



NOT REPORTABLE

CASE NO: SA 53/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

IMMANUEL DAVID FREITAS DIAS

First Respondent

EDGAR CARDOSO ALVES

Second Respondent

Coram: DAMASEB DCJ, MAINGA JA and HOFF JA

Heard: 2 October 2017

Delivered: 13 April 2021

Summary: The respondents were acquitted in the High Court on 137 charges of fraud. The appellant was granted leave to appeal against the respondents' acquittal.

Even though the appellant during the trial in the High Court attached columned schedules to the charge sheet setting out the particulars of each of the 139 charges (at that stage), the court *a quo* erred in finding that those counts constituted only one charge of fraud.

The first respondent, as manager of Pupkewitz Megabuild Oshikango, devised a scheme, together with second respondent as yard supervisor, to assist one of their clients, Hauwanga, to buy material on account in instances where Hauwanga had reached his credit limit. Hauwanga would then buy goods on quotation and would receive and dispatch the material. No sales were generated on the computer system. The second respondent would then weeks or months later issue Hauwanga with the required advice notes and tax invoices of the goods taken on quotation, after Hauwanga had cleared his account. Second respondent would also book goods on Hauwanga's account where Hauwanga had not received the goods reflected on invoices.

Hauwanga subsequently claimed that he had not received goods from Pupkewitz Megabuild to the value of N\$4,9 million. Nevertheless, Hauwanga had paid N\$3,7 million in respect of the disputed goods which he claimed not to have received.

Held that common purpose is present when two or more persons having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. Common purpose is not dependent upon a prior agreement or conspiracy but may be inferred from the circumstances of the case where the evidence shows active association with the common purpose.

Held that first and second respondents devised and implemented a scheme or scam, involving Hauwanga, with the common purpose to increase sales volumes of material or goods in an unprocedural way enabling Hauwanga to buy on credit when he was disqualified to do so. Inference from clear evidence by respondents indicated that they acted with common purpose.

Held that fraud – prejudice may be either actual or potential. The existence of prejudice must be determined at the time when the misrepresentation is made.

Potential prejudice means that the misrepresentation objectively viewed, involved some risk of prejudice or that it was likely to prejudice.

Held that implementation of a procedure not sanctioned by Pupkewitz Megabuild, in the circumstances, more serious than just a mere deviation from the correct procedure. When second respondent entered into the computer system that certain goods were invoiced to Hauwanga's account they misrepresented that whilst making that entry the goods were ordered and dispatched to Hauwanga which was not truthful. They induced Pupkewitz to embark on a course of action, namely to accept on the face of the entries that B H Motor Spares CC received the goods for which it must pay and that a binding contract was concluded, enforceable in a court of law.

Held that the evidence shows that the respondents knew that the representations were false. Potential prejudice was proved – the respondents cannot escape convictions on the crime of fraud.

Held that the finding of not guilty by the court *a quo* in respect of counts 1 – 137 is set aside and substituted with convictions of fraud.

The matter is referred back to the High Court for sentencing.

APPEAL JUDGMENT

HOFF JA (DAMASEB DCJ and MAINGA JA concurring):

[1] The two respondents together with a third person, Mark Paul Alves, were arraigned in the High Court for fraud (counts 1 – 139), a first alternative to 139 counts of theft, a second alternative to 139 counts of theft (general deficiency); one count of theft (count 140); one count of theft by false pretence (count 141), alternatively theft.

[2] It was alleged that these crimes were committed between 8 August 2007 and 19 March 2008 at or near Oshikango in the district of Eenhana and that the complainants were Pupkewitz & Sons (Pty) Ltd and/or Ian D Gallagher and/or Willem Johannes Paulus Burger and/or Volker Hans Otto and/or B H Motor Spares CC and/or Ben Hauwanga. The alleged amount involved was N\$5 227 594,74.

[3] All three accused persons pleaded not guilty to all counts and no written plea explanations were given. The first respondent represented, by Mr Murorua, elected to remain silent. The second respondent, represented by Mr Mbaeva, orally placed certain 'facts' before the court *a quo* from the bar, and the third person represented by Mr Maritz gave an oral plea explanation. The third person was found not guilty of all counts at the conclusion of the State's case and was discharged.

[4] At the conclusion of the trial, the first and second respondents were found not guilty as follows (except in respect of count 139):

Counts 1 – 137: Fraud: Main count and both alternative counts not guilty and discharged.

Count 138: Theft: Not guilty and discharged.

Count 139: Theft: Both guilty – theft of goods in exhibit 'H' worth N\$239 054,10

Count 140: Both not guilty and discharged.

Count 141: Accused 1: Not guilty: Main and alternative count.

Accused 2: Guilty alternative count (fraud).

[5] The first respondent was sentenced to six years imprisonment of which three years imprisonment was wholly suspended for a period of five years on condition that the accused is not convicted of theft committed during the period of suspension.

[6] The second respondent was sentenced on count 139 to three years imprisonment of which one year was wholly suspended for a period of five years on condition that the accused is not convicted of theft committed during the period of suspension. On count 141, the second respondent was cautioned and discharged.

[7] The first respondent applied for leave to appeal against the sentence imposed. This application was refused. The appellant applied for leave to appeal against the acquittal of the respondents on counts 1 – 137 of fraud and all the alternative charges thereto. This application was similarly refused by the court *a quo*. On petition to the Chief Justice, leave to appeal was granted against counts 1 – 137.

[8] Counts 1 – 137 reads as follows:

‘WHEREAS

The first accused Immanuel David Freitas Dias was at all material and relevant times employed by Pupkewitz & Sons (PTY) as the Branch Manager of Megabuild, Oshikango. He was responsible for implementing and managing the operational procedures of the company and had the responsibility to ensure that every employee complied with the set procedures.

The second accused, Edgar Cardoso Alves, was at all material and relevant times employed by Pupkewitz & Sons (PTY) Ltd as a Sales Representative at Megabuild, Oshikango branch. His duties inter alia included assisting cash sale and account sale customers.

The third accused, Mark Paul Alves was also at all material and relevant times employed by Pupkewitz & Sons (PTY) Ltd at Megabuild, Oshikango branch as a Dispatch Controller. His duties inter alia included delivering goods to the customers as per the invoices or advice notes and to make sure that the customers' signed the invoice or advice slip to acknowledge receipt of the goods.

AND WHEREAS the accused persons acting in concert, and/or common purpose, and/or one or more of them, did, between the period extending from the 8th August 2007 to the 19th March 2008 and at or near Oshikango in the district of Eenhana, wrongfully, unlawfully, falsely and with intent to defraud give out and pretend to Pupkewitz & Sons (PTY) Ltd and/ or Ian D. Gallagher and/or Willem Johannes Paulus Burger and/ or Otto Volker Hans and/or B.H. Motor Spares CC and/or Ben Hauwanga that:

- a. B.H. Motor Spares CC and/or Ben Hauwanga had purchased goods and materials listed in invoices under **Column C of Schedule 1** on or about the dates indicated in column B of the same schedule for the total amounts indicated in column E of the same schedule, on credit through account number H00004 and/or;
- b. the goods and materials referred to in paragraph (a) above had been delivered to B. H. Motor Spares and/or Ben Hauwanga and/or his chosen appointees and/or;
- c. consequently, B.H. Motor Spares CC and/or Ben Hauwanga owed Pupkewitz & Sons (PTY) Ltd N\$ **N\$ 5 227 594.74** which was due and payable and/or;
- d. items listed in quotation number Q00066425 were still part of the stock available for resale at Megabuild, Oshikango and/or;
- e. they were keeping good accounting record of the stock meant for resale and were working to the best interests of their employer.

And did then and there by means of the said false pretences induce Pupkewitz & Sons (PTY) Ltd and/or Ian D. Gallagher and/or Willem Johannes Paulus Burger and/or Otto Volker Hans and/or B.H. Motor Spares CC and/or Ben Hauwanga to the actual or potential loss or prejudice to Pupkewitz & Sons and/or B.H. Motor Spares CC and/or Ben Hauwanga to:

- f. believe and accept the above mentioned misrepresentations and/or any part thereof and/or;
- g. believe that all goods and materials supplied to Megabuild, Oshikango for resale were duly accounted for and/or;
- h. to demand payments from B.H. Motors Spares and/or Ben Hauwanga for goods purportedly sold and delivered and/or;
- i. effect actual payments to service the account number H00004 belonging to B.H. Motor Spares CC and/or Ben Hauwanga and/or;
- j. to accept payments from B.H. Motors Spares CC and/or Ben Hauwanga for goods purportedly sold and delivered.

Whereas in truth and in fact the accused, when he and/or they so gave out and pretended as previously mentioned he and/or they well knew that:

- k. the goods and materials listed in invoices under column C of Schedule 1 issued on the dates indicated in column B of the same schedule for the total amounts indicated in column E of the same schedule had, in actual fact not been purchased by B.H. Motor Spares and/or Ben Hauwanga and/or delivered to the same or their appointed nominees and/or;
- l. they had appropriated some of the goods and materials for their own benefit and/or for one of them and/or;
- m. they had sold some of the goods and materials to among other people, Angolans,

and he and/or they had either pocketed the proceeds thereof or they stood to be paid at a later date and thus appropriate the proceeds for his and/or their own benefit and/or;

- n. goods and materials listed in quotation number Q00066425 were no longer part of the stock at Megabuild, Oshikango but had been appropriated by all or one of them and/or;
- o. the representations aforementioned in paragraphs (a), (b), (c), (d) and (e) above, or any part thereof were false and/or incorrect and/or;
- p. they and/or he had no lawful right to appropriate all the goods previously mentioned and/or to dispose of them as they did without the consent of their employer.

And thus, the accused did commit the crime of FRAUD.

