REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: A 383/2008

In the matter between:

VINSON HAILULU **APPLICANT**

and

THE DIRECTOR OF THE ANTI-CORRUPTION COMMISSION **1ST RESPONDENT**

THE ANTI-CORRUPTION COMMISSION **2ND RESPONDENT**

THE NATIONAL UNION OF NAMIBIAN WORKERS **3RD RESPONDENT**

THE MAGISTRATE, MAGISTRATE'S COURT, WINDHOEK **4TH RESPONDENT**

THE PROSECUTOR-GENERAL OF NAMIBIA **5TH RESPONDENT**

Neutral citation: *Hailulu v The Director of the Anti-Corruption Commission* (A 383/2008) [2013] NAHCMD 205 (19 July 2013)

Coram: DAMASEB, JP

Heard: **20 March 2012**

Delivered: **19 July 2013**

Flynote: **Review** – Review application – To set aside decision of Anti Corruption Commission to investigate applicant for corruption by a public office – To set aside his arrest and detention and bail conditions – To quash charges brought against him and to seek an order discontinuing his pending criminal prosecution.

Summary: Applicant seeks the review and setting aside of an investigation against him by the Anti Corruption Commission on the grounds, inter alia, that it was not warranted on reasonable grounds and that it was prompted by ulterior motives. He also seeks an order to set aside the warrant for his arrest and detention on the ground that the arresting officers did not consider less drastic methods such as summons or warning-

Held that relief seeking review and setting aside of investigation and subsequent prosecution not competent.

Held further that arresting officers ought to have considered less drastic method then arrest in view of history of matter. Applicant therefore achieving limited success and denied his costs of review.

ORDER

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1. Applicant's prayers contained in paragraphs 2, 3 and 5 of the Amended Notice of Motion, are dismissed and the corresponding rule *nisi* accordingly discharged.
2. The warrant for the applicant's arrest, the subsequent detention effected on 27 November 2008, and the bail conditions imposed on the applicant in the wake of such arrest and detention, are declared unlawful and are hereby set aside and the corresponding rule *nisi* accordingly confirmed.
3. The 1st, 2nd and 5th respondents are awarded the wasted costs occasioned by their in *limine* objections in respect of the following:
   3.1. applicant's abandoned constitutional challenge to s 43 of the ACC;
   3.2. the non-joinder of the Prosecutor General.

4. The 1st, 2nd and 5th respondents are awarded their costs of opposing the review application;
5. Such costs in respect of paragraphs 3 and 4 of this order to include the costs of one instructing and two instructed counsel in respect of 1st and 2nd respondents, and the costs of one instructing and one instructed counsel in respect of 5th respondent.

JUDGMENT

DAMASEB JP:

[1] This is the extended return date of an interim interdict granted by this court on 6 February 2009 in favour of the applicant on an urgent basis, against ACC respondents, in the following terms:

> *'1. Reviewing and setting aside the decision of the first and second respondents in terms of section 18(1)(b) of the Anti Corruption Act 8 of 2003 ("the ACA") to conduct an investigation of the allegations against the applicant;*
>
> *2. Reviewing and setting aside the decision of the first and second respondents in terms of section 18(3) of the Act that the investigation permitted by the decision contemplated in the foregoing paragraph was to be conducted by the first and second respondents;*
>
> *3. Declaring the applicant's arrest of 27 November 2008 to have been unlawful;*
>
> *4. Declaring invalid the criminal proceedings instituted against the applicant in the Magistrates' Court, Windhoek.'*

[2] The interim interdict was granted pending the finalisation of review proceedings brought by the applicant on 19 December 2008 in substantially the same terms as the relief granted on an interim basis. Subsequent to the interim relief being granted and in August 2009, the applicant amended and supplemented his notice of motion relying on four main review grounds and a daunting 25 subsidiary review grounds as follows:

‘(1) Calling upon the respondents to show cause why the decisions contemplated by prayers 2 and 3 below should not be reviewed and set aside, and why orders in the terms of prayers 2 and 3 should not be made;

(2) Reviewing and setting aside the decision in terms of section 18(1)(b) of the Anti-Corruption Act, No 8 of 2003 (“the Act”) to conduct an investigation of the allegations against applicant, upon the grounds, each such ground being an independent basis for the relief sought by applicant on this prayer 2, that:

2.1 The Director of the Anti-Corruption Commission (such Commission hereinafter referred to as “the ACC”), or the party within the ACC responsible for such decision, failed to take the provisions of section 18 (2) of the Act, in particular section 18 (2)(*a)*, (*b)* and (*d*) into consideration prior to coming to its decision;

2.2 The allegations against applicant did not amount to evidence of any involvement in any “corrupt practice’’ as contemplated by sections 33 to 48 of the Act, as a consequence whereof the decision to investigate the allegations against applicant was *ultra vires* the powers and duties of the ACC as circumscribed by section 3(*a*), or any of the other subsections of section 3 of the Act;

2.3 The decision was prompted by ulterior motives, and was taken in bad faith and for purposes of achieving the unlawful aim of undoing or reversing the retrenchment of former employees of the National Housing Enterprise (hereinafter “the NHE”) outside the scope of the legal remedies available to achieve such objective, and/or the unlawful aim of removing the applicant from his position as Chief Executive Officer of the NHE;

2.4 No rational and legitimate connection existed between the decision to investigate applicant, purportedly taken in terms of the provisions of section 18(1)(*b*), and the evidence presented to the ACC;

2.5 The decision was not “warranted on reasonable grounds”, as required by the provisions of section 18(1)(*b*) of the Act;

2.6 The decision was based on, inter alia, considerations unrelated to the provisions of the Act;

2.7 The decision maker(s), in bringing out their above decisions, was/were biased against applicant;

2.8 The decision maker(s), in bringing out their above decisions, failed to consider, and failed to take steps to gather and/to obtain relevant material that were crucial to such decisions.

(3) Reviewing and setting aside the decision of first and/or second respondent in terms of section 18(3) of the Act, that the investigation permitted by the decision taken in terms of section 18(1)(b) was to be conducted by the ACC, upon the grounds, each such ground being an independent basis for the relief sought by applicant under this prayer 3, that:

3.1 The threshold requirement of a proper prior decision taken in terms of section 18(1)(b), for a valid decision in terms of section 18(3), was not complied with;

3.2 The decision in terms of section 18(3) was prompted by ulterior motives, and was taken in bad faith and for purposes of achieving the unlawful aim of undoing or reversing the retrenchment of former employees of the NHE, and/or the unlawful aim of removing the applicant from his position as Chief Executive Officer of NHE;

3.3 No rational and legitimate connection existed between such decision and the evidence presented to the ACC;

3.4 Such decision was not warranted on "reasonable grounds" as required by section 18(3) of the Act;

3.5 The decision was based on, inter alia, considerations unrelated to the provisions of the Act;

3.6 The decision maker(s), in bringing out their above decision, was/were biased against applicant;

3.7 The decision maker(s), in bringing out their above decision, failed to consider, and failed to take steps to gather and/to obtain relevant material that were crucial to such decision.

