

REPORTABLE

CASE NO.: SA 45/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

SIMON NAMA GOABAB

First Respondent

ABRAHAM JOHN GEORGE

Second Respondent

Coram: SHIVUTE CJ, MARITZ JA, and MAINGA JA

Heard: 27 June 2012

Order: 27 June 2012

Delivered: 15 November 2012

APPEAL JUDGMENT (REASONS)

SHIVUTE CJ (MARITZ JA and MAINGA JA concurring):

[1] This appeal by the State against the discharge of the respondents was heard on 27 June 2012. On the same day, we allowed the appeal and indicated that reasons were to follow. These are the reasons.

[2] The respondents, then as accused persons, were arraigned in the High Court on an indictment containing three principal charges. In respect of counts 1 and 2 the respondents were jointly charged with corruptly using office or position for gratification in contravention of s 43(1) of the Anti-Corruption Act, 8 of 2003 (the Act). In summary, count 1 is to the effect that they used an official purchase order and claim form to rent a motor vehicle with registration number N 82959 W on 1 March 2007 from a car rental company for private use at a discounted governmental rate. Count 2, in brief, is that they rented a motor vehicle with registration number DDS 937 FS on 15 March 2007 from a car rental company for private use and later paid the rental charges with an official cheque drawn against the account of the National Assembly. The charge of fraud was preferred against them as an alternative to the first count. In respect of the second count, fraud and theft were preferred as first and second alternative charges respectively. Additionally, the first respondent was charged with corruptly using office or position for gratification in contravention of s 43(1) of the Act by using a motor vehicle with registration number GRN 343 for personal gain or benefit without authority or permission of the owner, with the charge of use of motor vehicle without owner's consent in contravention of s 83(2) of the Road Traffic and Transport Act, 22 of 1999 as the alternative charge. The indictment shows that s 43(1) of the Act under which the main charges were preferred, was to be read with ss 32¹, 43(2)², 43(3)³ and

¹Definitions for Chapter 4 of the Act.

² Which reads: 'For the purposes of subsection (1), proof that a public officer in a public body has made a decision or taken action in relation to any matter in which the public officer, or any relative or associate of his or hers has an interest, whether directly or indirectly, is, in the absence of evidence to the contrary which raises reasonable doubt, sufficient evidence that the public officer has corruptly used his or her office or position in the public body in order to obtain a gratification.'

³ Definitions for 'relative' and 'associate'.

49⁴ of the Act. Both respondents pleaded not guilty to all the charges and tendered written plea explanations. In summary, the first respondent produced a lengthy document advancing a convoluted argument denying in effect that he had committed any offence at all and contending that the conduct complained of did not amount to any offence in terms of the Act. The second respondent likewise denied that he had any intention to commit the alleged offences and maintained in effect that he was merely obeying orders or instructions given to him by the first respondent, his superior.

[3] At the conclusion of the State's case the respondents applied for their discharge in terms of s 174 of the Criminal Procedure Act, 51 of 1977 (Criminal Procedure Act). The Court below granted the application and discharged them on the three main counts. They were, however, placed on their defence in respect of the alternative charges. The State made application for leave to appeal against the discharge of the respondents, which application was granted by the Court below on 6 September 2011.

Background

[4] At the time of the events leading to the prosecution of the respondents, the first respondent was the Secretary of the National Assembly appointed or designated as such pursuant to Article 52 of the Namibian Constitution. As Secretary of the National Assembly, the first respondent was the accounting officer and, as such, the most

⁴ Penalties.

senior administrative officer at that institution. The second respondent was the Chief Accountant and Acting Financial Advisor to the National Assembly. As Secretary of the National Assembly, the first respondent was given a motor vehicle allowance entitling him to purchase a motor vehicle of his choice at or below a benchmark level which he could use both for private and official purposes. In terms of regulations governing the motor vehicle scheme of which the first respondent was a member, officials who receive motor vehicle allowances were precluded from using State motor vehicles except in certain circumscribed circumstances to which I shall advert later on in this judgment.

