-DIESEL,HIRSCH-FIN-MIN-DIESEL,MITTENDORF-FIN MIN-DIESEL, MUHL-FIN-MIN-DIESEL, RIEDEL-FIN MIN-DIESEL, RIEHS-FIN-MIN-DIESEL, RUPPERT-FIN MIN-DIESEL, RUSCH-FIN-MIN-DIESEL, RUDIGER-FIN MIN-DIESEL, SHIVON-FIN-MIN-DIESEL, SHUBERT-FIN MIN-DIESEL, STEIN-FIN-MIN-DIESEL, STOERMER-FIN MIN-DIESEL, ZANDER-FIN-MIN-DIESEL.

1.2 Strowitzki did not deny in his evidence that the index book was his and the entries made by him or on his behalf. He could not at any stage give any satisfactory explanation for the aforesaid entries. It is clear that Strowitzki was

meticulous in recording his activities in his diary Exhibit "DF". The entries in his diary also provided damning evidence of the fact that he was the one who prepared and submitted the claims. So e.g. in regard to the purported claimant Ebrecht, the diary contains an entry on 23rd August, 1991

"H A Ebrecht" and "Preparation application diesel oil". On the same date the first claim under the name Ebrecht was submitted and forms the substance of count 28.

Strowitzki nevertheless persisted in his denial that the claims for diesel levy refunds were made by him or on his behalf. He vaguely suggested that some person in his office could have submitted the claims without his knowledge.

1.3 The defence witness S M Jones was employed by Strowitzki's company at the office of National Car Rental and was the senior in the office for the two months preceding the arrest of Strowitzki. She has knowledge of his handwriting. She testified without any contradiction that neither she nor any of the juniors in the office had any knowledge of the claims submitted or any cheques received in regard thereto. She also identified in cross-examination the signature of Dr Strowitzki on the original claim forms and his handwriting on many of them, including his handwriting on many of the annexures to the claims in the case of the claims purporting to be by the diesel suppliers. Although she was no handwriting expert, her experience of Strowitzki's handwriting made her evidence and opinions relevant and admissible, at least in so far

as she averred that the aforesaid signatures and handwriting were similar to that of Strowitzki. She also testified about the equipment and filing at Strowitzki's flat where only Strowitzki and his 14 year old son, Burkhardt resided and where Strowitzki kept his filing system.

This witness also made a good impression on the Court. She also had no motive to incriminate Strowitzki and to give evidence prejudicial to him.

(41) As far as the signature and handwriting is concerned the Court had the opportunity in the course of this long trial, to see and compare almost on a daily basis, the signature and handwriting of Strowitzki on documents admitted to have been signed by him and those aforesaid which he disputed or evaded. The Court's own impression is that the admitted signatures and handwriting are extremely similar, if not identical, to those alleged by the State to have been signed, filled in and prepared by Strowitzki.

(42) The evidence of the co-accused Bock was also to the effect that the claims were submitted by Strowitzki. Although Bock appeared to be a liar in many respects, there seems to be no motive discernable why he would in this respect, tell lies to incriminate Strowitzki, particularly in view of the fact that up to a late stage in the trial, the defence refrained from incriminating Strowitzki, possibly because it was hoped that Strowitzki would reciprocate.

(43) There is also no reason whatever to doubt the evidence of Van Vuuren in regard to the documents found in the files of Strowitzki.

(44) In the circumstances of this case, there is no indication of any person other than Strowitzki, who could have submitted the claims or at least the vast majority of them. The probabilities clearly point to Strowitzki as the person who not only received, banked and converted the Government cheques to his use, but who submitted all the claims in regard thereto.

(45) Strowitzki himself was a hopeless witness who made a bad impression throughout. He was evasive and contradicted himself repeatedly. In the face of the most damming evidence consisting of documentary proof, he persisted unashamedly with his lies.

It follows that his bare denial without any corroboration from any source and in the face of the overwhelming mass of viva voce and real evidence and the probabilities, must be rejected as false beyond any doubt.

(46) I agree with the argument of Mr Small that the defence of the alleged prior agreement with the Government, cannot avail the accused even if there was such agreement because the accused admitted and had to admit that the agreement did not provide for false claims to be submitted by him or any other person to the Ministry of Finance for diesel levy refunds.

(47) It must also be noted that it follows from the aforesaid analysis that the bank was never a party to the alleged agreement. Consequently the bank was also defrauded by Strowitzki as alleged in the indictment, in that the bank was

led to believe by the misrepresentations of Strowitzki inherent in his course of conduct, that Strowitzki was entitled to deposit the said cheques in his bank account and therefore was entitled to the funds generated by the said deposits, whereas in truth and in fact the accused when he so gave out and pretended, knew that he was not entitled to the cheques.

(48) It follows from the above that Strowitzki must be convicted on all counts, unless there is substance in his so-called "constitutional defence."

6. In the circumstances it is not strictly necessary to deal with the defence of the alleged special agreement or to deal with it nevertheless in much detail. I would deal with that defence as briefly as possible because it is also relevant to Strowitzki's constitutional defence and may also be relevant to sentence, should Strowitzki be convicted.

**SECTION F; THE DEFENCE OF THE ALLEGED SPECIAL AGREEMENT:**

1. My finding in **SECTION E**, together with the preceding analysis and facts not in dispute, are already strong indications that the alleged special agreement is a fiction of the imagination of a compulsive liar.

2. The question arises: Why would Strowitzki go to all the trouble of an elaborate system of the submission of false

claims, when there is an agreement not providing for it and where the money received from the Government, is received in response to such fabricated claims with no indication of any nexus to an underlying agreement with the Government. Why would Bock, who processed the claims not know about such agreement? Why would Strowitzki not tell Bock, his close friend and associate anything about the agreement? Why would Strowitzki falsely deny the submission of the said claims by him?

3. I have already indicated supra, that the key person in the defence, the so-called Mr Schmidt, was only brought into the picture at a late stage when the defence must have realised, after an indication from the Court already in the course of the first so-called constitutional application, that it is difficult to believe that Strowitzki cannot give the name, status and particulars of the person with whom he entered into such an important contract where millions would be involved. There could also be no excuse of

forgetfulness because of the lapse of time because this person, if it was not a fictitious name, would have been prominent in the mind of Strowitzki, throughout the period of implementation and during the period following upon the arrest. It is also strange that such an agreement, if bona fide, was not in writing and that no trace or reference to an agreement could be found in any of the documents of the accused, including his index, his diary, his cash book and his filing system.

(49) Strowitzki could also not produce any documentation or witnesses to corroborate him. Strowitzki for a considerable period could not even identify the bank or banks or other financial institutions of which he allegedly made use when repaying the Namibian Government or the principals in the scheme. Correspondence by him or his counsel with some of the banks and institutions allegedly involved, met with negative replies in the sense that they had no knowledge of any fact supporting Strowitzki's story.

(50) It is also of some relevance to trace the development of this defence from arrest to the end of the trial.

5.1 Both accused appeared in Court on 16th April, 1992, shortly after their arrest, to apply for bail. They were then represented by the same legal practitioner, namely Mr Vaatz. Mr Vaatz is an experienced lawyer. Both accused at that stage under oath pledged their cooperation in the investigation. After their testimony the investigating officer van Vuuren testified in support of the State's opposition to bail. Van Vuuren set out the substance of the alleged crimes allegedly committed by the accused. On behalf of the defence, Mr Vaatz in cross-examination stated:

> ".... my instructions are that Mr Strowitzki acted as an agent for farmers and service stations to collect this refund levy, if I may call it that. The 0.18 cents per litre and if surely, if you work for the commercial *branch* you know that it is general commercial practice that sometimes you employ other people to do a job for you, even so far as collecting money."

In their evidence in this Court the accused did not deny that they had given such instructions to their attorney but tried to avoid the issue by claiming that they could not remember.

In reply Van Vuuren indicated that it had already been established in the case of Autoland. one of the alleged service station claimants for refunds, that the claim was false and that Strowitzki was not appointed as agent by Autoland.

It is also of importance to keep in mind that civil proceedings were instituted against Strowitzki and Bock in which the State case and evidence was set out in considerable detail and in which it was made clear that Strowitzki did not act as agent for those in whose names the false claims were submitted. These proceedings were not defended by Strowitzki or Bock even though, as this Court found in its judgment in the first constitutional application, the accused had due notice of the application by the state. The first proceeding was for an interdict to stop the accused from withdrawing money from their bank accounts and to stop them from dealing with their assets pending an action for the repayment of the State monies which were paid into Strowitzki's accounts from where same amounts were withdrawn and invested in certain assets. The second proceeding was an action for repayment of the monies illegally obtained and in respect of which default judgment was obtained and execution levelled. The order for attachment of the assets was already made in June, 1993. These civil proceedings were instituted in 1992 soon after the arrest of the accused.

It must have been abundantly clear to both accused already in September, 1992 that there were no prospects at all for a defence that Strowitzki submitted the claims as agent for the purported claimants.

The accused knew at an early stage after- their arrest that the police had confiscated all or most of -Strowitzki' s filing system, including the part removed by Strowitzki's son Burkhardt to a cellar of a certain Mr Kirch, the father of Ms Jones. The accused must then already have realised that these files, together with the bank statements and other documents obtained from the offices of the Directorate of Customs and Excise provided strong evidence of their criminal actions.

When in addition they were confronted with statements under oath by van Vuuren and the purported claimants, to the effect that the claims were totally false and that Strowitzki was never authorised by them to submit the claims, they must finally have realised that the defence that Strowitzki acted as agent was doomed to failure.

It was then that their fertile imaginations probably gave birth to the defence of a special agreement.

The reason why Brandt was selected as a target to incriminate, was probably because he was in fact known to Strowitzki and even befriended by Strowitzki and he was the attorney who on behalf of the State, instructed the institution of the civil proceedings which deprived Strowitzki of his funds and assets.

The accused, particularly Strowitzki, probably felt betrayed by Brandt and he may have had thoughts of

vengeance against Brandt. Furthermore Brandt was a reality not a fiction and because of the friendly ties Strowitzki had with Brandt, it was easy for Strowitzki to turn their innocent contacts into consultations on the special agreement.

Herrigel on the other hand was the head of the Ministry of Finance before he resigned. His resignation probably gave the accused the idea that the said resignation would make their story that he was the principal in an underhand and illegal deal, more plausible.

5.2 In September, 1992, Strowitzki attempted to get van Vuuren to agree on arranging to withdraw all the charges against him in return for information for a prosecution against Dr Otto Herrigel, a former Namibian Minister of Finance and against Dr Christiaan Brandt, then the Government Attorney. Strowitzki in this proposed agreement would give all cooperation and would assist van Vuuren, including the use of his connections and contacts in Europe. One of the proposed terms were that Strowitzki should have "all freedom of movement for the necessary actions."