(4) Declaring the warrant for applicant's arrest ,and the arrest effected on 27th November 2008, to have been unlawful, and setting the warrant for applicant's detention and the arrest effected on such date and the bail conditions imposed upon applicant, aside, upon the grounds that, each such ground being an independent basis for the relief sought by applicant under this prayer 4:

4.1 The ACC, or any party acting in terms of a purported delegation under the Act, or in terms of a delegated power deriving from the Prosecutor General, has no powers to effect any arrest prior to any decision by the Prosecutor General taken in terms of the provisions of section 31(2) of the Act, other than for purposes of arresting a person who is found to have perpetrated a recent or contemporaneous offence in terms of section 28 of the Act;

4.2 At the time of the arrest on 27 November 2008, the Prosecutor General had not taken any decision as contemplated by section 31(2), and the applicant was not found perpetrating a recent or contemporaneous offence as contemplated by section 28 of the Act;

4.3 The decision to arrest applicant, and the detention itself, was prompted by the considerations set out in prayer 2.3 above;

4.4 The arrest was not intended to and could not serve the purposes of an arrest, namely the arraigning of an accused person for trial on specific charges, as no prior decision to prosecute applicant had been taken as at the time of his arrest;

4.5 The ACC ignored, in bad faith and prompted by considerations set out in prayer 2.3 above, other measures not as severely infringing applicant's constitutionally entrenched right to liberty, that could have achieved applicant's presence in court, such as a summons, or a warning to appear in court;

4.6 The contents of the warrant of arrest falsely stated that applicant was "arraigned for trial on a charge of Count /… contravening section 43(1) of the Anti-Corruption Act./\ whilst no decision to prosecute applicant on any such or other charge(s) had preceded the issue and execution of such warrant;

4.7 None of the charges investigated by the ACC amounted to an offence in terms of section 43(1) of the Act, which section was falsely stated by the warrant to represent the offence with which applicant was charged;

4.8 In the absence of any proper or lawful or legitimate decisions taken in terms of the provisions of section 18(1)*(b)* and 18(3) of the Act, the threshold requirements for the authority of the ACC to effect an arrest, namely a validly established investigation, was absent, and the purported arrest was *ultra vires* the powers of the ACC.

(5) Declaring invalid the criminal proceedings instituted against applicant in the Magistrates' Court, Windhoek.'

Definitions

[3] I shall for ease of exposition use the following shortened forms in the body of the judgment:

(a) ‘ACC’ or ‘ACC respondents’ refers to the first and second respondents.

(b) ‘ACA’ refers to the Anti Corruption Act, 8 of 2003.

(c) ‘Trade Union’ refers to the third respondent.

(d) ‘PG’ refers to the Prosecutor General.

(e) ‘NHE’ refers to the National Housing Enterprise, a public institution created by an Act of Parliament and of which the applicant is the chief executive officer.

(f) ‘CEO’ refers to chief executive officer.

The applicant’s case briefly stated

[4] In its most rudimentary form, the case of the applicant can be summarised as follows:

(a) Measured against the requirements of the ACA, the investigation by the ACC respondents against the applicant for alleged corruption was unlawful as it did not meet the jurisdictional facts to satisfy such an investigation;

(b) The allegations against the applicant do not rise to the standard of ‘corrupt practice’ as contemplated by the ACA;

(c) The investigation by the ACC respondents against the applicant was unlawful as it was in pursuance of an improper and ulterior motive and not in compliance with the ACA;

(d) The arrest and detention of the applicant by the ACC respondents were unlawful as those respondents did not consider less drastic measures than arrest and detention; and that the facts of the case called for the application of less drastic measures such as summons or warning to bring the applicant before a criminal court.

The respondents’ case briefly stated

[5] The ACC respondents' defence to the case of the applicant thus stated, can in turn be summarised as follows:

(a) The ACC respondents were lawfully requested by the trade union to investigate the applicant;
(b) The ACC respondents had the authority to conduct such investigation in terms of s 18(3) of the ACA;
(c) The arrest of the applicant was properly and lawfully effected and justified by the evidence gathered as a result of the investigation;
(d) The decision to investigate and arrest the applicant was warranted on reasonable grounds as required by the ACA;
(e) The ACC respondents acted independently and without ulterior motive in investigating and arresting the applicant, and such investigation was lawful and well within the powers of the ACC respondents;
(f) The applicant was arrested in terms of s 28(1) of the ACA , which gives the second respondent's 'authorised officer' power to arrest a person suspected of having committed an offence.

[6] In a nutshell, the applicant challenges:

(a) the investigation conducted against him;

(b) his arrest and detention, and

(c) the prosecution brought against him in the Magistrates Court.

Against whom is relief sought?

[7] The main relief is directed principally at the ACC respondents, although in view of the conduct attributed to the trade union – and in the event the applicant is successful in the main relief – a costs order is also sought against all respondents jointly and severally, the one paying, the other to be absolved.

[8] A related issue that falls for determination is where the costs should fall in respect of (a) the relief since abandoned by the applicant impugning the

constitutionality of s 43 of the ACA, and (b) the relief seeking to quash the charges against the applicant. That arises because the applicant had initially sought a declaration of unconstitutionality of the said section, and to quash the charges – without, as regards the first, citing the Government; and, as regards the second, the PG – in the latter respect in regard to the part of the relief that is aimed at the quashing of the charges against the applicant. In the latter respect the issue is predicated on the fact that under Namibia's constitutional scheme it is the PG that initiates all prosecutions.[1] The respondents took the posture that it was impermissible to seek to impugn a statutory provision without citing the Government, or to have criminal charges initiated by the PG quashed without citing the authority whose constitutional mandate it is to bring them.

[9] No costs order or any substantive relief is sought against the fourth respondent, the magistrate for the relevant district where the criminal charges are pending and where the warrant of detention issued.

Condonation applications

[10] The second respondent seeks condonation for the late filing of its opposing affidavits and for which purpose the first respondent ('the director') on behalf of the second respondent relies on the confirmatory affidavit of legal practitioner, Mr Khupe.

[11] On 25 August 2009, after the ACC respondents filed the record of proceedings sought to be set aside, the applicant filed an amended notice of motion to supplement his papers. These papers are accompanied by an affidavit in support of a condonation application for the late filing of the supplementary papers which, he maintains, was necessitated by the fact that the ACC respondents initially filed an incomplete record. Again on 11 May 2010, the applicant filed a further supplementary affidavit in support of a further condonation application, in response to a record received at the end of November 2009 – a record which, on the respondents' version, was excluded from the record originally filed.

[1]Article 88(2) of the Namibian Constitution and s 3 of the Criminal procedure Act, 51 of 1977.

[12] None of these applications are opposed, and I am satisfied that a case is made out in respect of each and in the exercise of my discretion grant the applications in the terms sought.

Issue for decision defined

[13] The case brought by the applicant brings to the fore the tension between two important considerations in a democratic society governed by the rule of law: The rule of law requires that courts should not place unnecessary hurdles in the way of the organs of State charged with the responsibility of investigating suspected criminal conduct and pursuing prosecution of such conduct before a competent court or tribunal based on the facts and evidence uncovered during an investigation. The public expect of such agencies to conduct investigations and pursue prosecution without fear or favour. Those who are the target of investigation and prosecution have the opportunity to challenge the authorities in open court and to require the law enforcement agencies to prove their guilt beyond reasonable doubt. It is unwholesome to prevent the ventilation of all facts and evidence in open court by the law enforcement agencies, lest there be created the public perception that those powerful enough or have the means to do so may thwart due process of law and place themselves above the reach of the law. Everyone is presumed innocent until proven guilty, but it is as much a travesty of justice that the guilty escape the sanctions imposed by the law by the suppression of legitimate investigation and prosecution.

[14] That important tenet of a society governed by the rule of law does not negate the equally important one that the power to investigate and to prosecute is a public power to be deployed for a public purpose and in the public interest. The exercise of those powers have far reaching implications for a person's liberty, dignity, reputation and even livelihood and must be exercised in good faith and for substantial reasons; certainly not in order to strengthen the hand of one person against another in their pursuit of civil, commercial or labour disputes against the person whose conduct is the subject of investigation and criminal prosecution by the law enforcement agencies.

[15] Where should the balance be struck? That is the difficult task facing the court in the present proceedings.