ANNEXURE A

SCHEDULE 1

| A | B | C | D | E |
|--------------|-------------|-------------------|---------------------|----------------------------------|
| COUNT | DATE | INVOICE NR | ADV. NOTE NR | INVOICE TOTAL EXCLUDE VAT |
| 1 | 08-Aug-07 | 8201702 | 202135 | 36 089.37 |
| 2 | 08-Aug-07 | 8201703 | 202136 | 34 179.12 |
| 3 | 08-Aug-07 | 8201704 | 202137 | 42 912.00 |
| 4 | 08-Aug-07 | 8201705 | 202138 | 44 262.42 |
| 5 | 08-Aug-07 | 8201707 | 202140 | 32 904.00 |
| 6 | 08-Aug-07 | 8201708 | 202141 | 14 931.00 |
| 7 | 08-Aug-07 | 8201709 | 202142 | 44 005.50 |
| 8 | 08-Aug-07 | 8201710 | | 49 567.66 |
| 9 | 08-Aug-07 | 8201711 | | 36 282.88 |
| 10 | 08-Aug-07 | 8201712 | | 47 557.44 |
| 11 | 08-Aug-07 | 8201713 | 202146 | 49 680.24 |
| 12 | 08-Aug-07 | 8201714 | 202147 | 46 189.44 |
| 13 | 08-Aug-07 | 8201715 | 202148 | 45 618.96 |
| 14 | 08-Aug-07 | 8201716 | 202149 | 40 658.27 |
| 15 | 08-Aug-07 | 8201717 | 202150 | 45 104.64 |
| 16 | 08-Aug-07 | 8201718 | 202151 | 30 263.84 |
| 17 | 08-Aug-07 | 8201719 | 202152 | 9 077.48 |

| | | | | |
|----|-----------|---------|--------|-----------|
| 18 | 08-Aug-07 | 8201720 | 202153 | 12 575.33 |
| 19 | 08-Aug-07 | 8201721 | 202154 | 49 932.00 |
| 20 | 08-Aug-07 | 8201722 | 202155 | 49 914.00 |
| 21 | 08-Aug-07 | 8201723 | 202156 | 41 595.00 |
| 22 | 08-Aug-07 | 8201725 | 202158 | 9 333.00 |
| 23 | 08-Aug-07 | 8201727 | 202160 | 32 550.00 |
| 24 | 30-Aug-07 | 8201740 | 202175 | 8 517.20 |
| 25 | 30-Aug-07 | 8201742 | 202177 | 49 788.00 |
| 26 | 30-Aug-07 | 8201744 | 202179 | 34 684.25 |
| 27 | 30-Aug-07 | 8201745 | 202180 | 42 176.00 |
| 28 | 30-Aug-07 | 8201746 | 202181 | 24 001.95 |
| 29 | 30-Aug-07 | 8201747 | 202182 | 34 323.30 |
| 30 | 26-Sep-07 | 8201771 | 202207 | 10 695.00 |
| 31 | 26-Sep-07 | 8201757 | 202193 | 11 989.68 |
| 32 | 26-Sep-07 | 8201763 | 202199 | 19 512.90 |
| 33 | 26-Sep-07 | 8201770 | 202206 | 37 107.20 |
| 34 | 26-Sep-07 | 8201767 | 202203 | 49 882.00 |
| 35 | 25-Oct-07 | 8201788 | 202227 | 49 062.30 |
| 36 | 25-Oct-07 | 8201790 | 202229 | 31 890.00 |
| 37 | 25-Oct-07 | 8201791 | 202230 | 41 151.60 |
| 38 | 25-Oct-07 | 8201792 | 202231 | 40 918.05 |
| 39 | 25-Oct-07 | 8201794 | 202233 | 25 762.55 |
| 40 | 25-Oct-07 | 8201795 | 202234 | 9 855.46 |
| 41 | 25-Oct-07 | 8201797 | 202236 | 46 790.80 |
| 42 | 25-Oct-07 | 8201799 | 202238 | 23 812.40 |
| 43 | 25-Oct-07 | 8201800 | 202239 | 34 109.16 |
| 44 | 25-Oct-07 | 8201802 | 202241 | 38 533.60 |
| 45 | 25-Oct-07 | 8201803 | 202242 | 31 500.00 |
| 46 | 25-Oct-07 | 8201804 | 202243 | 31 500.00 |
| 47 | 25-Oct-07 | 8201805 | 202244 | 28 350.00 |
| 48 | 25-Oct-07 | 8201806 | 202245 | 11 239.00 |
| 49 | 25-Oct-07 | 8201807 | 202246 | 47 370.50 |
| 50 | 25-Oct-07 | 8201809 | 202248 | 37 414.20 |
| 51 | 25-Oct-07 | 8201810 | 202249 | 40 186.56 |
| 52 | 25-Oct-07 | 8201811 | 202250 | 39 486.72 |
| 53 | 25-Oct-07 | 8201812 | 202251 | 30 354.72 |
| 54 | 25-Oct-07 | 8201813 | 202252 | 40 176.85 |
| 55 | 25-Oct-07 | 8201815 | 202254 | 11 800.32 |
| 56 | 25-Oct-07 | 8201816 | 202255 | 48 204.00 |
| 57 | 25-Oct-07 | 8201817 | 202256 | 48 204.00 |
| 58 | 25-Oct-07 | 8201818 | 202857 | 48 204.00 |
| 59 | 25-Oct-07 | 8201819 | 202858 | 7 498.40 |
| 60 | 30-Nov-07 | 8201865 | 202307 | 43 560.00 |
| 61 | 30-Nov-07 | 8201864 | 202306 | 46 260.00 |
| 62 | 30-Nov-07 | 8201863 | 202305 | 43 395.00 |
| 63 | 30-Nov-07 | 8201304 | 202304 | 42 140.00 |
| 64 | 30-Nov-07 | 8201860 | | 21 780.00 |
| 65 | 30-Nov-07 | 8201859 | 202301 | 47 866.00 |
| 66 | 30-Nov-07 | 8201858 | 202300 | 47 866.00 |

| | | | | |
|-----|-----------|---------|--------|-----------|
| 67 | 30-Nov-07 | 8201857 | | 34 190.00 |
| 68 | 30-Nov-07 | 8201854 | 202296 | 21 261.26 |
| 69 | 30-Nov-07 | 8201853 | 202295 | 34 218.00 |
| 70 | 30-Nov-07 | 8201852 | 202294 | 47 012.46 |
| 71 | 30-Nov-07 | 8201851 | 202293 | 44 988.48 |
| 72 | 30-Nov-07 | 8201850 | 202292 | 37 841.64 |
| 73 | 30-Nov-07 | 8201849 | 202291 | 43 010.00 |
| 74 | 30-Nov-07 | 8201848 | 202290 | 34 560.00 |
| 75 | 30-Nov-07 | 8201847 | 202289 | 45 120.00 |
| 76 | 30-Nov-07 | 8201843 | 202285 | 21 879.36 |
| 77 | 30-Nov-07 | 8201842 | 202284 | 39 704.64 |
| 78 | 30-Nov-07 | 8201839 | 202281 | 43 763.22 |
| 79 | 30-Nov-07 | 8201833 | 202275 | 30 102.12 |
| 80 | 30-Nov-07 | 8201830 | 202272 | 40 641.00 |
| 81 | 30-Nov-07 | 8201829 | 202271 | 43 560.00 |
| 82 | 30-Nov-07 | 8201828 | 202270 | 47 601.00 |
| 83 | 30-Nov-07 | 8201827 | 202269 | 43 560.00 |
| 84 | 30-Nov-07 | 8201826 | 202268 | 49 113.20 |
| 85 | 30-Nov-07 | 8201823 | | 42 140.00 |
| 86 | 30-Nov-07 | 8201822 | 202264 | 35 413.38 |
| 87 | 17-Jan-08 | 8201866 | 202309 | 7 244.56 |
| 88 | 17-Jan-08 | 8201867 | 202310 | 33 353.00 |
| 89 | 17-Jan-08 | 8201868 | 202311 | 49 873.44 |
| 90 | 17-Jan-08 | 8201871 | 202314 | 4 102.80 |
| 91 | 17-Jan-08 | 8201872 | 202315 | 41 313.60 |
| 92 | 17-Jan-08 | 8201875 | 202318 | 37 905.00 |
| 93 | 17-Jan-08 | 8201876 | 202319 | 2 492.28 |
| 94 | 17-Jan-08 | 8201879 | 202322 | 42 772.50 |
| 95 | 17-Jan-08 | 8201880 | 202323 | 42 772.50 |
| 96 | 17-Jan-08 | 8201881 | 202324 | 49 629.08 |
| 97 | 17-Jan-08 | 8201882 | 202325 | 42 681.12 |
| 98 | 17-Jan-08 | 8201883 | 202326 | 45 196.80 |
| 99 | 17-Jan-08 | 8201885 | 202328 | 41 580.00 |
| 100 | 17-Jan-08 | 8201886 | 202329 | 47 616.00 |
| 101 | 17-Jan-08 | 8201887 | 202330 | 42 192.96 |
| 102 | 17-Jan-08 | 8201888 | 202331 | 40 149.50 |
| 103 | 17-Jan-08 | 8201889 | 202347 | 47 455.33 |
| 104 | 11-Feb-08 | 8201903 | 202347 | 47 455.33 |
| 105 | 11-Feb-08 | 8201904 | 202348 | 47 347.20 |
| 106 | 11-Feb-08 | 8201896 | 202340 | 48 963.60 |
| 107 | 11-Feb-08 | 8201897 | 202341 | 44 810.24 |
| 108 | 11-Feb-08 | 8201898 | 202342 | 7 793.96 |
| 109 | 11-Feb-08 | 8201900 | 202344 | 41 588.00 |
| 110 | 11-Feb-08 | 8201901 | 202345 | 41 311.36 |
| 111 | 11-Feb-08 | 8201906 | 202350 | 42 810.76 |
| 112 | 11-Feb-08 | 8201902 | 202346 | 43 213.94 |
| 113 | 13-Feb-08 | 8201910 | 202354 | 39 238.72 |
| 114 | 13-Feb-08 | 8201911 | 202355 | 40 218.30 |
| 115 | 13-Feb-08 | 8201912 | 202356 | 32 356.72 |

| | | | | |
|-----|--------------|-----------|--------|---------------------|
| 116 | 13-Feb-08 | 8201913 | 202357 | 44 638.70 |
| 117 | 13-Feb-08 | 8201914 | 202358 | 43 360.00 |
| 118 | 13-Feb-08 | 8201918 | 202362 | 34 218.00 |
| 119 | 13-Feb-08 | 8201919 | 202363 | 47 347.20 |
| 120 | 13-Feb-08 | 8201920 | 202364 | 6 451.65 |
| 121 | 13-Feb-08 | 8201921 | | 33 515.25 |
| 122 | 21-Feb-08 | 8201922 | | 21 787.20 |
| 123 | 10-Mar-08 | 8201931 | 202376 | 39 810.48 |
| 124 | 10-Mar-08 | 8201932 | 202377 | 32 596.72 |
| 125 | 13-Mar-08 | 8201957 | 202408 | 35 136.00 |
| 126 | 13-Mar-08 | 8201958 | 202409 | 23 309.50 |
| 127 | 13-Mar-08 | 8201959 | 202410 | 41 569.00 |
| 128 | 13-Mar-08 | 8201960 | 202411 | 48 870.00 |
| 129 | 13-Mar-08 | 8201961 | 202412 | 42 745.50 |
| 130 | 13-Mar-08 | 8201962 | 202413 | 42 745.50 |
| 131 | 13-Mar-08 | 8201963 | 202414 | 42 745.50 |
| 132 | 13-Mar-08 | 8201964 | 202415 | 46 842.00 |
| 133 | 13-Mar-08 | 8201965 | 202416 | 44 500.00 |
| 134 | 13-Mar-08 | 8201966 | 202417 | 36 888.25 |
| 135 | 13-Mar-08 | 8201967 | 202418 | 36 888.25 |
| 136 | 13-Mar-08 | 8201968 | 202419 | 35 133.00 |
| 137 | 13-Mar-08 | 8201969 | 202420 | 22 183.20 |
| 138 | 19-Mar-08 | 8201973 | | 11 175.90 |
| 139 | 25-Feb-08 | Q00066425 | | 239 054.10 |
| | TOTAL | | | 5 227 594.74 |

[9] The grounds of appeal by the State are listed in its notice of appeal as follows:

'The learned presiding Honourable Judge misdirected himself, alternatively, erred in law and/or in fact when he acquitted the Respondents of counts one(1) to one hundred and thirty-seven (137) - fraud more particularly in that;

- i. the court *a quo* inexplicably found that the Respondents were arraigned on a single charge of fraud whereas the indictment as amplified by the schedule clearly showed 139 distinct counts of fraud as particularized in columns A-E of the schedule.
- ii. the court *a quo* in its analysis of failed to appreciate that the facts it accepted as true about how the accused persons conducted business with Mr. Hauwanga satisfied the elements of the offence of fraud against their employer.