[5] On or about 1 March 2007, the first respondent rented a motor vehicle with registration number N 82959 W from Budget Rent-a-Car (the rental company). The two respondents collectively arranged, through the medium of their subordinates, for the rental of the vehicles using a government 'purchase order and claim form' which would entitle the first respondent to rent the vehicle at the government rental rate which is lower than the rate charged by the rental company to private persons. When one of the subordinates questioned the propriety of the instruction to rent a vehicle for the first respondent's personal use, both respondents entered the office of the subordinate concerned. There and then the second respondent ordered the subordinate to rent the vehicle for the first respondent for 15 days. The vehicle was rented without following the established procedures of having the intended expenditure first scrutinised and approved by a structure in the National Assembly known as the 'Economising Committee' and having first obtained a requisition for the

expenditure. It was contended on behalf of the respondents at the trial that the agreement between the respondents was that the first respondent would pay the amount owing to the rental company out of his pocket in due course. The purchase order having been issued by the National Assembly, it did not come as a surprise that the tax invoice in the amount of N\$4379,54 was sent to that institution for payment. This amount was, however, never paid and the rental company ultimately wrote it off as bad debt, the National Assembly being recorded in the rental company's books as the bad debtor.

[6] On 15 March 2007, the first respondent rented a second motor vehicle with registration number DDS 937 FS (the second vehicle) from the rental company, which vehicle was returned to the rental company on 24 April 2007. The rental company took the imprint of the first respondent's credit card and 'stopped' an amount of N\$5000. Another N\$5000 was credited to the rental company on 4 April 2007 when the vehicle was not returned by the date agreed in the contract. No further amounts could be obtained from the first respondent's credit card since the card was reported lost. The second vehicle's rental charges totalling N\$18 497,20 were ultimately paid by the National Assembly with government cheque number 14612068. This payment was authorised by the respondents with the first respondent signing as the 'accounting officer' while the second respondent signed both as 'claimant' and 'authorising officer'. Although the first respondent allegedly undertook to repay this amount to the National Assembly, he did so only after he had been arrested by agents of the Anti-Corruption Commission on 12 June 2007 in connection with this matter.

[7] On 25 May 2007, the first respondent was found driving a government vehicle with registration number GRN 343. The key to the vehicle was given to the first respondent on the instructions of the second respondent. A document officially known as a 'trip authority' normally constitutes the written authorisation for the driver of a government vehicle to drive the vehicle in question. Attempts were made by the second respondent to have at least two subordinates enter the first respondent's particulars on the trip authority but this attempt was politely but firmly rebuffed by the officials concerned. When the first respondent was asked by a police officer to produce the trip authority, he allegedly replied that he had forgotten the document at the office. The relevant trip authority in respect of the vehicle did not bear his particulars at all. In terms of the regulations governing the motor vehicle scheme in respect of which a motor vehicle allowance is paid to members, the member must utilise his or her vehicle for all official journeys arising from his or her duties. When a member cannot use his or her vehicle, e.g. when it is in for repairs, he or she must make alternative private arrangements to secure a suitable vehicle and the regulation makes it clear that no State vehicle will be provided in those circumstances⁵. A State vehicle may, however, be provided to the member of the scheme on the approval of the Permanent Secretary or Accounting Officer when the member concerned is compelled to travel on roads that are not suitable for use of his or her private vehicle.⁶ But members' attention is expressly drawn to paragraph 7.1 of the regulations that states that a member who receives the motor vehicle allowance should acquire and

⁵ Car Scheme, Par 7.5.

⁶ Id. Par 9.1.

maintain a vehicle suitable for the nature of his or her job. An example is given there that if a member is required to travel on a regular basis to areas where a four wheel vehicle would be appropriate, it would be foolhardy for such member to buy a sedan in terms of the scheme. The overall object of the scheme was, according to the regulation, to reduce the provision of State vehicles to the members receiving car allowances.⁷