FACTUAL MATRIX

Common cause

[16] It is common cause that an investigation was initiated by the ACC against the applicant during the course of 2007 and that the applicant was arrested without a warrant by an officer of the second respondent (Mr Masule) on 27 November 2008 on 13 charges. It is not in dispute that the applicant's arrest coincided with complaints of corruption laid by the trade union and its members. These members of the trade union were disaffected employees of the NHE. The employees were dissatisfied on account of being retrenched as a result of the retrenchment initiated by the applicant as CEO.

[17] The applicant was appointed CEO of the NHE in July 2005. In 2006, he embarked on a restructuring of the NHE which resulted in retrenchments. As was to be expected, certain employees of the NHE were unhappy about being retrenched. Being members of the trade union, the disaffected employees enlisted the assistance of the trade union whose Secretary General is Mr Evilastus Kaaronda. Mr Kaaronda then begun a campaign against the retrenchment which included media statements and demands for an investigation by the ACC respondents.

[18] It is further common cause that the ACC had conducted an investigation of allegations leveled against the applicant concerning alleged misuse of the NHE credit card; extending benefits at the expense of the NHE to the board chairman who was his business partner; unlawfully extending benefits to himself and his family, and allowing NHE employees to conduct private work for him at the expense of the NHE.

[19] It is common cause that in May 2007 the NAFINU[2] issued a media statement accusing the applicant and the NHE of mismanagement of funds and stating that;

[2]Namibia Financial Institutions Union.

'[I]t will be in the interest of the Nation if the ACC can investigate NHE, especially if they should concentrate on the revenue leakages…We have already forwarded a request to the ACC director to investigate. This is a public institution and we have every right to be concerned.'

[20] It is admitted that these media statements came to the knowledge of the ACC respondents and at the core of them was the desire by the makers to reverse the retrenchment instituted by the applicant. In fact, in one of them, it is suggested that the applicant too must be retrenched.

[21] Two things are therefore very clear: The first is that the applicant's restructuring exercise at the NHE irked the labour movement and the employees, and they were determined to do everything possible to stop it. The campaign they engaged in took the form of putting pressure on the government to stop the process and to level all manner of allegations, including criminal wrongdoing, against the applicant. It is beyond dispute that the one institution which decided to act on the allegations was the ACC. In so doing they received particular allegations from the trade union and the employees and tailored their investigation around those allegations.

Applicant's evidence

[22] The applicant deposed to the main affidavit in support of the relief he seeks, which he subsequently amplified (as will be shown below) after the record of proceedings sought to be reviewed was filed. Therein he makes the following salient allegations: About a year before his arrest and detention, the ACC respondents had been conducting an investigation into allegations of corruption on his part. He had throughout cooperated with the investigation and continued to perform his duties and responsibilities as CEO of the NHE. All that changed when he, as CEO, begun a restructuring process at the NHE which necessitated the retrenchment of certain employees who were members of the third respondent.

[23] The affected employees and the trade union then approached the ACC respondents and made allegations of corruption against him. The main actor identified by the applicant as the person who spearheaded the allegations

against him is Mr Evilastus Kaaronda, Secretary General of the trade union. The applicant alleges that Mr Kaaronda told him in no uncertain terms that he wanted the applicant to rescind the retrenchment of the employees who were also members of the trade union. When the applicant refused to accede to this demand, Mr Kaaronda informed him that he would take steps to have him arrested for corruption by the ACC. The allegations in this regard are very specific and unambiguous. I will list them hereunder.

[24] The disaffected employees approached the District Labour Court to have their retrenchment set aside. That court decided in the employees' favour and the applicant, as CEO, spearheaded an appeal on behalf of the NHE against the decision of the District Labour Court. Mr Kaaronda then by telephone told the applicant not to appeal. The applicant refused to meet this demand whereupon a certain Mr Deon Gerber, a labour consultant purporting to act on Mr Kaaronda's instruction, informed the applicant on 30 October 2008 not to proceed with the appeal and that if the appeal proceded it would cost the applicant 'dearly'. Mr Gerber allegedly also conveyed to the applicant that Mr Kaaronda had already made entreaties to the Minister of Regional and Local Government and Housing to 'block' the appeal and to remove the applicant as CEO. Mr Gerber added that the applicant was to have been arrested already the previous day by the ACC but that Mr Kaaronda had asked the ACC not to effect the arrest as such an arrest would have the effect that the applicant would not be able to cause the NHE to abandon the appeal or to reinstate the retrenched employees.

[25] It was argued on behalf of the ACC respondents that the statements attributed to Mr Gerber be excluded on the ground they constitute hearsay evidence. That objection is without merit: The undisputed version of the applicant is that Mr Gerber was acting as an agent of the trade union, a party in these proceedings. The trade union has not denied that allegation and no attempt was made by the ACC respondents to file an affidavit by Mr Gerber or Mr Kaaronda denying the alleged relationship of agent. A statement by a person acting as an agent of a party to a proceeding is not hearsay and is admissible.[3]

[26] The applicant proceeded with the appeal against the reinstatement of 11 retrenched employees. The appeal was opposed and thereafter upheld by the

[3] Schwikkard et al, *Principles of Evidence* (3ed) at para 16.5.1.1.

Labour Court which set aside the order of the District Labour Court. The applicant was thereafter subjected to defamatory accusations by Mr Kaaronda who, amongst others, referred to him as a 'black racist'.

[27] The applicant further alleged that the ACC respondents' decision to investigate the applicant was initiated by the second respondent on request of the trade union and that the former was instigated by the latter to carry on the investigation and to arrest the applicant. The arrest was effected by Mr Masule and Mr Olivier of the ACC only a day after Mr Kaaronda's threat. The arrest was without a warrant.

[28] It is applicant's case further that the arrest was unlawful since the ACC respondents should have resorted to less drastic measures to secure the applicant's attendance at court. The warrant of detention contained the charges on which the applicant was arraigned for the alleged contravention of s 43(1).

[29] The applicant was after arrest taken to the Windhoek police station, charged and brought before the Windhoek Magistrate's Court. He was released on bail the same day on condition that he does not come within 100 meters of the offices of the NHE, for the period 27 November 2008 to 8 December 2008 and had to hand over all keys to the office of the CEO at the NHE. The applicant however retained his position as CEO despite his arrest.

[30] The legal issue raised by the applicant as a result of his arrest is that no decision to prosecute him was made by the PG at the time of the arrest as, allegedly, contemplated in s 31(2) of the ACA and that the ACC respondents had not completed the investigation nor referred the matter for investigation and institution of criminal proceedings to the PG. It is on these grounds that the applicant seeks relief to declare the arrest, the warrant of detention, and the bail conditions imposed upon his release all unlawful in the absence of a prior decision from the PG to conduct criminal proceedings.

Applicant's steps post filing of the record sought to be set aside

[31] The gravamen of the applicant's case in his supplementary papers is that the ACC respondents were induced by the trade union (acting through Mr

Kaaronda) to act *ultra vires* their powers by accepting and giving credence to allegations of criminal conduct made by the trade union against the applicant – allegations of which the high watermark was alleged wasteful expenditure by the applicant which did not rise to the standard of corrupt practice. The applicant maintains that even if the allegations were true, such conduct fell outside the scope of offences over which the ACC respondents had jurisdiction and competence to investigate in terms of the ACA and did not justify an investigation under s 18 of the ACA.

[32] The applicant claimed that none of the charges make mention of any '*gratification received or another party causing gratification to be received by the public officer'* and that the ACC respondents' investigation did not satisfy any threshold requirements for any such offence. In addition, it is alleged by the applicant that his arrest and the charges leveled against him were prompted by what the trade union referred to as the 'senseless and bogus restructuring and retrenchments' at the NHE and which the applicant states amounts to unlawful and improper motives on the part of the ACC respondents. Such motives, the applicant maintains, were to achieve his suspension as CEO if regard is had to the fact he gave full cooperation to the ACC respondents during their investigation of him.

