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**IN THE HIGH COURT OF SOUTH AFRICA FREE STATE DIVISION,
BLOEMFONTEIN**

08/2022

THE STATE

V

MBANA PETER THABETHE AND 7 OTHERS

JUDGMENT

INTRODUCTION:

[1] In this matter Mr Serunye, Ms Witbooi and Ms Nkula-Nyoni appear for the State, Messers. Mantsha, Edeling, Semanya, Forbay, Oldwage and Hellens for the defence.

[2] The defence at the close of the State's case, brought an application in terms of section 174 of the Criminal Procedure Act, Act 51 of 1977 for the discharge of accused 1, and accused 3-8.

[3] With regards to accused 2 no such application was brought and she is merely mentioned herein for the sake of completeness.

[4] The State and defence counsels in addition to their oral submissions, favoured this court with comprehensive heads of argument. I am indebted to them.

THE CHARGES:

[5] The charges as preferred by the State are extensive and have been fully canvassed in the indictment and on the record. I shall therefore only refer thereto succinctly as I am loathe to overburden this judgment any more than is necessary.

[6] Count 1 relates to accused 1 and 2 only. The State alleges that the accused are guilty of contravening section 86(1) of the Public Finance Management Act (PFMA), Act 1 of 1999, read with the provisions of sections 1, 36, 38, 39, 44(2) and 76 (4)(c) of the Act, and further read with the provisions of section 217 (1) of the Constitution. In respect of this count the State conceded that the evidence against accused 1 fell short of the required threshold and accordingly the application for the discharge of accused 1 in respect in respect of count 1 should succeed. Accordingly, I shall not take this any further than I have.

[7] Count 2 relates to all the accused. The State alleges that all the accused unlawfully and intentionally and with common purpose committed fraud.

[8] Count 3 relates to accused 4, 5, 7 and 8 only. It is alleged that they are guilty of contravening the provisions of section 4 read with the provisions of sections 1, 8(1) of Act 121 of 1998 and further read with the provisions of section 51(2) of the criminal law amendment act 105 of 1997.

[9] The fourth and final count relates to accused 4, 5, 7 and 8. It is alleged that they are guilty of contravening the provisions of section 4 read with the provisions of sections 1, 8 (1) of Act 121 of 1998 and further read with the provisions of section 51(2) of the criminal law amendment act 105 of 1997.

THE PLEA(S)

[10] All the accused tendered pleas of not guilty to the charges as preferred against them. All but accused 2 and 6 elected to exercise their constitutional right to remain silent. As accused 2 is not the subject of this application I shall not venture to deal with her plea explanation. Accused 6 proffered admissions pertaining to certain entities and their registration details in terms of section 220 of the CPA, which admissions have been fully canvassed on the record. No purpose would be served by repeating same here.

LEGAL POSITION ACCOMPLICE WITNESS

[11] The aforesaid charges evince that the alleged unlawful conduct of accused 1-3 and Mr Cezula in respect of count 1, is a precursor to the remaining counts, as their alleged unlawful conduct gave rise to the remainder of the charges as preferred. As the other alleged role players i.e. accused 1-3, stand accused in this court, the State's case, on the disputed facts, i.e. the circumstances surrounding and leading up to the compilation and approval of the deviation submission as well as the authenticity of the signatures thereon, in respect of counts 1 and 2, is premised primarily on the evidence of Mr Cezula, who at the request of the State, was warned by this court in terms of section 204 of the CPA, in respect of the offence of fraud. It deems to be noted already at this stage of the judgment that Mr Cezula is, on this score, a single witness. His evidence therefore, as both a single and an accomplice witness stands to be treated with caution.

[12] It is established law that a conviction can follow even on the evidence of a single competent witness provided same is trustworthy and satisfactory in all material respects. In **S v Sauls and Another 1981 (3) SA 172 (A)** the court held that;

"There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told."

[13] As regards the evidence of an accomplice, the court in **S v Hlapezula and Others 1965 (4) SA 439 (A) at 440 D-H**: explained the position thus;

'It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self- confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit. Accordingly there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as a corroboration implicating the accused in the commission of the

offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near or dear to him; see in particular *R v Ncanana*, 1948 (4) SA 399 (AD) at 405- 6; *R v Gumede*, 1949 (3) SA 749 (AD) at 758; *R v Nqamtweni and Another*, 1959 (1) SA 849 (A) at 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguards aforementioned.' See also **Tshiki v The State neutral citation (358/2019) (2020] ZASCA 92 (18 August 2019).**

[14] It is trite that by corroboration is meant other evidence which supports the evidence of the complainant, and which, on the issues in dispute, renders the evidence of the accused less probable.

APPLICATION FOR DISCHARGE

[15] Section 174 of the Criminal Procedure Act provides as follows;

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

[16] It is trite that "no evidence" does not mean no evidence at all, but rather that there is lack of evidence on which a reasonable court, acting carefully, might convict. Whether or not a discharge should be granted at the close of the State's case entails an exercise of a discretion by the trial court, a discretion which it must exercise judicially **(See in this regard S v Dewani (CC15/2012) [2014] ZAWCHC 188(8 December 2014).**

[17] In **S v Lubaxa, 2001 (2) SACR 703 (SCA)** the court held that;

"I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will

ordinarily vitiate a conviction based exclusively on his self-incriminatory evidence.

The right to be discharged at that stage of trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and s 12."

[18] It is trite that the credibility of State witnesses at this stage of the proceedings only play a very limited role as it can only be ignored only if it is of such poor quality that no reasonable person could possibly accept it. In this regard the court in **S v Agliotti, 2011 (2) SACR 437 (GSJ)** per Kgomo, J held as follows;

"In **S v Lavhengwa 1996 (2) SACR 453 (W)** the view was expressed that the processes under s 174 translate into a statutorily granted capacity to depart discretionally, in certain specific and limited circumstances, from the usual course, to cut off the tail of a superfluous process. Such a capacity does not detract from either the right to silence or the protection against self-incrimination. If an acquittal flows at the end of the State case the opportunity or need to present evidence by the defence falls away. If discharge is refused, the accused still has the choice whether to testify or not. There is no obligation on him to testify. Once this court rules that there is no prima facie case against the accused, there also cannot be any negative consequences as a result of the accused's silence in this context. ...

I agree with the view that it is an exercise in futility to lay down rigid rules in advance for an infinite variety of factual situations which may or may not arise. It is thus, in my view, also 'unwise to attempt to banish issues of credibility' in the assessment of issues in terms of s 174 or to 'confine judicial discretion' to 'musts' or 'must nots'."