It must be noted here that the only names mentioned in this document by Strowitzki are those of Dr Herrigel and Dr Brandt. There was no mention of "Schmidt". Furthermore the emphasis was on information and sources allegedly in Europe and the need to conduct the major, if not

exclusive investigation in Europe. There was no suggestion whatever that Strowitzki had any proof in Namibia, e.g. anything contained in his filing system, or in his diary or in any other document and also no indication whatever that a person by the name of Schmidt was supposed to be in Namibia. There was also no mention of the fraudulent claims for fuel levy refunds submitted by him. Bock's name and role was also absent from this proposed agreement. This omission was probably a
deliberate attempt to lead the investigation away from Bock because of the risk, realised by Strowitzki, in opening that can of worms or because he was already contemplating obtaining freedom for himself and double-crossing Bock or because of both such considerations.

It is clear from Bock's evidence under cross-examination by Mr Geier, for Strowitzki, that Bock insisted on Strowitzki making a full statement and even showed some aggression against Strowitzki when a satisfactory statement by Strowitzki was not forthcoming. When Bock realised that van Vuuren was not taken in by Strowitzki and refused to enter into the proposed written agreement, he struck out on his own.

(51) As -indicated supra, by the time of Strowitzki's aforesaid pre-plea constitutional application, up to and including his subsequent plea explanation, Strowitzki was unable to give the name of any person with whom he allegedly entered into the special agreement.

(52) It was only much later in the trial as pointed out supra, that "Schmidt" was named as the key figure. It seems that when however it became clear to all concerned, including Strowitzki and his counsel, that the attempt at the Schmidt version was doomed to disaster, Strowitzki resurrected at least the version that Brandt, was the key contact and the go-between between the Government and/or Minister Herrigel, and himself. As time went on and after Herrigel had testified, the incrimination of Brandt grew in severity in the Strowitzki defence. It seems that the shifting of the emphasis to Brandt was because there was at least proof that Brandt had befriended Strowitzki, had even sold a flat to him and at one stage lived in the proximity of Strowitzki's flat. By drawing in Brandt, the defence hoped to make their story more plausible. This was clearly a last straw grasped at by the defence.

> Of course Herrigel as well as Brandt in their
>
> > evidence denied every allegation of Strowitzki regarding a special agreement. It is also important here to note that it was never put to Herrigel when he testified that he in fact had anything to do with Strowitzki or had anything to do with the alleged special agreement. Dr Herrigel also pointed out that if the Government needed foreign exchange, it would certainly not approach a newcomer to Namibia and an unknown, to provide foreign currency for the Government. The defence at no stage during the trial contended that Dr Herrigel was involved in such a scheme.

6. The reasons for the fundamental changes in Strowitzki's particulars and emphasis in regard to the alleged special agreement, can be better understood in the light of the fundamental changes in the defences of co-accused Bock with whom Strowitzki certainly coordinated efforts, amounting to a conspiracy to mislead the police and Court, from the time of the arrest at least up to 1st April, 1993.

(53) As indicated supra, both accused during their first appearance for bail on 16th April, 1992, raised the defence that Strowitzki was an agent of those who claimed and claimed on their behalf.

(54) On 6th August, 1992 Bock signed a plea explanation in which he claimed to have performed his duties bona fide when he received claims and paid out the claims.

6.3 On -4th September, 1992 Bock however for the first time alleged that he acted on instruction from Dr Herrigel. Bock admitted at the beginning of the trial and throughout the trial that all these allegations were lies told by him on the instigation of Strowitzki and concocted from information supplied by Strowitzki in prison. He also admitted that he knew of the falsity of the allegations already at the time when he made the allegations. This Bock statement corresponds to some extent to the allegations made by implication in Strowitzki's proposed written agreement made before 11th September, 1992, i.e. more or less within the same time frame as the aforesaid Bock statement of 4th September, 1992.

Bock's statement however contained specific allegations about Dr Herrigel's alleged instructions to him. It contained at least nineteen lies of the gravest nature imaginable. The best is to quote the statement in full. This statement was made after Warrant Officer van Vuuren had warned Bock that he must be cautious of what he said because it was a serious matter and could be used as evidence in a Court of law. The statement reads:

"WARNING STATEMENT

I Bernd Albert Bock

Declare:- in English under oath

I am an adult White male, ID no. 510125 01 0025 7, born on 25/01/51: Born at Okaputa

Residing at Freyn Str. 3

Employed by: Unemployed

I am informed by D.W.O. (1) W F Janse van Vuuren that he is a Peace Officer and that he is investigating an alleged offence of Fraud involving a amount of ± R2 461 000. That he wants to know anything which I can tell him about it and that I must be cautious of what I say because it is a serious matter.

It is alleged that I support Dr R E A Strowitzki in submitting fraudulent diesel refund levies at the Ministry of Finance of the Government of Namibia since August 1991 until April 1992.

I am warned that I am not obligant to answer any questions and/or make any statement but what I may say will be written and may be used at a later date as evidence in a Court of Law. I am sober and by my full sense and understand the contents hereof.

PLACE: WINDHOEK (sgd.) B Bock

DATE: 92/09/04 SIGNATURE OF

SUSPECT

In answer to the above read out to me and signed by me, I wish to state the following:- As per attached annexure written in my own handwriting....."

"While working as Senior Customs & Excise officer in the 'fuel levy refund' (diesel) section, I got verbal information by the Minister of Finance, Dr Otto Herrigel, to check and pay out all claims from Dr R E A Strowitzki, who was appointed by the Minister as agent. Dr 0 Herrigel was to my experience also acting as money distributor for the present Government or/and Government Personnel. The Personnel that worked for/with/under me all claims were perfect and in order. Although it did seem tricky to me with the verbal orders that I received from Dr 0 Herrigel, I did not know or suspect anyway of dark money transaction in it, especially not Dr 0 Herrigel and/or Dr Strowitzki or any other person. On or about the end of September 1991 I was at Dr Strowitzki's house and then Mr Christiaan Brand did come to visit Dr Strowitzki and it was at about 21:30 hours, when I did question Mr Brand about the verbal orders that I did get from the then Minister of Finance, but then in the presence of Dr Strowitzki he said that if the Minister of Finance did give the orders (verbal) it is in order.

After I was put in jail as awaiting trial prisoner the following information did I gather. Dr 0 Herrigel had a close friend from Namibia to talk to all his clients, also Dr Strowitzki and he drove the official vehicle of the Min. of Finance. This close friend of Dr Herrigel did arrange for the payment of German Mark in either Cologne or Antwerp at an exchange rate of R3,0 0 to DM 1,0 0 for the transport by a person in a red 190E Mercedes Benz vehicle from the province of Heidelberg, and the exchange rate was at that moment about Rl,65 for DM1,00. It was then transported by the studyfriend of Dr O Herrigel coming from the Heidelberg district to the group of Banks, also known as City Corporation GmbH in Zurich and payed into an account unknown to me. As far as my information goes it was an account of Dr Herrigel and two others. Dr Herrigel was to my knowledge asked to resign as Min. of Finance due to the fact that he took a greater amount of money due to him in Europe than that he should have received.

The then Minister of Finance also supplied money in this manner to other companies through the Receiver of Revenue. The manner how the money was handed out to these companies and how the whole process worked is unknown to me. The total amount of money that was put into the private accounts of Dr O Herrigel and the other two is above R6 0 million and we do have to get an high Court order in Switzerland to get the statements from these banks."

Bock was not satisfied with these lies and pursued it. So e.g. he told van Vuuren on 10th September in -a letter handed in as Exhibit "K", that he wanted to visit van Vuuren that day, inter alia to "add a small annexure to my report, how and where in the Fiscus Building I met with Dr Herrigel. " Bock also

admitted in his evidence under cross-examination that also this statement was an absolute lie in that he never met with Dr Herrigel.

Bock was still not satisfied. Shortly before 19th December, 1992 he made a statement to the reporter-in-chief of the Windhoek Advertiser for publication in that newspaper, after numerous messages to that reporter to come and see him in prison for an interview. Bock admitted in cross-examination in Court that the report appearing as the main story in the Windhoek Advertiser of 19th December, 1992 under the heading "Three top Govt, men names in R64 million theft" was a true and accurate rendering of his interview with the said reporter. It is best therefor to quote the article in full:

> "Bock, an official in the department of customs and excise, stands accused by the State of unlawfully appropriating government money in the sum of R2 641 000 which, he claims, he appropriated on the instructions of one of the three government principals.
>
> 'What I am telling you today is going to be part of my evidence in the High Court
> trial next year,' Bock said.
>
> The interview was arranged after numerous messages had been sent to the Advertiser's offices in which Bock requested a meeting with the reporter-in-chief. The police commercial branch was contacted and Warrant Officer Jan van Vuuren spoke to General Foffie Badenhorst, who said the police had no objection to the interview.
>
> The prison authorities said it was not in their hands to grant leave for the interview because Bock was still awaiting trial and only the police investigating the case against him could give clearance for the interview.
>
> The interview was delayed and a prison official who sat in on the interview explained that it was due to the considerable distance - almost a kilometre's walk - from the section where Bock is detained to the office allocated for the interview.
>
> The reporter greeted Bock and told the latter, now bearded, that his appearance was good. That seemed to take Bock by surprise, and he pulled up his tattered T-shirt to reveal that

his jeans were hoisted up with braces. He said his condition was poor due to lack of ample and wholesome food.

Bock said he would not speak to the reporter in the presence of Warrant Officer Van Vuuren and asked him to leave the office. The prison officer could be present, he said.

He said R64 million had been taken out, as he put it, from an account of the Receiver of Revenue in Windhoek and the money was exchanged at a rate of R3 against DM1, either in Cologne or Antwerpen. After the exchange was made the money was given to a personal friend of one of the three government principals, and that money was placed in an account of the City Corporation Bank BGMBA.

It was a joint account of the three government principals and Bock startled both the reporter and prison official when he mentioned the names of the three principals. The reporter was speechless but Bock assured the newsman that he had not misunderstood him. He repeated his statement.

Bock said Inspector Wimpie van Vuuren, also of the police's commercial branch, knew about everything and had done nothing about it. Bock also named a big German company with extensive interests in Namibia as being involved in the graft he mentioned.

He could appropriate R2 641 000 for himself on the instructions of one of the three principals, and said that when his trial opened in the High Court he would go into more detail. Hopefully by then he would have certain bank account numbers which he could have had already for he had written a letter to a banking official in Switzerland to obtain certain information.

