REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON SPECIAL PLEA OF JURISDICTION

Case No. CC 20/2013

In the matter between:

THE STATE

And

DIRK HENDRIK CONRADIE **ACCUSED 1**

SARAH NGENOHANI DAMASES **ACCUSED 2**

Neutral citation: S v Conradie (CC 20-2013) [2016] NAHCMD 263 (9 September 2016)

CORAM: MASUKU J

Heard: 8 August 2016

Delivered: 9 September 2016

FLYNOTE: CRIMINAL PROCEDURE ACT – Section 106 – jurisdiction of the court to try an offence that allegedly occurred abroad – COMPANIES ACT – Section 142 – a director's failure to disclose the nature and extent of an

interest in a contract to co-directors. LEGAL ETHICS – duty by legal practitioners to act in a manner that advances the course of justice and one that serves to redeem time and identify issues for determination at the earliest stage and in the most convenient manner.

SUMMARY: The 1st accused was charged with contravention of the provisions of s. 242 of the Companies Act, 2004, for his alleged failure to disclose in a directors' meeting an interest he allegedly had in an advertising tender that MTC, of which he was chairperson of the board of directors, was in due course to consider. He filed a special plea to the effect that the court did not have the jurisdiction necessary to try the offence for the reason that the said offence allegedly occurred in Lisbon, Portugal, where the alleged meeting at which the disclosure was to be made took place.

Held – where an accused person raises the issue of the court's jurisdiction to try him or her, all that he or she has to do is to raise the issue and it is for the State to prove that the court has the jurisdiction to try the offence charged beyond reasonable doubt.

Held – in order to identify the facts on which the determination on the issue of the court's jurisdiction can be made, the State may lead oral evidence to that effect, especially if there are serious disputes of fact, or the parties may agree on the common cause facts on which the ruling can be predicated.

Held further – that although the accused suggested the common cause facts by application in an unusual manner and at a late time in the context of the hearing, the intention was laudable and geared to save time and costs and that the State should have concentrated on the content of the application rather than the container. *Held* – that had the State considered the application in a correct light and separated procedural issues from the issues of justice at play, the court may have saved time and expended a reasonable time to the case and the balance of the days allocated to the matter could have been expended on other deserving cases.

Held further – that legal practitioners should deal with cases in a manner that advances the course of justice rather than what serves the interests of their particular clients.

Held – that the general rule is that courts in both statutory and common law crimes have jurisdiction to try offences that occur within their territorial precincts. *Held further* – that in statutory offences, the courts may not extend the territorial jurisdiction if Parliament has not in clear language granted the courts extra-territorial jurisdiction. If the courts arrogate themselves jurisdiction not granted by Parliament, they may fall foul of the doctrine of separation of powers.

The special plea that the court does not have jurisdiction to try the accused person for the offence was thus upheld.

ORDER

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1. The special plea that this court does not have the jurisdiction to try Accused 1 in relation to the alleged contravention of the provisions of section 242 (5), as read with subsections (1), (2), (a), (b), and (6) of section 242 and sections (1) and 243 of Companies Act, No. 28 of 2004, as alleged in count 4, is upheld.
2. The matter is postponed to 23 September 2016 at 10h00 for setting of trial dates.

RULING

MASUKU J;,

Introduction

[1] At issue in this Ruling is the question whether this court has the jurisdiction necessary to try the 1st accused, Mr. Dirk Hendrik Conradie for

an offence he allegedly committed in contravention of the provisions of s. 242 (5) as read with subsection (1), (2), (a), (b), and (6) of s. 242 and sections 1 and 243 of the Companies Act.[1] For reasons to be adverted to in the course of this ruling, the said accused person claims that this court does not.

The charge

[2] The indictment in relation to this count, stripped to the bare bones, is that the said accused person, on 12 June 2012, approached the directors of a company known as DV 8 Saatchi & Saatchi (Pvt) Ltd ('Saatchi') and stated that if they appointed the 2nd accused as a Black Economic Empowerment partner and/or in any other portfolio in their establishment, he, the 1st accused would use his influence as the Chairperson of MTC to convince his fellow directors at MTC to award the advertising tender in which MTC was engaged worth about N$ 60 Million to the said Saatchi.

