

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING IN TERMS OF SECTION 174 OF ACT 51 OF 1977

Case no: CC 02/2014

In the matter between:

THE STATE

and

IGNATIUS SHIDUMIFA KELLY NGHIXULIFA

ANNA NDOROMA

HAFENI NGINAMWAAMI

FIRST ACCUSED

SECOND ACCUSED

THIRD ACCUSED

Neutral citation: *S v Nghixulifa* (CC 02/2014) [2023] NAHCMD 546
(5 September 2023)

Coram: LIEBENBERG J

Heard: 9 August 2023

Delivered: 5 September 2023

Flynote: Criminal procedure – Application in terms of s 174 of the Criminal Procedure Act 51 of 1977 – Discharge of accused in terms of s 174 – Applicable test – Whether there is evidence on which a reasonable court acting carefully may convict – Principles restated – Approach where common purpose is alleged – Inferences may be drawn from established facts to prove allegations.

Summary: The accused, *inter alia*, stand charged with 11 counts and alternative counts ranging from various charges of corruption and fraud and theft as stipulated under the Anti-Corruption Act 8 of 2003; a contravention of the Road Contractor Company Act 14 of 1999 and Companies Act 28 of 2004. They pleaded not guilty to all counts and at the close of the State's case, the accused persons each brought respective applications for their discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977. The application for discharge by accused 1 only concerns counts 1, 2, 4, 5, 8, 9 and 10, on the main and alternative counts. As for accused 2, the application includes all charges against her as set out in counts 2, 5 and 7, on both main and alternative counts. In respect of accused 3, the application is in respect of counts 2, 5 and 7, on the main and alternative counts. The application is opposed by the State.

Held that: Where there is a *prima facie* case against the accused persons which they should answer to in the respective charges against them, discharge will not be granted.

Held further that: Where it is alleged that two accused persons acted with common purpose and one co-accused already intimated that he would give evidence, this is a factor to take into consideration when considering an application of this nature.

Accused persons consequently discharged where the state has failed to make out a *prima facie* case against them.

ORDER

The court finds the following in the s174 application for discharge brought by accused 1 to 3:

Accused 1 – In respect of counts 1, 2 (main and alternative counts), 3, 5 (main and alternative count) 6, 7 (main and alternative counts), 9 (main and alternative counts) and 11 (main and alternative counts) the application is dismissed. On counts 4, 8 and 10 the accused is found not guilty and discharged.

Accused 2 – In respect of count 7 (main and alternative counts) the application is dismissed. On counts 2 (main and alternative counts) and 5 (main and alternative count) the accused is found not guilty and discharged.

Accused 3 – In respect of count 5 (alternative count), 7 (main and alternative counts) and count 11 (main and alternative counts) the application is dismissed. On counts 2 (main and alternative counts) and 5 (main count) the accused is found not guilty and discharged.

**RULING ON APPLICATION FOR DISCHARGE IN TERMS OF SECTION
174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977**

LIEBENBERG J:

Introduction

[1] After the leading of evidence and the state having closed its case, the accused persons brought respective applications for their discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977 (CPA). The accused

persons are in total charged with 11 counts and alternatives counts, to which they pleaded not guilty.

[2] The application for discharge by accused 1 only concerns counts 1, 2, 4, 5, 8, 9 and 10, on the main and alternative counts. As for accused 2, the application includes all charges against her as set out in counts 2, 5 and 7, on both main and alternative counts. Count 11 is erroneously included in the application, for which the accused was not charged; neither did she plead thereto. In respect of accused 3, the application is in respect of counts 2, 5 and 7, on the main and alternative counts.

[3] While accused 1 and 3 are charged with count 11, neither of the accused included this count in their respective applications, nor have they dealt with it in their heads of argument. It was however advanced during oral argument by counsel that it was overlooked and ought to have been included in the application, and therefore to be considered.

[4] With regards to count 10 for which only accused 1 stands charged, the state concedes that the application for discharge should succeed. As for the remaining counts, the state opposes the respective applications.

[5] In the state's heads of argument the counts are conveniently categorised, stemming from four different events namely:

5.1 Counts 1 to 5 and alternatives, relate to the purchase of Erf 10485 Katutura (the erf) for the intended B1 City Development project.

5.2 Counts 6 to 8 and alternatives, relate to contracts between the Roads Contractors Company (RCC) and Karl Neumeyer Civil Contractors (Pty) Ltd (KNCC) and a payment made by RCC to Price Waterhouse Coopers (PWC) for services rendered.

5.3 Count 9 and alternatives, relate to the payment by RCC towards the home loan of Mr Brian Nalisa, an employee of RCC.

5.4 Counts 10 and 11 and alternatives, relate to events leading to the construction of the RCC headquarters.

[6] Mr Alexander represents accused 1, Mr Shakumu accused 2 and Mr Brockerhoff accused 3. Mr lipinge appears for the state.