'When I wrote that letter I was already in detention and I asked and obtained permission to use the post box number of Inspector Wimpie van Vuuren. If there was a reply I have not received it until this day,' Bock said.

He related details about the Falcon 900B jet deal. He said that a commission of R15 million was payable on the controversial presidential jet, and he named the government principal who had received the commission.

Bock said if he could be out of prison while awaiting trial he would be afforded the opportunity to lay his hands on the documentary proof in support of his allegation.

This he said after being asked several times how he could make such allegations if he could not even in one instance substantiate those statements with documents.

Bock and Dr Reinhard Strowitzki, 36, arrested with him on charges of suspected theft or fraud involving several million rand which were fraudulently obtained, according to the State's allegations, by paying out diesel fuel subsidies to fictitious recipients.

Bock, who hails from a top family and whose father established the first butter factory in Namibia many, many

years ago not far from the Elefantenberg rail head near Otavi, is unmarried and lived in a rather comfortable home in Klein Windhoek. His father was also one of the foremost earlier aviators of the country and engraved on the old man's tombstone is an exact replica of the Focke Wulf 9 0 fighter interceptor which was part of the Luftwaffe's arsenal.

Bock said he was going to apply for bail
and that he had understood that he could
secure bail which would be fixed at R50 000 ....."

^ In this interview Bock did not claim to have acted

bona fide and without knowing of any fraud or theft.

The amount of R2 641 000 stated by him as the amount he was allowed to misappropriate was probably a reference to the amount alleged by the State to have been misappropriated by him and Strowitzki namely R2 461 958 but where Bock inadvertently used the figures 641 instead of 461.

Some of the important features of this interview were :

(i) Bock admitted that he misappropriated Government money in the amount of R2 641 000 in accordance with instructions from one of the three

alleged Government principals who took out R64 million of Government money from the account of the Receiver of Revenue in Windhoek.

(ii) Bock did not mention Strowitzki's name or role.

(iii) Bock assured the reporter that what he was telling the reporter would be part of his evidence the next year in the High Court.

6.7 This was however not the end of Bock's efforts to deceive the police, the Court and the public with monstrous lies.

When he appeared in the magistrate's court for bail on 1st April, 1993 he persisted with his lies in stating under oath:

> "I was working for my salary and I got instructions from the Minister of Finance to have A2 (then Strowitzki) as an agent."

6.8 It was alleged by Bock in his evidence in this Court and admitted by van Vuuren that Bock did admit to him after his release on bail and before the commencement of the trial in the High Court, that his allegations in his written statement to van Vuuren and in his interview with the reporter were fabrications originating from Strowitzki.

It is probable that Strowitzki abandoned his reference to Herrigel and Brandt in his founding affidavit in support of his aforesaid constitutional pre-plea application as well as in his plea explanation in this

> Court, because Bock had by that time already withdrawn from the conspiracy to falsely implicate Herrigel and Brandt and this obviously weakened the prospects of succeeding with the deception.

(55) Whatever the precise reasons for Strowitzki's change of tactics, it is significant that Bock, co-accused and co-conspirator in the aforesaid attempted deception, who would know precisely how he and Strowitzki reached the agreement to tell the story, now testified under oath that the whole story was a fabrication. Although Bock has been shown to be an unconscientious liar, there could be no reason to repudiate Strowitzki, if there was any substance in the story.

(56) Strowitzki had the audacity to contend that he did not realise he was committing a crime because he was acting in terms of the special agreement and was bona fide and without any guilty intent at any stage.

> Now Strowitzki testified that he obtained a doctorate in economics at a German University and also studied Criminal law in so far as it affected economics. He gave himself out, also in Court as an experienced economist and business person. Whether he lied in this regard, the Court does not know. It is clear however that Strowitzki is an intelligent person but without much respect for the

intelligence of other mortals and apparently also not for the intelligence of the Court.

A person in his position could never have thought for one moment that Ministers and other Government officials -involved in or masterminding such a deal were acting lawfully and above board. No wonder that Bock in his aforesaid interview with the Windhoek Advertiser described the deal as "appropriating government" money.

If as Strowitzki alleged, Brandt had instructed him not to tell Bock about the deal because he as an extrovert, would tell others, he must have realised that the secrecy was indicative of an underhand and illegal deal.

If this was a bona fide contract with Government, surely one would have expected an agreement in writing with witnesses and setting out precisely the terms and the whole modus operandi relating to the implementation of the agreement.

It is common cause that the monies received by Strowitzki, paid into his banking account and converted to his own use, were State funds, belonging to the Namibian nation. It is also common cause that the persons and companies to whom the cheques were made out, did not receive the money and did not give Strowitzki the right to convert to his own use monies earmarked for them. Surely Strowitzki would also have known that such conversion to his own use would constitute fraud and/or theft.

There can be no doubt that if an agreement as alleged was ever entered into, Strowitzki would have realised its illegality.

Taken in conjunction with all his other lies, there can be no doubt that participation in such a scheme by him would have been with the knowledge of wrongfulness and intention to defraud and he would on that basis, also have been guilty of fraud and/or theft.

10. There are many other factors and circumstances not specifically discussed in this judgment which point to the falseness of the "special agreement" defence.

It will however be a waste of space and time to deal with all these factors and circumstances in this judgment. Suffice to say that I accept the evidence of Brandt and reject that of Strowitzki in regard to the alleged special agreement. The evidence of Dr Herrigel that he was not aware of such agreement and had no part in it was not contested by the defence and that evidence stands uncontradicted. It follows also from this that there never was such a special agreement. That finding in itself goes a long way in destroying the possibility that Dr Strowitzki was misled by Schmidt, Brandt or any other person into the bona fide belief that Dr Herrigel was the principal behind the scenes in such a scheme or scam.

In the light of all the evidence and the probabilities, I reject the allegations of Strowitzki as to a special agreement as false beyond all reasonable doubt. The defence based on the alleged special defence therefore also fails, in so far as it may be relevant.

## G: THE SO-CALLED CONSTITUTIONAL DEFENCE

1. This defence is a continuation of the aforesaid constitutional application made before plea and which was rejected by this Court in the judgment on 22nd April, 1994 in S v Strowitzki & Another, reported in 1995 (1) BCLR 12 (Nm) .

2 . It is necessary to point out however that in the aforesaid judgment, the Court already dealt with the many untruths uttered by Strowitzki under oath in the aforesaid application. The merits of the contentions and the fallacies of the argument as it stood at that stage, were also dealt with to a substantial degree and need not be repeated verbatim. The thrust of the judgment was however that Strowitzki was the author of his own dilemma and that there was no substance in his contention that he could not have a fair trial.

What is new is that we have now reached the end of the trial, bar the judgment on the merits. As I have indicated supra, the accused Strowitzki has persisted with lies throughout the trial and is guilty beyond all reasonable doubt and must consequently be found guilty, unless there is substance in the so-called constitutional defence at the present point in time.

On behalf of the accused it is now contended that the accused did not have a fair trial because the fundamental right to a fair trial enshrined in Article 12 of the

Constitution of Namibia is absolute and unqualified, the accused must be acquitted notwithstanding his apparent guilt.

I will assume for the purposes of this judgment, without deciding, that the defence is entitled to raise the defence that the accused did not have a fair trial at this stage of the proceedings. This would also be in accordance with the judgment in S v Burger & Van der Merwe, infra.

3. Both Mr Small and Mr Geier have provided this Court with extensive and thorough written heads of argument.

However none of them has referred to the important decision by the late Berker J.P., in the case of the S v W P Burger and A G du T van der Merwe, decided in the High Court of South West Africa during the pre-independence dispensation on 11th May 198 9, unreported.

In the said trial the accused were charged with alleged fraud on 77 charges containing 3 133 separate items of having submitted false claims to the Government for payment in their capacity as district surgeons. These charges were based on alleged offences committed many years before the accused were charged, many allegedly committed more than 10 years before the commencement of the trial. There were also several important alleged irregularities in the course of the investigation.

Counsel for the defence, advocate O'Linn as he was at that time, contended before judgment on the merits, that the accused did not have a fair trial because of the inherent difficulty of defending alleged offences allegedly committed so far in the distant past, combined with proven irregularities in the course of the investigation. He contended that the aforesaid factors tainted all the evidence and prejudiced the accused in their defence throughout the trial. Berker J. P., as he then was, upheld the defence contention and acquitted both accused on all the charges.

The learned trial judge had this to say about the fair trial issues:

> "Die vraag wat beantwoord moet word is egter of die onreelmatighede wat in hierdie saak plaasgevind het wel van so 'n aard is dat, soos mnr. O'Linn gesubmitteer het, geregtigheid nie geskied het nie en die beskuldigdes derhalwe geregtig is om onskuldig bevind te word. 'n Onreelmatigheid in verband met strafregtelike verhore is soos volg deur Botha A.R. in S v Xaba, 1983 (3) S.A. 171 omskryf:
>
> > 'Generally speaking, an irregularity or illegality in the proceedings at a criminal trial occurs whenever there is a departure from those formalities, rules and principles with which the law requires such a trial to be initiated or conducted (see R v Thielke, 1918 AD 373 at 376; S v Mofokeng, 1962(3) SA 551 (A) at 557) ... the basic concept underlying s 317(1) is that an accused must be fairly tried (see S v Alexander • and Others (1) , 1965(2) SA 796 (A) at 809 C-D; and cf S v Mushimba en Andere, 1977(2) SA 829 (A) at 844 H).'

Dit is egter duidelik dat nie elke onreelmatigheid wat binne die bestek van bogenoemde definisie val, noodwendiglik die gevolg het dat 'n beskuldigde onskuldig bevind moet word nie. Daar is tientalle gewysdes wat hierdie stelling uitwys. 'n Beskuldigde behoort slegs onskuldig bevind te word, of sy skuldigbevinding op appel of as gevolg van 'n spesiale inskrywing in terme van die Strafproseswet tersyde gestel behoort te word, indien geregtigheid as gevolg van die onreelmatigheid nie geskied het nie. Die volgende opmerkings van Rumpff, H.R. in S y

Mushimba en Andere, 1977(2) SA (A), te bl. 844, is van toepassing, waar hy se:

> 'Die Strafprosesordonnansie vereis dat indien daar 'n onreelmatigheid plaasgevind het, 'n skuldigbevinding alleen tersyde gestel kan word indien geregtigheid inderdaad nie geskied het nie. Die "geregtigheid" waarna hier verwys word is nie 'n begrip wat veronderstel dat die beskuldigde noodwendig onskuldig is nie. Geregtigheid wat geskied het in hierdie sin, is die resultaat wat 'n bepaalde eienskap van verrigtinge aandui. Die eienskap toon aan dat aan vereistes wat grondbeginsels van reg en regverdigheid aan die verrigting stel, voldoen is. Die vraag of onreelmatige of met die reg strydige verrigtinge in verband met 'n verhoor van 'n beskuldigde van so 'n aard is dat dit gese kan word dat van daardie grondbeginsels nie nagekom is nie, en geregtigheid dus nie geskied het nie, sal afhang van die omstandighede van elke geval en sal altyd 'n oorweging van publieke beleid vereis.'

