



**IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY**

Reportable  
Case No: CA & R 62/23

In the matter between:

**DR DION THEYS**

**APPELLANT**

And

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Theys v The State* (Case no. CA & R 62/2023 (29 November 2024))

**Heard:** 29 July 2024

**Delivered:** 29 November 2024

Coram: Phatshoane DJP and Stanton J

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**Judgment**

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**PHATSHOANE DJP:**

[1] One of the key components to our constitutional vision is to make a decisive paradigm shift from the unchecked abuse of state power and resources that was virtually institutionalised during the apartheid era.<sup>1</sup> The Public Finance Management Act 1 of 1999 (PFMA) is the enabling legislative framework that regulates financial management in the national government and provincial

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<sup>1</sup> *Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly* 2016 (3) SA 580 (CC) para 1.

governments. It ensures that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively and provides for the responsibilities of persons entrusted with financial management in those governments.<sup>2</sup>

[2] The appellant, Dr Dion Garvey Theys, an acting Head of the Department of Health (HOD) and its accounting officer during the period 01 October 2009 to 31 March 2012, was entrusted with the statutory responsibilities referred to in the preceding paragraph. He is before us on appeal with leave of the Special Commercial Crimes Court, Kimberley (Magistrate V Smith), against his conviction on three counts of contravening s 86(1) read with ss 1, 38(1)(a)(iii); 38(1)(c) (ii); 38 (1)(n); 39(1)(b; 40(4); 40(5); 44(2)(d); 64 and 76(4)(c) of the PFMA, further read with s 217(1) of the Constitution<sup>3</sup>. He was sentenced to a fine of R150 000 or three-years imprisonment of which R100 000 or two-years imprisonment was suspended for a period of five years on certain conditions. R10 000 of the fine was payable to the clerk of the court on or before 7 September 2023 and thereafter R2000 on or before the 7<sup>th</sup> of each succeeding month until the fine was liquidated.

[3] It is vehemently contested in this appeal whether the appellant was correctly convicted of contravening the statutory provisions specified in the indictment. It is convenient at the outset to lay down the statutory scheme which forms the basis of the charges. First, is s 86(1) of the PFMA which provides that an accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of ss 38, 39 or 40 of the PFMA.

[4] Section 38 deals with the general responsibilities of accounting officers; it provides in s 38(1)(a)(iii); (c) (ii) and (n):

“(1) The accounting officer for a department, trading entity or constitutional institution-

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<sup>2</sup> Preamble – Public Finance Management Act 1 of 1999 (PFMA)

<sup>3</sup> The Constitution of the Republic of South Africa, 1996.

- (a) must ensure that that department, trading entity or constitutional institution has and maintains-
  - (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective;
- (c) must take effective and appropriate steps to-
  - (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and
- (n) must comply, and ensure compliance by the department, trading entity or constitutional institution, with the provisions of this Act.”

[5] Section 39(1)(b) stipulates that accounting officers should ensure that effective and appropriate steps are taken to prevent unauthorised expenditure whereas s 40(4) and (5) deals with some of their reporting responsibilities on matters of revenue and expenditure of departments. Section 44(2)(d) concerns the delegation of the powers of accounting officers or instructions to officials to perform duties assigned to the accounting officers which authority is subject to any limitations and conditions the accounting officers may impose. Section 64 prescribes that the executive directives, with financial implications, be in writing and where the implementation of such directives is likely to result in unauthorised expenditure, the accounting officer is to be held accountable for such expenditure unless he or she had informed the executive authority in writing of the likelihood of that unauthorised expenditure.

[6] The charges are further predicated on s 217(1) of the Constitution which provides that when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. In respect of the institutions to which the PFMA applies s 217 is given effect to by s 76(4)(c) of that Act which provides that the National Treasury may make regulations or issue instructions applicable to those institutions concerning the determination of a framework for an

appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective.

