

REPUBLIC OF NAMIBIA

Reportable



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: CC 27/2012

In the matter between:

THE STATE

And

MELANEY THERON

ACCUSED

Neutral citation: *State v Theron* (CC 27 - 2012) [2019] NAHCMD 237 (11 July 2019)

CORAM: NDAUENDAPO J

Heard: 22 May 2015

Delivered: 11 July 2019

Flynote: Criminal Law–The accused, a former magistrate accused of –Defeating or obstructing the course of justice–Contravening s 47(a) of the Anti-Corruption Act, Act No. 8 of 2003–Destroying or falsifying documents–Contravening s 43(1) of the Anti-Corruption Act, Act No. 8 of 2003–Corruptly using office or position for gratification–Contravening s 35(1) of the Anti-Corruption Act, Act No. 8 of 2003–Corruptly accepting gratification by agent–Pled–Not Guilty–Evidence overwhelming–Guilty as charged.

Summary: The accused, a former magistrate is arraigned in this Court and charged with twenty counts. Count 1: Defeating or obstructing the course of justice by withdrawing charges against Mr Nuuyoma Daniel;

Count 2: (discharged);

Count 3: Fraudulent concealment of offence (destroy/falsifying a document) Contravening s 47(a) of Act 8 of 2003 in that the accused made false entries in the court book that Mr. Sheehama appeared in court before her, pleaded and was convicted, warned and cautioned, whereas Mr. Sheehama never appeared before her;

Count 5: Corruptly using office or position for gratification – Contravening s 43(1) of Act 8 of 2003. The state alleged that she corruptly received N\$ 500 as a gratification from Mr. Paulinus Kakelo;

Count 6: Fraudulent concealment of offence (falsifying a document) Contravening s 47(a) of Act 8 of 2003 by falsifying a case record on case no. T 1765/2011;

Count 7: Defeating or obstructing the course of justice, by cancelling the warrant of arrest in respect of Mr. Shikalepo without any legal basis;

Count 8: Fraudulent concealment of offence (falsifying a document) Contravening s 47(a) of Act 8 of 2003 making false entries in the court book that Mr. Haulenga appeared before her in court as an accused on case no. T 1369/2011 on 28 July 2011, whereas in reality Mr. Haulenga never appeared before her in court;

Count 9: Fraudulent concealment of offence. Contravening s 47(b) of Act 8 of 2003 by making false entries that Mr. Haulenga was convicted by the court on case no 1367/2011, cautioned and warned, whereas well knowing that did not happen;

Count 10: Defeating or obstructing the course of justice by recording in the traffic court book that a warrant of arrest no 1544/2011 was issued, but held over for 14 days by doing so accused foresaw the possibility that her conduct will protect Kakelo from being prosecuted;

Count 11: Corruptly using office or position for gratification. Contravening s 43(1) of Act 8 of 2003 by corruptly accepting N\$ 1 500 from Mr. Haulenga/ Mr. Hiluwa as a gratification;

Count 12: Corruptly using office for gratification. Contravening s 43(1) Act 8 of 2003 by corruptly accepting N\$ 1 000 from Mr. Shependa as gratification;

Count 13: Corruptly using office or position for gratification – Contravening s 43(1) Act 8 of 2003 by receiving N\$ 500 from Mr. Iitembu as gratification;

Count 14: Defeating the course of justice by cancelling a warrant of arrest of Mr. Iitembu without any legal basis;

Count 15: Defeating the course of justice by withdrawing case no T1690/2011 against Mr. Ndungula without any legal basis;

Count 16: Defeating the course of justice by withdrawing case no T 1680/2011 against Mr. Ashiyana without any legal basis;

Count 17 (alternative): Corruptly using office or position for gratification Received unspecified amount of money from Mr. Iitenge as a gratification;

Count 18: Corruptly using office or position for gratification by corruptly receiving N\$ 1 000 from Mr. Sabas as a gratification;

Count 19: Corruptly accepting gratification by agent (inducement) contravening s 35(1) of Act 8 of 2003 by receiving N\$ 1 000 from Sergeant Mwinga as gratification on 15 August 2011;

Count 20: Corruptly using office or position for gratification in contravention of s 43(1) of Act 8 of 2003 on 15 August 2011 by receiving (corruptly) N\$ 1 000 from Sergeant Mwinga as gratification.

The accused pleaded not guilty to all the charges. She denied all the charges and challenged the state to prove its case.

Count 1

Mr. Nuuyoma testified that he was issued with a traffic ticket on 24 February 2011. The fine was N\$1000 and trial date was 26 May 2011. He gave the ticket and N\$2000 to Mr. Sabas to go and pay. He did not appear in court on 26 May 2011 and the accused withdrew the charge. The accused testified that she withdrew the ticket at the request of the prosecutor as it was defective.

Held that in terms of s 6 of Act 51 of 1977 the withdrawal of the charge must take place at the instance the prosecutor in an open court and the accused must be present.

Held further that no evidence that the prosecutor applied for the withdrawal of the charge nor was the accused present when the charge was withdrawn.

Held further that by withdrawing the charge against Mr. Nuuyoma who committed an offence, the accused defeated or obstructed the course of justice.

Count 3

A traffic ticket was issued in the name of Mr. Sheehama. He did not testify, however, Mr. Mbwale who was the interpreter assigned to the accused's court on 27 June 2011 testified that the entries made by the accused in Exh "HHH" did not take place. The entries showed that the accused was Mr. Sheehama, the presiding officer was Ms Theron the interpreter was Mr. Mbwale and prosecutor was Ms. J Shilunga. The accused recorded that it was a warrant of arrest inquiry. The warrant of arrest was cancelled after the accused asked Mr. Sheehama why he was not at court. He pleaded and the verdict and sentence were: warrant of arrest cancelled, accused warned and cautioned. As alluded, Mr. Mbwale who was the interpreter in that court testified that those proceedings did not take place and the entries were false. His evidence was not challenged on that score.

Held that the entries made by the accused were false and therefore she contravened s 47(b) of the Anti-corruption Act, Act no 8 of 2003.

Count 5

Mr. Kakelo testified that he was issued with a traffic ticket in May 2011. After he was called he proceeded to room 8 at the magistrate's court Oshakati, where he paid N\$ 500 to the accused, but did not receive a receipt. The accused denied that. On 12 August 2011 Mr. Kakelo did not attend court, yet the charge/ticket was withdrawn by the accused. She testified that it was at the instance of the prosecutor.

Held that there was no legal basis for the accused to withdraw the charge against Mr. Kakelo.

Held further that her conduct of withdrawing the charge against Mr. Kakelo indirectly corroborated the version of Mr. Kakelo that he paid her N\$ 500, otherwise why withdraw the charge?

Held further that taking into account the totality of the evidence, the state proved beyond a reasonable doubt that the accused contravened s 43(1) of Act 8 of 2003.

Count 6

Ms Hekandjo testified that in 2011 she owned a taxi, driven by Mr. Shikalepo. A traffic ticket was issued against Mr. Shikalepo, he failed to appear in court and on 30 June 2011 and a warrant of arrest was issued. Ms Hekandjo testified that on 12 July 2011 she did not appear in court before the accused. The accused testified that the ticket (Exh "JJJ1") of Mr. Chrispus Shikalepo was defective and she withdrew it as per application of prosecutor Ms Shilunga.

However, there is a court book record Exh "JJJJ" showing that the employer of Mr. Shikalepo appeared in court. The presiding officer was the accused.

Held that the entries made by the accused on 12 July 2011 as reflected in Exh "JJJ2" are false and was meant to defraud or conceal an offence in terms of section 47(a) of Act 8 of 2003.

Count 7

Mr. Franco Cosmos testified that he was the Magistrate assigned to the traffic court on 30 June 2011 at Oshakati Magistrate's court and he noticed in the court book that the case of Mr. Shikalepo was 'withdrawn' before he had dealt with the case. After noticing this irregularity and bringing it to the attention of the Chief Magistrate, and as Mr. Shikalepo was in default, he ordered that a warrant of arrest be issued.

The accused testified that because the ticket was defective as there was no citation of the Act, she had to do an inquiry and cancelled the warrant of arrest in respect of Mr.

Shikalepo on case no: T 176/2011. She further testified that the warrant was also not signed and therefore it was invalid.

Held that the accused assertion that she could cancel the warrant of arrest because it was not signed is misplaced, bearing in mind that Mr. Shikalepo was not in court and the mandatory 14 days had not yet lapsed. Mr. Shikalepo was still in default on 12 July 2011 and did not attend court on that day and by cancelling the warrant of arrest, the accused made herself guilty of defeating or obstructing the course of justice.

Count 8

Mr. Haulenga testified that he was issued with a traffic ticket during 2011. He sent Mr. Hiluwa to go and pay the ticket for him. On Sunday he gave Mr. Hiluwa N\$ 1 000 and his (Automatic Teller Machine) ATM card to go and withdraw an additional N\$ 1 000. On Monday, Mr. Hiluwa called him and told him that he had paid to Ms. Theron, but did not get a receipt. He further testified that he did not appear in court on 28 July 2011 before the accused in respect of the traffic ticket where in the court book it was indicated that Mr. Haulenga pleaded guilty and made submissions in mitigation.

Mr. Hiluwa also testified that he did not appear in court on 28 July 2011. The accused testified that those proceedings took place and Mr. Haulenga or Hiluwa appeared before her in an open court. Mr. Ipinge, the prosecutor, testified that he could not recall those proceedings, but he noted the shockingly lenient sentence; 'warned and cautioned.' The accused testified that somebody must have appeared before her for her to make those entries. Mr. Haulenga and Hiluwa were adamant that they did not appear in court on 28 July 2011 before the accused.

Held that the evidence of the accused that somebody must have appeared before her is difficult to believe as it is highly unlikely that anybody else, except the person in whose name a ticket had been issued, would appear before a magistrate, plead and mitigate on behalf of the real owner of the ticket and pay a fine or in default face a jail term.

Held that Mr. Haulenga's evidence that he was not in court is credible, otherwise why would he lie about it?

Held further that having regard to the totality of the evidence, the state proved beyond a reasonable doubt that the accused contravened s 47(a) read with section 1, 32, 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 9

Mr. Mbwale who was recorded as the interpreter corroborated Mr. Haulenga's version and testified that those proceedings did not take place on 28 July 2011, the proceedings were not done in court.

Held that the entries made by the accused in Exh "FF2" to the effect that Mr. Haulenga pleaded guilty, he had no previous convictions and placed mitigating factors such as that he is 50 years old, he is the sole bread winner in the house of 6 people and was warned and cautioned, were false as Mr. Haulenga was not at court on 28 July 2011 and never appeared before the accused when she made those entries.

Held that the version of the accused that somebody appeared before her is false beyond a reasonable doubt and is rejected by the court.

Held further that the state proved beyond a reasonable doubt that the accused contravened s 47(b) read with sections 1, 32, 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 10

Mr. Kakelo testified that he was issued with a traffic ticket on 21 May 2011 for driving without a license. He was fined N\$1000 to be paid before 14 July 2011 or appear in court on 28 July 2011. He defaulted and a warrant of arrest was issued by the accused. The warrant of arrest was held over and the return date (14 days) was the 12 August

2011. After having been called on his phone he went to the Oshakati magistrate's court and paid N\$ 500 to a 'baster lady' by the name of Theron.

He testified that on 28 July 2011 he did not appear in court and he was not aware of a warrant of arrest that was issued by the accused. He further testified that he was also not aware that the warrant of arrest was subsequently cancelled on 12 August 2011. The accused testified that the warrant of arrest is not reflected in the court book because on 12 August 2011 they did not deal with tickets and the prosecutor brought it to her in the afternoon.

Held that Mr. Kakelo failed to appear in court on 28 July 2011 and the accused was justified to issue the warrant of arrest.

Held that the accused committed no offence by issuing the warrant of arrest. Accused found not guilty on this count.

Count 11

Mr. Hiluwa testified that after he was given the N\$1000 by Mr. Haulenga and the N\$1000 from the ATM that he withdrew on Sunday, he went on Monday to Oshakati magistrate's court and paid N\$1500 to the accused on the instruction of Mr Haulenga for the ticket that was issued to him (Mr. Haulenga). He testified that he did not receive a receipt for that from the accused. The accused on the other hand testified that he never received any money from Mr. Hiluwa. Counsel for the state argued that it was immaterial that the accused could not have received the money directly from Mr. Haulenga, as it was Mr. Haulenga and not Mr. Hiluwa who had been issued with the traffic ticket.

Counsel further argued that the fact that the accused then made various false entries in Exhibits "FF1", "FF2", "FF3" are corroborative of such payment to her, otherwise why should she sought, by so doing, to benefit Mr. Haulenga?

Held that the accused's version is a bare denial. Both Mr. Haulenga and Mr. Hiluwa did not appear in court on 28 July 2011 when the accused made the false entries in Exhibits "FF1", "FF2" and "FF3",

Held that the only reasonable inference to be drawn is that the accused made those false entries because she received money from Mr. Hiluwa, otherwise why would she do something like that?

Held further that the court is satisfied that the state proved beyond a reasonable doubt that the accused is indeed guilty of contravening s 43(1) read with sections 32, 43(3), 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 12

Mr. Japhet Shipenda, a taxi driver, testified that in August 2011 in Oshakati he was issued with a traffic ticket for N\$ 2 000 because he did not have a public permit. He was supposed to appear in court on 8 August 2011. He then realized that the ticket had expired and he went to the Oshakati magistrate's court where he met the accused who was coming from court c going to the office. In the office he gave his ticket to the accused and he told her that he managed to raise N\$ 1 000. He then gave her the N\$ 1 000 and she counted it. She was alone in her office when he handed her the money.

In the court document it was noted by the accused that Mr. Japhet Shipenda appeared and the matter was withdrawn, he said no, he did not appear. The accused denied having received any money from Mr. Japhet Shipenda. She cannot recall that he was in her office.

Mr. Shipenda's version was corroborated by Mr. Mbwale, the interpreter, who testified that Mr. Japhet Shipenda's ticket was not dealt with in court which led to him (Mr. Mbwale) noticing the anomaly of him having been entered by the accused as the attending interpreter on Exh "U2".

Held that the only reasonable inference to be drawn from 'withdrawing' the ticket of Mr. Shipenda is that the accused received payment of N\$ 1 000 from Mr. Shipenda, otherwise why withdraw the ticket in the absence of the accused?

Held further that having regard to the totality of the evidence the court is satisfied that the state proved beyond a reasonable doubt that the accused contravened s 43(1) read with section 32, 43(3), 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 13

Mr. Kalusha litembu testified that he was issued with a traffic ticket on 21 April 2011 for obstructing other road users. The fine was N\$ 1 000 to be paid by 15 June 2011 in default the trial date was 30 June 2011. However on the control document the month was altered and the '8th' was super imposed on the 6th (June). He testified that he did not know who altered the month. He testified that before 30 June 2011, he went to court with the aim of asking for an extension of the date as he wanted time to raise the money to pay the fine. He went to Oshakati magistrate's court where he met the accused in the veranda. He told her, his problem and she said they must go into her office. The accused asked him how much he could afford and he told her N\$ 500. She asked him to give her the ticket. She looked at it and she then said give me the N\$ 500 you have.

Mr. Kalusha litembu then proceeded to give the accused the N\$ 500. She then said its ok and she did not give him a receipt. The accused denied having received any money from Mr. Kalusha litembu. She never met him before, only here in court. Mr. litembu was adamant that he paid N\$500 to the accused.

Held that the version of Mr. litembu is indirectly corroborated by the subsequent conduct of the accused of withdrawing the traffic ticket without Mr. litembu being present at court. If the accused did not receive any gratification from Mr. litembu why withdrew the traffic ticket?

Held that the inescapable conclusion is that she indeed received the N\$500 from Mr. litembu. She is therefore guilty of contravening s 43(1) read with section 32, 43(3), 46, 49 and 51 of Anti-corruption Act, Act 8 of 2003.

Count 14

The accused testified that there was an alteration to the '8' (month) of the trial date and therefore the ticket was defective and there was also no Act cited. She testified that the ticket was initially brought to her in chambers by prosecutor Shilunga to see whether she could assist her. After that Ms Shilunga applied in open court to declare the ticket defective and for the cancellation of the warrant of arrest. She declared the ticket defective and 'withdrew' it in the court book on 30 June 2011 and then magistrate Cosmos scratched it.

She testified that she can't state whether Mr. Kalusha was in court, but the accused need not be there when the ticket is to be withdrawn. By the time, being 12 July 2011, the accused cancelled the warrant of arrest, it had not yet been signed by the magistrate as the 14 day had not yet lapsed.

Held that the accused had no basis in law to cancel the warrant of arrest issued lawfully against Mr. litembu.

Held further that the accused's conduct frustrated or interfered or protected Mr. litembu from being prosecuted for the traffic offence he had committed and therefore the state proved beyond a reasonable doubt that she is guilty of defeating the course of justice.