[19] The legal position with regards to applications in terms of section 174 of the CPA can be summarised thus, therefore summarise the legal position regarding applications in terms of section 174:

- (a) An accused person is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself;
- (b) In deciding whether an accused person is entitled to be discharged at the close of the State's case, the court may take into account the credibility of the State witnesses, even if only to a limited extent;
- (c) Where the evidence of the State witnesses implicating the accused is of such poor quality that it cannot safely be relied upon, and there is accordingly no credible evidence on record upon which a court, acting carefully, may convict, an application for discharge should be granted. **(See S v Dewani *supra*)**

[20] Having outlined the legal position, I now turn to analyse the evidence. The facts of this case are very laborious as evinced by the number of witnesses called and the duration of this trial. Once more I am loathe to overburden this judgment, however in the circumstances I must.

MR. SIMPHIWE STANLEY MAHLANGU:

[21] Mr Mahlangu plies his trade at National Treasury as a Director Forensic audits and has been with said unit for the past 11 years. His duties entail the performance of forensic and performance audits in terms of the Public Finance Management Act. He is responsible for all 3 spheres of government and renders support to these as well as law enforcement agencies.

[22] During February 2021 he was approached by Lt. Col. Mtolo, who furnished him with

certain documents and requested that he peruse same and determine which procurement procedure was followed by the Department in appointing accused 5 as a service provider, more specifically whether the procedure followed was a deviation from normal procurement process or a PPP, and if so ascertained, to then determine whether the correct procurement procedures were followed. He explained a PPP to be a commercial transaction between a state entity and a private entity wherein the private entity assumes a function that ordinarily resides with the state. Alternatively, that it could be a commercial transaction that involves both the state and a private entity wherein the private entity will utilize a building belonging to the state. In such transactions the private entity would absorb most of the operational, financial and technical risks.

[23] In order to aid him in his quest, he was favoured with the following documents which were provisionally admitted into the record;

- A submission drafted by Mr Cezula to deviate from prescribed procurement processes
- A contract concluded between the Free State Department of Agriculture and Nulane Investments
- National Treasury Practice Note 6 of 2007/2008 dealing with issues relating to deviations from normal procurement processes
- A letter from an entity known as World Window Impex which was attached to the submission drafted by Mr Cezula
- A letter from Dr Masiteng in response to Mr Mahlangu's letter.

[24] He also extracted from the National Treasury Departmental system the BAS payment printouts which indicated that the Department of Agriculture on diverse dates made payments to accused 5 totaling R24 984 240 (twenty four million nine hundred and eighty four two hundred and forty rand).

[25] At this stage already, it is apposite to mention that all these documents were copies and not the original documents. After some spirited objections from the defence I provisionally admitted these into the record. I shall at the opportune time revert to this aspect.

[26] He testified further that the submission for deviation from prescribed procurement processes, dated 06 October 2011 was compiled by Mr Cezula. In it Mr Cezula sought approval for a deviation from the departmental Supply Chain Management (SCM)

processes in order to appoint Nulane Investments to perform due diligence and feasibility studies for the Mohoma Mobung Project. As motivation for the sought deviation, Mr Cezula used the contents of the World Window Impex India Pvt. Ltd letter which I deal with in more detail later on in this judgment. It would appear that it is on the strength of this letter that Mr Cezula recommended that deviation from the SCM processes be granted and that Nulane Investments be appointed as a service provider. The deviation memorandum appears to have been signed and dated on the 06 October 2011 in recommendation by Mr Cezula, and Ms Dhlamini (Accused 3), who at the time was the CFO of the Department. Same appears to have been signed on the 07 October by Mr Thabethe (Accused 1), in his then capacity as the Head: Rural Development, and appears to have been approved on the same date by Accused 2, Dr Moorosi, in her capacity as the accounting officer of the Department of Agriculture and Rural Development.

[27] He testified that as per Treasury Practice Note 6/2008, regulation 16A6.4 (hereinafter Treasury Regulation 16A6.4) a service provider could be appointed without following prescribed procurement processes in cases of emergency or in instances where the goods and or service sought to be procured was available only from a sole service provider.

[28] He further established that SSM 2 was a copy of a contract concluded between the Department of Agriculture and Rural Development and Nulane Investments signed on the 28 October 2011 in Sandton. As appears from said document the signatories purported to be Accused 6, Mr Dinesh Patel, as the Project Director for and on behalf of Nulane Investments. Mr Patel was at the time a person unknown to him. Underneath Mr Patel's purported signature, a Praveen Permal purportedly appended his signature as a witness. On the portion of the contract meant for the signature of the official signing for and on behalf of the Department the names in manuscript, L Moorosi appeared, ostensibly signing as the HOD of the Department. The date and place of signature were left blank. Underneath the names L Moorosi, appeared the names SS Dhlamini, which person purportedly signed as a witness. Both L Moorosi and SS Dhlamini are persons unknown to Mr Mahlangu. He however testified that he recognised the name SS Dhlamini from some other departmental documents he had seen prior, whose designation in those documents was indicated as the departmental CFO.

[29] He further established that the contract was for a study to be conducted for the development of a concept document for the project as outlined in the commercial proposal of the contractor and to identify a possible strategic partner for the project.

The term of the aforesaid contract entered into between the department and Nulane Investments was with effect from 01 November 2011 to the 28 February 2012, and the total amount payable being R24 948 240 (twenty four million nine hundred and forty eight thousand two hundred and forty rand).

[30] Furthermore that in terms of the aforesaid contract, a mobilization payment of R12 492 120 (twelve million four hundred and ninety two thousand one hundred and twenty rand) which represented 50 % of the agreed upon amount, was to be paid by the department to Nulane Investments Nedbank's account number [...] in advance, against issuance of a purchase order, with the remainder to be paid in three equal monthly payments within 30 days of completion of monthly purchase milestones and sign off by the project manager.

[31] He further ascertained that in terms of the aforementioned contract, Mr Thabethe was indicated as the departmental official to whom any correspondence and or notices from the contractor to the department regarding this contract had to be forwarded and that in turn, same for Nulane Investments had to be forwarded to Mr Dinesh Patel.

[32] Subsequent to perusing all the documents he had at his disposal, he ascertained from the National Treasury whether the project was registered as a PPP, upon not finding such registration at National Treasury, he then enquired from and requested the Department to furnish him with proof, if any, that the project was registered as a PPP with the Free State Provincial Treasury. In response, Dr Masiteng, informed that the Department was not in possession of any PPP documents as the project was not a PPP. Dr Masiteng instead furnished him with certain documents relating to this project which documents were in the custody of the Department at that time.

[33] In the course of his investigations, he could also not find any evidence suggesting that the entities Nulane Investments or World Window Impex made any financial contribution towards the project as required in a PPP project.

[34] He further established that the Department had a SCM policy which outlined, amongst others, the processes to be followed as well as regulated how and when deviations ought to occur. With regards to the deviation process, he could recall three instances in which deviations were allowed in terms of the SCM policy, viz, emergency, impracticality and when items of historical or value are to be procured.