[3] The said meeting, at which the decision regarding the said tender, was scheduled to take place in Lisbon Portugal on 19 June 2012. It is contended in this regard that the said accused person, although aware of the impending meeting whereat a decision to consider the award of the tender by MTC, failed to declare his interest, its nature and extent in the said meeting, as required by the aforesaid provisions of the Act.

[4] It is on that basis that he has been charged as aforesaid for non-disclosure of his interest in the said tender. His contention, as appears from the plea, is that this court is bereft of jurisdiction to try him because the said meeting, at which the non-disclosure is alleged, took place outside the jurisdiction of this court in Lisbon, Portugal. To that extent, it is claimed that this court has no jurisdiction to try him therefor.

[1] Act No. 28 of 2004.

The relevant provisions of the Companies Act

[5] It is convenient, at this juncture, to have regard to the provisions in terms of which the accused has been indicted in respect of this count. I will start with s. 242, which has the following rendering:

'(1) A director of a company who is in any way, whether directly or indirectly, materially interested in a contract referred to in subsection (2), which has been or is to be entered into by the company or who so becomes interested in that contract after it has been entered into, must declare his or her interest and full particulars of his or her interest as provided in this Act.

(2) Subsection (1) applies to any contract or proposed contract which is of significance in relation to a company's business and which is entered into –

(a) in pursuance of a resolution taken or to be taken at a meeting of directors of a company; or
(b) by a director or officer of the company who either alone or together with others has been authorised by the directors of the company to enter into that contract or any contract of a similar nature.

(3) For the purposes of subsection (1) a general notice in writing given to the directors of a company by a director to the effect that he or she is a member of a specified company or firm and is to be regarded as interested in any contract which may after the date of the notice and before the date of its expiry is made with the company or firm, is deemed to be a sufficient declaration of interest in relation to any contract or proposed contract so made or to be made, if –

(a) The nature and extent of the interest of that director in that company or firm is indicated in that notice; and
(b) At the time the question of confirming or entering into the contract in question is first considered or at the time that director becomes interested in a contract after it has been entered into, the extent of his or her interest in that company or firm is not greater than that stated in the notice.

[6] I now move to quote the provisions of s. 243 (1), entitled 'Manner of and time of declaration of interest'. They read as follows:

'A declaration of interest by a director under section 242 is not effective unless it is made at or before the meeting of directors at which the question of confirming or entering into the contract is first taken into consideration and, if in writing, is read out to the meeting or each director states in writing that he or she has read that declaration.

(2) If for any reason it is not possible for a director to make the declaration referred to in section 242 at or before the meeting of directors, he or she may make it at the first meeting of directors held thereafter at which it is possible to do so and must in that event, state the reason why it was not possible to make it at the particular meeting.'

The defence's application

[7] Before I deal with the implications of the foregoing provisions, it became necessary, for the court, in order to be perfectly placed to decide the special plea, to first identify the facts on which a decision on whether said plea was sustainable could predicated.

[8] There were two possible ways of determining same. First was to have evidence led by the prosecution to prove that the court has jurisdiction. In the alternative, a statement of facts agreed to by the parties could be submitted and made to form the substratum of the decision and to which the relevant legal principles could be applied.

[9] In this regard, I must mention that the defence took the initiative to clarify the facts by filing an application supported by an affidavit, setting out what were, in the defence's view, the material allegations on which the determination of the special plea could be predicated. The notice of motion reads as follows:

'1. Unless the State sets out allegations on oath disputing the correctness of the averments made in paragraph 10 of the accompanying affidavit of Mr. Slysken

Sekiso Makando, the jurisdictional challenge of the First Accused in respect of Count 4 is to be decided on the basis that those averments are correct.'