- [7] The appellant concluded three lease agreements on behalf of the Department of Health, Northern Cape (the department), with JP Hugo Residence t/a Hoffe Park, which was represented by Mr H O Jansen Van Vuuren, for the accommodation of the Department of Health's Henrietta Stockdale Nursing College (the nursing college) students at 30 Birbeck Avenue, Newpark, Kimberley (Hoffe Park). The first lease was concluded on 12 July 2010, for a term of one year ending 30 June 2011, for the accommodation of 60 students at the rental of R120 per student daily which included their three daily meals. The second lease was concluded on 24 December 2010, for a term of approximately six months ending 30 April 2011, for the accommodation of 41 students at the rental of R3 600 monthly per student inclusive of their three daily meals. On 28 November 2011, the third lease was concluded. Its inception was 01 July 2011. The duration was for a year ending 30 June 2012, for the accommodation of 200 students at the rental of R210 per student daily inclusive of meals.
- [8] It is set out in the charge sheet that the appellant did not follow any procurement process prior to concluding the aforesaid leases with Hoffe Park and had failed to record reasons for his deviation from inviting competitive bids. Insofar as the appellant procured services, as he did, it was contended that he unlawfully, wilfully or alternatively, in a grossly negligent manner failed to comply with the specified provisions of the PFMA. In addition, that he failed to ensure that the department has and maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; and or he failed to prevent unauthorised, irregular, and or fruitless and wasteful expenditure; and or he failed to comply and ensure that the department complies with the PFMA.
- [9] Apparent from the affidavit handed in in evidence by consent, attested to by Mr DM Gaborone, the Chief Financial Officer of the department at the relevant time,

from November 2009 to February 2013, the department paid R23 941 779 for the Hoffe Park leases. From May 2013 to November 2016, when the HOD had already left the services of the department, the department paid R60 784 722.60 for the Hoffe Park lease which at that stage appears to have been on a month-to-month basis. From February 2017 to March 2017 the amount of R2 223 834 was paid whereas from May 2017 to October 2018 approximately R9 143 828 was paid. In total the department paid rental in the order of R96 094 163.60. Prior to the closure of the State's case, it sought leave to bring an application for the amendment of the indictment, based on the evidence adduced, to reflect the rental paid in respect of leases, during the appellant's tenure as the HOD, to be R13 228 280 which amount appears to have been calculated by the parties based on the documentary evidence presented during the trial. The application for the amendment was deferred but never revisited. In its verdict the trial court fixed the value of the leases at R13 228 280.

- [10] The appellant had pleaded not guilty and tendered no plea explanation. The State called seven witnesses.
- [11] The Director General of the Northern Cape Provincial Government, Mr Justice Bekebeke, explained that the appellant ought to have been reasonably familiar with the provisions of the PFMA. He became aware of the contentious leases when the investigating officer (I/O) requested him to confirm the dates in respect of which the appellant had acted as the accounting officer of the department. Procurement of goods and services is a matter that falls within the discretion of the HOD. The duty to investigate financial misconduct lies with the Provincial Treasury but this did not prevent the National Prosecuting Authority (NPA) from instituting criminal proceedings against the perpetrators.
- [12] Mr Thabo Modise is a portfolio manager in the property division of Transnet responsible for the overall management of Transnet's residential, commercial and industrial properties in the Free State and Northern Cape. Transnet, represented

by Mr Modise, and JP Hugo Residence represented by Mr HJ Jansen Van Vuuren, concluded an agreement on 31 October 2012 in terms of which Transnet leased the same property referred to in the impugned leases from 01 September 2010 to 31 August 2013 at a rental of R40 000 per month excluding VAT. The contract did not prohibit subletting, provided Transnet consented thereto. Mr Modise is unaware that such consent was given. Nevertheless, the property was sublet to the department and there had been nothing irregular with that insofar as Hoffe Park rented the rooms for purposes of accommodation, he says.

- [13] Ms Nothemba Maxi Selemela was the principal at the nursing college during the relevant period. The college required accommodation for nursing students who at the time resided in various places in Kimberley. It was decided to accommodate them in a single residence in order to provide them with uniform services and for their convenience. Where accommodation is to be procured, as here, the process she embarked upon was to write a submission containing the number of students to be accommodated which included accommodation specifications in terms of the norms and standards of the South African Nursing Council. She submitted this document to her director. Ordinarily, her director would pass this submission to the chief director and the chief financial officer who would verify whether the goods and services to be procured were within the budget and further verify the availability of funds. Following this process, the submission would be transmitted to the HOD and the MEC, respectively, for approval. Once approved the submission would be forwarded to Human Resources for recordal and finally to the Supply Chain Management Unit (SCM) to follow the procurement process.
- [14] Ms Selemela says she was not involved in the SCM process. She intimated that after the accommodation had been secured, she and the college (the end user) were invited to inspect the premises to assess if it accords with the specifications. There had been no urgency to procure the accommodation but some pressure had been exerted. It took approximately two months, from the date her submission was drafted, for the students to be accommodated at Hoffe Park. The written

submission has been mislaid and could not be located. However, it existed when payments in excess of R1 million annually were made to Hoffe Park, approximately R223 200 on a monthly basis. She was aware that Hoffe Park did not belong to JP Hugo Residence but was Transnet's property because the chief director of the department had requested officials, prior to the engagement of JP Hugo Residence, to verify whether the accommodation could not be directly sourced from Transnet.

