REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 09/2008

In the matter between:

THE STATE

v

PAULUS ILONGA KAPIA	**1ST Accused**
INES GASES	**2nd Accused**
OTNIEL PODEWILTZ	**3rd Accused**
SHARON LYNETTE BLAAUW	**4th Accused**
RALPH PATRICK BLAAUW	**5th Accused**
MATHIAS SHIWEDA	**6th Accused**
NICOLAAS CORNELIUS JOSEA	**7th Accused**

Neutral citation: *S v Kapia* (CC 09/2008) [2018] NAHCMD 124 (11 May 2018)

Coram: LIEBENBERG J

Heard: 04–12 August 2014; 01–26 June 2015; 09–20 May 2016; 13–24 June 2016; 06–16 February 2017; 02–06 October 2017; 07–09 May 2018.

Delivered: 11 May 2018

Flynote: **Criminal procedure** – Charges – Application of s 332(5) of the CPA – Deeming provision to hold directors of a juristic body liable for acts committed in their official capacity – Accused employed as directors of Avid but charged in their personal capacity – Avid, the corporate body not held liable to create legal basis on which a director could be held personally liable for corporate crimes committed in the course of its corporate activities – No allegations that the accused were directors acting in their official capacities – Absent such allegation, the State cannot rely on s 332(5) in order to secure a conviction.

Company law – Contravention of section 424 (3) of the (repealed) Companies Act 61 of 1973 – Subsection (3) has a wide ambit aimed not only at directors of the company or its employees as it includes every person – In order to sustain a conviction in contravention of s 424 (3) court relies on the same facts relied on in proving the offence of fraud.

Summary: The State did not charge the company as a juristic person in terms of s 332(5) of the CPA and the subsection has a deeming provision to hold directors of a juristic body liable for acts committed in their official capacity. In the charge sheet the accused persons were cited in their personal capacity.

All accused persons were charged with contravention of s 424 (3) of the (repealed) Companies Act 61 of 1973. Subsection (3) has a wide ambit aimed not only at directors of the company or its employees as it includes every person. In order to be liable the section requires more than a mere association with the reckless carrying on of the business by another.

Held, that, s 332 (5) of the CPA does not find application in this case because the accused persons were not charged as directors but in their personal capacities.

Held, further that, where there has been misuse of corporate personality, it may be disregarded in order to arrive at the true facts and attribute liability where it should lie, notwithstanding the application of s 332 (5) of CPA.

Held, further, that the prohibited carrying on of business referred to in section 424(1) requires an element of recklessness or with intent to defraud creditors of the company or its creditors of any other person or for any fraudulent purpose.

ORDER

Count 1: Main count – Fraud: Accused no's 1, 2 and 5: Guilty.
Accused no's 3 and 4: Not guilty and discharged.
Alternative count – Theft by conversion: Accused no 7: Guilty.

Count 2: Accused no's 1, 2, 3, 5 and 6: Not guilty and discharged.
Accused no's 4 and 7: Guilty.

JUDGMENT

LIEBENBERG J:

Introduction

[1] An investment that was initially considered lucrative rapidly spiralled out of control like a proverbial hurricane and in its wake left nothing but destruction. This is evident from the disappearance of an investment of N$30 million, the dismissal of officials involved in the awarding thereof, the loss of life of a suspect, the liquidation of two companies, a judicial inquiry and ultimately, prosecution of the accused persons before court more than a decade later. Understandably, where it involves public funds, society has a direct interest in the outcome of these proceedings.

[2] It is against this background that Mr *Namandje*, representing accused no 1, reminded the court at the onset of his submissions of the test in criminal trials being proof beyond reasonable doubt and that the court has the onerous duty to ensure that there is an adherence to the rule of law as guaranteed by the Constitution. Even if suspected that an accused was the perpetrator of the offence charged, his or her guilt still has to be proved.[1] It is trite that the test in our criminal justice system has always been proof beyond reasonable doubt and the onus is therefore on the State to satisfy the test and prove the charges in the indictment preferred against the accused persons, as such.

The charges

[3] As set out in the indictment, the accused persons were jointly and severally charged with eleven counts ranging from fraud, alternatively, theft; several contraventions of the Companies Act of 1973;[2] a contravention of Ordinance 2 of 1928; and a contravention of the Anti-Corruption Act, 2003.[3] At the close of the State case all the accused applied for discharge under s 174 of the Criminal Procedure Act 51 of 1977 (CPA), which was met with limited success.

[4] On count 1 accused no's 1 – 5 were put on their defence on one charge of fraud, alternatively theft (by conversion), and in the further alternative, theft. Accused no 6 was however discharged on all charges preferred in count 1. As

[1] *Phetoe v State* (1361/2016) [2018] ZASCA 20 (16 March 2018).
[2] Act 61 of 1973 (now repealed).
[3] Act 8 of 2003.

for accused no 7, though having been discharged on the main count of fraud, his application on the alternative counts of theft was unsuccessful.

[5] Count 2 concerns a contravention of s 424(3) of the repealed Companies Act in which it is alleged that accused no's 1 – 6 carried on the business of Avid Investment Corporation (Pty) Ltd (hereinafter Avid) recklessly or with such intent, or for such purpose as mentioned in subsection (1), namely, with the intention of defrauding creditors of the company, any other person, or for fraudulent purposes. A contravention under this section is not only limited to directors of the company, but includes every person who was knowingly party to the carrying on of the business in the aforesaid manner. Accused no 7 faces the same charge but only in respect of the company Namangol Investment (Pty) Ltd (hereinafter Namangol), of which he was the sole shareholder. The application for all the accused persons' discharge on this count was equally dismissed.

[6] On the remaining charges (counts 3 – 11) all the accused were discharged in terms of s 174 of the CPA at the close of the State case.

Charging the directors in their private capacity

[7] As far as it concerns the then directors of Avid (accused no's 1, 2 and 4) and Namangol (accused no 7), what stands central to the charges indicted is that these accused are before court not in their capacity as directors of their respective companies, but for having acted in their personal capacities when allegedly committing the said crimes. It was pertinently pleaded by these accused that they had prepared their defence solely on this basis. At the end of the State case it was argued by the prosecution that the indictment and substantial facts, by implication, adequately contain sufficient facts to invoke the provisions of s 332(5) of the Criminal Procedure Act.[4] Alternatively, the

[4] The section provides for vicarious liability imputed to a director of the corporate body in the following terms:

'(5) When an offence has been committed, whether by the performance of any act or by the failure to perform any act, for which any corporate body is or was liable to prosecution, any person who was, at the time of the commission of the offence, a director or servant of the corporate body shall be deemed to be guilty of the said offence, unless it is proved that he did not take part in the commission of the offence and that he could not have prevented it, and shall be liable to prosecution therefor, either jointly with the corporate body or apart therefrom,

State sought an amendment of count 1 to incorporate the said section into the charge by which the directors could personally be held accountable 'unless it is proved that [they] did not take part in the commission of the offence and that [they] could not have prevented it'.

[8] The court in an earlier ruling[5] at para 21 found the State, on the current formulation of count 1, cannot rely on s 332(5) of the CPA and that the deeming provisions under this section therefore find no application. As for the application made to amend count 1 by the insertion of s 332(5), the court had found that by allowing the amendment, those accused affected would be prejudiced in their defence; hence the application was dismissed.

[9] Whereas the issue about accused no's 1, 2 and 4 having been charged and prosecuted in their personal capacities was revived during closing submissions, and support for counsel's argument found in the court's earlier s 174 ruling, it seems necessary to briefly reiterate what the court has ruled in this regard.

[10] With specific emphasis on what is stated in paragraph 16, it was argued that the State completely disregarded the court's finding on s 332(5) of the Criminal Procedure Act when presenting its case and during the cross-examination of defence witnesses. The court in this regard said:

'[16] … In fact, it appears to me that the said subsection is the **only** legal basis on which a director of a corporation could be held personally liable for corporate crimes committed in the course of its corporate activities. Thus, it would appear to me that if the evidence procured at the trial proves that an offence was committed by the corporate entity (in this instance Avid), then a director, <u>having acted within his/her mandate or powers when representing the corporate entity</u>, cannot be convicted when charged in criminal proceedings in his/her personal capacity.'

[11] While counsel emphasised use of the word 'only' in the passage, sight was clearly lost of what was stated thereafter and the context in which the statement was made. It is evident from a reading of the paragraph that the statement is qualified by the words underlined in the passage and which

---

and shall on conviction be personally liable to punishment therefor.'

[5] See: *Kapia v The State* (CC 09/2008) [2015] NAHCMD 195 (21 August 2015).

counsel seemingly chose to ignore. The caveat inserted becomes more apparent when regard is had to the court's conclusion as reflected in paragraph 31, of which the relevant part reads:

'It seems to me that where the evidence proves that a director is found to have exceeded the powers vested in him in his official capacity when knowingly making false representations, or acts recklessly and carelessly as to whether a presentation is true or false and the misrepresentation involves some risk of prejudice, that there is no reason in law why such person cannot be found liable in his personal capacity, even if he at the time claims to have represented the company in corporate dealings. It would appear to me that the reason for coming to this conclusion is that, as a director, he would have no general powers to make any misrepresentation on behalf of the company and by so doing, legally exceeds the powers vested in him in his official capacity.'

[12] In coming to this conclusion, regard was had to the remarks made by Smalberger JA in *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd and Others*[6] where it was said:

'It is undoubtedly a salutary principle that our Courts should not lightly disregard a company's separate personality, but should strive to give effect to and uphold it. To do otherwise would negate or undermine the policy and principles that underpin the concept of separate corporate personality and the legal consequences that attach to it. But where fraud, dishonesty or other improper conduct (and I confine myself to such situations) is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in such circumstances have to be balanced against policy considerations which arise in favour of piercing the corporate veil (cf. *Domanski* 'Piercing the Corporate Veil - A New Direction' (1986) 103 SALJ 224). And a court would then be entitled to look to substance rather than form in order to arrive at the true facts, and if there has been a misuse of corporate personality, to disregard it and attribute liability where it should rightly lie. Each case would obviously have to be considered on its own merits.'

(My emphasis)

[6] 1995 (4) SA 790 (A).

[13] During closing submissions I have been referred to the case of *The Shipping Corporation of India Ltd v Evdomon Corporation and Another*[7] where the following was said as per Corbet CJ at 566D:

> 'I do not find it necessary to consider, or attempt to define, the circumstances under which the Court will pierce the corporate veil. Suffice it to say that they would generally have to include an element of fraud or other improper conduct in the establishment or use of the company or the conduct of its affairs.'

(Emphasis provided)

[14] Though the company's separate personality may not lightly be disregarded, there are indeed instances where courts will look beyond form and rather at substance, when holding those persons liable who, through their fraudulent conduct, exploited and abused the company.

[15] The approach of this court would therefore not be to completely disregard the company's separate legal personality, but where fraud, dishonesty and improper conduct has been proved and which, in the circumstances of the case are deemed material, the court must have regard thereto. The misuse of corporate personality may therefore be disregarded in order to arrive at the true facts and attribute liability where it is due.

[16] Thus, the conclusion reached by counsel is inconsistent with the court's reasoning and seems to have been reached as a result of selective or misreading of the judgment itself. Accordingly, I am satisfied that the directors of Avid at the time could be convicted of the common law offence of fraud, notwithstanding the State not relying on the provisions of s 332(5) of the CPA.

[17] It was argued by the defence that the State failed to lead evidence to prove that the accused were acting in furtherance of their own personal interest and/or in their personal capacities. It is not an element of either the offence of fraud or theft that the perpetrator has to benefit from his unlawful actions. A conviction of fraud is neither dependent on the furtherance of the perpetrator's personal interest. I am accordingly not in agreement with counsel's submission.