[35] He could also not find any evidence that the Department had complied with Treasury Regulation 16A6.4 in that it did not report the deviation from the prescribed procurement processes in respect of the project. He based this conclusion on the following; prior to May 2016, governments were required to report any deviations, in terms of Treasury Regulation 16A6.4 for all transactions in excess of a million rand, to the Provincial Treasury and the office of the Auditor General. This was the sum total of Mr Mahlangu's evidence.

CROSS EXAMINATION

[36] Save to quibble with Mr Mahlangu regarding, amongst others, his credentials as an expert on matters relating to SCM, the fact that in the course of his investigations he did not consult with and afford any of the accused an opportunity to be heard, nothing much turned on his cross examination which had the effect of vitiating his evidence, I shall therefore not take this matter any further than I have.

EVALUATION:

[37] It is clear from the aforesaid evidence that Mr Mahlangu, firstly, testified ex post facto, his evidence is based on copies of documents he was favoured with. His evidence does not take the State's case anywhere, save to only confirm that the amount of R24 948 240 (twenty four million nine hundred and forty eight thousand two hundred and forty rand) somehow made its way out of the coffers of the Department and into the banking account of Nulane Investments.

[38] Secondly, on the disputed documents, his evidence did not serve as authentication of same, he was neither the author thereof nor was he presented when same were either authored and or signatures appended thereto. On this aspect too, his evidence does not take the state's case any further.

[39] With regards to the procurement processes embarked upon by the Department, his evidence only served to show what should've been and not what was. Differently put, his evidence was largely to demonstrate which procurement processes were to be followed when different services were to be procured etc.

MR. SHADRACK CEZULA

[40] Prior to Mr Cezula's evidence, the State informed the court that he is implicated in

the offence of fraud and will, during the course of his testimony, tender evidence that may incriminate him in the commission of said offence. Having duly warned him in terms of section 204 of the CPA, he indicated that he understood the explanation and furthermore informed the court that he also took it upon himself to seek independent legal advice on the provisions of the aforesaid section. Having satisfied myself that he understood the import of the section as well as the implications that may obtain pursuant to his testimony, and that he freely and voluntarily presented himself to testify, he proceeded to tender his evidence.

[41] He testified that he is a Manager in the Department of Agriculture for the District of Lejweleputswa and holds a Master's degree in Public Management. He is responsible for projects implementation. He has been in the employ of the Department since 2007. In 2009 he was appointed as the Manager for Assets and Disposal which is a unit within the Department's SCM unit. During April 2011 he was appointed in an Acting capacity as the Senior Manager for the broader SCM unit as evinced by a copy of his letter of appointment dated and signed on the 12 April 2011 by the then MEC for Agriculture and Rural Development, which was provisionally admitted into the record. On the 13th April 2011 he accepted the acting appointment as evinced by his letter of acceptance provisionally admitted into the record.

[42] Subsequent to his acceptance of the acting appointment, Ms Dhlamini, the then CFO and his supervisor and also Accused 3 in these proceedings, on the 6 June 2011 addressed a letter to one Mr. M Ndumo confirming therein that Mr Cezula had acted for an uninterrupted period of 6 weeks as Manager: SCM.

[43] He testified that due to the lapse of time, he did not know the whereabouts of the originals of these documents. At the end of the State's case and upon a request from defence counsel, I ruled these letters finally admitted into the record, as Mr Cezula had in the course of his evidence authenticated same and in any event no serious issue was taken therewith by the defence.

[44] He further testified that during midday on the 6 October 2011 Accused 3 visited him in his office and with a sense of urgency instructed him to compile a deviation submission in order to appoint Nulane Investments as a service provider for the Mohoma Mobung Project. No supporting documents were initially furnished to him, instead Accused 3 stood in his office and dictated the contents of the submission to him, whilst he typed. He testified that this left him with a great sense of trepidation as he felt that something was greatly amiss due to the haste with which the submission had to be compiled. He did as

instructed albeit he was anxious. This he testified was an error of judgment on his part as he could have indicated to the CFO that what she wanted done amounted to an irregularity.

[45] At some point, whilst typing he indicated to Accused 3 the difficulty of compiling a deviation submission without any supporting documentation. She then exited his office and momentarily returned with the World Window Impex Pvt. Ltd letter. He testified that accused 2 informed him that she was given this letter by Accused 1. This letter, dated 3 October 2011, purported to be from a company called World Window Impex Pvt. Ltd, being importers of ferrous and non-ferrous metal scrap. As per the letter this entity was based in New Delhi, India and was addressed to the Free State Department of Agriculture and Rural Development. He included this letter, as furnished, in the submission as supporting documentation for the deviation.

[46] For purposes of this judgment I deem it apposite to refer to the letter in full, and it reads thus;

Subject: Letter of intent to participate as a Strategic Partner in Project Mohoma Mobung

Gentlemen;

Department for this pioneering project, which we feel will be a flagship project for the whole country and will go a long way in alleviating the poverty situation by creating a sustainable agro-business model that will help the small-holder farmers gain financial independence and become positive contributors to the economy of South Africa.

We wish to introduce ourselves as Worlds Window Group, which is a diversified business conglomerate with global presence. The group is into the business of manufacturing, logistics, infrastructure, mining and metal scrap trading. South Africa is a territory known to us since the last 15 years. We, until mid of last year, were operating outside of South Africa as metal scrap traders. The presence, however, has further intensified with recent acquisition of some coal mines in South Africa. Going forward, we have plans of major investments in the territory by replicating our Indian business model here. Our presence extends to the most developed economies of the world viz. UK and USA, as well as to the most dynamic countries viz. the Africa nations. The reach is further pervading into the Caribbean, Far East Nations, UAE

and the entire Indian Sub-Continent. In all, the Group has its own offices in over 25 countries of the World. The Group is into logistics and infrastructure segment where we are running a fleet of around 400 trailers and several dry ports in India. Our freight forwarding offices are extant in India, London, Manchester, New Jersey, Los Angeles, Durban, Dubai and Singapore. Several more are under final stage of establishment in Kenya, Germany and several other European destinations.

We are equally passionate about initiating social change and empowering the weaker sections of society through similar projects as initiated by your Department.

Please therefore consider this as a letter of intent from ourselves to participate in a strategic partnership with the Free State Department of Agriculture and Rural Development under the Private-Public Partnership (PPP) framework of South Africa to initiate this project by a funding mechanism that will be mutually aggregable to all parties and in conformance with the requirements of the National and Provincial Treasury Departments of South Africa.

We agree in principle to participate on an equal (50/50) partnership basis to fund this project, which we understand has been initially projected at R1 billion. This, however, would be subject to a proper due diligence process conducted by a reputable Agency covering the commercial aspects of the project with detailed business plans which we would request the Department to conduct in order for us to take an informed decision in the matter.

We would request that the above due diligence and planning exercise be conducted by an Agency of our choice to provide the necessary comfort to our

stakeholders. In the event that you are in agreement with our proposal, we would request you to revert to us in the affirmative and we will immediately advise you of the details of the proposed Planning Agent.