- [15] Ms Selemela's evidence took a different angle under cross-examination. It turned out that she was involved in the process of identifying a suitable building for students' accommodation. She and some colleagues in SCM went in search of accommodation around Kimberley but were unsuccessful. Their chief director, a certain Dr Mbulawa, suggested that they enquire from Transnet whether Hoffe Park could not be procured. There were some delays and eventually JP Hugo Residence acquired the Transnet's lease. Following this, Ms Selemela and her team inspected the building and were satisfied that it complied with the applicable norms and standards. Thereafter, SCM compiled a report, briefed the chief director and the leases were concluded. The contracts made provision for accommodation, catering and laundry services.
- [16] From 2016 Mr Steven Motingoe was the acting chief director: corporate services in the department. He is not aware of the procurement process that was followed to secure the leases because this was before he joined the department. He became aware of the leases towards the end of 2016 when the students took issue with the strict conditions attached to their accommodation. At the time, Ms Wookie had been recently appointed the HOD for Health. The department's legal services unit did not have copies of the leases and its director, Mr David Ndlovu, reported that legal services played no role in the procurement of nursing accommodation. It follows, as it were, that legal services had not drafted the contracts but were produced externally. Although this was not an anomaly legal services would still be required to verify the contracts.

- [17] Mr Faas, the director SCM of the department at the relevant time, explained that the department had in place the appropriate procurement and provisioning system which was fair, equitable, transparent and competitive as envisaged in the PFMA. In respect of goods or services above R10 Million a bid had to be advertised in the State Tender Bulletin. Where the contract value was less than R10 million but over R500 000 the advertisement would be placed in regional and national newspapers. Where it was impractical to obtain the goods and or services through a competitive bidding process, *i.e.* in cases of a sole supplier of goods and or services, or in cases of an emergency or urgency, a deviation would be permitted in terms of the Treasury Regulation 16A. He referred to this as a secondary procurement process.
- [18] Mr Faas explained that naturally financial projections serve as a guide in respect of the manner in which the market is to be engaged. He intimated that insofar as the rentals for the leases exceeded R500 000 the process set out above kicked in and it would have been initiated by a requisition and submission from the end-user (the college). In this case SCM did not have the requisition and the submission from the college with financial projections on the services to be procured to commence with the procurement process. He further indicated that the procurement of student accommodation is not an emergency. SCM could not say whether this was a case of a sole supplier as it was never afforded the opportunity to test the market.
- [19] Mr Faas testified that in addition to the said failure to follow the supply chain processes in this case there had been no proper deviation process in terms of Treasury Regulation 16A. Where there was a deviation SCM would draft a motivation and not the HOD, setting out reasons for dispensing with the cumbersome process. He was summoned to some meetings at the college when complaints emerged, which concerned, *inter alia*, the quality of food offered to the students, use of cold-water during winter and shortage of blankets. Mr Faas stated

that a proper procurement process would have eliminated these problems as these additional services would have been part of the bid specifications.

- [20] Mr Faas testified that in the normal course of events SCM would have uplifted the file which would contain the minutes of the bid specification committee (BSC), the bid evaluation committee (BEC) and the bid adjudication committee (BAC). Once the BAC had approved the bid and issued a letter of appointment bearing a unique bid reference this would be tabled before the HOD for the approval of the award. Following this proper process, the documents would be transmitted to the legal services department to draft a service-level agreement (SLA) or a contract to be concluded with a successful bidder. The copy of the signed contract together with the bid documents would be kept in the SCM unit and the originals filed with the Contract Management Unit (CMU).
- [21] Mr Faas said as the SCM had not been involved in the procurement process he could not find any documents in SCM which pertained to the leases. The second lease overlaps the first in that when it was concluded the first had not yet lapsed. This was an anomaly and hindered any procurement process that could have been implemented by SCM.
- [22] Mr Ockert Marthinus Vermeulen, a director supporting interlink financial systems in the Provincial Treasury, explained that in terms of the National Treasury Practice Note No 8 of 2007/2008, item 3.4.1, the accounting officers are required to invite competitive bids for goods and services above R500 000. Where there is a deviation para 3.4.3 required that the Provincial Treasury and Auditor General be provided with reasons for dispensing with the bidding process. The Provincial treasury had no record of approval of the deviation or digression, nor any proof of the submission of such documents or the extension of the contracts. The documents in respect of the three leases, he said, should be kept in the department even after the lapse of a nine-year period. He explained that had due diligence been performed, it would have been uncovered, when testing the market for the

first time through a bidding process, that the property belonged to Transnet to obviate the leases being concluded with a third party who had no ownership of the property. Mr Vermeulen explained that the Provincial Treasury does not investigate cases of financial misconduct. That process resorts within the ambit of the department.

