

REPUBLIC OF NAMIBIA

REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 05/2018

In the matter between:

**THE STATE**

and

**KATRINA HANSE-HIMARWA**

**ACCUSED**

**Neutral citation:** *S v Hanse-Himarwa* (CC 05/2018) [2019] NAHCMD 229  
(08 July 2019)

**Coram:** LIEBENBERG J

**Heard:** 29 October – 02 November; 12 – 16 November 2018; 11 – 14  
March; 01 – 05; 15 – 18 April; and 21 – 22 May 2019.

**Delivered:** 08 July 2019

**Flynote:** **Constitutional law** – Fair trial – Accused alleges ACC agents conspired with state witnesses during investigation stage as statements were similarly worded – Similarity in witness statements explained by investigating officer – Witnesses reporting on same events – Statements drawn from notes made by investigating officer during interview with witnesses – Investigating

officer denies any factual input on contents of statements – Similarities concern issues unrelated to charge – Witnesses denied alleged conspiracy – Witnesses claimed ownership of their respective statements.

**Constitutional law** – Fair trial – Section 31 (1) of the Anti-Corruption Act 8 of 2003 not complied with – Investigating officer alleged to have withheld witness statements – Evidence of investigating officer controverts allegation – Impugned statements formed part of docket sent to the Prosecutor-General – Statements withheld only after consolidated statement by witness.

**Constitutional law** – Fair trial – Whether witnesses unduly influenced – Factors to be taken into account – Authority exerted over witnesses allegedly influenced – Relationship between the persons – Type of witness as regards age, standing in society and intellect – Susceptibility of state witnesses not established.

**Constitutional law** – Review – Irregularity in selection of beneficiaries – Accused alleges selection committee did not act fairly in allocation of houses – Article 18 of Namibian Constitution empowers aggrieved persons right to approach competent court to seek redress – No review application lodged – Issue before court whether established beyond reasonable doubt that accused interfered with selection process – Criminal Court not required to decide issues ought to have been brought in terms Article 18 of the Constitution i.e. question whether selection process was fair.

**Criminal Procedure** – Charge – Accused charged with s 43(1) of the Anti-Corruption Act 8 of 2003 – Issue for determination – Whether accused used her position or office corruptly – Accused acting in region in capacity of supervisor – Accused had no power or authority over selection process – Accused assumed power and authority through her actions – Accused correctly charged.

**Criminal Procedure** – Charge – Accused charged with s 43(1) of the Anti-Corruption Act 8 of 2003 – Meaning of corruptly – Definition to be accorded its

ordinary meaning – General meaning of ‘corruptly’ to act knowingly and dishonestly with the specific intent to subvert or undermine the integrity of something – Accused actions squarely falls within the ambit of the meaning of corruptly.

**Summary:** The accused is charged with a contravention of s 43(1) of the Anti-Corruption Act 8 of 2003. It is alleged that the accused corruptly used her office or position corruptly in order to obtain gratification for two of her relatives. The charge stems from an incident where accused, at the time as the Governor of the Hardap Region, caused the names of two persons to be removed from the list and to be substituted with two of her family. The accused pleaded not guilty by denying the allegation, claiming that she was not empowered to do so. Furthermore, she alleged that she could not have a fair trial due to the manner in which the investigating officers of the Anti-Corruption Commission conducted themselves by influencing state witnesses to incriminate the accused, withholding evidence from the Prosecutor-General during the stage of referral for possible prosecution. This is mainly based on witness statements being similar in respect of the duplication of some words or sentences used in some of the statements. Further, that the officers unduly influenced state witness by applying pressure on them to incriminate the accused when making their statements.

*Held*, that, in the present instance the duplication in the statements only concerns peripheral matters limited to the selection process not implicating the accused.

*Held*, further that, the taking of notes by investigating officer during interviews with state witnesses and drafting of statements from the notes did not constitute an irregularity.

*Held*, further that, the consolidation of the four statements into in of one of the state witness’s was not irregular. The explanation by the investigating officer is reasonable as there was no reason for the officer to hide the statements

due to any irregular changes made thereto or to withhold information favourable to the accused.

Held, further that, section 31 (1) of the Anti-Corruption Act 8 of 2003 had been complied with as there is no evidence about statements not forming part of the docket when forwarded to the Prosecutor-General for consideration.

*Held*, further that, the evidence did not establish that any undue influence had been exerted by investigating officers on state witnesses to align their statements in order to incriminate the accused.

*Held*, further that, though the selection process might not have satisfied the applicable criteria and therefore reviewable in terms of Article 18 of the Constitution and no application made to have the process reviewed, it is not the court's function or duty during criminal proceedings to make any finding in that regard.

*Held*, further that, the accused was correctly charged with a contravention of section 43(1) of the Anti-Corruption in that she assumed power and authority over the selection process when exerting her authority and that of her office as Governor to compel the selection committee to amend the list of beneficiaries as per her directive.

*Held*, further that, the accused's intervention, being a public officer, falls within the ambit of the ordinary meaning attributed to act corruptly.

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**ORDER**

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On a count of contravening s 43(1) of the Anti-Corruption Act 8 of 2003: Corruptly using office or position for gratification, the accused is found guilty as charged.

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## JUDGMENT

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LIEBENBERG J:

*Introduction*

[1] In his opening remarks during oral submissions, Mr *Namandje*, counsel for the accused, referred to the role of the judiciary when judges (add thereto lawyers) that served during the apartheid era, allowed injustices to occur in cases they presided over.<sup>1</sup> It was submitted that judges in modern times should not become complacent now that apartheid and the violence that accompanied that system have seized, but must be vigilant against perpetuating injustices, albeit presenting itself in different forms. Today we live in a society characterised by extreme disparities of wealth and power and distinguished by extreme dispossession. With regard to the present case, defence counsel argued that the state may be trivialising the issue by getting to pin down a senior politician but, in accordance with the Namibian Constitution, all people must be treated with dignity and be given a fair trial. It was said that 'The court should therefore not adopt an inappropriate complacent view of our present social order and of the legal system that upholds and enforces it'.<sup>2</sup>

[2] In light of these remarks it seems necessary to make some comments at the onset as regards the approach followed by the court when deciding the matter and the accused person being on trial.

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<sup>1</sup> Article on '*Submission on the role of the judiciary under apartheid*' by Judge Edwin Cameron, published in the South African Law Journal.

<sup>2</sup> *Ibid* at 438.

[3] Under Article 10 of the Namibian Constitution all persons shall be equal before the law and no person may be discriminated against on the grounds stated, including social or economic status. In terms of Article 5 these fundamental rights shall be enforceable by the courts as judges are required to take the oath or solemnly affirm to defend and uphold the Constitution as the Supreme Law and to fearlessly administer justice to all persons without favour or prejudice in accordance with the laws of the land (Article 82(1)).

[4] Thus, the accused's status and political affiliation as former Governor of the Hardap Region or currently as Minister of Education, Arts and Culture is inconsequential to the court's approach when evaluating the evidence adduced by either the state or the defence. Because all persons are considered equal before the law, the personal circumstances of the accused at trial stage are of little or no consideration to the court when evaluating the evidence adduced, except where relevant to the particulars of the charge.

[5] With regards to the investigation conducted by officers of the Anti-Corruption Commission (hereafter the 'ACC') and the possible infringement of the accused's rights enshrined in the Namibian Constitution, including the right to a fair trial, this question will not be decided in isolation but in the end on the facts established and against the totality of the evidence.

[6] Accordingly, in view of Mr *Namandje's* remarks, I see no reason for the court to follow any different approach in its assessment and consideration of the evidence and the applicability of rules and principles of law. It is against this backdrop that I proceed to discuss and evaluate the evidence adduced.

*The investigation by the Anti-Corruption Commission and referral – was the accused deprived of a fair trial?*

[7] It was contended by defence counsel that the accused should be acquitted on the basis of several legal and factual grounds, each of which being decisive on its own.

[8] The accused firstly took issue with and contended that the trial is flawed in that the accused's right to a fair trial has been infringed due to the manner in which evidence was obtained from state witnesses during the different stages of investigation. The argument is essentially based on what was described as the 'striking similarities' in the wording of some witness statements when compared to others.

[9] The investigation was primarily conducted and directed by two officers of the ACC appointed in terms of s 13(1) of the Anti-Corruption Act, 2003 (hereafter the 'ACA'). Mr Esterhuysen started the investigation from whom Mr Masule took over when the former resigned towards the end of 2015. Besides leading the evidence of the investigating officers, the state also called the Director-General of the ACC, Mr Paulus Noa, whose evidence, in particular, dealt with the referral of the matter to the Prosecutor-General (PG) for her decision to prosecute, or otherwise.