The charges

First category: B1 City Development project

[7] In count 1 it is alleged that accused 1 contravened s 43(1) of the Anti-Corruption Act 8 of 2003 (the ACA), when he caused RCC's money to be used to purchase the said erf, from which he and/or others stood to benefit.

[8] Count 2 is preferred against all three the accused where it is alleged that they, acting with common purpose, committed the offence of fraud in respect of the payment of N\$4 494 419,92 by RCC for the erf, which was transferred and registered in the name of /Ae//Gams Engineering (Pty) Ltd (/Ae//Gams). In the first alternative, it is alleged that the accused persons contravened s 46(b) of the ACA in that they conspired with accused 1 to contravene s 43(1)¹ when he caused RCC's money to fund the purchase of the erf to their benefit. In the second alternative, it is alleged that the accused persons, acting in concert, committed theft when using RCC funds to purchase the erf.

[9] It is further alleged that at all material time to this count: (i) the RCC was a public body as defined in the ACA; (ii) accused 1 was employed as Chief Executive Officer (CEO) of the RCC and as such a public officer as defined in the ACA; (iii) accused 2 was a business person, cited in her personal capacity and also, as the nominee shareholder on behalf of accused 1 in /Ae//Gams; (iv) that accused 1, as a covert shareholder in /Ae//Gams intended to become a shareholder in /Ae//Gams; and, (v) accused 3, cited in his personal capacity, was a director of Cradle Investment (Pty) Ltd (Cradle Investment)², a corporate body liable for prosecution for this offence under the laws of Namibia.

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.

² A shelf company.

[10] In count 3, preferred against accused 1 only, it is alleged that he committed fraud when he, on 30 June 2006, misrepresented to the RCC Board of Directors (the Board) that a bond had been registered against the erf in favour of the RCC, well knowing that not to be the case.

[11] In count 4, it is alleged that accused 1 contravened s 13(3) of the Roads Contractor Company Act 14 of 1999 (the RCC Act), for failing to declare that he had interests in the agreement between RCC and /Ae//Gams to purchase the erf.

[12] In count 5, preferred against all the accused, it is alleged that they acted with common purpose to contravene s 45(a) of the ACA, alternatively, contravening s 45(b).³

Second category: Karl Neumeyer Civil Contractors

[13] In count 6, only preferred against accused 1, it is alleged that he contravened s 43(1) of the ACA when authorising payment of N\$29 954,73 by RCC to PWC for the benefit of himself or any other person (Cradle Investment).

[14] Count 7, preferred against all the accused, is a charge of fraud in which it is alleged that the accused persons, acting in concert and with common purpose, misrepresented to the RCC that (i) RCC was liable to pay N\$29 954,73 to PWC for professional services rendered to Cradle Investment; (ii) that accused 1 had no interest or shares in Cradle Investment; and (iii) that accused 1 acted in good faith when he caused the monies to be paid over to PWC. Whereas in truth and in fact, the accused persons knew that RCC was not liable to make such payment, that accused 1 had interest and shares in Cradle Investment, and that he was not acting in good faith as CEO of RCC. Alternatively, that the accused persons contravened s 46(b) of the ACA when

³ A person commits an offence who, directly or indirectly, whether on behalf of himself or herself or on behalf of any other person-

(a) enters into, or causes to be entered into, any dealing in relation to any property; or

(b) uses or causes to be used, or receives, holds, controls or conceals any property or any part thereof,

which was obtained as gratification, or derived from the proceeds of any gratification obtained, in the commission of an offence under this Chapter.

allegedly conspiring with accused 1 to contravene s 43(1) when causing payment to PWC. In the further alternative, that the accused persons allegedly committed the offence of theft of the said monies.

[15] Count 8 is another contravention of s 13(3) of the RCC Act against accused 1 only, in which it is alleged that he failed to declare to the RCC Board of Directors that (i) he was or had become materially interested in an agreement entered into between RCC, Cradle Investment and KNCC for acquisition of interests in KNCC; and/or (ii) the agreement for RCC to pay for professional services rendered by PWC to Cradle Investment.

Third category: Home loan to Mr Nalisa

[16] In count 9, only preferred against accused 1, it is alleged that he contravened s 43(1) of the ACA by corruptly using his office or position as CEO of the RCC to obtain gratification for his own benefit, or that of Mr Nalisa, by authorising payment by RCC towards the home loan account of Mr Nalisa with First National Bank, in the amount of N\$92 729,26. In the alternative, it is alleged that accused 1 committed the offence of fraud when pretending that such payment was authorised. In the second alternative, it is alleged that his actions amounted to theft of the funds.