- iii. the court *a quo* failed to appreciate and accept that the modus operandi of the respondents was best exposed by Count 139 and the evidence of the second respondent wherein he admitted invoicing such goods against the account of Mr. Hauwanga with the full knowledge of the first respondent when they well knew that the goods were meant for the first respondent.
- iv. the court *a quo* considered the evidence of Mr. Hauwanga in isolation and thereby failed to appreciate the cumulative effect of all the evidence that was led by the state which should have necessitated the drawing of appropriate inferences more particularly for goods that were invoiced against Mr. Hauwanga's account a day before the second accused's resignation.
- v. the court *a quo* in justifying the acquittal of the respondents defied the cardinal principles of a fair trial in that it used the evidence of the respondents which in all fairness had not been put to Mr. Hauwanga.
- vi. the court *a quo* failed to appreciate the uncontroverted evidence of Mr. Hauwanga about his telephone conversation with the second respondent more particularly in the face of the influx of invoices against Mr. Hauwanga's account a day before the second accused's resignation.
- vii. the court *a quo* failed to appreciate the uncontroverted evidence led by the state to the effect that building materials were transported to the first respondent's construction site on numerous occasions at the command of the respondents' without any proof of payment and supporting documents, which evidence was in line with the accepted modus operandi of the respondents'.
- viii. the court *a quo*'s finding that Mr. Hauwanga was incited by Mr. Grimbeek and Mr. Volker Otto cannot be sustained in the face of the evidence by Mr. Hauwanga which clearly showed that he had already queried with the second respondent as early as January 2008 and also that the second respondent had telephoned him and pleaded with him to bear with him for the abuse of his (Mr. Hauwanga's) account.

- ix. the court *a quo's* finding that the state failed to prove common purpose against the respondents cannot be sustained given its reasons for convicting the respondents of Count 139 and also in the face of the first respondent's evidence that he was aware and complacent to the manner in which the account of Mr. Hauwanga was operated by the second respondent.
- x. the court *a quo* misdirected itself by allowing itself to be influenced by alleged settlement that was made by Mr. Hauwanga and the respondents' employer in a separate civil suit and thereby concluding that the settlement was as a result of the fact that Mr. Hauwanga could not prove his claim against the respondents' employer and therefore in the same vein the respondents were entitled to be acquitted.
- xi. the court *a quo* misdirected itself by finding that the respondents' use of wrong procedures to dispatch, sell or book out goods to Mr. Hauwanga did not *per se* mean that they committed fraud or theft because this finding flies in the face of the proven *modus operandi* of the respondents and it also ignores the actual and potential prejudice which their employer was exposed to.'

[10] During the trial the State called a number of witnesses:

The first witness was Volker Hans Otto. He was employed by Pupkewitz Megabuild as Assistant General Manager: Operations, during the period 2007 to 2008 and was based in Windhoek. All 15 branch managers reported to him. He knew first respondent as the branch manager of the Oshikango branch and second respondent as an employee at the same branch.

[11] During February 2008, Otto visited the Oshikango branch of Pupkewitz to investigate the disappearance of a forklift which disappearance was discovered during the annual stocktaking on 22 February 2008. The investigation revealed that

the forklift was sold by the first respondent without authorisation. First respondent was subsequently dismissed after a disciplinary hearing. Kobus Meuwesen was appointed as branch manager in the place of the first respondent and as a result a hand-over stocktaking was done by Otto during which a shortage of ± N\$246 000 was detected. From this amount, the value of 325 pellets of cement (which were returned to the supplier) was subtracted which brought the value of the unaccounted stock to N\$197 000. A discrepancy report was compiled which indicates discrepancies between the physical stock on hand compared to the stock on the computer. Otto explained this discrepancy report during his testimony.

[12] Otto testified that he had been informed by some of the labourers¹ of the Oshikango branch that they took products from the Oshikango branch, which had not been invoiced to the first respondent, to a warehouse which the first respondent was busy constructing and neither did first respondent pay for those products. Otto testified that Meuwesen discovered a quotation generated by second respondent in the name of the first respondent for material valued at N\$239 054,10 and dated 25 February 2008 – quotation no. 00066425 (count 139).² Except for three items, all the material which appeared in the discrepancy report also appeared on the quotation. These three items had been invoiced on two invoices to the account of Hauwanga by second respondent on 12 March 2008, a day before he resigned. According to Otto, Hauwanga denied having bought or having received those three items. The impression is created, according to Otto, that the three items had been sold to Hauwanga whereas in fact they had not been sold. Otto however could not say where

¹ Reported to him by Frisbie Shipanga, Trophinuse Erasmus, Ipinge Petrus and a fourth person.

² Quotation received as exhibit H.

these missing items were physically. Otto testified that he subsequently (on 27 or 28 March 2008) asked the first respondent about the stock losses and the first respondent admitted having taken certain material from the Oshikango branch (*inter alia* 400 lengths of roof sheeting, cement, a concrete mixer and welded mash) – belonging to Pupkewitz Megabuild.

[13] Otto further testified that Hauwanga had during February 2008 (before the stocktaking) queried three advice notes³ for cement. The first advice note (no. 202363 dated 13 February 2008) was for 640 bags of cement, the second advice note (no. 202347 dated 11 February 2008) for 680 bags of cement, and the third advice note (no. 202363 dated 13 February 2008) for 640 bags of cement. All three advice notes had been generated by second respondent. Otto testified that Hauwanga queried these advice notes because according to Hauwanga he had not received the cement.

[14] Otto further testified that second respondent resigned within 24 hours and on the day prior to his resignation, second respondent invoiced a number of goods to the account of Hauwanga. These documents were presented to Hauwanga on occasion at the Ondangwa airport (in the presence of Grimbeek, an accountant) and Hauwanga denied having bought those goods.⁴ Hauwanga subsequently confirmed in writing that he did not receive the goods.

³ It was explained that an advice note is not the same as an invoice. An advice note is generated when goods are purchased on account (on credit) and is used by a customer to dispatch goods from the premises, ie for delivery purposes. The next day an invoice is produced which is linked to the advice note by an internal reference number. This invoice is a tax invoice that the customer submits to the revenue office.

⁴ These invoices relate to counts 125 and 128-137.

[15] According to Otto, the following tax invoices were also shown to Hauwanga at the airport:

- Tax invoice 08201943 dated 11 March 2008 in the amount of N\$8030;
- Tax invoice 08201957 dated 13 March 2008 in the amount of N\$35 136 (count 125);
- Tax invoice 08201960 dated 13 March 2008 in the amount of N\$48 870 (count 128);
- Tax invoice 08201961 dated 13 March 2008 in the amount of N\$42 745 (count 129);
- Tax invoice 08201962 dated 13 March 2008 in the amount of N\$42 745 (count 130);
- Tax invoice 08201963 dated 13 March 2008 in the amount of N\$42 745;
- Tax invoice 08201964 dated 13 March 2008 in the value of N\$46 842 (count 132);
- Tax invoice 08201965 dated 13 March 2008 in the amount of N\$44 500 (count 133);
- Tax invoice 08201966 dated 13 March 2008 in the amount of N\$36 888,25 (count 134);
- Tax invoice 08201968 dated 13 March 2008 in the amount of N\$35 133 (count 136); and
- Tax invoice 08201969 dated 13 March 2008 in the value of N\$22 183 (count 137).

[16] Hauwanga denied that he had ordered or had bought those materials. These tax invoices had been generated by the second respondent. According to Otto, the stock was not there.

[17] Otto testified that exhibit H amounted to stock losses to the company Pupkewitz. The stock taking of 8 February 2008 detected a loss of N\$197 000, not a loss of N\$4,9 million. Goods to the value of N\$4,9 million were invoiced to B H Motor Spares CC, some of which were exported to Angola.

[18] During cross-examination of Otto, it was put to him that the goods on the quotation was not secretly taken by first respondent since it was reported on the system. It was put that first respondent raised funding from First National Bank in the amount of N\$4 million with which he had to pay for the material which were necessary to complete his warehouse.

[19] It was also put that a settlement was reached between Pupkewitz and first respondent and that Pupkewitz was paid in full by utilising his pension benefits in respect of the discrepancies of 26/27 March 2008 in the amount of N\$211 046. This was in terms of a civil judgment in the High Court dated 25 January 2011.

[20] Otto further testified that exhibit J (three advice notes for cement Hauwanga claimed not to have received) was not part of the stock loss detected on 26/27 March 2008 – ie they are separate and distinct from the discrepancies of N\$211 046.

[21] Otto testified that at the airport Hauwanga denied that he had ordered and purchased exhibits K1 & 2, L1 – 12 and three cement invoices. Exhibit L1 – 12 were meant to be exported therefore the tax invoices were zero rated. The exporter was B H Motor Spares CC.

[22] During cross-examination by Mr Mbaeva, Otto testified that the second respondent was responsible for generating advice notes – not invoices – invoices were generated a day later by another employee, Anna Immanuel. He testified that the operator code of second respondent was 1202. When generating an advice note the operator would enter an operator code as well as a password on the computer. The password was known only to the salesperson, it is confidential, and would not appear on any document whereas operator codes were known (to other employees). He testified that second respondent was a warehouse supervisor but that he also did a lot of sales.

[23] Kobus Meuwesen testified that at the end of 2007 and early 2008 he was employed at Ondangwa as branch manager and was subsequently asked to replace first respondent as branch manager in Oshikango. There was stocktaking done because of this takeover. On 26 March 2008 while the internal investigation was ongoing, first respondent phoned him and asked him to tell Otto that he (Meuwesen) had given first respondent permission to take certain materials from the branch. He (Meuwesen) declined to make such a statement because it would have been untrue. He testified that he found a quotation in the sales office (on a sales desk) which quotation he handed over to Otto. This quotation was marked exhibit H

(provisionally). The person's name who created the quotation appears on it, namely second respondent.

[24] Meuwesen testified that at some stage he received a letter from Hauwanga in which letter Hauwanga disputed receiving certain goods which were booked on his account. This letter was also handed over to Otto. According to Meuwesen, he participated in the stocktaking where a shortage was detected. Meuwesen denied that the quotation was found subsequent to a conversation with first respondent and at a stage when his attention to the quotation was apparently drawn by second respondent.