We would consider it an honor to become part of this prestigious Project and hope that we can form a strong strategic partnership that will enable us to jointly embark on this ambitious project that will transform the rural landscape of South Africa.

Thanking you, Yours faithfully,

For World Window Impex Pvt. Ltd Anil Misra

Director

[47] The submission he compiled as dictated to by Accused 3, reads as follows;

To the HOD

DATE: 06 October 2011

REQUEST TO DEVIATE FROM NORMAL TENDER PROCEDURES TO APPOINT NULANE INVESTMENTS 204 t/a NULANE MANAGEMENT SERVICES

1. Purpose

To request approval for deviation in terms of the departmental SCM policy and regulations for the appointment of NULANE INVESTMENTS 203 (PTY) LTD t/a Nulane Management Services to perform due diligence and feasibility study for Mohoma Mobung Project.

2. DISCUSSION:

The unaccepted low results that were obtained with development attempts especially also with land reform and agricultural development were also experienced in certain parts South Africa, and in spite of the intensive attention that was given to development aspects over the past decade, mainly on political and academic fields, one still finds a great degree of disillusionment and even pessimism concerning development in Africa and South Africa in particular. The poverty problem has increased, which indicated that development strategies did not really show any meaningful results. Within the land reform programme, which is one of the most strategic and political important development and affirmative attempts, a success rate of less than 50 percent was obtained so far.

The poverty and development problems in the third world countries gave rise to the stimulating of thoughts about the concept of development and a change in development strategies. It was accepted that the development models which was inspired due to the growth and modernization of first world countries, was not applicable for the circumstances in under-developed countries. The conventional

development approach was criticized and questioned.

On the other hand, the agricultural sector, which is the most natural resource of the majority of the provinces, are however far under-utilized, and only contributes a small portion to further economic development.

The department and the province recognised the need for an appropriate development and land reform approach, and recommended that:

- extension, support and advisory services should be upgraded and trained to be more holistic oriented, and
- more holistic development approach should be followed when planning for agricultural and land reform projects.

The above discussions resulted in the decision by the department to come up with a more integrated approach that will address the issues and concerns as raised and further address the zero hunger strategy; hence MOHOMA MOBUNG PROJECT.

3. MOTIVATION

The SCM regulations and policy of the department allow the accounting officer to dispense with the official procurement process established and procure any required goods and services through any convenient process, which may include direct negotiations, but only in the following cases;

- Emergency or exceptional cases;
- If such goods or services are produced or available from a single provider only;
- For the acquisition of the special works of art or historical objects where specifications are difficult to compile;
- In any other exceptional cases where it is impractical or impossible to follow the normal procurement processes.

The appointment of Nulane Management Services makes it impossible for the department to follow the normal procurement processes due to the fact that it is a condition from the intended Strategic Partner (World Window Impex India Pvt. Ltd) that for them to be able to have comfort and confidence in the due diligence and feasibility study, they require us to use the services of Nulane Management Services as they know

the quality of work they performed in similar projects around the world. **Refer to the attached letter.**

4. FINANCIAL IMPLICATIONS

The budget required for these services will require an estimated amount of R 25 million.

5. POWER OF APPROVAL

The power of approval is vested in the Head of Department as the accounting officer for the Department. The SCM regulations and policy of the department allow the accounting officer to dispense with the official procurement processes established and procure any required goods and services through any convenient process, which may include direct negotiations, but only in the following cases;

- Emergency or exceptional cases;
- If such goods or services are produced or available from a single provider only;
- For the acquisition of the special works of art or historical objects where specifications are difficult to compile;
- In any other exceptional cases where it is impractical or impossible to follow the normal procurement processes.

6. RECOMMENDATIONS

It is recommended that:

- Approval be granted for deviation in terms of the departmental SCM policy and regulations for the appointment of NULANE INVESTMENTS 204 PTY. LTD t/a Nulane Management Services.

[48] Subsequent to finalizing the submission he emailed the draft submission to both Accused 1 and 3 as the originators of the instruction for deviation, for their comfort and or inputs. He however did not attach the World Wide Impex letter to the email sent. A while later, the submission was transmitted back to him via email.

[49] Upon receiving the document back from Accused 3 with some changes made to it,

he signed and recommended that the deviation be approved. Accused 3 in his presence and whilst both were in his office, also signed and recommended approval. He then informed Accused 3 that the submission required the signatures of Accused 1 and 2, to which she informed him that Accused 1 had allegedly given the go-ahead for payments to be processed and that he would reportedly sign the submission on the following day. He testified that he personally did not speak to Accused 1 regarding the deviation submission. At the time he recommended that Nulane Investments be appointed as a service provider, he did not know if any contract between the latter and the Department had been concluded, in fact, his evidence is that, as at the time of his evidence, he still did not know.

[50] After he and Accused 3 appended their signatures thereon, the submission was forwarded to the office of the HOD for approval. Subsequent to signing the submission, he and Accused 3 took same to the finance section for the payment to be processed. As no financial details of Nulane Investments were furnished to him, none were captured in the submission. At Finance however, Accused 3 handed to the processing official a piece of paper on which the banking details of Nulane Investments were written on. This is how the initial payment of R12 000 000 (twelve million rand) came to be processed, he however had no knowledge with regards to when actual payment was effect to Nulane Investments.

[51] As per the submission, it appears that both Accused 1 and 2 appended their signatures thereon on the 7th October 2021, respectively, recommending and approving the deviation. He was however not present when Accused 1 and 2 appended their signatures thereon and could therefore not vouch for the authenticity of said signatures.

[52] He testified that During May 2012 he was eventually moved from the SCM section to the Monitoring and Evaluation section.

CROSS EXAMINATION

[53] As to be expected Mr Cezula was subjected to lengthy and spirited cross examination which centered mainly on his status as a section 204 witness. It was among others, put to him that he had an incentive for implicating the accused in the manner that he did in his evidence in chief. What is noteworthy of his evidence in chief as well as during cross examination is that, not once, did Mr Cezula implicate himself in the commission of the offence of fraud. Tried as he did, not even Mr Serunye could get Mr Cezula to admit to committing an offence, let alone fraud. Instead he testified that he committed an error of judgment. At best what he admitted to was contravening the Public

Finance Management Act, in his words, he says;

"One, you do not have a tax clearance for a company. When you do not have banking details for the company it means there is something wrong and you need to take time. The part of it is to make sure that you have compared the market as to whether, is it true that this company was a sole provider of this service".

[54] He further goes on and has the following to say;

"So I have erred or contravened that act by allowing myself to go the route of doing this that I had to be under pressure to do".