Fourth category: Construction of RCC Headquarters

[17] In count 10, preferred against accused 1 only, it is alleged that the accused on 8 December 2004 contravened s 43(1) by corruptly using his office or position when causing the RCC to pay the amount of N\$150 000 to accused 3 and/or Cradle Investment.

[18] The state however concedes that the ACA only came into force on 12 April 2005, well after the alleged offence was committed, wherefore it will not pursue this count.

[19] Count 11 and the alternative counts thereto, are preferred against accused 1 and 3 only. In the main it is alleged that the accused persons committed fraud when they caused a payment to be made by RCC in the amount of N\$150 000 to accused 3 and/or Cradle Investment as a facilitation

fee. In the alternative, it is alleged that the accused, through their actions, committed the offence of theft by false pretense.

The law

[20] Section 174 of the CPA provides that if, at the close of the case for the prosecution, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge (or any competent verdict to the charge), it may return a verdict of not guilty. The court thus has a discretion which, based on the evidence presented, must be exercised judiciously. It is now settled law that the term 'no evidence' in s 174 means no evidence upon which a reasonable court, acting carefully, may convict. (*S v Khanyapa* 1979 (1) SA 824 (A) at 838F; *S v Nakale* 2006 (2) NR 455 (HC) at 457, endorsed in *S v Teek* Case No. SA 44/2008 (SC) delivered on 28 April 2009 (unreported).

Analysis of the evidence

[21] With regards to counts 3, 6 and 7, it is submitted on behalf of accused 1 that discharge is not sought in respect of these counts, for reason that evidence was adduced which is sufficient to put the accused on his defence. The concession is proper and need not be further developed.

Counts 1 to 5: B1 City Development project

[22] The charges in this category primarily hinge on two incidents, to wit: (a) Purchase of Erf 10485, Katutura from the City of Windhoek (CoW); and (b) a Memorandum retrieved from the computer laptop of accused 1, dated 21 November 2005.

[23] *Count 1* – According to the evidence of Mr Rudi Saunderson (Saunderson), he was employed at RCC as General Manager: Administration during 2004 when accused 1 introduced Mr David Imbili of /Ae//Gams⁴ to explore possible participation with RCC which gave birth to the B1 City Project. In November 2004, Saunderson prepared a proposal for submission to the Board regarding the proposed development of Erf 10485, Katutura

⁴ A dormant company, owned by three shareholders and Mr David Imbili the main shareholder.

between RCC and /Ae//Gams, to whom the CoW awarded a tender for the purchase and development of the said erf. In his view, the project required the investment of funds and exceeded the normal business of RCC, hence, Board approval was required. Of note is that in para 6, it is recommended to the Board that a two-staged proposal is suggested, firstly, the purchase of the property *as an investment*; and secondly, development of the property. Saunderson handed the proposal to accused 1 but was unable to say whether it was placed before the Board for approval as he did not attend board meetings. From the evidence of the then Chairperson of the Board, Mr Otto Shikongo (Shikongo), it is evident that board approval was not sought or obtained at the time and only in February 2006 did the Board become aware of the B1 City Project. Only in June 2006 did accused 1 present to the Board the B1 City Development. The Board was informed (by accused 1) that RCC acquired the land and registered a bond over the property which, according to the witness, was not true.

[24] During cross-examination of the witnesses it was asserted that the RCC's participation in the B1 City Development project was the collective decision of RCC management and, to this end, was authorised. The evidence of witnesses Saunderson and Shikongo, however, proves otherwise and, in the absence of evidence supporting the assertion of accused 1, it remains unsubstantiated and unproven at this stage.

[25] Evidence presented thus far, either through the testimonies of state witnesses and supporting documentary evidence, proves the sale of Erf 10485, Katutura to /Ae//Gams Engineering (Pty) Ltd (/Ae//Gams), transferred and registered on 17 October 2005 in the name of the purchaser, namely, /Ae//Gams. As borne out by correspondence between /Ae//Gams and the CoW, /Ae//Gams would become the sole owner of the property and financed by RCC. Also that the development of the property would be in a JV and done by both /Ae//Gams and RCC. /Ae//Gams confirmed to CoW that the JV for the development was successful and, on the same day, RCC addressed a 'Letter of Undertaking' to CoW in which it confirmed that RCC and /Ae//Gams have entered into a Memorandum of Understanding for the joint development of the

property to be sold to /Ae//Gams, and that RCC would provide the required guarantees for the sale to /Ae//Gams.