[25] Meuwesen denied that he visited first respondent at his uncompleted warehouse and that at that stage he had asked first respondent how he would pay for the goods listed on the quotation when the first respondent replied that he was busy arranging a facility from FNB to settle that account.

[26] Trophinuse Erasmus was employed at Pupkewitz Megabuild during the years 2007 to 2008 as a general worker. The respondents were his seniors. On the instructions of first respondent he took pellets of tiles, wire mesh, cement and corrugated iron sheets with a tractor to a new warehouse – a building where first respondent works. He left the yard without any receipts during working hours.

[27] Frisbie Shipanga was employed as a forklift driver by Pupkewitz Megabuild Oshikango from 2003. During 2007/2008 he was informed by first respondent about a

new warehouse that was being built. He was ordered by first respondent to take cement and tile grout to the new building. The prosecutor requested this witness to be declared hostile because of a contradiction between his witness statement and his *viva voce* evidence.

[28] Gotlieb Simon was, during 2007, employed by Nored Security Company as a security guard and was stationed at Pupkewitz Oshikango. He was taken to the new building by first respondent, given a book and instructed by first respondent to write down in the book building materials brought there by employees of Pupkewitz Megabuild. He also had to guard the new warehouse.

[29] Anna Christiana Immanuel testified that she was employed by Pupkewitz Megabuild Oshakati during the last part of 2007 and early part of 2008 as an admin supervisor and cashier. She testified of the procedure when a customer wants to buy goods on account. An account is created by a salesperson and she then receives an internal number from the salesperson. If a sale is created, it automatically prints at her printer as advice note. This advice note is then returned to the salesperson. A tax invoice is then printed the next day by herself. The same information which appears on the advice note also appears on the tax invoice – including the date of the transaction. Goods destined to cross the Namibian borders are not subject to VAT. In such an instance a customer would also get a D 500⁵ form which is used to clear the goods at the border. This D 500 form is used by another employee, Zita Maria Shooya, to make a 'manifesto'. This manifesto is in turn given to another employee

⁵ D 500 is the same document as SAD 500 form.

who is called a 'runner' who will assist the customer to clear the goods at the border. After the goods have crossed the border, the runner returns to Pupkewitz with the manifesto duly stamped and certified. Three customers bought on credit at Pupkewitz Megabuild, one being B H Motor Spares CC. She testified that when the computer system was down, the transactions were recorded manually – manual tax invoices for account holders and manual cash invoices for cash sales.

[30] She testified that Hauwanga once phoned her in connection with cement that was booked on his account of which he was unaware of. She found three invoices on his file concerning the said (truckloads of) cement. She informed him that second respondent was at that stage no longer employed there – this she mentioned because the operator number of second respondent appeared on these invoices and that she was herself unable to assist him. She referred him to Kobus Meuwesen. The witness identified exhibit J⁶ as the invoices she referred to. During cross-examination she testified that Hauwanga subsequently phoned her and informed her that he could recall having taken the cement. She then informed Meuwesen about Hauwanga's phone call.

[31] Zita Maria Shooya testified that she was employed at Pupkewitz Megabuild from August 2007 until March 2008 as a filing clerk. One of her duties was to complete a manifesto also known as a SAD 500 – a form which accompanies goods destined for the border. She testified that she had a conversation with second respondent regarding the account of B H Motor Spares CC since SAD 500 forms had

⁶ Exhibits J1, J2 and J3.

been piling up at her desk which should have been cleared within seven days. According to her, second respondent told her that it was none of her business. Goods bought by B H Motor Spares CC were first taken to the warehouse of Hauwanga in Oshikango and did not immediately cross the border according to procedure. Hauwanga was apparently given permission by first respondent to operate in this way. She testified that her office is linked with Customs to the effect that as soon as a SAD 500 form is generated at her office, Customs would become aware of it and enquiries would be made by Customs after seven days. According to her it often happened that Hauwanga would leave the premises of Pupkewitz Megabuild with goods purchased only on the strength of an advice note destined for the border – ie without a tax invoice or a SAD 500 form. The SAD 500 form would only be collected when they physically move with the goods to the border.

[32] John Darius Cloete testified that he was employed at Pupkewitz Megabuild as an information technology manager since 2001. During August 2007 to March 2008 he was a systems administrator whose duty it was to look after the company's hardware (computer system) and the management thereof as well as servicing the internal users of the company. He testified about the password policy at that stage in respect of access of employees to the computer system and the allocation of passwords. The first allocated passwords would expire after 30 days from the date of allocation, thereafter an employee would himself or herself change his or her password to a number of own choice. He also testified about the procedure to allocate sales codes, user names and the method used to generate sales of goods from a computer.

[33] Isak Mekondjo Nahum is a registered quantity surveyor who was requested to make a cost estimate of the warehouse being constructed by first respondent. He estimated the building cost of that building to be N\$7 million of which N\$4 500 000 consisting of building material.

[34] Willem Johannes Paulus Burger was employed by Pupkewitz Megabuild as a divisional credit manager since 1986 and was stationed in Windhoek. His duties included the recommendation of applications for credit facilities. He testified that he was aware that first respondent had applied for credit facilities but had since February 2005 never made use of those facilities. He testified that there was no other way an employee could purchase material but through his or her account. He testified that he also used to deal with the account of Hauwanga from B H Motor Spares CC at Oshikango. According to him there was a good relationship between him and Hauwanga. Nothing was wrong with the account of B H Motor Spares CC until the beginning of February/March 2008 when Hauwanga called and informed him that he had not received all his goods. He referred him to the branch manager at Oshikango to sort out the issue.

[35] Cornelius Johannes Grimbeek was employed by Pupkewitz Megabuild as a senior financial accountant. He testified that he went to Oshikango branch on 26/27 March 2008 to take stock and to hand over the supervision of the branch to Meuwesen as branch manager, releasing first respondent. At the completion of the stocktaking, a loss of N\$246 296 was discovered. The next day it appeared that some

pellets of cement had not been counted the previous day which reduced the stock loss to N\$197 000.

[36] He testified that Meuwesen subsequently showed him a quotation generated by second respondent without any supporting documents like proof of delivery. The number of the quotation was 66425 dated 25 February 2008. It was marked exhibit H. The quotation was compared with the stocktake summary (a spreadsheet) and all the stock on the quotation appeared on the stocktake summary, except three different items⁷ booked out to Hauwanga's account. These three types of items were reflected on exhibits K1 and K2. The quotation was handed over to Otto. The job reference on the quotation was first respondent. Grimbeek confirmed that he was present at the airport with Hauwanga and Otto where Hauwanga complained that he did not receive cement which had been booked out to him. The cement in question were reflected on exhibits J1, 2 and 3.

[37] He testified that he had a meeting in Windhoek with Hauwanga's accountant where a summary was drawn up based on the documents received from the accountant. The result was an amount of nearly N\$4,8 million representing goods apparently not received by Hauwanga. Grimbeek testified that he made a schedule of all the relevant documents used by them. He divided the invoices into categories ie those 'not disputed' (which were material received by Hauwanga) and those 'in dispute' which represent goods claimed not to have been received by Hauwanga. The total amount of goods 'in dispute' was calculated to be N\$4 977 364.

⁷ Three items included ceiling lights, roofing sheets and floor tiles.

[38] There was a third section namely: 'items in dispute but paid'. This amounted to N\$3 791 777,76. This amount had been paid by Hauwanga in spite of being 'in dispute'. Then there was a section: 'suspected signed by Alves'. There was also a section: 'documents not signed' – ie there was nothing signed on the proof of delivery (POD) but stock had been released from the warehouse. This amounted to N\$72 407,20. There was also a section: 'documents missing'⁸ – ie there was no proof of delivery, but the stock was booked out on 13 March 2008, ie the last work day of second respondent, in the amount of N\$1 155 834,74. Then there was also a section relating to goods which had crossed the border in the amount of N\$390 923,84 which Hauwanga denied having received, Grimbeek then explained the contents of the advices and invoices relating to counts 1 – 139.

[39] He testified that goods in the amount of N\$390 923,84 booked to B H Motor Spares CC crossed the border. According to him on the SAD 500 form appears the destination of the goods and who registered the SAD 500 form (Pupkewitz Megabuild). These goods Hauwanga intimated that he did not receive. This figure of N\$390 923,84 is included in the total figure of goods Hauwanga claimed he did not receive. The schedule (report compiled by the witness) was received as exhibit U.

[40] During cross-examination by Mr Mbaeva, Grimbeek testified that although goods had been booked out he was unable to identify the person(s) who had removed the goods from the premises of Pupkewitz Megabuild. Therefore he also

⁸ These documents only appeared on the system (computer).

could not dispute the statement by Hauwanga that Hauwanga did not receive certain goods neither could he gainsay such a statement.

[41] Grimbeek was referred to a confirmatory affidavit in a subsequent civil matter between Hauwanga and Pupkewitz Megabuild in which, one Gallagher deposed to and *inter alia* stated in para 11.2 of that affidavit: 'Fraud by the third respondent with or without the involvement of the second respondent and possibly B H Motor Spares CC is suspected'. It was put to the witness that Pupkewitz Megabuild suspected B H Motor Spares CC (not the person Hauwanga) of having committed fraud to which Grimbeek replied fraud was suspected to have been committed by employees of Pupkewitz Megabuild in conjunction with individuals employed by B H Motor Spares CC.

[42] Meriam Hauwanga (the wife of Hauwanga) was employed by B H Motor Spares CC as an accountant and was stationed in Windhoek. Regarding statements from Pupkewitz, she testified that she would normally receive same from Burger in the form of faxes. She would then effect payment by way of a cheque previously signed by Hauwanga. The practice was to leave signed cheques with her. Burger used to pick up the cheques personally from her on a monthly basis. All the payments made were done on instructions of Hauwanga.

[43] Ian David Gallagher was employed by Pupkewitz Megabuild as chairperson and joint managing director of Pupkewitz & Sons. He testified that during the period August 2007 and March 2008 fraud was perpetrated at Pupkewitz Megabuild

Oshikango which resulted in potential loss of N\$4,9 million. Gallagher himself was not involved in any of the stocktaking at the Oshikango branch. He testified that Pupkewitz Megabuild was unable to prove that B H Motor Spares CC had in fact received the goods in dispute because some delivery notes had been destroyed, some had not been signed, whilst others had apparently been signed by second respondent.⁹

[44] During cross-examination by Mr Murorua, the witness testified that he found it 'extraordinary' that a customer would make payments in excess of N\$3 million for products he did not receive – especially a business man of Hauwanga's stature. He testified that he later learned that the way Hauwanga conducted his business was that he would simply leave cheques signed and when the statement of Pupkewitz reached Hauwanga's office, his accountant would simply make payment against the statement and later some reconciliation would take place. With this information at hand, Gallagher testified that he could understand why Hauwanga would have made payments for goods he believed he did not receive. He testified that in the civil matter Pupkewitz could not prove that Hauwanga in fact received the goods and Hauwanga could not prove that he did not receive the goods.