- [23] The I/O, Capt BS Tawanyane of the South African Police Service - Directorate for Priority Crime Investigations (DPCI), commonly known as the Hawks, commenced an investigation into the improper procurement process during 2014 following receipt of copies of the leases from a whistle-blower. He, accompanied by Col Luis and Capt Smith attended to the office of the HOD, Ms Matlaopane, where they were also furnished with copies of the leases and their payment batches which comprised approximately 454 pages. Having established that the procurement process had not been followed he investigated whether there had been any recordal of the deviation process. He contacted the aforesaid Mr Vermeulen who reiterated the earlier information. He also discovered that Transnet owned Hoffe Park and not JP Hugo Residence as set out in the leases. Capt Tawanyane intimated that where State funds were improperly used or where there is a complaint of financial misconduct the Hawks would have the authority to investigate and collaborate with the Provincial Treasury and other relevant departments.
- [24] At the end of the State's case the appellant unsuccessfully applied for his discharge in terms of s174 of the Criminal Procedure Act 51 of 1977 (CPA). He then testified that the nursing students were trained on models centred on group studies, therefore, it was convenient for them to reside under one roof. These students, who were mostly young women, would occupy his office anxious and lamented the inadequacies of their security. He bore a duty of care and was impelled to act within the confines of the law. In light of the disparities in the meals that the students received and their safety and security the nursing college

accompanied by SCM went in search of proper accommodation for these students and secured Hoffe Park which catered for everything that the department needed.

- [25] The appellant stated that he signed piles of documents daily. Any procurement of goods and services was initiated by a submission which specified the reasons the goods and services were being procured; the source of funding; and the legislative framework which formed the basis of the procurement. The end-user would sign the submission and pass this on to the chief directorate of the unit and lastly, to the CFO who would verify the availability of funds. In this case the submission went through the relevant functionaries including SCM which reports to the CFO. He says he had a functional SCM system, a proper financial management system and a competent CFO. These systems and their functionaries played a role in the production of source documents that informed his decision to append his signature on the three leases. According to him, in each of the leases SCM produced a document which contained reasons for deviating from inviting competitive bids.
- [26] The appellant protested that he suffered substantial prejudice and there had been an element of maliciousness at play because some crucial documents, which formed the basis of his defence (the documents which informed his decision to append his signature to the three leases) could not be found and had not been placed before the trial court by the State. Instead, incomplete documents were handed in on a piecemeal basis.
- [27] He explained that the leases were audited with no negative findings from the Auditor General. It came as a complete surprise to him years later that the leases were being investigated by the Hawks. There had been nothing untoward in respect of the sundry payments that were made for Hoffe Park because if there were irregularities his functionaries would have alerted him to such. Where sundry payments were made there must be source documents in place to effect payments. The documents which evince the deviation from the competitive bidding

process should have been part of every payment made in terms of sound financial practices that were applied in his department.

- [28] The appellant further stated that he signed the second lease before the first had expired because of the midyear admission of nursing students which necessitated that a new lease be concluded, separate from the first. This had been preceded by due process. This version, concerning the midyear intake of students, was not put to any of the State witnesses who testified that the second lease overlapped the first. When probed further on this aspect he intimated that, in the absence of supporting documents, he was speculating and that this was a common practice within the department. He later somersaulted and disavowed that he ever said that he speculated. He conceded that, absent any explanation, the second lease interrupted the first. He could not say when the procurement of the second lease would have commenced. He also could not explain why he signed the second lease on Christmas Eve of 2010 when the lease commenced on 01 November 2010 and accepted that it was illogical.
- [29] The amount of rental per student in respect of the second lease was R3 600 monthly. The appellant could not explain why the midyear intake was not made part of the first lease and blamed time-lapse and fading memory for his inability to explain. The payments made for the duration of the first and the second leases did not distinguish between the two. He also signed the third lease on 28 November 2011, some six months after its commencement date of 01 July 2011. He said all documents were supposed to be in a batch, which would include a contract, prior to the payment of the invoices. However, in respect of the third lease, the services were rendered, and payments effected prior to the contract being signed.
- [30] The appellant went on to say that the daily rental of R120.00 per student in respect of the first lease was value for money as the students received three meals per day, had access to Wi-Fi, received laundry services and were provided with security. He conceded that other services attendant to this lease such as laundry,

catering, and security could have been procured elsewhere than from Hoffe Park but maintained that he was guided by what was contained in the documents to which he appended his signature. He also conceded that the leases made no mention of access to Wi-Fi which conflicts with his earlier evidence.