[10] It is common cause that Mr Esterhuysen recorded the statements of five state witnesses in which he adopted the same procedure. Firstly the witnesses would be interviewed individually during which he took notes for his personal use. He then returned to his office and, based on his notes, prepared the statements of the particular witnesses. He explained that although he drafted the statements in his own words, he did not have any factual input on the contents. He would thereafter return to the witness and read through the statement together. If changes were to be made, this was done there and then where after the statement was printed and the witness was required to read and verify the content; if satisfied the witness appended his/her signature to the statement. All statements were made under oath and commissioned by either the two investigating officers or their colleagues.

[11] With regards to similarities noted in the wording and recurring grammatical mistakes made in some of the statements, the witness explained that they look alike because the witnesses' reports covered the same events and processes explained in the statements i.e. the preparation of the list of beneficiaries. Pertaining to the age of 42 years erroneously appearing on the

statements, Mr Esterhuysen conceded that it was a mistake on his part but remarked that the ID numbers of the witnesses were correctly recorded in each statement. When put to him under cross-examination that the 'startling similarity of the statements' is testament of a collusion between the witnesses and the investigating officers, he dismissed the allegation as false and said that each witness read and signed the statement, claiming it as his/her own statement and not that of the investigating officer who prepared and reduced it to writing. When pointed out to him that some of the witnesses during their testimony disowned certain words used in the statement, he responded saying that it remained the duty of the witness to have identified any mistakes made and to have same corrected before signing the statement. Regarding two of the statements commissioned at exactly the same time, it was explained that this came about merely because these persons worked in the same office and not because their statements were jointly crafted as suggested.

[12] The accused *inter alia* pleaded that, irrespective of the merits of the allegations charged, the underlying decision of the PG and the charge preferred against the accused are invalid and unlawful for reason that the requirements under s 31(1) of the ACA have not been satisfied. This is based on a contention that some of the state witnesses' statements did not form part of the docket when submitted to the PG for consideration. In view thereof, it was submitted that it constituted an irregularity which vitiates the trial.

[13] Mr Masule who took over from Mr Engelbrecht finalised the investigation and upon completion, submitted the docket to his senior Mr Becker. Once satisfied that the investigation was complete, he had to forward the docket to the PG for her decision and further instructions. According to Mr Masule the docket was returned to the investigating officer several times with further instructions which, *inter alia*, resulted in the taking of additional statements mainly for purposes of clarification. Mr Masule was not sure whether these instructions came directly from his senior or the PG. After the additional information was obtained, the docket was returned to the office of the PG. This was particularly the case with witness Nghiwilepo from whom he



had to obtain two further statements subsequent to two earlier statements deposited to.<sup>3</sup> As a result of multiple statements obtained from the same witness, Mr Masule took the initiative to consolidate these in a single statement.<sup>4</sup>

[14] As regards the consolidated statement he explained that he requested Mr Nghiwilepo to copy from his four previous statements all information into a single statement and after that was done, they went through the statement together. Having been satisfied that it was correct, Mr Nghiwilepo signed and the statement was commissioned by Mr Masule. The four statements were then removed from the docket and kept on file at the office as it was substituted by the consolidated statement. The existence of the four statements retained by Mr Masule only became known during Mr Nghiwilepo's testimony which led to the belated disclosure to the defence and introduction of the statements into evidence. The investigating officer explained his decision saying that he thought that multiple statements might be confusing and decided to consolidate them in one statement.

[15] Insertions made in ink on the first statement (Exhibit 'N1') was done by Mr Masule for purposes of clarity. He explained where reference was made in the statement to the 'local authority' and 'political leaders' he considered this to be vague and wanted the actual persons referred to, to be mentioned. One sentence where the witness said that he had picked up certain information from the 'grapevine', he scratched this out when Mr Nghiwilepo was unable to say who the exact person was who conveyed it to him. These alterations were done when interviewing the witness in his presence and only for purposes of clarity. Mr Masule denied having had the intention to prescribe to the witness what to record in the statement; neither did he force him to do so.

[16] During the testimony of the Director-General of the ACC, Mr Paulus Noa, he explained the procedure at the ACC when complaints of alleged corruption are made directly to the commission. Contrary thereto, he said in

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<sup>3</sup> Exhibits 'N1 – N4'.

<sup>4</sup> Exhibit 'N5'.

the present instance the commission decided to investigate allegations made in the media about the names of some Mariental residents removed from the list of beneficiaries to whom houses were allocated under the MHDP, as it was of public concern. Personally he was not involved in the investigation and had only forwarded the docket upon completion of the investigation to the PG for her decision. In the covering letter addressed to the PG dated 07 March 2016,<sup>5</sup> the subject matter was the alleged corrupt practices by the Governor (accused), Mayor Kamberute and Regional Councillor Wambo. Mr Noa, during his testimony, explained that these were the names that came up in the investigation and who were considered possible suspects.

[17] In cross-examination Mr Noa elaborated on the procedure adopted by Mr Esterhuysen to take notes when interviewing a witness without these notes forming part of the docket. According to him, what was cardinal is that the statement ultimately had to be made and signed by the witness under oath or affirmation. He was however unable to say why certain statements of witness Nghiwilepo were not filed in the docket. However, as explained by Mr Masule, it is not the case that these statements were never part of the docket. According to him it remained on the docket until such time that he decided to consolidate the statements into one, where after the original statements were taken out and kept on the B-file in his office. That much was confirmed when the statements were produced during the trial.

[18] With regards to the similarities in the witness statements, it was contended that the ACC investigating officers intentionally manipulated witness statements in order to incriminate the accused, to which Mr Noa responded that he did not receive any information or complaint regarding the alleged intimidation of witnesses, in whatever form.

[19] Concerning the procedure adopted by Mr Esterhuysen to first take brief notes of witness reports, this was not considered by Mr Noa to be irregular or ominous. He said that though no such procedure was prescribed or prohibited, there was nothing sinister about proceeding in this way. This is

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<sup>5</sup> Exhibit'A' – Annexure A.

likely because there are no prescribed orders or procedure which regulate the taking of witness statements. As was testified by witnesses Esterhuysen and Noa, what was essential is that the statement must be made under oath (or affirmation) and signed by the witness. I agree. The purpose of obtaining a statement from a witness is primarily to decide whether or not an offence has been committed requiring an investigation. How information is gathered seems to me of less importance: provided that the content of the statement correctly and truly reflects the facts and purview of a witness's report.

[20] As to the unavailability of such notes during a subsequent trial, I am unable to see, under the present circumstances, how the accused could possibly be prejudiced if the notes had gone missing or were destroyed and not available for disclosure. The use of notes was solely to prepare witness statements from, not for state witnesses to testify from during the ensuing trial. In my view nothing further turns on this point.

[21] Concerning the challenge that the requirements of s 31(1) of the ACA had not been satisfied in that 'the Director-General must refer all relevant information and evidence assembled by the Commission to the Prosecutor-General', the evidence of Mr Masule remained undisputed when he explained that he only removed the impugned statements *after* the docket had been returned from the PG's office with further instructions and not before. It thus formed part of the assembled evidence forwarded to and considered by the PG as prescribed by section 31(1) of the ACA. Furthermore, it would *prima facie* appear from the content of these statements that there was no reason for the officer to hide the statements due to any irregular changes made thereto or to withhold information favourable to the accused. Minor changes that were made and incorporated in the consolidated statement were duly explained and considered reasonable in the circumstances. In my view there would be no basis for a finding that this formed part of any scheme initiated by the ACC to incriminate the accused. I am for the foregoing reasons neither persuaded that the officer's conduct constituted an irregularity under s 31(1) of the ACA.

[22] Regarding the similarities between some statements as pointed out by the defence, this clearly came about when Mr Esterhuysen duplicated words, sentences and phrases from one statement onto the other. Though he explained that this occurred due to the witnesses reporting on the same issues they had observed, there is a risk of unwittingly transferring evidence into a witness's statement falling outside the knowledge of the witness. Although one would expect of such witness to disclose any mistake to the officer who either drafted or commissioned the statement, the risk remains real. For that reason the practice must be discouraged as a witness statement should be distinctive and independent from the statements of other witnesses, even where they relate to similar issues or incidents.

[23] In the present instance the duplication complained of in the statements conveys what could be described as peripheral matters limited to the selection process and by no way implicating the accused in any form or manner. Therefore, the seriousness of the concern raised by the defence, in my view, loses significance in the absence of evidence supporting counsel's inference that it ultimately impacted on the final decision taken by the PG to prosecute the accused, or the fairness of the ensuing trial. There is no evidence before court supporting such claim.