Daar is sekere onreelmatighede wat van so 'n aard is dat dit sonder meer aanvaar word dat geregtigheid nie geskied het nie. Dit is egter buitengewone gevalle - sien S v Moodie, 1961(9) SA 752 (A) en die verwysing daarna in S v Mthembu and Others, 1988(1) SA 145 (A).

'n Geval waar 'n onreelmatigheid op sigself bevind was om 'n regskending uit te maak is S v Mavuso, 1983(3) SA 499 (A). Sien ook S v Rossouw, 1979(3) SA 895 (T). Op die ander kant is in Mthembu se saak (supra) die onreelmatigheid bevind om nie van so 'n aard te wees om 'n regskending daar te stel nie.

Per slot van sake moet elke saak op sy eie feite beoordeel word, en soos Williamson, J. in S v Manqcola and Others, 1987(1) SA 512 (B) dit gestel het:

> ' It is abundantly clear from a consideration (of the cases quoted) that a value judgment has to be made as to the nature and extent of the prejudice to which an accused has been subjected

en soos Rumpff H.R., dit ook in die laaste gedeelte van die bogenoemde passaat van Mushimba se saak gestel het. Sien verder S v De Lange, 1983(4) SA 621, waar ook beslis was dat die bewyslas op die Staat rus om te bewys dat geen regskending plaasgevind het as gevolg van 'n bewese onreelmatigheid nie.

Hierdie is nie 'n saak waar een of twee onreelmatighede, waarop die verdediging steun, geskied het nie, maar eintlik 'n hele reeks onreelmatighede van min of meer ernstige aard. Basies kom dit daarop neer dat die hele ondersoek in al sy fasette deurspek is met onreelmatighede, baie waarvan op sigself nie van geweldige belang is nie. Daar is egter ook instansies waar wel ernstige onreelmatighede geskied het. Ek het na sommige van hulle verwys. Dit is egter die kummulatiewe effek van al hierdie onreelmatighede wat die Hof, na my mening, in ag moet neem om tot 'n beslissing te kom of dit van so 'n aard is dat geregtigheid inderdaad nie geskied het nie.

Soos dit uit die gewysdes blyk (sien bv. Mushimba se saak te bis 844) is die geregtigheid wat hier ter sprake is, nie 'n begrip wat veronderstel dat die beskuldigdes noodwendig onskuldig is nie. In hierdie geval wil ek dit duidelik stel dat, na my mening, die Staat geslaag het om te bewys dat die beskuldigdes wel in 'n getal gevalle bewustelik eise vir vervoerdienste ingedien het, welwetende dat die spesifieke vervoerdienste nie gelewer was nie, en dat die hoofverweer, naamlik dat 'n geweldige getal vervoer deur agente plaasgevind het, behalwe in 'n relatief klein getal gevalle, nie aanvaarbaar is nie, en dat hulle wel skuldig bevind kon word op sekere van die klagtes.

> Na baie ernstige oorwegings het ek egter tot die slotsom gekom dat daar onder die spesifieke omstandighede van hierdie saak daar soveel onreelmatighede plaasgevind het, dat- geregtigheid in die sin soos dit deur die aangehaalde gewysdes uiteengesit is, nie sal geskied as beskuldigdes skuldig bevind word nie . "

This judgment by the late Berker J.P., later the first Chief Justice of the Supreme Court of Namibia after independence, should be followed by this Court in so far as it has not been overtaken by provisions of the Constitution of Namibia.

This decision is one of many in the pre-independence era in Namibia as well as South Africa which reaffirmed the basic principles of a fair trial as well as that relating to other fundamental rights. The culture of human rights does therefore not commence with independence and the enactment of the new constitutions in Namibia and South Africa, even though the new constitutions abolished the discrimatory and security-dominated legislative dispensation and the principle of the supremacy of parliament. Consequently the Courts can now also declare laws of parliament unconstitutional and null and void on the ground of being in conflict with human rights enshrined in the aforesaid constitution.

The accumulated wisdom contained in the precedents of the past as well as present dispensation on human rights issues such as

the meaning and ambit of the fair trial requirement, must therefore be regarded as an

important source of contemporary values and norms of society and as such, of the meaning and ambit of the expressions such as "fair trial" and "reasonable", etc.

None of counsel has addressed me on onus. In my view however the overall onus is on the accused to satisfy me that he did not have a fair trial. However, my conclusion would not be different even if the onus was on the State to satisfy me that the accused had a fair trial.

The question of onus was fully discussed and the precedents on onus reviewed in my recent separate judgment in S v Vries, NmHC, 19.06.96, unreported, where I came to the conclusion that when dealing with an alleged breach of a fundamental right contained in Articles 6 - 20, in contrast to the freedoms enumerated in Article 21(1) , the initial onus as well as the overall onus is on the person who alleges a breach.

Mr Geier also contended that fundamental rights in Articles 6 - 20 are absolute and unqualified in contrast to the fundamental rights to freedoms in Article 21(1) which are subject to the limitations in Article 21(2).

It is true that in the judgment of Frank J. in S y Vries, supra, it was assumed without discussing the precedents other than Ex-parte Attorney-General, Namibia In re Corporal Punishment, 1991(3) SA 76

(NmSC), that the fundamental rights contained in Article 8 of the constitution are absolute and unqualified. In my judgment in the same case I referred to the subsequent decision of the Supreme Court of Namibia in S v Tcoeib, NmSC, 6.02.96, unreported, from which it appears that the Supreme Court has abandoned the dictum in the In re Corporal Punishment decision. I also referred to several other decisions of the Namibian High Court as well as the Constitutional Court of South Africa. I came to the conclusion that the dictum that the fundamental rights in Article 8 are absolute and unqualified in the sense in which this term was applied in the ratio in the In re Corporal Punishment decision, is not valid.

It of course depends on what is meant by the words "absolute and unqualified." If it is merely meant, as I think Frank J. understood and used the expression in his judgment in S v Vries, that the fundamental rights must first be defined to establish its meaning and ambit and that the fundamental rights so defined, are absolute and unqualified, then there may be something to be said for the proposition that the rights are absolute and unqualified.

This construction however was not the construction applied in the ratio in the In re Corporal Punishment decision, supra.

The aforesaid construction used by Frank, J. would in my respectful view not be useful in deciding whether the fundamental right has been breached when the fundamental right is couched in terms which are relative and imprecise, and where its meaning and ambit must nevertheless be established by using

the values-test in conjunction with a proportionality test as was done by the Court in the S v Vries decision supra. This is further underlined if one looks at some dictionary meanings of the word "absolute" such as e.g. contained in the Oxford Advanced Learners Dictionary of Current English by A S Hornby where the word is defined as: "complete"; "perfect" ; "unlimited"; "having complete or arbitrary power"; "real"; "undoubted"; "unconditional"; "unqualified"; "not relative" ; "not dependent or measured by other things". (My emphasis added).

In S v Vries, supra, both Frank J. and I, certainly did not accept that the fundamental rights as stated in Article 8 were "complete", "undoubted", "not relative", and "not dependent or measured by other things." The very fact that we both applied a "values-test" as defined in the In re Corporal Punishment decision itself, supplemented by a proportionality test, militates against the concept of "absolute and unqualified. "

Coming now to the fundamental rights contained in Article 12, it follows that the terms "fair trial" used in the heading as well as key words such as "reasonable time", "failing which the accused shall be released", "interests of juveniles require", "shall be presumed to be innocent until proved guilty according to law", "afforded adequate time and facilities", "shall be entitled to be defended by a legal practitioner of their choice", "no court shall admit in evidence against such persons evidence which has been obtained from such persons in violation of Article 8(2) (b) hereof", are all relative terms which must be defined, and the content and ambit ascertained.

I agree with what was said e.g. in the S v Heidenrich, (NmHC), 1996(2) BCLR 197 (NmH):

> "'Reasonable' is, of course a relative term and what constitutes a reasonable time for the purposes of Article 12(1) (b) must be determined according to the facts of each individual case. The Courts must endeavour to balance the fundamental right of the accused to be tried within a reasonable time against the public interest in the attainment of justice in the context of the prevailing economic, social and cultural conditions to be found in Namibia."

In my view, the constitutionality of a law, rule or action must be determined by making use of the values-test laid down in the Supreme Court decision "In re Corporal Punishment" as supplemented by the proportionality test, particularly where the values test is inadequate, as held in S v Vries, supra.

For a better understanding of what is meant by these tests, it is best to repeat what was said in my judgment in S v Vries, supra:

> "In the decision In re Corporal Punishment, supra, the Court also held in the words of Mahomed, A.J.A., that:
>
> > 'The question as to whether a particular form of punishment authorised by the law can properly be said to be inhuman or degrading, involves the exercise of a value judgment by the Court. It is however a value judgment which requires obj ectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.'
>
> It is to be noted that it was not said in Mahomed, A.J.A.'s judgment that the "value judgment" is also

applicable to the decision of what amounts to "torture" or "cruel" treatment or punishment. It will however assume that it must be.

Berker, C.J., who agreed with the conclusion arrived at by Mahomed, A.J.A., however contributed some telling remarks regarding the "basic enquiry" and the predominant consideration. Although I do not agree with the application of these criteria by Berker, C.J., his aforesaid remarks are important and instructive and are not necessarily inconsistent or in conflict with the judgment of Mahomed, A. J. A., in which both he and Trengove, A.J.A. concurred. There is therefore no reason not to follow the dictum of Berker, C.J., at least in so far as it set out the predominant criteria. I therefore repeat his remarks for the purposes hereof:

> 'There are only a few general comments I should like to make in addition thereto. Whilst it is extremely instructive and useful to refer to, and analyse, decisions by other Courts such as the International Court of Human Rights, or the Supreme Court of Zimbabwe or the United States of America on the ■ question whether corporal punishment is impairing the dignity of a person subjected to such punishment, or whether such punishment amounts to cruel, inhuman or degrading treatment, the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia.'