Count 15

Ms Peya Petrina Ndungula testified that she was issued with a traffic ticket on 3 July 2011 for driving without a driver's license. The fine was N\$ 300 to be paid by 22 July 2011 or to appear in court on 11 August 2011. She did not pay the fine nor appeared in court on 11 August 2011. She misplaced her ticket. On 11 August 2011 on the reverse side of the control document the following entries were made by the accused:

“Withdrawn - ticket defective” (Exh “Z2”). In the court book the accused wrote: “Withdrawn – ticket defective no citation of Act” (Exh Z 3).

Ms Kefas testified that she was the prosecutor in the accused’s court on 11 August 2011 and she never applied for the withdrawal of the ticket on the basis of defectiveness. Ms Peya Ndungula also testified that she never appeared in court before the accused on 11 August 2011. The accused testified that she withdrew the ticket on application by the prosecutor because the ticket was defective as there was no Act cited. She further testified that the “annexure” which would have shown who applied for the withdrawal of the ticket and the reasons are not before court.

Held that the accused’s explanation that there was such an application, which is denied by the prosecutor, Ms Kefas and the witness who testified that she was not at court, cannot be true.

Held that the accused’s version is not reasonably possible true and is rejected by the court.

Held further that the court is satisfied that the state proved its case beyond a reasonable doubt and the accused is found guilty on count 15.

Count 16

Mr. Ashiyana testified that he was issued with a traffic ticket on 12 July 2011. He gave N\$ 2 000 to the late Mr. Ndapandula to go and pay. The late Mr. Ndapandula did not give him a receipt. He further testified that he did not appear in court on 11 August 2011. Counsel for the State submitted that Exh “HH2” is self-explanatory and the accused is not denying that she made the entry.

Counsel argued that as it is not disputed that Mr Ashiyana did not attend court on 11 August 2011, it follows that such “withdrawal” was done secretly by the accused on her own, without the participation of the other role players, such as the prosecutor, interpreter and or court orderly. The accused argued that she withdrew the ticket on application by the prosecutor as the ticket was defective and the annexure showing who

the prosecutor was is not attached or disclosed. The fact that there was no Act cited was not a basis for the withdrawal of the ticket.

Held that the fact that the accused did not request a disclosure of the so called annexure which should have proved her innocence, show that there was no such annexure and I agree with counsel for the state that such 'withdrawal' was done by the accused on her own.

Held further that there was no legal basis for her to withdraw the ticket and when she did that she knew that her conduct may frustrate or interfere or protect Mr. Ashiyana from being prosecuted for the traffic offence he had committed.

Held further that the state proved the guilt of the accused beyond a reasonable doubt. The accused is accordingly found guilty of defeating the course of justice.

Count 17 (alternative count) The accused was discharged on the main count Mr. litenge testified that he was a taxi driver and on 21 July 2011 he was issued with a traffic ticket for inconsiderate driving. The fine was N\$2000 and the trial date was 15 August 2011. A certified copy of the traffic ticket was admitted as Exh "S1". He testified that on 15 August 2011 at around 11am a lady who identified herself as 'Marlene' phoned him and told him to come and see her at the Oshakati Magistrate's court in connection with an expired ticket and that he should attend court at 14h00. At court he was told that Marlene was arrested by the police. He further testified that he did not appear in court where the ticket was withdrawn as being defective.

The accused testified that she did not phone Mr. litenge. She testified that she withdrew the ticket "S1 and S2" on request of prosecutor Mr. Likando. It was withdrawn because it was defective – no Act was cited.

Held that there is no evidence that it was the accused who called Mr. litenge.

Held that there is also no evidence that the person who called Mr. litenge asked him to bring some money. By the time Mr. litenge came to court, the accused was arrested

and did not meet with Mr. litenge and therefore she did not receive an unspecified amount of money from Mr. litenge as alleged by the state.

Held further that the court is not satisfied that the state proved the guilt of the accused on this count. The accused is acquitted on this count.

Count 18

Mr. Taddeus Sabas testified that in 2011 he was given N\$ 1 000 and a traffic ticket by Mr. Daniel Nuuyoma to go and pay on his behalf at the Oshakati magistrate's court. He proceeded to Oshakati magistrates' court and paid the N\$ 1 000 to the accused, a light in complexion lady. He also handed the traffic ticket to her. He was told to come and get the receipt the next day. The next day, he came but did not find the accused. The accused denied having received any money from Mr. Taddeus Sabas. She disputed the payment on the basis that no receipt was issued to him.

Counsel for the state argued that the fact that the accused then made clear false entries indicating that the matter had been withdrawn, yet neither Mr. Nuuyoma nor Mr. Thedeus Sabas appeared before her in court are indirectly corroborative of the entries having been made with a mind to benefit either herself or Mr. Nuuyoma. The accused on the other hand testified that the witnesses were implicating her because they wanted to exonerate themselves from not having paid traffic tickets.

Held that, that argument is baseless as it is not only one witness who implicated her, but many and there is no evidence that all those witness wanted to exonerate themselves for not paying traffic tickets.

Held the making of those false entries was a way of returning the favour for having received the N\$ 1 000. Otherwise why make the false entries?

Held further that having regard to the totality of the evidence the court is satisfied that the state proved beyond a reasonable doubt that the accused contravened s 43(1) read with sections 32, 43(3), 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Counts 19 and 20

Inspector Namweya testified that he made sure that the fake traffic ticket with his cellphone number on was forwarded to the accused's court, court c. Subsequent to that he received a call on his mobile from a lady who called around 15h00 saying: 'This is magistrate Theron calling from Oshakati Magistrate's court, you are having a traffic ticket and that you need to be at court and the fine is N\$ 2 000 and if you pay the same day before 16h00 you will get a discount of N\$ 1 000 and if you come the next day you will pay N\$ 1 500 and if you do not turn up, she will issue a warrant of arrest then he will be arrested and detained in the police cells.' She introduced herself as magistrate Theron who informed him about the traffic ticket and that he must come in to pay it.

The accused denied that she called Inspector Namweya but Inspector Namweya was adamant that a magistrate by the name of Theron called him and the accused was the one whose court dealt with traffic tickets. In addition he was told to come to office no 8, which was indeed her office and the person who called him introduced herself as magistrate Theron. The accused's version was a bare denial. She denied that she called Inspector Namweya. The accused had the "Pomwene Absalom" control document in her office on 15 August 2011 in the afternoon, which had not been dealt with at all at the time of her arrest.

Sergeant Mwinga testified that he was told by Inspector Namweya that the accused called him and they must proceed to Oshakati magistrate's court to make a payment. He went inside the office of the accused with a ticket and N\$1000 and handed it to her.

Held that given the earlier conversation she had with Inspector Namweya over the phone wherein she requested him to come and pay N\$ 1 000, her explanation that she asked Sergeant Mwinga to go and get an Oshiwambo interpreter, after he threw the money on her desk is not reasonable possible true and is rejected by the court.

Held that having regard to the totality of the evidence, the court is satisfied that the state proved beyond a reasonable doubt that in respect of count 19, the accused solicited a

gratification from Inspector Namweya and is guilty of contravening s 35(1) of Act 8 of 2003.

Held further that in respect of count 20, the court is satisfied that sergeant Mwinga gave the accused N\$ 1 000 and she put it on her table and by so doing she was abusing her office to obtain a gratification and accordingly, she is also found guilty of contravening s 43(1) of Act 8 of 2003.

ORDER

1. Count 1 – Defeating or obstructing the course of justice – Guilty as charged.
2. Count 3 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
3. Count 5 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
4. Count 6 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
5. Count 7 – Defeating or obstructing the course of justice – Guilty as charged.
6. Count 8 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
7. Count 9 – Contravening section 47(b) of the Anti-Corruption Act, Act 8 of 2003 – Guilty as charged.
8. Count 10 – Defeating or obstructing the course of justice – Not guilty.
9. Count 11 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
10. Count 12 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
11. Count 13 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
12. Count 14 – Defeating or obstructing the course of justice – Guilty as charged.

13. Count 15 – Defeating or obstructing the course of justice – Guilty as charged.
14. Count 16 – Defeating or obstructing the course of justice – Guilty as charged.
15. Count 17 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Not guilty.
16. Count 18 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
17. Count 19 – Contravening section 35(1)(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
18. Count 20 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.

JUDGMENT

NDAUENDAPO, J

[1] The accused was arraigned in this Court and charged with the following counts:

COUNT 1 DEFEATING OR OBSTRUCTING THE COURSE OF JUSTICE

[2] In that on or about the 26th day of May 2011 and at or near Oshakati in the district of Oshakati, the accused did unlawfully and with intent to defeat or obstruct the course of justice:

1. Withdraw the charges against Mr. Nuuyoma Daniel of contravening Regulation 2(1), 2(2) & 25(1) of Government Notice No. 53 of 2001 read with the provisions of the Road Traffic and Transportation Act, No. 22 of 1999: Case No. T 1429/11: Without an application by the prosecutor/State to withdraw such charges and/or without the power and Authority to do that.

Whereas when this act was done, the accused knew or foresaw the possibility that:

- (1) Her conduct may frustrate and/or interfere or may protect Mr. Nuuyoma Daniel from being prosecuted for the crime he has committed.

Whereas the accused is guilty of the crime of defeating or obstructing or attempting to defeat the course of justice

COUNT 2 DISCHARGED

COUNT 3

FRAUDULENT CONCEALMENT OF OFFENCE (DESTROYING/FALSIFYING A DOCUMENT)

[3] That the accused is guilty of the offence of Contravening Section 47 (a) read with sections 1, 32, 46, 49 and 51 of the Anti-Corruption Act, Act No. 8 of 2003.

1. Mr. Michael Sheehama appeared before court on the 27th day of June 2011;
2. That an enquiry was done as to why Mr. Michael Sheehama was not at court on 29 April 2011;
3. Mr. Michael Sheehama informed the court that he lost the ticket during the flood;
4. The court was satisfied with his explanation;
5. The Prosecutor put the charge to Mr. Michael Sheehama to which he pleaded guilty;
6. Following Michael Sheehama's own plea of guilty, the court warned and cautioned him, as his punishment.

Whereas in actual fact, the accused well knew that when she made such an entry on the case record, that the entry was false and that in fact:

1. Mr. Michael Sheehama never appeared before court on the 27th day of June 2011;

2. No enquiry was conducted by the court to determine why Mr. Michael Sheehama was not at court on the 27th day of June 2011;
3. Mr. Michael Sheehama never informed the court that he lost the ticket during the flood and that court could not have been satisfied with such explanation in view of the above fact;
4. No charge was put to Mr. Michael Sheehama on the 27th day of June 2011;
5. Mr. Michael Sheehama never pleaded to the charge and was never sentenced at all; [which record belongs to or is in possession of her employer, to wit, the Magistrate Commission and/or the Ministry of Justice and/or the Government of the Republic of Namibia or has been received by her on account of her employment].

ALTERNATIVELY TO COUNT 3: FRAUD

[4] In that on or about the 27th day of June 2011 and at or near the Magistrate's Court Oshakati, in the district of Oshakati the accused did wrongfully, falsely and with intent to defraud or give out and pretend to the Magistrate's Commission and or Mr. Mikka Namweya and/or the Clerk of court, Oshakati and/or the Ministry of Justice and/or the Government of the Republic of Namibia that:

1. Mr. Michael Sheehama appeared before court on the 27th day of June 2011, on a Traffic Case No: T 1267/2011;
2. An enquiry was done by court as to why Mr. Michael Sheehama was not at court on the scheduled date of trial i.e. the 29 April 2011;
3. Mr. Michael Sheehama informed the court that he lost the ticket during the flood;
4. The court was satisfied with Mr. Michael Sheehama's explanation above;
5. The Prosecutor put the charge to Mr. Michael Sheehama to which he pleaded guilty;
6. Following Mr. Michael Sheehama's plea of guilty and after mitigation, the court warned and cautioned him, as his punishment

[5] And did then and there by means of the said false pretenses induce the said: Magistrate's Commission and/or Mr. Mikka Namweya and/or the Clerk of Court, Oshakati and/or the Ministry of Justice and/or the Government of the Republic of Namibia to the actual or potential loss and prejudice of the Magistrate's commission, Oshakati and/or the Ministry of Justice and/or the Government of the Republic of Namibia.

- (i) Believe the misrepresentation or any part thereof and/or
- (ii) Accept that the case record on Case No: T 1267/2011 and proceedings of the 27th of June 2011 were correct.

[6] Whereas in truth and in fact the accused when she so gave out and pretended as a foresaid well knew that:

1. Mr. Michael Sheehama never appeared before court on the 27th day of June 2011 on a Traffic Case No: T 1267/2011;
2. No enquiry was done by the court as to why Mr. Michael Sheehama was not at court on his trial date which was the 29th day of April 2011;
3. Mr. Michael Sheehama never informed the court that the reason for his non-appearance at court on the 29th of April was because he lost the ticket during the flood;
4. It is also false that the court was so satisfied with his explanation;
5. The prosecutor never put the charge to Mr. Michael Sheehama on the 27th of April 2011 and that Mr. Michael Sheehama never pleaded guilty to the charge he was facing;
6. No mitigation and sentence proceedings took place.

And thus the accused did commit the crime of fraud.

Count 4: Discharged

Count 5: Corruptly using office or position for gratification

[7] That the accused is guilty of the offence of contravening section 43(1) read with sections 32, 43(3), 46, 49 and 51 of the Anti-corruption Act, Act No. 8 of 2003.

In that on or about the 12th day of August 2011 and at or near the Magistrate's court, Oshakati in the district of Oshakati, the said accused being a public officer, to wit: a Magistrate/Judicial Officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally used his/her office or position in a public body, to wit: The Magistrate's Commission/and or Ministry of Justice and or Government to obtain a gratification for his/her own benefit or that of other person, to wit: an amount of N\$ 500 from Mr. Paulinus Kakelo and thus the accused did contravene section 43(1) of Act 8 of 2003.

Count 6: Fraudulent concealment of offence (destroying/falsifying a document)

[8] That the accused is guilty of the offence of contravening section 47(a) read with sections 1, 32, 46, 49 and 51 of the Anti-corruption Act, Act No. 8 of 2003.

In that on or about the 12th day of July 2011 and at or near the Magistrate's court, Oshakati in the district of Oshakati, the accused did wrongfully, unlawfully, and with intent to defraud or to conceal the commission of an offence under Chapter 4 of the Anti-Corruption Act, 2003 (Act 8 of 2003) or to obstruct an authorized officer in the investigation of any such offence, destroy, alter, mutilate or falsify, a book, document, valuable security, account, computer system, disk, computer printout or other electronic device, or an entry in such book or document to wit: a Case Record on Case No. T 1765/2011, which belongs to or is in possession of his/her employer, to wit: The Magistrate's Commission and/or Ministry of Justice and/or Government of the Republic of Namibia or has been received by him/her on account of his/her employment.

Alternative to count 6: - Fraud

[9] In that on or about the 12th day of August 2011 and at or near Magistrate's court, Oshakati in the district of Oshakati, the accused did wrongfully, unlawfully, falsely and with intent to defraud give out and pretend to the Magistrate's Commission and/or Mr.

Mikka Namweya and/or the Clerk of Court, Oshakati and/or the Ministry of justice and/or the Government of the Republic of Namibia, that:

1. Ms. Selma Hekandjo and/or Mr. Chrispus Hemedede Shikalepo appeared in court on the 12th day of July 2011 on a Traffic Case No: T1765/2011;
2. Mr. Mbwale was the interpreter on the 12th day of July 2011 on Case NO. T1765/2011;
3. An enquiry was made by the court why Ms. Selma Hekandjo and/or Mr. Chrispus Hemedede Shikalepo was/were not at court on the 30th of June 2011 being the date of Trial on Case No. T1765/2011;
4. Ms. Selma Hekandjo allegedly informed the court that the ticket bearing Case No. T1765/11 was issued to her driver namely Mr. Chrispus Hemedede Shikalepo, and she was not aware of such ticket;
5. The court was satisfied with the above explanation;
6. The charge was put to Ms. Selma Hekandjo and that she pleaded guilty as contained in the case recorded of Case No. T1765/2011;
7. The court found Ms. Selma Hekandjo guilty upon her own plea of guilty in terms of Section 112 (1)(a), of the Criminal Procedure Act, 51 of 1977;
8. The prosecutor informed the court that the accused (Ms. Selma Hekandjo) had no records of previous convictions;
9. The accused (Ms. Selma Hekandjo) informed the court that she is asking for mercy, that her driver (had more than one ticket and has ran away, leaving her to pay everything, that her driver had bumped her car which she still have to fix;
10. The court warned and cautioned the accused viz Ms. Selma Hekandjo.

[10] And did then and there by means of the said false pretenses induce the Magistrate's Commission and/or Mr. Mikka Namweya and/or the Clerk of court, Oshakati and/or the Ministry of Justice and/or the Government of the Republic of Namibia to the actual or potential loss and prejudice of the Magistrate's Commission and/or Mr. Mikka Namweya and/or the Clerk of Court, Oshakati and/or the Ministry of Justice and/or the Government of the Republic of Namibia to:

- (i) Believe the misrepresentation or any part thereof and or

- (ii) Accept that the case record on Case No. T1765/2011 and proceedings of the 12th of July 2011 were correct.