[33] The applicant alleged that an article appeared in the Observer newspaper towards the end of November 2006 reporting on allegations of improper conduct by the applicant. According to the applicant, there was a remarkable coincidence in the Observer newspaper's report which mirror the allegations by a Mr Beukes who was an employee of the NHE to that newspaper, in 'similar gist' to those forming the subject matter of the list of charges supplied to the applicant by the ACC.

Respondents' rebuttal evidence

[34] Mr Paulus Noah, the director of the ACC, denies that the ACC or its officials collaborated with the trade union or any of its members to bring about the applicant's arrest. He also denies knowledge of an ultimatum by the trade

union or its members to the applicant to reinstate the retrenched employees or face arrest by the ACC.[4]

[35] Although he admits the fact of the arrest, the director denies that the ACC acted at the behest of or in collaboration with the third respondent, its members or employees to arrest the applicant on 27 November 2008.

[36] The director does not deny that the trade union and its members engaged in a well publicized campaign to make allegations of financial abuse, corruption and abuse of office against the applicant. He denies though that the ACC collaborated with the trade union in that endeavour or that because it acted as it did on those allegations and initiating an investigation, it acted *ultra vires* its powers. The director added that the allegation which the ACC found of particular interest, but which was not specifically dealt with by the applicant in the NHE's public rebuttals of the allegations made by the trade union, was stated in the following terms by the aggrieved individuals:

> 'The NUNW[5] remains strongly worried about and oppose to the dangerous business relationship that exists between the CEO of the NHE [the applicant] and his Board Chairperson stemming from a company called 'New Paradigm Consultancy' which company is owned by both the CEO and his Board Chairperson. This unhealthy relationship which makes these two individuals equal business partners at night and then employee and employer during the day at the NHE can no longer remain unchallenged. One wonders why the Anti-Corruption Commission is mute on this unhealthy state of affairs.'

[37] Although it is admitted that the applicant was arrested without a warrant, it is the ACC respondent's case that such arrest was not done in the presence of Mr Kaaronda, the group of retrenched employees and the media as alleged by the applicant. The director maintains that the arrest was justified in terms of s 28 of the ACA and based on the ACC's independent investigations which disclosed evidence that the applicant had transgressed s 43(1) of the ACA. The charges were formulated, the director stated, by the office of the PG and the imposition of bail conditions was done between the prosecution and the applicant's legal practitioner at the time.

[4]Allegedly that was conveyed to the applicant on 28 October 2008 by third respondent's Secretary General, Mr Kaaronda. The same message was also conveyed on 30 October 2008 by a labour consultant of the third respondent.
[5]The trade union.

[38] In a confirmatory affidavit, Mr. Masule admitted to visiting the premises of the NHE and being granted permission, telephonically, by applicant to have access to documents which he deemed necessary for the investigation. He however denies the allegations that the applicant did not fabricate certain documents in order to exculpate himself.

[39] From the outset, Mr. Masule pointed out that he received a file containing documentation from the informants. After having considered its contents in order to decide in respect of which information an investigation was warranted, he advised the informants of other avenues to pursue relating to those issues the ACC was not prepared to take up. In any event the ACC contended that they were entitled to investigate those allegations against the applicant:

(a) once they were publicised in the media;
(b) because they related to an alleged abuse of public funds of a public institution;
(c) because they related to proper governance of an important institution in whom the public has reposed lawful and proper administration of public funds.

[40] Mr Masule stated that during his investigation he obtained an exculpatory statement from the applicant regarding the charges against him and that he accepted that same may be supplemented from time to time due to time constraints facing the applicant in the preparation thereof. He states further that he obtained forensic evidence confirming the suspicion that some documents may have been fabricated on the applicant's laptop. It also appears from Mr. Masule's evidence that he consulted quite extensively with relevant employees of the NHE to gather information. The evidence of the ACC further bears out that the applicant as well as the NHE failed to respond to the allegations regarding the improper business relationship between applicant and the chairperson of the NHE board and that the ACC respondents were thus, in the absence of a suitable explanation from the applicant regarding matters of public concern, entitled to investigate the allegations made against the applicant.

[41] The ACC respondents deny that the charges leveled against the applicant are vexatious and frivolous or that they do not measure up to a corrupt practice

as contemplated in s 33.[6] The ACC respondents maintain that the applicant failed to consider s 32 of the ACA in the determination of what amounts to a corrupt practice and whether or not the threshold jurisdictional requirements in initiating the investigation were met. In addition, the ACC respondents deny that an expressed requirement of 'gratification' had to be specifically alleged in relation to the 13 charges and that the conduct as set out in annexure 'VH7' is embraced by the term gratification.

[42] It is the respondents' case that the first respondent is competently seized with the investigation and arrest and that it took a proper and legitimate decision warranted in terms of the ACA and did not act *ultra vires* its powers. The respondents maintain that the ACC respondents did not act in any unlawful manner whatsoever that suggests a predetermined guilt on the part of the applicant up until the completion of the investigation and that no procedural aspect of an investigation or arrest was abused through an unlawful strategy. The ACC respondents maintain that they have not acted on the influence of the Union and did not entertain an unlawful and improper motive for the arrest and that their officials acted independently and without undue influence during the investigation and arrest of the applicant.

[43] According to the director, the allegations against the applicant raise matters of public concern and that the ACC was entitled to investigate those allegations, as soon as they were brought to its attention.

[44] The ACC respondents do not deny that there was no prior decision by the PG and that the investigation was not completed at the time of the applicant's arrest. It is denied, however, that such decision was required in terms of s 31(2). The respondents also state that the applicant was arrested in terms of s 28(1). Alternatively, any decision of the Prosecutor-General would have been done in terms of the provisions of the Criminal Procedure Act 51 of 1977. The arrest, the warrant of detention and the bail conditions are therefore denied to have been unlawful.

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[6] Section 33 reads:

> 'Offence of corruptly accepting gratification
> A person commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept for the benefit of himself or herself or any other person any gratification as-
> (a) an inducement to do or to omit doing anything;
> (b) a reward for having done or having omitted to do anything.'

[45] I must now consider the applicant's review grounds against the backdrop of the factual landscape set out above.

The ACA construed

[46] The ACC respondents have the power to investigate corrupt practices in terms of the ACA. The present proceeding implicates their powers principally under s 18, read with s 31, 33 and 43(1). The outcome of the case will depend on the proper construction of these provisions, in particular the limits, if any, on the exercise of the powers enjoyed by the ACC respondents in terms of s 18 of the ACA. The applicant seeks a finding that on the facts of the present case there was an abuse of the powers given under s 18 of the ACA as there were no reasonable grounds as required by the ACA for the exercise of such power by the ACC respondents.