I need not set out these allegations at this point in the light of the manner in which the matter later developed.

[10] Critically, at para 11 of the said affidavit, the deponent, Mr. Makando stated the following:

'I submit that the averments set out above, which have been extracted from the State's documents, and must be accepted as the relevant facts on which this Honourable Court is required to make its decision on the jurisdictional challenge in respect of Count 4, correctly and accurately reflect what is contained in the State's documents.'

[11] What was the State's response? By letter dated 11 August 2016, the State recorded its protestations about the timing and manner in which the application was being moved i.e. at the eleventh hour, when the case was due to resume the following day. At para 3 of the said letter, the State said the following:

'3. The purported application certainly has no legal basis. You have not indicated, as you have always religiously done in the past, under which section of the Criminal Procedure Act, 1977 (No. 51 of 1977) your client's application is premised on. We find this deliberate because you well know that you cannot seek such an order under the Criminal Procedure Act, 1977 (No. 52 of 1977).

4. We cannot imagine under what circumstances at law, you can seek an order compelling the State to depose to an affidavit outlining the evidence and facts relating to the charges your client is facing. This preserve is for the State witnesses who will testify during the trial.

5. Similarly, we cannot imagine under what circumstances at law, you can seek an order compelling the State to agree with your perceived views about the matter when

you have in your possession the State's heads of argument in postponed, opposition of the Special Plea.
6. Your application exposes your realisation that your client's Special Plea and related applications are entangled in a grave dispute of facts which can only be determined by the Honourable Court after hearing of evidence and at the end of the trial.'

[12] As a parting shot, the State said in para 7:

'In the circumstances the State kindly refuses to take the bait. Your client's Special Plea should stand or fall on the basis you initially indicated to the State and the Honourable Court.'

[13] Objectively viewed, the impression created in the mind of the court, probably together with that of the accused person, by the State's firm and unyielding response, was that the State did not accept the facts and allegations made on behalf of the said accused on oath and that the State was ready on the date to which the matter was postponed, to lead *viva voce* evidence to show that this court has jurisdiction to try the accused. This much is very clear from the contents of para 6. of the State's letter quoted immediately above.

[14] The approach of the State at the time the letter was authored is clearly permissible and understandable and more importantly, it was within the State's right to do as it did. It must be recalled that in special pleas such as the one under consideration, all that the accused has to do, is to allege the absence of jurisdiction and the onus is on the State to show that this court has jurisdiction to deal with the issue beyond reasonable doubt. See *R v Radebe;*[2] *S v December*[3] and of course, *S v Buys en Andere;*[4] and *The State v Dirk Hendrik Conradie and Another.*[5]

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[2]1945 AD 590 at 603.
[3]1995 (1) SACR 438 (A) at 439j.
[4]1994 (1) SACR 539 (O) at 541 a-b
[5](CC 20/2013) [2016] NAHCMD 24 (12 February 2016) at para and the other authorities therein referred to.

[15] It must also be stated, as an aside, that once the issue of the court's jurisdiction has been properly raised by an accused person, such issue must be first heard and determined by the court in a dispositive manner.[6] A further applicable principle is that should it transpire that there is an irresoluble dispute regarding the special plea, such dispute must be resolved by resorting to the hearing of *viva voce* evidence.[7]

[16] What the State may, however, not do, is to send the accused, and by extension, the court on a wild goose chase as it were. This was achieved by the State not accepting the facts suggested by the defence in the said application, intimating strongly and thereafter pointing inexorably in the direction that there were serious disputes of fact, which could not be resolved and which would accordingly require the adduction of oral evidence. As the date of reckoning approached, there was nothing done by the State to indicate to the accused and the court what evidence would be led and by which witnesses, to prove that the court has jurisdiction beyond reasonable doubt, which exercise would have enabled the defence to prepare its case accordingly.

[17] What happened at the date of the hearing was that the State, for the first time, and without any prior notice to the other side and the court, accepted the facts as stated by the defence's aforesaid application without more. This appears to me to have been a capitulation that robbed the defence of an opportunity to properly prepare for the determination of the matter. This knee-jerk reaction, if I may call it that, placed the court in a cloud of uncertainty as to what would happen on the appointed day.