Whereas in truth and in fact, the accused when she so gave out and pretended as aforesaid well knew that:

1. Ms. Selma Hekandjo and/or Mr. Chrispus Hemedede Shikalepo never appeared before court on the 12th of July 2011 on Case No. T1765/2011;
2. Mr. Mbwale was never the interpreter on Case No. T1765/2011 on the 12th of July 2011;
3. No enquiry was made by the court as to why Ms. Selma Hekandjo and/or Mr. Chrispus Hemedede Shikalepo was/were not at court on the 30th of June 2011 being the date of trial on Case No. T 1765/2011;
4. It was false that Ms. Selma Hekandjo informed the court that the ticket bearing Case No. T1765/2011 was issued to her driver, Mr. Chrispus Hemedede Shikalepo and that she was not aware of such ticket;
5. It is false and not true that the court was so satisfied with her explanation;
6. It is false and not true that the charge was put to Ms. Selma Hekandjo and that she pleaded guilty on Case No T1765/2011;
7. It is false and not true that the court found Ms. Selma Hekandjo guilty upon her own plea of guilty;
8. It is false and not true that the prosecutor informed the court that the accused (Ms. Selma Hakandjo) had no records of previous convictions;
9. It is false and not true that Ms. Selma Hekandjo mitigated as reflected on Case No. T1765/2011;
10. It is false and not true that the court warned and cautioned her as her sentence on Case NO. T1765/2011.

And thus the accused did commit the crime of fraud.

Count 7: Defeating or obstructing the course of justice

[11] In that upon or about the 12th day of July 2011 and at or near Oshakati Magistrate's court, in the district of Oshakati, the accused did unlawfully and with intent to defeat or obstruct the course of justice commit the said offence in that:

1. She without any legal basis cancelled the warrant of arrest which was lawfully issued against Mr. Chrispus Hemedede Shikalepo on Case No. T1765/2011, on the 30th of June 2011 for failing to be in attendance and or to remain in attendance until excused by the court.

Whereas when this was done, the accused knew or foresaw the possibility that:

1. Her conduct may frustrate and or interfere or may protect Mr. Chrispus Hemedede Shikalepo, from being prosecuted for the crime he has committed to wit: Contravening Regulation 2(1), 2(2) and 25(1) of Government Notice No: 53 of 2001 read with Road Traffic and Transportation No: N16049SH failing to display, paint identification particulars on the vehicle via names, business address or nature of business on the vehicle and/or the offence of contempt of court.

Wherefore the accused is guilty of the crime of defeating or obstructing or attempting to defeat the course of justice.

Count 8: Fraudulent concealment of offence (destroying/falsifying a document)

[12] That the accused is guilty of the offence of contravening section 47(a) read with sections 1, 32, 46, 49 and 51 of the Anti-corruption Act, Act No. 8 of 2003.

In that on or about the 28th day of July 2011 and at or near the Magistrate's court, Oshakati in the district of Oshakati, the accused did wrongfully, unlawfully, and with intent to defraud or to conceal the commission of an offence under Chapter 4 of the Anti-corruption Act, 2003 (Act 8 of 2003) or to obstruct an authorized officer in the investigation of such offence, destroy, alter, mutilate or falsify a book, document, valuable security, account, computer system, disk, computer printout or other electronic device, or an entry in such book or document to wit: a case record on Case No: T1367/2011, on which Mr. Israel Haulenga is the accused to the effect that:

1. Mr. Israel Haulenga appeared before court as an accused on Case No. T1369/2011 on the 28th day of July 2011;
2. He pleaded guilty to the charge of contravening Regulation 127(1)(a) read with sections 1, 128, 129, 134 and 369 and further read with section 1, 33(1), 86 and 89 of the Road Traffic and Transportation Act, No. 22 of 1999: i.e. operating a white Scania Truck with Registration No. N1321G, on a public road to wit Oshakati – Ondangwa road, Whilst the driving license is not endorsed with Professional Authority;
3. The court convicted him upon his own plea of guilty;
4. The public prosecutor, informed the court that the accused on a Case No. T1367/2011, viz Mr. Israel Haulenga had not previous convictions;
5. The court explained to Mr. Israel Haulenga his rights to mitigation and that pursuant to such explanation, the said Mr. Israel Haulenga informed the court that he is 50 years old, he is the only breadwinner in the house of ten (10) people; that some of his children are studying and that he was asking the court to be lenient;
6. The prosecutor recommended a fine of N\$2000 or 3 (three) months imprisonment;
7. And that, after taking all factors into consideration, the court warned and cautioned the accused Mr. Israel Haulenga.

Whereas in truth and in fact when the accused so gave out and pretended as aforesaid well knew that:

1. Mr. Israel Haulenga never appeared before court as an accused on Case NO. T1367/2011 on the 28th day of July 2011;
2. It is false that the said Mr. Israel Haulenga pleaded guilty to the charges he was facing on Case No. T1367/2011;
3. It is false that the Prosecutor informed the court that Mr. Israel Haulenga had no records of previous convictions;

4. It is false that the court informed Mr. Israel Haulenga of his rights to mitigation before sentence, furthermore it is false that the said Mr. Israel Haulenga mitigated before the sentence was passed;
5. It is false that prosecutor recommended a fine of N\$2000 or 3 (three) months imprisonment;
6. It is false that a sentence of a caution was imposed on Mr. Israel Haulenga.

And thus the accused contravened section 47(a) read with sections 1, 32, 46, 49 and 51 of the Anti-corruption Act 8 of 2003 by falsifying a document, viz a case record on Case No. T1367/2011, which record belongs to or is in possession of his/her employer, to wit: the Magistrate's Commission and/or the Ministry of Justice and/or Government of the Republic of Namibia or has been received by him/her on account of his/her employment.

Alternatively to count 8 - Fraud

[13] In that on or about the 28th day of July 2011 at or near the Magistrate's court, Oshakati in the district of Oshakati, the accused did wrongfully, falsely and with intent to defraud, give out and pretend to the Magistrate's Commission and/or the Clerk of court, Oshakati and/or Mr. Mikka Namweya and/or the Ministry of Justice and/or the Government of the Republic of Namibia that:

1. Mr. Israel Haulenga appeared before court as an accused on Case No: T1367/2011 on the 28th day of July 2011;
2. He pleaded guilty to the charge of contravening Regulation 127 (1)(a) read with sections 1, 128, 129, 134 and 369 and further read with section 1, 33(1), 86 & 89 of the Road Traffic and Transportation Act, 1999 (Act No. 22 of 1999: operating a white Scania Truck with registration No. N1321G, on a public to wit Oshakati - Ondangwa road, whilst the driving license is not endorsed with professional authorization;
3. The court convicted him upon his own plea of guilty;
4. The public prosecutor informed the court that the accused on Case No. T1367/2011 viz Mr. Israel Haulenga had no previous convictions;

5. The court explained to Mr. Israel Haulenga his rights to mitigation and that pursuant to such explanation, the said Mr. Israel Haulenga informed the court that he is 50 years old, he is the only breadwinner in the house of ten (10) people, that some of his children are studying and that he is asking the court to be lenient;
6. The prosecutor recommended a fine of N\$ 2000 or 3 (three) months imprisonment;
7. And that, after taking all factors into consideration the court warned and cautioned the accused Mr. Israel Haulenga.

And did then and there by means of the said false pretenses induce the Magistrate's Commission and/or Mr. Mikka Namweya and/or the Ministry of Justice and/or the Government of the Republic of Namibia to the actual or potential loss and prejudice of the Magistrates Commission and or Mr. Mikka Namweya and/or the Ministry of Justice and/or the Government of the Republic of Namibia to:

1. Believe the misrepresentation or any part thereof and/or;
2. Accept that case record on Case No. T1367/2011 and proceedings of the 28th of July 2011 were correct.

Whereas in truth and in fact when the accused so gave out and pretended as aforesaid well knew that:

1. Mr. Israel Haulenga never appeared before court as an accused on Case No. T1367/2011 on the 28th of July 2011;
2. It is false that the said Mr. Israel Haulenga pleaded guilty to the charges he was facing on Case No. T 1367/2011;
3. It is false that the court convicted him upon his own plea of guilty;
4. It is false that the prosecutor informed the court that Mr. Israel Haulenga had no records of previous convictions;

5. It is false that the court informed Mr. Israel Haulenga of his rights to mitigation before sentence, further more it is false that the said Mr. Israel Haulenga mitigated before the sentence was passed;
6. It is false that the prosecutor recommended a fine of N\$ 2000 or 3 months imprisonment;
7. It is false that a sentence of a caution was imposed on Mr. Israel Haulenga.

And thus the accused did commit the crime of fraud.

Count 9 Fraudulent concealment of offence (obstructing investigation)

[14] That the accused is guilty of the offence of contravening section 47(b) read with sections 1, 32, 46, 49 and 51 of the Anti-Corruption Act, Act No. 8 of 2003.

In that on or about the 28th day of July 2011 and at or near the Magistrate's court, Oshakati, in the district of Oshakati, the accused did wrongfully, unlawfully, and with intent to defraud or to conceal the commission of an offence under Chapter 4 of the Anti-Corruption Act, 2003 (Act 8 of 2003) or to obstruct an authorized officer in the investigation of any such offence, make or was privy to the making of any false entry in a book, documents, account or electronic device, to wit: Traffic Court book for 28 July 2011 in respect of Mr. Israel Haulenga on Case No T1367/2011, which Traffic Court Book belongs to or is in possession of his/her employer, to wit: the Magistrate's Commission and/or the Ministry of Justice and/or Government of the Republic of Namibia or has been received by him/her on account of his/her employment (by recording that Mr. Israel Haulenga was convicted by the court on said case and cautioned and warned, well knowing that the was not convicted at all and was therefore not sentenced.

Count 10 – Defeating or obstructing the course of justice

[15] In that or about the 28 July 2011 and at or near Oshakati in the district of Oshakati the accused did unlawfully and with intent to defeat or obstruct the course of Justice:

1. By recording in the Traffic court book for 28 July 2011 in respect of Mr. Paulinus Kakelo on Case No. T1385/2011, that a warrant of arrest No. 1544/2011 was issued but held over for 14 days.

Whereas when this act was done, the accused knew or foresaw the possibility that:

1. Her conduct may frustrate and or interfere or may protect Mr. Paulinus Kakelo from being prosecuted for the crimes he has committed.

Wherefore the accused is guilty of the crime of defeating or obstructing or attempting to defeat the course of justice.

Count 11 Corruptly using office or position for gratification

[16] That the accused is guilty of the offence of contravening section 43(1) read with section 32, 43(3), 46, 49 and 51 of the Anti-Corruption, Act No. 8 of 2003.

In that on or about the 1st day of August 2011 and at or near the Magistrate's court, Oshakati in the district of Oshakati the said accused being a public officer, to wit: A Magistrate/Judicial officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally use his/her office or position in a public body, to wit: The Magistrate's Commission and/or Ministry of Justice and/or Government of the Republic of Namibia to obtain a gratification for his/her own benefit or that of other people, to wit: an amount of N\$1500-00 from Mr. Israel Haulenga and/or Mr. Mathews Hiluwa and thus the accused did contravene section 43(1) of Act No. 8 of 2003.

Count 12 Corruptly using office for gratification

[17] That the accused is guilty of the offence of contravening section 43(1) read with section 32, 43(3), 46, 49 and 51 of the Anti-Corruption, Act No. 8 of 2003.

In that on or about the 8th day of August 2011 and at or near the Magistrate's court, Oshakati in the district of Oshakati the said accused being a public officer, to wit: A Magistrate/Judicial officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally use his/her office or position in a public body, to wit: The Magistrate's Commission and/or Ministry of Justice and/or Government of the Republic of Namibia to obtain a gratification for his/her own benefit or that of other people, to wit: an amount of N\$1000-00 from Mr. Japhet Shipenda and thus the accused did contravene section 43(1) of Act No. 8 of 2003.

Count 13 Corruptly using office or position for gratification

[18] That the accused is guilty of the offence of contravening section 43(1) read with section 32, 43(3), 46, 49 and 51 of the Anti-Corruption, Act No. 8 of 2003.

In that on or about the 12th day of July 2011 and at or near Magistrate's court, Oshakati in the district of Oshakati the said accused being a public officer, to wit: A Magistrate/Judicial officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally use his/her office or position in a public body, to wit: The Magistrate's Commission and/or Ministry of Justice and/or Government of the Republic of Namibia to obtain a gratification for his/her own benefit or that of other people, to wit: an amount of N\$500-00 from Mr. Kalusha Werner Iitembu and thus the accused did contravene section 43(1) of Act No. 8 of 2003.

Count 14 Defeating the course of justice

[19] In that upon or about the 12th day of July 2011 and at or near Oshakati Magistrate's court, in the district of Oshakati, the accused did unlawfully and with intent to defeat or obstruct the course of Justice commit said offence in that:

1. She, without any legal basis cancelled the warrant of arrest which was lawfully issued against Mr. Kalusha Werner Iitembu on the 30th of June 2011, on Case No. T1795/2011 for failing to be in attendance at court and to remain in attendance until excused by the court.

Whereas when this was done, the accused knew and or foresaw the possibility that:

1. Her conduct may frustrate or interfere or may protect Kalusha Werner litembu from being prosecuted for the crimes he has committed to wit: Contravening Regulation 336(1) of Government notice No. 53/2001, read with the road Traffic and Transportation No. N17078SH on public road by stopping where it would likely constitute a danger to other Traffic, and/or the offence of contempt of court.

Wherefore, the accused is guilty of defeating or attempting to defeat the course of justice.

Count 15 Defeating the course of justice

[20] In that upon or about the 11th day of August 2011 and at or near Oshakati Magistrate's court, in the district of Oshakati, the accused did unlawfully and with intent to defeat or obstruct the course of Justice to commit the offence of defeating/obstructing course of justice in that:

1. She, without any legal basis and/or without an application by the prosecutor and/or the State withdraw Case No. T1690/2011 against Mr. Peya Petrina Ndungula in respect of a valid notice to appear in court, No: A 3156105, issued on the 3rd of July 2011 for contravention of Section 31(1)(a) read with sections 1, 86,89 and 106 and further read with Regulation 110 & 122 of the Road Traffic and Transportation Act, Act No. 22 of 1999: driving a motor vehicle on a public road without a valid driver's license: as defective.

Whereas when this was done, the accused knew and or foresaw the possibility that:

1. Her conduct may frustrate or interfere or may protect Mr. Peya Petrina Ndungula from being prosecuted for the above mentioned offence, he has committed.

Wherefore, the accused is guilty of defeating or attempting to defeat the course of justice.

Count 16 Defeating the course of justice

[21] In that upon or about the 11th day of August 2011 and at or near Oshakati Magistrate's court, in the district of Oshakati, the accused did unlawfully and with intent to defeat or obstruct the course of Justice to commit the said offence in that:

1. She, without any legal basis and/or without an application by the prosecutor and/or the State withdrew Case No. T1680/2011 against Mr. Kefas Ashiyana Ashiyana as defective, in respect of a notice to appear in court, No. A 3156129, issued on the 12th of July 2011 for contravention of Regulation 127(1)(c) read with sections 128, 129, 134, 304 and 369 read with section 33(c), 86 and 89 of the Road Traffic and Transportation Act, Act 22 of 1999: operating a motor vehicle with registration No. N8866SH on a public road to wit Oshiko road, conveying dangerous goods, whilst the driving licence is not endorsed with a professional authorization.

Whereas when this was done, the accused knew and or foresaw the possibility that:

- 1 Her conduct may frustrate or interfere or may protect Mrr. Kefas Ashiyana Ashiyana from being prosecuted for the above mentioned offence, he has committed.

Wherefore, the accused is guilty of defeating or attempting to defeat the course of justice.

Count 17 Corruptly accepting gratification by agent (as an inducement)

[22] That the accused is guilty of the offence of contravening section 35(1)(a) read with sections 32, 35(4), 46, 49 and 51 of the Anti-Corruption Act, Act No. 8 of 2003.

In that on or about 15 August 2011 and at or near Magistrate's court, Oshakati in the district of Oshakati the said accused being a public officer, to wit: A Magistrate/Judicial officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally solicit or accept or agree to accept from Mr. Jacob M. litenge a gratification, to wit: an unspecified amount of money as an inducement to do or to omit doing anything in relation to the affairs or business of his/her principal to wit: the prosecution and/or trial of Mr. Jacob M. litenge for the contravening of Regulation 25(2)(i)(b) read with 369, Government notice No. 53 of 2001 and further read with the Road Traffic and Transportation Act: Drive a motor vehicle with Registration No. N15622SH on a public road to wit, Oshakati main road without consideration for other road users as per notice to appear in court, No A645177.

Alternative to count 17 Corruptly using office or position for gratification

[23] That the accused is guilty of the offence of contravening section 35(1)(a) read with sections 32, 35(4), 46, 49 and 51 of the Anti-Corruption Act, Act No. 8 of 2003.