- [31] The appellant was confronted with the Auditor General's report for the 2009/2010 fiscal year, handed in by consent and the truth of the contents thereof accepted, in terms of which it had been reported that the department omitted to disclose irregular expenditure incurred due to the absence of a system to account for irregular expenditure. The department notched up R377 million and R147 million in irregular expenditure resultant from the contravention of supply chain management regulations albeit the particulars of the expenditure had not been specified.
- [32] The trial court found no fault in the wording of the charge and held that s 86(1) of the PFMA is a crime-creating provision. It rejected the argument that the National Prosecuting Authority (NPA) was statutorily barred from prosecuting the appellant for the offences he allegedly committed. The trial court further found that the appellant signed the leases without following the prescribed procurement procedures. Based on Mr Faas's evidence that the bids are ordinarily advertised for a period of 30 days before the closing date for purposes of "interacting with the market" and that the bid specification, bid evaluation and bid adjudication committees should conclude the procurement process within a period of 90 days, the trial court held the view that procurement of the students' accommodation ought to have been subjected to a bidding process by means of an advertisement for the specified period and dealt with by the respective procurement committees prior to referral to the HOD for approval. Such an assessment, so reasoned the court, would have assisted the HOD in making an informed decision and a proper lease agreement would have been crafted.

- [33] The trial court accepted that there would be circumstances where the HOD would be justified to deviate from applying the normal procurement process. However, as the evidence demonstrated, even then, the court held, the application of the normal procurement process ought to have been first explored to test the market prior to the deviation being employed as this would have fortified transparency with the resultant value for money. The trial court was displeased with the process the appellant embarked upon and labelled it unfair to other potential bidders. The court found that the procurement for student accommodation was not an emergency or urgent which would have justified the deviation. The court could not comprehend why the regular procurement processes were not followed in the circumstances where the department's officials took the trouble to consult, visit the site and drafted the recommendations for the approval of Hoffe Park as a service provider.
- [34] The appellant did not impress the trial court as a credible witness. It acknowledged that he testified on incidents that occurred many years back but found that his memory conveniently faded when he had to provide answers in respect of documents that the State maintained were nowhere to be located. The trial court found that the process the appellant adopted resulted in three "vague leases" or "dubious rental agreements". It expressed doubt whether Hoffe Park had the authority to conclude the first lease. Regarding the second lease, the trial court remarked that it was difficult to grasp whether it had interrupted the first or whether it was a separate agreement. As to the third lease, the trial court took issue with the fact that it had been signed 5 months after its commencement date with the result that payments were made to Hoffe Park when the written lease had not been concluded.
- [35] The trial court held that there were uncertainties on the type of meals that were to be offered to the students and payment for meals which some of the students may have opted to abstain from. The court also found that even though the appellant placed a high premium on cleaning, laundry and security services, these ancillary services, although offered to the students, were not provided for in the leases or

separately subjected to a bidding process. Instead, the department engaged the same service provider to render these services which “created the impression that Hoffe Park was unfairly favoured”.

- [36] Insofar as the court found that the appellant failed to follow the supply chain procedures that were extant, it concluded that his actions were “unlawful and wilful” and “grossly negligent”. To the extent that the appellant purported to have deviated from the procurement process, the court found that his reasons were “unacceptable and totally unlawful and reckless”. The trial court concluded that the appellant contravened “the relevant sections” of the PFMA as set out in the indictment and accordingly found him guilty as charged.
- [37] The appellant assails the judgment and order of the trial court on multifarious grounds. Before turning to the merits, it is necessary to consider what I have condensed into two main technical points raised before the trial court and persisted in on appeal.
- [38] First, it was contended for the appellant that the trial court ignored the materiality and centrality of the Provincial Treasury in instituting disciplinary and criminal proceedings against the accounting officers and that such proceedings cannot be capriciously set in motion based on information from an unknown whistle-blower without the concurrence of or consultation with the Provincial Treasury as contemplated in sections 3(3), 6(2)(b)(g)(f), 18(2)(b), 18(2)(f) and 85(1)(c), of the PFMA read with clauses 4.1.3 and 4.2.2 of the Treasury Regulations (2005). It is imperative to set out the statutory architecture he relies on in support of this point.
- [39] Section 6(2) of the PFMA provides, in the relevant part, that to the extent necessary to perform the functions mentioned in subsection (1), the National Treasury-
- “(b) must enforce this Act and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments;

(f) must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution; and

(g) may do anything further that is necessary to fulfil its responsibilities effectively.”