[45] He testified that they had invoiced B H Motor Spares CC in the amount of N\$4,9 million of which N\$3,7 million had been paid of the N\$4,9 million where certain goods of which there were SAD 500 forms showing that the goods (in the amount of

⁹ His testimony was that to the layperson the signatures appeared to be that of second respondent. These signatures were subjected to a forensic analysis but no reply was ever received from the handwriting expert.

N\$390 000) had been exported to Angola by persons unknown to Pupkewitz Megabuild. The witness denied that he considered the conduct of B H Motor Spares CC or Hauwanga to have been fraudulent, although his testimony was that at the time when he deposed to an affidavit in the civil matter his suspicion was that Hauwanga was 'possibly' involved in the fraud together with first and second respondents.

[46] Manuel Parez Guedes was employed by Pupkewitz Megabuild Oshikango as a dispatch and receiving clerk from December 2004 until 2010. He would see to it that whatever a customer bought (cash or on account) was loaded. Second respondent was his immediate supervisor. Guedes testified that he was not the only dispatcher. During August 2007 until March 2008 himself and one De Almeida¹⁰ were responsible for dispatching goods. In an instance where B H Motor Spares CC would purchase goods on account and a quotation is handed to him either by De Almeida or second respondent (both of whom were also salespersons) he would after loading, sign at the end of the quotation to confirm the loading had been done correctly. The quotation would then be put on the file of B H Motor Spares CC.

[47] He testified that he operated in this way on instructions of second respondent. His testimony was that several truck drivers employed by Hauwanga used to load the material but that he did not know to which destination the drivers took the goods.

[48] Martha Ningensheni Latoka was employed by the B H Group of companies owned by Hauwanga first as a stock controller but later as the internal auditor of the

¹⁰ He appeared as accused no. 3 but was discharged at the closure of the State's case.

group. She testified that sometime during the year 2008 she was instructed by Hauwanga to go to Ondjiva at BMN¹¹ in Angola to get all the documents that were related to Pupkewitz Megabuild account from the manager, one Gerry Selao. In Ondjiva she only found quotations on file – no invoices nor advice notes. She returned with the file to Namibia and went to Ms Anna Immanuel at Pupkewitz Megabuild who provided her with invoices of B H Motor Spares CC. She compared the quotations with the invoices and found that for the period January 2007 until July 2007 the documents matched. Those for August 2007, two documents did not match. She informed Hauwanga of her findings. On a later date Hauwanga instructed her to take the documents and to meet Grimbeek from Pupkewitz Megabuild in Windhoek. The two of them went through the documents and subsequently Grimbeek drew up a report.

[49] Shidute Festus was employed by the Ministry of Finance, Directorate Customs and Excise based at the Oshikango border post as a controller: customs and excise. He testified about the procedure for clearing export goods. He was unable to tell whether or not goods which were reflected on SAD 500 forms were taken across the border by B H Motor Spares CC or Hauwanga. His testimony was that it was not possible for goods to cross the border merely on the strength of a quotation – a tax invoice was required.

[50] Benjamin Hauwanga testified that he is a business man who used to buy building material from Pupkewitz Megabuild on account for export to Angola. He

¹¹ BMN stands for 'B H in Angola'.

opened an account in 2004. During December 2007 he became concerned about his high account and spoke to second respondent during January 2008 about it. Second respondent informed Hauwanga that he could not assist because the computers were off-line. During January, February, March 2008 he reduced the amount of goods bought from Pupkewitz Megabuild. The value of the goods purchased during March 2008 was about N\$40 000 but he received an account of almost N\$1 million. He called Pupkewitz and spoke to a lady by the name of Anna. She could not assist him, but referred him to first respondent and second respondent or the new branch manager Meuwesen. Meuwesen could not assist, and he eventually spoke to second respondent who admitted to him telephonically that he, himself (ie second respondent), put goods on Hauwanga's account because of an unexpected stock taking, and that he would remove the goods from his account after the stocktaking. According to Hauwanga, second respondent also offered him some money. According to him, second respondent informed him (Hauwanga) that he gave the goods to a customer from Quandokubango in Angola. Hauwanga testified that he also spoke to first respondent who denied any knowledge about goods being placed on his account. According to Hauwanga, Meuwesen informed him subsequently that the persons who came to conduct the stocktaking were at Ondangwa airport. He met the persons from Pupkewitz at the airport where he laid his complaint in respect of cement and IBR iron sheets. He denied having bought the goods and stated that he never bought iron sheets from Pupkewitz because he gets 'a good supply' from a dealer in South Africa. He subsequently opened a criminal case against first and second respondents. At some stage his auditor ie Latoka went to Pupkewitz Windhoek to explain his position.

[51] Hauwanga confirmed that he wrote a letter dated 28 March 2008 to the manager of Pupkewitz Megabuild Oshikanago to explain that he did not buy the goods and to inform them that second respondent tried to bribe him. Hauwanga identified 17 invoices (for the period February/March 2008) which he referred to in the letter. Hauwanga testified that his business dealings with Pupkewitz went smoothly until the year 2007 when at a certain stage second respondent informed him that their computers had broken down and that they could not print invoices. Thereafter he obtained goods by means of quotations. According to him second respondent informed him to create his own customs documents – SAD 500 forms. Second respondent gave him the quotations. He testified that when he used to go to the Oshikango branch enquiring about his statement, first and second respondents always referred him to the Windhoek office which he found strange since the goods had been bought at Oshikango. There was always a delay in obtaining statements. He then arranged with Burger in Windhoek to deliver the statements to his wife in Windhoek, who would make the necessary payments after he had given his consent for those payments to be made.

[52] According to Hauwanga he suffered a loss of N\$4,9 million and had paid his account up to January 2008. During February and March he stopped payments – he did not pay the full amount of N\$4,9 million.

[53] During cross-examination by Mr Murorua, Hauwanga testified that goods had been added on his account from August 2007 but that he only complained during

January/February 2008 because he did not have time to follow up in August 2007. Hauwanga testified that he paid the N\$3,7 million in order to avoid the closure of his account since at that stage he had limited time to finalise a project in Angola. He at that stage trusted that the amounts reflected on statements were the amounts owed to Pupkewitz Megabuild.

[54] Margaret Dikenge Simunja testified that she was a member of the Namibian Police Force with the rank of inspector attached to the Commercial Crime Investigating Unit in Windhoek and the investigating officer in this matter. As a result of a complaint received from Pupkewitz Megabuild she went to the warehouse of first respondent still under construction in Oshikango. She informed the first respondent of the purpose of her visit. Inside the warehouse she found a concrete mixer marked 'Pupkewitz Megabuild'. First respondent voluntarily informed her that in addition to the mixer he also took other material including cement, paint, roof sheets, ceiling lights, floor tiles from Pupkewitz Megabuild. He was informed of his right to legal representation. He phoned his legal representative in the presence of the officer but the legal representative declined to come and see first respondent. First respondent said he was going to pay for the goods from a loan granted to him by First National Bank in the amount of N\$4 million. A letter of approval¹² from the bank dated 1 March 2008 was handed to her by the first respondent. On 8 April 2008 she arrested first respondent. He was released on bail the same day. In respect of second respondent, her investigation revealed that second respondent generated invoices by misusing the account of Hauwanga and also generated a quotation. Second respondent was

¹² This letter was received as exh AA.

also arrested by her. She testified that her investigation revealed that goods apparently crossed the border but she could not tell who took the goods across the border.

[55] Freddy de Almeida testified that he was employed as a salesperson at Pupkewitz Megabuild during the period August 2007 to March 2008. Second respondent, as salesperson, was responsible for assisting big customers like B H Motor Spares CC, although he on occasion also dealt with the account of Hauwanga in the absence of second respondent. Many customers bought goods using quotations. One Garry Nangova from Angola sometimes ordered goods telephonically on the account of B H Motor Spares CC. He testified during cross-examination that other persons namely, Norberto, Six, Rasta, Matthew and Nally¹³ also bought goods on the account of B H Motor Spares CC. On occasion when there was no credit on Hauwanga's account they would assist him by loading goods on the basis of a quotation. The quotation was put on B H Motor Spares CC's file. The sale was not processed until such time when payment had been made and there was credit on the account – then the sale would be processed,¹⁴ afterwards at a stage when the goods had already been removed from the premises. He personally used to deliver the quotations at the warehouse of Hauwanga. First and second respondents were close friends of Hauwanga and assisted him whenever he needed their service.

¹³ Employees of Hauwanga.

¹⁴ Ie the advice note generated.

[56] At the conclusion of the State's case on an application in terms of s 174 of the Criminal Procedure Act 51 of 1977 as amended, accused no. 3, Mark Paul Alves was discharged.

[57] Immanuel Davis Freitas Dias (the first respondent) testified that he was a 42 years old businessman owning and managing Build-It Warehouse Oshikango – he traded in building materials. He testified that just after the second stocktaking, Inspector Simunja arrived at his business place in Oshikango during April 2008, together with two other persons. Inspector Simunja came to him with a quotation signed by himself. He admitted that he took the material listed on the quotation. At that stage Inspector Simunja investigated the shortage at the time of the second stocktaking. During the first stocktaking no irregularities were unearthed.

[58] According to the first respondent he sold a forklift, the property of Pupkewitz Megabuild and put the money in a safe where it was later found by KPMG auditors. He left Pupkewitz Megabuild on 5 March 2008 subsequent to a disciplinary hearing. He testified that after the conclusion of the first stocktaking he took some material from Pupkewitz Megabuild because at that stage he was busy building his own warehouse. He made out a quotation in respect of the materials he took to his warehouse. The employees of Pupkewitz Megabuild transported these materials to his warehouse. On his request second respondent generated the quotation and filed it. On the quotation appeared the words: 'Manny Warehouse'.

[59] The first respondent admitted that the discrepancy of N\$211 000, testified to by Otto, was paid by utilising his pension monies. He took the said material because he could not phone head office for permission because he knew that permission would not have been granted as he was building a warehouse to compete with his employer. He intended to pay for the material by means of a loan from First National Bank.

[60] The first respondent testified that he found the claim by Hauwanga ie that he did not receive certain goods as ridiculous, because as a businessman Hauwanga used to purchase goods valued at millions monthly and was supposed to have checked the correctness of the statements he received. He was aware that people other than Hauwanga ordered and collected goods on Hauwanga's account. Hauwanga's credit limit was N\$1 million and he, ie first respondent and second respondent, assisted Hauwanga to obtain material by means of a quotation when Hauwanga reached his credit limit. First respondent testified that he took a calculated risk when he approved such a procedure on the understanding when Hauwanga has freed up his credit, that those quotations would be turned into advice notes, tax invoices and 'border documents'. One Garry, the manager of Hauwanga's branch in Ondjiva Angola, used to make telephonic orders on Hauwanga's account.