In that on or about 15 August 2011 and at or near Magistrate's court, Oshakati in the district of Oshakati the said accused being a public officer, to wit: A Magistrate/Judicial officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally use his/her office or position in a public body, to wit: The Magistrate's Commission and/or Ministry of Justice and/or Government of the Republic of Namibia to obtain a gratification for his/her own benefit or that of another person, (to wit: unspecified amount of money from Mr. Jacob M. litenge) and thus the accused did contravene section 43(1) of Act 8 of 2003.

Count 18 Corruptly using office or position for gratification

[24] That the accused is guilty of the offence of contravening section 43(1) read with sections 32, 43(2), 43(3), 46, 49 and 51 of the Anti-Corruption Act, Act No. 8 of 2003.

In that on or about the unknown date during 2011 and at or near the Magistrate's court, Oshakati in the district of Oshakati the said accused being a public officer, to wit: A Magistrate/Judicial officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally use his/her office or position in a public body, to wit: The Magistrate's Commission and/or Ministry of Justice and/or Government of the Republic of Namibia to obtain a gratification for his/her own benefit or that of another person, to wit: an amount of N\$1000-00 from Mr. Daniel Nuuyoma and/or Mr. Taddeus Sabas and thus the accused did contravene section 43(1) of Act 8 of 2003.

Count 19 Corruptly accepting gratification by agent (as an inducement)

[25] That the accused is guilty of the offence of contravening section 35(1)(a) read with sections 32, 35(4), 46, 49 and 51 of the Anti-Corruption Act, Act No. 8 of 2003.

In that on or about 15 August 2011 and at or near the Magistrate's court, Oshakati in the district of Oshakati the said accused being an agent, to wit: A Magistrate/Judicial officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally solicit or accept or agree to accept from Mr. Pomwene Absalom and/or Detective Warrant Officer Absalom Namweya and/or Sergeant Seebertter Dalvin Mwinga a gratification, to wit: an amount of N\$1000-00 as an inducement to do or to omit doing anything in relation to the affairs or business or his/her principal, to wit: not issuing a warrants of arrest against Mr. Pomwene Absalom and or Detective Warrant Officer Absalom Namweya; a purported accused on notice to appear in court No. A 3043417.

Count 20 Corruptly using office or position for gratification

[26] That the accused is guilty of the offence of contravening section 43(1) read with sections 32, 43(2), 46, 49 and 51 of the Anti-Corruption Act, Act No. 8 of 2003.

In that on or about 15 August 2011 and at or near Magistrate's court, Oshakati in the district of Oshakati the said accused being a public officer, to wit: A Magistrate/Judicial

officer did wrongfully, unlawfully, directly or indirectly, corruptly and intentionally use his/her office or position in a public body, to wit: The Magistrate's Commission and/or Ministry of Justice and/or Government of the Republic of Namibia to obtain a gratification for his/her own benefit or that of another person, to wit: and amount of N\$1000-00 from Pomwene Absalom and/or Detective Warrant Officer Absalom Namweya and/or Sergeant Seeberter Dalvin Mwinga and thus the accused did contravene section 43(1) of Act 8 of 2003.

[27] The accused pleaded not guilty to all the charges. She submitted a statement in terms of s 115 of Act 51 of 1977 in which she pleaded not guilty to each and every charge and placed the state to prove the allegations levelled against her. In terms of s 220 of Act 51 of 1971 she admitted that she was a magistrate at Oshakati magistrate's court from September 2010 to 15 August 2011. The accused was initially represented by Mr. Joseph, but later he withdrew and she then acted in person. The state was represented by Mr. Nduna.

STATE'S CASE

In order to prove its case, the state called the following witnesses to testify:

Count 1

[28] Mr. Daniel Nuuyoma testified that on 24 February 2011 a traffic ticket was issued to him for transporting people without a permit. The fine was N\$ 1000. He further testified that as he was going somewhere, he gave the ticket and N\$ 1000 to Mr. Tadeus Sabas to go and pay. That was before the trial date. He further testified that he did not appear in court in relation to this ticket. In the court documents it is indicated that the matter was withdrawn on 26 May 2011, but he denied that he appeared before the accused when the matter was withdrawn. The control document was admitted as Exhibit "CC1". In the court book (Exh "CC2"), the following entries were made – 26 May

2011, Presiding Officer, Ms. Theron, Case No. T 1429/11 – Mr. Daniel Nuuyoma – Withdrawn.

[29] Mr. Thadeus Sabas testified that in 2011 Mr. Daniel Nuuyoma gave him N\$ 1000 and a traffic ticket to go and pay at the Oshakati magistrate's court on his behalf. He proceeded to Oshakati magistrate's court and paid the N\$ 1000 to the accused whom he described as a light in complexion lady. He also handed the traffic ticket to her. He was told to come and get the receipt the next day. The next day he came, but did not find the accused. In cross-examination the accused denied having received any money from Mr. Thadeus Sabas. She disputed the payment on the basis that no receipt was issued to him to which the witness testified that he was in a hurry as he had passengers in his car which was outside the court premises and could not wait for the receipt.

Count 2

[30] The witness could not be found and the State conceded that the accused should not be placed on her defence. The accused was accordingly discharged on this count.

Count 3

[31] Mr. Paulus Mbwale testified that he was a casual interpreter at the Oshakati Magistrate's court during August 2009 until August 2011. He testified that he worked with the accused before court in court c and dealt mainly with traffic ticket cases. Apart from interpreting, he was also doing administrative duties like entering traffic cases in the court book, the names of officials appearing in court, names of accused as well as the offences. He testified that the entries in the extract from the court book dated 27 June 2011 showed that the case number was T126/11, the accused was Mr. Michael Sheehama, the presiding officer was Theron, the interpreter Mr. Mbwale and the prosecutor was Ms Shilunga. The verdict and sentence were: 'warrant of arrest cancelled, accused warned and cautioned.'

[32] Mr. Mbwale testified that, those entries were done by the accused before court. The extract from the court book dated 27 June 2011 was admitted as Exh "FFF". He testified that he was not present when those proceedings allegedly took place. He told

the court that on the same day he went to collect the traffic ticket from the accused and then found out that the proceedings were already entered in the court book and he became suspicious and he contacted the prosecutor who then informed him to report the matter to the Chief Magistrate. The long hand proceedings recorded by the accused on 27 June 2011 was admitted into evidence as Exhibit "HHH".

Count 4

[33] The accused was discharged on the main court and the State conceded that the accused must not be put on her defence as there is no alternative charge to the main count. The accused was accordingly discharged on this count.

Count 5

[34] Mr. Paulinus Kakelo, a teacher by profession, testified that on 21 May 2011 he was issued with a traffic ticket for driving without a driver's licence. The fine was N\$1 000 to be paid on or before 14 July 2011 or to appear in court on 28 July 2011. He testified that he was called from a landline by a lady who informed him that he must come to room 8 at Oshakati Magistrate's court to make a payment. That was after 3 July 2011. He proceeded to room 8 where he found a 'baster' lady who introduced herself as Theron. The accused asked him to pay N\$500 which he paid and he was told that the receipt will be issued to him the next day. He waited for her to call back, but she did not call. He also did not enquire further about the receipt as he thought that since it was paid at the magistrate's court everything was fine.

[35] He further testified that on 28 July 2011 he did not appear in court and he was not aware that a warrant of arrest was issued against him. He was also not aware that the warrant of arrest was subsequently cancelled on 12 August 2011. The court record extract in respect of the warrant of arrest (28 July 2011) was admitted as Exh "BBB". The warrant of arrest which was cancelled on 12 August 2011 was admitted as Exh "AAA". He further testified that on 15 August 2011 he did not appear in court when the ticket was allegedly withdrawn as being defective. The control document was admitted in evidence as Exh "CCC". During cross-examination it was put to him that the accused

never called him and he was adamant that she called him to come and make a payment, which he did.

Counts 6, (alternative to count 6) and 7

[36] Mr. Chrispus Shikalepo testified that he was a taxi driver for Ms Selma Hekandjo. He testified that on 12 April 2011 a traffic ticket was issued to him because the name of the taxi owner, Selma Hekandjo, was not displayed or written on the door of the taxi. The fine was N\$1000 to be paid before 9 June 2011. He further testified that he gave the ticket to Selma Hekandjo to pay it on the same date it was issued to him. He denied having appeared in court on 30 June 2011 and that the ticket was withdrawn. He also has no knowledge that his name was called 3 times and a warrant of arrest was issued.

[37] Ms Selma Hekandjo testified that she is a police officer based at Oshakati. She knows the accused from Oshakati. She testified that in 2011 she owned a taxi and the driver was Mr. Shikalepo. She testified that Mr. Shikalepo did not refer any traffic ticket to her whilst he was the driver and he worked for several months for her, but his contract was terminated due to ill health. On 30 June 2011, a warrant of arrest was issued because he was not at court. She testified that on 12 July 2011 she was not at court. The court record book Exhibit "JJJ" showed that the following entries were made:

"JJJ2"

Mag: Theron

PP: Shilunga

Int: Mbwale

Acc: I/P

SP: Matter is for W/A inquiry

CRT: Acc why were you absent from crt on 30 June 2011?

ACC: Your worship I did not know about the ticket as it was issued to my driver.

CRT: Satisfied W/A cancelled.

SP: Puts charge

CRT: Accused did you understand the charge how do you plead?

ACC: Understood I plead guilty

SP: May provision of section 112(1)(a) be applied

CRT: Accused you are found guilty based on your own admissions and convicted as such i.to section 112(1)(a).

SP: No previous convictions

CRT: Accused rights to mitigation explained

ACC: I am asking court for mercy as it seems my driver is having more than 10 tickets and now he has run away leaving me to pay everything even he bumped my car which I have to fix and he crossed out the address. I ask this court for mercy

SP: Leave it in the hands of the court

CRT: Accused warn and cautioned.'

[38] Ms Hekandjo testified that she never appeared in court on 12 July 2011 when those proceedings are alleged to have occurred. The control document issued in respect of Mr. Shikalepo and record of proceeding were admitted as Exh "JJJ1" and Exh "JJJ2" She was adamant that she did not appear in court on that date nor was she warned and cautioned. During cross-examination, she denied having received the ticket from Mr. Shikalepo.

[39] Mr. Franco Cosmos testified that he was the Magistrate assigned to the traffic court on 30 June 2011 at Oshakati Magistrate's court and he noticed in the court book that the case of Mr. Shikalepo was 'withdrawn' before he had dealt with the case. After noticing this irregularity and bringing it to the attention of the Divisional Magistrate, and as Mr. Shikalepo was in default, he ordered that a warrant of arrest be issued (Exh "M") and to be held over for 14 days to the 14 July 2011.

Counts 8 and 9

[40] Detective Warrant Officer Hiluwa testified that he knows the accused as she was a Magistrate at Oshakati Magistrate's court. He testified that he was given N\$2000 and a traffic ticket by Mr. Israel Haulenga to go and pay on his behalf. On Monday August 2011 between 9am and 10am, he went to the magistrate's court at Oshakati and paid

the money to the accused. The traffic ticket was admitted into evidence as exhibit "FF1". He testified that he went inside the office of the accused and told her that he came to pay a traffic ticket on behalf of Mr. Israel Haulenga, he went straight to the office of accused because Mr. Israel Haulenga told him that he spoke to the accused.

[41] The accused told him that Mr. Israel Haulenga was supposed to pay N\$2000-00, but he can pay only N\$1500-00. She did not explain why he only had to pay N\$1500-00. He gave her N\$1500 and asked for a receipt. She told him that there was no receipt and that is not a problem, she will record it in the book. He left and informed Mr. Israel Haulenga that he paid N\$1500-00 and later he handed the N\$500-00 back to Mr. Israel Haulenga. He further testified that Mr. Israel Haulenga called him later and confirmed that he spoke to the accused and she confirmed receipt of the N\$1500-00. He further denied that on 28 July 2011 he appeared in court and had no knowledge that Mr. Israel Haulenga appeared in court on that day and that he was found guilty and warned and cautioned.

[42] Mr. Israel Haulenga testified that he was issued with a traffic ticket during 2011. He testified that he was a long distance driver and he went to the village in the Okalongo area and stayed there for some time. He then sent Detective warrant officer Hiluwa to go and pay the ticket for him. He met Detective warrant officer Hiluwa on a Sunday and gave him N\$1000 and gave him his ATM card to withdraw an additional N\$1000-00 and to go and pay N\$2000 on Monday. On the Sunday he drove to Tsumeb. On Monday Detective warrant officer Hiluwa called him and told him that he paid to Ms. Theron. When they met he asked him for the receipt and he told him that he did not get a receipt. He testified that he never appeared in court in respect of this case nor was there a warrant of arrest for him. On the control document it was endorsed that he appeared in court on 28 July 2011 before the accused and that he pleaded guilty, convicted, mitigated and that he was warned and cautioned, he denied having done that.

Count 10

[43] Mr. Paulinus Kakelo, a teacher by profession, testified that he knows the accused and testified that he was issued with a traffic ticket for driving without a driver's license in May 2011. The fine was N\$1 000 to be paid on or before 14 July 2011 or to be in court on 28 July 2011. He testified that he was called from a landline by a lady who informed him that he must come to room 8 at Oshakati Magistrate's court to make a payment. He proceeded to room 8 where he found a 'baster lady' who introduced herself as Theron. He testified that he was asked to pay N\$ 500 and that the receipt will be issued to him the next day. He waited for her to call back, but she did not call. He also did not enquire as he thought that since it was paid at the magistrate's court everything was fine.

[44] He denied any knowledge of a warrant of arrest in his name that was issued by the accused. He also does not know that the warrant of arrest was later cancelled. He also testified that he did not appear in court on 15 August 2011 as it appears on the reverse side of the control document (Exh "CCC 1"). He also had no knowledge that the ticket issued to him was defective.

Count 11

[45] Detective Warrant Officer Hiluwa testified that he knows the accused as she was a magistrate at Oshakati Magistrate's court. He testified that he was given N\$2 000 by Mr. Israel Haulenga, to whom a traffic ticket was issued, to go and pay it to the accused as per their agreement. He only paid N\$ 1 500 and did not get a receipt for it.

Count 12

[46] Mr. Shipenda Jafet testified that he was a taxi driver and that on 28 June 2011 he was issued with a traffic ticket because he did not have an open public permit. The fine was N\$2 000. He testified that he was supposed to appear in court on 8 August 2011. He realized that the ticket had expired and he decided to go to court. At court he saw the accused coming from court going to room C. He followed her into the office and told her that he managed to get N\$ 1000 and he gave the N\$1000 to her.

[47] The ticket was for N\$ 2000, but she said the N\$ 1000 was fine and after he handed the N\$ 1000 to her, he left. He further testified that the accused did not give him a receipt nor did he ask for one as he knew that she was a magistrate and she worked with people. He denied having appeared in court on 8 August 2011 before the accused. It was put to him that the control document states that he appeared in court on 8 August 2011 and that the case was withdrawn but he denied having appeared in court. He later heard his name being announced over the radio and being told to go and see Inspector Kakwambi. He proceeded to the police station and made a statement.

Counts 13 & 14

[48] Mr. Kalusha Itembu, a taxi driver, testified that, he knows the accused as they met at Oshakati Magistrate's court. He testified that a traffic ticket was issued to him for stopping the vehicle in the road and obstructing other vehicles. The fine was N\$1000 to be paid on or before 30 June 2011. On the control document, the month (June) was altered to be 30 August 2011, he testified that he does not know how the August 2011 month was superimposed on the ticket. He then went to court before 30 June 2011 to go and ask for a postponement to secure funds to pay the fine. He proceeded to Oshakati magistrate's court and on arrival he saw the accused. He approached the accused, showed her the ticket and told her his problem. The accused told him to accompany her to her office. In the office she asked him how much he could afford and he told her N\$ 500 and she asked him to give her the N\$ 500. He handed the N\$ 500 to her and she said is fine. She did not give him the receipt, he then left. He further testified that on 12 July 2011 he did not appear in court nor was he arrested by the police on a warrant of arrest.

Count 15

[49] Ms Peah Ndungula testified that on 3 July 2011 she was issued with a traffic ticket for driving without a driver's license. The fine was N\$ 300, the appearance date in court was 11 August 2011. She further testified that she did not appear in court on 11 August 2011 as she had misplaced her ticket. She told the court that she never appeared in court when the ticket was withdrawn. On 11 August 2011 the accused purported to have the matter 'withdrawn as the ticket was defective' (Exh Z2). In the

court book, it was entered that, 'withdrawn ticket defective no citation of Act' (Exh Z3). Ms Kefas testified that she was sure that she was the prosecutor in court on 11 August 2011 and she conceded that the charge on the ticket of Ms Ndungula was defective because the citation did not mention the year or the provision, but she never applied for the withdrawal of such charge on the basis of defectiveness and that any withdrawal could only be by the application of the prosecutor.