[24] Counsel for the accused further contended that there was a concerted effort between state witnesses and the investigating officers to falsely implicate the accused. Paragraph 6 of the accused's plea explanation reads that Mr Paulus Nghiwilepo and Ms Lydia Ganeb 'were constantly under pressure from the agents of the ACC to make statements that incriminate me in particular'. In cross-examination it was put to witness Nghiwilepo as a fact that he told the accused that he was actually influenced by the ACC. However, neither the accused nor any of these persons gave evidence to substantiate such allegation. As for Ms Ganeb, what is missing from her testimony and witness statement is that she was under any pressure to implicate the accused in any form or manner. The evidence at most shows that these witnesses were approached by the investigating officers more than once for purposes of obtaining statements from them while none claimed to

have been unduly influenced to incriminate the accused. Neither could that be inferred from the number of times they were approached to obtain statements from them.

[25] In a further attempt to discredit the state witnesses the defence attacked the legitimacy of the witness statements. The accused asserted that the witnesses were forced by the ACC investigators to align their evidence with incriminating fabrications against the accused which were incorporated into their statements and the witnesses wittingly joining forces. In support of the contention the respective witness statements were closely scrutinised and compared for similarities from which certain inferences favourable to the accused were drawn.

[26] As far as it concerns evidence regarding the meetings held with the accused, it will suffice to say that each witness was extensively cross-examined on his statement and each being adamant that what is contained therein is what had been reported to the investigating officers – albeit not in their own words. They equally confirmed having been satisfied with what is recorded in the statements before appending their signatures. At no stage during their testimony did the witnesses state otherwise or complain of having been forced to produce statements contrary to their beliefs or knowledge. Each claimed ownership of his statement and gave evidence consistent with what is contained therein.

[27] In determining whether the witnesses for the state were subjected to any undue influence during the investigation, one might be guided by factors such as authority exerted over the person alleged to have been influenced; the relationship between the persons and most importantly, the type of witness one is dealing with. Is this a person who, due to his/her age, standing in society, or intellect, is likely to be influenced? For purposes of this inquiry, I do not deem it necessary to look any further for other possible factors; there may be several more, though.

[28] As regards the four witnesses under consideration, there is nothing remotely showing that they were susceptible to influence by the two investigating officers, or that they had any authority over the witnesses. All four witnesses were high ranking officials and held respectable positions in society, while two of them were close friends of the accused. In my opinion, in these circumstances one is not likely to find that a witness is unable to withstand any form of pressure or influence to change or fabricate his evidence, contrary to his own beliefs and knowledge. Moreover, when realising that it would constitute an offence of perjury when made under oath. On the contrary, all the witnesses refuted the suggestion of having been unduly influenced. Bearing in mind the relationship between the accused and witnesses Nghiwilepo and Kamberute, it seems highly unlikely that they would have been willing to falsely incriminate the accused, or team up with officials from the Ministry and ACC officers to do so.

[29] For the foregoing reasons, I find myself unable to come to any conclusion that the evidence given by witnesses Thaniseb, Nghiwilepo, Castro and Kamberute was not their own, but the product of undue influence exerted on them by officers of the ACC to falsely implicate the accused. The assertion is accordingly found to be without substance and falls to be rejected.

[30] In consideration of the accused's fears and concerns that her constitutional right to a fair trial had been breached due to irregularities committed during the investigation stages, the court is bound to take a serious view of pre-trial proceedings that are likely to impact on the trial itself; moreover, where there is evidence of witness statements having been partly duplicated and allegations of undue influence exerted on witnesses to change their evidence in order to incriminate the accused person. The court in *S v Agliotti*<sup>6</sup> found that the prosecution were directly involved in the manipulation of witness statements on matters of which the witness had no independent knowledge. At 459E-F of the judgment it is stated:

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<sup>6</sup> 2011 (2) SACR 437 (SCA).

[287] Any attempt to manipulate the evidence of a State witness so as to ensure that he/she testifies in court about matters that are not covered by his/her statement, or of which he has no independent knowledge — and more so where the statement is in terms of s 204 of the Criminal Procedure Act — is irregular and may be unconstitutional and render the trial unfair.'

[31] In the present instance, however, the defence has rightly exonerated the prosecution from any interference with the investigation and subsequent prosecution of the accused as there is no evidence in support thereof. The irregularities complained of were duly explained by the implicated officers and although their *modus operandi* might be undesirable and open to criticism, the court is satisfied that it falls significantly short from constituting an irregularity that renders the ensuing trial unfair. Evidence of collusion between the witnesses and/or the investigating officers is lacking and the accused's assertions were unsubstantiated by evidence to the contrary.

[32] As regards statements that were not initially disclosed to the defence but disclosure made only during the trial when requested from the investigating officer, the court is satisfied that the defence did not suffer any prejudice as a result thereof. The explanation given as to why these statements remained with the investigating officer is neither suspect nor deemed irregular in the absence of evidence showing otherwise. In fact, the mere production of the statements at a later stage and nothing untoward arising from its contents, dispels any suggestion that the withholding of the said statements was done with malicious intent.

[33] After due consideration of the explanations and reasons advanced by the investigating officers and corroborated by the respective witnesses, the only conclusion to come to is that there is no evidence to substantiate any claim that the prosecution and trial of the accused is consequential to a conspiracy between the ACC and state witnesses, depriving the accused of a fair trial. Neither has it in my view been established that the investigation and procedure of referral under s 31(1) of the ACA was irregular, rendering the trial a nullity.

[34] Next I turn to consider the charge and the evidence adduced.

### *The Charge*

[35] The accused is before court on a charge of contravening s 43(1) of the Anti-Corruption Act 8 of 2003 for corruptly using her office or position to obtain gratification for herself or another person. The indictment reads that at the relevant time the accused was the Governor of the Hardap Region, duly appointed in terms of the Special Advisors and Regional Governors Appointment Act, Act 6 of 1990 and, by virtue of her appointment, the holder of public office. That the government of Namibia launched a programme called the Mass Housing Development Programme (hereafter 'MHDP') through the Ministry of Regional and Local Government and Rural Development (hereafter 'the Ministry')<sup>7</sup> aimed at providing state subsidised houses to low and middle income earners. Under the said programme 19 houses built at Mariental were ready for handover to the selected beneficiaries during a ceremony held on the 17<sup>th</sup> December 2014, where the accused was due to officiate. It is alleged that the accused during the period 15 to 16 December 2014 wrongfully, unlawfully and corruptly used her office or position as Governor to obtain gratification for her own benefit, or for that of Justine Gowases (her niece) and Christiana Hansen (her sister-in-law), by using her power and influence as the Governor to prevail over the decision of the selection committee tasked with the vetting and selection of applicants to benefit from the first phase of the MHDP houses. It is alleged that the accused substituted two of the selected beneficiaries in the list i.e. Regina Kulman and Piet Fransman with that of her relatives.

[36] In amplification of the charge, the summary of substantial facts<sup>8</sup> reads that upon being presented with the list of beneficiaries compiled by the selection committee, comprising staff members from Mariental Municipality and the Ministry, the accused directed and/or caused to be removed from the list, the names of two selected beneficiaries who were to be substituted with the names of persons related to the accused.

<sup>7</sup> Renamed the Ministry of Urban and Rural Development.

<sup>8</sup> In terms of s 144(3)(a) of the Criminal Procedure Act 51 of 1977.



*The accused's plea*

[37] The accused pleaded not guilty to the said charge and prepared a statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 in amplification of her plea.

[38] As regards the charge itself, the accused's defence is a blunt denial of the allegations levelled against her, thus disputing any changes made or brought about to the final list of beneficiaries by her during a meeting with the selection committee. It is further disputed that she gave any directive for changes to be made to the list. The accused also disputes that she had the power to change or approve the final list. It is specifically denied that the accused used her power and office in respect of the allocation of houses, alternatively, that she used her office corruptly or had acted with the intention to commit any act of corruption.

*Facts not in dispute*

[39] It is common cause that during December 2014 the accused was the appointed Governor of the Hardap Region and in view thereof, the accused admitted having been a 'public officer' as required under the said charge.

[40] Furthermore not in dispute is that upon completion of 40 houses under the MHDP in December 2014, a selection committee was tasked with the vetting and selection process of selecting beneficiaries from the list of applicants that initially started off under the Build Together Programme. Also common ground is that officials of the Mariental Town Council and the Ministry paid a courtesy visit to the Office of the Governor on the 15<sup>th</sup> December 2014 to brief and present her with the list of beneficiaries for purposes of the handover ceremony.

[41] Evidence presented by the state can be divided in two distinct parts (a) evidence pertaining to work done by the selection committee who prepared and compiled the list of beneficiaries; and (b) evidence implicating the accused emanating from visits or meetings held at the Governor's office.