---

[7] 1994 (1) SA 550 (A).

[18] Criticism was specifically levelled against the State for relying on company documents during the presentation of its case while the accused are indicted in their personal capacities. Though argument may be advanced that these documents were issued by the directors in their official capacities, the circumstances under which these documents were produced and issued cannot be ignored and must equally be considered. As will become evident from the judgement, not all actions taken by the directors could be attributed to them acting in their official capacity. In some instances they merely endorsed what was perceived to be company decisions, unilaterally taken by an unofficial person by appending their signatures to company documents drawn by that person. Their personal and official capacities have therefore become so intertwined when the alleged misrepresentations were made, that it is difficult (if not impossible) to clearly distinct in what capacity they have acted at the different stages. Moreover when the charge of fraud is based on numerous alleged misrepresentations made by different persons, having acted with common purpose over a period of time.

[19] In my view, it is not necessary for the court to follow the approach proposed by Mr *Namandje* that the court must first decide whether the accused's conduct was personal or in furtherance of the company's affairs, as it could be both. The one does not necessarily exclude the other; this will mainly be determined by the facts.

The offence of fraud

[20] 'The crime of fraud can be defined as "the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.[8] In the authoritative work of *Snyman* Criminal Law[9] the learned author on the requirement of intention states:

'… an accused can be said to be aware that his representation is false, not only if he knows that it is false, but also if he has no honest belief in its truth, or if he acts recklessly, careless as to whether it is true or false. He can even be said to know that his representation is false if, although suspicious of their correctness, he

[8] *S v Longer* SA 1/99 (unreported) delivered on 08.12.2000 at p 11.
[9] Sixth Edition at 531.

intentionally abstains from checking on sources of information with the express purpose of avoiding any doubts about the facts which form the subject matter of the representation.'

Besides the intentional making of a misrepresentation, the accused's intention could equally be established in circumstances where he has no honest belief that it is true and foresees the possibility that his representation *may* be false but nevertheless continues making it.

[21] Whereas the law looks at the matter from the deceiver's point of view, it is irrelevant whether the person being deceived is aware of the fact that it is false.[10]

[22] The question of prejudice is determined at the time when making the misrepresentation. It is settled law that actual prejudice is not required to constitute fraud as potential prejudice will suffice i.e. it must 'involve some risk of harm, which need not be financial or proprietary, but must not be remote or fanciful, to some person, not necessarily the person to whom it is addressed'.[11]

[23] It was correctly submitted that the court must not have regard to evidence after the fact when deciding whether there was any risk at the time of the representation. In *S v Kruger and Another*[12] the court endorsed what was said in *R v Kruse*[13] as per TINDALL, J.A. at p. 553:

'.."The terminology used by SOLOMON, J., in Jolosa's case is: 'It is not necessary to prove actual prejudice, but it is sufficient if the act were done with intent to deceive and if in the ordinary course of things it was calculated to prejudice some person or persons.' It seems to me that when it is said that the act must be 'calculated to prejudice', the word 'calculated' does not refer to the intention of the doer of the act but is used in the sense of 'likely', and the meaning is that the act must be of such a nature as, <u>in the ordinary course of things, to be likely to prejudice</u>."'

[10] *S v Campbell* 1990 NR 274 (HC) at 279.
[11] *R v Heyne and Others* 1956 (3) SA 604 (A) at 622.
[12] 1961(4) SA 828 (AD).
[13] 1946 AD 524.

(Emphasis provided)

[24] In the context of this case the court must determine whether the alleged deceitful acts were executed in the ordinary course of an investment and likely to prejudice the SSC or Avid. The test is therefore objective and not subjective.

[25] The evidence presented can be divided in two distinct stages firstly, evidence describing the chain of events leading up to the awarding of the investment to Avid, and secondly, the handling thereof once the money was transferred into its bank account.

Social Security Commission as the investing company

[26] The Social Security Commission (hereinafter the SSC) is a creature of statute which came into existence by virtue of s 3 of the Social Security Act, 1994.[14] At times the SSC through its management structures invested surplus capital with various financial institutions in order to yield interest on surplus funds. Whenever funds were available, financial institutions were invited to submit quotations while asset managers would submit tenders for purposes of investing funds awarded by the SSC. The bidders would be screened and assessed by Mr Gideon Mulder, Manager of Corporate Finance who shortlisted potential bidders. His report would then be submitted to Mr Avril Green, General Manager (Finance) for his input and recommendation and to Mr Tuli Hiveluah, the Chief Executive Officer for approval or otherwise. It would finally be submitted to the Investment Steering Committee of the SSC for final approval.

Avid and its Directors

[27] Evidence proved that from the inception of Avid, accused no's 1 – 4 were directors. Though at some stage the name of accused no 6 was listed on the letter head of Avid as director, this was evidently wrong as he, from the outset indicated that he had no interest in becoming a director, only a shareholder. It is not in dispute that the company was formed by the late

[14] Act 34 of 1994.

Lazarus Kandara (hereinafter Kandara), who allegedly committed suicide following his arrest. It is therefore not surprising that Kandara was key in putting together the Board of Directors of Avid. In the recruitment of suitable directors Kandara was assisted by Mr Gordon Goeieman and accused no 5, the latter having introduced accused no's 1 and 6 to Avid.

Other role-players

[28] As regards accused no 3 as a former director of Avid, it is of significance to note that he tendered his resignation already in November 2004 where after he no longer officially represented the company. This covers the period January 2005 when the SSC investment was made. Notwithstanding, evidence was adduced by the State attempting to show that accused no 3 continuously and actively associated himself with the alleged misrepresentations made by his co-accused to the managers of the SSC when vying for the investment. Accused no 3 however denies his alleged involvement.

[29] It is not in dispute that though accused no 5 had no official ties with Avid, he actively involved himself in the affairs of the company by either advising or assisted his wife (accused no 4) as director and continuously discussed issues concerning the SSC investment with the directors, particularly accused no 1 with whom he had close ties as friend and on the political front. It is against this background that the State alleges his involvement in misrepresentations made to the SSC.

[30] Though accused no 6's sole intention was to obtain shares in the company (which never materialised), he willingly participated in what was labelled a 'presentation' made to the managers of SSC on the profile of Avid, prior to the awarding of the investment. At the stage of the s 174 application the court on the strength of evidence adduced came to the conclusion that, despite evidence showing that accused no 6 actively associated himself generally with the common pursuit of Avid's business as an asset investment company, his actions fell short from proving that he associated himself with

the commission of the offences charged in count 1. He was accordingly discharged on this count.

[31] Despite the pivotal role played by Kandara in forming the company and his involvement subsequent thereto as borne out by the evidence, it is of significance to note that his name never featured in the official company registration documents, neither in correspondence and the business proposal of Avid which was submitted to the SSC managers in support of the company's bid. As will be shown later, the involvement of Kandara in the SSC investment was key and remained a contentious issue among the accused in their defence. Kandara's involvement in the business of Avid, or otherwise, was equally a factor that impacted on the manner in which each of the accused conducted his/her defence – for some more than others – ranging from Kandara merely acting as Avid's advisor on investments, to being the Managing Director and effectively running the company.

Events preceding the investment

[32] It is common ground that during 2004 Avid tendered by way of a quote for an investment of N$60 million with the SSC but which, according to the evidence of Mulder, did not meet the set requirements. As a result thereof, accused no 1 in the beginning of 2005 enquired from Hiveluah about the company's unsuccessful bidding in the past and was invited to make a profile presentation to the senior managers of the SSC. According to Mulder he subsequently received from accused no 5 a profile document of Avid (Exh 'L') in which accused no's 1 – 4 were portrayed as directors. I will return to the company profile shortly.

[33] In the meantime on the 3rd of January accused no 5 approached Green to promote Avid as a potential investment company and parted the following information: He introduced himself as a Member of Parliament and said he was sent by 'higher authority'. He claimed to be representing Avid and mentioned accused no's 1 – 4 and 6 being directors. He further said that SWAPO Youth League (SPYL) was the major shareholder in Avid with 80 percent of the shares, and that the company offered rewarding interest rates.

The next day accused no 5 set up a meeting between accused no 1 and Green which, according to the latter, was because SPYL being the major shareholder and accused no 1 the movement's leader at the time.

[34] It must be noted that from evidence adduced it is clear that the information conveyed to Green by accused no 5 was factually incorrect in more than one way. Accused no 5 however disputes Green's evidence in that regard and claims that his visits to the SSC were for other purposes; also their visit to accused no 1's office the next day, he said, was at the instance of Green for political reasons and not in connection with any proposed investment.

[35] What followed next was a letter dated 04 January 2005 (Exhibit 'MM') sent to the SSC inviting the Commission to invest the amount of N$60 million with Avid as set out in the attached schedule, at an interest rate of 20.13 percent. Though having signed the letter, accused no 2 said it was prepared by Kandara and that no meeting of directors had taken place in which the terms of the proposed investment were discussed. This initiated and formed the basis of an investment of N$30 million made with Avid soon thereafter. Nine days later (as per the letter of Hiveluah addressed to accused no 1 – Exhibit 'H') accused no 1 contacted the SSC for the introduction of Avid as a potential investment company.

Avid Profile submitted to the SSC

[36] The main reason for providing the SSC managers with this document, styled *Avid Investments (Pty) Ltd – Profile,* must have been to bring to their attention what Avid, as an investment company, represents. The document is quite comprehensive and *inter alia* conveys corporate information, the company's objectives, products and services available and guaranteed investments. In the field of *Experience and Expertise* under the heading of *Financial Investments*, is reported that a total portfolio of over N$450 million for more than ten clients, in and outside the borders of Namibia, had been invested, of which the average private placement per client was about N$37 million. The last page of the profile depicts the names and photos of the Board

of Directors: Chairlady Inez /Gases (accused no 2); Sharon Lynette Blaauw (accused no 4); Paulus Iilonga Kapia (accused no 1); Otniel Podewiltz (accused no 3); and Fritz Charles Jacobs.

[37] There are conflicting versions as to how the said document found its way to the SSC as the accused, for good reason, have distanced themselves from it. Messrs Green and Mulder in their testimony described the build-up of events which led to the profile document being given to Mulder by accused no 5 after he had approached Green and enlightened him about Avid as a potential investment company.

[38] When regard is had to the evidence presented, it could safely be said that not all information contained in the company profile was factually correct and is therefore misleading. The defence did not contend otherwise.

[39] Firstly, the evidence shows that since Avid's inception in 2004 only one investment was made by Navachab Mine in the amount of N$10 million, of which the maturity date was in December 2004. Therefore, at the beginning of January 2005 when Avid's profile was submitted in support of their bid, there was no investment under its management, neither any placements that were still running. In the absence of evidence to the contrary, the figures relating to investments made with Avid and their clientele of the past were mere fabrications, seemingly to create the impression with the reader that this is an established company, thereby instilling trust with potential investors.

[40] Secondly, two of the persons depicted as directors in the profile were indeed no longer directors as they had already resigned during 2004 i.e. Podewiltz and Jacobs. Whether or not they personally knew that their names were still included in the company profile is not material, rather why it was included. Again, in the absence of any other explanation, the only reasonable deduction to make is that their inclusion was to portray that persons of standing in society are directors of the company which, in itself, would have given credence to Avid as an investment company and bolster its chances of being awarded the investment. This much is evident from a letter sent to the SSC dated 08 February 2005 (Exhibit 'V-1') styled *Letter of Confirmation*

where reference is made to the shareholders list presented to the SSC and which reads that Avid's objective is not self-enrichment, but community empowerment and development. With reference to the board members it reads that '[they] are people with strong roots in the community and were carefully selected'. This clearly confirms the importance of the company profile and shareholders list presented to the SSC in Avid's bid. It also seems to have had the required result as the SSC managers changed their stance about Avid as a possible investment company. This much is evident from Mulder's testimony. Though additional information regarding the company was subsequently requested and furnished, this was clearly done supplementary to the profile document and not in substitution thereof.