Suffice to say that the approach and ratio in the Supreme Court decision In re Corporal Punishment, supra, and its application by O'Linn, J. in S v Tcoeib, HC, supra, has not been overruled insofar as it was held in the latter decisions that when deciding whether a particular provision of a statute providing for punishment amounts to cruel, inhuman or degrading treatment or punishment, an objective value judgment must be made by the Court, inter alia by having regard to the 'aspirations, norms, expectations and sensitivities of the Namibian people' and in the words of the late Berker, C.J., 'following the approach that the one major and basic consideration at arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other beliefs of the people of Namibia.'

This approach is also followed substantially in the USA as appears from the decisions referred to in the judgment of my brother Frank, J.

I also agree with Frank, J. that the postulated value judgment 'must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms which may or may not coincide with the norms of any particular judge.' As was pointed out in Coker v Georgia, 1977, 433 US 584 at 592, these judgments 'should not be, or appear to be, merely the subjective

views of individual justices; judgment should be informed by objective factors to the greatest possible extent.'"

The place of the proportionality test in determining *whether* a law, rule or act is unconstitutional, was explained as follows in my judgment in S v Vries, supra:

"The question arises how to reconcile the 'current values' test *with* the aforesaid 'proportionality test.

It seems to me that the aforesaid *proportionality* test is to be regarded as part and parcel of the 'current values' test in that it should be seen as logically flowing from current values and consistent with current values, but at the same time, a more precise and *practical yardstick* to measure what is to be regarded as constitutionally *cruel* and unusual punishment or constitutionally cruel, inhuman and degrading punishment. It can also be regarded as an independent exercise of the Court's discretion and responsibility as the final *arbiter of the correct interpretation* and application of the fundamental *rights* and freedoms contained in the Namibian Constitution."

In the aforesaid decision I also dealt *extensively with* the manner in which contemporary values can *b< ascertained from public opinion.* See the Vrif judgment, p. 12, last par. - p. 22, end of second pc

It is when applying the values-test *aforesaid, that decisions of Courts both before* and after the pr constitutional dispensation are important *sourc the traditions, norms* and values of the Namibi South *African nations.*

*Pre-independence decisions such* as S v Burge der Merwe, supra, and the decisions referred are therefore *sources of such traditions, values.*

It follows that the new constitutions in Namibia and South Africa can be regarded as having crystallised and codified ■ to

a substantial degree, traditions, contemporary norms and values already established over decades in Namibia and South Africa in regard to concepts such as the requirements of a fair trial.

Although I accept that the fair trial provisions in Article 12, read with Article 5 and 25 of the Namibian Constitution, leave scope for development over and above the specific rights enumerated in the subarticles of Article 12, it is not always necessary to search for interpretations and solutions not already crystallised in the Namibian and South African law of precedent.

Article 12(1) (b) as interpreted and applied in S _____y Heidenrich, supra, is an example of a right probably extended by the Constitution over and above the law of precedent.

In S v Vries it was also pointed out that current public opinion properly identified and evaluated by the Court, could be an important indicator and source of contemporary norms and values and could not be ignored when interpreting, evaluating and implementing provisions of the constitution dealing with fundamental human rights. This is also the position in the USA as explained in S v Vries, supra. There is also some analogy to be found in Canadian case law when the Courts interpret the expression "disrepute" in section 24(2) of the Canadian Charter of Rights and Freedoms which provides that evidence will be excluded if- it is established that the admission of such evidence will bring the administration of justice into disrepute. See infra par. 8.8 of the article by Dr S E van der Merwe entitled "The Exclusionary Rule and a Bill of Rights".

In my respectful view the main aim of the fair trial provisions in the constitution is to ensure that the innocent is not punished and the guilty does not escape punishment. This main aim is also in accordance with the contemporary norms and values of Namibians.

It is therefore apt to reiterate observations in this regard made by the High Court of Namibia in its decision in S v van den Berg, 1995(4) BCLR 479 (Nm) regarding the approach when interpreting and applying provisions of the constitution providing for fundamental human rights.

> "The general approach when interpreting the Namibian Constitution is:
>
> > 'It must broadly, liberally and purposively be interpreted so as to avoid the "austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government .....'
>
> See Government of the Republic of Namibia v Cultura 2000, 1994(1) SA 407 (NmSC) at 418 F - G.
>
> This approach has been followed in several Namibian decisions, inter alia, in the Kauesa decision (supra).
>
> But as pointed out in the Kauesa decision -
>
> > 'In doing so, a court cannot be selective and apply this approach only when dealing with limitations on freedom of speech. The approach must also be applied when considering the limitations on fundamental rights, including the case where a fundamental freedom is in conflict with a fundamental right ....'
>
> See Kauesa at 56 J - 57 C.
>
> To these remarks can be added that when the Court has to interpret various fundamental human rights, some that may seem to be in conflict with others, the Court should apply the said approach in a balanced and even-handed manner to all such fundamental rights. So, for example, as pointed

out (supra) article 12 must be interpreted and applied by a court in the context of, for example, articles 6, 7, 8, 13 and 16, read with articles 5 and 25."

See S v van den Berg, supra, 495 F - I.

The Court then dealt with the role of the Court and the aim of the criminal justice policy in general and the Criminal Procedure Act in particular:

> "The purported right on which Mr Maritz relies is the right to be able to rely on a lower court's decision in a criminal case when in favour of an accused as a final judgment, not subject to reversal by a higher court on appeal by the State. He further contends that an accused is prejudiced if he or she cannot continue to rely on such a decision because of the amendment of the Criminal Procedure Act.....
>
> It seems to me that such a purported right should not be upheld by a court of law. Similarly a court of law should not protect an accused from purported prejudice arising merely from the fact that the State is given a provisional right of appeal to reverse a

lower court decision, where that decision mistakenly allowed the acquittal of an accused.

In my view, the role of the court in criminal matters and the primary aim of criminal procedure should be to ensure that substantial justice is done. This Court can do no better than to adopt the words of some eminent Judges when interpreting ■ the provisions of section 247 of Act 31 of 1917:

> '.... to see that substantial justice is done, to see that an innocent person is not punished and that a guilty person does not escape punishment.'

These words were used by Wessels CJ in R v Omar 1935 AD 230 at 323, when interpreting the provisions of section 247 of Act 31 of 1917, relating to the role of the Court and the powers and duties relating to the calling and recalling of witnesses.

The above quotation was adopted by another eminent Judge, the late Ramsbottom J in R v Kubeka, 1953(3) SA 689 (T) . It is in line with the dictum of Curlewis CJ in R y Hepworth, 1928 AD 265 at 277. The latter judgment was followed by many subsequent decisions also in this Court and was correctly described by Broome J in R v Beck, 1949(2) SA 626 (N)

at 628 as the locus classicus on the subject of the Court's power and function under the said provisions:

> 'By the words 'just decision in the case' I understand the legislature to mean to do justice as between the prosecution and the accused. A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and the Judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are applied by both sides. A Judge is an administrator of justice, not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done The intention of section 247 seems to me to give a Judge in a criminal trial a wide discretion in the conduct of the proceedings, so that an innocent person be not convicted or a guilty person get free by reason, inter alia, of some omission, mistake or technicality.' (Emphasis mine.)

Although these words were used in connection with the role of the Court when applying the then section 247 of Act 31 of 1917, the words express the basic aim of the courts and the provisions of the Criminal Procedure Act to ensure substantial justice, by ensuring that an innocent person is not punished and that a guilty person does not escape punishment.

A perception exists in some circles that the fundamental right to a fair trial focuses exclusively on the rights and privileges of accused persons. These rights however, must be interpreted and given effect to in the context of the rights and interests of the law abiding persons in society and particularly the persons who are victims of crime, many of whom may be unable to protect themselves or their interests because they are dead or otherwise incapacitated in the course of crimes committed against them.

Another perception which needs careful thought is the role of the State in criminal law and criminal proceedings. The prosecution in a criminal case, acts formally in the name of the State, but is not an entity acting in its own cause. The counsel and/or lawyers acting for the State are officers of the Court who are expected also to divulge to the Court matters favourable to the accused and as such, they not only have to attempt to ensure that a guilty person does not escape punishment, but that an innocent person is not convicted and punished. The prosecution in our criminal law and procedure is not the all powerful, specialised, competent, and even evil entity with all the means at its disposal bent on the conviction and punishment at all costs of a hapless and helpless innocent. The prosecution should rather be seen as the representative of society, of the people and of the victims of crime.

In a developing country like Namibia, the prosecution suffers from all the constraints caused by lack of financial means, experience and proper qualifications and is not always dealing with the unrepresented, ignorant, innocent accused who is being charged with a minor offence. No, the prosecution often has to confront intelligent, well-educated, callous and dangerous criminals committing grave crimes, often members of powerful

crime syndicates, with all the expertise and means at their disposal to frustrate and defeat the end of justice. Furthermore, the prosecution must overcome formidable hurdles including that it must prove its case beyond all reasonable doubt, after being compelled to provide before trial, full particulars of its case, including the statements of their witnesses. In contrast the defence is not compelled to provide particulars of the defence or to disclose the statements and identity of defence witnesses beforehand and not even at the time of plea; the prosecution is required to maintain complete openness; not so the defence and the defence is never required to prove the defence beyond reasonable doubt, not even in regard to issues where a statutory presumption purports to place a burden of proof on the accused in respect of the particular element or issue.

Notwithstanding the escalation of crime and the progressive disillusionment of the public with the enforcement of the law and the system of justice as applied in the courts of law, the claims for further concessions to accused persons proliferate without corresponding and balancing measures to ensure, not only that innocent persons are not punished but also to ensure that the guilty do not escape punishment.

In our developing country, it is apt to remember the proverb, used by Jackson J in Terminiello v Chicago, quoted in Kauesa v Minister of Home Affairs, 1994(3) BCLR (1) (NmH) at 241 - 24B:

> 'An old proverb warns us to take heed lest we walk into a well from looking at the stars.'

The aforesaid duty of the courts in interpreting and giving effect to all the aforesaid fundamental rights enumerated in the Constitution and not only rights of accused persons, flows from the duty and power to uphold, protect and enforce all fundamental rights and freedoms enumerated in Chapter 3 of the Namibian Constitution, which duty and power are clearly set out in article 5, read with article 25 and article 1(1) of the said Constitution. In the last-mentioned subarticle, the rule of law and justice for all are stated to be part of the supreme law of Republic of Namibia."

S v van den Berg, supra, 489 C - 491 A.

Mr Geier also urged on the Court to uphold the

fundamental rights of the individual. There is no problem in

that submission provided those rights are interpreted, applied

in the context of and balanced with that of law-abiding individuals in society, and law-abiding victims and potential victims in society.