Primarily the charge preferred against the accused is based on what transpired during meetings held with the accused between 15 and 17 December 2014. The latter will thus require closer scrutiny.

*(a) Compilation of list of beneficiaries*

[42] Mr Daniel Nghidinwa was the Permanent Secretary of the Ministry in 2014 and responsible for dispatching a technical team from the Ministry to Mariental to oversee the selection process of beneficiaries of houses constructed under the MHDP. On the 16<sup>th</sup> December 2014, one day before the official handover, he received phone calls from the team leader, Mr Merrow Thaniseb<sup>9</sup> and the Special Advisor to the Minister, Mr Gabriel Castro, about the Governor not being satisfied with the selection process that was carried out. I will return to this part of his evidence in more detail later.

[43] Mr Merrow Thaniseb was instructed by the Permanent Secretary to travel to Mariental where a joint selection committee were to be formed with the local municipality<sup>10</sup> and representatives of the National Housing Enterprise (NHE) to facilitate the selection of beneficiaries of government subsidised houses (referred to as 'social housing'), and to make the necessary arrangements for the official handover of houses on the 17<sup>th</sup> December 2014. He explained the criteria used during the selection process and how the final list of 19 beneficiaries for social housing and 21 under 'credit linked housing' was compiled. The selection of beneficiaries under the latter category was mainly done by the two officials from NHE and thus excluded from the charge. During the vetting process questions arose about the first 354 applicants on the waiting list whose applications were listed but without reflecting the date of application. After a satisfactory explanation was given by the officials from the municipality, the selection process proceeded and was finalised on Monday the 15<sup>th</sup> December 2014 where after the list of names of 19 beneficiaries was prepared.<sup>11</sup>

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<sup>9</sup> Deputy Director for housing within the Ministry.

<sup>10</sup> Under the leadership of the Chief Executive Officer (CEO).

<sup>11</sup> The import of dates was that the main criteria for the selection process was based on the principle of 'first come, first serve'.

[44] According to Mr Thaniseb a briefing was called during which the selection process and criteria were explained to councillors of the local authority and the Mayor. With their blessing, it was decided that the Governor should be briefed on the selection process and the list of beneficiaries. In this regard they simply followed procedure as was done in other regions before the handing over ceremony. It should be noted that at this stage the accused was still to officiate at the handing over ceremony; this only changed later.

[45] The state at length led the evidence of a number of officials forming part of the selection committee who testified on the criteria used and how they came up with the list of 19 names of beneficiaries. It was common ground among them that they relied on information captured in what was generally referred to as 'the master/waiting list', prepared by the Mariental Municipality and forwarded earlier to the Ministry for verification. They were further in agreement that the 19 successful candidates satisfied the applicable criteria and were selected from the first 354 applicants listed. There is no need to consider the evidence of these witnesses in any detail.

[46] Suffice it to say, the witnesses in some respects differed on the criteria used during the selection process, paving the way for extensive cross-examination by defence counsel. The accused further relied on discrepancies in their evidence as platform to launch an attack on the fairness of the vetting process. In the plea explanation the accused contends that her office 'was inundated at the relevant time with complaints from members of the community to the effect that it appears the officials .... were not acting fairly and equitably in allocating houses to the beneficiaries ...'. This culminated in defence counsel's submission that the entire selection process was irregular and ought to have been investigated by the ACC.

[47] In terms of Article 18 of the Constitution administrative bodies and officials are required to act fairly and reasonably and to comply with the requirements imposed upon such bodies and officials under common law and any relevant legislation. Also that persons aggrieved by the exercise of such

acts and decisions shall have the right to seek redress before a competent court. Though it would appear to me that rightful criticism could be levelled against the procedure adopted by the selective committee during the vetting process by not strictly abiding with the prescribed and binding criteria applicable when adapting same to suit the circumstances encountered, no application has been made to date by anyone to have the process reviewed. Neither is it this court's function or duty during criminal proceedings to make any finding in that regard.

[48] As far as it concerns the accused's defence, suffice it to say that, even after the accused was presented with both the master list and the list of 19 beneficiaries and having had the opportunity to familiarise herself with the information contained therein and briefed on the criteria used in the selection process, she did not deem it necessary to have it investigated or reviewed. It would thus appear that the accused crying foul only at this late stage is self-serving and lacks sincerity.

[49] What is before court for determination is not the validity of the master list or the list of beneficiaries as per the findings of the selection committee, but rather whether it has been established beyond reasonable doubt that subsequent amendments and substitutions made to the list constituted an offence. It is neither for the court to decide the fairness or validity of the replacement by the selection committee of the name Helmut Afrikaner with that of Linda Muheli on the list of beneficiaries. According to evidence presented this came about when Helmut Afrikaner declined the house offered to him where after Muheli's name was inserted, being a disabled person and brought to the attention of the selection committee by the MVA Fund. The accused clearly had no role to play in this decision.

*(b) Meetings held with the Governor*

[50] I intend discussing the nature and extent of the meetings individually while establishing the relevant and reliable facts presented by the state and the defence, respectively.

*The meeting of Monday 15 December 2014*

[51] This meeting was not an official meeting but was generally referred to as 'a courtesy meeting' to brief the Governor on the selection process and present her with the list of names of beneficiaries.

[52] According to Mr Thaniseb the briefing of the Governor took place on Tuesday the 16<sup>th</sup> December 2014 at the municipal council chambers. After Mr Thaniseb explained the criteria used and how the list of beneficiaries were derived at, the accused expressed her displeasure and questioned the authenticity of the list. She was not pleased with the fact that her office was not beforehand informed of the selection process, neither that the municipal officers failed to inform her office sooner about the selection process. She further remarked that the political leadership was excluded from the process. When pointed out to the accused that the same selection process had been used before in two other regions, her response was that she was the appointed leader of the region and that things should be done the way she deems fit. Notwithstanding, the list of beneficiaries remained as is and after the meeting the beneficiaries were called in for the signing of contracts. Later in the afternoon the officials were summoned to the Governor's office.

[53] I pause to observe that Mr Thaniseb's evidence about the meeting held with the Governor at the municipal chambers on the morning of 16 December 2014 is clearly wrong. The accused as well as other state witnesses dispute his evidence on this score and are in agreement that it was held at the Governor's office in the afternoon of Monday 15 December 2014.

[54] Mr Paul Nghiwilepo, the Chief Executive Officer (CEO) of Mariental Municipality, explained that he knows the accused personally as they are business partners in two fishing companies. He was not directly involved in the vetting process and was only presented with the list of beneficiaries by Mr Thaniseb on Monday, 15 December 2014. He thereafter presented the list to the Mayor, Mr Alex Kamberute (and not the council as Thaniseb said), who raised no concern regarding the beneficiaries selected, or the criteria used.

On Mr Thaniseb's proposal that the list should be presented to the Governor, they visited her office in the afternoon. He confirmed Mr Thaniseb's evidence of the accused expressing her dissatisfaction about the list and that her office was supposed to have been involved in the selection process; despite Mr Thaniseb's explanation of the procedure to be followed. The Governor then requested a copy of the waiting/master list and after making a call to his office, a copy of the list was brought and presented to the accused. That brought an end to the courtesy meeting.

[55] Mr Alex Kamberute served as Mayor of Mariental until 2015 and knows the accused since childhood as a learner at the school where he was the principal. Though not being part of the vetting process, he confirmed having been satisfied when presented with the list of beneficiaries by the CEO. Contrary to the accused's evidence that the Mayor during this meeting equally expressed his and the councillors' dissatisfaction with the selection process, the witness did not mention this during his testimony; neither was he confronted with the accused's version.

*The meeting of Tuesday 16 December 2014*

[56] State witnesses corroborate one another as regards them having been summoned to the Office of the Governor at her behest on the Tuesday afternoon. Mr Thaniseb said that during the meeting the accused indicated that the list should be amended and identified two names that must be removed and to be substituted with two other names. The names to be removed were that of Mr Piet Fransman and Ms Regina Kuhlman, while substituted with the names of Ms Justine Gowases and Christiana Hansen. Elaborating on her decision she said that the latter persons had the immediate need for housing as they were physically challenged, but did not explain as to how they qualified or on what basis they were selected i.e. the criteria used. Regarding the persons removed from the list, she merely asked why people who campaign against SWAPO should be given houses. According to Mr Thaniseb, the accused at that stage had the backing of Regional Councillor Wambo who attended the meeting. The accused then gave instructions that the two persons removed from the list should accordingly be informed.