The presentation and subsequent events

[41] What flowed from this information is the meeting of 19 January 2005 between accused no's 2 and 6 representing Avid, and Mulder and Green representing the SSC. Information regarding Avid's bank accounts; where the investment would be kept; and who the shareholders were, was exchanged. According to accused no 2 this meeting was set up by Kandara. Based purely on how the Navachab investment was managed – by persons other than any of the accused before court – accused no 2 said that the money would be transferred into a Standard Chartered Bank account for a period of four months.

[42] There can be no doubt that what Avid had to offer was set out in the placement proposal letter of 04 January and what is stated in the company profile. Whereas neither accused no's 2 or 6 played any part in putting these documents together, they were clearly in no position to vouch for its content stating the true facts. This notwithstanding, the sincerity of the presentation was based on these documents. I pause to observe that on the evidence of the State witnesses and his own evidence, accused no 6 did not actually partake in the presentation and was merely present as shareholder, having been requested by accused no 1 to be in attendance.

[43] Consequential thereto further information was sought on the company's shareholding. It would appear that Mulder was mostly interested in SPYL's share-holding.

[44] In a follow-up letter[15] addressed to the SSC, Avid undertook to furnish them with a financial guarantee bond within seven days after placement of the funds, followed by monthly reports. Also that the funds would be kept in a scroll account with Standard Chartered Bank. Appended thereto was a list of six shareholders inclusive of accused no 4's name. This letter, though reflecting that it was drafted by accused no 2, does not bear her signature and was disputed as she claimed never to have seen it before. In view of Kandara's strong influence in Avid's matters, it is reasonably possible that this letter was sent by Kandara, based on information emanating from the discussions between the SSC managers and accused no's 2 and 6, and that accused no 2 indeed had no knowledge thereof.

[45] The extent to which Mulder was influenced by these meetings at the hand of the company profile and additional information obtained, is evident when he specifically said that during the first evaluation in 2004 he did not know the directors but, now that he had been introduced to them, he could see that the company was credible and he being less concerned about the company's integrity. Another factor carrying weight with Mulder was the fact that he had been informed by accused no 5 that the State President was a shareholder. Though Mulder's evidence was that Avid's successful bidding was ultimately decided on merit, it would be naïve to think that he was not guided or induced in any way by what he had seen in the profile, or what had been conveyed to him by accused no 5 right in the beginning. Subsequent negotiations between the SSC managers and accused no's 2 and 6, and the final requisites identified by the managers which Avid had to meet, materially emanated from the company profile, with minor amendments though. As for the directors, Mulder testified that he was pleased to see that accused no 3 was a director of the company and that he considered him a respectable person; also that they had a good relationship.

---

[15] Exhibit 'M'.

[46] From the above it seems inevitable to come to the conclusion that the company profile submitted in support of Avid's bid for the SSC investment was not only factually wrong in material respects, but that it distorted the truth. As regards the experience and expertise of the company, a factor likely to have carried significant weight with a potential investor, gross misrepresentations were made. On the strength of Mulder's evidence, his proposal that Avid be awarded the investment was based on the company profile submitted to him. In addition thereto, was the presentation made by Avid representatives and additional information and formalities exchanged. The awarding to Avid was ultimately founded on the totality thereof.

[47] On 21 January 2005 the SSC notified Avid that their investment quotation at a fixed-interest rate was successful and that the amount of N$30 million would be invested for a period of four months. The letter was handed to accused no 5 at the offices of the SSC. However, prior to the transfer of funds to Avid, Green contacted the financial manager of Navachab Mine to enquire about the guarantee issued to them during the investment made with Avid and learned that some problems were experienced. This, together with the name of Kandara that surfaced in the meantime and him allegedly being part of Avid, raised sufficient concern with the SSC to suspend the transfer of funds. All this culminated in a follow-up meeting between the three managers of the SSC and accused no 1.

The meeting of 24 January 2005

[48] During this meeting troubling issues were addressed.[16] As far as the discussions concerned the involvement of Kandara, Green and Hiveluah corroborate one another in stating that accused no1 explained that Kandara was not involved in Avid. It has been their stance throughout that if Kandara were to be involved, they would have no further dealings with Avid. In this regard accused no 1 said that when the matter was raised, he admitted

[16] The concerns of the SSC managers were: (a) Who the contact persons in Avid were; (b) A complete list of Avid's shareholders was required; (c) The key persons dealing with the SSC investment being unknown; (d) The key persons dealing with accounting and internal control and safeguarding of the investment; and (e) The risk of investments made with Avid.

Kandara's involvement as advisor to the company on investments which, according to him, satisfactorily addressed the managers' concerns.

[49] The next day (25 January) and as requested by the SSC managers, a detailed list of Avid's shareholders was submitted to the SSC as per Exhibit 'R-1'. There are conflicting versions as to the person(s) responsible for compiling the list with accused no 1 claiming that his input was very limited and only concerned the listing of Community Care Trust, SWAPO Youth League and Juventus Enterprises, in which he was personally involved. According to accused no 2 she was picked up by Kandara and taken to accused no 1's office where the shareholding was discussed. In attendance were herself, accused no's 1, 3, 5, 6 and Kandara. A shareholders' list was subsequently drafted which was presented to the managers of SSC by accused no's 1 and 2 the next day. The list addressed the managers' concerns on shareholding.

[50] In addition, a resolution was taken by the board of directors[17] dated 24 January 2005 and signed by accused no's 1, 2 and 4. It reads that accused no's 1 and 2 were the contact persons while the persons dealing with investments were accused no 1, Justin Rentzke and Gottlieb Hinda. I will return to this part of the evidence shortly.

The shareholders in Avid

[51] As per the undisputed evidence of Mr Knouwds, the liquidator appointed in respect of Avid, the two lists submitted to the SSC managers did not reflect the true status of Avid shareholding at the time. He testified that the company secretary addressed a letter to the directors informing them of the transfer of shares which had to be approved by the board. However, according to the witness the documentation was never signed and returned. This meant that until its liquidation, all the shares of Avid were still registered in the name of Nadiema Izolda Eberenz. The names listed in the detailed shareholder's list, at most, were *intended shareholders*. As for accused no 4's name appearing

[17] Exhibit 'R-2'.

on the list, she could never have been a shareholder or for that matter an intended shareholder as she at no stage sought to acquire shares in Avid.

[52] It was submitted on accused no 1's behalf that an adverse inference should be drawn from the fact that the State failed to call the company secretary and auditors who could have testified on the shareholding and in the absence thereof, the evidence of Knouwds is rendered inadmissible hearsay evidence. It must be observed that the admissibility of Knouwd's evidence, as regards the letter sent to the directors, had not been challenged during his testimony; neither had it been put to the witness that the directors in fact approved the transfer of shares, or was evidence adduced to that effect by any of the accused. I can think of no reason why such crucial information that undoubtedly will count in favour of accused no 1's defence would be withheld from the court if that was indeed the case; it would have exonerated the accused of having made misrepresentations to the SSC as regards the shareholders list. The issue had neither been raised during cross-examination with any of the other accused who were directors. Knouwds was unable to find any proof of the transfer of shares and there is no evidence confirming a transfer of shares. In these circumstances it would in my view not be proper to draw any adverse inference from the State's failure to call the two witnesses referred to, and I decline to do so.

Further deliberations

[53] Despite conflicting versions between accused no's 1, 2 and 5 as to how it came about and by whom travelling arrangements were made, it is common cause that on the 26th of January 2005 accused no 2 and Mulder travelled to Johannesburg where they met a certain Mr Wayne van der Westhuizen, apparently representing the trader. The purpose of the meeting *inter alia* was for Mulder to familiarise himself with the trader; where the funds would be kept; how transfers would be made; and the issuing of a financial guarantee bond. Mr van der Westhuizen thereafter played no further part in the investment.

[54] Upon his return Mulder submitted a follow-up report to the SSC management, reporting that the concerns earlier raised were addressed to the SSC's satisfaction. Furthermore, that in respect of (a) above the contact persons of Avid were accused no's 1 and 2. As for (b) a complete list of all shareholders and trustees was already submitted while in (d) accused no 2 was deemed sufficiently qualified with the necessary experience to be the accounting officer. Accused no 2 was identified as the key person in Namibia dealing with the investment (c), and that Mulder had met the South African counterpart during their visit. Regarding the safety of the investment (e), it was reported that a financial guarantee bond would be issued to the SSC, either by the World Bank or the IMF as confirmation of the investment placed with Standard Chartered Bank. Avid was required to confirm in writing the validity of the financial guarantee bond. This requirement was met in a letter dated 08 February 2005, signed by accused no 2. Having so been satisfied, Muller submitted his final report in which the investment with Avid was recommended.

[55] It is common cause that on 26 January 2005 the SSC invested the amount of N$30 million with Avid in the aforesaid manner. It is not disputed that the investment subsequently disappeared after N$29.5 million was transferred into the account of Namangol. The next day accused no 7 transferred N$20 million and a further N$6.3 million to accounts held in South Africa. What happened to the money subsequently was explained by accused no 7 in his testimony. The disappearance of the purported investment led to an inquiry in terms of s 417 of the Companies Act conducted during 2005, in which the accused persons were called upon to either explain their involvement in the doomed investment, or their managing of Avid's business affairs. A direct consequence of the inquiry was the arrest of the accused persons and prosecution on the aforementioned charges. Subsequent thereto Avid and Namangol were liquidated in order to recover financial losses suffered by its creditors i.e. the SSC and Avid. From the evidence of Knouwds the approximate amount of N$9 million was finally recovered during the companies' liquidation with a further estimated N$1 million on hand. From the

afore-going it is evident that the SSC suffered a substantial loss of approximately N$20 million.

[56] The gravamen of the fraud and theft charges turns on the alleged fraudulent representations made to the SSC financial managers for purposes of acquiring an investment with Avid, and the subsequent appropriation of funds so invested.

The 'Kandara factor'

[57] What is clear from the evidence of the SSC managers, the suspected involvement of Kandara in Avid was not only of great concern to them, but sufficiently important to suspend the whole deal. It has not been disputed by accused no 1 that Kandara's involvement was raised with him during the meeting on 24 January 2005 and his response that Kandara merely advised Avid on investments. Contrary thereto is corroborating evidence that the managers were told that Kandara was not involved in Avid in any form or manner. The latter explanation was accepted, as there was nothing showing otherwise.

[58] As borne out by the evidence, Kandara was not merely acting as advisor to Avid but had orchestrated the gathering and presentation of information to the SSC managers in support of the investment bid. Besides the presentation of the company profile and compilation of the shareholders list, he directed who had to attend meetings with the SSC and called the meeting of the 24th in accused no 1's office to discuss the shareholding. I am alive to the fact that this meeting had been denied by accused no 1, but the evidence of accused no 2 that Kandara prepared the same list presented to the SSC the next day, was undisputed. Accused no 1 had seen this list and said he only verified the names he earlier provided.