Consideration of the review grounds

[47] The following review grounds will now be considered:

'There was no rational or legitimate connection between the decision to investigate and the evidence'

This ground of review hinges on whether or not there was evidence which justified the initiation of an investigation. I will therefore consider this review ground together with the second one which postulates that '*The allegations did not amount to evidence of any involvement in a corrupt practice'.*

[48] No less than 13 charges have been levelled against the applicant by the ACC respondents. In a nutshell, the charges entail allegations of the following conduct allegedly perpetrated by the applicant:

'

(a) promoting an employee contrary to the policies and procedures of the NHE;
(b) appointing new employees contrary to the policies and procedures of the NHE;

(c) conducting a private consultancy business contrary to applicant's employment agreement with a fellow board member of the NHE and in doing so utilizing NHE resources for private gain;

(d) misusing his powers to approve and pay for subsistence and travel allowances in favour of a fellow board member (also being his private business partner) being at a rate higher than what is allowed in terms of NHE policies;

(e) misusing his powers to approve and pay for accommodation in favour of a fellow board member (also being his private business partner) whilst such expense was not actually incurred;

(f) using the NHE credit card for private purchases on at least two occasions;

(g) making unauthorized withdrawals from the NHE credit card;

(h) claiming travelling and subsistence allowances and accommodation for himself and his family contrary to NHE policies and procedures;

(i) using the NHE credit card for amounts in excess of the amounts allowed and thereafter not being able to substantiate such usage with documentary proof;

(j) making withdrawals from the NHE credit card without being able to substantiate such withdrawals with documentary proof;

(k) misusing his powers by allowing NHE employees to do work at his private residence at the expense of NHE.' (My underlining for emphasis).

[49] In terms of s 18(1), the ACC

(a) …must receive information by any person if that information relates to an allegation that another person: (i) has or is engaged, (ii) or is about to engage in a corrupt practice;

(b) It must examine each corrupt practice alleged;

(c) It must decide whether an investigation is warranted on reasonable grounds, taking into account the following:

(i) the seriousness of the conduct or involvement to which the allegation relates;

(ii) whether or not the allegation is frivolous or vexatious or is made in good faith;

(iii) whether or not the conduct or involvement to which the allegation relates is or has been the subject of investigation or other action by any other appropriate authority for the purposes of any other law;

(iv) whether or not, in all the circumstances, the carrying out of an investigation for the purposes of this Act in relation to the allegation is justified and in the public interest.

Jurisdictional fact for undertaking an investigation

[50] The Commission may not investigate a matter if not warranted on 'reasonable grounds'.

Who may conduct an investigation?

[51] The ACC may conduct an investigation itself or ask another appropriate authority for appropriate action. The use of the expression 'another appropriate action' in my view implies that not every complaint will assume a criminal character: the infraction involved could be administrative in character and internal disciplinary measures could be more appropriate. An investigation could also be more appropriately dealt with internally and the facts submitted to the ACC for consideration. To do all of the above, the ACC *may* make a preliminary inquiry and consult any other appropriate authority.

[52] What seems obvious to me on a careful reading of the section and the Act as a whole is that it seeks to exclude and guard against hasty action. It appears to me that the legislature intended the ACC to carefully apply its mind before investigating a person for alleged corrupt conduct. Above all, what the ACC is vested with is a public power which must be exercised for substantial reasons. The power is not unfettered and its exercise is subject to curial challenge and scrutiny by the court against the standard of 'justification in the public interest' and 'warranted on reasonable grounds.'

[53] The decision to investigate must be 'warranted on reasonable grounds' as I have shown. If there was evidence *prima facie* disclosing the commission of an offence, an investigation would be 'warranted on reasonable grounds'. It is important therefore to examine what was the nature and quality of the evidence that the ACC had implicating the applicant in any offence under s 43(1).

[54] The applicant's main contention is that the charges stated in paragraph 44 of this judgment do not involve 'corrupt practices' and were therefore not capable of being investigated by the ACC. He also alleges that in doing so the ACC acted *ultra vires* its powers.

Corruptly construed

[55] In terms of s 43(1) of the ACA:

> (1) ' A public officer[7] commits an offence who, directly or indirectly, corruptly uses his or her office or position in a public body to obtain any gratification, whether for the benefit of himself or herself or any other person.'

[57] The Supreme Court recently considered the scope of the offence of corruption in *S v Goabab and Another.*[8] The Chief Justice, writing for the Court, held that:

'[T] he word 'corruption', at its lowest threshold when used in the context of the public service, includes the abuse of a public office or position (including the powers and resources associated with it) for personal gain.'

[58] The learned Chief Justice also commented that the statutory definition of the crime of corruption had 'done away with the previous common law elements of the crime of corruption and has heralded in a new dispensation in the definition, reach and scope of the offence of corruption' and that 'the offence is now broad in its reach and scope.' He gave the reason therefor as follows:

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[7]Defined in s 32 of the ACA as: 'a person who is a member, an officer, an employee or a servant of a public body, and includes-

(a)a staff member of the public service, including the police force, prisons service and defence force, or of a regional council or a local authority council;

(b) a member of the National Assembly, the National Council, a regional council or a local authority council;

(c) a judge of the Supreme Court or the High Court or any other member of the judicial authority;

(e) any person receiving any remuneration from public funds…''

[8] SA 45/2010 delivered on 15 November 2012.

'This appears necessary because corruption may manifest itself in different shapes and forms. It is also notoriously difficult to prove, because it often does not take place in the full view of the public.'

[59] The sense one gets reading the judgment of the Supreme Court in *Goabab*[9] is that corruption is now universally recognised as a scourge that threatens to ruin society and needs to be vigorously combated.

[60] Mr Barnard, for the applicant, forcefully argued that the charges founded on s 43(1) suffer from the absence of an allegation that the allegedly wrongful actions attributed to the applicant were done as 'reward for having done or having omitted to do anything'. He added that a criminal offence in respect of which the wrongdoer has not given or received 'a reward for having done or having omitted to do anything'' cannot qualify as a 'corrupt practice for purposes of the ACA. In addition, Mr Barnard argued that the commission of an offence in terms of Chapter 4 of the ACA would, in his words, 'self-evidently imply the participation of another party, complicit in the crimes listed by Chapter 4.' He concluded this aspect of the argument by stating that:

'Their inability to have done so is not surprising: the allegations leveled at applicant do not make provision for the implication of the essential second party whose participation would have been a prerequisite for any offence contemplated by Chapter 4 of the ACA.'

[61] Chapter 4 to which counsel refers creates not one offence but several offences: all told it enacts 16 instances of possible corrupt practices. Gratification is a common denominator in all but one[10] of them. The gratification[11] is either for

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[9] See also para 15 thereof.

[10] Being 'corrupt acquisition of private interest by public officer.'

[11] In terms of s 32, 'gratification' includes-

(a)money or any gift, loan, fee, reward…

…

(d) any valuable consideration or benefit of any kind, any discount, …, rebate, …, deduction

(e) any forbearance to demand any money or money's worth or valuable thing;

(f) any service or favour, including protection from any penalty or disability incurred or apprehended…;

(g) any right or privilege;

one self or for another. In some instances, but not all, the gratification must have been a reward for doing or omitting to do something. Some of the instances require the involvement of a joint wrongdoer. In some cases there is no explicit requirement of the involvement of a joint wrongdoer. Section 43(1) is an example where the involvement of a joint wrongdoer, or the doing or omission to do something for reward, are not express requirements. Mr Barnard's departure point that: (a) gratification must have been a reward for doing or omitting to do something, and (b) that the accused must have a joint wrongdoer, is not supported by the provisions of the ACA. Section 43(1) is another form of theft from a public institution. To suggest that a theft only occurs if one does it for reward, or if acting with a joint wrongdoer, is far-fetched. Certainly, that goes again the grain of the core meaning of corruption as explained by the Chief Justice in *Goabab*.

[62] Of the listed charges with which the applicant was confronted upon his arrest, the first two[12] support his allegation that the ACC respondents did not apply their mind whether or not they constitute corrupt practices. If those respondents did, it would have been obvious to them that those allegations cannot constitute corruption as defined in the ACA. It seems to me a manifest overreach to pursue criminal prosecution of an alleged failure to comply with administrative stipulations relating to personnel appointments, unless it can be shown that it was for gratification. It is a trivialization of the ACC's role which, in my view, was not intended by the legislature. The first two charges therefore support the applicant's version that in their pursuit of those charges the ACC sought to strengthen the hand of the trade union and its members. It is a practice that must be deprecated; yet, because the balance of the charges, if proved, would amount to corrupt practices, the effect of the first mentioned charges on the relief sought by the applicant, is inconsequential.