Findings by trial court

[8] In her reasons for the discharge of the respondents on the main charges, the trial Judge reasoned that in enacting the Act, the Legislature did not intend that courts should usurp the State's function to discipline its staff unless the transgression in question fell within the framework of criminal law. If the intention of the Legislature was to criminalise misconduct, the Legislature would have said so in clear and unambiguous language. The learned Judge opined that corruption was merely an extension of the crime of bribery which implied that there must be a 'corruptee' and 'corruptor'. The Court below found that in the absence of evidence pointing to the existence of a corruptor, no sufficient evidence had been adduced to support the commission of the offence of corruption. The Judge ultimately held that not enough evidence leading to the conclusion that the respondents committed the offence referred to in the main counts, namely corruptly using office or position for gratification in contravention of s 43(1) of the Act, had been led. The Court below found, however, that the alternative counts fell within the scope and ambit of criminal

⁷ Par 1.

law and evidence had been adduced by the State upon which a reasonable court, acting carefully, may convict. Consequently, the respondents as mentioned before were placed on their defence on the alternative counts.

[9] The Court below initially did not give reasons for granting the appellant leave to appeal. The reasons therefor were furnished a few days before the commencement of the hearing of the appeal. In those reasons, the learned Judge magnanimously conceded that she did not apply her mind properly to the issues raised by the appellant when the application for the discharge of the respondents was granted. It was also accepted in the reasons that in effect the court erred in discharging the respondents without considering that the respondents may be convicted on the alternative charges as s 174 of the Criminal Procedure Act appears to provide. The High Court expressed a view that this Court may come to a different conclusion on that score and that for those reasons it had granted the then applicant leave to appeal.

Counsel's submissions on appeal

[10] In this Court Mr D F Small argued the appeal on behalf of the appellant while Mr G H Oosthuizen assisted by Mr G Narib argued the appeal for the first respondent. Mr Z J Grobler argued the appeal on behalf of the second respondent.

[11] Counsel for the appellant submitted that the phrase 'any offence' used in s 174 of the Criminal Procedure Act⁸ meant that if there is evidence that the accused committed, for example, an offence which is a competent verdict on such charge or an attempt to do so, the court may refuse to discharge the accused. It was further submitted on behalf of the appellant that the court below misdirected itself by allegedly adding an element to the offence created by s 43(1) of the Act when it reasoned that the appellant had to prove the payment of a gratification to the public officer who allows himself or herself to be corrupted and by finding that, for there to be a corruptor, there must equally be a corruptee. Counsel argued that the court below misdirected itself when it decided that the statutory crime of corruption was an extension of the common law crime of bribery. He contended that the basic definition of 'corruption' is essentially the abuse of public power for gain. It was counsel's submission that although the definition of 'corruptly' contained in s 32 of the Act was declared unconstitutional and struck down by the High Court in *Teckla Nandjila Lameck and Another v President of the Republic of Namibia and Others*, as yet unreported, (the *Lameck* matter) the offences in the Act were not affected and the word 'corruptly' used in those sections would bear its ordinary grammatical meaning. Counsel submitted that sufficient evidence had been adduced to prove all the necessary allegations required by s 43 (1) of the Act, upon which a reasonable court, acting carefully, may convict the two respondents on the first two main counts and the first respondent on the third count.

⁸ Section 174: Accused may be discharged at close of case for prosecution
If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

[12] Before the reasons granting the appellant leave to appeal were furnished, counsel for the first respondent argued with reference to the *Lameck* matter, that although the Court below did not have the benefit of knowing that the definition of 'corruptly' would be declared unconstitutional, the Judge below applied her mind correctly as that Court's reasoning was premised on the legality principle in relation to the definition of 'corruptly' in the Act. As such, so counsel argued, it could not be said that the Court below's reasoning was incorrect or that it did not apply its mind properly. Counsel further contended that the decision to discharge does not bring appellant's case to an end, as the respondents had not been discharged on the alternative counts. With the Court below's reasons having come to hand, counsel filed supplementary notes in which he argued, amongst other things, that now that the definition of the word 'corruptly' appearing in s 32 of the Act has been struck in the *Lameck* matter, and given further the importance of the meaning to be ascribed to that word as used in s 43 and other sections of the Act, this Court should give guidance on how the word 'corruptly' should be interpreted. This submission will be dealt with below. It remains to consider next arguments advanced on behalf of the second respondent.