See the quotation supra from S v van den Berg as well as my comment on the protection of the individual in S v Vries, supra, at p. 24 and 25 when dealing with the remarks of Chaskalson P., in S v Makwanyane & Another, 1995(3) SA 391 (CC) in regard to securing for "individuals the full measure of the constitution's protection".

It may be said that the interest and rights of law-abiding individuals in society need not be considered in a case like the present where the allegation is that the accused defrauded the State, alternatively stole from the State and not from the individual law-abiding citizen. This again is a fallacy. The money obtained by fraud or theft is public money obtained also from individuals and due to be distributed inter alia in the interest of individuals. The interest of every individual is eventually affected by such fraud or theft. The State again is the not owner, but merely the custodian and where the prosecution is in the name of the State, the State acts on behalf of the law-abiding citizens in society, including the individuals, because that is the only practical way in bringing the accused to justice.

Mr Geier has also referred me in his additional- heads to an article with the title "The Exclusionary Rule in a Bill of Rights", by Dr S E van der Merwe of the Department of Public Law at the University of Stellenbosch, in his representations to the South African Law Commission on 30th May, 1989.

The learned author in this interesting and well-researched article came to the conclusion that the Canadian approach is the correct one. He says:

> "It seems to me that the Canadians have managed to strike a balance between competing interests. 'The law' said Camen and Carter with reference to the exclusionary rule, 'should strive to balance the interest of the citizen to be protected from illegal invasions of his liberties by the authorities and the interest of the state to bring to justice persons guilty of criminal conduct. An attempt to reconcile these two interests which may come into conflict will mean that sometimes such evidence will be admitted and sometimes rejected."

The movement in the USA away from the strict exclusionary rule and the development and exposition of the Canadian approach are dealt with in par. 8.3 - 8.9 of the said article. Although it deals with the exclusionary rule regarding evidence, it is relevant and applicable, <u>mutatis mutandis</u> to the fair trial issue to be decided in this judgment. It is best therefore to quote these paragraphs in full. They read as follows:

> "8.3 Now, it seems to me that a rigid exclusionary rule is not acceptable. It deprives the courts of a discretion, and its strict application might produce results which cannot be harmonized with considerations of public policy. <u>The ■ infringement of any fundamental right of a suspect (accused) may lie somewhere on a scale ranging from the trivial, technical and inadvertent to the gross, violent, deliberate and 'cruel'</u>. It is submitted that there should be a qualified exclusionary rule, which ought to be formulated and applied in the light of considerations of public policy. Would public policy demand exclusion of evidence which is of high probative value but which was also obtained as a result of a technical and inadvertent infringement of a fundamental right?
>
> 8.4 The American experience has shown that the strict application of a rigid exclusionary rule can bring the criminal justice system into disfavour. In 1974 the director of the criminal justice division of the attorney-general's office in Illinois (USA) complained as follows:
>
> > 'In one recent instance in my experience a person murdered a young teenage girl and hid her body in a

> rural farm area. The police got a warrant signed by a judge, which gave them the right to search. [B]ut there was a technical deficiency in the warrant, and the Court held that the very body itself, the nature of the crime itself, had to be suppressed. It was a magical disappearing act. It was as if this young girl never walked the earth.'

This is the type of situation, and this is the kind of complaint, that should be avoided. In the USA the rigid exclusionary rule has come under increasing attack, and the US Supreme court has in the past few years 'made a concentrated effort to whittle back the expansions of Miranda that occurred during the late 1960's and 1970's.' The US supreme court has also relaxed the rigidity of the exclusionary rule in cases of good faith, for example, where a law enforcement officer had reasonably relied and acted upon a statute which was only at a later stage held to be in violation of the fourth amendment.

(57) It seems as if the gentle pruning of the exclusionary rule in the USA, became necessary because the rule was reaching into areas where it no longer served the best interest of society, the very interest it was originally designed to protect. The rule went beyond its original purpose and terrain, allowing, for example, an accused to benefit from bona fide but illegal police actions: and the accused was permitted to take advantage of technicalities.

(58) But the fact that the exclusionary rule has in the USA been trimmed, should not detract from its basic value - and its trimming should, in fact, merely be seen as an admission that the exclusion or admission of illegally obtained evidence is a matter which should be decided in the light of more than mere 'strict law. '

(59) Sir Rupert Cross has said (my emphasis) :

> '[A] robust judiciary is the best guarantor of the rules of evidence. The fruits of the poisoned-tree doctrine with its automatic exclusion of improperly obtained evidence is the product of lack of confidence in the judiciary; some improprieties are venial, or such as must be tolerated having regard to the gravity of the situation with which the police were faced, others are fit subjects for action against the police without the exclusion of the improperly obtained evidence, while others are so gross that it would be base for the State, however stringent the official action against their perpetrator might be, to rely on evidence produced by them.'

An approach which allows scope for all the above factors to be considered, is essential.

8.8 It is submitted that there is much value in the 'Canadian approach' : If the court is satisfied that evidence was obtained in a manner which infringed or denied any rights or freedoms guaranteed by the Canadian Charter of Rights,

the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of such evidence would bring the administration of justice into disrepute. This provision is contained in section 24(2) of the Canadian Charter. In R v Collins the court considered the method of ascertaining the meaning of 'disrepute'. Seaton JA held as follows (my emphasis):

> 'Disrepute in whose eyes? That which would bring the administration of justice into disrepute in the eyes of a policeman might be the precise action that would be highly regarded in the eyes of a law teacher. I do not think that we are to look at this matter through the eyes of a policeman or a law teacher, or a judge for that matter. I think that it is the community at large, including the policeman and the law teacher and the judge, through whose eyes we are to see this question. It follows, and I do not think this is a disadvantage to the suggestion, that there will be a gradual shifting. I expect that there will be a trend away from admission of improperly obtained evidence ... I do not suggest that the courts should respond to public clamour or opinion polls. I do suggest that the views of the community at large, developed by concerned and thinking citizens, ought to guide the courts when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.

8.9 In R v Collins Seaton JA was also careful to point out the following:

> 'Nothing in section 24(2) of the Charter of Rights suggests a discretion. If it'is established that admission of the evidence would bring the administration of justice into disrepute "the evidence shall be excluded." There is only the one test. When it is passed, the evidence is excluded. If it is not passed, the evidence is admitted. There is no basis for any other test, or for the exercise of a discretion.'

But, of course, this does not mean that the court cannot consider a wide variety of factors in determining whether the admission of certain evidence would bring the administration of justice into disrepute. And in this sense the Canadian courts are left with a discretion. In R v Cohen Anders JA enumerated the following factors, principles and guidelines:

[1] The words 'administration of justice' include not only the trial process but the investigatory process. In other words, the 'integrity of the judicial process' depends not only on the conduct of strictly judicial matters but also on the conduct of the police in their dealings with suspected offenders.

[2] The administration of justice will be brought into disrepute if the conduct of the police tends to 'prejudice

the public interest in the integrity of the judicial process. '

[3] The 'integrity of the judicial process' may be prejudiced by the conduct of the police in several ways, some of which are as follows:

(60) failure to observe a humane and honourable standard of conduct in the treatment of persons suspected or accused;

(61) flagrant abuse of police powers;

(62) failure of the police to abide by the law in carrying out their duties.

[4] A balance must be struck between the need for firm and effective law enforcement and the right of the citizen to be free as far as reasonably possible from illegal and unreasonable conduct on the part of the police.

[5] The courts will not be concerned with technical or insubstantial breaches of the law by the police-.

[6] In determining whether the violation is 'prejudicial to the integrity of the judicial process', the court will review all the circumstances in the light of, at least, the following factors:

(63) The seriousness of the offence in the light of the facts relating to the charge.

(64) The seriousness of the violation and, in particular:

(i) the extent to which the constitutional rights of the accused were breached in obtaining the evidence;

(ii) whether any harm was inflicted on the accused;

(iii) the seriousness of the violation as compared to the seriousness of the offence.

(c) Was the violation deliberate or inadvertent?"

I have no problem with this approach and will endorse it. It is consistent with what has already been said in this judgment and in S v van den Berg, supra, S v Vries, supra and S v Burger and van der Merwe. I may add however that the question whether a breach caused prejudice to the accused in his defence, is an

important element not only in the consideration of the traditional "irregularity" but also in the case of a breach of a procedural requirement of the fundamental right to a fair trial. It is also in accordance with the approach by the Namibian Supreme Court in Kau and 15 Others v The State, 1993 unreported, relied on by Mr Small.

However,- Mr Geier now argues that in view thereof that fundamental rights in Article 12 are "absolute and unqualified" and not subject to a limitation clause as in Canada since the enactment of the Canadian Charter, the said approach "can not be of guidance in Namibia (although a lot can possibly be said for it.)"

I do not agree with Mr Geier that the Namibian Constitution provides for a rigid exclusionary rule, as must be clear from the discussion supra on the relative nature of the fundamental rights and the manner in which those rights should be defined and its ambit determined.

I have no doubt that the rigid exclusionary rule as contended for by Mr Geier is in conflict with the contemporary norms and values of Namibians at this stage of its development. Such an approach is also in conflict with the proportionality test applied in S__y Vries, supra. I consequently reject Mr Geier's submission on this issue.

Namibians will certainly rue the day when the sort of aberration related in par. 8.4 of Dr van der Merwe's article, quoted supra, is incorporated by the Court into Namibian law.

With this prelude to the legal approach, I can now shortly deal with the factual averments relied on for the contention that the trial was unfair.

Mr Small set out in full the whole course of the trial in regard to the duration of the trial and the reasons for the many postponements.

It is absolutely clear from this uncontested summary that there was no undue delay in finalising the prosecution and the trial.

Many postponements were caused by manoeuvres by the defence to obstruct and delay the speedy conclusion of the trial. See also my judgment on the first so-called constitutional application.

Accused Strowitzki promised his full cooperation with the police. This was an empty undertaking. His cooperation was in the form of raising every conceivable defence, however intrinsically hopeless or in conflict with overwhelming evidence in the form of real, incontrovertible documentary evidence and viva voce evidence.

The trial dealt with 130 counts of fraud alternatively theft. The volume of documents and evidence was out of the ordinary. The trial was unique in the legal history.

There was a co-accused who also had to be considered.

There were three advocates involved. The extensive request for further particulars and the supply thereof took time. The continuous complaints of the accused and his several attempts at raising complaints about an unfair trial wasted a lot of time.

Strowitzki was granted every possible indulgence by the Court. The State spent tens of thousands of Namibian dollars to provide an experienced advocate to defend him.