…

(i) "property" means money or any other… corporeal or incorporeal thing, …and includes any rights, privileges, claims…'

[12] a) promoting an employee contrary to the policies and procedures of the NHE;

b) appointing new employees contrary to the policies and procedures of the NHE.

[63] At the core of the balance of the charges[13] are the allegations that:

(a) The applicant misappropriated the money of the NHE through unauthorized use of the official credit card; and for private benefit used the labour of the NHE's employees at the latter's expense; and

(b) Extended financial benefits to a business associate, who happened to be a board member of the NHE, himself and his family, when in truth they were not entitled to those benefits.

[64] If true, most of these allegations amount to theft. At the time that the ACC was investigating the applicant, he had made representations in respect of the information uncovered by Mr Masule during the investigation and warned Mr Masule that the complainants had an ulterior motive in making the allegations and that the ACC would become a pawn in the process of discrediting him. According to the applicant, the charges formulated based on the complaints made and the investigation conducted are 'frivolous and vexatious' in 'its extreme', but does not say why. It is beyond me how theft by a public official from a public institution can be characterised as a minor issue.

[65] The NHE[14] is owned by the Government of Namibia and is therefore funded with taxpayers' money. It is a public body or institution.[15] Thus viewed, the NHE is an extension of the public service. The resources it owns and manages are therefore part of the national silver. An employee of the NHE- the most senior administrative officer at that- stealing from the NHE equates diminution of the national patrimony. Against the backdrop of the Supreme Court's decision that corruption must be vigorously combated, I do not find it unreasonable that the

[13] Vide paragraph 48 of this judgment.

[14] Is created by the National Housing Enterprise Act, 5 of 1993 (s 2(1)) and has the government as its sole shareholder in terms of s 15(3).

[15] Defined in s 32 of the ACA as: 'public body' means-

(c) any corporation, board, council, institution or other body, whether incorporate or unincorporated, or any functionary-

(i) exercising any power or performing any duty in terms of the Namibian Constitution; or

(ii) exercising a public power or performing a public function in terms of any law or the common law.' (My underlining).

agency mandated and tasked with the responsibility to fight corruption should show zero tolerance for corrupt practices, however small the value of the benefit allegedly improperly obtained. Those tasked with managing public resources must not abuse their privileged position to benefit themselves or others at the expense of the public. I am therefore unsympathetic to the view that because the amount of the benefit which the applicant is alleged to have illegally obtained is paltry, it should not have been the subject of investigation by the ACC respondents.

[66] The charges that relate to the alleged corrupt use of the NHE credit card therefore form a proper basis for investigation and prosecution under the ACA, as do those that accuse the applicant of extending unmerited benefits to a business partner, himself and his family, and that alleging that he used for private ends the labour of employees of the NHE at the latter's expense.

[67] I have no hesitation in holding that those allegations, if proved at a criminal trial, would constitute corruption as that word has since been interpreted by the Supreme Court. It matters not that the applicant in law has good defences to the allegations being made against him. That is a matter for a criminal court when the matter proceeds to trial. The only issue at this stage is whether the ACC respondents were warranted on reasonable grounds to initiate an investigation against the applicant in terms of s 18.

[68] It bears mention that some of the alleged acts involving a potential breach of s 43 of the ACA are in fact admitted by the applicant, although he gives explanations intended to negate criminal intent, both in the present proceeding and in explanations he gave to the investigators. For example, he admits use of the NHE credit card for private purchases but states it was unintentional and that it was being handled internally by the NHE.

[69] The ACC investigation points to the use of the NHE credit card for a purchase at *Pick n Pay* totaling N$ 225 and at *Total Sports* totaling N$ 727. Even if one were to accept that the first purchase was unintentional, it raises a strong suspicion of criminal intent if there is proof of a second purchase. But those are matters for the criminal court to determine. The point is that the fact that the applicant may have a valid defence to the criminal allegations does not justify the

conclusion that the ACC was not entitled to investigate him and to pursue a criminal prosecution. That is what the rule of law requires. It was no less objectionable to investigate him just because those who laid complaints pointing to criminal conduct on his part have grudges against him.

[70] Information provided by grudge-bearing whistleblowers is often the best source of information for investigators, especially in corruption cases which, as recognized by the Supreme Court, are difficult to uncover because they are kept well below the public radar.

[71] I am compelled by the facts of the case to conclude that the ACC respondents were warranted on reasonable grounds to initiate an investigation against the applicant. In so doing I once again pray in aid the dictum by the learned Chief Justice in *Goabab* when he said:

> '[T] he word 'corruption', at its lowest threshold when used in the context of the public service, includes the abuse of a public office or position (including the powers and resources associated with it) for personal gain.'

[72] Whether in fact there was a corrupt intent is a question for the trier of fact to determine in the fullness of time at the criminal trial. I express no view one way or the other on the merits of the charges. Whether the ACC respondents were justified in arresting the applicant when and in the way they did is a separate question, and to which I shall return presently.

[73] Mr Barnard also made much of what he characterised as the fatal deficiency apparent from the charges in their current form: in that, according to him, no allegation is made in them that the alleged unlawful conduct imputed to the applicant constitutes 'gratification'. Mr Barnard was not impressed by the director's suggestion in the answering papers that it was not necessary to expressly allege gratification and that same is implied in the accusations as formulated and that, if the need arises, the charges will be amended in due course of the conduct of the criminal prosecution.

[74] I find myself unable to agree with the approach put forward by Mr Barnard. On the contrary, I agree with the director that the allegations in the way they are formulated and were presented to the applicant (save the first two mentioned ones) sufficiently convey the message that the applicant is being accused of

benefiting others, or himself, to the financial detriment of the NHE. That detriment consists in the fact that, as alleged, the benefits extended were not lawfully due: Gratification in the context of s 43(1) means no more than that. Secondly, it is imposing an obligation on the ACC respondents not intended by the legislature, that at the stage of his arrest after investigation, the applicant was entitled to charges which are precisely formulated. It suffices, in my view, that the allegations (as indeed the present ones do) give him sufficient information about the nature of the criminal conduct he is accused of, by reference to the relevant statutory provisions.

[75] The applicant has procedural rights under the CPA to seek better particularity before he actually pleads to the charges at his criminal trial. The present is not that forum. At his criminal trial the applicant will have the right to object to whatever charges are preferred against him in terms of s 85 of the CPA: on the grounds, inter alia, that the charges do not disclose the essential elements of the offence. The criminal court has the power to require the state to amend the charge or to direct the delivery of better particulars.[16] Most crucially, in terms of s 88:

> 'Where a charge is defective for want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.'

[76] Given the procedural rights the applicant will enjoy as an accused, and the fact that the omission of an essential element of an offence is not necessarily fatal as it may be cured by evidence at the trial, it is not within the competence of this court in a review application to make a determination that the charges which have been presented to the applicant following an investigation under s 18 are defective. He must therefore fail on this review ground too.

The investigation was for an ulterior motive and was conducted in bad faith

[77] The assertion here is that the sole purpose of the investigation conducted by the ACC was to assist the trade union and its members in scuppering the

[16] See further the court's power under s 86 to order amendments of charge; and the accused's rights under s 87(1) to 'at any stage before any evidence in respect of any particular charge has been led, in writing request the prosecution to furnish particulars or further particulars of any matter alleged in that charge…'

retrenchment and to achieve the removal of the applicant as CEO. Is a finding to that effect justified? Assuming that Mr Kaaronda actually made the utterances and threats toward the applicant, can it be inferred from the evidence on record that the ACC knew of and made common cause with Mr Kaaronda's motives?