[18] Such actions and practices on the part of the State must be deprecated in the strongest possible terms. It must be recalled that a criminal trial is not a game of chess, where the proposed line and manner of assault must be kept in that party's bosom and particularly in the deepest recesses thereof. Such tactics of secrecy, if they serve the parochial interests of a party, must not,

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[6] *S v Willem* 1993 (2) SACR 18 (E) at 20 d and *S v Dersely* 1997 (2) SACR 253 ©

[7] *Ndluli v Minister of Justice* 1978 (1) SA 893 (A) at B-C

however, be placed ahead of the doing of substantive justice between the parties who are represented by legal practitioners who are officers of the court.

[19] Openness and transparency as to the best and efficient and less time-consuming manner of dealing with issues in need of resolution must be preferred to one which forces a party to shoot from the hip as it were, particularly in the case of an accused person who may be facing serious charges. The element of fair play, must be strictly and unyieldingly observed by both parties to the contest, in matters serving before court.

[20] It may be that the State was understandably infuriated by the nature and timing of the defence's application, not to mention its novelty. By the same token, this should not, however irked the State may understandably be, lead to the State acting in a tit-for-tat manner that throws some dust of confusion in the manner the matter should fairly proceed. Whatever objections one may have regarding the manner and timing of the defence's aforesaid application, the underlying intention was in my view honourable and praiseworthy, namely, to curtail the proceedings by identifying what were the common cause facts, the agreement of which could have obviated the need to call *viva voce* evidence, a laudable step, which maybe with hindsight, was not taken propitiously.

[21] In this regard, a party in the State's position, faced with a bombardment of this sort and at the eleventh hour, requires and should summon and employ a measure of calmness, focus and sober reflection, with all consequences properly weighed in. Particularly excepted in this regard is a retaliatory response, which throws away the elements of certainty, fairness and redeeming of time that were clearly interwoven in the very fabric of the defence's application, objectionable as it may have been in the State's view.

[22] The State, it would seem in my respectful view, in anger, and possible revenge, threw away the baby with the water by leading the defence and the court, to believe that oral evidence would be led to prove that the court has

jurisdiction, only to concede once the whistle to commence hostilities by pitting the wits had been blown, i.e. during argument. Even then, this was done with tongue-in-cheek, the State, for the first time since the postponement of the matter, stating that there is nothing new in the contents of the affidavit filed in support of the application save what was contained in the indictment and other documents filed by the State. Why a timely concession in that regard could not have been made earlier for the sake of progress and certainty regarding what is at stake and the best way to move it forward with minimum difficulty and effort simply escapes me. Two wrongs never make a right.

[23] Although it does not ordinarily lie within the court's powers to prescribe to a party how to run its case, where it is apparent that the manner chosen to run a case does not reflect positively on issues of fairness and efficient use of the court's time and facilities, the court should not shy away from sending a condign rebuke. This is one such fitting case in my view. As a result, the matter was set down for a period of about two weeks and only a morning of the first day was utilised, thus robbing other litigants of making good use of the days that had been allocated to this case. This should not be. I do hope that a right cue is taken in this regard in running the trial going forward.

Analysis, interpretation and application of the relevant provisions of the Companies Act

[24] It now remains for me to interpret and analyse the relevant provisions under which the 1st accused was indicted. At the end, I will have to make a determination on whether the State has proved indubitably that this court has jurisdiction to try the said accused person.