EVALUATION:

[55] I found Mr Cezula to be an evasive witness especially on the very reason he found himself in court. He was hell-bent on distancing himself from committing the offence of fraud. This I find rather disquieting. Prior to testifying in court, on his own version, he was fully apprised of the provisions of section 204, firstly by Capt. Mtolo and secondly through the independent legal advice he sought. Throughout his time in this court, I found him to be an intelligent and well-spoken witness, and who more often than not, gave calculated responses to questions in cross examination. Throughout his evidence he sought to downplay his role, to at best an employee who had no choice but to comply with an instruction from a superior and at worst misconduct in not complying with the PFMA. I cannot conclude that he misunderstood his presence and role in these proceedings, if anything his prevarication must point to his mendacity as a witness.

[56] During arguments the State submitted that it was not necessary for Mr Cezula to state in his evidence that his conduct amounted to fraud and was thus unlawful. They correctly submitted that the court as the trier of fact must determine the facts, apply the law thereto and make the necessary finding. To avail himself of the indemnity however, he should have either testified that he had the intention to defraud the Department and acted in accordance therewith. In the absence of an express admission of committing fraud, he should at the very least have given factual evidence fulfilling the essential elements of fraud from which this court could then infer the commission of the offence of fraud. He did not do that.

[57] The facts in this case are that Mr Cezula testified that he categorically did not

commit fraud. In fact he testified that he compiled the submission because he was acting on an instruction from accused 3 and that he made an error of judgment by not speaking up that it was wrong to compile a submission without supporting documentation. By his own admission he lacked the requisite *mens rea* to commit fraud.

[58] Furthermore it is quite illuminating that there is no corroboration for the version as advanced by Mr Cezula. This court only has his mere say-so that the deviation submission was compiled under the circumstances he says it was. It is further illuminating that he could not recall a single person to whom he handed the deviation submission to for signature, or who the official was he dealt with at Finance. Perhaps more illuminating is the fact that having realised that something was "abnormal" he kept a copy of the original submission, but did not make a copy or print out of the emails with the now altered submission.

[59] In **S v Gentle 2005 (1) SACR 420 (SCA)** the court held that "It must be emphasised immediately that by corroboration is meant other evidence which supports the evidence of the complainant, and which renders the evidence of the accused less probable, ***on the issues in dispute***". I must hasten to add that Mr Edeling in cross examination, did not place in issue the signature of accused 3 on the deviation submission, taking issue only with the why and wherefores thereof. When regard is had to Gentle *supra*, that aspect cannot lend corroboration to the version of Mr Cezula as it is an aspect not in dispute.

[60] The facts as placed before me and indeed the evidence of Mr Cezula do not evince that there was any prior agreement between him and any of the accused and or a decision to act in concert with any of the accused to defraud the Department, in any event none was alleged in the indictment, and even it were so alleged, Mr Cezula testified that, save for accused 1-3, he did not know the other accused at all.

[61] The state alleged that the accused acted in concert by misrepresenting to the Department of Agriculture and Rural Development, that the World Window Impex letter was received in the ordinary course of business. On their own version, this cannot stand. Not only did they not present evidence to prove the collusion, save for introducing the letter into evidence, the state did not take the trouble to investigate the origins of same. This could've been easily ascertained.

[62] Taking into account that a little more than R24 million (twenty four million rand) of tax payers money was at stake, the lackadaisical manner in which this matter was investigated

is truly to be lamented. To find that common purpose under these circumstances existed would be a quantum leap.

[63] What perhaps stands to be lamented even more is that the very witness the state depended on to prove counts 1 and 2 came to the stand and lied. I say this emboldened by the following; during cross examination Mr Cezula alluded that because of his uneasiness with how things unfolded, he kept in a folder a copy of the deviation submission he authored as well as copies of his acting appointment letters. These he took with him when he was eventually transferred to his current post in Lejweleputswa. What I find improbable is why he would not keep copies of the allegedly altered submission. Why would he not print out the email communication between him and accused 2 and 3 in this regard?

[64] On the question of whether I should grant Mr. Cezula indemnity from prosecution I hold the view that his evidence and his mendacity speak for itself, to justify a refusal to grant him indemnity. He is therefore not granted indemnity.

MR. AVELAMADODA STOFIE

[65] Mr Stofie is a former employee of the FS department of Agriculture whereat he plied his trade as a Director: SCM, having joined the Department in August 2017. He is currently employed at the Local Government SETA. During 2021, whilst he was still in the employ of the Department, he was requested by the HOD, Dr Masiteng, to assist in retrieving the documents required by the police. The documents required were procurement documents related to Nulane Investments. Upon searching for the said documents, he could not locate them at the SCM unit.

[66] Upon a further search he located two copies of the same contract entered into between the Department and Nulane Investments as well as a copy of the Nulane report. These documents were located in the HOD's office.

[67] At Finance he located copies of the following; the deviation submission, registration documents relating to Nulane Investments, a document titled Amended Commercial Proposal Summary: Mohoma Mobung, of two invoices from Nulane Investments.

[68] At finance he retrieved an invoice for an amount of R 4164 040.00 (four million one hundred and sixty thousand and forty rand). Both these invoices were from Nulane Investments to the Department. From the departmental computer system the following

payment stubs were retrieved indicating payments to the Nulane Investments Nedbank account; R12 492 132.00 (twelve million four hundred and ninety two thousand) R4 000 000 (four million rand).

[69] With regards the payment stubs and printouts, in so far as they were computer generated documents I admitted same into the record

[70] He also handed to the police a document he found with Dr Masiteng bearing the names of the entities Deloitte and Nulane date 12 March 2012 and titled Final Report for due diligence on selected projects identified by the Free State Department of Agriculture and Rural Development.

[71] He testified that he bore no knowledge of the whereabouts of the originals of these documents and surmised that they may have been lost when the Department moved to their Glen offices.

CROSS EXAMINATION:

[72] Mr Stofile's evidence centered mainly on how and where he acquired the documents requested by the police. He was neither the author nor the custodian thereof. He also could not assist the court with regards the whereabouts of the original documents. As his evidence did not take the state's case any further on the issues in dispute I shall not take it any further than I have.

MR. SEKOTOANE MOALOSI

[73] Mr Moalosi testified briefly that he is the Deputy Director: Financial Accounting. He testified broadly about the processes that need to be followed in order to effect payment to a service provider. He testified amongst others that he had no knowledge of the originals of these disputed documents, as the departmental documents were placed in boxes during the move to the Glen offices. He also could not explain by whom and when the alterations on the amount to be paid was made or the inscription "irregular" on the transaction logsheet.

MS. SETOANE MERRIAM MOTSHUMI

[74] Ms Motshumi is an employee of the Department of Agriculture since her permanent

appointment in June 2011. She is employed at the Finance section of the department. During the financial year 2011-2012 her duties entailed capturing payments to be made on BAS. Her testimony can briefly be summarised as follows; on the 12 March 2012 she was furnished with a sundry payment and an invoice which she captured on BAS. She further testified that after authorization, the documents were brought back to her and she then compiled the transaction logsheet and forwarded same together with the documents for filing.

[75] During cross examination Ms Motshumi conceded that at the time she populated and signed the transaction logsheet the words "irregular" did not appear on the original document she dealt with.