[40] Section 18(2)(b) of the PFMA mirrors s 6(2)(b) except that it applies to provincial treasuries. It provides that a provincial treasury must enforce the PFMA and any prescribed national and provincial norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in provincial departments. Section 18(2)(f) provides that a provincial treasury may investigate any system of financial management and internal control applied by a provincial department or a provincial public entity.

[41] At s 84 of the PFMA it is stipulated that a charge of financial misconduct against an accounting officer or official referred to in s 81 or 83, or an accounting authority or a member of an accounting authority or an official referred to in s 82, must be investigated, heard and disposed of in terms of the statutory or other conditions of appointment or employment applicable to that accounting officer or authority, or member or official, and any regulations prescribed by the Minister in terms of s 85. Section 85(1) concerns the regulations on financial misconduct. It provides in part that:

“(1) The Minister must make regulations prescribing-

- (a) the manner, form and circumstances in which allegations and disciplinary and *criminal charges of financial misconduct* must be reported to the National Treasury, the relevant provincial treasury and the Auditor-General, including-
  - (i). particulars of the alleged financial misconduct; and
  - (ii). the steps taken in connection with such financial misconduct;
- (b) matters relating to the investigation of allegations of financial misconduct;

- (c) the circumstances in which the National Treasury or a provincial treasury *may* direct that disciplinary steps be taken or criminal charges be laid against a person for financial misconduct.”

[42] The regulations referred to in s 85(1) above are Treasury Regulations,<sup>4</sup> in particular, regulation 4 thereof. Regulation 4.1.3 finds application in domestic disciplinary enquiries against the accounting officers whereas regulation 4.2. concerns the reporting and instituting criminal proceedings against them. Regulation 4 provides in part:

- “4.1 Investigation of alleged financial misconduct [Sections 85(1)(b), (c) and (d) of the PFMA]
- 4.1.3 If an accounting officer is alleged to have committed financial misconduct, the relevant treasury, as soon as it becomes aware of the alleged misconduct, must ensure that the relevant executive authority initiates an investigation into the matter and if the allegations are confirmed, holds a disciplinary hearing in accordance with the prescripts applicable and agreements applicable in the public service.
- 4.2 Criminal proceedings [Section 86 of the PFMA]
- 4.2.1 The accounting officer must advise the executive authority, relevant treasury and the Auditor-General of any criminal charges it has laid against any person in terms of section 86 of the Act.
- 4.2.2 The relevant treasury *may* direct an institution to lay criminal charges against any person should an accounting officer fail to take appropriate action.”

[43] Based on the aforesaid legislative framework the appellant argued that the trial court’s finding, that it was not necessary for the criminal charges on financial misconduct to be preceded by a complaint from the Provincial Treasury, was erroneous. In amplification, it was contended that s18(2)(b) read with s 84 and s 85 of the PFMA, together with the Treasury Regulations, employs the word “must” at least five times in their texts whereas s 18(2)(b) of the PFMA entrust Provincial

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<sup>4</sup> Published under GN R225 in GG 27388 of 15 March 2005.

Treasuries with authority to enforce that Act. It was argued that a contextual purposive interpretation to s 6(2)(b), on the function and powers of the National Treasury where it states: the “National Treasury must enforce this Act”, considered holistically with all the aforesaid sections of the PFMA, is peremptory. It was contended that the Provincial Treasury was not afforded the legislative right to determine whether the financial misconduct in issue constituted gross misconduct and to exercise its legislative discretion to refer such misconduct for criminal prosecution.

- [44] The appellant further contended that the trial court erred because it did not consider that the Hawks and the NPA could not initiate and prosecute the appellant arbitrarily without the concurrence of the Provincial Treasury. It was argued that in terms of s 17D (1)(a) of the South African Police Service Act 68 of 1995 (SAPS Act) the Hawks ought to investigate national priority crimes and not the offences the appellant is alleged to have committed which, *ex facie* the Constitutional Court’s decision in *Helen Suzman Foundation v President of the Republic of South Africa & others*<sup>5</sup>, do not constitute national priority offences referred to in Chapter 2 and s 34 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (Corruption Act).
- [45] Section 20 of the National Prosecuting Authority Act 32 of 1998 (NPA Act), *inter alia*, vests in the NPA the power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to institute and conduct criminal proceedings on behalf of the State. The appellant argued that the trial court failed to consider that his prosecution in terms of section 20(1) of the NPA Act could only be lawful if preceded by a lawful investigative process referred to in the PFMA.