[25] In the heads of argument filed in support of the assertion that this court has jurisdiction to try the accused person, the State made a few submissions, which acuminate to the following main points –

(a) the accused met the directors of Saatchi in the company of his co-accused on 12 June 2012;
(b) the meeting was held at the 1st accused offices in Windhoek;
(c) at that meeting, the 1st accused solicited and/or demanded a gratification from the Saatchi directors as earlier alleged;
(d) the accused persons promised the directors of Saatchi that the 1st accused would use his influence as the MTC chairperson to influence the award of the tender as earlier discussed at the meeting which shall be held in Lisbon on 19 June 2012;
(e) the 1st accused travelled to Lisbon on a later date;
(f) the headquarters of MTC are in Windhoek, Namibia;
(g) MTC is a Namibian company, duly registered in terms of the company laws of this Republic;
(h) the advertisement was for advertising MTC products in Namibia;
(i) that the 1st accused was aware whilst in Namibia that the issue of the contract would be on the agenda in the meeting in Lisbon, Portugal.

[26] The State accordingly argued that before the said accused person boarded the flight to Lisbon, Portugal, the offence of failing to make the disclosure, which originated in Windhoek, was choate in Windhoek by 12 June 2012. To add salt to injury, as it were, the said accused person, on arrival in Lisbon, did not make the necessary disclosure and decided to maintain his peace.

[27] Particular reliance was placed in favour of the court having jurisdiction on the judgment of Frank A.J. in *S v Mwinga and Others,*[8] where the learned Judge said the following:

'In my view Namibian Courts, faced with an "International Law Friendly" Constitution (Art 144) and with its already "extensive" jurisdiction in common law, should not base its jurisdiction on "definitional obsessions and technical formulations" but should stay in step with the other common law Commonwealth countries such as

[8]1995 NR 166 (SC) at 171-2.

England and Canada. Thus in order to determine whether the High Court has jurisdiction in a trans-national crime or offence all that is necessary is that a significant portion of the activities constituting the offence took place in Namibia and that no reasonable objection thereto can be raised in international comity.'

[28] In further substantiation of the argument that this court has jurisdiction, the court was referred to *S v Basson,*[9] where the court expressed itself as follows regarding offences that the appellant had allegedly committed outside the Republic of South Africa:

'As a general proposition, our courts had declined to exercise jurisdiction over persons who had committed crimes in other countries. However, there were exceptions to this rule, one of which was created by the existence of a real and substantial link between the offence and this country.'

[29] In this regard, it would seem that the State argued that the court has jurisdiction for the reason that a significant portion of the offence took place in this Republic. They also persuaded the court to find that the crime, although a portion of it may have occurred in Portugal, there was a substantial link between the offence and this Republic.

[30] In *S v Dersely* (*supra*),[10] White J stated the following applicable general principles:

'The general rule accepted by our courts is that a court's jurisdiction extends only to crimes committed within its area of jurisdiction – Lord Halsbury LC in *Mcleod v Attorney – General for New South Wales* [1891] ac 455 at 458. There are accepted exceptions to the general rule in respect of certain offences under the common law, eg treason and the continuous offence of theft, and under statute law, eg aviation and shipping offences. In the latter exceptions the Legislature has specifically extended the jurisdiction of the courts to cover those offences when committed outside the boundaries of their jurisdiction.'

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[9]2007 (1) SACR 566 (CC) at 223 – 226.
[10]At p.225.

[31] For his part, Mr. Soni, for the 1st accused started argument on what he referred to as the proper approach to interpretation of statutes and other documents. His argument was that in dealing with the matter of this court's jurisdiction, the court must have regard to the language chosen by the law-giver in the relevant statute.

[32] The mainstay of the defence's argument was based on the case of *Natal Joint Municipal Pension Fund v Endumeni,*[11] where Wallis J.A. said the following regarding the proper approach to the interpretation of statutes:

'The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reason the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and divination. In a contractual context it is to make a contract for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[11] 2012 (4) 26 SCA at para [18].

[33] At para [25], the learned Judge proceeded to reason as follows:

'Most words can bear several different meanings or shades of meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language that avoids the absurdity. This is said to involve a departure from the plain meaning of the words used. More accurately it is either a restriction or extension of the language used by the adoption of a narrow or broad meaning of the words, the selection of a less immediately apparent meaning or sometimes the correction of an error in the language in order to avoid the identified absurdity.