[76] Ms Motshumi's evidence too did not take the state's case any further on the issues in dispute.

MR. KENOSI THUBISI

[77] Mr Thubisi is an employee of the Department of Agriculture and Rural Development and has been in its employ since his appointment in 2012. He is employed there as an Administrative Clerk at the SCM unit. He recalls that on the 27 March 2012 he was requested by Mr Mofokeng to complete Sundry payment Advice for Nulane Investments in the amount of RS 000 000. 00 (five million rand). After completing same, he signed it and took same to Mr Mofokeng who also signed and requested him to take same to the CFO's office, which he did, and this he testified, is the last he had sight of these documents. He was not present when the documents were signed by whoever appended their signature thereon after he did. He could not assist the court with regards to, by whom and when, the amount of RS million was altered to R4 million.

[78] Mr Thubisi was subjected to lengthy and difficult cross examination which reduced him to tears. Contrary to the suggestions made during cross examination that Mr Thubisi was an unreliable witness, hence the tears, having had the opportunity to observe him, I am of the view that he was simply overwhelmed by the forum he found himself in. I am satisfied that the tears notwithstanding, he was an honest witness. In any event he too could not take the state's case any further on the disputed issues. He too did not know what happened to the original documents he dealt with, he did not know by whom and when the alteration in the amount to be paid was made on the copy.

MR. JOSEPH MOLOI

[79] Mr Moloi is a Senior State Accountant in the employ of the Free State Department of Agriculture and Rural Development. His total tenure in the Department is 36 years. He gave a broad overview of the workings of the unit with regards to how and when payments are processed. His evidence did not take the state's case any further.

MR. MAHLOMOLA PETRUS MOFOKENG:

[80] Mr Mofokeng is a retired employee of the Department. He testified that during March 2012 he received documents for payment of R5 million rand to Nulane Investments. He gave same to Mr Thubisi and instructed him to compile a sundry payment advice and then to take same to accused 2 for her signature.

MR. GODFREY MAHLATSI

[81] Mr Mahlatsi was during the period between 2014 and 2021 employed as the HOD of the FS Provincial Treasury. He was requested to confirm whether the FS Department of Agriculture registered a PPP project in respect of the Vrede Diary Project as well as to confirm whether there was a budget for said project. As the said transaction took place prior to joining the Provincial Treasury, he had to consult various sources to get the information requested. He ascertained that the project was not registered with the Provincial Treasury as a PPP. He testified that albeit that the project was not registered with the Provincial Treasury, the Department could on its own conduct a feasibility study, and if this course was chosen, they did not require Provincial Treasury approval, provided that upon finalization of the study and the report being furnished, the Department had to submit same to National Treasury. He was able to ascertain that no such feasibility study was registered with National Treasury.

[82] Mr Mahlatsi could not assist this court with regards to whether the project was budgeted for or not. He testified that his scope was limited to ascertaining whether the project was registered as PPP with Provincial Treasury or not and whether funds were available. He testified that at the beginning of the financial year he ascertained that funds were not available but that during the budget adjustment an amount of R34 million was appropriated for the project.

MR. TAKISI MASITENG

[83] Dr Masiteng is the current HOD of the Department. He confirmed Mr Mahlangu's evidence in so far as it related to the latter's request to him for documents. He was furthermore approached by the police in terms of a section 28 warrant to furnish certain documents. He furnished the police with copies of the following documents;

- Transfer function in respect of the Department of Rural Development as signed by Mr Magashule
- Acting appointment of Dr Moorosi signed by MEG Thlabathi
- Acting appointment of Mr Cezula signed by MEG Zwane
- Mr Cezula's acceptance letter
- Confirmation of acting appointment signed by accused 3
- Mr Cezula's acceptance letter of the appointment as Manager: Logistics and Disposals
- Organisational structure
- Mr Cezula's appointment as a manager signed by Dr DB Malakoane

[84] Dr Masiteng could not account for the originals of all these documents. He ascribed this to what he called confusion that was caused by the Department moving offices from town to Glen College of Agriculture. He testified that this confusion resulted because the Dept. engaged the services of a service provider who was responsible for the packaging, transportation and off-loading of the boxes.

[85] Dr Masiteng was called by the State ostensibly to authenticate the disputed documents, sadly this fell flat. Firstly it became apparent during cross examination that he himself was not the custodian of the documents seized. The copies were found in different offices. He was not present when Stofile collected some of the documents. He could also not assist the court with regards to which procurement strategy was applicable during 2011, having located only the 2004 and 2012 SCM policies.

MR. OMRI VANZYL

[86] Mr Van Zyl is a former employee of Deloitte. He testified that whilst employed by Deloitte, the latter entered into a sub-contracting agreement with Nulane Investments to conduct a feasibility study for the benefit of the Department. After performing in terms of the contract and submitting a report, Deloitte was paid an amount of R1.5 million rand by Nulane Investments. He testified that throughout his dealings with Nulane Investments, Mr

Dinesh Patel was his contact. He was introduced to him by a Ms Rapetti. He met Mr Patel once or twice in person and the bulk of their engagements were per email. He specifically recalled one in person meeting at Tasha's attended by himself, Mr Botha, Mr Church and Mr Patel. He specifically remembered this meeting as they enjoyed the now infamous Dr Paw-Paw meal.

[87] Mr Van Zyl was called to authenticate the copy of the report produced by Deloitte. He could not produce the original as he testified that the original was probably destroyed due to Deloitte's 7 years retention policy. With regards to the report he testified that the copy that served before the court was not the report that the Deloitte team produced as it was altered and showed numerous track changes. In this regard the take-home point is that Van Zyl did not know who made the changes on the report or to whom at Nulane Investments the report was ultimately sent to.

[88] The less said about Mr Van Zyl's bona fides and credibility the better, suffice to say that during cross examination the wheels came off.

MR. WBOTHA

[89] Mr Botha was also an employee of Deloitte. Whilst at Deloitte he worked on the Nulane project and he was a project manager. He testified that whilst working on the project, his point's person at Nulane was a Mr Dinesh Patel. He communicated mostly via email with the said Mr Patel and only met him at the same Tasha's. I do not attach any value to this identification, regard being had to Mr Van Zyl's evidence and the now known suggestions to and interference with this witness. Mr Botha also alluded to some changes being made on their report but he too could not assist the court with regards to by whom and when said changes were made.

MR. CHARLES CHURCH

[90] Mr Church testified that during 2010-2012 he worked as a consultant for Deloitte. He and Mr Botha were co-project managers on the Nulane project. He testified that he knew Mr Sharma and was introduced to him by Mr Van Zyl during a brief meeting regarding the Nulane project. He also knew Mr Dinesh and was also introduced to him by Mr Van Zyl.