[59] Accused no 2 is clear that Kandara acted as the CEO of the company which is fortified by evidence of the extent in which he involved himself in the day-to-day affairs of Avid. He was clearly more than an advisor on

investments. With the assistance of accused no 5 they recruited accused no's 1, 3, and 4 as directors and accused no 6 as shareholder, and was personally involved in the process by explaining the company's business to them. In fact, there is not a shred of evidence that Kandara advised the board on any of the two investments made with Avid i.e. the Navachab deal and the SSC deal. As a director, accused no 4 also did not find it strange when Kandara asked her to be part of the delegation meeting with the SSC on the 19th of January. Clearly this was a managerial decision and defeats any suggestion that he was merely advising Avid on investment matters.

[60] From accused no 2's testimony it is further evident that Kandara facilitated the meeting between Mulder, accused no 2 and Van der Westhuizen in Johannesburg. Again he relied on accused no 5's assistance. He further entered into a lease agreement on behalf of the company and incurred costs to put up office. Yet, except for accused no 6 who questioned where the funds came from, none of the others seemed to have doubted his actions and questioned where the necessary funds came from. No decision had been taken by the board on these matters as could be expected which, in itself, should have raised the alarm – moreover the appointment of Ms Schröder as an employee of Avid. Surely where the management of the company rested on the shoulders of the three directors, this is not something minor that could have gone unnoticed. They must have realised that it would have required some discussion on Avid's financial position and whom to appoint. To afterwards explain that the impression was gained that it was made possible due to commission earned from the Navachab deal, has all the makings of an afterthought as none of the directors were involved in the Navachab deal and therefore could not have known as to the profit it yielded in commission. It further does not explain the decision to put up office and appoint personnel which required entering into contracts on behalf of Avid. In the light of the testimony of accused no's 2 and 6, it is clear that Kandara took the lead on these ventures and in the absence of evidence showing otherwise, it seems to me reasonable to infer that his actions behind the scene were tacitly endorsed by the directors.

[61] The true extent of the *carte blanch* given to Kandara becomes evident when regard is had to his actions the moment the money landed with Avid. Contrary to what was given out to the SSC, N$29.5 million was immediately transferred into the account of Namangol. According to accused no 2 the letter of transfer of funds to the bank was prepared by Kandara and although she had signed it, she did not realise that the said amount had to be paid into Namangol's account. Well-knowing what was offered to the SSC and her personal involvement in satisfying the requirements agreed on in order to avoid or reduce possible risks, I find the excuse proffered by accused no 2 highly unlikely. She had trusted Kandara thus far in securing the investment and her signing of the instruction letter seems to have been a mere extension of that trust.

[62] It seems to me that the same could be said of accused no 1 who was duly informed that the SSC funds had been deposited into Avid's account. A logical consequence thereof would have been for the board to convene and decide the way forward as nothing of that sort had been decided up to this stage. However, it did not happen and what boggles the mind is what the directors were thinking as to how the investment would be effected without specific instructions given by the board. Perhaps the answer to this vexed question is to be found in accused no's 2 and 4's evidence.

[63] According to accused no 2 no prior decision had been taken by the board, the reason being that to her mind Kandara would handle the investment in the same way as the Navachab deal and equally assumed that the other board members entertained the same notion. Judging from the outcome, accused no 2's deduction cannot be faulted. As for accused no 4, in cross-examination on a question as to whether she was surprised to learn that the funds were transferred by Kandara, she responded by saying that she was not, as he was 'there'. Despite her not knowing who had signing rights, she did not question his involvement – the same reaction that could be attributed to her co-directors – particularly in view of accused no 2's evidence who downright admitted that Kandara was *de facto* managing the company as CEO.

[64] From the above it is evident that Kandara was key in the operations of Avid and played a major role in acquiring the investment.

Money handed over to the accused

[65] The State led the evidence of Mrs Kandara who testified about an incident that took place in February/March 2015 when she was told by her husband that accused no 7 would bring money to her house on a specific day. Before his arrival accused no's 3 and 5 turned up asking whether the man brought the money. Upon accused no 7's arrival he requested her to open the garage and he parked his vehicle inside. He then took out a bag containing money and started counting. She said he gave her between N$220 – 240 000 in cash. He also handed her a document reflecting the amount of N$300 000 she had to sign. Though at first reluctant to sign she eventually signed where after accused no 7 left. On instruction of her husband she had to give N$40 000 each to accused no's 3, 5 and 6. While accused no's 3 and 5 arrived shortly thereafter and was given the money, accused no 6 only arrived the next day in the company of accused no 3 to collect his share of the money. A further N$40 000 was to be given to accused no 1 by accused no 5.

[66] Although accused no 7 confirmed having dropped off money at the house of Kandara, according to him this was in connection with a loan between him and Kandara. As for the remaining accused they vehemently disputed Mrs Kandara's evidence which was relentlessly attacked in cross-examination. At the end of her testimony the witness was shown to be incredible and her evidence unreliable. In the light of her evidence being single and contradicted by other witnesses, little weight, if any, should be accorded thereto.

Alleged misrepresentations by the accused persons

[67] In its assessment of evidence relating to the representations made to the SSC by the accused persons, the court should not look at each

representation in isolation, but should rather follow an holistic approach in determining whether any misrepresentation was made. Neither should the actions or omission on the part of an accused person be viewed in isolation as the evidence has duly established that those accused involved in the attainment of the investment had acted in unison. Moreover where the accused persons stand charged with the offence of fraud on the basis of having acted with common purpose.

[68] Firstly, the position of the three directors namely, accused no's 1, 2 and 4 on the main count.

[69] There had been no meeting earlier among the directors to discuss the initial proposal made to the SSC and the terms thereof as offered. When asked whether the proposal was made without consultation between the directors, accused no 1 said he did not doubt accused no 2 and, on his own made no enquiry in that regard. Notwithstanding, without first familiarising himself with the nature and extent of the proposal, accused no 1 associated himself with it, moreover when it formed the basis of subsequent consultations and presentation made to the SSC managers. In his defence he said that he relied on accused no 2 having signed the proposal. Despite claiming that money invested with Avid would be placed with Standard Chartered Bank, he personally had no prior dealings with the trader and simply relied on what he had been told by Kandara during 2004 on how investments would generally be handled by Avid. Evidence that any of his co-directors has had such dealings is also lacking. In particular as regards the SSC investment, no advice was sought from any trader. I hereby include the meeting in Johannesburg with Mr van der Westhuizen whose sudden appearance on the scene has the making of a guise organised and orchestrated by Kandara, always hovering in the background.

[70] I find accused no 2's evidence on this point credible when she said that it was Kandara who had contact with traders, not the directors. This much is evident from accused no 1's own evidence when asked during the meeting with the SSC about the traders when he did not disclose any names – names

that emerged only later in a resolution drafted by Kandara. These names were provided in circumstances where accused no 2, on her own admission, had no experience in investments, while there had been no prior contract or agreement between Avid and the traders to act as portfolio managers, as alleged by accused no 1. These names were clearly inserted with the sole intention of creating the impression that the SSC investment would be managed by knowledgeable asset managers, which clearly was not the case.

[71] According to accused no 1, the three directors first had a telephonic discussion about the persons who would be managing the investment, while accused no 2 said this was one of the issues decided (the other being the shareholders list) during the meeting in the office of accused no 1. Despite accused no 1's denial of that meeting and his insistence that the discussions were done telephonically, accused no 4 was adamant that there was no prior discussion on what was decided, though she had signed the resolution. It is common cause that she was not present at the meeting testified about. Whereas Kandara was the contact person working with the traders and also attended the said meeting (according to accused no 2), it seems to me likely that he produced these names. If on their own evidence accused no's 1 and 2 only knew about these people without commissioning them in the past, would they among themselves have been in the position to nominate them as asset managers? I doubt it, hence the probabilities on this point favour more the version of accused no 2, than the blunt denial of accused no 1.

[72] It goes even further. The remaining issues that Avid had to address regarding shareholders, contact persons and persons handling the investment, were set out in a letter and resolution handed over to Mulder by accused no's 1 and 2. In paragraph 2 of the letter it is stated that Avid is not at liberty to disclose the particulars of their traders (as requested by the SSC) due to the *confidentiality agreement* that existed. No evidence had been led about any agreement entered into between Avid and a trader. Thus, this was yet another misrepresentation made to the SSC managers. Though accused no 1 disassociated himself with page 2 of the said letter as he claims not to have seen it at the time but only during cross-examination, his explanation

has a hollow ring to it. The relevant part of the letter had been read into the record during the testimony of Mulder and was admitted into evidence by agreement. From Mulder's evidence there can be no doubt that both pages were handed over to him at the time. In any event, it appears to me unlikely that when presenting the letter and resolution to Mulder, accused no 1, being the contact person approached by the managers, would only have looked at the first page instead of ensuring that the correct information is reflected in the documents handed over to the SSC. His explanation on this score clearly falls to be rejected as false.

[73] In circumstances where both documents were simultaneously handed over in order to satisfy the last outstanding issues raised with accused no 1 by the SSC managers the previous day, it seems reasonable to infer, contrary to what he asserts, that accused no 1 associated himself with its content and gave out that what was stated therein was the truth. It evidently was not. He did not say that he believed it to have been the truth, all that he said was that he trusted accused no 2's decisions. This was clearly not a decision taken by accused no 2 alone.

[74] Though accused no 1 denies the meeting held in his office during which the shareholders were discussed, he must have become aware of the remaining names on the list prior to presenting it to Mulder. It is accused no 2's evidence that the list culminated from the discussion attended by Kandara, who subsequently provided her with the list. It then begs the question how Kandara obtained the names provided by accused no 1 if there had been no prior meeting or discussion? Though claiming that the names were given to accused no 2 over the phone, she disputed it, while accused no 6 also made mention of the same meeting he attended. His evidence as to the meetings he attended is however vague and should not readily be relied upon where uncorroborated.

[75] Whereas the transfer of shares to any of the persons or legal entities listed had not been endorsed by the board and had not been verified, neither accused no 1, nor any of the directors for that matter, could honestly have

believed that the list represented the true shareholders of Avid – not even as far as it concerned those names provided by accused no 1. There was simply no legal basis to rely on when submitting these names. By handing a copy of the SWAPO Youth League Code of Conduct to Mulder under cover of a Community Care Trust coversheet reflecting accused no 1 as the chairperson of the board, was seemingly done to give more credence to the shareholders list.

[76] There can be little doubt that the shareholders list presented to the SSC was a material misrepresentation, moreover where it had been pointed out that a detailed shareholders list was required for purposes of finalising the investment (with Avid). Add thereto the information set out in the resolution, simultaneously submitted, equally misrepresenting the true facts and Avid's portrayed experience as an investment company. These two documents were produced by Kandara after the meeting and accused no's 1 and 2 associated themselves with what it represented by presenting same to Mulder, well-knowing that it was misleading and not of their making.

[77] Accused no 1's explanation of him having been unaware of Kandara's direct involvement in managing Avid and him solely having relied on accused no 2's guidance and actions for purposes of securing and managing the SSC investment, falls far short from being reasonable or acceptable in the circumstances of this case. On his own admission and despite his initial lack of knowledge regarding investments, he by then at least had learned the basic principles applicable to investment companies, well-knowing that Avid acted through its board of directors. In correspondence directed to the SSC prepared by accused no 1 (Exhibit 'X') and that by Kandara (Exhibit 'V-1'), cross-reference was made to the respective letters. Though mindful that Kandara's letter was signed by accused no 2, the content of the letters address the same issues. This seems to suggest that it was produced as a result of co-operation between accused no 1 and Kandara. This conclusion is fortified by accused no 2's evidence that Kandara brought her the letter to sign in which the shareholders were already listed, including those mentioned by accused no 1.

[78] In the present circumstances, it appears to me absurd to suggest that accused no 1 genuinely believed that Kandara was not involved in the actual running of the company and merely acted as an advisor on investments when called upon. Evidence to the contrary is overwhelming.