[57] The name Christiana Hansen appears on the waiting list next to number 283 and, according to Mr Thaniseb, she would not have qualified for the house allocated to her (Core 6) as she was a civil servant who generally qualified for a housing subsidy. What this amounted to is that this person would qualify for a government subsidised house, but in circumstances where she was supposed to buy the house at its original price because of the housing subsidy she received, being a government employee. However, whether Ms Hansen was subsidised twice, was not established. Mr Thaniseb is adamant that changes made to the list in respect of these two persons were brought about at the insistence of the Governor.

[58] Dissatisfied with the outcome of the meeting, Mr Thaniseb briefed the Permanent Secretary telephonically and in particular on the substitution of names on the list. He further decided to distance himself from any amendments made to the list and only saw the final list shortly before the handing over ceremony on Wednesday the 17<sup>th</sup> December 2014.

[59] Mr Gabriel Castro was appointed in 2014 by the State President as Special Advisor to the Minister of the Ministry on the implementation and monitoring of the MHDP. He met up with the selection committee in Mariental on Tuesday 16 December 2014 and was satisfied with the selection process followed and endorsed same. He was then called to a meeting with the Governor which he assumed was to discuss the ceremony of the following day. She however confirmed her dissatisfaction with the selection process and that her office was not involved, to which he and Mr Thaniseb explained the selection process. When she wanted to change some names on the list Mr Castro pointed out that they adopted the same approach normally used by the Ministry during the selection process and that no names were to be removed from the list. Notwithstanding, the accused identified the names to be removed and those substituting them. She justified her decision by saying that she knew the local people better than they do and who deserves houses. He recalled her saying that the two names who were to be taken off the list are people who had actively been campaigning against SWAPO, being

members of the opposition. During the debate it was pointed out to the accused that it was a mass housing programme intended for all Namibians and that the selection of beneficiaries should not be politicised. However, when the accused said that in these circumstances the ceremony would be suspended, Mr Castro compromised on behalf of the Ministry in order not to sabotage the launching of the project (in the Hardap Region) and the handover ceremony. He thereafter reluctantly agreed that the proposed names could be changed on the list and that the handover to those persons removed from the list would merely be postponed to the next date for the allocation of houses.

[60] Mr Nghiwilepo confirmed having briefed Mr Castro upon his arrival where after they attended a follow-up meeting with the Governor where Mr Castro explained the MHDP to her. He said this erupted in a heated discussion and standoff between Mr Castro and the accused as both had been appointed by the President. The accused however asserted authority over Mr Castro. After the meeting, fears were expressed by the officials that the handing over was in jeopardy – at that stage the Governor would still have officiated at the handing over ceremony – to which Mr Castro expressed the view that they rather give in to the demands made by the Governor to bring about changes to the list. They were compelled to agree, albeit reluctantly. Mr Nghiwilepo further confirmed that it was the accused who identified the names of Piet Fransman and Regina Kuhlman to be substituted with that of Christiana Hansen and Juliana Gowases. As the accused wanted to know exactly who the persons on the list were, they worked through the list answering her questions as regards the beneficiaries. During the meeting Mr Nghiwilepo entered onto his list those names when introduced by the accused.<sup>12</sup> He was then directed by her to do the changes as requested. The witness is clear that the direction given by the Governor was not the consensus of the meeting. Personally he deemed the directive strange as those persons who were to be entered onto the list had not gone through the vetting process.

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<sup>12</sup> Exhibit 'C'.



[61] Mayor Kamberute said he was contacted by the secretary of the Governor on Tuesday 16 December 2015 and summoned to her office to attend a meeting. The list of beneficiaries was discussed and the Governor said that she was not satisfied with the way the list was compiled. According to her there were people in dire need of houses and then removed the names of Mr Piet Fransman and Ms Regina Kuhlman from the list, replacing them with Ms Gowases and Ms Hanse. I pause to observe that in cross-examination the witness said that this was not physically done, but a verbal direction. It is common cause that changes to the list were only subsequently made. During the meeting he personally did not speak out against the changing of the list as he was satisfied that arrangements were already made regarding the two names taken off the list to be allocated with houses on the next occasion. He said that the political affiliation of the two persons whose names were removed was not discussed in his presence. According to him there were no opposing comments and the Governor's directions were accepted by those in attendance.

[62] In cross-examination it emerged that immediately before this meeting, Mayor Kamberute had informally met with the Governor and Mr Wambo where the list was discussed and they (the political leadership) were in agreement that it was unsatisfactory and had to be changed. He described their gathering as a 'talk' and not an official meeting. He however denies having made a turnaround with regards him earlier having been satisfied when presented with the list by the CEO the previous day. Though the impression was initially gained from his evidence that those in attendance accepted the Governor's proposed changes, he later changed course and said that there were indeed opposing views. He was however unaware of any talk about the handover ceremony being in jeopardy. The witness deviated from his witness statement in certain respects and when pressed for an answer, became vague. His evidence where in conflict with his statement on material aspects, should therefore be treated with caution, unless where corroborated.

*The meeting on Wednesday 17 December 2014*

[63] Permanent Secretary Daniel Nghidinwa proceeded to Mariental on the 17<sup>th</sup> December where he attended a meeting at the Governor's office with her, the Deputy Minister, the Chairperson of the Hardap Regional Council, the Mayor of Mariental and the Special Advisor. At the meeting the accused's dissatisfaction with the list of beneficiaries were raised and the dropping of two names from the list, to be replaced by two persons with disabilities. The witness was not sure who in the meeting mentioned the names of these persons but seems to recall that it was the accused and Mr Thaniseb. It was finally concluded in the meeting that the handover would proceed and that the two beneficiaries whose names were removed from the list would be catered for in the next batch of houses for allocation. Also that individual agreements had already been reached with the affected persons. The witness further confirmed that the position of the Governor is not a repository of power in relation to the allocation of houses or land owned by a local authority.

[64] During the meeting a list of beneficiaries were presented to those in attendance<sup>13</sup> and after the finalisation of the logistical arrangements, Messrs Thaniseb, Nghiwilepo and Castro were excused from the meeting. It seems that from that moment on their focus shifted to the two persons who were taken off the list and to get the paperwork ready for houses they were to receive during February 2015.

[65] According to Mr Nghiwilepo only upon the arrival of the Deputy Minister did they learn that she were to officiate at the handing over ceremony (not the Governor) and after a final briefing at the Governor's office, the list of 40 beneficiaries could be finalised.<sup>14</sup> No discussion on the selected beneficiaries took place during the briefing. The selection committee was only informed that morning (Wednesday) of the outcome of the meeting where after the actual changes were made to the list. Although the selection committee queried the decision, the changing of the list being considered unusual, Mr Nghiwilepo explained that there was nothing they could do about the situation as it was a

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<sup>13</sup> Hon. Boois (Deputy Minister); Mr Nghidina (PS); Governor (accused); Chairperson of the Management Committee; Mr Kamberute (Mayor); Mr Nghiwilepo (CEO); Mr Castro (Special Advisor).

<sup>14</sup> Exhibit 'L'.

directive from the Governor. He further confirmed that Mr Castro took it upon himself to explain to the two persons whose names were removed from the list what the reasons were and to ensure that they were to be given houses during the next handover. As regards the two beneficiaries added onto the list at the insistence of the accused, Mr Nghiwilepo testified that he was unaware of them being disabled persons.

*The Defence case*

[66] In response to the allegations levelled against her, the accused testified and called two witnesses, to wit, Mr Carl Christians, the Personal Assistant (PA) to the Governor and Ms Lydia Ganeb, the Deputy Mayor of Mariental Town Council in December 2014.

[67] According to the accused by September of that year her office was inundated with complaints by members of the community expressing their dissatisfaction with the allocation of houses by the Mariental Municipality. This prompted a letter dated 29 September 2014 drawn by Mr Christians (seemingly with approval of the Governor) and sent to the CEO,<sup>15</sup> directing that a list of the houses allocated, as well as the criteria applied to allocate such houses, be submitted to the Governor's office on or before 03 October 2014.

[68] I pause to observe that this letter came before court as annexure to the accused's plea explanation and was only later testified on by Mr Christians. The letter is unsigned and bears no stamp by the CEO's office, or the Mariental Municipality as proof of receipt. According to Mr Christians this letter was subsequently produced directly from his computer at the request of the accused for purposes of the trial. On this score the accused came up with a different explanation saying that she obtained the document from her PA's office file. According to Mr Christians he had personally delivered the original letter to the secretary of the CEO. He thereafter stayed in touch with Ms Elma Gawachas who provided him with the waiting lists. Upon establishing that no

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<sup>15</sup> Exhibit 'A' – Annexure 'B'.

houses had been allocated at that stage and that the complaints lodged were baseless, he informed the Governor accordingly.