Count 16

[50] Mr. Ashiyana testified that on 12 July 2011 he was issued with a traffic ticket for not having a professional authorization certificate. The fine was N\$ 2000 to be paid before 27 July 2011 and the trial date was 11 August 2011. He testified that he gave the ticket plus N\$ 2000 to Mr. Ndapandula to go and pay in July 2011. After that Mr. Ndapandula passed away and he never received a receipt from Mr. Ndapandula to confirm that payment was indeed done. He further testified that he never appeared in court on 11 August 2011. Counsel for the state put to him that at the back of the ticket it was recorded that on 11 August 2011 the charge was withdrawn because the ticket was defective. He testified that he knows nothing about the ticket been withdrawn because he did not appear in court. The control document was admitted into evidence as Exhibit "HH2". Counsel for the state also informed the witness that entries were also made in the court book that he appeared in court on 11 August 2011, but he maintained that he never appeared in court on 11 August 2011.

Count 17: (Alternative count)

[51] Mr. Jacob litenge, a taxi driver in Oshakati, testified that on 2 July 2011 a traffic ticket was issued to him. The fine was N\$ 2000 and appearance date in court was 15 August 2011, if he did not pay. He testified that on 15 August 2011 a lady by the name of 'Meralin' phoned him and told him to appear in court because his ticket had expired. He was not asked to bring money along, but he took N\$ 200 along. He proceeded to court but was told that the lady who phoned him was arrested. He further testified that he did not appear in court and has no knowledge about the matter being withdrawn because the ticket was defective.

Count 18

[52] Mr. Taddeus Sabas testified that in 2011 he was given N\$ 1000 and a traffic ticket by Mr. Daniel Nuuyoma to go and pay on his behalf at the Oshakati magistrate's court. He proceeded to Oshakati magistrates' court and paid the N\$ 1000 to the accused, a light in complexion lady. He also handed the traffic ticket to her. He was told to come and get the receipt the next day. The next day he came, but did not find the accused. The accused denied having received any money from Mr. Taddeus Sabas. She disputed the payment on the basis that no receipt was issued to him to which the witness testified that he was in a hurry as he had passengers in his car which was parked outside the court premises. He further testified that he did come back for the receipt and went to check at her office, but could not find the accused.

Counts 19 & 20

[53] Sergeant Mwinga testified that in August 2011, himself and Inspector Namweya were tasked to conduct an operation in Oshakati about a magistrate who was soliciting bribes from traffic offenders. They departed from Windhoek to Oshakati and met with Magistrate Namweya who briefed them about a magistrate who was soliciting bribes from traffic offenders at Oshakati magistrate's court. They devised a plan to trap the accused. They obtained a blank traffic ticket (Exh "JJ1") from Eenhana and Inspector Namweya filled in the blank ticket by using pseudonym and fake particulars but with actual phone numbers. The offender on the ticket was 'Pomweye Absalom', the fine was N\$ 2000, date of trial 15 August 2011 and date of issuance was 2 July 2011, the offence was driving without professional authorization. The ticket was then sent through to the office that process the fines. Around 15h00 Inspector Namweya received a call that said he had a traffic ticket which he has to pay or appear in court. He was directed to go and pay at office no. 8 at the Oshakati magistrate's court.

[54] Inspector Namweya informed him that the magistrate called and that he should go and pay N\$ 1000. They devised a plan whereby he would pretend to be Mr. Absalom and that he could only speak Oshiwambo. They proceeded to office 8. He had N\$ 1000 that they received from the office in Windhoek as operation money and they made copies of the money, it was N\$ 200 dollar notes totaling N\$ 1000 (Exh "JJ3"). He

proceeded to office no. 8 at the Oshakati magistrate's court building, the plan was that he will go in and give the money and ticket then get out and the others will go in and retrieve the money. When he entered the office, he saw the accused with a gentleman and he told the accused in Oshiwambo that he was Absalom, the taxi driver, the accused told him to wait outside. After few minutes, she called him in and he said he was Absalom the taxi driver, he gave her the money and the traffic ticket. He went outside and told Inspector Namweya that the money was on the table.

[55] Warrant officer Shilongo testified that on 15 August 2011 she was part of the group of officers that set up a trap for the accused. She went to the Oshakati magistrates' office around 16h00 at room 8, her task was to search the accused. She was with Inspector Kakwambi and Inspector Namweya. They entered the office no 8 and found the accused seated on the chair and Inspector Kakwambi introduced them. Inspector Kakwambi told the accused to bring the money which was paid by the man who had just left her office. She took the money underneath a paper and she was shivering and afraid. The money was covered under a paper, she took out the money and told to count the money. It was N\$ 1000 of N\$ 200 dollar notes. The money was the same as the copies they had and she was asked to sign which she did, she was then arrested. The copies of the money was admitted into evidence as Exh "JJJ3".

[56] Inspector Namweyo testified that he was attached to the Namibian police special branch at Windhoek. In 2011 he received instruction from Detective Chief Inspector Amhimu in Windhoek to go to Oshakati to investigate claims that a magistrate was receiving monies from traffic offenders. He and Sergeant Mwinga proceeded to Oshakati and received information that it was magistrate Theron who was receiving money. They decided to put up a trap for her. They drove to Eenhana and picked up a blank traffic ticket. He filled in the ticket using a pseudonym name 'Absalom Namweyo' as the offender and his cellphone number 0811294721 and other fake details. He further testified that he arranged that the ticket went to the traffic court which was assigned to the accused. The date of trial on the ticket was 15 August 2011. Around 15h00 a woman called him and said: 'This is magistrate Theron calling from Oshakati magistrate court' and she said 'you are having a traffic ticket that you need to be at

court and the fine is N\$ 2 000 and she told him that if he pays the same day before 16h00, she will give him a discount of N\$ 1 000 and if he goes there the next day he will pay N\$ 1 500 and if he does not turn up, she will issue a warrant of arrest then he will be arrested and detained in the police cells. He told her that it was his driver, Mr. Popyene Absalom, who is responsible for the ticket so he will make arrangements for him to come and pay.

[57] He testified that he then approached Inspector Kakwambi and informed him of their operation. They proceeded to Oshakati magistrate's court. He testified that he had the N\$ 1 000 that they had brought from Windhoek. Around 15h00 to 16h00, the accused called again demanding to know where the driver was. She was calling from a landline number with the Oshakati area code. An MTC printout (Exh "JJ2") showing a landline number 0646522361 calling 0811294721 was admitted into evidence. The first call was at 15h54. He told the accused (caller) that the driver was in the vicinity of the court. He testified that they went to the office where Theron directed him to go and pay. He was with Inspector Kakwambi and Sergeant Mwinga. Sergeant Mwinga entered the office of the accused with the ticket and N\$ 1 000. As soon as he came out, Inspector Kakwambi, Warrant officer Shikongo and himself entered the office and Warrant officer Shikongo retrieved the money from the accused. She was then arrested.

DEFENCE'S CASE

[58] The accused testified that she is 31years of age. She was employed as a magistrate from February 2010 until 2011. She started in Windhoek and was transferred to Oshakati. She worked in the traffic court. She testified that when an accused makes a first appearance, the procedures were to explain the rights of the accused. If the accused is not present then a warrant of arrest will be issued, to be held over for 14 days, she would sign it immediately, normally done in chambers. After 14 days the police would come get it and execute it. She testified that you would deal with the matter in court and you don't need a prosecutor to issue the warrant of arrest in chamber.

Count 1

[59] In respect of count 1, she testified that in respect of the traffic ticket of Mr. Daniel Nuuyoma, (Exh "CC1") control document, the front part is completed by the traffic officer and the reverse side is completed by the clerk of the court or interpreter, as per annexure. She testified that there was an application for the withdrawal of the ticket (Exh "CC1") of Mr. Daniel Nuuyoma by Ms Shilunga, the prosecutor. She cannot confirm or deny that the accused, Daniel Nuuyoma or Thaddeus Sabas was present or absent in court when she withdrew the ticket. She withdrew the ticket on 26 May 2011 because it was defective as there was no Act cited.

[60] She testified that the annexure would have shown that the prosecutor brought the application for withdrawal, but the annexure was not disclosed to her. The annexure would have shown that the prosecutor brought the application for the withdrawal of the case and that is what occurred in this case. She testified that as long as the ticket is defective the accused need not be present, if the prosecutor brings an application for withdrawal and the ticket is defective, it can be done.

Count 3

[61] In respect of Exh "GGG" (traffic ticket) relating to Mr. Sheehama, it was put to her by her counsel that Mr. Sheehama was not present at court on 17 June 2011 when the warrant of arrest was cancelled and he was 'warned and cautioned,' she denied that because when an accused person stands before her she did not ask for identification document. It was put to her that Mr. Mbwale also testified that Mr. Sheehama was not there to which she responded that Mr. Mbwale was lying. She testified that Mr. Mbwale was not present and she made use of a casual interpreter. In respect of Exh "GGG", she testified that her name was not entered on the ticket as presiding officer, she completed the part – judgment – guilty – sentence – warned and cautioned and she signed it. She testified that Mr. Sheehama did not testify and only Mr. Mbwale testified that those proceedings did not take place. She denied having acted unlawfully and that what is recorded there is what transpired.

Alternative charge to count 3

[62] The state alleges that the inquiry that she allegedly conducted and recorded that Mr. Sheehama was at court was false because Mr. Sheehama was not at court, she denied that and testified that it was not her responsibility to ask for the identification document of the person who appeared before her. She testified that at the time they had interpreters on training and the fact that interpreters on training were not paid, Mr. Mbwale was the assigned interpreter to her court and his name was written on the court roll and in the court book on the day in question so that he could receive payment as if he was the one working on that day. She testified that she made use of an interpreter on training and not Mr. Mbwale. She further testified that although no mitigation was reflected, she could not force the accused to place mitigating factors before court. She further testified that the prosecutor was Ms Shilunga.

Count 5

[63] She denied ever calling Mr. Kakelo, nor seeing him in her office number 8. She denied receiving N\$ 500 from Mr. Kakelo. There is also no proof from MTC that she called Mr. Kakelo. She testified that the ticket Exh "CCC" was withdrawn by her because there was no year citation and therefore the ticket was defective and because the ticket was defective then the warrant of arrest was invalid and she cancelled it. She testified that she withdrew the ticket because there was an application by the prosecutor to withdraw the ticket. The annexures in which it was reflected that the state brought the application to withdraw the ticket was not disclosed to her. She testified that when a ticket is withdrawn due to the fact that the ticket is defective, the accused may not be present in court.

Count 6

[64] She testified that the ticket (Exh "JJJ1") of Mr. Chrispus Shikalepo was defective and she withdrew it as per application of prosecutor Ms Shilunga. There should have been an annexure reflecting that Ms Shilunga brought the application to have the ticket withdrawn. She noted 'withdrawn' on Exh "M" because she was approached by Ms Shilunga, but then magistrate Cosmos drew a line across/cancelled 'withdrawn' and decided to issue a warrant of arrest. She further testified that looking at the court book

(Exh "M") of 30 June 2011 where she wrote 'withdrawn', it was cancelled by magistrate Cosmos and he changed it to 'call 3 times – absent - warrant of arrest-held over', but on the ticket itself due to the fact that the ticket was defective, there should have been an annexure showing that the prosecutor brought an application before the court to have the ticket withdrawn due to defectiveness and those annexures were not disclosed to her by the state. She denied having committed the offence as alleged.

[65] In respect of the alternative count, she testified that she conducted an inquiry in respect of Mr. Shikalepo (Exh "JJJ1"). She denied that the prosecutor, Ms Shilunga, was absent. According to the long hand notes, it was the owner of the taxi who was present, instead of the accused (to whom the ticket was issued). She testified that was the norm and the ticket was dealt with on 12 July 2011 because, although magistrate Cosmos dealt with it on 30 June 2011, it was again dealt with afresh. She testified that on 12 July 2011 Ms Hekandjo, the owner of the taxi, appeared before her. Ms Shilunga the prosecutor brought the application to have the ticket withdrawn because it was defective, there was no citation of the Act.

Count 7

[66] She testified that the ticket in respect of Mr. Shikalepo was withdrawn because it was defective because there was no citation of the Act. There was an application before her for the withdrawal of the ticket because it was defective. She testified that the warrant of arrest (Exh "P") of Shikalepo was cancelled because it was defective as it was not signed by the magistrate. She testified that the ticket came before her on 30 June 2011. On 12 July 2011 the traffic court was conducted in an open court. She denied having obstructed or defeated the course of justice.

Count 8

[67] She testified that the proceedings in respect of Mr Haulenga reflected as Exh "FF1" and Exh "FF2" took place in an open court. The prosecutor was Mr. Ipinge, the interpreter was Mr. Mbwale and the accused was present. She testified that those proceedings took place despite the evidence of Mr. Haulenga (accused) and Mr. Ipinge that those proceedings did not take place. When asked why Mr. Haulenga would deny

that he was not at court, she testified that she cannot confirm nor can she deny that it was not him because she does not ask for the identity document of a person appearing before her. She further testified that she used an interpreter on training and not Mr. Mbwale.

Count 9

[68] She denied the allegations in this count. She testified that she acted in accordance with her duties, she told the court that somebody appeared before her and Mr. Ipinge was the prosecutor as per her notes.

Count 10

[69] She testified that the ticket, Exh "CCC", in this case was withdrawn because there was no citation of the Act. That was on 28 July 2011. She issued a warrant of arrest and held it over for 14 days. On 12 August 2011 the warrant of arrest was cancelled. Exhibit "CCC" which is a traffic ticket in respect of Mr. Kakelo and the warrant of arrest marked Exh "DDD" were admitted in evidence. The ticket was defective because there was no Act cited. On 28 July 2011 she issued a warrant of arrest to be held over for 14 days. The accused was asked as to why the warrant of arrest was not entered in to the court book on 12 August 2011 at 14:30, she testified that by then Ms Shilunga brought the warrant of arrest to be cancelled due to the fact that the traffic officers were about to pick up the warrant to execute them and due to the fact that the ticket was defective then the warrant of arrest was automatically defective, that is why she cancelled it.

Count 11

[70] She testified that she did not receive any money from Mr. Israel Haulenga or Mr. Mathews Hiluwa.

Count 12

[71] She denied having received N\$ 1 000 from Mr. Japhet Shipenda.

Count 13

[72] She denied that she received any money from Mr. Kalusha litembu. She never met him, only saw him when he testified in court.

Count 14

[73] She testified that there was an alteration to the month, the "08" was written in after the ticket was issued. She testified that she does not know who made the alteration. The ticket was therefore defective. The Act was also not cited and therefore it was defective. On 30 June 2011 the prosecutor, Ms Shilunga, brought an application to declare the ticket defective. She declared the ticket defective on 30 June 2011 and then magistrate Cosmos scratched/drew a line across 'withdrawn'. She withdrew the ticket in open court and there should have been an annexure attached indicating what transpired in court which is not attached.

[74] She testified that she does not know whether Mr. Kalusha was at court, but the accused need not be at court when the ticket is to be withdrawn. She testified that the prosecutor, Ms Shilunga, made the application on 12 July 2011 to have the warrant of arrest cancelled because the ticket was defective. She granted the application and the ticket was withdrawn.

Count 15

[75] She testified that she withdrew the ticket in respect of Ms Peya Petrina Ndungula because it was defective as there was no Act cited. She testified that she is not sure who the prosecutor was, but it could have been ascertained by the annexures which were not attached. The annexures would have shown the name of the magistrate, the prosecutor and the interpreter, the accused person and the submissions by the prosecutor that the ticket is defective and therefore asking for the ticket to be declared defective, the magistrate will then grant the order and withdrew the ticket.

Count 16

[76] She testified that she withdrew the ticket against Mr. Kefas Ashiyana because the ticket was defective and there was no Act cited. In addition, the registration number of the car was scratched out without initials being put next to the scratched part and therefore it was defective. She testified that the ticket was withdrawn as per the request of the prosecutor. It was recorded in the annexure as to who the prosecutor was, but the annexure was not disclosed to her. The accused need not be present when a ticket is withdrawn, she testified.

Count 17, (alternative count)

[77] She testified that she never phoned Mr. Jacob litenge. She also denied having received money from Mr. litenge. She testified that she never acted unlawfully and that she withdrew the ticket on the application of the prosecutor, Mr. Likando. The ticket was withdrawn because it was defective as there was no Act cited. Exhibits "S1" and "S2", the trial date was tampered with, she testified that the ticket should not have been in court because there was many mistakes on the ticket, the trial date was not indicated and was only written afterwards, there was no Act cited.

Count 18

[78] She denied having received any money from Mr. Daniel Nuuyoma and or Mr. Taddeus Sabas. She denied having benefited from Mr. Taddeus Sabas and or Mr. Daniel Nuuyoma. In her opinion they are implicating her because they were called over the radio about traffic tickets and therefore they are implicating her to exonerate themselves.