[61] According to the first respondent, he informed Meuwesen about the quotation on file in the container room – it was not 'discovered', as testified, by Meuwesen. According to him 95 percent of the material he used to build his warehouse he sourced from South Africa because it was 'cheaper' than Pupkewitz Megabuild. He

bought from the same suppliers as Pupkewitz Megabuild. He confirmed that he placed a security guard of Pupkewitz Megabuild, one Gotlieb Simon, at the time he was constructing his warehouse in order to record what was brought to his warehouse.

[62] He testified that he ran Pupkewitz Megabuild, Oshikango as if it was his own business – he had carte blanche. During the time when he was the manager of that branch Hauwanga never approached him about any discrepancies. He testified that after the stocktaking in March 2008 Meuwesen phoned him and informed him to explain to Otto about the discrepancy which he did by informing Otto that he took the material and that his intention always was to pay for it. He explained that the only reason why the period in the charge sheet starts with August 2007 was because that was the time he started to build his warehouse. He testified that the various invoices attached as an annexure to the charge sheet, starting from 8 August 2007, he knew nothing about. He denied that he and second respondent at any time agreed 'either expressly or silently' to carry out illegal activities. He testified that Pupkewitz Megabuild had closed its Oshikango branch within 18 months after he had started his business, that he was the one who knew all the customers and developed the Angolan market and in effect 'outcompeted' Pupkewitz Megabuild Oshikango.

[63] Edgar Cardoso Alves (the second respondent) testified that he was employed by Pupkewitz Megabuild. He was a yard supervisor from 2003 until 2008. Pupkewitz Megabuild Oshikango differed from other branches to the extent that it was a depot or warehouse with one container where the sales were done – it served as an export

branch, mainly to Angola. Hauwanga was an account holder for export purposes. He testified that he himself and De Almeida were responsible for 'handling' this account. Hauwanga would personally come to the warehouse to order material or he would send some of his workers. In those instances where workers came to purchase goods, second respondent would first confirm with Hauwanga before the workers would take the goods. When the account reached its limit for a specific month, himself and first respondent would provide a quotation on the basis of which Hauwanga could purchase goods. Hauwanga never used their SAD 500 form (border documents), but created his own border documents. The credit limit of Hauwanga was N\$1 million per month. According to him some goods bought by Hauwanga went to Angola, while the rest stayed in Namibia to be re-sold by Hauwanga. Everything bought from Pupkewitz Megabuild went to Hauwanga's branch in Oshikango – where everything was recorded.

[64] He denied that he resigned within 24 hours and his letter of resignation was handed in as exhibit Z. He denied that he had misused the account of Hauwanga for his own personal benefit.

[65] The second respondent was referred to a letter written by Hauwanga (dated 28 March 2008) with the heading: 'Clarification on invoices dispute' and addressed to Pupkewitz Megabuild, in which letter Hauwanga *inter alia* alleged that second respondent had phoned him and had asked him to accept that he (Hauwanga) had bought and received certain goods on disputed invoices and that the second respondent had promised to pay Hauwanga the full amount appearing on those

invoices. The second respondent denied that he had ever made such a promise to Hauwanga.

[66] The second respondent explained the invoices appearing on exhibit Z as follows:

In respect of the three February invoices – these relate to the cement invoices which Hauwanga according to the testimony of Anna Immanuel subsequently acknowledged having received the goods (cement). In respect of the 14 March invoices – these were invoices he booked out before he left because he was cleaning his desk. Two of these invoices were wrongly booked out (to Hauwanga) but the goods on those two invoices went to first respondent's warehouse instead. These goods were tiles.

[67] The second respondent admitted that he generated exhibit H, the quotation, with 'Manny', the first respondent as reference. These were goods which were taken to the warehouse, the first respondent was busy building at the time.

[68] The second respondent denied that he appropriated these goods or that he stole goods to the value reflected in the charge sheet.

[69] During cross-examination by the State, second respondent testified that everything which he (second respondent) did at Pupkewitz Megabuild was known by the first respondent. He testified that in each and every instance where an employee of Pupkewitz Megabuild would take building material from the yard to the warehouse first respondent was busy building, he (second respondent) was aware of it.

[70] Second respondent testified that although De Almeida may have been the person who assisted Hauwanga in obtaining goods ordered by Hauwanga, he (ie second respondent) would be the one who would invoice the goods against Hauwanga's account, because only he as supervisor could give discount on Hauwanga's account.

[71] According to second respondent, the procedure was that the booking out of goods were done solely on quotations for Hauwanga – no sales were generated on the system. The quotations would then stay on Hauwanga's file, maybe for a month or two long after the goods had already been delivered. At the stage when there was money (credit) on Hauwanga's account only then would advice notes, invoices and SAD 500 forms be generated. The first respondent was at all relevant times aware of this procedure. This procedure was not done at the insistence or request of Hauwanga but because of their internal arrangements. The procedure was similar to the one used in respect of the first respondent. Exhibit H (dated 23 February 2008) was like a master list and when on different occasions when certain goods were booked out (which appeared on the list) separate quotes would be made out.

[72] Second respondent confirmed that since there was no stock loss during the February stocktaking that the goods must have been taken to first respondent's warehouse between 1 March and 5 March, since first respondent resigned on the latter date.

[73] In reply to a question in the State's pre-trial memorandum whether second respondent will dispute that the generated invoices, quotations¹⁵ and advice notes listed in Schedule 1 to the charge sheet, he (second respondent) stated that he indeed generated the advice notes and the quotation, but that the tax invoices were generated at the desk of Anna Immanuel (the next day). And that every tax invoice is preceded by a corresponding advice note. The second respondent confirmed that the tax invoices always reflected the operating code of the person who generated the sale.

[74] Responding to another question in the State's pre-trial memorandum, the second respondent during cross-examination admitted that he signed the invoices, quotation and advice notes listed in Schedule 1 to the charge sheet. The second respondent confirmed furthermore that he himself put the 'security check' stamp on the advice notes indicating his approval.

[75] The second respondent was referred to exhibit T,¹⁶ exhibit J,¹⁷ exhibit K,¹⁸ and exhibit L.¹⁹ Second respondent confirmed that the tax invoices reflected in exhibit L, all dated 13 March 2008 (the day prior to his resignation), were goods he booked out on Hauwanga's account and all those sales had been generated by himself.

¹⁵ There is only one quotation.

¹⁶ Advice notes which refer to counts 1 – 103 and counts 106 – 118.

¹⁷ Advice notes which refer to counts 104, 105 and 119.

¹⁸ Advice notes which refer to counts 126 and 127.

¹⁹ Tax invoices which refer to counts 125, 128 – 137.

[76] The second respondent admitted that himself and the first respondent never complied with the laid down procedures when he or they removed goods and materials from Megabuild Oshikango branch. He readily conceded the delivery of goods were supposed to be with an invoice and that in the case of the first respondent, first respondent had to pay in cash, ie the payment procedure was not followed. The same applied in respect of Hauwanga, he was supposed to pay his account before he could take more goods.

[77] Second respondent testified that he never signed invoices, he only signed advice notes.

[78] Second respondent also testified that Hauwanga generated his own invoices in order to avoid paying tax at the border, that he (second respondent) knew that it was wrong to do so but nevertheless decided to assist Hauwanga.

[79] Second respondent further testified that Hauwanga did not export all the goods purchased at Pupkewitz to Angola but instead sold some of the goods on the local market. Second respondent testified that he knew that this amounted to a criminal offence but nevertheless assisted Hauwanga as their main purpose was to make sales.

Submissions on appeal by counsel

[80] Mr Makando who appeared on behalf of the first respondent submitted that the only issue on appeal is the question whether or not the High Court misdirected itself

or erred in law and on the facts by acquitting the first and second respondents in respect of counts 1 – 137.

[81] Counsel submitted that this appeal should fail on four points.

[82] Firstly, the court *a quo* made credibility findings in respect of Hauwanga. It was submitted with reference to relevant authorities that in criminal or civil cases the issue of credibility of witnesses is one which trial judges are better qualified to deal with and determine than appellate judges and that a court of appeal would be slow to interfere with credibility findings of the trial court unless it appears from the record of the proceedings that the trial judge made ‘pertinent errors’ in respect of his or her credibility findings.

[83] It was submitted that central to the acquittal of the first and second respondents on counts 1 – 137 was the testimony of Hauwanga. The findings of fact and findings in respect of credibility made by the court *a quo* was not erroneous, it was submitted. Thus credible and reliable testimony being absent, the acquittal of the first and second respondents was obviously to follow.

[84] It was pointed out to Mr Makando by this court that it was clear from the record that as a witness, the first respondent was very vague, could not answer questions, was argumentative and was also warned by the court *a quo* but no reference was made thereto by the court *a quo* in his finding on credibility. It was submitted by Mr Makando that since the court *a quo* believed the first respondent it did not want to

'deal with those instances', and that the failure by the court *a quo* to raise it, cannot be seen as a misdirection.

[85] The second issue on which this appeal should fail, it was submitted, was the lack of cogent and sufficient evidence justifying a finding of guilty in respect of the first respondent.

[86] It was submitted that from the evidence presented by the State there was nothing which pointed to a misrepresentation of fact or a distortion or deviation from the truth made by the respondents.

[87] It was submitted that where the State relies on circumstantial evidence, as in this case, the cardinal rule is firstly, that 'the inference sought to be drawn must be consistent with all the proved facts. If not, the inference cannot be drawn, and secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude the other reasonable inferences, then there must be a doubt whether the inferences sought to be drawn is correct'.²⁰

[88] It was submitted that from the host of invoices nothing could be gleaned to indicate that the first respondent misrepresented to either Pupkewitz or B H Motor Spares CC that all is well at Pupkewitz Oshikango. It was submitted that one of the reasonable inferences to be drawn from the documentation was that all the goods

²⁰ *R v Blom* 1939 AD 188 at 202-203 by Watermeyer JA.

were indeed exported to Angola by Hauwanga or exported on his behalf by his employees. It was submitted that the inference sought to be drawn by the State is not consistent with all the proven facts and further that from the said proven facts there are a host of reasonable inferences to be drawn. It was submitted that in the circumstances the guilt of the respondents had not been proven beyond reasonable doubt by the State.

[89] The third issue was that the State and respondents' versions were mutually destructive of each other with regard to the alleged fraud or theft of goods. It was submitted that the State's case was that goods on the account of Hauwanga or B H Motors Spares CC were quoted for B H Motor Spares CC but not received by them and further that the goods were delivered at first respondent's warehouse, which allegations, the first respondent denied and had given a different version. It was submitted that no reasons were advanced by the State as to why the version of the first respondent was false in the circumstances of this case or ought to be outright rejected. There was thus no obligation on the court *a quo* to decide which version it accepts, and even if both versions were accepted, the court *a quo* was correct to acquit the respondent in respect of counts 1 – 137. The court *a quo* was thus bound to acquit the first respondent.

[90] The fourth and final issue why this appeal should fail was the impermissible 'splitting of charges'.