[26] In between these two extremes, in most cases the court is faced with two or more possible meanings that are to a greater or lesser available on the language used. Here it is usually said that the language is ambiguous although the ambiguity lies in selecting the proper meaning (on which views may legitimately differ). In resolving the problem apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.'

[34] The court was thus urged by each of the respective parties, to apply the foregoing authorities in their favour in the determination of the condign order to grant in the circumstances. The question is which of the two approaches should be adopted in untying the present imbroglio?

[35] I am of the view that the starting point should be a close consideration of the relevant provisions of the legislation under which the said accused was charged and it may actually provide the guiding light in the circumstances, taken of course with the principles extracted from the *Endumeni* case (*supra*).

[36] A reading of the relevant provisions of ss. 242 (2) suggests the following:

(a) A director of a company who has an interest, whether directly or indirectly in a proposed contract must declare that interest and the full particulars thereof to the fellow directors of the company;
(b) The notice of the interest by the director in question must be made to the company directors in writing, indicating to the other directors that the said director in question is a member of a specified company or firm with which the said company to whose directors the disclosure is made, may enter into a contract;
(c) In that regard, the nature and extent of the interest of that director in the said company to be possibly engaged in a contract must be notified.

[37] Section 242 (1), on the other hand, penalises a director of a company who is directly or indirectly materially interested in a contract or proposed contract which is to be or has been entered into with the company and who becomes interested in that contract after it has been entered into but does not declare that interest and its full particulars. This, it is claimed, the 1st accused did not do.

[38] More importantly, I now turn to consider the provisions of the manner of declaration which appear to be the mainstay of the 1st accused's plea of lack of jurisdiction. The said subsection suggests that for a declaration of interest to be effectual, it must be made by the interested director '. . . at or before the meeting of directors at which the question of confirming or entering into the contract is first taken into consideration. . .' (Emphasis added).

[39] In this regard, from the allegations contained in the particulars of the indictment, there is only one date mentioned, namely 19 June 2012. The other date mentioned, namely 12 June 2012 is in my considered view irrelevant. I say so for the reason that it is the date when the said accused person allegedly held a meeting with the directors of Saatchi to try and influence them to engage the 2nd accused with the promise of influencing the directors of MTC to award the tender to Saatchi. It is a date that has no bearing on the

issue of non-disclosure, save maybe to that by that date, the accused was already aware of the nature and extent of his interest in the tender. In particular, there is no direct allegation that a meeting of the directors of MTC took place on that day in Windhoek, and in terms of which the said accused person had an opportunity to declare his interest.

[40] The only meeting alleged in the particulars of the indictment is the one of 19 June 2012 and which it is not disputed presently that the issue of the award of a tender in which the said accused may have been interested in was due for consideration. The said meeting, it is also not disputed, was held in Lisbon, Portugal. In other words, the place at which the declaration was to be made was not within the jurisdictional area of this court but in Europe, a few thousands of miles away.

[41] It would appear that this was the meeting at which the award of the tender in question was going to be 'first taken into consideration'. In other words, the alleged non-disclosure did not take place in this jurisdiction but in Portugal. This, in my view suggests that the offence alleged, as it occurred outside the jurisdictional precincts of this court, renders this court bereft of the power to hear and determine the accused's liability as alleged.

[42] A reading of s. 243 (2) suggests that a failure to declare one's interest in terms of s. 243 (1), is not necessarily fatal. This is because the said subsection envisages a situation in which the interested director is for any reason unable to declare his or her interest at the first meeting but is then allowed at the first meeting held thereafter and in which meeting he or she is able to make the disclosure, to make a declaration of the nature and extent of his interest. In this regard, it is incumbent upon the said director to state the reasons why he or she did not make the declaration at the first meeting.