[13] Counsel for the second respondent contended that not a single witness testified that the second respondent at any stage acted for himself and that on the available evidence the only inference to be drawn was that he acted on behalf of the first respondent to rent the vehicles. Thus, counsel submitted, the only conclusion that

can be arrived at in the circumstances is that he acted as an agent as defined in s 32 of the Act.⁹ Counsel developed the argument that s 32 read with s 35¹⁰ of the Act, however, requires that for the agent to be guilty of an offence in terms of the Act, he or she must receive gratification as an inducement or reward from another person. In the submission of counsel, no evidence was led to prove that the second respondent had received gratification in any form. Therefore, so counsel argued, the Court below's decision to discharge the second respondent in respect of the first two main counts was correct. Counsel continued to contend that the second respondent was not charged with 'corruptly accepting gratification' in contravention of s 35 of the Act. Instead, the charges against him were based, as previously noted, on s 43(1) read with ss 32, 43(2), 43(3) and 46. Counsel submitted that, s 35 must be read with s 32 of the Act or the definition of 'agent' in s 32 would be superfluous. He argued furthermore that s 46(b)¹¹ of the Act must be interpreted strictly and since the section

⁹ Section 32: Definitions for this Chapter

'In this Chapter, unless the context indicates otherwise-

"agent" means a person employed by or acting for another in any capacity whatsoever, and includes-

- (a) a trustee of an insolvent estate;
- (b) the assignee of an estate assigned for the benefit or with the consent of creditors;
- (c) the liquidator of a company or other corporate body that is being wound up or dissolved;
- (d) the executor of the estate of a deceased person;
- (e) the legal representative of a minor or a person who is of unsound mind or otherwise under legal disability;
- (f) a public officer or an officer serving in or under any public body;
- (g) a trustee, an administrator or a subcontractor and any person appointed as an agent in terms of any law;

¹⁰ Section 35: 'Corruptly accepting gratification by or giving gratification to agent

(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 affairs or business of the agent's principal.'

¹¹ Conspiring with any other person to commit an offence under Chapter 4

is allegedly too vague it cannot be applied and must be struck from the Act. We note, however, that the constitutionality of s 46(b) has not been challenged in these proceedings. We are therefore of the view that it is neither necessary nor appropriate to express any opinion on this aspect of counsel's submissions.

Scope and ambit of consideration of appeal

[14] The approach regarding an appeal against the discharge of an accused person under s 174 of the Criminal Procedure Act is settled. In *S v Teek* 2009 (1) NR 127 (SC) this Court held that a court of appeal may interfere with the exercise of discretion if the repository of the discretion acted mala fide or from ulterior motive or has failed to apply his or her mind.¹² Where there has been no allegation, as here, that the trial judge acted mala fide or from ulterior motive, this Court can only interfere with the exercise of the discretion to discharge the respondents if it can be found that the trial judge failed to apply her mind to the matter when she found that there was no evidence upon which a reasonable court could convict – and therefore discharged – the respondents on the principal counts.¹³ The trial Court had clearly not applied its mind to the correct interpretation and application of the Act when it decided the s 174 application for discharge on the basis of the common law crime of corruption. It was correct, however, to concede in its reasons granting the application for leave to appeal that its views based on the common law definition of 'corruption' were erroneous. Consequently, the trial Court was entirely justified in granting the applicant leave to appeal. Certain of the arguments advanced on behalf of the appellant

¹² Par 9

¹³ Id par 10

relating to the justification for what was perceived to be an overreach of certain of the provisions of the Act were meritorious. It is clear that, in so far as the proscribed conduct falls within the sweep of the Act, it has done away with the previous common law elements of the crime of corruption and has heralded in a new dispensation in the definition, reach and scope of the offence of corruption. The offence is now broad in its reach and scope. This appears necessary because corruption may manifest itself in different shapes and forms. It is also notoriously difficult to prove, because it often does not take place in the full view of the public.