[91] It was submitted that from a summary of the substantial facts, counts 1 – 137 were either the ‘offshoots and/or intertwined’ with count 139,²¹ and thus be it one invoking a single intention test or single evidence test. It was submitted that counts 1 – 141 were indeed a single act allegedly perpetrated by the respondents and that the charges amounted to an impermissible ‘splitting of charges’.

[92] Mr Grobler appeared in this appeal on behalf of the second respondent.

[93] It was submitted that apart from ground (i) all the grounds of appeal relate to invoices issued to B H Motor Spares CC over the period 8 August 2007 to 13 March 2008.

[94] It was submitted that in the charge sheet it is alleged that the respondents acting in concert falsely pretended that B H Motor Spares CC and/or Hauwanga had purchased goods and materials listed in Schedule 1 to the indictment and the said goods were delivered whereas in truth it was never sold and/or delivered. The argument went that Gallagher testified that it was impossible to determine whether Hauwanga received or did not receive the goods described in the invoices 1 – 139 mainly because necessary documentation had been destroyed. Therefore it is impossible to infer from the charges that the respondents ‘over a period of time persistently perpetuated fraud by using the same *modus operandi* as averred by the State in their heads of argument. It therefore follows that there are no grounds to allege (as the State did in their heads of argument) that the court *a quo* erred by not

²¹ Count 139 received as exhibit H, was a quotation found by an employee of Pukpewitz Megabuild and which was admitted by first respondent relating to goods removed by him.

reading the charges set out in paragraph 1 of the indictment together with Schedule 1 attached thereto.

[95] It was submitted that the onus was on the State to prove beyond reasonable doubt that the goods and materials described in each invoice were not sold and/or delivered to B H Motor Spares CC and/or Hauwanga.

[96] It was further submitted that since Hauwanga was the main witness of the State, the goods and materials described in counts 1 – 137 were in fact never sold and delivered to B H Motor Spares CC or Hauwanga. It was therefore imperative that the evidence of Hauwanga must have been credible, instead the court *a quo* found that Hauwanga did not tell the truth.

[97] It was submitted that the court *a quo* did not relinquish its duty to analyse the evidence before drawing inferences, as submitted by the State in its heads of argument. In the court *a quo*, it was submitted, following the approach in *S v Radebe* 1991 (2) SACR 166 (T) by considering all the evidence and not only parts of the evidence.

[98] It was submitted that contrary to the contention on behalf of the State, namely, that the respondents acted with common purpose and actively or impliedly associated themselves in the use of quotations, invoices and/or advice notes to commit fraud or theft, the court *a quo* found that:

'Without an intention to commit an offence on the part of the accused, the failure to follow the laid down procedures for supply in goods on credit to customers will just amount to a failure to follow the laid down procedures of the company and nothing more.'

[99] With reference to the record, it was submitted that there are a number of indications in the evidence of Hauwanga that he was 'possibly not truthful'.

[100] Ms Husselmann, on behalf of the State, in response to the submission that there was an impermissible splitting of charges, pointed out that the original charge sheet had been subdivided into three paragraphs. The first paragraph sets out counts 1 – 139, the second paragraph sets out the particulars of count 140 and paragraph three the particulars of count 141. She submitted that the court *a quo* wrongly followed the submission of Mr Murorua that the respondents had been charged with only three counts with their alternatives. It was submitted that the court *a quo* failed to read the charges set out in the indictment together with Schedule 1 attached thereto resulting in a failure by the presiding judge *a quo* to appreciate that the respondents had over a period of time persistently perpetuated fraud using the same *modus operandi*. It was submitted that each misrepresentation in the 'schedule charge sheet' constituted a separate fraudulent act.

[101] Ms Husselmann submitted that in its judgment at the conclusion of the defence case, the court *a quo* misdirected itself in law and on the facts. It was submitted that since the court *a quo* found that Hauwanga's evidence contradicted 'in many material respects' evidence of his 'own witnesses and vice versa', that the court *a quo*

erroneously regarded Hauwanga as the complainant and 'seemingly' placed an onus on Hauwanga to prove that he did not order and receive the goods set out in the various quotations. In addition the court *a quo* found that the State failed to prove counts 1 – 138 and 140 'due to conflicting stories of the State witnesses'. It was submitted that the court *a quo* did not express itself on what it regarded as contradictions – nowhere in the judgment did the court *a quo* point out these material contradictions.

[102] It was submitted that the court *a quo* was factually incorrect to find that if it were not for Messrs Otto and Grimbeek who 'activated the alarm' in respect of irregularities at Oshikango Megabuild, Hauwanga would not have queried the so-called irregular bookings on his account. It was pointed out by Ms Husselmann that on the evidence Hauwanga met Messrs Otto and Grimbeek at the Ondangwa airport during March 2008 where Hauwanga raised his concerns in respect of the correctness of the information reflected on some invoices, but that the court *a quo* failed to take into account the evidence of Hauwanga that during December 2007 he became worried about the high amount on his statement and that he spoke to the second respondent about it during January 2008 who informed him that he could not assist because the computers were off-line, and that he (Hauwanga) subsequently contacted Meuwesen who could not assist him. The meeting at Ondangwa airport took place after Hauwanga's efforts to get clarity on his account proved fruitless. Hauwanga himself took the initiative long before the meeting at the airport.

[103] In respect of the finding of the court *a quo* that no evidence was presented to prove common purpose, the State submitted that this is not borne out by the record of the proceedings, and in particular, the evidence of the second respondent during cross-examination.

[104] In respect of the finding by the court *a quo* that a deviation from the correct guidelines and procedures by the respondents, may at best attract an administrative sanction in the form of misconduct proceedings, it was submitted that the court *a quo* failed to appreciate that the respondents' use of the wrong procedure by invoicing goods on the account of B H Motor Spares CC weeks or months after the said goods had already been dispatched amounted to a misrepresentation made to their employer. The misrepresentation, through the conduct of the respondents, manifested itself by pretending that the goods as reflected in counts 1 – 137 were credited to the account of B H Motor Spares CC, on the dates reflected thereon, that goods were ordered on those dates, and were dispatched to Hauwanga, which were all lies – the goods had been dispatched some time prior to the advice notes being generated by the second respondent.

[105] Ms Husselmann submitted that the State proved that the respondents had the necessary intention to deceive as well as the intention to prejudice. Firstly, the respondents knew that the representation was false since both respondents allowed Hauwanga to remove goods from the premises of Pupkewitz Megabuild without payment or invoicing to an account. Secondly, the State proved an intention to induce Pupkewitz to embark upon a course of action potentially prejudicial to itself as a result

of the misrepresentation. Presently both the respondents intended Pupkewitz to believe that goods were dispatched properly, and thus exposed Pupkewitz to an unmitigated risk that the goods would not be paid for as there was no proof of delivery. The potential prejudice came about it was submitted, when the goods left the premises of Pupkewitz without payment and without anybody promising to pay for the goods in the form of having the goods credited to his account. The potential prejudice also lies in the possibility that Hauwanga may claim not to have received the goods and Pupkewitz, save for the word of the respondents, would not have been able to prove otherwise through advice notes or invoices.

[106] It was submitted in the present instance that the State not only proved potential prejudice, but actual prejudice, since Hauwanga not only denied having received the relevant material, but claimed money back, already paid by him to Pupkewitz. Pupkewitz was sued in a civil matter and had to pay B H Motor Spares CC a certain amount of money in settlement of Hauwanga's claim – proving actual prejudice.

The charges of fraud and the doctrine of common purpose

[107] Fraud is defined as 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.²²

[108] Essentially some form of deception or misleading on the part of the perpetrator is required in order to prove misrepresentation on a charge of fraud.

²² *S v Campbell* 1990 NR 274 (HC) at 277B and the authorities referred to; *S v Gardener & another* 2011 SACR 570 (SCA) at 578F-G.

Misrepresentation may be either express or implicit,²³ it may be made by *commissio* (positive act) or an omission, and it is possible to make a misrepresentation not only to a person but also to a computer or machine.

[109] The prejudice may be either actual or potential. The State submitted that Pupkewitz suffered not only potential prejudice but indeed actual prejudice.

[110] Potential prejudice means that the misrepresentation, objectively viewed, involved some risk of prejudice or that it was likely to prejudice.

[111] In *R v Heyne & others*²⁴ Schneider JA pointed out that . . . ‘the false statement must be such as to involve some risk of harm, which need not be financial or proprietary, but must not be too remote or fanciful, to some person, not necessarily the person to whom it is addressed’.

[112] The learned judge continued at 622F as follows:

‘In *Rex v Kruse*, 1946 A.D. 524, the meaning of the expression “calculated to prejudice” was discussed . . . It was pointed out that it was not subjective but objective and in that respect equivalent to “likely”. But the use of the word “likely” was not intended to convey that there must be a probability as opposed to a risk of harm . . .’

[113] In *S v Kruger & another*²⁵ Ogilvie Thompson JA referred with approval to a passage in *Kruse* as expressed by Tindall JA at 533 as follows:

²³ *S v Thomas & others* 2007 (1) NR 365 (HC).

²⁴ 1956 (3) SA 604 (A) at 622E-F.

²⁵ 1961 (4) SA 816 (A) at 829H.

'It seems to me that when it is said that the act must be "calculated to prejudice", the word "calculated" does not refer to the intention of the doer of the act but is used in the sense of "likely", and the meaning is that the act must be of such a nature as, in the ordinary course of things, to be likely to prejudice.'

[114] The existence or otherwise of the prejudice must be determined as at the time when the misrepresentation is made.²⁶

[115] It has further been held that the expression 'would or could have caused prejudice' does not mean that prejudice would have been caused but that it could have been caused.²⁷

[116] Non-proprietary prejudice would suffice eg in *R v Gweshe*,²⁸ a storekeeper had pretended to his employer that five customers had purchased goods on credit from the store on accounts prepared by him and exhibited to his employer that one Pedious was their employer guaranteeing payment. The court held as follows at 297E:

'In the present case, however, the *modus operandi* adopted by the appellant was such to bring about the risk of further harm to his employer by involving him in a fruitless and, to some extent, expensive search for non-existent debtors, and perhaps also to involve him in abortive legal proceedings against Pedious, the alleged guarantor of the fictitious debts.'

²⁶ *Kruger (supra)* at 828A.

²⁷ *Kruger (supra)* at 829A. See also *S v Campbell* 1991 (1) SACR 503 Nm at 507d.

²⁸ 1964 (1) SA 294 (SR) at 297E. See also *Heyne (supra)* at 624-625.

[117] Since the test is objective, the question is not whether the perpetrator intended to cause prejudice, but whether objectively viewed, his or her misrepresentation would have brought about prejudice.

[118] The State must also prove intention ie the perpetrator must know or foresee that the misrepresentation is false and that the perpetrator intended his misrepresentation to be acted upon ie to induce someone to embark upon a course prejudicial to himself or herself as a result of the misrepresentation.

[119] It is of no consequence that the perpetrator had no intention to acquire some advantage or benefit.

Common purpose

[120] The State in the charge sheet alleged that the respondents acted with a common purpose when committing the counts of fraud.