[78] In applying the well known rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at (634I-635D), I base my decision on facts that are common cause or otherwise on the respondent's version.

[79] Briefly, the factual basis for this ground is that applicant alleges that Mr Kaaronda informed him telephonically that he did not want an appeal against the decision of the District Labour Court reinstating the retrenched employees. Applicant was also subsequently informed by a labour consultant acting for the trade union, that if the NHE pursued an appeal it would 'cost him dearly'. Applicant alleges that it was further intimated to him that if it was not for Mr Kaaronda dissuading the ACC to arrest him on the charges of corruption, he would already have been arrested the previous day: The reason being that if the applicant had at that stage already been arrested, there would be no person at the NHE to abandon the appeal. It is thus suggested by the applicant that the ACC respondents and the trade union acted in cahoots and unlawfully in pursuing the applicant. The applicant in this connection also lays great store by the fact that there was close proximity between Mr Kaaronda's threats of impending arrest and the actual arrest.

[80] The ACC respondents have denied that they sought to promote the trade union's interests in initiating the investigation. They went as far as to suggest that it was irrelevant if in performing their statutory duties they promoted the interests of the employees and the trade union. I agree with the submissions of Mr. Maleka SC for the ACC respondents that whatever the ill-motive which may have been entertained by the trade union which lodged the complaint, that motive would not necessarily impair the lawfulness of the investigation.

[81] In support of this submission, Mr Maleka relied on the case of *National Director of Public Prosecutions v Zuma*[17] where it was held that:

[17] 2009 (2) SA 277 (SCA).

'A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr Zuma and which, in any event, can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.'

[82] I agree with and apply the ratio in the *Zuma* case but wish to caution that public institutions – especially those that through their decisions have the power to limit the liberty of the subject (or to destroy their reputation) – must guard against becoming instruments for settling scores between private individuals.

[83] I am not persuaded that the applicant has made out the case that because Mr Kaaronda and the trade union entertained improper motives in laying complaints against the applicant with the ACC respondents, the ACC respondents had, by acting on those complaints, made common cause with the improper motives of the trade union and Mr Kaaronda. Even if they had, the allegations upon which they acted in initiating an investigation were of sufficient gravity to warrant an investigation on reasonable grounds.

[84] I expressly leave open the question whether obvious lack of merit in the allegations made by a complainant in terms of s 18, taken together with a proven improper motive (or reckless disregard of the possibility that a complainant may be acting for an improper motive) on the part of the ACC respondents in pursuing an investigation contemplated in s 18 would constitute a sufficient basis for the setting aside of an investigation initiated in terms of that provision.

The ACC had no power to arrest the applicant prior to a decision of the PG in terms of s 31(2)'

[85] Section 31 of the ACA stipulates as follows:

'(1) If, upon completion of an investigation by the Commission, it appears to the Director that a person has committed an offence of corrupt practice under Chapter 4 or any other offence discovered during the investigation, the Director must refer the matter

and all relevant information and evidence assembled by the Commission in connection with the matter to the Prosecutor-General.

(2) If, upon referral of a matter in terms of subsection (1), the Prosecutor-General decides to prosecute any person for an offence under this Act, the Prosecutor-General, in consultation with the Director, may delegate authority-

(a) to conduct criminal proceedings in court in respect of that matter; or;

(b) to defend or prosecute any appeal emanating from criminal proceedings in relation to that matter,

to any staff member of the Commission, including the Director or Deputy Director, who possesses the required legal qualifications to appear in the courts of Namibia.'

[86] I have great difficulty comprehending this review ground. It implies that the ACC has no power to arrest in the absence of a decision by the PG to prosecute. In the first place, it sounds incongruous that the PG should be expected to take a decision to prosecute before an investigation has been completed. An arrest ordinarily happens at the stage of investigation and evidence gathering; and invariably precedes the decision to prosecute.

[87] The applicant seems to confuse the decision to prosecute implicated in s 31(2), with the power of arrest without warrant provided for in s 28 of the ACA. The following is apparent from a reading of the relevant provisions of the ACA: In terms of s 18, the ACA is required to examine any allegation of corrupt practice, either completed or imminent, and then decide whether an investigation is 'warranted on reasonable grounds'. In deciding whether or not to investigate, the ACC is guided by the criteria set out in sub-sec (2) of s 31. Section 23 gives the ACC the power of search without warrant, while s 24 gives it the power to enter and search.

[88] An authorised officer may, in terms of s 28, without warrant arrest any person whom he or she reasonably suspects to have committed an offence or is about to commit an offence under the ACA. Upon arrest, the person is taken to a police station to be dealt with in terms of the CPA. Section 31 deals with referral to the PG and obliges the director after an investigation has been completed to refer the matter to the PG. It is at this stage that the PG exercises the decision

whether or not to prosecute, and if she does, to either prosecute herself or delegate the authority to prosecute to the ACC respondents.

[89] The plain language used in these provisions does not support the conclusion contended for by the applicant that the PG must take a decision to prosecute before an arrest is effected by an authorised officer under s 28.

[90] This ground of review is utterly meritless and must fail.

'The ACC respondents failed to consider less drastic methods than arrest'

[91] The relief which the applicant seeks in that respect is founded on the following salient factual allegations:

(a) That prior to the arrest on 27 November 2008, the ACC respondents had been conducting an investigation against the applicant in respect of alleged corrupt practices; and that he cooperated fully with the investigation.

(b) That there was not a scintilla of evidence to suggest that he was a flight risk and that having previously fully cooperated with the investigation by the ACC respondents, he would quite willingly have reported voluntarily at court if summonsed. That in fact he had previous to the arrest left the shores of Namibia and returned.

(c) That the arrest on 27 November 2008 was the direct result of the pressure placed on the ACC respondents by the trade union explicable on no other basis than that it was intended to strengthen the hand of the trade union and its members in their dispute with the applicant over the retrenchments.

[92] In so doing, the applicant squarely placed in issue the fact that the ACC respondents failed to consider properly (or at all) whether the circumstances of the applicant justified less drastic measures (such as summons or warning) than arrest. That foundational factual premise remains unchallenged in any serious way by the ACC respondents. In support of this review ground, the applicant

relies on the principle laid down by Bertelsmann J in *Louw v Minister of Safety and Security*[18] where the learned judge said the following:

'I am of the view that the time has arrived to state as a matter of law that, even if a crime which is listed in Schedule 1 of Act 51 of 1977 has allegedly been committed, and even if the arresting peace officers believe on reasonable grounds that such a crime has indeed been committed, this in itself does not justify an arrest forthwith.

An arrest, being as drastic an invasion of personal liberty as it is, must still be justifiable according to the demands of the Bill of Rights. . . . [P]olice are obliged to consider, in each case when a charge has been laid for which a suspect might be arrested, whether there are no less invasive options to bring the suspect before the court than an immediate detention of the person concerned. If there is no reasonable apprehension that the suspect will abscond, or fail to appear in court if a warrant is first obtained for his/her arrest, or a notice or summons to appear in court is obtained, then it is constitutionally untenable to exercise the power to arrest.'