Count 19

[79] She denied having received N\$ 1 000 from Sergeant Mwinga. She testified that Sergeant Mwinga came in her office and said something in Oshiwambo which she could not understand. She told him to go and get an interpreter and he left the money and ticket on her desk. After a second, Inspector Kakwambi, Inspector Namweya and Warrant officer Shilongo came barging in her office and Sergeant Kakwambi shouted:

'Where is the money, give us the money'. She picked up the money which was on her desk and handed to them. She denied that she phoned Inspector Namweya to come and pay the money. She denied calling Inspector Namweya from landline no. 26 06522361 to his cellphone no. 0811294721. She testified that the land line number is a switchboard number from the Oshakati magistrate's court. She never called him. She testified that she signed copies of the money that was found on her desk because she was asked to sign and she handed it to them. She felt intimidated by the presence of three police officers and that is why she signed the copies of the monies.

Count 20

[80] She testified that she never used her office for any gratification. She testified that Inspector Kakwambi was not called by the state. She testified that there were irregularities during the investigation. The witnesses were summoned through the radio. Mr. Kakwambi put his own facts in the statements, he commissioned the statements before it was signed. The complainant (magistrate Namweya) was her boss, he wrote to Windhoek to get someone to come and investigate the case and his brother (Inspector Namweya) was appointed to come and do the investigation that was a conflict of interest that tainted the investigation.

[81] Mr. Viljoen testified that he hold a traffic diploma from the Institute of Traffic Officers in the Republic of South Africa. He was an advisor to the Chief of City Police, Windhoek from 2009 to 2012. He testified that he was called to explain to the court the way and manner that traffic tickets were dealt with. The evidence of this witness was not helpful to the court at all. The way how traffic tickets are issued and dealt with is governed by the Magistrate's court Act, The Criminal Procedure Act and so on. He was not present when the alleged offences were committed. He was also not present at court when the tickets were dealt with. His opinion as to the law relating to the handling of traffic tickets, and whether offences were committed is for the court to adjudicate upon. I find the evidence of this witness not helpful at all.

SUBMISSIONS AND ANALYSIS

The applicable law

[82] The relevant statutes pertaining to the charges levelled against the accused are the Magistrates Court Act No. 32 of 1944, the Criminal Procedure Act, Act No. 51 of 1977 (“CPA”) and the Anti-Corruption Act, Act no 8 of 2003.

The relevant sections are the following:

Section 56 of the Criminal Procedure Act 51 of 1977 provides:

“56 written notice as method of securing attendance of accused in magistrate’s court:

56(1) if an accused is alleged to have committed an offence and a peace officer on reasonable grounds believes that a magistrate’s court, on convicting such accused of that offence, will not impose a sentence of imprisonment only or of a fine exceeding N\$6 000, such peace officer may, whether or not the accused is in custody, hand to the accused a written notice which shall-

- (a) Specify the name, the residential address and the occupation or status of the accused;
- (b) Call upon the accused to appear at a place and on a date and at a time specified in the written notice to answer a charge of having committed the offence in question;
- (d) contain a certificate under the hand of the peace officer that he or she has handed the original of such written notice to the accused and that he or she has explained to the accused the import thereof.

(3) The peace officer shall forthwith forward a duplicate original of the written notice to the clerk of the court which has jurisdiction.

(4) The mere production to the court of the duplicate original referred to in subsection (3) shall be prima facie proof of the issuance of the original thereof to the accused and that such original was handed to the accused...”

6. Payment to avoid a court appearance

57(b) of the Criminal Procedure Act deals with the payment, prior to the court date of the fine stipulated on the ticket:

57 Admission of guilt and payment of fine without appearance in court

(1) where-

(a).....

(b) a written notice under section 56 (in this section referred to as the written notice) is handed to the accused and the endorsement in terms of paragraph (c) of subsection (1) of that section purports to have been made by a peace officer, the accused may, without appearing in court, admit his guilt in respect of the offence in question by paying the fine stipulated (in this section referred to as the admission of guilt fine) either to the clerk of the magistrate's court which has jurisdiction or at any police station within the area of jurisdiction of that court or, if the summons or written notice in question is endorsed to the effect that the fine may be paid at a specified local authority, at such local authority. (my underlining)

(2) (a) The summons or the written notice may stipulate that the admission of guilt fine shall be paid before a date specified in the summons or written notice, as the case may be.

(b) An admission of guilty fine may be accepted by the clerk of the court concerned notwithstanding that the date referred to in paragraph (a) or the date on which the accused should have appeared in court has expired.

(3) An admission of guilt fine shall not be accepted under subsection (1) unless the accused surrenders the summons or the written notice, as the case may be, at the time of payment of fine.

In other words, a ticket issued to an accused, as long as the fine stipulated is below the N\$6 000 threshold, may be paid at the clerk of the court or at a police station.(my underlining)

7. **Charges:** Sections 84-86 of the Criminal Procedure Act, Act No. 51 of 1977

84 **Essentials of charge**

(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as the time and place at which the offence is alleged to have been committed and the person, if any against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient.

Counsel for the state argued that **Section 84(3) strikes at the heart of the defence advanced by the accused in some counts, namely that her reason for withdrawal was because the charge was defective as there was no citation of the relevant infringed statutory provision.**

85 **Objection to charge**

- (1) An accused may, before pleading to the charge under section 106, object to the charge on the ground-
- (a) That the charge does not comply with the provisions of this Act relating to the essentials of a charge;
 - (b) That the charge does not set out an essential element of the relevant offence;
 - (c) That the charge does not disclose an offence;
 - (d) That the charge does not contain sufficient particulars of any matter alleged in the charge; or
 - (e) That the accused is not correctly named or described in the charge:

Provided the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given

(2) (a) If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.

(b) Where the prosecution fails to comply with an order under paragraph (a), the court may quash the charge.

86 Court may order that charge be amended

(1) Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.

(2) The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.

(3) Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.

(4) The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, effect the validity of the proceedings thereunder.

[83] Counsel for the state correctly argued that: **'What is clear from the foregoing sections (84-86) is that there is no provision for a magistrate, either in chambers or in open court, on detecting a defective charge on a ticket/charge sheet, to quash such charge without first inviting and affording the prosecutor the opportunity to amend the charge.'**

[84] The magistrate is obliged to bring such defect to the attention of the prosecutor, as it is the prosecutor who will have initiated the whole process by handing in the ticket.

The withdrawal of charges is provided for in terms of section 6 of the Criminal Procedure Act, Act 51 of 1977:

"6 Power to withdraw charge or stop prosecution

An attorney-general or any person conducting a prosecution at the instance of the state or anybody or person conducting a prosecution under section 8, may-

- (a) Before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge..."
(own emphasis)

[85] Counsel for the state submitted that 'It is clear from section 6(a) that the withdrawal of charges is done in open court and further that the accused must be present in court, as otherwise it would not have been necessary to spell out that in the event of such withdrawal, no verdict of acquittal is;

[86] The relevant provisions of the **Anti-Corruption Act, Act no. 8 of 2003** are the following:

Corruptly accepting gratification by or giving gratification to agent:

S 35(1) An agent commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept from any person a gratification-

- (a) as an inducement to do or to omit doing anything;
 - (b) as a reward for having done or having omitted to do anything,
- In relation to the officer or business of the agent's principal.'

[87] **Corruptly using office or position for gratification**

"43 (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."

S 46(d) Anti-Corruption Act 8/2003 provides:

Attempts and conspiracies

S46: A person who

- (a) Attempts to commit an offence under this chapter

Commits an offence and is on conviction, liable to the punishment prescribed for that offence by this Act"

[88] **Fraudulent concealment of offence**

"47 A person commits an offence who, with intent to defraud or to conceal the commission of an offence under this Chapter or to obstruct an authorized officer in the investigation of any such offence-

- (a) destroys alter, mutilates or falsifies any book, document, valuable security, account, computer system, disk, computer printout or other electronic device which belongs to or is in the possession of his or her employer, or has been received by him or her on account of his or her employment, or any entry in such book, document, account or electronic device, or is privy to any such act;
- (b) makes or is privy to the making of any false entry in such book, document, account or electronic device."

Submissions by accused

[89] The accused submitted that there were irregularities committed during the investigation of this case. The irregularities were such that they tainted the investigation

and infringed her right to a fair trial. She argued that she finds it strange that Magistrate Namweya who was the head of Oshakati Magistrate's court did not report the 'alleged corrupt activities' to the Anti-Corruption Commission or to the Magistrates' Commission and that created a presumption in her mind that magistrate Namweya had a personal interest in this case. She argued that she and magistrate Namweya did not have a good working relationship. She argued that magistrate Namweya wrote to Windhoek Police Station for investigators to be appointed, his young brother Inspector Namweya was appointed to investigate and put up a trap for her and that created a conflict of interest. I must pause here and add that magistrate Namweya testified that the reason why he contacted the police in Windhoek to appoint investigators was because the accused is related to Chief Inspector Theron who was based in Oshakati and she was also residing at his house and that he did not want the information about the investigation to leak, hence the reason for approaching the police in Windhoek. She argued that traps are illegal in Namibia as per the judgment of *S v De Bruyn* 1992 (2) SACR 574. That submission is not correct.

[90] In *S v De Bruyn* 1992 (2) SACR 574 (Nm) at 579, Hannah, J said the following: 'Police traps and informers have been part of the armory of police forces throughout the world for a great many years in their battle against crime. The courts have frequently expressed their distaste for such methods and have been at pains to emphasize the need to treat evidence obtained by such means with all due caution. But the courts, certainly in South Africa and the United Kingdom, have concluded that the use of traps and informers is a justifiable and necessary means of detecting crime.' Therefore traps in Namibia have not been declared illegal.

[91] She argued that Inspector Namweya instructed the police to set-up the trap, the two brothers discussed the case and Inspector Namweya was eager to secure a conviction no matter the costs. She argued that magistrate Namweya and Inspector Namweya proceeded to recruit Inspector Kakwambi to conduct the investigations and after the trap was executed magistrate. Namweya was involved again. She argued that crucial documents (annexures – APA – as per annexures) in which she recorded what transpired in court when she withdrew tickets were missing and they were not disclosed

to her and she argued that these documents (annexures) were deliberately removed by magistrate Namweya in order to prove his case against her. I must pause here and say that the accused throughout the trial testified that these missing annexures were crucial to her defence in the sense that they would have shown the name of the prosecutor who applied for the withdrawal of the tickets, the reasons for the applications to withdraw the tickets and her ruling, yet when the docket was disclosed to the accused, she did not request those annexures. It was only during trial that she raised the issue of missing annexures. That clearly cast serious doubt to the existence of the so called annexures. If indeed those annexures were crucial to her defence and would have exonerated her, why did she not request that from the state to disclose them? The accused is a qualified and experienced magistrate who was also represented by a qualified and experienced lawyer, why did they not ask for disclosure of those crucial annexures? The inescapable conclusion is that those so called annexures did not exist.

[92] The accused further argued that Inspector Kakwambi under the influence of Mr. Namweya went beyond his call of duty to gather evidence in favour of the complainant (Mr. Namweya). Inspector Kakwambi, took statements from witnesses who spoke mainly Oshiwambo, translated the statements to English without showing them a translator certificate and wrote statements to his satisfaction. There is no requirement in court that when a police officer take a statement from a witness and translate it to English, a translator certificate must be produced. She also argued that sometimes he wrote statements in the absence of witnesses and would just send the statements to be signed. No evidence was presented to support that claim. **As regard the taking of statements from the witnesses is concerned, this court held in the matter of S v Ditshabue¹ that:**

“...The shortcomings of police officers in investigating cases in this country, have always been known and these courts have given a sympathetic ear to witnesses who unfortunately find themselves in such unfortunate situations... In Jaar’s² case, Mainga J at page 12-13 stated, “A court should be careful in discrediting a

¹ CC 26/2012, delivered on 20 September 2013.

² Alois Jaar v The State (unreported) CC 43/2007.

witness because his evidence in chief slightly differs from the statement a witness should have told the police, especially in this country where it is a notorious fact that the majority of police officers who are tasked with the duties to take statements from prospective witnesses and accused persons are hardly conversant in the English language and more so that police officers who take down statements are never called and confronted with the contradictions that an accused or witness may have raised in cross-examination"...These contradictions must be considered in light of their importance and their impact on the parts of other witnesses' evidences..."

[93] The accused also referred to *S v Mushimba and others* 1977(2) SA 829 where irregularities occurred and the appeal was upheld.

The Mushimba matter is clearly distinguishable from this case because that case concerned a secretary who disclosed privileged confidential documents between the accused and his lawyer to the security branch of the police. In that case the court ruled that the attorney and client confidentiality or privilege was breached and therefore the accused did not get a fair trial. The court held further that the breach of the privilege affected the proceedings. *The court held further, that by reason of the nature and extent of the breach of the privilege of the appellants, that it had to be found that their protection by the privilege and during the trial had disappeared totally through the action of the Security Police, that thereby the trial did not comply with what justice required in this respect and that a failure of justice had occurred* (headnote). The reliance on the Mushimba matter is clearly misplaced. There was no relationship of privilege between the accused and Magistrate Namweya which was breached.

[94] The accused also relied on the case of *S v Monday* 2002 NR at 167 where it was held that:

"No reasonable court, acting carefully would after due consideration of the applicable principles discussed before this Honorable court have come to the conclusion that the accused should be convicted as such." The *Monday* matter is clearly distinguishable from this case. The *Monday* matter dealt with the accused's right to legal representation and the duties of a presiding officer to assist an unrepresented accused. In this matter

the accused, who is a magistrate, was initially represented by a lawyer and then acted in person. She is not a layperson when it comes to the law.

ANALYSIS OF THE EVIDENCE

Count 1: Obstructing the course of justice

[95] Mr. Daniel Nuuyoma testified that on 24 February 2011 a traffic ticket was issued to him for transporting people without a permit. The fine was N\$1000 and the trial date was 26 May 2011. He testified that as he was going somewhere, he gave the ticket and N\$1000 to Mr. Thadeus Sabas to go and pay at the Oshakati magistrate's court. On 26 May 2011, he did not appear in the Oshakati magistrate's court before the accused. Exhibit CC1 is a control document in the court book where entries were made that on 26 May 2011, the accused withdrew the case of Daniel Nuuyoma. The accused testified that the prosecutor, Ms Shilunga applied in open court to have the ticket withdrawn as it was defective.

[96] The accused testified that she granted the application because the ticket was defective as there was no Act cited. Even if there was no Act cited, s 84(3) of the Criminal Procedure Act 51 of 1977 provides that the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient. Exhibit "CC1" stated clearly what offence was committed. She further testified that she cannot confirm nor deny whether Mr Nuuyoma or Mr. Sabas was at court. She further stated that as long as the ticket is defective the accused need not be present. S 86(1) of Act 51 of 1977 also gives the power to a magistrate to amend the charge where it is defective. As alluded to, the withdrawal of charges is regulated by s 6 of the Criminal Procedure Act. It provides:

"6. Powers to withdraw charge or stop prosecution. An attorney general or any person conducting a prosecution at the instance of the state or anybody or person conducting a prosecution under section 8, may –

(a) Before an accused pleads to a charge, withdraw that charge, in which event the accused shall not be entitled to a verdict of acquittal in respect of that charge..."

(my underlining)

From the reading of s 6(a), the withdrawal of the charge must take place at the instance of the prosecutor in an open court and the accused must be present, otherwise as counsel for the state correctly put it: 'it would not have been necessary to spell out that in event of such withdrawal, he shall not be entitled to a verdict of acquittal.'

There is no evidence that the prosecutor, Ms Shilunga applied to have the charge withdrawn. The accused testified that there should be an annexure (APA) which would have shown that Ms Shilunga applied for the withdrawal of the charge and the reasons?. The annexure would have also shown that she granted the application and the reasons why. She testified that the annexure was not disclosed to her, yet there was nothing preventing the accused and her previous defence lawyer from requesting it. If indeed that annexure was in existence, defence would have requested that as it was crucial to her defence. When the public prosecutor Mr. lipinge was cross examined by counsel for the accused, he said the following:

"Q: Okey, so what is the APA, what would be the annexure be that is attached, what document?"

A: It is just the second copy that is usually on the control document."

[97] Counsel for the state put it: 'It is thus clear that the version of the meaning of 'APA' that the accused subsequently sought to insist on the defence case, in view of the defence's acceptance of the meaning attributed to the acronym by witness lipinge, is without foundation and ought to be dismissed as lame attempt to mislead the Court.'

When Mr Nuuyoma and Sabas testified, it was never put to them that they appeared in court on 26 May 2011 when the ticket was withdrawn. As counsel for the state put it: 'This should have been imperative, as in her testimony the accused insisted that someone did, in fact, appear before her, adding that it was neither her duty nor the practice, to confirm the identity of the appearer. That is clearly not true as every person who appears before her is the person whose name appears on the traffic ticket.'

[98] Why would somebody else appear on behalf of the offender and pay a fine or face a jail term for an offence he or she did not commit? That is absurd. Counsel for the state argued that the fact that the accused then made false entries indicating that the

matter had been withdrawn, yet neither Mr. Nuuyoma nor Mr Thedeus Sabas appeared before her in court (See Exhibits “CC1”, “CC2”) are indirectly corroborative of the entries having been made with a mind to benefit either herself or Mr. Nuuyoma. The accused on the other hand testified that the witnesses were implicating her because they wanted to exonerate themselves from not having paid traffic tickets. Counsel for the accused submitted that the prosecutor in relation to the ticket of Mr. Daniel Nuuyoma was Ms Shilunga and she was not called to testify and therefore no evidence was presented by the state indicating that any application to withdraw the charges was requested by the State.