[91] The take home points from his evidence is that Deloitte and not Nulane Investments conducted the feasibility study and produced a report on their findings. He testified that the

report they compiled was handed to Mr Van Zyl. The prickly point though is, where is that report, because he categorically testified that the report that served before the court purporting to be the final report is not what he and his team produced and handed to Mr Van Zyl, as evinced by the many changes thereon. He furthermore could not assist the court with regards to, by and to whom, how and when the report was sent to Nulane Investments and the Department.

MR. ROBERT BOLZ

[92] Mr Bolz is employed by Deloitte as an Internal Legal Advisor and is an admitted attorney. He has been in the employ of Deloitte since 2012. Pursuant to Deloitte being served with a summons in terms of section 28 of the NPA Act 32 of 1998, dated 12/11/2020 to furnish certain information relating to the Nulane project, specifically, signed contracts, email communication, invoices and other ancillary documentation relating to the project for the period between 2011-2012, he requested the individuals who were involved with the project as well as the Deloitte's risk team to provide him with same. He was subsequently furnished with limited information and or documentation as most of the required information was no longer available due to Deloitte's 7 year retention policy. The team were only able to locate some email communication and invoices between Deloitte and Nulane.

[93] It emerged during cross examination that the risk team consulted comprised of Messrs. Kobus Swart and Eugene Lategan. Save for the retrieved documents being handed to him, Mr Bolz had no knowledge of their origins or by whom they were compiled. Furthermore that the search for the retrieved documents was done by Mr Lategan who retrieved the emails and the contract, the Deloitte Tech retrieved the invoices. It further emerged that during the course of collating the information, he consulted with Mr Van Zyl, who initially was reluctant to provide an affidavit as he reportedly had no recollection of the said transaction. He further testified that he knew of Ms Rapetti, albeit not personally, and that as far as he knew she was not asked about any knowledge she might have had regarding the project. He was also quizzed on whether a search for the email address [...] was conducted to which he testified he had no knowledge of said email address.

MRS. LINDA CHANNING

[94] Mrs. Channing is a retired ABSA employee. At the time of her employment with ABSA bank, she plied her trade as a Manager for Digital Channels responsible for

operational processes and procedures in relation to the onboarding of clients onto the CashFocus /Business Integrator client self-servicing system platforms. Prior to her retirement, she had been in the employ of the bank for 41 years. She deposed to an affidavit in terms of section 236 of the CPA.

[95] Briefly, she testified that ABSA bank has a facility known as ABSA Business Integrator Online Channel. This facility enables clients, upon application and approval by the bank, to link any account, to the client's existing ABSA bank account. Once the accounts are linked, the client will notify and furnish the bank with details of the persons authorized to approve transactions between the linked accounts. A system manager, the so-called super -user, will also be created and will effectively take control of the client profile. Once the process of creating the super-user is completed, the bank no longer had any control of the profile.

[96] The system manager is able create users from his environment to work on the system. What these people would be able to do on the system would be whatever the super -user granted them access to.

[97] She testified that Sahara Computers (Pty) Ltd has such a cash focus facility, with Mr Atul Gupta as the system manager, Ms Ugeshni Govender, Mr Evan Tak and Mr Sanjay Das as the operators. This cash focus facility consisted of approximately 32 accounts of various companies and private individuals. She testified that the purpose of the link was to enable Sahara Computers to obtain full access to the linked accounts and to receive and disburse funds without limitation between the accounts. The number and detail of these accounts within the cash focus facility are not in dispute.

[98] The following emerged during cross examination; the fact that one was a system manager of the facility, in this instance Mr Atul Gupta, did not necessarily mean that he was responsible for the transactions conducted therein. Differently put, it did not mean that a system manager would necessarily have authorized each transaction or had anything to do therewith. In fact the evidence is that Mr Gupta delegated authorization to effect transactions within the cash focus facility to certain identified operators.

[99] Mrs. Channing testified that she was not requested by the state to check who of the operators and or the system manager was responsible for the transactions in question. In fact she conceded that that information was readily available and would have been furnished had it been requested by the state.

MR. NORMAL PERCIVAL SMIT:

[100] Mr. Smit is specialist data analyst employed in the Financial Crime Compliance department of ABSA bank. He has been with ABSA for some 40 years. Pursuant to being approached by the police, he compiled an affidavit in terms of section 236 of the CPA the subject matter of which related to the ABSA account held by Pragat Investments (Pty) Ltd with account number 4[....]9. Annexed to his aforesaid affidavit are Annexures A and B which are respectively the financial transactional information for the period 01 July 2008 to 16 February 2016 and bank statements for the same period. The aforementioned period, he testified, represented the inception and date of closure of the account. He testified that aforesaid documents are or have been in the ordinary records of the bank and the entries therein have been made in the ordinary course of business of the bank and are in the custody or under the control of the bank.

[101] The main thrust of his evidence was to show the movement of money from Nulane Investments, Pragat Investments, Bank of Baroda and Islandsite Investments.

[102] The cross examination of Mr Smit elicited nothing to discredit his evidence, save only to point out that the records as presented to court were incomplete, with entries in June 2009 and May 2010 amongst others not accounted for.

MR. THISELE RANKOUATSANA

[103] Mr Rankuoatsana is a senior financial investigator employed by the National Prosecuting Authority. He was tasked with reporting on the flow of funds from whence it was paid by the Department of Agriculture to Nulane Investments. He also assisted Capt. Bunu of the DPCI to type the witness statements that the latter obtained from witnesses at Glen College of agriculture.

[104] Col Mtolo, also of the DPCI, furnished him with bank statements obtained from various banking institutions. Said bank statements related to the following entities; Nulane Investments, Burnelia, Pragat Investments, Islandsite Investments and Bank of Baroda, He analysed the said statements, the process he embarked upon entailed the identification, comparison of a link and timeline chart of deposits, withdrawals and transfers from the relevant accounts. The period of review was August 2011 to October 2012. His investigation revealed, amongst others, that the funds moved with alarming speed in

between the accounts and appeared to not be in the ordinary course of business.

[105] During cross examination Mr Rankuoatsana conceded that his period of review was narrow and this led him to not take into account other funds which flowed from Pragat Investments to Nulane Investments. It was put to him that there was nothing sinister about the movement of money in between these companies as these were loans *intra* the companies and that Islandsite was merely performing a treasury function. He conceded that indeed there was a regular flow of money by way of loans and nothing sinister and that the books were meticulously kept and in order and no funds were concealed.

MR. NTOKOZO ZAMA

[106] Mr Zama is a chartered accountant who was attached to the Zonda Commission of Inquiry into State Capture, commonly known as the State Capture Commission, as a financial investigator and is currently contracted to the Investigative Directorate. He too analysed bank statements, annual financial statements and ledgers of Pragat Investments and Islandsite Investments for the period February 2009 until February 2013.

[107] His analysis revealed that the flow of funds occurred with alarming and rapid speed. He also could not discern from any of the statement any business related expenses e.g. rental and or salaries. His conclusion with regards to the loan agreements attached to Accused B's affidavit were that they were concluded after the fact, i.e. after the auditors requested same.