[26] RCC subsequent thereto arranged with Bank Windhoek to issue the required bank guarantees in favour of CoW, forwarded on 1 March 2005 under cover of a letter signed by accused 1, in his capacity as CEO. The initial bank guarantees issued were not to the satisfaction of CoW and on 20 May 2005, Bank Windhoek reissued new guarantees. Once the guarantees were in place, the deed of sale was signed between CoW and /Ae//gams which culminated in the transfer and registration of the property in the name of /Ae//Gams. It is common cause that RCC paid the full purchase price of the property on 18 October 2005.

[27] The JV Agreement entered into between /Ae//Gams and RCC was only signed on 11 April 2006, during which accused 1 represented the RCC. Para 2 of the agreement reads that the 'Agreement shall be deemed to have commenced on 1 July 2005'. The effect of the belated signing of the JV Agreement is that Bank Windhoek paid the amount of N\$4 494 419.92 for property that was registered in the name of /Ae//Gams, even *before* the JV Agreement was entered into. Despite RCC financing the sale, there is nothing showing that RCC co-owned the property. Quite the contrary, the RCC letter dated 3 December 2004 echoes the same sentiments as Mr Imbili's correspondence to CoW that the property would be that of /Ae//Gams. It is only in the RCC's application for a Letter of Undertaking from Bank Windhoek where it is stated that registration of Erf 10485 Katutura should be made in the names of /Ae//Gams / RCC. This, however, never materialised.

[28] There is no evidence showing that any attempt was made from RCC's side to take action and ensure that the property be registered in the name of RCC. This unfortunate state of affairs must have been within the knowledge of accused 1 when authorising payment of the conveyancing attorneys' invoice to /Ae//Gams (not RCC), for transfer costs amounting to N\$377 371.

[29] It was argued on behalf of accused 1 that the decision pertaining to the B1 City project was taken in late 2004 and that any unlawful act by the accused was fulfilled when the bank guarantee was issued. Thereafter, he

(accused 1) need not have done anything more to further or advance the alleged offence as gratification already accrued; all of which before the ACA came into operation on 12 April 2005.

[30] This argument was countered by the state who reasoned that the offence for which accused 1 is charged in count 1, was not determined by a single act, but rather by a series of acts and events which culminated in the commission of the offence alleged. Though the decision between /Ae//Gams and RCC to join forces in the B1 City project was discussed towards the end of 2004 and bank guarantees provided in early 2005, state counsel reasoned that several actions taken subsequent thereto, bring the actions of accused 1 within the ambit of s 43 (1) of the ACA. New bank guarantees were requested by RCC and issued by Bank Windhoek on 20 May 2005 which was in furtherance of the sale and after the ACA came into operation. Furthermore, the JV agreement relied on by accused 1 was only signed after the ACA was enacted and in force. It was also argued that gratification only accrued on 17 October 2005, with payment effected the following day. Counsel reasoned that where a series of acts were performed at different stages to commit an offence, it does not mean that each individual act amounts to the completed offence.⁵ The Supreme Court cited with approval the *dictum* enunciated in *S v Alexander and Others*⁶ at 254A-D where it is stated:

[T]he State has on each alternative count alleged only one offence against the accused, based on a series of acts done in the course of conduct in the execution of a common criminal intent. It has been authoritatively laid down by the Appellate Division in the case of *Rex v Heyne and Others*, 1956 (3) SA 604 (AD), that when there is a series of acts done in pursuance of one criminal design the law recognises the practical necessity of allowing the State, with due regard to what is fair to the accused, to charge the series as a criminal course of conduct, i.e. as a single crime. It was further held in the same case that collaborators participating in such a course of criminal conduct may be joined in one indictment even if they participated therein at different times. It remains therefore to be seen whether the State has in fact alleged in its indictment a criminal course of conduct. To my mind, it is not essential for the State to allege in an indictment in so many words that the accused acted in

⁵ *S v Libongani* 2015 (2) NR 555 (SC).

⁶ *S v Alexander and Others* 1964 (1) SA 249 (C).

concert or with a common purpose or in a criminal course of conduct. It will be sufficient if the State alleges in its indictment sufficient particulars to show that the accused in doing what they are alleged to have done became associated with one another in an unlawful purpose or scheme and that the series of acts done by them was done in connection with and in the furtherance of that unlawful purpose.' (Emphasis provided)

[31] In *Heyne* (supra) it was further said that '... if the Crown relies upon a course of conduct, ... the course of conduct must be regarded as one continuing crime, provable in various ways, including the proof of individual criminal acts making up the course of conduct'.

[32] When applying the principles stated above to the present facts, there is *prima facie* evidence showing that the charge in count 1 relies on a series of acts, executed in pursuance of a single goal i.e. to use RCC funds to purchase Erf 10485, Katutura and to register it in the name of /Ae//Gams. In achieving this goal, accused 1 was key in that he not only oversaw the process, but also authorised payments. It is my considered view that these acts cannot be restricted to events which took place before the ACA came into operation, but extends to and includes actions taken subsequent thereto.