[121] Common purpose is present when two or more persons having a common goal to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. In *S v Banda & others*²⁹ Friedman J explained the concept of common purpose as follows:

'It is a convenient and useful descriptive appellation of a concept, that, if one or more persons agree or conspire to achieve a collective unlawful purpose, the acts of each one of them in execution of this purpose are attributed to the others. The essential

²⁹ 1990 (3) SA 466 (BG) at 500J-501A.

requirement is that the parties thereto must have and did in fact have the same purpose – that is a common purpose.’

[122] Proof of a common purpose is not dependent upon a prior agreement or conspiracy but may be inferred from the circumstances of the case where the evidence shows active association with the common purpose. In *S v Cooper & others*³⁰ the following appears:

‘Although the common design is at the root of a conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. The agreement may be shown like any other fact by circumstantial evidence. The detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession, relative to the main design, will sometimes of necessity be admitted as steps to establish the conspiracy itself. It is generally a matter of inference deduced from certain acts of the parties concerned, done in pursuance of a criminal purpose in common between them.’

[123] In *S v Nakale & others*,³¹ although that court dealt with the issue of discharge at the close of the State’s case, the following passage, in my view, is apposite in respect of the issue of common purpose:

‘Furthermore, if more than one accused is charged for committing the same offence and the State alleges common purpose, evidence which strongly implicates one accused, but to a lesser extent another accused, may be evidence on which a reasonable court may convict, if the basis of common purpose is laid by the State in its evidence. If *prima facie* a scheme or a scam can reasonably be inferred from the State’s evidence, in which all, or more than one, of the accused may have played a

³⁰ 1976 (2) SA 875 (TPD) at 879E-F. See also *Banda (supra)* at 501B-C.

³¹ 2006 (2) NR 455 (HC) at 465B-C.

part, however small, to achieve the result of committing the alleged offence(s) an accused that may appear less guilty at the close of the State case, may at the end of the trial also be convicted.'

The judgment of the court *a quo* and the evaluation of the evidence

[124] I shall first deal with the last point raised by Mr Murorua, namely alleged impermissible 'splitting of charges'.

[125] The court *a quo* found that if one has regard to the manner in which the indictment was framed it appears that counts 1 – 139 were supposed to be one count of fraud, with its alternative counts. The court *a quo* referred to the second page of the charge sheet which alleged that the respondents acting in concert and/or common purpose between the period 8 August 2007 to 19 March 2008 had the intention to defraud Pupkewitz and Sons (Pty) Ltd. The court *a quo* then stated that to charge an accused person with 139 counts of fraud, the State was supposed to state the period of each fraud count separately in order for an accused person to understand the offences he or she was facing even if the offences were committed during the period as reflected in the charge sheet. The court then on this point concluded that Mr Murorua also seemed to understand that counts 1 – 139 constituted one count, not separate substantive counts.

[126] The annexure to the charge sheet³² sets out counts 1 – 139 with reference to a schedule which consists of a spreadsheet with five columns marked A to E and 139 rows – each row contains the particulars of a different count. Column A refers to each

³² Constituting p 9–12 of the charge sheet and which forms part of the record.

separate count sequentially numbered, column B to the date on which the representations had been made, column C to invoice numbers, column D to advice note numbers, and column E to the value of the goods reflected on each individual invoice.

[127] It should be apparent that the court *a quo* failed to read the charges as set out in the indictment read with the annexure attached to the charge sheet. Had the court *a quo* had regard to the annexure it would not have laboured under the impression that counts 1 – 139 were supposed to be one count. Since counts 1 – 139 relate to different invoice numbers, different advice notes, and different values of goods, there is no substance in the submission that there was an impermissible duplication of charges – each advice note generated by the second respondent represents a separate and distinct misrepresentation. This court as far back as 2001³³ held that ‘the term “splitting of charges” is not really appropriate . . . The concern of the court is not so much with splitting of charges as with duplication of convictions’. This is so because s 83 authorises the drafter of a charge sheet, by reason of uncertainty which facts can be proved by the available evidence, to include all the charges which could possibly be supported by the facts, even if they overlap. It is therefore the task of the court to guard against the duplication of convictions and not the prosecutor’s duty to refrain from duplication of charges. In my view neither the single intention test nor that of the single evidence test finds application to charges 1 – 139.

³³ In *S v Gaseb & others* 2001 (1) SACR 438 NmS at 447A-F; *S v Gaseb & others* 2000 NR 139 at 149A-F.

[128] In *S v Albertina Nghipandulwa*³⁴ the court referred to the usefulness of 'columned schedules' in fraud cases showing the separate alleged acts committed, the dates on which the alleged acts had been committed, and the amounts involved, as well as what the total prejudice was.

[129] The court *a quo* in my view, without giving any reasons for so finding, misdirected itself by finding that counts 1 – 139 constitute only one count.

[130] In respect of the issue of common purpose the court *a quo* reasoned as follows (para 43 of the judgment):

'It is apparent from the above conclusions that the State in the present matter did not produce any evidence to the effect, with the exception of goods described in quotation number Q 00066425 dated 25 February 2008, that the accused planned or agreed or that they actively or impliedly associated themselves in the use of quotations or invoices or advices for purpose of loading goods to commit fraud or theft. The evidence at hand is that accused 2, although worked under accused 1 as his branch manager, did not require permission from accused 1 to help customers who came to the store to do business. Accused 2, as a sales person generated sales at times without the knowledge of accused 1. Thus the State failed to prove common purpose between accused 1 and 2.'

[131] The evidence presented by the respondents themselves however paints a different picture. The first respondent testified that he ran Pupkewitz Megabuild Oshikango as if it were his own business, and that he himself and second respondent assisted Hauwanga to obtain material by means of quotations when Hauwanga

³⁴ An unreported High Court decision in case number CA 91/98 delivered on 06 August 2001.

reached his credit limit. His testimony was that he took a calculated risk when he approved of such a procedure.

[132] The second respondent confirmed that this procedure was not done at the insistence of Hauwanga but because of his and first respondent's internal arrangements. This procedure was done for the sole purpose to increase sales at Pupkewitz Megabuild according to the second respondent. The uncontested evidence of the second respondent was that in each and every instance where building material had been removed from Pupkewitz Megabuild to the warehouse, the first respondent had been building, he (ie second respondent) had been aware of it. It was also his uncontested evidence that everything which he (second respondent) did at Pupkewitz Megabuild, was known to the first respondent.

[133] The finding by the court *a quo* that the second respondent generated sales at times without the knowledge of the first respondent is not supported by the testimony of the second respondent and is a misdirection.

[134] It should be apparent, in my view, that the first and second respondents devised and implemented a scheme or a scam, involving Hauwanga, with the common purpose to increase the sales volumes of material or goods in an unprocedural way and therefore enabling Hauwanga to buy on credit when he was disqualified to do so. Whether their failure to follow the laid down procedures of the company amounted to just that and nothing more (as found by the court *a quo*) must accordingly be considered.

[135] The respondents' use of the wrong procedure namely that second respondent, with the knowledge of the first respondent, invoiced goods to the account of B H Motor Spares CC weeks or months after the said goods had already been dispatched, amounted to a misrepresentation made to their employer. This is so because when they entered into the computer system of Pupkewitz that certain goods are now invoiced to the account of B H Motor Spares CC, they are misrepresenting that now, ie today, whilst making this entry into the computer, these goods were ordered and delivered to B H Motor Spares CC. This representation was not the truth. They induced Pupkewitz to embark upon a course of action, namely, to accept on the face of the entries, that B H Motor Spares CC received those goods, must pay for it, and that there is a legally binding contract, enforceable by a court of law.

[136] The fact that Hauwanga could deny that he had received goods to the value of N\$4,9 million underscores potential prejudice. The conduct of the respondents were 'of such a nature as, in the ordinary course of things, to be likely to prejudice'.³⁵

[137] As it turned out Pupkewitz had to embark upon (partially successful) court action in order to recoup its losses. The harm Pupkewitz suffered was the N\$4,9 million worth of disputed goods of which they received payment of N\$3,7 million. This leaves a shortfall of N\$1,2 million. Pupkewitz instituted a counterclaim and paid B H Motor Spares CC N\$750 000 in settlement of that civil suit. Their actual loss was therefore N\$1,2 million plus N\$750 000 which equals N\$1 950 000.

³⁵ *S v Kruger & another (supra)*.

[138] The failure by the respondents to follow the laid down procedures of the company in my view amounted to much more than just that, namely a failure to follow procedure, but in fact facilitated the misrepresentation by the respondents. These misrepresentations formed the basis of the charges preferred against the respondents ie, the charges of fraud, alternatively theft.

[139] It is clear from the testimonies of the respondents that, the only inference which can be drawn in the circumstances is that they knew that the representations were false. First respondent's testimony was that he was aware of the risk he took to operate in such a manner. Both respondents knew that goods could not be dispatched without either payment in cash or invoicing it to an account.

[140] Furthermore in respect of both respondents the only inference to be drawn in the circumstances is that both intended Pupkewitz to believe that goods were dispatched properly and that Pupkewitz could thus be exposed to an unmitigated risk namely, that the goods would not be paid for as there was no proof of delivery.

[141] It must be stated that in terms of the definition of the crime of fraud, the crime is completed when potential prejudice has been proved as was done in this case. Therefore the respondents had committed the crime of fraud when the risk of harm was proved. The fact that Pupkewitz might have suffered actual harm was therefore not a *sine qua non* for the proof of the crime of fraud.

[142] The second and third grounds of appeal raised by Mr Makando are therefore bound to fail on the basis of the testimonies of the two respondents themselves. Similarly the argument raised by Mr Grobler on appeal for the same reason stands to be dismissed. I must add that irrespective of the dismissal of the evidence of Hauwanga by the court *a quo*, the respondents cannot escape conviction on the charges of fraud based on the evidence of the respondents themselves and their undisputed unauthorised *modus operandi*, – they should have been convicted of the crime of fraud in respect of counts 1 – 137 by the court *a quo*. The appeal accordingly succeeds. The respondents are convicted of fraud in respect of counts 1 – 137.

[143] The parties (ie appellant) and counsel on behalf of the respondents did not address this court on the issue of sentencing, except for the suggestion by counsel for appellant that this court may impose an appropriate sentence.

[144] I am of the view however that it would be prudent, in the absence of any submissions on sentence, to refer the matter back to the High Court for the purpose of sentencing in respect of counts 1 – 137.

[145] In the result, the following orders are made:

- (a) The appeal succeeds and the acquittal of the respondents in respect of counts 1 – 137 is substituted with a conviction in respect of counts 1 – 137 (fraud).

(b) The matter is referred back to the High Court for sentencing.

HOFF JA

DAMASEB DCJ

MAINGA JA

APPEARANCES

APPELLANT:

I O Husselmann

Of the office of the Prosecutor-General,

Windhoek

FIRST RESPONDENT:

S S Makando

Of S S Makando Chambers, Windhoek

SECOND RESPONDENT:

Z J Grobler

Of Grobler & Company, Windhoek