Strowitzki was not prejudiced in his defence by not being able to recall names and details. His problem was not forgetfulness, but how to fabricate a defence where none existed.

His complaint of the inability to remember and call possible overseas witnesses and blaming the State's refusal to provide further funds are also without substance. At no stage could he produce any sensible particulars of where these witnesses were to be found and what they could say. The replies from the banks showed that there was no possible corroboration for his various stories. If his son Burkhardt were brought to Namibia and it was shown that he was involved with his father, a prosecution against him may have resulted. The lack of particularity of what Burkhardt could contribute in the line of corroboration was one of the main reasons why no order could be given for a commission to take his evidence in Germany. It was also totally impractical. In the light of the overwhelming evidence against Strowitzki, such an excursion would only have been another exercise in futility and further unnecessary delay.

The first excuse that the trial could not be fair and the contention now that it was not fair, appears to have been the only possible defence to which the defence clung desperately from beginning to end.

If ever there was an abuse of the fundamental rights which Namibians hold dear, it was Strowitzki's concerted attempt to rely on it.

To release Strowitzki from prosecution and to prevent his conviction, would be a mockery of fundamental rights.

See judgment on the first constitutional application S v Strowitzki and Another, supra, p. 36 D - 37 G.

Baker v Wingo, 407 US 514, 33 LEd 2d 101, 92, Ct 2182 at 116 - 8. R v Morin, 8CRR (2d) 193 (SCO at 213.

Strowitzki's guilt was proved overwhelmingly. The trial took a considerable time, but that was inevitable to bring this unscrupulous person to justice. The trial was fair considering all the circumstances.

I consequently also reject his defence that he did not have a fair trial. In the result:

> Mr Strowitzki, you are convicted of the 130 charges of fraud in respect of the amount of N$2 461 958.60.

**H: DID ACCUSED NO. 2, MR BOCK HAVE KNOWLEDGE OF THE FALSENESS OF THE CLAIMS SUBMITTED BY STROWITZKI, ACCUSED NO. 1**

The only point in dispute between the State and Bock is on this issue.

1. The State has inter alia placed considerable emphasis on the false defences raised by Bock during the bail applications, in his two voluntary statements to the police and in his admitted interview with the Windhoek Advertiser. As already pointed out supra, the lies told by Bock continued over the period September, 1992 to at least April, 1993. I have also analysed supra how he obviously cooperated with Strowitzki in a joint conspiracy of deception, in which they in desperation, made the most outrageous allegations, incriminating prominent but innocent public figures, such as Dr Herrigel, the former Minister of Finance and Mr Brandt, the State Attorney. Some time after being released on bail, Bock admitted that these allegations were all lies but Strowitzki persisted until the end. This Court however found in the judgment on Strowitzki supra that these allegations were in fact false. Bock admitted not only that they were false, but he knew of

its falsehood at the time when he made it. His excuse was that he was under the influence of Strowitzki and would have done anything to be released on bail. Mr Botes on his behalf also put forward this excuse in argument.

The said excuse is not credible and does not explain Bock's conduct. It also does not help Bock to avoid the inferences that can and should be drawn from Bock's conduct after arrest. The following points must be made :

(i) The lies told by Bock were not little white lies, they were gross and atrocious, deliberate and reckless, whether or not they destroyed the reputation of important and innocent public figures, such as Dr Herrigel and Mr Brandt.

(ii) Bock blamed Dr Strowitzki for his scandalous conduct. First he testified that Strowitzki instructed him, but under cross-examination he admitted that Strowitzki at most advised him and provided him with some information, that he was aggressive at one stage against Strowitzki apparently because Strowitzki did not produce the required or promised statement or because Strowitzki's statement did not come up to expectations. Bock however remained vague,

evasive and unconvincing on this issue as on all others, in examination-in-chief as well as under cross-examination. The fact is that when he alleged in his two statements to the police and in his- last bail application in April, 1993 where he alleged that Dr Herrigel had given him the instructions, he knew that he was lying and that he himself was the author of those allegations.

Bock, as pointed out supra, struck out on his own. Just as Strowitzki did not mention Bock in his proposed written agreement with van Vuuren, so Bock did not mention Strowitzki in his statements to the police and the interview with the newspaper. He placed himself in the foreground as a principal.

(iii) He made a damning admission, if not a confession, in his interview with the newspaper, where he explained that he was allowed to misappropriate the amount claimed by the State, by Dr Herrigel. Here he did not claim ignorance of illegality. He made this statement in the context of allegations of alleged misappropriation by Dr Herrigel and two others of R62 million.

(iv) He apparently was determined at that time, to tell this false story in Court.

(v) He committed perjury when he continued to allege, this time under oath in Court proceedings in April, 1993, that he acted on instructions of Dr Herrigel that Dr Herrigel had told him that he had appointed Bock as his agent.

(vi) In his first statement to the police he told at least 19 deliberate lies and added one in the second statement four (4) days later.

(vii) He changed his various false defences as the realization dawned that the previous false defences, could never succeed.

(viii) He says that he would have done anything to get out of prison because of conditions there. Later in the trial he conceded that he at least benefitted in that he lost a lot of weight.

The problem is that he never thought of telling the police the true story during all this time when he persisted with his lies, namely that Strowitzki had submitted the claims and that he bona fide believed in the correctness and authenticity of the claims and that he even had written authorities appointing Strowitzki as agent to submit the claims and receive the money. When the question was put to him why he never thought of telling van Vuuren this story, he appeared to be taken aback. Later he ventured a lame allegation that he did tell van Vuuren, but van Vuuren did not want to believe him. Mr Geier put it to him that his counsel never put such an allegation to van Vuuren. Bock replied that he did not think it important to tell his counsel. This explanation was totally unconvincing and clearly another lie.

Now the question arises why did he not tell van Vuuren the version which he in Court alleged to be the true version?

The only reasonable inference is that he did not have such authorities, that he knew that the claims were false and that the police by then had sufficient proof of his complicity.

(ix) His guilty mind is also apparent from the fact that he never confronted Strowitzki after his arrest and when it became clear from van Vuuren's evidence in the bail applications and from the affidavits and other documentation in the civil proceedings, that Strowitzki had no authority to submit the claims and to receive the money.

Any person in the position of Bock would have confronted Strowitzki and demanded an explanation. Such a person would have been furious and would have broken all bonds with Strowitzki and probably also would have told the police of his bona fides. Bock had to admit that he never confronted Strowitzki and could not offer any explanation why not. He also had to admit that he never thought of confronting Strowitzki.

Ins-tead he conspired with Strowitzki to tell the false story of Herrigel's instructions and a special agreement.

Bock is certainly not an intellectual giant, but he had passed matric, was at university and had technical training. He had a relatively important job. He may be an extrovert but he is intelligent and not a fool.

His aforesaid conduct after arrest, points to only one inference namely - knowledge of the false claims, participation in the scheme, a guilty mind and knowledge of unlawfulness.

2. Mr Botes further contended that the evidence of Bock that the purported claimants were all registered in his office as dealers or users and that there was an authority in each case appointing Dr Strowitzki as agent entitled to submit claims and receive the cheques was uncontradicted and had to be accepted. The vast majority of purported claimants however testified that they did not apply for registration and had not appointed Strowitzki as agent. The applications for registration, if any, as well as the authorities, if any, must therefore have been forgeries. In the context of the evidence and all the circumstances, such forgeries of signatures could only have been made by Strowitzki or his son Burkhardt, acting on his instructions, or Bock himself.

Van Vuuren testified that in his investigation at Bock's office he only obtained the authorities placed before Court. There is no person who could have had the motive to destroy the authorities appointing Strowitzki as agent. That these authorities were mislaid in the course of the investigation, is possible, but improbable.

Furthermore, Bock never relied on the existence of such authorities during his Court appearances in the magistrate's court, or in his written and oral communication to the police.

Why not? The obvious answer seems to be that he knew that such authorities did not exist in most cases.

The probability therefore is that his evidence is also false in this respect.

The probability is that Bock was the inside person required as an essential link.

The admitted fraud by Bock could never have been conducted persistently and continuously over the period of 8 months from September, 1991 to April, 1992, without an inside person who would handle all or most claims from receipt up to processing and the delivery of the cheque to Strowitzki after its issue. We know that Bock received and processed the bulk of the claims; he was supposed to check the claim, authorize the issue of the cheque, receive the cheque and hand it over or deliver it to Strowitzki.

Without a trusted inside collaborator functioning as aforesaid, the risk was too high for Strowitzki to be discovered when a genuine claimant submits a genuine claim and it is discovered that Strowitzki had already submitted a claim.

That is why Strowitzki approached Bock inter alia by means of a letter, Exhibit El, containing the names of a number of persons and requesting Bock to indicate whether these persons were already registered, whether they have already submitted claims.

The question is why would Strowitzki target Bock for this information! The answer is that Bock was the inside person, the co-conspirator.

Mr Botes makes the point that it was not proved that Bock had received any advantage or money from the deal. If he was also the co-conspirator in the scam, in addition to being Strowitzki's partner in the Car Rental business, one would have expected proof that he received a considerable amount of money.

The answer to this is that he did receive some perks, even though these do not indicate that he was a partner

in the conspiracy.

However,- this was not a case where the fraudulent conduct had run its course and the partners had divided the spoils. The scheme was discovered and stopped abruptly by outside interference, in the form of arrest by the police and confiscation of the monies remaining and the assets. It may be that the division of the spoils was contemplated for a later stage.

There are other strange and suspicious features. After arrest a so-called friend from Germany brought R300 000 to Namibia from Germany. The first impression from Bock was that this friend donated the money for his bail. Later Bock indicated that the friend used R100 000 for himself and R200 000 was given for bail. Mr Botes must have spotted the suspicious character of this transaction and intervened with a leading question or two. He put it to Bock that part of this money was the proceeds of a

house belonging to Bock sold in Germany and Bock responded in the affirmative.

I am not impressed at all with the argument that Bock had received nothing substantial from Strowitzki or from the alleged conspiracy.

Bock alleges that he never became suspicious when the number of cheques going to Strowitzki increased dramatically and when many farmers suddenly came forward with massive claims for diesel far in excess of what the average farmer could be expected to use. He thought, that his economic genius Strowitzki, was uplifting the farming community and the farming economy to such an extent with all his schemes, that the average cattle and sheep farmers were now also equipping themselves with their own heavy trucks to transport their own cattle and sheep to the markets.

When asked whether he saw any sign of any of Strowitzki's schemes for developing Namibia materialising, he had to admit that he did not see such development. When asked why he never enquired from his friend and partner Strowitzki as to the progress of his development schemes or the reason for the dramatic increase in the cheques payable to him, he had no answer.