[33] With regards to the question of gratification obtained, the evidence further proves that /Ae//Gams gained financially from the transaction when becoming the lawful owners of fixed property not paid for. With regards to accused 1, that would satisfy the requirement, as per s 43 (1) of the ACA, of obtaining gratification for another's benefit.

[34] What is further alleged in the charge, is that accused 1 was a covert shareholder in /Ae//Gams through accused 2 being the nominee shareholder, alternatively, that he intended to become a shareholder in /Ae//Gams. If these allegations were to be proved, then accused 1, obviously, would have obtained gratification for his own benefit from the sale to /Ae//Gams.

[35] It is common cause that there is no direct evidence showing that accused 1 was a covert shareholder in /Ae//Gams through a nominee shareholder (accused 2) or that he intended to become such shareholder. The allegation is solely based on the memorandum (Exhibit 'QQ') recovered from

a RCC laptop, issued to and under the control of accused 1 during an internal investigation conducted by RCC. Though the memorandum was ruled admissible into evidence, the truth of its content had not been established and until that happens, remains unsubstantiated allegations.

[36] State counsel's argument with regards to the memorandum is that, despite the content of the memorandum not having been proved to be truthful, the court would be entitled to draw inferences from the proven facts. In the memorandum, reference is made of a meeting held between accused 1, 3 and a certain Nathan Brown, and the noting of agreements reached during that meeting. This included the establishing of a separate holding company and exposition of the directors and shareholders. With regards to shareholding set out in para 1 of the memo, the words 'for K. Nghixulifa' appears in brackets next to the name 'A. Ndoroma' twice. Based on these entries, the state argues that accused 1 was a covert shareholder in /Ae//Gams and that such inference may be drawn from the proven facts. Moreover, where there is evidence to show that some of the entries made in the memorandum did materialise later i.e. the establishment of a separate holding company (Cradle Holdings) and its directors as envisaged, and the change of auditors.

[37] Though such evidence is capable of establishing a link between some of the notes appearing in the memorandum, it falls short of constituting proof of the truth of the whole memorandum. For that, some form of *aliunde* evidence is required. Neither would it be justified for the court to draw inferences from the unsubstantiated recordings/notes, for reason that they remain allegations which would only translate into evidence (facts), once evidence to that effect has been adduced. The entry of accused 1's name next to that of accused 2 under shareholding, without any evidence proving the alleged and suspected nominee shareholding by accused 1 in /Ae//Gams, is therefore not a proven fact from which this court may draw reasonable inferences. Consequently, allegations of accused 1 being a covert shareholder through accused 2 as nominee shareholder, or that he intended becoming one, had not been proved. This would equally apply to accused 2 where charged on the same basis.

[38] Notwithstanding, with regards to count 1, there is evidence from which a court may reasonably conclude, in the absence of evidence showing otherwise, that accused 1 contravened s 43 (1) of the ACA, having corruptly used his position as CEO of RCC for gratification of another.

[39] *Count 2* – The main charge relates to the alleged fraudulent conduct of all three accused, acting in concert, when making misrepresentations to RCC, the Board, Saunderson and Ms Chimunda, the Company Secretary, regarding the purchase of the stated erf and that they were acting in good faith when entering into a contractual agreement with /Ai//Gams, to the actual or potential loss of RCC in the amount of N\$4 494 419,92.

[40] *Accused 1* – Argument was advanced on behalf of accused 1 that it was a collective decision of the management of RCC, taken in October 2004 to enter into an agreement with /Ae//Gams and that accused 1 could not have intended to induce and cause RCC loss, even if he participated in the taking of the decision to apply to Bank Windhoek to issue a guarantee in favour of CoW and for RCC to finance the B1 City project. This, it was said, is because the intention was for Bank Windhoek to only release the funds on condition that the B1 City property is registered in the name of both RCC and /Ae//Gams. Had Bank Windhoek complied with the conditions, then no potential prejudice by RCC would have arisen.

[41] Despite accused 1's assertion that RCC's management had the necessary authority to enter into the agreement with /Ae//Gams, there is evidence to the contrary. Also that this project, from RCC's side, was primarily pushed and authorised by accused 1 with the issuing of guarantees by Bank Windhoek as a result thereof. These actions, in themselves, posed potential prejudice to RCC, moreover in circumstances where there is evidence that prior authorisation from the Board was required, which was not done. The fact that Bank Windhoek paid over money to the CoW, as per the guarantee, does not seem to nullify the actions or intentions of accused 1. At face value, the actions of accused 1 could be seen to have constituted a misrepresentation to the actual or potential prejudice of RCC.