[99] Although Ms Shilunga did not testify, Mr Nuuyoma and Mr. Sabas testified that they were not at court when the charge was withdrawn. By ‘withdrawing’ the charge against Mr Nuuyoma, who committed an offence, without any justification in law, the accused frustrated or interfered with the course of justice as Mr. Nuuyoma did not appear in court and was not tried and sentenced. In my respectful view the state proved beyond a reasonable doubt that the accused defeated or obstructed the course of justice.

Count 3 (alternative): Fraud

[100] Counsel for the accused argued that the state failed to prove the elements of the offence because Mr. Sheehama, in whose name the ticker was issued, did not testify. However, Mr Mbwale, who was the interpreter assigned to the court of the accused testified that he was a casual interpreter and worked with the accused in court C. Apart from interpreting, he was also doing administrative duties like entering traffic cases in the court book, the names of officials, accused as well as the offences. The extract from the court book **Exh “HHH”** dated 27 June 2011 showed that the accused was Mr. Sheehama, presiding officer Ms. Theron (the accused) and interpreter Mr. Mbwale and prosecutor Ms. J Shilunga. The following entries were recorded on Exh “HHH”:

‘SP: Warrant of arrest inquiry

Crt: Accused, why were you absent from court?

Acc: I lost the ticket during the flood.

Crt: Satisfied: Warrant of arrest cancelled.

SP: Puts charge to accused.

Crt: Accused and you understand the charge and how do you plead?

Acc: Understand and plead guilty.

Crt: Accused you are found guilty.

SP: No previous convictions.

Crt: Accused's right to mitigation explained.

Accused: I have nothing to say.

SP: Leave it in the hands of court.

Crt: Sentence – warned and cautioned.'

[101] Mr. Mbwale testified that those entries were done by the accused and that he was not present and did not interpret when those proceedings allegedly took place. On that same date he went to collect the traffic ticket from the accused and found out that the proceedings were already recorded in the court book with his name as the interpreter and he became suspicious and he contacted the prosecutor who then informed him to report the matter to the Chief Magistrate. Mr. Mbwale's evidence that he was the interpreter in court on that day was not challenged, it follows that the assertion by the accused during her testimony that Mr. Mbwale was not present on that date as he had gone to police training interviews is not true. On the reverse side of the control document (Exh. "GGG") in respect of Mr. Sheehama, the following entries were also made by the accused: judgment 27 June 2011 – guilty, sentence: Warned and cautioned. The making of those false entries in Exh "HHH" and "GGG" were therefore in contravention of s 47(b) of the Anti-corruption Act, Act 8 of 2003. The accused is accordingly found guilty of having contravened s 47(b) of the Anti-Corruption Act, Act 8 of 2003.

Count 5: Corruptly using office or position for gratification

[102] Mr. Kakelo testified that he was issued with a traffic ticket in May 2011. The fine was N\$ 1 000 and he was supposed to appear in court on 28 July 2011. He was called from a landline by a lady and informed that he must come to room 8 at the Oshakati magistrates' court to make a payment. He proceeded to room 8 where he found a 'baster lady' who introduced herself as Theron. He paid N\$ 500 to Theron and she

informed him that he will get the receipt the next day, but did not. The accused denied that she called Mr. Kakelo and that she received N\$ 500 from him. She admitted that room 8 was her office, but she never saw him in her office. She testified that Exh. "CCC" (ticket) was withdrawn by her after an application by the state to withdraw the ticket because it was defective as there was no Act and year cited. The annexure (APA) on Exh. "CCC" were not attached and that could have shown clearly that it was the prosecutor who applied to have the ticket withdrawn. She testified that if the ticket is defective the accused need not be there. Mr. Kakelo testified that he was not at court on 12 August 2011 when the ticket was withdrawn, whereas the accused was adamant that Kakelo attended court. Counsel for the accused argued that no evidence was presented by the witness regarding a phone call. No proof apart from word of mouth that payment was received.

[103] The accused's testimony that the annexure that would have shown clearly that it was the prosecutor who brought the application for the withdrawal of the charges was not disclosed to her, is untruthful. If such an annexure ever existed, she would have raised that with her counsel and they would have requested that from the State. Mr. Kakelo's evidence that he was not at court on 12 August 2011 and that he paid N\$ 500 to the accused explains the subsequent conduct of the accused, namely; the withdrawal of the charge without Mr. Kakelo being present. If the accused did not receive the N\$ 500, why was it necessary to withdraw the charge? Why not amend the charge as provided for in the Criminal Procedure Act? Having regard to the totality of the evidence, I am satisfied that the state proved beyond a reasonable doubt that the accused contravened s 43(1) of Act 8 of 2003 and she is found guilty on that count.

Count 6 (Alternative): Fraud

[104] Ms Selma Hekandjo testified that she is a police officer. In 2011 she owned a taxi, a Toyota corolla, and the driver was Mr. Shikalepo. She testified that Mr. Shikalepo never gave her any traffic ticket and he worked for few months and his employment was terminated due to ill health. On 30 June 2011 he (Mr. Shikalepo) was not at court and a warrant of arrest was issued. She testified that on 12 July 2011 she was not at court, yet there is a court record book Exh "JJJ2" showing that somebody attended court where

the warrant of arrest was dealt with and an inquiry held. According to Exh “JJJ2” the person who appeared in court was the employer of Mr. Shikalepo. She testified that she did not appear. According to Exh “JJJ2” the presiding officer was Theron, prosecutor Ms Shilunga and interpreter Mr. Mbwale, the person pleaded guilty. Mitigating factors amongst others... the driver even bumped my car – sentence – warned and cautioned.

[105] She testified that she did not appear in court when those entries were made. She never pleaded guilty as stated in the court record book nor did she place mitigating factors before court. The accused on the other hand testified that on 12 July 2011 she held an inquiry, Ms Shilunga was the prosecutor and Ms Selma Hekandjo, the owner of the taxi, was before court. She further testified that if Mr. Mbwale was not the interpreter, then an interpreter on training was the interpreter. She testified that she withdrew the ticket because it was defective. Ms Selma Hekandjo was adamant that she was not at court on 12 July 2011, she further stated that Mr. Shikalepo (her driver) never bumped her car as stated in the mitigating factors.

[106] She told the court that she vividly remembered that she was not at court on that day. Mr. Mbwale also testified that he was not the interpreter where Ms Hekandjo appeared and testified. Counsel for the State submitted that it is common cause that although Mr. Shikalepo did not appear in court on 30 June 2011 an entry “withdrawn” was made by the accused and according to witness Mr. Cosmos that was done before he, as the magistrate assigned to that court on that date, had dealt with the case. After noticing this anomaly and bringing it to the attention of the Chief Magistrate and as the accused (Mr. Shikalepo) was in default, he ordered that a warrant of arrest be issued, to be held over for 14 days to the 14 July 2011.

[107] He further submitted that on 12 July 2011 the accused before court purported to cancel the warrant of arrest ordered by Mr. Cosmos. On the same date, the accused purportedly proceeded to preside in the trial, a plea, (Exh “JJJ2”), where after she purportedly warned and cautioned the “Mr Shikalepo.” Mr Shikalepo and Ms Selma Hekandjo testified that they were not in court and did not place mitigating factors before court on 12 July 2011, it follows that the entries made by the accused on 12 July 2011

as reflected in Exh “JJJ2” were false and were meant to defraud or conceal an offence in terms of section 47(a) of Act 8 of 2003. The accused is accordingly found guilty of contravening section 47(a) read with sections 1, 32, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 7: Defeating or obstructing the course of justice

[108] Mr. Shikalepo testified that a traffic ticket was issued to him to appear in court on 30 June 2011. He testified that the fine was N\$1000. He gave the ticket to Ms Hekandjo to go and pay and he did not appear in court on 30 June 2011. The accused testified that because the ticket was defective as there was no citation of the Act, she had to do an inquiry and cancelled the warrant of arrest in respect of Mr. Shikalepo on case no: T 176/2011. She further testified that the warrant was also not signed and therefore it was invalid. Mr. Shikalepo testified that he was not at court when the warrant of arrest was cancelled and the mandatory 14 day period from date of issue of the warrant of arrest had not yet lapsed.

[109] The warrant of arrest was issued by Magistrate Cosmos on 30 June 2011 to be held over for 14 days to the 14 July 2011, by the time the accused purported to cancel the warrant of arrest on 12 July 2011, the warrant of arrest had not yet lapsed and it had not been signed for collection by the police officer for effecting an arrest on the defaulting offender. The accused argued that there was an application to withdraw the traffic ticket due to its defectiveness. An inquiry was held whereby somebody appeared before her and then the warrant of arrest was cancelled and the court proceeded with s 112 application by the state and that is how she ended up with the verdict of: ‘Warned and cautioned.’ That argument is clearly baseless as the accused could have cured the defect by amending the charge.

[110] The accused assertion that she could cancel the warrant of arrest because it was not signed is misplaced, bearing in mind that Mr. Shikalepo was not in court and the mandatory 14 days had not yet lapsed. Counsel for the state argued correctly that Mr. Shikalepo was still in default on 12 July 2011 and did not attend court on that day and by cancelling the warrant of arrest, the accused made herself guilty of defeating or

obstructing the course of justice. I agree. Accordingly, the accused is found guilty of defeating or obstructing the course of justice.

Count 8: Fraudulent concealment of offence (destroying/falsifying a document)

[111] Mr. Haulenga testified that he was issued with a traffic ticket during 2011. He sent Mr. Hiluwa to go and pay the ticket for him. On Sunday he gave Mr. Hiluwa N\$1000 and his ATM card to go and withdraw an additional N\$1000. On Monday Mr. Hiluwa called him and told him that he had paid to Theron, but did not get a receipt. He further testified that he did not appear in court on 28 July 2011 before the accused in respect of the traffic ticket where in the court book (Exh "FF2") it was recorded that *he pleaded guilty and made submissions in mitigation to the effect that he was 50 years old, the only bread winner in the house of 10 people etc and that he had no previous convictions and that he was warned and cautioned.*

[112] Mr. Hiluwa also testified that he did not appear in court on 28 July 2011. The accused testified that those proceedings took place and Mr. Haulenga or Hiluwa appeared before her in an open court. Mr. Ipinge, the prosecutor, testified that he could not recall those proceedings, but he noted the shockingly lenient sentence; 'warned and cautioned.' The accused testified that somebody must have appeared before her for her to make those entries. Mr. Haulenga and Hiluwa were adamant that they did not appear in court on 28 July 2011 before the accused. The evidence of the accused that somebody must have appeared before her is difficult to believe as it is highly unlikely that anybody else, except the person in whose name a ticket had been issued, would appear before a magistrate, plead and mitigate on behalf of the real owner of the ticket and pay a fine or in default face a jail term.

[113] What makes her version even harder to believe is the fact that on that day there were even older persons than Mr Haulenga on the roll but none was warned and cautioned (See Exh "FF3"). Counsel for the State submitted that both Mr. Haulenga and Mr. Hiluwa were adamant that they did not appear in court on 28 July 2011. He further submitted that in respect of the "concealment" aspect it is clear that the long hand record (Exh "FF2") is a fiction, inclusive of untrue submissions in mitigation. Mr

Haulenga could not, if his evidence is true that he was not at court, have made those submissions. Mr. Haulenga's evidence that he was not in court is credible, otherwise why would he lie about it? Mr. Mbwale, the interpreter, who was assigned to the court of the accused on 28 July 2011 also corroborated Mr. Haulenga and testified that, those proceedings recorded on 28 July 2011 did not take place. The version of the accused is clearly false and I reject it. I am satisfied that having regard to the totality of the evidence, the state proved beyond a reasonable doubt that the accused contravened s 47(a) read with section 1, 32, 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 9: Fraudulent concealment of offence (obstructing investigation)

[114] The entries made by the accused in Exh "FF2" to the effect that Mr. Haulenga pleaded guilty, he had no previous convictions and placed mitigating factors such as that he is 50 years old, he is the sole bread winner in the house of 10 people and was warned and cautioned, were false as Mr. Haulenga was not at court on 28 July 2011 and never appeared before the accused when she made those entries. Mr. Mbwale who was recorded as the interpreter corroborated Mr. Haulenga's version and testified that those proceedings did not take place, the proceedings were not done in court. The version of the accused that somebody appeared before her is false beyond a reasonable doubt and I reject it. The only reasonable inference to be drawn is that the accused made those false entries because she received N\$1 500 from Mr. Hiluwa on behalf of Mr. Haulenga. Having regard to the totality of the evidence, I am satisfied that the state proved beyond a reasonable doubt that the accused contravened s 47(b) read with sections 1, 32, 46, 49 and 51 of the Anti-corruption Act 8 of 2003.

Count 10: Defeating or obstructing the course of justice

[115] Mr. Kakelo testified that he was issued with a traffic ticket on 21 May 2011 for driving without a licence. He was fined N\$1000 to be paid before 14 July 2011 or appear in court on 28 July 2011. He defaulted and a warrant of arrest was issued by the accused (See Exh "F2") and the instruction in the court book (Exh "BBB"). The warrant of arrest was held over and the return date (14 days) was the 12 August 2011. After having been called on his phone he went to the Oshakati magistrate's court and paid N\$ 500 to a 'baster lady' by the name of Theron. He testified that on 28 July 2011 he did

not appear in court and he was not aware of a warrant of arrest that was issued by the accused. He further testified that he was also not aware that the warrant of arrest was subsequently cancelled on 12 August 2011. The accused testified that the warrant of arrest was brought to her at 14h30.

[116] She testified that the warrant of arrest is not reflected in the court book because on 12 August 2011 they did not deal with tickets and the prosecutor brought it to her in the afternoon. Counsel for the accused submitted that the court book was confiscated by the police around 15:00 on 15 August 2011 when the matter was dealt with, so the accused could not have made the entry. Counsel for the State, correctly, submitted that the practice was that the interpreter would enter all cases for the day in the Court Book before such were dealt with in court or even in the case of a cancellation of a Warrant of Arrest in chambers in the event that the offender turned up after the sitting of the court, but for such chamber proceedings, the prosecutor, court orderly and or interpreter would still be in attendance and a proper inquiry would have to be held. Mr. Paulinus Kakelo testified that he never appeared before the accused in court or chambers and the warrant of arrest could not have been dealt with in his absence.

In the charge sheet the state alleges that by recording in the traffic court book for 28 July 2011 in respect of Paulinus Kakelo on case no T1385/2011 that a warrant of arrest no. 15444/2011 was issued but held over for 14 days, the accused's conduct frustrated and or interfered or may had protected Paulinus Kakelo from being prosecuted for crimes he committed. Mr. Kakelo testified that a ticket was issued to him on 21 May 2011. A fine of N\$1000 to be paid before 14 July 2011 or to appear in court on 28 July 2011. He did not pay nor appear in court on 28 July 2011. The accused was justified to issue a warrant of arrest and I cannot see how that conduct frustrated, interfered or protected Mr. Kakelo from prosecution. She was justified to issue the warrant of arrest because Mr. Kakelo did not appear in court. The state did not prove the guilt of the accused on this count. She is accordingly acquitted.

Count 11: Corruptly using office or position for gratification

[117] Mr. Hiluwa testified that after he was given the N\$1000 by Mr. Haulenga and the N\$1000 from the ATM that he withdrew on Sunday, he went on Monday to Oshakati

magistrate's court and paid N\$1500 to the accused on the instruction of Mr Haulenga for the ticket that was issued to him (Mr. Haulenga). He testified that he did not receive a receipt for that from the accused. The accused on the other hand testified that he never received any money from Mr. Hiluwa. Counsel for the state argued that it was immaterial that the accused could not have received the money directly from Mr. Haulenga, as it was Haulenga and not Hiluwa who had been issued with the traffic ticket. Counsel further argued that his omission to insist on a receipt was the inherent trust he had in the accused, who assured him she would later enter the payment in a book although he was later to have misgivings about the non-issue of a receipt by the accused.

[118] Counsel further argued that the fact that the accused then made various false entries in Exhibits "FF1", "FF2", "FF3" are corroborative of such payment to her, otherwise why should she sought, by so doing, to benefit Mr. Haulenga? The accused's version is a bare denial. Both Haulenga and Hiluwa did not appear in court on 28 July 2011 when the accused made the false entries in Exhibits "FF1", "FF2" and "FF3", the only reasonable inference to be drawn is that the accused made those false entries because she received money from Hiluwa, otherwise why would she do something like that?

I am satisfied that the state proved beyond a reasonable doubt that the accused is indeed guilty of contravening s 43(1) read with sections 32, 43(3), 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 12: Corruptly using office or position for gratification

[119] Mr. Japhet Shipenda, a taxi driver, testified that in August 2011 in Oshakati he was issued with a traffic ticket for N\$2000 because he did not have a public permit. The trial date was 8 August 2011. He then realized that the ticket had expired and he went to Oshakati magistrate's court where he met the accused, she was coming from court c going to the office. In the office he gave his ticket to the accused and he told her that he managed to raise N\$1000. He then gave her the N\$1000 and she counted it. She was alone in her office when he handed her the money.