[79] It was contended on behalf of accused no 1 that the SSC managers in fact knew about Kandara's involvement in Avid prior to their meeting with accused no 1 and only sought clarification on the extent of his involvement. That explains why they only enquired from accused no 1 and were satisfied when told that he acted as advisor on investment, the argument went. It was submitted that Kandara had not been convicted or was under investigation at the time, and that there was no reason why his involvement in Avid would be a concern to the SSC; he was now made the scapegoat by the managers for an investment which should never have been made by the SSC. It would therefore not have been a misrepresentation, neither was it shown that Kandara's involvement would likely be prejudicial to the SSC.

[80] Kandara's involvement in Avid and the significance thereof to the SSC managers was crucial and had personally been conveyed to accused no 1. This was a precondition of making the investment with Avid. Whatever the reasons were why the SSC refused to do any business with Kandara had not objectively been established. These were the subjective views of the SSC managers. In view thereof, it was argued, it cannot be said that there was a potential risk of prejudice simply because Kandara was involved with Avid's affairs. From the evidence of the managers it would appear that there was a history between the SSC and Kandara as a result of which they refused to do further business with him; probably based on mistrust. This in itself would surely have created some risk of prejudice for the SSC if their investment were to be managed by a person whom they did not trust. They were obviously not willing to take the chance and made their views clear to accused no 1. One of the conditions set by the SSC was that Kandara must not be involved and which they were not willing to compromise on. Therefore, if it

were held out to the SSC that he was not involved in Avid whilst in fact he was, then that would have constituted a material misrepresentation.

[81] As discussed above, Kandara was the key player in the running of Avid's business and orchestrated the investment deal brokered with the SSC, a fact accused no 1 simply could not have overlooked – moreover regard being had to accused no's 2, 4 and 5's evidence. I have no difficulty in coming to the conclusion that accused no 1 blatantly lied to the SSC managers when asked about Kandara's involvement in Avid, well-knowing that the deal was off if he were to admit his actual involvement. I accordingly reject as false his evidence that he informed them about Kandara merely acting as their advisor. Had that been the case, then the SSC undoubtedly would have pulled out of the investment as they threatened to do.

[82] After the investment was made and the SSC started getting second thoughts on the safety thereof, accused no 1 on 07 March 2005 by letter reminded them that a financial guarantee bond was obtained and produced as agreed. Furthermore, that it was issued in Avid's name who was unable to provide the SSC with the bond due to trade considerations. Though expecting the money to have gone to Standard Chartered Bank he noticed in the letter (purporting to be a guarantee bond) the name of Alan Rosenberg. Until then he had no communication with this person but did not raise any questions, despite it not being in accordance with the undertaking given to the SSC. Against this background, there seems to be merit in the State's submission that it clearly demonstrates accused no 1's persistence with the misrepresentations earlier made to the SSC.

[83] In accused no 2's narrative of events she saw Kandara as the person who oversaw the day-to-day operations of the company. She frankly admitted this. He was involved in the appointment of directors and her appointment as chairperson, the opening of bank accounts, having managed the Navachab investment, and generally took charge of the SSC investment by giving her instructions while drafting letters sent to the investor which she was expected to sign. In the absence of evidence to the contrary, it can safely be accepted

that she followed his lead and effected his instructions. It is therefore not surprising that it was submitted by her counsel, Mr *Theron*, that 'Kandara deceitfully manipulated and abused her and the other directors into acting as he wanted them to'. This was possible, the argument went, because she was naïve and trusted him, being a respected and trusted family member.

[84] Bearing in mind that accused no 2 chaired the board – a position she accepted without being formally elected – a disquieting feature of her conduct at the time is that she allowed an outsider to effectively capture management of the company without raising any concern. She abdicated her responsibilities as director by simply endorsing Kandara's decisions who had been working behind the scene and out of the public eye. She blindly signed letters drafted by him without questioning the content. On 10 November 2004 she signed a letter that was prepared by Kandara and addressed to FNB in which the bank is informed that Kandara would forthwith be a co-signatory to Avid's accounts. He told her that the board had agreed that he be a co-signatory. However, as chairperson of the board, how is it possible that she would not have known about a board decision of such importance affecting the company? Accused no 2's excuse of her having had no reason to doubt this information falls far short from being reasonable or satisfactory.

[85] It was accused no 2's testimony that no formal board meetings were held while the decisions under consideration were finalised by way of round-robin resolutions. These were drafted by Kandara and submitted for signature to the directors without requiring any decision making on their part. As regards the method adopted, this was confirmed by accused no's 1 and 4. This included the shareholders list and resolution dated 24 January 2005 which she knew did not emanate from the directors, but Kandara. As for the resolution she further knew that, as far as the asset managers are concerned, it constituted a misrepresentation. She had no personal experience in investment and had not managed a single investment by then, whilst the board had no contact with or even entered into any agreement on behalf of Avid with either Rentzke or Hinda to be the company's asset managers. Neither were there any plans, nor the need to do so, as this was left to

Kandara. The identification of these persons who would manage the investment and the tendering of that information to the SSC managers was without substance and was nothing more than a smoke screen. To this end it was yet another material misrepresentation made to the SSC managers as neither accused no 2 nor the two persons so identified, took charge of the funds after its transfer to Avid.

[86] The deviousness of the plan hatched to win over the trust of the SSC managers manifested itself in the trip arranged to meet the trader. While the SSC has all along been assured that their funds would be kept in a scroll account with Standard Chartered Bank from where it would not be moved by either Avid or the traders, accused no 2 did not know the trader she would be meeting with and assumed it would be Alan Rosenberg or his representative. In view of Avid's intention to deal only with Standard Chartered Bank, I find her assumption against this background peculiar. The person whom she and Mulder ultimately met, Wayne van der Westhuizen, never featured anywhere thereafter, from which it would appear that he was only there to reassure the SSC that their funds were not at risk. Accused no 2 did not question Kandara on where this person fits in and to date still does not know whom he represented. Yet, she went along with it. She only started questioning Kandara on the investment later upon discovering that the money was transferred to Namangol, and that the full amount had not been transferred.

[87] If accused no 2 honestly believed that Kandara's involvement in Avid was rightful, I find it surprising that she at no stage questioned her being used to give effect to *his* decisions in circumstances where she knew the board had not decided on it. Conceded that accused no 2 had no experience in the field of investment, she is a qualified accountant by profession and there can be no doubt that, from her studies, she must have been familiar with the duties and responsibilities of board members. She clearly had no regard thereto when acting as a mere extension of Kandara during the preparation and uttering of documents which were not issued by the board.

[88] Once the money had reached Avid's account, there was no discussion as to how the investment would be handled as she *assumed* the board was in agreement that it would be dealt with in the same way as the Navachab investment. Essentially, she expected Kandara to handle the investment and there is not the slightest indication from her side that she ever intended managing it herself, as held out to the SSC in the resolution. This much is evident from her signing the letter to the bank to transfer the money to Namangol without even reading the letter presented to her by Kandara.

[89] According to accused no 2, and based on Kandara's briefing on progress made on the SSC investment attended by accused no's 1, 2, 3, 5, and 6, she was of the view that they all knew that Kandara would handle the investment. Though accused no's 1, 3 and 5 disputed her evidence on this point, accused no 6 during his testimony appears to have some recollection of the meeting. What gives credibility to accused no 2's assumption that they all knew that Kandara would take over and deal with the investment as he did with the Navachab investment, is that once the funds were received by Avid, everyone just sat back in circumstances where there was a duty on them to decide how to manage the investment. For accused no 1 to have admitted this would obviously confirm Kandara's involvement in Avid; as for accused no's 3 and 5, it was likely to show their continued involvement and interest in the investment.

[90] For the foregoing reasons, it is evident that accused no 2, who was kept in the loop by Kandara, must have appreciated that the documents produced by him evinced material misrepresentations regarding Avid. Notwithstanding, she and her co-directors endorsed it when presenting same to the SSC managers. At no stage did she personally verify the facts and information set out in the company profile or in letters drafted by Kandara she had signed. On the strength of her evidence it was submitted that it was Kandara's show and he controlled the puppets. Counsel's remark is not entirely without merit. However, I am unable to associate myself with counsel's portraying of a picture of accused no 2 being an innocent victim of Kandara's deceitful plans. Neither am I able to agree with the submission that accused no 2 never made

any material misrepresentation with the intent to defraud, and that she at all times were under the impression that Avid was pursuing a *legitimate* business goal.

[91] Despite Kandara's fingerprints being all over Avid's bid the directors did not deem it necessary to verify the truthfulness of material information set out in the shareholder list and resolutions held out to the SSC. There is no evidence that any of the accused ever questioned Kandara on the operations of Avid or doubted his sincerity to act in the best interest of the company. Notwithstanding, they pursued the SSC deal under these circumstances, giving out that the investment deal was of their own making, whilst in truth and in fact their presentations were baseless, misplaced, and lacked substance. What they essentially did was to allow Kandara to use Avid, an investment company, to acquire the SSC investment. It was never about Avid – it was all about Kandara. For the accused to have found comfort in the Navachab deal as proof of Avid's past successes is equally optimistic, as none of the accused were involved in that investment[18] and could therefore not realistically assume that the SSC investment would be dealt with in the same way and bear the same results. To this end, to blindly have accepted as correct and reliable what they were told by Kandara, either directly or by way of documentation provided by him, was reckless and irresponsible.

[92] It was submitted on behalf of the accused that they had no basis to doubt information provided through other sources and had a *bona fide* belief in its correctness. Counsel's contention is not supported by evidence and I respectfully disagree. On the contrary, there was no basis for an honest belief in its truth. Furthermore, the misrepresentations were material to the awarding of the investment. There can be no doubt that the SSC, when deciding to make the investment, acted solely on what was presented to them by the respective persons who imparted information about Avid as an investment company, its past experiences, the shareholders involved and guarantee or assurance that the investment is not at risk.

[18] Except for accused no 2 who had only forwarded updated reports to Navachab.

[93] It was further argued that there was no evidence showing that the directors knew or ought to have known about the fraudulent scam run by Kandara, Rosenberg and accused no 7, and that they were cleverly and cunningly manipulated and kept in the dark in relation to the actual dealings of Avid. Though the evidence fall short of them having known beforehand that the SSC investment was doomed to be misappropriated, accused no's 1, 2 and 5 in particular played active roles in laying the groundwork. They endorsed and presented material facts and documents for purposes of the investment to the SSC managers, knowing that it was not of their own making as held out; and expected it to sway the tender in Avid's favour. They essentially made it possible for Kandara to swindle the SSC out of its money.

[94] I have no doubt that the board at the relevant time were 'puppets manipulated from outside by [a] person who [is] ostensibly unconnected with the company'[19] with the intention to mislead the SSC as potential investor. Against this backdrop, the only reasonable inference to draw is that, among the directors, accused no's 1 and 2 well knew that the funds would be handled by Kandara and not in the manner as collectively held out by them to the SSC. This much is evident from their complete disregard to follow up on the transfer and security of the funds once deposited into Avid's bank account. They simply lost interest well-knowing that Kandara would take over.

[95] Irrespective of what ultimately happened with the investment, there was already a potential loss when the SSC parted with its funds when transferring it into Avid's account. Already at that stage the offence of fraud had been committed. Accordingly, accused no's 1 and 2 made themselves guilty of fraud and stand to be convicted.