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<sup>5</sup> *Helen Suzman Foundation v President of the Republic of South Africa & others* 2015 (2) SA 1 (CC), 2015 (1) BCLR 1 (CC) - concerned the constitutionality of various provisions of the South African Police Service Act 68 of 1995 (SAPS Act) as amended.

- [46] The appellant contended that s 17D of the SAPS Act and s 20 of the NPA Act do not supersede the powers vested on Provincial Treasuries in terms of the PFMA to initiate investigations and exercise their discretion to complain or refer financial misconduct for criminal proceedings. To hold otherwise, it was argued, would be to usurp the powers conferred upon another organ of the State. In any event, where there is an inconsistency between the PFMA and any other legislation, in terms of s 3(3) of the PFMA, the latter should prevail, so the argument went.
- [47] Section 17C(1) of the SAPS Act, which establishes the DPCI or the Hawks and locates it within the SAPS, was enacted pursuant to s 205(2) of the Constitution. In terms of s 17D (1)(a) of the SAPS Act the functions of the Hawks are to prevent, combat and investigate national priority offences, which in the opinion of the National Head of the Directorate need to be addressed by the Directorate. Section 17A defines the national priority offences as 'organised crime, crime that requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof, as referred to in section 16(1)'. Section 16(1) provides that the circumstances referred to in s16(2) amounting to criminal conduct or an endeavour thereto, shall be regarded as organised crime, crime which requires national prevention or investigation, or crime which requires specialised skills in the prevention and investigation thereof. These circumstances comprise criminal conduct or endeavour thereto: inter alia, by a person or persons in positions of trust and making use of specialised or exclusive knowledge; crimes in respect of the revenue or expenditure of the national government; or which takes on such proportions or is of such a nature that the prevention or investigation thereof at national level would be in the national interest.<sup>6</sup>
- [48] The Constitutional Court in the *Helen Suzman Foundation* case did not set aside the whole of s 16 of the SAPS Act save the words 'in accordance with the approved policy guidelines' as contained in s 16(2)(h) and (3). The definition of national priority crime as set out in s 16 of SAPS Act is, in my view, sufficiently wide and

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<sup>6</sup> See s 16(2)(b)(i)-(ii) and (c) of SAPS Act.

may invariably result in an overlap between the statutory mandate of the Hawks and that of SAPS. To manage the tension apropos the overlap, the legislature saw it fit to provide in s 16(3) that in the event of a dispute between the National Head of the Directorate for Priority Crime Investigation and the National Commissioner or the National Head for Priority Crime Investigation and a Provincial Commissioner regarding the question whether criminal conduct or endeavour thereto falls within the mandate of the Directorate, the determination by the National Head of the Directorate for Priority Crime Investigation shall prevail. There was no dispute in this case amongst these bodies regarding their respective mandates.

- [49] Section 16 provides for cooperation between all members of SAPS. Where an investigation of a crime or alleged crime reveals that it is a national priority crime the Provincial Commissioner is enjoined to speedily report the matter to the National Head of the Hawks.<sup>7</sup> Additionally, the National Head of the Hawks may, after consultation with the Provincial Commissioner, notwithstanding the presence of the circumstances referred to in s 16(2), direct that the investigation or any part thereof, be conducted by the Provincial Commissioner.<sup>8</sup> The establishment of the Hawks and its location within the framework of the SAPS was principally designed to augment the capacity or improve the efforts of the SAPS to prevent, combat and investigate national priority crimes and other serious crimes.
- [50] It so that the present alleged impropriety did not involve corruption as set out in Chapter 12 of the Corruption Act or an offence created by s 34 of that Act or an organised crime. However, an untransparent tender process is just as much nefarious and may require the Hawks' investigation. In any event, insofar as the value of the leases was found by the trial court to have been in the order of R13 million the offence amounts to a serious commercial crime referred to in s 17B(a)

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<sup>7</sup> Section 16(4)(b) of SAPS Act.

<sup>8</sup> Section 16(4)(c) of SAPS Act.

of the SAPS Act. Accordingly, I strain to find that the investigation the Hawks carried out was improper. The appellant's argument on this score must falter.