[69] Mr Nghiwilepo however said that he had no knowledge of the letter directed to him from the Governor's office, or that lists were requested as per the letter. He was adamant that the only time when a list was requested was during the courtesy meeting on the 15<sup>th</sup> December 2014 when the Governor at the end of the meeting asked for the waiting/master list the committee had worked on during the selection process.

[70] As regards the MHDP deployed in the respective regions, the accused testified that the role and duty of the Governor was to act as representative of central government in the region and to ensure the smooth running of affairs and reporting to the President and the Minister. As for the allocation of houses, she acknowledged that she had no powers over the process and that her role was merely ceremonial.

[71] Against this background, it must be assumed that the accused considered it her duty to supervise the allocation of houses rumoured about when making the demands set out in the letter of 29 September 2014 addressed to the CEO as regards the allocation of houses.

[72] It is common cause that no list of houses allocated by the municipality was forwarded to the Office of the Governor as directed, simply because no such list existed. According to the accused what instead was received by her office in October 2014 was the waiting list of 2007 comprising 367 names,<sup>16</sup> and two further waiting lists.<sup>17</sup> These lists were also annexures to the accused's plea explanation. When asked in cross-examination to explain her premature actions at the time, the accused said she was under the impression that the local authority had already allocated houses.

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<sup>16</sup> Annexure 'C' to Exhibit 'A'.

<sup>17</sup> Annexures 'D' and 'E' to Exhibit 'A'.

[73] Although never provided with the requested information, the accused's failure to follow up on the complaints lodged with her office was explained by saying that it became clear to her that no allocation of houses was made at municipal level as alleged. She was not clear as to how this had come to her attention – despite Mr Christians saying that he personally informed her that the complaints were baseless. Neither was a clear explanation given as to whether the accused was satisfied that the complaints were without merit; nor the need for raising it with the selection team during their courtesy visit as she claims. Contrary to the assertion in para 3.3 of the accused's plea explanation that her office was 'inundated at the relevant time' with complaints from members of the community, Mr Christians said that only four persons lodged complaints; clearly, an exaggeration by the accused of the number of complainants. Whatever is meant with the words 'at the relevant time', this could only have referred to the period before the end of September 2014 when the letter was sent. According to Mr Christians no complaints were received thereafter.

[74] Despite the accused's proclaimed appreciation of the seriousness of the complaints lodged with her office, she testified that she did not interview any of the complainants. The complainants were neither requested to put their complaints in writing; nor did she deem it necessary to report it to the President, or the line Ministry, or to have it investigated by the appropriate authority. The accused at that stage also knew that the allocation of houses under the MHDP was designated to a joint committee consisting of staff members of the Ministry, the Mariental Municipality and NHE. In view of the nature of the complaints levelled against the municipality, the state (correctly in my view) found it surprising that the CEO was not alerted about the complaints made to the Governor's office in the letter; she merely insisted to be provided with the list of beneficiaries and the criteria applied during the selection process.

[75] Concerning the courtesy meeting held at her office on the 15<sup>th</sup> December, the accused identified Messrs Thaniseb, Nghiwilepo, Kamberute and Wambo to have been in attendance. It should be noted that Mr Castro

was not mentioned as being in attendance at this meeting. During her evidence in chief the accused said she at no stage attended a meeting with Mr Castro on either the 15<sup>th</sup> or 16<sup>th</sup> December, but changed course under cross-examination when saying that she believes that he was in attendance in the meeting of the 15<sup>th</sup> December 2014. Mr Thaniseb briefed the meeting which, according to the accused, was not to seek her approval but rather to inform the meeting of the development of the selection process. When the accused drew their attention to the dissatisfaction of some members of public about the allocation of houses made, she could only have referred to the allegations levelled against the municipality in September 2014 and not in respect of the list of beneficiaries handed over in the meeting. As mentioned, the accused by then had already been satisfied that there was no merit in the complaints lodged with her office. On the accused's own evidence, to raise the issue only then, appears to have been baseless.

[76] According to the accused, the Mayor, Mr Kamberute, equally expressed his dissatisfaction at the time for reason that he and the local authority councillors were not involved in the selection process. This is in conflict with the testimony of Mr Nghiwilepo whose evidence was not challenged on this point when he said that the Mayor agreed with the Governor that her office should have been involved, opposed to the accused now saying that Mr Kamberute was dissatisfied because he and council were not involved in the selection process.

[77] Counsellor Wambo, in turn, was dissatisfied in that the names of two staff members from the Governor's office were not included on the list. The accused denies having had the power to direct the removal from the list of beneficiaries presented to the meeting; neither did she direct anyone to do so. One would assume the same applied to Counsellor Wambo who at that stage raised the housing needs of officers at the Regional Council, apparently with the view of getting them onto the list of beneficiaries there and then – amongst others, Mr Christians, the PA to the Governor.

[78] With regards to the removal of two names from the list due to them having actively campaigned for the opposition party as testified by Mr Castro, the accused countered by saying that she was not even aware of these persons' political affiliation; in fact, she did not even know Mr Piet Fransman.

[79] As for the alleged assertion of two names onto the list, she denied having known Justine Gowases and only came to learn about her at a later stage and her being a distant family member; she knew her only by her maiden name of Roile. As to the name of Christina Hansen, the accused admitted her being married to the accused's brother. She however denied suggesting the inclusion of her name to the list.

[80] The accused disputes the meeting of the 16<sup>th</sup> December 2014 as testified by state witnesses, or that she intimidated Mr Castro in any manner during such meeting. She said that before concluding the meeting she merely asked the officials to sort out the issues with the local council and to ensure that a council resolution be taken in that regard. It was the accused's belief that in order to contractually bind the council, a council resolution was required.

[81] It is common cause that the matter was never brought before the council as, according to state witnesses, it was not a matter for the council's consideration. Despite the accused's persistence on this point, the evidence of state witnesses to the contrary was left unchallenged. According to the accused, during the meeting on the morning of the 17<sup>th</sup> December 2014, she understood from Messrs Nghiwilepo and Thaniseb that the issues earlier raised by her were resolved by way of a council resolution as per her directive. Again, this aspect of the accused's evidence was never put to the two witnesses who allegedly gave the accused that assurance; neither to Mr Kamberute during his testimony. The accused said that when it was confirmed in the Mayor's presence there was no need, in her view, to make further enquiries. The accused further said that she does not know why her version was not put across to state witnesses where in conflict, or was left out during their testimony.

[82] It is settled law that 'a cross-examiner should put his defence on each and every aspect which he wishes to place in issue, explicitly and unambiguously, to the witness implicating his client' (*S v Boesak*<sup>18</sup>). Similarly, the Constitutional Court in the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*<sup>19</sup> commented that when it is intended to suggest that a witness is untruthful on a particular point, then the witness's attention must be drawn to that fact and to afford the witness an opportunity while still on the stand of giving an explanation open to the witness and of defending the witness's character. If left unchallenged, the party calling the witness may assume that the unchallenged testimony of the witness is accepted as correct. The precise nature of the imputation should be made clear to the witness under cross-examination and how it will be challenged. This would allow the witness the opportunity to deny the challenge, to call corroborative evidence, to qualify his/her own evidence and explain contradictions.

[83] Contrary to what state witnesses testified, the accused said that when presented with the list of 19 beneficiaries (Annexure 'F') during the courtesy meeting, she did not, in view of the complaints lodged with her office, scrutinise the names on the list to check whether some of the names did not belong there. On the 17<sup>th</sup> December 2014 when presented with the final list, the accused equally did not compare it with Annexure 'F' to see whether any changes were made to the list of beneficiaries.

[84] In light of the nature of the discussions held at the meeting of the 15<sup>th</sup> when the accused raised the complaints made to her office, her apathy in this regard appears peculiar. Moreover, considering that when allegations of corruption on the part of the accused surfaced about her having removed names from the list and substituting them with her family, she did not afterwards deem it necessary to check the list to see whether there was any merit in the rumours. She justified her actions by saying that there was no

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<sup>18</sup> 2000 (1) SACR 633 (SCA) at 647C-I.

<sup>19</sup> 2000 (1) SA 1 (CC) at 36J-37E.



reason to panic about something that had not formally been brought to her attention and that her conscience was clear. This, despite the accused having been aware that her sister in law, Christiana Hansen, received a house on the day of the handover and that it was rumoured that it came about due to the accused's intervention. As regards rumours of the accused having secured Hansen's name onto the list, she did not discuss it with Hansen as, according to the accused, these were baseless rumours.