[93] Louw's case followed upon an earlier judgment of the same Division of the High Court in *Ralekwa v Minister of Safety and Security*[19] when the High Court departed from the long established principle formulated by the then Appellate Division in *Tsose v Minister of Justice and Others*[20] in which it was held that:

' An arrest is not unlawful because the arrestor intends and states that he intends to go on arresting the arrested person till he stops contravening the law if the intention always is after the arrest to bring the arrested person duly to prosecution. In such a case the only remedy of the arrested person would be an action for malicious prosecution. An arrest is, of course, in general a harsher method of initiating a prosecution that citation by way of summons but if the circumstances exist which make it lawful under a statutory provision to arrest a person as a means of bringing him to court, such arrest is not unlawful even if it is made because the arrestor believes that arrest will be more harassing than summons. For just as the best motive will not cure an otherwise illegal arrest so the worst motive will not render an otherwise legal arrest illegal.'

[94] Mr. Maleka argued that the South African Supreme Court of Appeal in *Minster of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 (SCA)*,

[18] 2006 (2) SACR 178 (T) at 186A – 187E.
[19] 2004 (1) SACR 131 (T)

[20] 1951 (3) SA 10 (A)

rejected the rule in *Ralekwa* and effectively overruled the line of cases which followed that rule, including the judgment in *Louw*. He argued further that even if it be found that there was a less intrusive means to bring the applicant before court that matters not as long as the arrest is within the law. He submitted that where an arrest complies with the statutory requirements, such as those in s 40(1)*(b)* of the Criminal Procedure Act, it would be inconsistent with the principle of the rule of law to import more requirements to justify the arrest.

[95] I beg to differ: that is too far reaching a conclusion. It does not resonate with the ethos of our constitution which attach great importance to the liberty of the subject and the presumption of innocence which must in any given situation preceding arrest temper the power of the arresting officer. I adopt and apply for present purposes the following dictum of Mpati P *National Commissioner of Police v Coetzee* (649/11) [2012] ZASCA 161 (16 November 2012):

> 'The jurisdictional facts necessary for an arrest under s 40(1)*(a)* are: (i) the arrestor must be a peace officer, (ii) an offence must have been committed or there must have been an attempt to commit an offence, and (iii) in his or her presence. The arresting officer is not required to conduct a hearing before effecting an arrest. Whether an arrested person should be released, and if so, subject to what conditions, arises for later decision by another person and that is the safeguard to the arrestee's constitutional rights. Once the jurisdictional requirements are satisfied the peace officer has a discretion as to whether or not to exercise his or her powers of arrest. Obviously, the discretion must be exercised properly.' (My emphasis)

[96] It is clear on this authority that it is incumbent upon an arresting officer to apply his or her mind to the question whether arrest, given its gravity, is the most appropriate manner of bringing a person before court. The obligation to do so becomes even more pronounced where the offence involved does not involve violence, there is no imminent threat to public safety or where, over a long period of time spanning the investigation, the suspect has been co-operative and did not show any sign of being a flight risk.

[97] Although conscious of the need not to impose onerous restrictions on the joints of the ACC respondents in the discharge of their powers and functions under the ACA, I am satisfied that the power of arrest enjoyed under the ACA must be used reasonably and for a public purpose and must be proportionate to

the circumstances of the case at hand. It must not be used to promote the interests of one private citizen against another in pursuit of private commercial or labour interest against another. On the conspectus of the common cause and the undisputed facts, the allegation that the ACC respondents used the power of arrest they enjoy under the ACA in order to advance the private cause of those who found themselves in a labour dispute with the applicant, is well-founded.

[98] I am satisfied that the applicant has made out a case that the respondents failed to apply their mind to whether or not it was necessary to effect arrest of the applicant instead of simply summoning or warning him to appear at court to answer the charges. He is therefore entitled to the relief he seeks for the setting aside of the warrant of arrest, the arrest and detention and the bail conditions imposed on him.

The criminal proceedings against the applicant are invalid

[99] Given that I have found that the ACC was justified in initiating an investigation against the applicant, however trivial the charges may be or whether in view of what I have said in this judgment, they choose not to proceed with certain charges, there is no basis for an order setting aside the criminal proceedings instituted against the applicant. He will be entitled to raise all legitimate defences at his criminal trial including raising any legal challenge to the formulation of the charges. That is not a matter to be resolved by this court in these proceedings for review. I am satisfied that in respect of a majority of the charges, the ACC respondents were justified to institute an investigation against the applicant.

[100] In the view that I take in respect of this review ground, it becomes unnecessary for me to decide the further review grounds raised by the applicant in paragraphs 4.6- 4.7 of the amended notice of motion.

Costs

[101] I have to make a determination as regards costs in three respects: the first is the wasted costs arising from the in *limine* proceedings brought by the

respondents in respect of the abandoned relief seeking a declaration of unconstitutionality of s 43(1) of the ACA. The second is the in *limine* proceedings brought by the respondents in respect of the non-joinder of the PG *a propos* the order seeking quashing of the charges against the applicant. The third is the cost liability in respect of the main relief. I deal with them in turn.

The abandoned relief

[102] There is ample authority both in the High Court[21] and the Supreme Court[22] to the effect that where an applicant seeks to impugn the constitutionality of a provision of the law (statutory or common law) the Government must be cited as a respondent. In the present case it is common cause that the applicant had failed to cite the Government in respect of that challenge. In fact, the relief seeking to impugn s 43 was only abandoned after the respondents had challenged the non-joinder of the Government in respect of the constitutional challenge to s 43. The applicant must therefore bear the costs arising from the in *limine* challenge to the non-joinder.

Non-joinder of the Prosecutor General

[103] The responsibility for initiating criminal prosecution vests under the Constitution in the PG. It is fatal therefore to seek to quash criminal charges without citing the PG. The costs arising from the in *limine* challenge to the applicant's failure to join the PG a propos the quashing of the charges against the applicant therefore fall to be borne by the applicant. No case has been made out of special circumstances justifying an order that the applicant should not bear those costs.

Costs in respect of the main relief

[104] The rule of thumb is that a party is entitled to its costs if it achieves substantial success. I have denied the applicant relief in respect of the quashing of the charges and allow him very limited relief in setting aside the arrest and detention. Given that the ACC respondents were warranted in investigating the applicant, the subsequent prosecution cannot be set aside. He has therefore, in

[21] *Kavendjaa v Kaunozondunge NO and Others* 2005 NR 450 at 465A-I.
[22] *Minister of Home Affairs v Madjiedt and Others* 2007 (2) NR 475 at 480, para 11H-I.

my view, not achieved substantial success and would not be entitled to costs. The respondents have, on the contrary, achieved substantial success and are entitled to their costs.

[105] In the premises, I make the following order:

1. Applicant's prayers contained in paragraphs 2, 3 and 5 of the Amended Notice of Motion, are dismissed and the corresponding rules *nisi* accordingly discharged.
2. The warrant for the applicant's arrest, the subsequent detention effected on 27 November 2008, and the bail conditions imposed on the applicant in the wake of such arrest and detention, are declared unlawful and are hereby set aside and the corresponding rule *nisi* accordingly confirmed.
3. The 1st, 2nd and 5th respondents are awarded the wasted costs occasioned by their in *limine* objections in respect of the following:
    a. applicant's abandoned constitutional challenge to s 43 of the ACC;
    b. the non-joinder of the Prosecutor General.
4. The 1st, 2nd and 5th respondents are awarded their costs of opposing the review application;
5. Such costs in respect of paragraphs 3 and 4 of this order to include the costs of one instructing and two instructed counsel in respect of 1st and 2nd respondents, and the costs of one instructing and one instructed counsel in respect of 5th respondent.

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P T DAMASEB

Judge- President

APPEARANCES:

APPLICANT:	TA Barnard (with him S Namandje) Instructed by Sisa Namandje & Co, Windhoek
1ST AND 2ND RESPONDENT:	V Maleka, SC, assisted by H Geier Instructed by Government-Attorneys, Windhoek
5TH RESPONDENT:	H Geier Instructed by Government-Attorneys, Windhoek