[108] During cross examination Mr Zama was painstakingly taken through each and every transaction as reflected on the entities bank statements, ledgers and loan accounts. Pursuant to this exercise, he conceded that he made a fundamental error and started with the wrong opening balance. He readily conceded that this led to him making the erroneous finding in his report. He further conceded that had he used the correct opening balance, his findings would have been different and indeed would've evinced nothing sinister in the manner in which the books of Islandsite were kept. He further conceded that the movement of money within the Cash Flow group of accounts did not evince suspicious transactions, they merely represented movement of funds within the entities because of the treasury function performed by Islandsite Investments.

MR. IM BUNU

[109] Mr Bunu is a retired police officer who together with Col Mtolo attended to the Glen College of Agriculture in order to effect a search and seizure at the Department. The said warrant was addressed to Dr Masiteng the departmental HOD. As per the warrant, they were looking for tax invoices and quotations. The high water mark of his evidence is that Dr Masiteng requested a clerk to look for the documents as listed in the warrant. Said clerk left and went to another office and moments later, came back with certain documents. He was not present when the clerk was looking for and retrieved the documents. He therefore could not assist the court with regards to where and how these were retrieved.

[110] What followed is a comedy of errors; to say that the manner in which he and Mtolo dealt with the disputed evidence is to be lamented will be the understatement of the millennia. One would expect that senior police officials such as he and Mtolo would know how to handle evidence especially disputed evidence.

MR MANDLA MTOLO

[111] Mr Mtolo is a Col. at the DPCI and holds an LLB and BA degree in forensic science. He testified that he and Capt Bunu attended at the Glen College offices of the Department of Agriculture for purposes of conducting a search and seizure. Upon arriving and attending to the office of Dr Masiteng, they introduced themselves and explained the purpose of their visit. He testified that as he had another engagement, he left Capt Bunu there.

[112] The high water mark to his cross examination is that the defence successfully elicited from him that the disputed documents from the moment they were seized at Glen to where they were eventually stored were mishandled with no correct chain of custody being complied with. He furthermore conceded that upon receiving the documents he did not consult any of the accused if only to get their inputs regarding said documents. With regards to the World Window letter he conceded that he did not even attempt to establish the origins and or authenticity of said documents. So too was the positions with regards to the other disputed documents, he did not even attempt to have them authenticated by their forensic crime laboratory.

[113] At the risk of repetition, to say that the manner in which this investigation was conducted is a comedy of errors would be the understatement of the millennia. Mtolo is not only an experienced investigator, in fact, he is a specialist investigator, and he holds degrees in law and forensic science. One would expect that senior police officials such as

he and Bunu would know how to handle evidence especially disputed evidence.

CONCLUSION

[114] The state with regards to accused 1 in argument conceded that they did not pass muster of the threshold referred to elsewhere in this judgment, it follows therefore that in respect of count 1 he is entitled to his discharge.

[115] With regards to count 2, as per their indictment, what the state had to prove was misrepresentation on the part of the accused as well as that they acted in concert. Count 2 primarily was premised on the evidence of Mr Cezula, the deviation submission he compiled, as well the World Window letter. In a previous ruling, I ruled the letter and other documents inadmissible as they remained copies even after the state closed its case. The state contrary to the application to have the documents provisionally admitted into the record, did not lead a single witness and or evidence who successfully authenticated the disputed documents. What this court instead heard was the ineptitude of the investigators and indeed the lackadaisical manner in which evidence and disputed documents was handled and a government department who seemingly evinced a willful disregard to the manner in which official documents were to be kept and archived. Just on these aspects only, the state's case as presented was still born.

[116] However even if it could somehow be successfully argued that I misdirected myself on the admissibility of the disputed documents, the fact still remains, if admitted, what was the court expected to do with same, in the face of the evidence it was presented with. The answer is zilch. With the findings I made in respect of Mr Cezula, what weight, if any, could I attach thereto? Secondly the fact that Accused 3 appended her signature on the submission is still not corroboration for the veracity of Mr Cezula's evidence. If regard is had to the Gentle decision *supra*, corroboration is other evidence which supports the evidence of the complainant, and which, **on the issues in dispute**, renders the evidence of the accused less probable. Accused 3 does not dispute her signature she disputes the circumstances under which it was appended. The state did not lead evidence to fortify Mr Cezula's evidence on this aspect.

[117] Furthermore save for the computer printouts of the BAS and Sundry documents, the other Finance documents remained copies too, and to add salt to injury, even those in the form they were presented in before the court, on the State's version, were altered. Again no evidence was proffered to this court with regards to when, why and by whom the

documents were altered. Lastly and perhaps more importantly, the state did not prove any common purpose between the accused.

[118] On Count 2 the State regrettably failed to pass even the barest of threshold; prima facie proof. An application for discharge cannot be refused in the hope that the accused persons will incriminate themselves when they give evidence, thereby closing material defects in the state's case.

[119] On Count 3 the state had to prove that accused 4, 5, 7 and 8 unlawfully colluded and conspired with one another and with a common purpose to launder the proceeds of unlawful activities whilst they knew or reasonably ought to have known that the funds from the Department paid to Nulane Investments were proceeds from unlawful activities. Having had regard to the evidence led, this count and the decision I reach is probably the single most count that will invoke a sense of loss, if not dejection, to the citizenry of this country. It is an inescapable fact that almost R25 million rand of tax payers' money left the fiscus. The question that remains is why and who facilitated this. Regrettably, *in casu*, the institutions responsible to answer those questions failed. With their concessions Messrs. Rankuoatsana and *Iama* put the death knell on the state's case.

[120] The state regrettably failed to pass even the barest of threshold. At the risk of repetition; an application for discharge cannot be refused in the hope that the accused persons will incriminate themselves when they give evidence, thereby closing material defects in the state's case.

[121] With regards to the fourth and final count, the State fared no better. The state was, amongst others, required to prove the elements of misrepresentation to the Bank of Baroda, National Treasury and the Reserve bank and that in misrepresenting as they did, the accused acted in concert with each other. Needless to say no evidence from the Bank of Baroda, National Treasury and the Reserve bank was led in this court.

[122] I have already bemoaned the lackadaisical manner in which this case was investigated and approached, I can therefore not take this aspect any further than I have save to conclude with the following African Proverb; "Haste and hurry can only bear children with many regrets along the way".

[123] In the circumstances I make the following order:

123.1 The application in terms of section 174 of the Criminal Procedure Act for the discharge of accused 1, 3-8 is granted as follows;

123.1.1. Accused 1 is found not guilty and discharged in respect of counts 1 and 2.

123.1.2. Accused 3 and 6 are found not guilty and discharged in respect of count2

123.1.3. Accused 4, 5, 7-8 are found not guilty and discharged in respect of counts 2, 3 and 4.

123.1.4. Mr Cezula is not indemnified.

NG Gusha: AJ

DATE: 21/04/2023