[96] It is not disputed that accused no 4 was approached by Kandara and Goeieman in April 2004 to become a director and her subsequent acceptance. From documents presented to her, she familiarised herself with the then directors listed (accused no's 1, 2 and 3), but at no stage had they officially met. During her tenure she never attended any board meeting and

[19] *S v Shaban* 1965(4) SA 646 (WLD) at 652A.

though she recalls signing the resolution of 08 February 2005, this was done on round-robin basis. Despite her signature appearing on the resolution of 24 January 2005 (Exhibit 'R-2'), she cannot recall having signed it. The fact that she cannot now recall having signed the resolution, however, does not mean that she did not append her signature to the document. In any event, the said resolution was handed into evidence by consent and it was not disputed that it carried her signature. I accordingly find that accused no 4 had the said resolution in hand and appended her signature thereto.

[97] Having at all times been kept abreast on the progress made with the Avid investment deal, accused no 4 must equally have been made aware of the request by the SSC managers to furnish additional information regarding shareholders, contact persons in Avid and persons responsible for managing the investment. This culminated in the two resolutions issued and presented to the SSC. I pause to observe that she qualified the information filtered to her to only concern the major developments in Avid and not the deliberations in all its detail. There was according to accused no 4 no discussion among the directors on the resolutions taken. This included the shareholders list which accused no 4 said she did not know that it had been presented to Avid. Her evidence stands in sharp contrast with that of accused no 1 about prior discussions having taken place among the directors and which was left unchallenged. It is common cause that she did not attend the meeting in accused no 1's office referred to by accused no 2.

[98] While accused no 4 had only been kept abreast on Avid matters by her husband, no evidence was presented to the effect that she either knew about misrepresentations made regarding the company's shareholders and the resolutions taken on the SSC investment, or had reason to believe that it was produced by Kandara. The accused clearly failed in her duty as a director by signing the resolutions blindly and without first familiarising herself with the facts, thereby completely disregarding the possible consequences of her actions, particularly when regard is had to her being a legal practitioner. She did nothing to verify the truth of these documents before it being presented to the SSC. This begs the question whether she knew or at least had no honest

belief in its truth and whether her conscious association with what is stated in the resolutions and shareholders list, constituted fraudulent conduct on her part.

[99] In the absence of evidence to the contrary, accused no 4's version as regards her ignorance about misrepresentations made to the SSC, remains uncontested and uncontroverted. Despite her having been kept informed of the investment, it cannot be inferred, as the only reasonable conclusion to come to, that she was equally informed of any intended and deliberate misrepresentation. Though aware of Kandara's presence in Avid, there is nothing showing that she knew about the false shareholders list or the resolutions being of his making. The totality of incriminating evidence against accused no 4, in my view, does not satisfy the test of proof beyond reasonable doubt. In the result, no fraudulent conduct by accused no 4 had been proved.

[100] Next I turn to consider the position of those accused who were non-directors i.e. accused no's 3 and 5.

[101] It is not disputed that accused no 3 resigned as director from Avid's board in November 2004. Notwithstanding, it was Mulder's testimony that shortly after accused no 1 made enquiries about Avid's earlier bid for investment by the SSC, accused no 3 paid him a visit at work. From the company profile which he had earlier received from accused no 5, Mulder saw that accused no 3 was a director. Though he on that day did not introduce himself as such or said he was representing Avid, Mulder accepted accused no 3 to have approached him and talk about the company in that capacity. As regards what exactly accused no 3 told Mulder when they met in January 2005 is not clear. At first he said the accused said he represented Avid but later changed course saying that the accused never said that he was there on behalf of Avid. The ambiguity on this aspect of his evidence had not been cleared up. The latter version is consistent with the testimony of accused no 3 and for reason that Mulder's evidence on this point is single, has to be accepted as correct. Evidence that he associated himself with Avid followed

on a leading question posed by the prosecutor and, in my view, not too much should be read into it. Having seen his photo in Avid's profile and accepting him to be a director, subjectively made Mulder feel more comfortable about Avid as an investment company. Other than this, accused no 3 had no further contact with the SSC or its managers.

[102] The State's contention that Mulder's evidence was not challenged at the time but only disputed afterwards and therefore must be accepted, is consistent with the law. (I will return to this point later.) Though accused no 3 does not dispute having met with Mulder as testified, he disputes that he at any stage gave out that he was representing Avid in any capacity. What the evidence of Mulder did not establish is the exact words used by the accused at the time or the context in which it was used. It is further clear that there was no talk about Avid's bid for the proposed investment by the SSC. There could therefore not have been any misrepresentation on his part as far as it concerned the investment deal. Evidence that accused no 3 knew that he was still being portrayed as a director in the company profile and that his visit to the SSC was to confirm his position in Avid – as Mulder seemed to have assumed – is lacking; neither can this be inferred from the established facts. The alleged misrepresentation made to Mulder has therefore not been proved, moreover where he had come on his own and not in the company of his co-accused. The assumptions made by Mulder in this regard were his own subjective reasoning and cannot be seen as evidence incriminating accused no 3.

[103] Accused no 2 thereafter puts him on the scene during two subsequent meetings held where further information was sought by the SSC about Avid, and when Kandara gave a briefing on progress made with the investment. Accused no 3 however disputes having attended as testified. No evidence was adduced about accused no 3's involvement in deliberations conducted during these meetings, if any.

[104] What must be decided is whether the accused, through his actions and association, made any misrepresentation to the SSC that was material to the

investment made with Avid, acting individually or in collaboration with his co-accused.

[105] His attendance of meetings where issues relating to the investment were discussed, also does not take the State case any further, as there is no evidence as to the involvement of accused no 3 during these meetings or that he openly associated himself with what was decided. To this end no fraudulent conduct on his part was shown and from his mere presence at these meetings (which he disputes), it cannot be inferred that he acted with common purpose. That is not the only reasonable inference to be drawn from the proven facts.

[106] For the aforesaid reasons the offences set out in the main and alternative of count 1 has not been proved, and accused no 3 stands to be acquitted.

[107] Earlier I alluded to the company profile presented to the SSC by accused no 5, the extent to which it portrayed Avid as an established investment company, and the effect it had on the awarding of the investment. There is no need to rehash what has already been stated except for saying that the conclusion reached that a number of material misrepresentations were made to the SSC through the company profile, is conclusive. In addition, two State witnesses testified about company information parted by accused no 5 which equally turned out to be false.

[108] It is not disputed that although accused no 5 was not officially appointed by Avid in any capacity, he promoted the company and partook in the company's business at will. He recruited accused no 1 and advised accused no 4 to become a director; he also approached accused no 6 to consider directorship. During this period he brought them in contact with Kandara. This tends to show the working relationship between him and Kandara; moreover when his subsequent participation in the investment deal is considered. According to State witnesses Mulder and Green he presented them with the company profile and documents about an earlier investment

(Navachab) which Avid had successfully managed. He openly promoted the company and elaborated on its distinguished shareholders. He was the contact person between Avid and the SSC until the 21st of January 2005 when he was told by the SSC managers that they would no longer work with him. At the meeting between the SSC managers and accused no 1, one of the issues raised was that contact persons had to be identified by Avid. That took him out of the equation as far as it concerned further contact with the SSC.

[109] However, from accused no 2's testimony it would appear that he remained engaged with the investment deal behind the scene in that he attended the meeting where the shareholders were discussed; also the briefing by Kandara on progress and status of the SSC investment. Other than attending these meetings there is no evidence of his involvement or with the decision making process during these meetings, which culminated in the resolutions presented to the SSC. Also from the testimonies of accused no's 1 and 2 it is clear that he carried the message that accused no 2 would be travelling to Johannesburg and the arrangements made in that regard. As shown above, this was Kandara's plan in which accused no 5 had some role to play.

[110] When asked to explain why the evidence of Green and Mulder had not been disputed in cross-examination, he blamed his erstwhile legal representative for not taking up his instructions with State witnesses. Though he explained that he had been making notes on which he consulted his lawyer during breaks, he did not explain what he did or attempted to do when realising that his counsel was not executing his instructions. Neither has any attempt been made after having replaced his legal representative to apply for the recalling of witnesses in view of his erstwhile counsel's remissness.

[111] Objectively considering the explanation proffered by accused no 5 it must be noted that despite the lack of formal legal education, the accused is a sophisticated and educated person in the field of commerce and politics. The unchallenged evidence formed the very basis of allegations against him in the fraud charge and could therefore not have gone unnoticed by either him or his

counsel. According to him he was aware of the inadequacies in his defence but clearly did nothing about it, letting it pass unchallenged. Notwithstanding, he contended that State witnesses Green and Mulder were not to be believed.

[112] The general rule of practice is to put the defence case to State witnesses whereby it is ensured that trials are conducted fairly and to afford witnesses the opportunity, whilst still on the stand, to answer challenges to their evidence. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[20] which had been endorsed in this Jurisdiction in a number of cases it was said that -

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character'. (Emphasis provided)

The rule applies to the challenging of all evidence adduced by the other party, irrespective of it being hearsay evidence, inadmissible evidence, lack of proof of authenticity, or on accuracy.[21]

[113] The omission to cross-examine the witnesses on material aspects of their evidence which directly implicates accused no 5, must be viewed on the facts and circumstances of the case. It is common cause that he openly associated himself with Avid and promoted it as an investment company. He unofficially assumed the role of the public relations officer of Avid until it had reached the point where the SSC managers refused to work any further with him.

[114] In these circumstances and given the unsatisfactory explanation proffered for failing to challenge crucial evidence against him, the only reasonable conclusion to come to is that witnesses Green and Mulder were credible as to what he had told them about Avid, and that it was him who

[20] 2000(1) SACR 1 (CC) par 61.
[21] *S v Boesak* 2001(1) SA 912 (CC).

handed them the profile. Accused no 5's evidence, on the contrary, has the making of an afterthought aimed at divorcing his actions from false information presented to the SSC managers, either orally or by way of documentation. These misrepresentations clearly paved the way for subsequent discussions and preparation to succeed in their bid. I am not persuaded by counsel's submission that whatever representations accused no 5 made amounted to nothing more than 'puffing'. On the contrary, he actively participated in disseminating information that was materially false and gave no explanation from whom or where he gathered this information. Taking into account the close relationship between him and Kandara and the latter's role in the affairs of Avid at the time, it would appear to me reasonable to infer that this likely came from Kandara himself, as none of the directors testified about them having been privy to this information.

[115] Whereas his evidence as regards the misrepresentations made to the SSC had been rejected, the court must by way of inferential reasoning decide whether the accused had the required *mens rea.* Considering the evidence as a whole, I am satisfied that it had been established beyond reasonable doubt that accused no 5 either knew that the information was false or had no honest belief in its truth. Notwithstanding, he associated himself therewith and recklessly continued making the fraudulent representations.

[116] It was argued on the accused's behalf that once the placement of funds with Avid was cancelled, whatever representations made to the SSC prior thereto, falls away, alternatively, its impact was too little to constitute fraud. This means that accused no 5's actions are 'cancelled out', it was said. Counsel did not submit any authority in support of his contention.

[117] It has already been found that the awarding of the investment to Avid was primarily based on documentary proof i.e. the company profile, resolutions and shareholders list, as well as oral presentations made by accused no's 1, 2 and 5. Despite the provisional suspension of the transfer of funds in order to clarify certain issues with accused no 1, the tender itself was never cancelled and was ultimately awarded on the same terms and documents presented. There is accordingly no merit in counsel's contention

that any fraudulent representation made prior thereto, should accordingly be disregarded. In any event, the subsequent cancellation of a tender, deal or transaction would not *per se* nullify any fraudulent representation made prior thereto.

[118] For the foregoing reasons accused no 5's conduct constituted fraud and he stands to be convicted on the main count.

The alternative count of Theft

[119] What remains to be decided is the charge of theft in the alternative to the main count in respect of accused no's 3, 4 and 7.