### *Two opposing versions*

[85] Where there are two irreconcilable versions the technique employed by the court in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*<sup>20</sup> has been adopted with approval in this Jurisdiction. It is a well-established rule of practice that the court must have good reason for accepting one version over the other and should not only consider the merits and demerits of the state and defence witnesses, respectively, but also the probabilities (*S v Engelbrecht*,<sup>21</sup> *S v Petrus*<sup>22</sup>). Also that the evidence presented by each side must not be considered in isolation as an independent entity when assessing the credibility of the witnesses and the reliability of their evidence. The approach the court must follow is to take into account the state case and determine whether the defence case does not establish a reasonable hypothesis.

[86] From the preceding summary of the evidence with regards to meetings held with the accused, it is evident that there are irreconcilable differences between the version of the state and that of the defence. With regards to meetings held with the Governor during which the alleged offence was committed, the accused's defence in essence is two-fold: (a) She lacked official power or authority to interfere with or overturn the selection team's decisions on the selection of beneficiaries; and (b) she disputes interfering in any form or manner with the compilation of the list of beneficiaries and that any changes subsequently made thereto, was not of her doing. As to the

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<sup>20</sup> 2003 (1) SA 11 (SCA).

<sup>21</sup> 2001 NR 224 (HC).

<sup>22</sup> 1995 NR 105 (HC).

latter, her defence amounts to a blunt denial of the particulars of the offence charged.

[87] On the accused's version of events during the courtesy meeting on the 15<sup>th</sup> December, she raised only two concerns, namely, complaints lodged with her office and that a council resolution was required where municipal land was sold off. Other than that, she had no quarrel or issue with the beneficiaries selected as per the list presented to her. The accused's testimony that Mayor Kamberute *mero motu* expressed his dissatisfaction in the meeting that the local authority council was not engaged during the selection process, was not dealt with during his testimony. According to him he kept quiet when the accused raised the issue in the meeting about her office being excluded from the process. In cross-examination the contradiction was not taken up with the witness and left unchallenged. Although his silence might be interpreted as tacit support for the notion that the Governor's office should have formed part of the selection process, it contradicts the accused's evidence that he had similar concerns which he raised. The accused's evidence on this point is further inconsistent with the corroborated evidence of the Mayor that when he was first presented with the list, he endorsed it before they proceeded to the Governor's office.

[88] The mainstay of the evidence of witnesses Thaniseb, Nghiwilepo and Kamberute on the meeting of 15 December is that the accused immediately expressed her displeasure about her office not having been informed of the selection process beforehand; that the political leadership was excluded and as a result thereof, she questioned the authenticity of the list of beneficiaries presented to her. Furthermore, despite being informed that similar process was followed in other regions, the accused was adamant that *she* was the appointed leader of the Hardap Region and that things should actually be done the way she deems fit. According to witness Nghiwilepo the accused was adamant that her office should have been involved in the selection process. This clearly prompted the accused to request a copy of the master/waiting list from which the beneficiaries were selected. That the accused was presented with the list, was not disputed. If the accused, as she

claims, had no quarrel with the list of beneficiaries presented to her, what need would there have been for her to call for the master list? Her actions in this regard rather favours the version of state witnesses that she had a particular interest in those persons listed as beneficiaries.

[89] Although the accused disputes any interference on her part with the composition of the list of beneficiaries due to lack of authority, her actions, even on her own evidence, shows otherwise. That the accused acted with purpose can clearly be observed from her actions starting off with the expression of dissatisfaction with the exclusion of her office from the selection process, the calling for the master list and the calling of a follow-up meeting the next day. Although the accused disputes the latter meeting ever taking place, there is overwhelming evidence that such meeting was held at the insistence of the accused. According to the evidence, it was during this meeting that the offence for which the accused is charged, was committed. It is then not surprising that the accused during the trial completely divorced herself from the events taking place at that meeting. This created further challenges to the accused as she became uncertain about the presence of Mr Castro and contradicted herself in that regard. There is overwhelming evidence that Mr Castro only arrived on Tuesday 16 December and therefore could not have attended the courtesy meeting on the Monday. Mr Christians' evidence that he saw Mr Castro at the Governor's Office on the 15<sup>th</sup> December 2014 has a hollow ring to it and the hallmark of fabricated evidence in order to lend credence to the accused's version. According to the accused there was no contradiction in the content of the meetings attended by Mr Castro which clearly stands in sharp contrast with what was testified by three state witnesses – evidence the accused could not dispute because according to her the meeting (of the 16<sup>th</sup> December) never took place. On her account the meeting of the 15<sup>th</sup> December was completely watered down to nothing more than a courtesy meeting during which she was briefed on the selected beneficiaries and her merely raising the requirement of a council resolution.

[90] Contrary thereto, the picture painted by state witnesses is that of the accused assuming authority and control of the selection process as Governor

of the region, while insisting that the list be amended as regards two names appearing thereon and to be substituted with other names provided by her. The reason for their removal from the list was said to be because of their political affiliation. According to the witness Castro the accused simply refused to accept their explanations about the programme being rolled out at mass level (irrespective of a person's political affiliation) and the process adopted for selection. He said at some point 'the discussion was done in a very high tone and people got much afraid' and just kept quiet. The evidence shows that at some point the accused even challenged the authority of the officials over the programme. Mr Nghiwilepo described the discussion as 'heated' with the Governor standing her ground against Mr Castro who insisted that her proposal was not the correct procedure to be followed.

[91] Mayor Kamberute's evidence also covers the meeting held on Tuesday 16 December when he was phoned by Mr Christians to attend the meeting at the Governor's office. He further confirmed the Governor's dissatisfaction with the compilation of the list and the substitution of names identified by her. He also testified about an informal discussion among the political leaders shortly before the meeting started where the names were discussed and decided that changes were to be made to the list.

[92] From the preceding paragraphs it is evident that the state witnesses who testified on the events taking place in the meeting of 16 December 2014, corroborate one another in material respects. Minor contradictions were pointed out during cross-examination which, in my view, are insufficient to discredit the witnesses' on, or being sufficient to impact on the outcome of the proceedings. Differences in their evidence identified by the defence relating to time and place of events prior to the meeting are clearly unintentional and considered bona fide mistakes made by the respective witnesses, mainly Thaniseb and Kamberute. The evidence of these witnesses need not be ignored or rejected entirely due to some contradictions, because they were corroborated in material respects on more important aspects of their evidence. I accordingly find these witnesses credible to the extent that their evidence may safely be relied on.

[93] When the court considers the nature and extent of evidence about the meeting held on the 16<sup>th</sup> December and the alleged dominant role the accused fulfilled during that meeting in her capacity as Governor, it boggles the mind as to how she could claim this not to have happened? It would thus imply that these witnesses jointly fabricated evidence to falsely implicate the accused in circumstances where two of them had no previous business with her namely, Messrs. Thaniseb and Castro, while Mr Nghiwilepo, her friend and business partner and Mayor Kamberute, still maintained good relationships with her to date. It therefore seems highly unlikely that any of them had reason to jointly fabricate evidence implicating the accused.

[94] I find any suggestion that these witnesses acted in concert with the purpose of falsely incriminating the accused preposterous and unsubstantiated by the established facts. On the contrary, Mr Nghiwilepo was the first person who informed the accused that he had been questioned by investigating officers from the ACC which clearly demonstrates his loyalty towards the accused. He however denied her assertion that he also informed her that they had put pressure on him to incriminate her.

[95] Any further argument suggestive of the witnesses having singled out the accused as scapegoat for their own corrupt conduct brought about by changes made to the list afterwards on their instruction, is misconceived; for the simple reason that if they wanted to manipulate the list to include persons of personal choice (and not that of the selection committee), they could have done this unhindered prior to the presentation made to the Governor. The actual changes were affected by the selection committee after being informed what the reasons were. Furthermore, the chances that two family members of the accused would randomly be picked to implicate her in circumstances where she herself did not even recognise the one name to be that of a family member, are so remote that one could barely conceive that possible. In my view any such contention is without merit and could safely be ruled out.

[96] The evidence of these witnesses as regards the meeting of the 16<sup>th</sup> December remained uncontroverted. The accused's evidence about a single meeting held with her mainly remained uncorroborated; not that there was any duty on the defence to prove her innocence by the leading of evidence. This was mainly brought about due to the accused's denial of the meeting held on the 16<sup>th</sup> December, which she obviously was unable to substantiate.