Now Bock is born and bred in Namibia. He grew up on a farm in Namibia. He would certainly have noticed that the development schemes as proposed by Strowitzki, were fictions of the imagination and that the scheme to submit false claims, was Strowitzki's main economic activity.

He blamed his seniors for the system at his office. However, any honest person in Bock's position would quickly have discovered the fraud, if he was not involved himself.

It is therefor significant that when Bock received several claims from Strowitzki at the same time with the same particulars of the same persons who allegedly bought the same amounts of diesel allegedly from the same purported diesel suppliers, he marked these claims only in red and sent them *back* to Strowitzki, without reporting the obvious fraud to any person. Although Bock in his evidence initially admitted that he sent the claims back to Strowitzki, he later denied it and said that he kept them in his office. Mr Botes also supported this version. The point however is that Bock did not report this obvious fraud. He did not even discuss it with Strowitzki. The only reason for this conduct is that the fraud in these cases was too blatant and he therefore did not want to take the risk to process it. But the reason for not taking the matter further, can only be that he and Strowitzki were co-conspirators.

On the first claim he signed as <u>diesel boekhouer</u> who signed for the purported claimant, at the same time signed as the person who checked, all in one. He admitted that he had no authority from the purported claimant to do so.

Again he claimed that this is what he was taught by his seniors to do when a claim from a registered user was received unsigned.

This explanation again demonstrated that Bock was a liar without scruples.

At the conclusion of Bock's evidence he made a sort of closing speech to the Court, now acting as an economic developer of significance with many investors from overseas just waiting for him to conclude his case so that they can put into practice all his schemes.

He said:

> "Your Lordship, I'm (indistinct) and one thing I can complain in this trial, I ask you now, I would like to make a request that you see to it that now in March or April, that we can finish this case off, Your Lordship, because I want to get on. I've got big plans for building factories here, from Germany and so on and I want to get this case finished that I know where I stand, that I know how far I can go, what I can do, what I can't do. That's point no. 1. Point no. 2 is, 1 person is busy with the Deputy Minister of Correctional Services plus the Head of Prisons plus the Permanent Secretary of Correctional Services to start a rehabilitation fund to get a new prison going here in Windhoek. And I just want to have this case finished that I know where I stand and I can get on with my daily work and try and get the (indistinct) situation in this country and especially in Windhoek, fixed. But I mean, I've got the legal terms now, (indistinct) the language and so on, that is now in plain English.

Q: So you've got a lot of plans for the economic development now?

A: Which are in progress already, very much, ja. When I, this morning I asked Mr Lottering to, he's got a photocopy already of it, for a translation of what I think is about 10 or 12 pages, from German into English for this water, water purification works, units for (indistinct) households and the company in Germany has got money in excess and they want to invest it here in Namibia and due to the fact that they (indistinct) and approached me I'm very keen to start this and on Monday morning I might have, at 12:00, I'm seeing the Mayor of Windhoek, Dr Bjorn, I think, is it Von Finkenstein and have a conversation with him and I just want to, that we finish this case off because we're now the fifth year and I'm really getting, I'm getting sick and tired of this case, Your Worship."

No wonder that the Court remarked:

> "Yes, I suppose you are now taking over some of Dr Strowitzki's schemes in developing the country."

Bock retorted:

> "No, I didn't need that......."

Mr Small made the following points in argument:

(65) "The first false claim is that in Count 121 -Xander. It was wholly completed by Accused 2. He and Accused 1 were clearly testing the system to establish whether the fraud will be picked up and whether Accused 2 would be able to provide Accused 1 with the cheque.

(66) Some of the documents clearly were backdated. There can be no innocent explanation for this. Examples are :

(a) Exhibit 1.7 - Application to register by Autoland was found in the filing system of Accused 1. It was dated 20/2/91 and 21/2/91 and bears the signature of Accused 1 who was not in Namibia at that stage. This document was most probably completed in February 1992.

(b) Exhibits 60.8, 64.9 and 72.7: Applications to register as users of diesel by Riedel, Riehs and Rusch signed by Accused 2 and dated 12/11/90. Claims later submitted for periods from April 1991.

(67) Documents under Count 3 8 indicate that 'Hartubon' completed the claim on 7/2/92. The claim was processed on 10/2/92 by Accused 2 and 'Hartubon' is on the same date informed that he is registered. This is also the position in Counts 52, 56, 68 and 117, being the first claims of other claimants.

(68) Accused normally send out a partly completed claim form to bona fide claimants . He must have changed exhibits 14.1, 38.1, 52.1, 56.1, 60.1, 64.1, 68.1 and 117.1 if regard is had to exhibits 14.7, 38.7, 52.8, 56.7, 60.7, 64.7, 68.7 and 117.7 to fit this picture. These are the first claims of Bockmuhl, Hartubon, Mittendorf, Muhl, Riedel, Riehs, Ruppert and Stoermer.

(69) One was only allowed to claim for a period of 6 months prior to the claim date. Older claims had to be approved by the Director. See undisputed evidence of Kotze on p. 1443 - 1446. Accused 2 returned older claims of valid claimants for this reason. See exhibit Ml and M2. In all of the false claimants except Bockmuhl in Count 14 and Steffens in Counts 106 and 107 he allowed some claims older than 6 months. They are:

| | | | |
|---|---|---|---|
| (1) | Autoland | 1.1 | 11 months |
| | | 1.2 | 10 months |
| | | 1.3 | 9 months |
| | | 1.4 | 8 months |
| | | 1.5 | 7 months |
| (2) | Del Monte | 15.10 | 1 month |
| | | 16.9 | 1 month |

| | | | | |
|---|---|---|---|---|
| | | 17. | 1 | - months |
| | | 18. | 1 | 7 months |
| (3) | Ebrecht | 28. | 1 | - months |
| (4) | Hartubon | 38. | 1 | - months |
| (5) | Hirsch | 42. | 1 | 7 months |
| | | 43. | 1 | - months |
| (6) | Kuhl | 49. | 1 | - months |
| (7) | Mansfeld | 51. | 1 | - months |
| (8) | Mittendorf | 52. | 1 | - months |
| (9) | Muhl | 56. | 1 | - months |
| (10) | Riedel | 60. | 1 | - months |
| (11) | Riehs | 64. | 1 | - months |
| (12) | Ruppert | 68. | 1 | - months |
| (13) | Rusch | 73. | 1 | - months |
| (14) | Rudiger | 81. | 1 | - months |
| | | 82. | 1 | - months |
| (15) | Shivon | 89. | 1 | 7 months |
| | | 90. | 1 | - months |
| (16) | Schubert | 98. | 1 | - months |

(70) Stein 109.1 - 19 months

(71) Stoermer 117.1 - 11 months

(19-) Zander 121.1 - Just more than 6 months

6 . 6 During 9 months Accused 2 must have had handed the following to Accused 1:

| | | | |
|---|---|---|---|
| In August 19 91 | 5 cheques | 77 | 514 58 |
| In September 1991 | 7 cheques | 256 | 289 57 |
| In October 1991 | 8 cheques | 121 | 782 88 |
| In November 19 91 | 8 cheques | 138 | 660 58 |
| In December 1991 | 9 cheques | 163 | 382 73 |
| In January 19 92 | 21 cheques | 294 | 559 45 |
| In February 1992 | 29 cheques | 720 | 595 99 |

| | | | | |
|---|---|---|---|---|
| In March 1992 | 26 cheques | | 407 138 | 22 |
| In April 1992 | 18 cheques | | 282 034 | . 60 |
| | 130 | R2 | 461 958 | . 60 |

6.7 During January 1992 to April 1992 suppliers claims of 120 602.39, 211 034.83, 34 481.42 and 17 817.31 were checked and paid out. Other employees worked with these claims as well as accused 2. This still leave 173 957.06, 509 561.16, 372 656.80 and 264 217.29 which was "checked", and paid out by Accused 2. In total he thus checked and approved R2 078 022.65 alone.

6.8 The claims should have invoices attached to it to prove the purchases. These were send back to claimants. It was sent back to Accused 1 and filed in his filing system. There were only invoices attached to some of the first 19 claims submitted. They were 121, 28, 29, 122, 123, 30, 97, 98, 108, 109, 72, 73, 31, 74, 89, 90, 99, 110 and 124. All except 121, 89, 90 and 124 have them attached. From November none of the claims have then been attached. This means that Accused 2 "checked" and approved numerous claims without proof of the purchases being attached.

(72) Exhibit D1-D19 (Subway Service Station) found in the filing system of Accused 1 indicate that Accused 2 returned claims to Accused 1 which contained apparent fraudulent entries. No person acting bona fide will do such a thing.

(73) Exhibit 81.13 is a completed claim by Dr Rudiger found in the filing system of Accused 1. It is clearly the next claim that would have followed on Claim in Count 88. Although still

with Accused 1 it bears the signature of Accused 2 and the official stamp of the Ministry.

(74) The statement Accused 2 made to Van Vuuren where he attempted to forward a similar defence as Accused 1 is unexplainable coming from a man who acted bona fide and in fact lost him employ due to fraud committed by Accused 1.

(75) His involvement in the partnership - Did not pay the R40 000.00, receiving pay as director, etc indicate that he was reimbursed for his duties indirectly.

6.13 It would be submitted that the Honourable Court should reject the evidence of Accused 2 that he acted bona fide. He was at all times fully aware of the Fraud being committed and assisted Accused 1. "

There is considerable substance in each of these points.

The counter arguments by Mr Botes are not convincing.

It is here where the Court is reminded of the wise words quoted by Davis A.J.A. in R v de Villiers, 44 AD, 493 at 508 from Best on Evidence, 5th ed., 298:

> "Even two articles of circumstantial evidence - though each taken by itself, weigh but as a feather - join them together and you will find them pressing down on the delinquent with the weight of a millstone -"

In all the circumstances dealt with herein and on the probabilities, I conclude that Bock is lying once more when he

denies that he knew that the claims were false. His denial is rejected as false beyond all reasonable doubt. The only reasonable inference from all the circumstances is that Bock knew of the falsity and was a co-principal with a common purpose with Strowitzki.

O'LINN, JUDGE

Mr Bock, you are found guilty of each and every one of the 13 0 charges of fraud, involving an amount of N$2 461 958. -60.

ON BEHALF OF -THE STATE: ADV D F SMALL

ON BEHALF OF ACCUSED NO. 1: ADV H GEIER Directorate of
Instructed by: Legal Aid

ON BEHALF OF ACCUSED NO. 2: ADV L C BOTES
Instructed by: P F Koep & Co