[120] Regarding accused no's 3 and 4, there is no evidence that could possibly link them with the appropriation of monies paid over to Avid, or part thereof. Therefore, they stand to be acquitted on the alternative of count 1.

[121] In respect of accused no 7 the relevant facts of the case against him have been outlined in the court's s 174 ruling and for the sake of clarity it seems necessary to repeat what appears at par 86:

'With regard to accused no 7 it is common cause that he was not personally engaged in the investment dealings between the SSC and Avid and only came into the fray after N$29.5 million of the SSC investment was transferred into the trust account of Namangol Investments (Pty) Ltd. Accused no 7 at the relevant time was the sole director and shareholder of the company. During the transfer Namangol's trust account reflected a credit of N$221 945.33. On the same day (28 January 2005) the amount of N$20 million was transferred into a South African account registered in the name of Allan Rosenberg Investments Services (hereinafter Rosenberg). Five days later a further N$6.3 million was transferred into the account of Dean Africa CC, another South African entity where after several transfers from the trust account followed, involving substantial amounts. On 11 February 2005 Namangol however recalled the investment made with Rosenberg and when legal proceedings were subsequently instituted in the High Court of South Africa (Witwatersrand Local Division) (as it then was), judgment was entered by consent between the parties whereby Rosenberg was ordered to pay R30 million to Namangol, exceeding the

actual investment made with it by N$10 million. Though of no significance to the present proceedings, the agreement reached between Rosenberg and Namangol which was made an order of court was shady. Be that as it may, Rosenberg paid the sum of R15 million into the account of Greyling Orchard Attorneys' Trust Account who, in turn, transferred N$14.9 million thereof into the *personal bank account* of accused no 7 which, by then, only reflected a balance of N$51 013.21. What followed thereafter is a constant dissemination of large sums of money from the personal account in favour of various beneficiaries, family members and other entities. Part thereof was for personal investment or paid into the business account of Namangol; vehicles were bought and paid for from this account; outstanding debt was paid; and a large amount was given to a church. Of note is a cheque drawn in the amount of N$500 000 in favour of Mrs Kandara on 30 March 2005. The above transactions have been admitted by accused no 7 (and co-accused) in a document handed into evidence and marked Exhibit 'DDD-1'.

[122] In addition, on 07 July 2005 a further sum of N$4 000 000.00 was transferred from Namangol into the account of Dey-Yar Investment CC which had been registered on the 10th of June 2005 by Kandara, being the only member. The money deposited into this account was soon depleted and on the 20th of July 2005 the account showed a zero balance. No evidence was presented explaining why this large sum of money was paid over to Kandara, and rather tends to underscore the irrational shifting of large sums of money between accused no 7 and Kandara at the time.

[123] Though not disputing that the sum of N$29.5 million was paid over to Namangol, accused no 7 denies having misappropriated funds of the SSC. It has throughout been his case that he was never informed by Kandara that the money deposited with Namangol emanated from the SSC investment; neither did he know that it was transferred by Avid or that it was stolen. Whereas Kandara never disclosed the source of the money to him, he was under the impression that this was Kandara's personal funds, as he understood Kandara to have owned several businesses. Kandara's instructions to him were oral and not in writing. Based thereon, it was submitted on his behalf that it was Kandara's money and not that of the SSC or Avid. According to him he had only heard of Avid during the s 417 inquiry and not prior thereto

which, he says, explains why he had no idea that the funds were transferred from Avid into Namangol's call account.

[124] In his plea explanation[22] accused no 7 explained how he met Kandara between September and October 2004 and that he wanted to invest through Namangol. The sum of N$10 million was invested and returns on the amount were subsequently paid over to him in December of the same year. From evidence adduced, this was what became known as the Navachab deal. During January 2005 Kandara again approached him with the view of investing the approximate amount of N$30 million and asked to be introduced to Namangol's traders. He put them in touch with one another as requested. Kandara borrowed money from accused no 7 with the understanding that he could recover the money advanced upon receipt of his returns on the investment. He did not mention the amounts involved in his plea explanation but in his testimony gave a longwinded explanation of his relationship with Kandara and the to and fro borrowing of large sums of money between them. This started within two weeks after they had met and prior to the N$29.5 million investment made on 28 January 2005.

[125] I do not deem it necessary to summarise these loans between accused no 7 and Kandara in any detail. Suffice it to say that on the strength of accused no 7's own evidence, there is simply no logic in his explanation about the loans between them. Despite these loans being the cornerstone of his defence, he kept quiet about it until giving his testimony. In fact, from reasons to follow it would become evident that these loans came into existence after the fact for purposes none other than attempting to explain why money that was *invested* with Alan Rosenburg, ended up in the *personal* bank account of accused no 7. What is further evident from his evidence is how he during these loans made no differentiation between his personal capacity and him acting as the CEO of Namangol, a legal entity. At one stage he demonstrated this when stating that he was the sole shareholder and that the company belonged to him; therefore he could use company money as he deemed fit. In some instances again he would prepare company resolutions pertaining to

[22] Exhibit 'G'.

personal loans between him and Kandara, clearly refuting his earlier beliefs that he and the company was one. The extent to which the accused tried to exonerate himself from any misdemeanour is evident from his testimony in cross-examination when he said he can no longer remember what the purpose was of Namangol having a trust account. With respect, I find the accused's response absurd, irrespective of him complaining of the lapse of time.

[126] In an attempt to corroborate his evidence, he relied on documents such as company resolutions, Namfisa quarterly reports, letters addressed to Kandara, and his founding affidavit relating to a court case filed in South Africa to retrieve funds invested with Alan Rosenberg. However, during cross-examination it soon became clear that these documents are inconsistent with his own evidence and tends to show that it was either fabricated or misrepresents the truth.

[127] According to accused no 7, Kandara during the second week of January 2005 told him about the second investment and gave a breakdown of how the money should be handled. It must be noted that this was even before the investment of N$30 million was awarded to Avid on the 21st and the funds being transferred only on the 27th of January 2005. The breakdown added up to N$29.5 million and not N$30 million which he expected to receive from Kandara. He only came to know about the amount of N$29.5 on the 28th of January 2005 when the bank informed him of the amount deposited into Namangol's call account. He could therefore not have known about the N$500 000 shortfall. This contradicts his own evidence about the alleged instructions he received from Kandara, and at what stage it happened.

[128] He went on to say that part of the instruction was that he had to keep N$3.2 million on behalf of Kandara because the latter did not have a bank account. To his mind Kandara was a successful business man who had N$30 million to invest, yet he does not have a bank account of his own? Though Mrs Kandara confirmed that her husband did not have his own bank account, but she opened an account in her name which he had been using. Why then

was it necessary to turn to accused no 7 for help? This fact, considered together with him having held this amount for Kandara whilst borrowing substantial sums of money during the same period, defies logic. When Kandara started borrowing money from accused no 7 about two weeks after they had met, he had no background information about the person other than his business card and a contact number. He never bothered to establish the kind of business Kandara was into and whether he would be able to service the loans. This is certainly not conduct to be expected from a business man of the accused's standing in the corporate world, but rather tends to show that they had closer ties than what the accused was willing to admit. Be that as it may, the keeping of a substantial amount of money on behalf of Kandara and his simultaneous borrowing of money is at least suspect. Moreover, the evidence established that funds were transferred from Avid's account into that of Namangol.

[129] What is clear from accused no 7's evidence is that he throughout dissociated himself from Avid as investment company, despite overwhelming evidence showing otherwise. He however maintained that he only came to hear about the company's existence during the s 417 inquiry in July 2005.

[130] Contrary thereto, in an affidavit dated 14 October 2005 (Exhibit 'GGGG') relied on by accused no 7 in the bail application, he explained that during or about September, October 2004 he met Kandara who introduced himself as the Chief Executive Officer of Avid.[23] When asked to explain the contradiction in his evidence, he said the statement was prepared whilst in custody by his erstwhile legal representative and after it was given to him to read, he was merely told to sign, despite the statement being incorrect. He explained that he just followed the instruction because he was in shock.

[131] I pause to observe that it has not been his evidence that he was forced to sign the affidavit, as was argued on his behalf. Though his evidence was vague on this point and he adapted his version as he went along, the final answer was that his lawyer undertook to correct mistakes in the affidavit

[23] See para 4.

pointed out by the accused *after* he had signed. These changes were however never made and the statement in its current form was used and relied on in the bail application; neither had it been corrected subsequent thereto. Accused no 7 now crying foul about the admissibility of the affidavit (in that he claims to have been under duress) and the content thereof being challenged, is not only belated, but has the making of an afterthought. Even where his erstwhile legal representative prepared the statement, he confirmed having read it prior to appending his signature thereto, clearly denoting his approval thereof. Neither did he object at the time of commissioning that the content of the statement was not true and therefore incorrect. The accused's evidence on this point is accordingly found incredible.

[133] He also introduced into evidence a document styled *Investment Agreement* between a certain Frik Blaauw (the Investment Provider) and Namangol Investments (Pty) Ltd (the Funds Provider) signed by both parties on the 27th of October and the 11th of November 2004, respectively. Appended thereto is a *STANDBY LETTER OF CREDIT* issued in October 2004 of which the first paragraph reads: *'On behalf of Avid Investment Corporation (Pty) Ltd, we, SASFIN Bank LTD, hereby issue in favour of …'.* Upon drawing his attention to reference made in the document to Avid having invested N$10 million through Namangol already in 2004, the accused explained that this document was not between him and Blaauw, and that the agreement culminated from discussions between Blaauw and Kandara. It must however be pointed out that the agreement does not support the accused's explanation as the name of Kandara features nowhere in the agreement. Furthermore, the Standby Letter of Credit was signed by the same persons who signed the Investment Agreement namely, the accused reflected therein as fund provider, Blaauw, as investment provider, and two witnesses. This clearly refutes the explanation advanced by the accused and confirms that already in 2004 he had acted *on behalf of Avid* during the Navachab investment, and not Kandara in his personal capacity, as he now claims.

[134] Direct evidence of accused no 7 having had knowledge of the connection between Kandara and Avid is found in Exhibit 'UU', being a letter

prepared by himself and addressed to Kandara, c/o Avid Investments, and a cheque in the amount of N$500 000 deposited into Avid's account. The address inserted by the accused clearly confirms the link between Avid and Kandara. Except for saying that this was the address and bank particulars he had been provided by Kandara, he was evasive on this point and unable to come up with a satisfactory explanation. He however persisted and maintained his stance that he only came to hear about Avid during the inquiry.

[135] Though these documents may not have a direct bearing on the charge at hand, it undoubtedly established the link between Kandara and Avid of which accused no 7 had knowledge prior to the so-called investment made by Kandara. Not only did he know about Kandara's link with Avid, but from the evidence by State witness Schröder and accused no 2, he actually knew that the funds came from the SSC. The accused however disputed their evidence by denying that he ever had contact with these persons.

[136] Ms Schröder was the receptionist at Avid's offices situated in the Trustco building and testified about an incident at the beginning of July 2005 when she was instructed by Kandara to contact accused no 7 who had to deliver a letter addressed to accused no 2. When he later turned up at the office with a sealed envelope and she remarked that she had been waiting for him, he responded by asking her what the SSC's problem was as they would get their money. Her testimony in this respect corresponds with what is stated in her police statement taken down in 2006.