[15] The wide scope and ambit of the crime also appears to be international in nature. It demonstrates the international community's resolve that corruption is an invidious crime that, if left unchecked, can erode a country's gains in all spheres of the human endeavour. In the words of the sixth Preamble to the Africa Union Convention on Preventing and Combating Corruption which Namibia has ratified, State Parties were concerned about 'the negative effects of corruption on the political, economic, social and cultural stability of African States and its devastating effects on the economic and social development of the African peoples'. It has been acknowledged in the seventh Preamble that corruption 'undermines accountability and transparency in the management of public affairs as well as socio-economic development on the continent'. Accordingly, in Article 5 of that Convention, State Parties undertook to adopt legislative and other measures that are required to establish as offences the wide-ranging acts mentioned in para 1 of Article 4 of that Convention. Similarly, in the first Preamble of the United Nations Convention against

Corruption which Namibia has also ratified, State Parties to that Convention expressed their concern 'about the seriousness of problems and threats posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardizing sustainable development and the rule of law'. Accordingly, paras 1 and 2 of Article 5 provide as follows:

- '1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anticorruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.
2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.'

[16] The *Lameck* matter was decided after the Court below had delivered its judgment discharging the respondents on the main counts. We have been informed that that judgment has not been appealed against and in the current proceedings the State has expressly accepted that the decision of the High Court finding, that the definition of the word 'corruptly' in the Act was overbroad, is correct. The Act being relatively new, the law in this field should be allowed to evolve. The Court below should be given amplitude to develop this important and nascent piece of legislation. It suffices for the purposes of this judgment to hold that the word 'corruption', at its lowest threshold when used in the context of the public service, includes the abuse of a public office or position (including the powers and resources associated with it) for

personal gain. The synonyms of 'corruptly' include 'immorally, wickedly, dissolutely and dishonestly'.

[17] The Act, in s 32, explicitly states that 'gratification' includes 'any discount' which the public officer in terms of s 43 - and more particularly s 43(1) - is alleged to have obtained. We are of the view that in respect of counts 1 and 2, the appellant has tendered sufficient evidence prima facie to establish that as the most senior administrative officials in the National Assembly responsible for signing documents necessary for the renting of cars to the institution for official use, the first and second respondents knew of the lower rates offered to Government by the rental company and that they acted together to obtain gratification (in the form of lower rates) for the first respondent. We are also satisfied that in respect of count 3, the evidence led at the close of the State case establishes, prima facie, that as a beneficiary of a car allowance who could use State vehicles only in certain circumscribed circumstances, the first respondent corruptly used office or position for gratification when he effectively allocated the State vehicle to himself for private use. In the view we take of the matter, the conduct of the two respondents, in the absence of credible evidence contradicting the evidence led by the State at the stage of their discharge amounted to acting 'corruptly' (according to the grammatical meaning of that word). We are satisfied that the appellant has established sufficient evidence upon which a reasonable court may convict the respondents for the contravention of s 43(1) of the Act. We emphasise, however, that the views we express on the evidence presented

by the appellant are prima facie and are made within the confines of the evidence apparent from the record.

[18] The argument advanced on behalf of the second respondent that there was no evidence upon which the second respondent may be convicted on the first two main charges and that he merely acted as the agent of the first respondent, cannot, in our view be accepted in the light of the above findings.

[19] It was for these reasons that the following order was made:

- '(a) The appeal succeeds.

- (b) The order of the High Court made in Case No. CC14/2008 on 12 August 2010 discharging the first and second respondents in terms of s. 174 of the Criminal Procedure Act, 1977 on the principal charges under counts 1, 2 and 3 is set aside and the following order is substituted:

'The applications for the discharge of the first and second accused on the principal charges under counts 1 and 2 and of the first accused on the principal charge under count 3 are refused.'

- (c) The matter is remitted to the High Court for further adjudication.'

SHIVUTE CJ

MARITZ JA

MAINGA JA

APPEARANCES

APPELLANT:

Mr D F Small

Instructed by the Prosecutor-General

FIRST RESPONDENT:

Mr G H Oosthuizen (with him Mr G Narib)

Instructed by Murorua & Associates

SECOND RESPONDENT:

Mr Z J Grobler

Instructed by Grobler & Co