[42] Having come to this conclusion, there is no need for the court at this juncture to pronounce itself on the counts charged in the alternative to that of fraud.

[43] *Accused 2* – As borne out by the charge, the alleged involvement of accused 2 is solely based on the assumption that she was the nominee shareholder on behalf of accused 1 in /Ae//Gams. This is mere speculation or conjecture and, in the absence of evidence validating the assumption, there is no evidence that links accused 2 to the commission of the alleged fraud, as set out in the main count and the alternatives.

[44] *Accused 3* – With regards to accused 3 it was submitted that the whole process concerning the B1 City project was concluded with Imbili, representing /Ae//Gams, and not accused 3, who only became a director on 1 October 2005, by which time the said transaction had already been concluded. He could therefore not be held liable for any misrepresentation or fraudulent activities which may be ascribed to the transaction as a whole.

[45] The charge of fraud preferred against accused 3 is exclusively based on the fact that he was a director of Cradle Investment on 18 October 2005, the day on which Bank Windhoek paid over the guaranteed funds to CoW. The alleged fraudulent misrepresentations made to RCC and the Board, turn on events and actions taken well before accused 3 became a director of /Ae//Gams. There is no evidence that shows his involvement in the B1 City project or that he acted in concert with accused 1 to deceive RCC before or after becoming a director. It seems that the only reason why he is implicated in this charge is because he was a director when the payment was made at the conclusion of a series of acts done in pursuance of a single goal. Although the state may charge the series of acts as a criminal course of conduct i.e. a single crime, due regard must be had to what is fair to the accused. The only reason why accused 3 is brought into the equation of allegations made in this count, is because of the manner in which the charge of fraud is drawn namely, by choosing the date of payment, the last act in the series of events, as the date of commission of the offence. In the circumstances, this does not appear

to be fair to accused 3. Whereas the alternative counts are founded on the same facts, the position of accused 3 would be the same.

[46] Consequently, on count 2 and the alternative counts, accused 2 and 3 are entitled to be discharged.

[47] *Count 3* – This count relates to a charge of fraud against accused 1 only. On this count it is conceded that there is evidence on which a reasonable court may convict; the concession is properly made.

[48] *Count 4* – This count relates to the alleged failure by accused 1, as CEO of RCC, to disclose during a meeting of the Board, held on 18 October 2005, his interest or intended interest in /Ae//Gams, thereby contravening provisions under the Roads Contractor Company Act. This charge, as borne out by the recordal, is based on the postulation that accused 1 was a covert shareholder in /Ae//Gams, alternatively, that he intended to become a shareholder at that stage.

[49] Section 13(3) of the RCC Act under which accused 1 is charged, criminalises a contravention of subsection (1) with the applicable penalty. Section 13 essentially regulates disclosure of interest by a *director* of the company and not by an employee in the company. Section 13(1) provides as follows:

‘A director of the Company who has a direct or indirect interest in any agreement entered into or to be entered into by the Company, or in any matter which is in conflict with, or is likely to be in conflict with, the interests or objects of the Company, shall as soon as possible after the relevant facts have come to his or her knowledge, disclose the nature, extent and full particulars of his or her interest at a meeting of the board, in accordance with the procedure provided in sections 234 and 241 of the Companies Act.’

[50] In turn, s 6 regulates the appointment of the chief executive officer of the company and in s 6(2) specifically provides that:

‘The chief executive officer appointed in terms of subsection (1) shall not be a director of the Company, and- ...’ (Emphasis provided)

[51] These sections make plain that the duty to disclose an interest to the Board only applies to a director, clearly excluding the CEO as being a director. The charge preferred against accused 1 is therefore defective and not deserving of any further consideration as regards the particulars of the charge. On this count accused 1 stands to be discharged.

[52] *Count 5* – In this count a contravention of s 45(a) of the ACA is alleged to have been committed by all the accused when directly or indirectly, whether on behalf of themselves or any other person, entered into or caused to be entered into, any dealing in relation to property which was obtained as gratification or which derived from proceeds of gratification obtained in the commission of an offence under Chapter 4 of the ACA. It is further alleged that the accused persons, when entering into a dealing relating to property, to wit, the purchase of Erf 10485, Katutura, acted in concert and with common purpose.

[53] *Accused 1* – Counsel for accused 1 submitted that any dealing accused 1 possibly entered into in relation to the said erf, took place before the coming into force of the ACA, wherefore the accused stands to be discharged on this count. It was further argued that it is not alleged that the dealing was in relation to the B1 City project, but specifically dealings pertaining to the acquisition of the erf.