[43] In this regard, I am of the considered view that for liability for non-disclosure to attach in terms of s.243 (2), specific allegations regarding the alleged non-disclosure at the latest meeting (if it did take place) must be made to place the accused person in a position to prepare his defence. In the

instant case, there is no specific allegation that a further meeting was held in Windhoek, after the Lisbon meeting on 19 June 2012 and at which the said accused person had an opportunity, after not making the disclosure in Portugal, to finally make the disclosure of his interest and to state the reason why the disclosure was not made earlier, but did not do so.

[44] Had the necessary allegations been made in the indictment, to specifically draw the said accused's attention to the alleged failure to comply with the provisions of s. 243 (2) on return to Windhoek, (if at all), after the first meeting held in Portugal, a different consideration may well have come into operation. The new allegations suggested immediately above may have persuaded the court to come to the view that it has jurisdiction as the latter non-disclosure would have taken place within its jurisdictional area and no longer in Portugal and in contradistinction to the non-disclosure mentioned in s. 243 (1).

[45] Section 2 of the High Court Act,[12] stipulates that this court shall have jurisdiction to 'hear and determine all matters which may be conferred or imposed upon it by this Act or any other law'. At s. 16, this court is given jurisdiction 'over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition, to any powers of jurisdiction which may be vested in it by law. . .'

[46] What is clear in this matter, is that the alleged non-disclosure in question, considered in view of the admitted facts, did not take place within the court's jurisdiction. The *actus reus,* it would seem to me, took place outside the jurisdictional precincts of this court. For that reason, the offence, if any, is not one triable by this court, unless there is a provision that notwithstanding the contemporaneity principle applying, specially imbues this court with jurisdiction to try offences occurring abroad. My reading of the Act does not, in any provision, clothe this court with specific power to try offences occurring outside the jurisdiction of this court.

[12]Act No. 16 of 1990.

[47] I have, in contradistinction, had regard to the provisions of the Anti-Corruption Act.[13] Section 50 thereof, titled 'Liability for offences committed outside Namibia', provides the following:

'The provisions of this Act shall, in relation to Namibian citizens and persons domiciled or permanently resident in Namibia, have effect also outside Namibia, and when an offence under this Act is committed outside Namibia by any citizen or a person or a person so domiciled or resident, such person may be dealt with in respect of that offence as if it had been so committed at any place within Namibia.'

[48] It accordingly becomes clear that the Legislature, in respect of this legislation, went out of its way to clothe and invest Namibian courts with special jurisdiction to try accused persons who are Namibians or ordinarily resident or domiciled in Namibia and who are alleged to have committed corruption related offences outside the jurisdictional precincts of this Republic. This, in my view, was the result of the Legislature being acutely aware that the ordinary provisions and application of the law does not allow our courts to exercise jurisdiction over alleged criminal acts that occur abroad.

[49] The Act does not have a similar or comparable provision and for that reason, I am of the considered view that the offence charged in count 4, having allegedly occurred outside this court's jurisdiction, cannot, in the absence of specific enabling legislation, be properly tried by this court. I say so in recognition, as stated earlier, that the State could have specifically alleged (depending on the presence of relevant facts and allegations), the operation of the provisions of s. 243 (2) of the Act, accompanied by specific allegations that the contravention of that subsection took place in this jurisdiction.

[50] In the *Dersely* case (*supra),*[14] the learned Judge, after reviewing the writings of Voet, came to the following conclusion:

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[13]Act No. 8 of 2003.
[14]At p. 260.

‘It seems to me, therefore, that not only do our courts have jurisdiction abroad in the recognised exceptions under the common and statute law – treason, theft, aviation and shipping – and where a crime is commenced outside and completed inside the area of jurisdiction, but also where the offence is commenced inside the area of jurisdiction and complete outside the area, or when any material element of the crime is committed within the area of jurisdiction. A substantial argument can also be made for extending that jurisdiction in certain circumstances to offences, the whole of which are committed outside the boundaries of the area of jurisdiction by citizens domiciled within those boundaries. The reasons for applying the above principles seem to be enhanced when the remaining elements of the offence have been committed across the borders of the various Provincial Divisions of the High Court, as such Divisions have the same system of justice and the same laws, and, furthermore, the offence is justiciable in both areas.’