[137] In turn, accused no 2 testified that during April 2005 she discovered from Avid's bank statements that the amount of N$29.5 million had been transferred to Namangol. After Mr Inkumbi from the bank confirmed the said transfer, accused no 2 phoned Namangol's offices and spoke to accused no 7. After introducing himself over the phone he confirmed the transfer made to Namangol. In cross-examination it was pointed out to the witness (accused no 2) that she had made no mention in her statement to the police about her having contacted accused no 7 in connection with the transfer of funds. Though conceding that it was indeed omitted, she was adamant that she gave

similar evidence at the s 417 inquiry, which evidence had not been challenged. This tends to show consistency in her version and that it was not recently fabricated.

[138] Besides accused no 7's blunt denial of the two witnesses' evidence, there is no controverting evidence showing otherwise. Witnesses are not obliged to record their evidence in all its detail in a police statement and when elaborating during their oral testimony on what has earlier been stated, the courts generally do not view that as deviating from the earlier statement, provided there is no material conflict between the two statements. When applying this rule of practice to the present facts, considered together with the duly established documentary link between Kandara and Avid, I am satisfied that these two witnesses were credible.

[139] From the preceding exposition it seems to me inevitable to come to the conclusion that accused no 7, at the time of taking possession of funds transferred into Namangol's account, knew that it was not Kandara's money, but an investment made by the SSC channelled through Avid. Had he not come to realise this from the day of the transfer, he soon thereafter must have appreciated that the money could not have belonged to Kandara. This conclusion is fortified by documents he introduced into evidence. Accused no 7's evidence in this regard is false beyond reasonable doubt and falls to be rejected.

[140] Despite appreciating that the N$29.5 million did not belong to Kandara but to the SSC, accused no 7 notwithstanding and after the investment was called up, had N$14.9 million of the investment paid into his personal bank account which was spent abundantly within a short period of time. His protracted explanation about it having been part of a loan he got from Kandara on the strength of a promise by Alan Rosenberg to repay him from funds due in the sum of US$38.8 (as set out in a Settlement Agreement), is not supported by any other (reliable) evidence and can safely be rejected as false. Besides mentioning the existence of this astronomical amount due to him by February 2006, he at no stage drew attention thereto. Bearing in mind

that he by then would have been in the position to make good the monies lent from Kandara and refund the SSC for their loss, accused no 7 was unable to satisfactorily explain why he to date never followed up on the investment. The best he could do was to explain that it never materialised because of the liquidation of Namangol and his personal sequestration. When reminded that it would have been all the more reason to tell the liquidator about the investment which could salvage his company and himself from downfall, he said that he actually did, but nothing had come from it. Had that indeed been the case, his counsel undoubtedly would have addressed it in cross-examination when the liquidator testified. In the circumstances it seems reasonable to infer that the reason for such failure was because the accused fabricated evidence about the offshore investment in an attempt to explain the so-called loan he got from Kandara.

[141] There can be no doubt that Kandara from the onset intended appropriating funds emanating from the SSC investment and in his endeavours, together with accused no 7 and Alan Rosenberg, concocted a scheme to swindle the SSC out of its money for their personal benefit. This much is evident from a letter dated 07 February 2005 sent by Alan Rosenberg to Avid, purporting to be a guarantee bond assigned to Avid in the amount of N$30 million with a return value of N$31 476 494. This despite having received only N$20 million (and not the amount stated) which was recalled by Namangol after four days. The instituting of court proceedings in South Africa between Namangol and Alan Rosenberg which, except for payment of N$15 million through his attorneys, seems to me to have been nothing more than a facade to re-route the investment away from Namangol and have the money transferred to accused no 7's private account, under the guise of a loan advanced by Kandara. On paper the investment of N$20 million was made by Namangol, according to which the money had to be returned to Namangol as lawful owner/possessor when recalled, no one else. At this stage Kandara had no say over the money and neither could it legally have been paid into accused no 7's private account.

[142] From the above it is evident that accused no 7 had all along been in cahoots with Kandara and Alan Rosenberg. What has further been established is that there was no intention to return the money either to Namangol or Avid. Of the amount of N$30 million intended for investment by the SSC through Avid, N$29.5 million was transferred to Namangol over which accused no 7 exercised control. As demonstrated, they assumed ownership of the moneys with the sole intention to deprive Avid or the SSC of their lawful possession and ownership of the funds. Accused no 7 was clearly not the innocent party he portrayed in court. Instead, there is overwhelming evidence showing that during his dealings with Kandara and Alan Rosenberg, he knew that the SSC's money had been stolen.

[143] It was submitted on his behalf that there should have been contemporaneity with regards to the act of appropriation and intention to permanently deprive the owner or lawful possessor of his property. This, in my view, had duly been established when accused no 7 actively joined forces with Kandara in appropriation of the Avid investment by using Namangol as conduit to get control of the money. He was a co-perpetrator right from the beginning. It is trite that theft is a continuing offence and in the present instance there were several acts of ongoing appropriation committed over a period of time in which accused no 7 was instrumental. The first was when the money was transferred to Namangol by Kandara (contrary to the SSC's instructions), from where it was deployed and controlled by accused no 7. At the outset the amount of N$3.2 million had been set aside for Kandara's personal use. The recalling of the N$20 million investment a few days after it was made with no prospects of it being reinvested elsewhere, or returned to the investor, confirms the existence of a mutual agreement between accused no 7 and Kandara to misappropriate the funds, thereby permanently depriving the lawful owners or possessors of the money. As for accused no 7, it would not involve the full amount but the actual amount of N$29.5 paid over to Namangol.

[144] In the result, I am satisfied that the State proved beyond reasonable doubt that accused no 7 has committed the offence of theft by conversion and should accordingly be convicted.

Count 2

[145] On this count all the accused persons were charged with a contravention of s 424(3) of the (repealed) Companies Act 61 of 1973. In respect of accused no's 1 – 6 the charge relates to Avid whilst for accused no 7 it concerns Namangol.

[146] Subsection (3) reads:

> 'Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence'.
> (Emphasis provided)

The prohibited carrying on of business referred to in subsection (1) requires an element of recklessness or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.

[147] Subsection (3) has a wide ambit aimed not only at directors of the company or its employees as it includes *every person*, but with the following proviso: The person must (a) *knowingly* have been a party to the carrying on of any business of the company in a reckless manner or (b) with *intent to defraud* creditors or for any fraudulent purpose. It thus requires more than a mere association with the reckless carrying on of the business by another. A clear distinction is made between a person who carries on company business in a reckless manner, and a person who trades or conducts company business for purposes of defrauding others.

[148] In order to sustain a conviction in contravention of s 424(3) in respect of those accused who had made themselves guilty of fraud – albeit acting in their personal capacities – the court has to rely on the same facts relied on when proving the offence of fraud. This in my view would constitute the impermissible duplication of convictions. Accordingly, accused no's 1, 2 and 5 are entitled to their discharge on count 2.

[149] As for accused no 3, there is no evidence showing that he was knowingly a party to the carrying on of Avid's business in a reckless manner, or for any defrauding purpose. He is equally entitled to be discharged on this count.

[150] Accused no 4 was a director in the company and as such directly involved in the carrying on of its business. On her own admission and the evidence presented, she thoughtlessly signed two resolutions which had far-reaching consequences for the company. She denied having personally been involved in any discussion or meeting prior to the signing of the resolutions. Notwithstanding, she gave out to have been part of the decision making process when appending her signature to both resolutions, well knowing that it was not the case. She clearly failed in her duty as director and by so doing made herself guilty of reckless conduct in contravention of s 434(3) of the Companies Act and accordingly stands to be convicted.

[151] Accused no 6's only involvement in the business of Avid was when it was proposed that he accompany accused no 2 as shareholder to the presentation made to the SSC managers on 19 January 2005. Subsequent thereto he attended two meetings from which the shareholders list and board resolution emanated. The last meeting was a mere briefing on the investment itself. It was submitted by the State that he at some point after the investment became suspicious about the guarantee bond received from Alan Rosenberg, but failed to raise and address his concerns. Had he done so, the argument went, part of the investment could have been salvaged.

[152] It had already been established that there is no evidence that accused no 6 during the presentation made any misrepresentation. Neither has any evidence been presented as to his participation in the preparation of the shareholders list or resolution; these were crafted by Kandara. Thus, prior to the issuing of these documents to the SSC, there is nothing showing that accused no 6 during these deliberations acted with the intention to defraud any creditors, or for any fraudulent purpose; neither was it established that he was knowingly a party thereto where others were involved in the carrying on of the business of Avid. It must be remembered that when he afterwards became suspicious and failed to act on his suspicion, the investment deal was already done and the offence of fraud completed. His failure to raise the alarm cannot revive the offence of fraud perpetrated, for which he should now be found guilty. The State's argument on this point is accordingly found to be without merit and accused no 6 should equally be acquitted on count 2.

[153] Next I turn to consider the position of accused no 7 whose circumstances are completely different from that of his co-accused in that it relates to the company Namangol, of which he was the sole shareholder.

[154] The main difference between him and his co-accused is that he was acquitted on the main count of fraud but stands to be convicted of theft (by conversion). As demonstrated above, he together with Kandara and Alan Rosenberg devised their evil plan to swindle Avid and the SSC out of the investment money. This was mainly possible due to the manner in which accused no 7 carried on the business of Namangol when managing the investment placed with it. From his own testimony it became clear that he made no distinction between the company and himself – to him it was one and the same thing. There can be no doubt that this was not out of ignorance, it was wilful. The business of Namangol was carried out by the accused in a reckless manner and for fraudulent purposes, the sole intention being to appropriate funds invested with the company. He therefore made himself guilty of the offence charged and must accordingly be convicted. I am further satisfied that a conviction on this count does not constitute a duplication of convictions.

Conclusion

[155] In consideration of the totality of evidence adduced, I am satisfied that there is insufficient proof for a finding that, except for accused no 7, the other accused were equally aware of any intention to steal the SSC's funds, or were involved in the unlawful appropriation thereof. Therefore, in my view they cannot be held accountable for what happened to the funds afterwards. In this regard accused no 7 must take the full blame, for he joined forces with the late Kandara to hijack the investment for their personal gain.

[156] What the evidence established beyond reasonable doubt is that the accused persons allowed Kandara during the bidding stage to manipulate the process and succeeded in the awarding of the tender. During this process they abdicated their duties and responsibilities towards Avid by consciously allowing and accommodating an outsider to abuse the company to achieve this goal. In the process substantial misrepresentations were made by the accused persons to the SSC, which mostly emanated from the creative mind of Kandara and which the accused simply adopted as their own, irrespective of the consequences. Those accused who made themselves guilty of fraudulent conduct each had a role to play in swaying the SSC managers to award the tender to Avid. Though they personally stood nothing to gain from it, their intentions and actions jointly satisfy the elements of the offence of fraud and they cannot escape conviction.

[157] In the result, the court finds as follows:

Count 1: Main count – Fraud: Accused no's 1, 2 and 5: Guilty.
Accused no's 3 and 4: Not guilty and discharged.

Alternative count – Theft by conversion: Accused no 7: Guilty.

Count 2: Accused no's 1, 2, 3, 5 and 6: Not guilty and discharged.
Accused no's 4 and 7: Guilty.

_____

JC LIEBENBERG

JUDGE

APPEARANCES:

STATE:	E E Marondedze (Assisted by C Lutibezi) Of the Office of the Prosecutor-General, Windhoek.

FOR ACCUSED NO 1:	S Namandje Of Sisa Namandje & Co, Windhoek.
FOR ACCUSED NO 2:	P D Theron Of P D Theron and Associates, Windhoek.
FOR ACCUSED NO'S 3, 4 & 5:	G Kasper Of Mororua & Associates, Windhoek.
FOR ACCUSED NO 6:	J H Wessels Of Stern & Barnard, Windhoek.
FOR ACCUSED NO 7:	S S Makando Of S S Makando Chambers, Windhoek.