[54] The evidence thus far, as already summarised and considered in count 1 above, establishes the involvement of the accused in dealings relating to the buying of the said erf by /Ae//Gams, which property, *prima facie*, appears to have been obtained as gratification in the commission of an offence. The prohibited conduct in the section is broadly stated and includes *any dealing* in relation to property entered into or caused to be entered into, obtained as gratification. For reasons already stated, there was a series of acts and events which culminated in finalising the deal in relation to the sale of the property. To this end, I am satisfied that the state had made out a case against accused 1 on the main count. Having come to this conclusion, there is no need to consider the alternative count, a contravention of s 45(b).

[55] *Accused 2 and 3* – For reasons already stated and as found by the court, the evidence presented does not prove that accused 2 and 3 acted in concert and common purpose with accused 1, or that they entered into or caused to be entered into, any dealing in relation to the acquisition of the said erf by /Ae//Gams. The accused therefore stand to be discharged on the main count.

[56] With regards to the alternative count and accused 2's alleged involvement with accused 1 as nominee shareholder, the court's earlier reasoning and findings find equal application to the alternative charge. Accordingly, there is no evidence that proves the charge against accused 2, set out in the alternative charge to count 5.

[57] As for accused 3, it is *inter alia* alleged that he used, received, held or controlled property (Erf 10485, Katutura) which derived from the proceeds of gratification obtained from the commission of an offence. It is not in dispute that accused 3 was a director of Cradle Investment at the relevant time. As such, he was (at least) in a position to have control over the property which, from the evidence, appears to be a proceed of gratification obtained from a crime or crimes committed under the ACA. To this end, I am satisfied that the evidence presented is sufficient to place accused 3 on his defence on the alternative charge to count 5.

Counts 6 to 8: Karl Neumeyer Civil Contractors

[58] *Count 6* – This count relates to accused 1 who allegedly corruptly used his office or position to obtain gratification for his own or another's benefit, by using RCC funds to pay PWC for professional services rendered to Cradle Investment. On this count it is conceded on behalf of accused 1 that there is sufficient evidence to put the accused on his defence.

[59] *Count 7* – Here all three accused are charged with fraud for allegedly making false representations to RCC and/or its representatives that accused 1, as CEO of RCC, was acting in good faith when causing RCC to pay the amount of N\$29 954,73 for professional services rendered by PWC to Cradle Investment.

[60] *Accused 1* – On this count, it was conceded that there is sufficient evidence before court to put the accused on his defence. In view thereof, there is no need to consider the application regarding the alternatives to the main count.

[61] *Accused 2* – In this instance, it is alleged that the offence of fraud was committed on 12 April 2006, the day on which payment by RCC was made. It was argued on behalf of accused 2 that none of the witnesses implicated her in the commission of the offence and that her name was only mentioned in respect of the company shareholding. As per the company records, she became a shareholder and director in Cradle Investment on 19 August 2005. It was argued that the payment by RCC was made for services rendered *before* accused 2 became a director and therefore she was not part thereof; neither did she have any knowledge of the transaction. Further assertions were made that accused 2 did not benefit in any way from the payment and that Cradle Investment invoices were already paid by accused 3.

[62] Without going into any detail, the evidence adduced establish *prima facie* proof that accused 2 was a shareholder and director at the time PWC submitted the outstanding account of Cradle Group (accused 3) on 6 April 2006. At the direction of accused 1 to Saunderson, RCC was re-invoiced by PWC and the former settling the account. As a director, accused 2 had a duty and responsibility towards the company and its commitments which she may be expected to explain when called upon. That appears to be the case in the present circumstances. On this basis alone, a reasonable court may convict on the evidence before court. Accused 2 is accordingly put on her defence on the main count. In light thereof, the alternative counts are not considered.

[63] *Accused 3* – According to Saunderson, he was presented with the PWC invoice by accused 3 during a meeting and was told that it represented costs incurred during the RCC and KNCC joint venture, which he was no longer part of. Accused 1 accepted the costs to be for the account of RCC and Saunderson requested PWC to re-invoice RCC. On the strength of the evidence of the witness, Mr Carl van der Merwe, a chartered accountant and partner in PWC during 2005/6, it would appear that the costs billed by PWC

were not for the account of RCC nor KNCC (the JV) but for accused 3's group of companies. The evidence is further that payment by RCC was effected consequential to a misrepresentation made by accused 3. In the absence of evidence to the contrary, such evidence would suffice to prove the offence of fraud. In the circumstances, accused 3 would not be entitled to discharge on count 7. Again, the alternative counts need not be considered.

[64] *Count 8* – This count concerns another contravention of s 13(3) of the RCC Act and similar to count 4 where the charge preferred against accused 1, for the stated reasons, was found to be defective. Consequently, the accused is entitled to a discharge on this count.