[51] A reading of the writings of Voet and on which it appears the learned Judge may, in part, have based his conclusions above, do not, with respect, appear to draw any distinction between common law crimes and statutory offences. There appears to be no basis upon which the courts, in my view can extend the application of statutory offences beyond the court’s jurisdiction unless the Legislature has chosen to do so in specific terms as it did in the Anti-Corruption Act (*supra*). In this regard, the last sentence of the excerpt by the learned Judge quoted in para [30] above, bears particular resonance.

[52] In my view, for the court to unilaterally extend a blanket jurisdiction in respect of statutory offences allegedly occurring beyond the court’s jurisdiction would be tantamount to the courts rewriting the relevant legislation and thereby transgressing the doctrine of separation of powers, as Parliament generally makes law and the courts interpret the law. Furthermore, Parliament must be assumed to know the general rule in these matters, namely that statutory crimes are ordinarily justiciable within the territorial precincts of that country. Where Parliament desires to extend the court’s jurisdiction beyond the normal rules of general application, then I am of the view that it must be Parliament that must do so and in clear and unambiguous language. The

courts cannot, with respect, tread where Parliament fears or has chosen, for whatever policy or other reasons, not to do so.

[53] I am of the considered view that the words used by the Legislature in the Act are clear and unambiguous. The principles stated in the *Endumeni* case are applicable in the instant case. The intention of the Legislature regarding what was sought to be punished and the circumstances in which it was to be so done is clear. In this regard, as earlier stated, there is no extra-territorial jurisdiction vested in the court for offences allegedly occurring abroad.

[54] In any event, it appears to me that in this case, even if the reasoning of the learned Judge in the *Dersely* case was to be held to be correct and applicable in respect of the alleged contravention of the provisions of the Act, there is no admissible evidence before court from which it can be deduced and therefore held with a degree of certainty as to where the alleged statutory crime commenced and where it was consummated, in order to bring it properly within the reasoning of the said court.

[55] Furthermore, and crucially, it would also seem that a fact that weighed heavily with the court in *Dersely* and which may have influenced the decision ultimately reached, was that the offences in question were committed across the borders of the various Provincial Divisions of the High Court and which High Court had the same system of justice and the same laws. That court, furthermore, considered that the said offences were justiciable in both areas.

[56] The situation, in the instant case, is a different kettle of fish altogether as there is no evidence that the principles, which influenced the *Dersely* decision, apply in the instant case. There is no evidence that the law of Portugal and Namibia is the same in this regard, nor that the offence in respect of which the said accused person has been indicted, is justiciable in Portugal as well.

[57] I am of the considered view, in the light of the foregoing, that the authorities cited by the State in support of the argument that the court has jurisdiction to try the said accused person in respect of count 4, will not avail the State. A reading of the relevant provisions of the Act, considered *in tandem* with the allegations contained in the indictment, shows indubitably that the alleged offence was committed outside this court's jurisdiction. The issue of the connectivity with, the strength and the impact of the alleged offence on Namibian soil, in my view, does not, with respect, avail the State.

[58] For the foregoing reasons, I am of the considered view that the special plea is good and must be upheld as I hereby do.

[59] I accordingly issue the following order:

1. The special plea that this court does not have the jurisdiction to try Accused 1 in relation to the alleged contravention of the provisions of section 242 (5), as read with subsections (1), (2), (a), (b), and (6) of section 242 and sections (1) and 243 of Companies Act, No. 28 of 2004, as alleged in count 4, is upheld.
2. The matter is postponed to 23 September 2016 at 10h00 for setting of trial dates.

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TS Masuku,

Judge

APPEARANCES

STATE:	E. E. Marondedze Instructed by: Office of the Prosecutor-General
ACCUSED 1:	V. Soni SC Instructed by: Conradie & Damaseb Legal Practitioners
ACCUSED 2:	J. Diedericks Instructed by: Diedericks Inc.