[120] She just said 'ok' and he left. He did not ask for a receipt because he knew that she was a magistrate and worked with people. He further testified that he never appeared in court before the accused in connection with this ticket on 8 August 2011. The reason why he was asked by the prosecutor whether he appeared in court is because in the court document it was noted by the accused that he appeared and the matter was withdrawn, he said no, he did not appear. The accused denied having received any money from Mr. Japhet Shipenda. She cannot recall that he was in her office.

[121] Mr Shipenda, was adamant that he went to the magistrate's court and paid N\$1000 to the accused. As counsel for the state put it: 'whereas the ticket was for N\$2000, he had managed to raise only N\$1000, hence he was obviously relieved when the accused, as a magistrate gave him a discount and that explains also why he did not ask for a receipt.' Mr. Shipenda was also adamant that he did not appear in open court before the accused on 8 August 2011, despite the accused having recorded in (Exh "U1") and in the court book (Exh "U2") that the matter was 'withdrawn'. Mr. Shipenda's version was corroborated by Mr. Mbwale, the interpreter, who testified that Shipenda's ticket was not dealt with in court which led to him (Mr. Mbwale) noticing the anomaly of him having been entered by the accused as the attending interpreter on Exh "U2".

[122] The accused responded by saying: '... these people were called, all of them were summoned to the police station after my arrest they did not know that the tickets or cases had been dealt with...' The only reasonable inference to be drawn from 'withdrawing' the ticket of Mr. Shipenda is that the accused received payment of N\$1000 from Mr. Shipenda, otherwise why withdrew the ticket in the absence of the accused? Having regard to the totality of the evidence I am satisfied that the state proved beyond a reasonable doubt that the accused contravened s 43(1) read with section 32, 43(3), 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Count 13: Corruptly using office or position for gratification

[123] Mr. Kalusha litembu testified that he was issued with a traffic ticket on 21 April 2011 for obstructing other road users. The fine was N\$1000 to be paid by 15 June 2011

in default the trial date was 30 June 2011. However on the control document the month was altered and the '8th' was super imposed on the 6th (June). He testified that he did not know who altered the date. He testified that before 30 June 2011, he went to court with the aim of asking for an extension of the date as he wanted time to raise the money to pay the fine. He went to Oshakati magistrate's court where he met the accused in the veranda. He told her, his problem and she said they must go into her office. The accused asked him how much he could afford and he told her N\$500. She asked him to give her the ticket. She looked at it and she then said give me the N\$500 you have.

[124] He gave her the N\$500. She then said is ok and she did not give him a receipt. He further testified that he did not appear in court on 30 June 2011 nor on 12 July 2011. He further testified that a warrant of arrest could not have been issued against him on 30 June 2011 as he had paid. The accused denied having received any money from Kalusha litembu. She never met him before, only here in court. Mr. litembu was adamant that he paid N\$500 to the accused. He was supposed to appear in court on 30 June 2011. Before he appeared in court, magistrate Cosmos wanted to write the order to issue a warrant of arrest against Kalusha litembu and he noticed that the accused had endorsed "withdrawn" against the entry of Mr. litembu, although Mr. litembu testified that he was not at court on that day.

[125] The version of Mr. litembu is indirectly corroborated by the subsequent conduct of the accused of withdrawing the traffic ticket without Mr. litembu being present at court. If the accused did not receive any gratification from Mr. litembu why withdrew the traffic ticket? The inescapable conclusion is that she indeed received the N\$500 from Mr. litembu. She is therefore guilty of contravening s 43(1) read with section 32, 43(3), 46, 49 and 51 of Anti-corruption Act, Act 8 of 2003.

Count 14: Defeating or obstructing the course of justice

[126] There is no dispute that on 12 July 2011 the accused purported to cancel the warrant of arrest issued by Magistrate Cosmos on 30 June 2011 in respect of Mr. litembu. By 12 July 2011 the warrant (Exh E) had not yet been signed by the magistrate, as the 14 day period had not yet lapsed. The accused testified that there

was an alteration about the '8' (month) of the trial and therefore the ticket was defective, there was also no Act cited. She testified that the ticket was initially brought to her in chambers by prosecutor Shilunga to see whether she could assist her. After that Ms Shilunga applied in open court to declare the ticket defective and for the cancellation of the warrant of arrest. She declared the ticket defective and 'withdrew' it in the court book on 30 June 2011 and then magistrate Cosmos scratched it.

[127] She testified that she can't state whether Mr. Kalusha was in court, but the accused need not be there when the ticket is to be withdrawn. By the time, being 12 July 2011, the accused cancelled the warrant of arrest, it had not yet been signed by the magistrate as the 14 day had not yet lapsed. The accused had no basis in law to cancel the warrant of arrest issued lawfully against Mr. litembu and her conduct frustrated or interfered or protected Mr. litembu from being prosecuted for the traffic offence he had committed and therefore the state proved beyond a reasonable doubt that she is guilty of defeating the course of justice.

Count 15: Defeating or obstructing the course of justice

[128] Ms Peya Petrina Ndungula testified that she was issued with a traffic ticket on 3 July 2011 for driving without a driver's license. The fine was N\$300 to be paid by 22 July 2011 or failure, to appear in court on 11 August 2011. She did not pay the fine nor appeared in court on 11 August 2011. She misplaced her ticket. On 11 August 2011 on the reverse side of the control document the following entries were made by the accused: "**Withdrawn - ticket defective**" (Exh "Z2"). In the court book the accused wrote: "**Withdrawn – ticket defective no citation of Act**" (Exh Z 3).

[129] Ms Kefas testified that she was the prosecutor in the accused's court on 11 August 2011 and she never applied for the withdrawal of the ticket on the basis of defectiveness. Ms Peya Ndungula also testified that she never appeared in court before the accused on 11 August 2011. The accused testified that she withdrew the ticket on application by the prosecutor because the ticket was defective as there was no Act cited. She further testified that the "annexure" which would have shown who applied for the withdrawal of the ticket and the reasons are not before court. As alluded to, the legal

position for withdrawal of a ticket is regulated by s 6(a) of the Act 51 of 1977 which provides that:

'in the case where the charge is defective and the court having brought this to the attention of the state, the prosecutor will then apply for amendment or withdrawal.'

[130] The accused's explanation that there was such an application, which is denied by the prosecutor, Ms Kefas and the witness who testified that she was not at court, cannot be true. The accused argued that if the annexure showing who applied for the application for withdrawal had been disclosed, she would have been vindicated, yet there was nothing preventing her from asking for disclosure of the annexure. In my view that is an afterthought, her version is not reasonable possible true and I reject it. I am satisfied that the state proved its case beyond a reasonable doubt and the accused is found guilty on count 15.

Count 16: Defeating or obstructing the course of justice

[131] Mr. Ashiyana testified that he was issued with a traffic ticket on 12 July 2011. He gave N\$2000 to the late Ndapandula to go and pay. The late Ndapandula did not give him a receipt. He further testified that he did not appear in court on 11 August 2011. Counsel for the State submitted that Exh "HH2" is self-explanatory and the accused is not denying that she made the entry. "**Withdrawn - ticket defective**" on the reverse page of the said Exh, as well as in the court book entry Exh "HH3". "**Withdrawn ticket defective no citation of Act**".

[132] Counsel argued that as it is not disputed that Mr Ashiyana did not attend court on 11 August 2011, it follows that such "withdrawal" was done secretly by the accused on her own, without the participation of the other role players, such as the prosecutor, interpreter and or court orderly. The accused argued that she withdrew the ticket on application by the prosecutor as the ticket was defective and the annexure showing who the prosecutor was is not attached or disclosed. The fact that there was no Act cited was not a basis for the withdrawal of the ticket. If indeed the ticket was defective, as counsel for the state argued, 'it boggles the mind what insurmountable difficulty would

have prevented the accused, the prosecutor being present, from ordering amendment so as to cure any defective citation.'

[133] The fact that the accused did not request a disclosure of the so called annexure which should have proved her innocence, show that there was no such annexure and I agree with counsel for the state that such 'withdrawal' was done by the accused on her own. There was no legal basis for her to withdraw the ticket and when she did that she knew that her conduct may frustrate or interfere or protect Mr. Ashiyana from being prosecuted for the traffic offence he had committed. In my view, the state proved the guilty of the accused beyond a reasonable doubt. The accused is accordingly found guilty of defeating the course of justice.

Count 17 (alternative count): Corruptly using office or position for gratification

The accused was discharged on the main count

[134] Mr. litenge testified that he was a taxi driver and on 21 July 2011 he was issued with a traffic ticket for inconsiderate driving. The fine was N\$2000 and the trial date was 15 August 2011. A certified copy of the traffic ticket was admitted as Exh "S1". He testified that on 15 August 2011 at around 11am a lady who identified herself as 'Marlene' phoned him and told him to come and see her at the Oshakati Magistrate's court in connection with an expired ticket and that he should attend court at 14h00. At court he was told that Marlene was arrested by the police. He further testified that he did not appear in court where the ticket was withdrawn as being defective. The control document was admitted as Exh "S2". The accused testified that she did not phone Mr. litenge. She testified that she withdrew the ticket "S1 and S2" on request of prosecutor Mr. Likando. It was withdrawn because it was defective – no Act was cited.

[135] Counsel for the state argued that "the witness clear testimony, that save for being called by a person who identified herself as "Marlene" telling him to attend at court, which prompted his attendance at court, but not in court, hence it follows that the purported withdrawal was a false recording by the accused, as it could only procedurally be made in his presence. Counsel further argued that because the accused made some

false entries on the control document 'no other inference can be drawn, save that such acts were preparatory stages, amounting to an attempt, in her either soliciting a gratification from the witness (main) or, was her *modus operandi* in other instances, to invite the payment of a discounted fine from him, which she would then pocket as a gratification and further argued that the accused's conduct amounts to what Snyman terms "interrupted attempt" which he defines as "... where X's actions are interrupted, so that the crime cannot be completed, for example X, meaning to commit arson, pours petrol onto a wooden floor, but is apprehended... just before she strikes a match" what was only left had her arrest not intervened, taking into account the aforementioned past *modus operandi*, applied by the accused to obtain gratification from traffic offenders, was merely for her to ask the witness to pay a lesser amount than the N\$2000 to her.

[136] There is no evidence that the person who called Mr. litenge asked him to bring some money. By the time Mr. litenge came to court, the accused was arrested and did not meet with Mr. litenge and she did therefore not receive an unspecified amount of money from Mr. litenge as alleged by the state. In the result I am not satisfied that the state proved the guilt of the accused on this count. She is acquitted on this count.

Count 18: Corruptly using office or position for gratification

[137] Mr. Taddeus Sabas testified that in 2011 he was given N\$1000 and a traffic ticket by Daniel Nuuyoma to go and pay on his behalf at the Oshakati magistrate's court. He proceeded to Oshakati magistrates' court and paid the N\$1000 to the accused, a light in complexion lady. He also handed the traffic ticket to her. He was told to come and get the receipt the next day. Next day, he came but did not find the accused. The accused denied having received any money from Mr. Taddeus Sabas. She disputed the payment on the basis that no receipt was issued to him to which the witness testified that he was in a hurry as he had passengers in his car which was parked outside the court premises. He further testified that he did come back for the receipt and went to look for her at her office, but could not find the accused.

[138] Counsel for the state argued that the fact that the accused then made palpably false entries indicating that the matter had been withdrawn, yet neither Mr. Nuuyoma

nor Mr. Thedeus Sabas appeared before her in court (See **Exhibits “CC1” and “CC2”**) are indirectly corroborative of the entries having been made with a mind to benefit either herself or Mr. Nuuyoma. The accused on the other hand testified that the witnesses were implicating her because they wanted to exonerate themselves from not having paid traffic tickets. That argument is baseless as it is not only one witness who implicated her, but many and there is no evidence that all those witness wanted to exonerate themselves for not paying traffic tickets.

[139] Mr. Sabas' clear evidence is that he paid the N\$1000 to the accused. Although he did not receive a receipt, his evidence that he paid the money to the accused is indirectly corroborated by the subsequent conduct of the accused of withdrawing the ticket of Mr. Nuuyoma as defective without Mr. Nuuyoma nor Mr. Sabas appearing before her in court. The making of those false entries was a way of returning the favour for having received the N\$1000. Otherwise why make the false entries? Having regard to the totality of the evidence I am satisfied that the state proved beyond a reasonable doubt that the accused contravened s 43(1) read with sections 32, 43(3), 46, 49 and 51 of the Anti-corruption Act, Act 8 of 2003.

Counts 19 and 20: Corruptly accepting gratification by agent (as an inducement) and corruptly using office or position for gratification

[140] Inspector Namweya testified that he made sure that the fake traffic ticket with his cellphone number on was forwarded to the accused's court, court C. Subsequent to that he received a call on his mobile from a lady who called around 15h00 saying: 'This is magistrate Theron calling from Oshakati Magistrate's court, you are having a traffic ticket and that you need to be at court and the fine is N\$2000 and if you pay the same day before 16h00 you will get a discount of N\$1000 and if you come the next day you will pay N\$1500 and if you do not turn up, she will issue a warrant of arrest then he will be arrested and detained in the police cells.' She introduced herself as magistrate Theron who informed him about the traffic ticket and that he must come in to pay it.

[141] The call was from a landline number 646522361. The accused admitted that number was from the switchboard of the Oshakati magistrate's court, but she had an

extension number. She denied that she called Inspector Namweya but Inspector Namweya was adamant that a magistrate by the name of Theron called him and the accused was the one whose court dealt with traffic tickets. In addition he was told to come to office no 8, which was indeed her office and the person who called him introduced herself as magistrate Theron. The accused's version was a bare denial. She denied that she called Inspector Namweya. The accused had the "Pomwene Absalom" control document in her office on 15 August 2011 in the afternoon, which had not been dealt with at all at the time of her arrest.

[142] The cellphone number of Inspector Namweya was on that control document (copy of the ticket). The only reasonable inference to be drawn is that the accused saw the cellphone number of Inspector Namweya on the control document (ticket) and she called him from her landline number. She was the only magistrate with the name Theron with office number 8. That version of Inspector Namweya is credible. She was assigned the traffic court, her office was no 8. Sergeant Mwinga testified that he entered office no 8 and handed the ticket and the money to the accused after he was told by Inspector Namweya that accused called him on his mobile. The version of the accused that she did not call Inspector Namweya cannot reasonably be seen to be true, it is false beyond a reasonable doubt and I reject it.

[143] Sergeant Mwinga testified that when he entered the office of the accused, he introduced himself as 'Pomwene Absalom,' the taxi driver and he gave the ticket and N\$1000 to the accused. Warrant officer Shilongo testified that she, Inspector Kakwambi and Inspector Namweya entered the office of the accused and retrieved the money N\$1000 from her. The N\$1000 and the ticket were on her desk. The accused's version was that when Sergeant Mwinga entered her office, he was speaking Oshiwambo and she told him to go and get an interpreter and he just threw the money on her desk.

[144] Given the earlier conversation she had with Inspector Namweya over the phone wherein she requested him to come and pay N\$1000, her explanation that she asked Sergeant Mwinga to go and get an Oshiwambo interpreter, after he threw the money on her desk is not reasonable possible true and I reject it. Having regard to the totality of

the evidence, I am satisfied that the state proved beyond a reasonable doubt that in respect of count 19, the accused solicited a gratification from Inspector Namweya and is guilty of contravening s 35(1) of Act 8 of 2003. Also in respect of count 20, I am satisfied that sergeant Mwinga gave the accused N\$1000 and she put it on her table and by so doing she was abusing her office to obtain a gratification and accordingly, she is also found guilty of contravening s 43(1) of Act 8 of 2003.

[145] In the result I make the following order;

1. Count 1 – Defeating or obstructing the course of justice – Guilty as charged.
2. Count 3 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
3. Count 5 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
4. Count 6 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
5. Count 7 – Defeating or obstructing the course of justice – Guilty as charged.
6. Count 8 – Contravening section 47(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
7. Count 9 – Contravening section 47(b) of the Anti-corruption Act, Act 8 of 2003. – Guilty as charged
8. Count 10 – Defeating or obstructing the course of justice – Not guilty.
9. Count 11 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
10. Count 12 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
11. Count 13 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
12. Count 14 – Defeating or obstructing the course of justice – Guilty as charged.
13. Count 15 – Defeating or obstructing the course of justice – Guilty as charged.
14. Count 16 – Defeating or obstructing the course of justice – Guilty as charged.
15. Count 17 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Not guilty.

16. Count 18 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
17. Count 19 – Contravening section 35(1)(a) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.
18. Count 20 – Contravening section 43(1) of the Anti-Corruption Act 8 of 2003 – Guilty as charged.

G N NDAUENDAPO

Judge

APPEARANCES

FOR THE STATE

Mr Nduna
Of the Office for the Prosecutor General

FOR ACCUSED

Ms Melaney Theron
In person