[65] *Count 9* – The charge in this count, is another contravention of s 43(1) of the ACA by accused 1 for his alleged corrupt use of office or position as CEO of RCC, for gratification. The charge relates to an instruction given by the accused that N\$92 729,26, being the amount in arrears on Mr Brian Nalisa's home loan account with FNB, be settled by RCC. According to Saunderson, accused 1 approached him with a document, purported to be a housing scheme which, according to him, was going to be adopted by the Remuneration Committee of RCC, whereby the company would take over the home loan schemes of its employees and become the bond holder. This prompted Saunderson to settle the amount in arrears on Nalisa's home loan. The purported home scheme was never given to Saunderson and neither had it been disclosed or approved by the Board.

[66] It is contended by the state that accused 1 well-knew that his instruction went against existing company policy and the approval of changes to the home loan scheme did not lie with him, thus acting without authority to implement an unauthorised proposal. It is common cause that accused 1 refunded RCC from his own pocket.

[67] The counter argument advanced on behalf of accused 1 is that the consultation with Saunderson to incur the expenditure regarding Nalisa's home loan, occurred on the understanding that the Board would approve the proposal to the housing policy, as prepared by management. Therefore, it was said, accused 1 lacked the requisite *mens rea*.

[68] From the evidence presented, it would appear that by way of inferential reasoning, it may reasonably be found that accused 1 acted outside the powers vested in him as CEO and corruptly used his office for gratification of another i.e. Nalisa. Regarding the contention that the accused lacked *mens rea* when he, admittedly, authorised the expenditure, the accused seems to be the only person who could possibly refute any inference to the contrary. In this regard, the accused bears the onus of rebuttal and is accordingly put on his defence. In reaching this conclusion, the alternative counts need not be considered for purposes of the application.

[69] *Count 10* – On this count, the state conceded that it failed to make out a case against accused 1, who then stands to be acquitted and discharged.

[70] *Count 11* – The main count concerns a charge of fraud preferred against accused 1 and 3, which relates to an agreement entered into between RCC and Murray and Robberts (Pty) Ltd (M&R) and/or Mr Jannie Louw (Louw). It is alleged that the two accused persons acted in concert and with common purpose when they falsely misrepresented to RCC, its employees and M&R/Louw that Cradle Investment or accused 3 (as director) was appointed as project facilitator and thus entitled to a facilitation fee of N\$150 000, alternatively, that accused 3 was part of M&R and entitled to the fee, well-knowing that the representations made were false.

[71] *Accused 1* – Counsel for accused 1 did not include this count in the heads of argument but, erroneously under counts 6 and 7, conceded that there is evidence on which the accused has to answer and that evidence will be adduced relating to this count. The concession is properly made.

[72] *Accused 3* – The argument advanced on behalf of accused 3, in essence, is that the factual allegations set out in the charge had not been proved, which raises the question whether any fraud was committed? Further, that there was no misrepresentation by accused 3; neither did RCC make any payment towards the transaction between M&R and accused 3.

[73] Contrary to the views held by accused 3, the evidence of Louw, Main and Ms Kahona from FNB, establishes *prima facie* proof of an agreement

reached between M&R and RCC and accused 1 advancing payment of N\$150 000 to accused 3 as facilitation fee. There is further evidence of an invoice issued by Cradle Investment in the same amount and a cheque issued by M&R as payment. The payment by M&R, as per the testimony of Main, was included in the final account submitted and signed off by RCC and M&R. In the end, the facilitation fee paid directly to Cradle Investment by M&R, was incorporated and reflected in the final account settled by RCC.

[74] In view of the uncontroverted evidence of state witnesses on this charge, reasonable inferences may be drawn from the established facts which are likely sufficient to prove the allegations set out in the charge against accused 3. Furthermore, where it is alleged that the two accused persons acted with common purpose and one co-accused already intimated that he would give evidence, this is a factor to take into consideration when considering an application of this nature. Accused 3's application is not supported by the facts and accordingly found to be without merit.

[75] Having come to this conclusion, there is no need to consider the alternative counts.

Conclusion

[76] In the result, the court finds the following in the s174 application for discharge brought by accused 1 to 3:

Accused 1 – In respect of counts 1, 2 (main and alternative counts), 3, 5 (main and alternative count) 6, 7 (main and alternative counts), 9 (main and alternative counts) and 11 (main and alternative counts) the application is dismissed. On counts 4, 8 and 10 the accused is found not guilty and discharged.

Accused 2 – In respect of count 7 (main and alternative counts) the application is dismissed. On counts 2 (main and alternative counts) and 5 (main and alternative count) the accused is found not guilty and discharged.

Accused 3 – In respect of count 5 (alternative count), 7 (main and alternative counts) and count 11 (main and alternative counts) the application is

dismissed. On counts 2 (main and alternative counts) and 5 (main count) the accused is found not guilty and discharged.

JC LIEBENBERG

Judge

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