[97] When considering the accused's version of a cordial courtesy meeting held on the 15<sup>th</sup> December and alleged lack of interference on her part with the selection process, compared to the overwhelming evidence of four state witnesses rebutting that version, the only reasonable conclusion to come to is that the accused did not take the court fully into her confidence and tried to mislead the court by contriving the facts to favour her version. In an attempt to exonerate herself from the incriminating evidence of state witnesses, she deliberately decided to mislead the court by testifying under oath that the meeting of the 16<sup>th</sup> December never took place – this was a blatant lie. Though one can clearly see why she decided to follow this route in that she wanted to distance herself from evidence that exposed her governance and enforcement of her own will as Governor of the region at the meeting, the fact remains that it did not pay off. Consequentially, her evidence in this regard is rendered false beyond reasonable doubt.

*Was the charge preferred against the accused correct?*

[98] As alluded to earlier, the accused is charged with one count of contravening s 43(1) read with sections 32, 43(2), 43(3), 46, 49, 50 and 51 of the Anti-Corruption Act. Section 43(1) and (2) of the Act reads as follows:

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

Subsection (2) is a deeming provision and reads:

'(2) For the purposes of subsection (1), proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public

officer, or any relative or associate of his or hers has an interest, whether directly or indirectly, is, in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her officer or position in the public body in order to obtain a gratification.'

(Emphasis provided)

[99] Mr *Namandje* on behalf of the accused submitted that s 43(1) of the ACA is aimed and directed at public officers who *use* their office or position corruptly. Only when a public official is vested with the power and duty to make a decision, *vis-á-vis* the amendment of the list of beneficiaries in the instant matter, would the element of 'use of office' be proved. He argues that the power to make such decision rested solely with the selection committee and not the accused. In support of this proposition he cited the case of *Matador Enterprises v Minister of Trade and Industry*<sup>23</sup> where it was held that where a functionary vested with a discretionary power takes a decision in terms of legislation, that power was to be exercised by that very functionary and no-one else; in this instance the selection committee. Therefore, in the final analysis he argued that the accused was rather supposed to have been charged under s 18(2)(b) of the *Riotous Assemblies Act*<sup>24</sup> as opposed to the ACA, for reason that the accused was not seized with the power or authority to effect changes to the list of beneficiaries and at most incited the committee members to do so.

[100] On the other hand, Mr *Maronedze*, counsel for the state, argued that the accused was rightly charged because, as the Governor of the Hardap Region, the accused (on her own evidence) played a supervisory role in the implementation of the MHDP. He cited the South African case of *S v Xaba and Another*<sup>25</sup> where the court had to decide whether the words 'in relation to such power or duty' as defined in s 1(1)(b)(i) of the Corruption Act<sup>26</sup> (South African legislation) were intended to be interpreted *broadly* so as to embrace the general powers of police officers, or *restrictively* so as to limit criminal

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<sup>23</sup> 2015 (2) NR 477 (HC).

<sup>24</sup> Act 17 of 1956.

<sup>25</sup> 1996 (2) SACR 259 (N).

<sup>26</sup> Act 94 of 1992.

liability to instances where the officers were seized with such power. It was argued that because the appellants, being police officers, were not vested with the power and duty to arrest and charge the complainant (based on the fact that he did not commit the alleged traffic offence), therefore a contravention of the section fell outside the scope of their statutory powers.

[101] The court held that, from a reading of the Act, it seems obvious that in enacting s 1(1), the Legislature intended to create a *wider and all-embracing offence*, one which would include, but not limited to, the offences which were repealed i.e. bribery.<sup>27</sup> Thus, the court found the appellants contravened the provision charged under the Act even though they lacked the power and duty to arrest or charge the complainant.

[102] The Supreme Court of this Jurisdiction in *S v Goabab and Another*,<sup>28</sup> though dealing with a differently worded section of the offence of corruption, followed the same approach when finding at 603 (Headnote):

'[That], referring to offences under that Act, that it was clear that, insofar as the proscribed conduct fell within the sweep of the Act, it had done away with the previous common-law elements of the crime of corruption and had heralded in a new dispensation in the definition, reach and scope of the offence of corruption. The offence was now broad in its reach and scope. This appeared necessary because corruption may manifest itself in different shapes and forms. It was also notoriously difficult to prove, because it often did not take place in the full view of the public.

*Held*, further, that the wide scope and ambit of the crime also appeared to be international in nature. It demonstrated the international community's resolve that corruption was an invidious crime that, if left unchecked, could erode a country's gains in all spheres of the human endeavour.'

(Emphasis provided)

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<sup>27</sup> 1996 (2) SACR 259 (N) at 263B

<sup>28</sup> 2013 (3) NR 603 (SC).



[103] The accused formally admitted that as Governor, she was a public official, by which it is accepted that, at the relevant time, she was a public official as defined in the Act.

[104] As stated before, it was argued on behalf of the accused that she did not use her office or position as Governor of the Hardap Region wrongly and corruptly to obtain any gratification because she was not vested with the power to amend the list of selected beneficiaries prepared by the selection committee. However, it was duly established that the accused, as Governor of the region, played a supervisory role in the implementation of the MHDP. She clearly assumed this role when *inter alia* directing the CEO in writing to submit to her office the selection list and criteria used during the selection process and 'to keep the Office of the Governor informed about all the activities and developments regarding this Programme – preferably in writing'. On her own account, she also gave directives to the selection committee about obtaining a council resolution. As already found, she assumed authority over the selection process during meetings held with officials from the selection committee and issued directives as regards the changing of the list which was affected as per her instruction.

[105] When applying the principles emanating from the above-cited cases to the present facts, it is the court's considered opinion that the accused, through her actions, clearly demonstrated that despite knowing her duties in relation to the mass housing programme being of supervisory nature only, she lacked the required authority to overrule the selection committee's discretion and decisions on the selective process. Notwithstanding, she assumed power and authority over the process as Governor when exerting such authority to compel the selection committee to give in and amend the list of beneficiaries as per her directive. In this instance, the accused's power came with the office. In view of the established facts, there can be no doubt that the accused by so doing, wrongfully used her position and office by overruling the final listing of beneficiaries prepared by the selection committee and affected the changes ultimately made to the list.

*Did the accused act corruptly to obtain gratification?*

[106] It is trite that the definition of 'corruptly' in the ACA has been struck down by the High Court in *Lameck and Another v President of the Republic of Namibia*.<sup>29</sup> The Supreme Court in the *Goabab* matter (supra at 612C-E) stated that the courts should be allowed to develop the law as regards the statutory offence of corruption. As decided in the *Lameck* case the meaning of 'corruptly' should bear its ordinary meaning.<sup>30</sup> In *Goabab* the court further held that the word 'corruption', when used in the context of the public service, would include the abuse of a public office or position. The general meaning of the word 'corruptly' is 'to act knowingly and dishonestly with the specific intent to subvert or undermine the integrity of something'<sup>31</sup> while the meaning of 'corrupt' is 'to be willing to act dishonestly in return for money or personal gain'.<sup>32</sup> It would appear to me that the accused's actions squarely falls within the ambit of the former meaning of corruptly when she knowingly and dishonestly acted with intent to subvert and undermine the vetting process and integrity of the selection committee's findings.

[107] As regards the element of gratification in the ACA, it *inter alia* includes, any interest in property whether movable or immovable, which in the present instance, would include the allocation of houses under the MHDP.

[108] For the foregoing reasons the requirements set out in subsection (2) of s 43 (the deeming provision), in my view, have been satisfied. In the absence of evidence to the contrary the evidence has shown that the accused, being a public officer, made a decision in which a relative(s) of hers had a direct interest (being allocated houses) and therefore corruptly used her office or position as Governor in order to obtain a gratification for such relative(s).

[109] I am accordingly not persuaded by defence counsel's argument that the accused was wrongly charged. In my view the charge of a contravention of s 43 (1) of the ACA brought against the accused is proper.

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<sup>29</sup> 2012 (1) NR 255 (HC) at 280H-I.

<sup>30</sup> At 281D-E

<sup>31</sup> USLegal.com.

<sup>32</sup> *South African Concise Oxford Dictionary*.

[110] Having reached this conclusion, it has become superfluous to consider counsel's further argument that the accused ought to have been charged under s 18 of the Riotous Assemblies Act, 17 of 1956.

*Conclusion*

[111] After due consideration of the totality of the evidence adduced, the only conclusion to come to is that the state has proved beyond reasonable doubt that the accused's version is not reasonably possibly true and therefore falls to be rejected as false. It was duly established that the accused as Governor of the Hardap Region clearly abused the power and authority vested in her office when insisting that the list of beneficiaries under the MHDP be amended to her satisfaction, thereby ensuring that at least one of her family members benefit directly from her actions. The accused's actions were intentional and constituted a chargeable offence under the ACA.

[112] In the result, on the count of contravening s 43(1) of the Anti-Corruption Act 8 of 2003: Corruptly using office or position for gratification, the accused is found guilty as charged.

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JC LIEBENBERG  
JUDGE

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