- [51] There is no evidence which posits that the Provincial Treasury had been aware of the possible flouting of the PFMA within the department regarding the procurement of the students' accommodation. What the evidence revealed is that the I/O had some consultation with the Provincial Treasury after the alleged commission of the offences. To the extent that the I/O testified that he attended to the offices of the Provincial Treasury to enquire whether the department had properly deviated from the procurement process it can safely be accepted that the Provincial Treasury was alive to the investigation.
- [52] There is no question that the Provincial Treasury is endowed with the obligation to enforce the PFMA in the manner sought by the appellant. Regulation 4.2.1 and 4.2.2 of the Treasury Regulations, referred to in para 42 above, does very little in prescribing the circumstances in which the National Treasury or Provincial Treasury *may* direct that disciplinary steps be taken against the accounting officer or that criminal charges be laid against a person found to have committed a financial misconduct. I do not read regulation 4.2.1 and 4.2.2 to disentitle interested parties from laying a criminal complaint with the police for the violation of financial prescripts. To find differently may render ineffectual the constitutional mandate of a concerted effort that ought to be made to fight against white-collar crime. In the present case there had been no complaint from the Provincial Treasury that it was denied an opportunity to exercise a discretion on whether to institute criminal proceedings against the appellant or a remonstrance from it that it did not concur in the investigation. In my view, the point taken is devoid of any merit.
- [53] As far as the NPA is concerned, their independence concerning prosecutions is entrenched in s 179 of the Constitution and given effect to by ss 20(1)(a) and 32(1)(a) of the NPA Act. Section 20(1)(a) vests the power to institute and conduct criminal proceedings on behalf of the State in the

prosecuting authority whereas s 32(1)(a) provides that a member of the prosecuting authority shall serve impartially and exercise, carry out or perform his or her powers, duties and functions in good faith and without fear, favour or prejudice and subject only to the Constitution and the law. The NPA therefore acted within its constitutional mandate to prosecute the appellant.

- [54] The appellant's further challenge is that the trial court erred in convicting him in terms of s 86(1) read with section 38 of the PFMA without particularising which of the provision(s) of the PFMA had been violated. It was submitted that the trial court failed to sufficiently evaluate the evidence with reference to the specific statutory provisions (sections 38(1)(a)(iii), 38(1)(c)(ii), 38(1)(b), 38(1)(n), 39(1)(b), 44(2)(a) and 76(4)(c) of the PFMA) which the appellant had been accused of contravening. It was argued that it is impossible to discern from the judgment whether the appellant was found guilty of contravening all the statutory provisions and acquitted on some. It was further submitted that the offences created by section 86 of the PFMA were restricted to the wilful or gross negligence emanating from failure to comply with ss 38, 39 or 40 of that Act. Reference to any other provisions of the PFMA in the charge sheet, it was argued, was inconsistent with s 86 and rendered the charges defective.
- [55] To recap, in terms of s38(1)(a)(iii) the accounting officers must ensure that a department maintains an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. To this end, in terms of s 38(1)(c)(ii) they are required to take effective and appropriate steps to prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct. In terms of s 39(1)(b) they are required to ensure that effective and appropriate steps are taken to prevent unauthorised expenditure. At section 38(1)(n) they are required to comply and to ensure the department's compliance with the PFMA.
- [56] As alluded to, the trial court found the appellant guilty as charged and had not specified the sections of the PFMA it returned the verdict on. It is important to state

that the three charges levelled against the appellant referenced the identical sections of the PFMA that the appellant allegedly contravened. In issue is whether the charge sheet was defective to the extent that it set out some statutory provisions (ss 44(2)(a) and 76(4)(c) of the PFMA and 217 of the Constitution) which fell outside the ambit of s 86(1) of the PFMA which only criminalises contravention of ss 38, 39 or 40. Should the answer be in the affirmative, it follows that it must be considered whether the trial court's failure to specify the statutory provisions the appellant was convicted on nullifies the verdict.

- [57] Section 84(1) of the CPA provides that a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge. This section gives more meaning to the accused's right to be informed of the charge with sufficient detail to answer as contained in s 35(3)(a) of the Constitution. In this case a summary of substantial facts as foreshadowed in the indictment were reasonably adequate to inform the appellant what the State's case was that he had to meet. In *Du Toit: Commentary on the Criminal Procedure Act*<sup>9</sup> the learned authors remark:

"Normally, prosecutors would include related sections in the charge, such as those in which the penalty for a contravention of the section is prescribed or presumptions are created, or which contain a particular evidential rule, or a particular regulation with which a particular section of an Act has to be read."

- [58] Some of the provisions of the PFMA referred to in the charge sheet may not be directly relevant to the offence. However, I am unpersuaded that they render the charges defective. This is especially so because the appellant, who enjoyed legal

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<sup>9</sup> S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act*- ('Jutastat e-Publications'- 2021 Revision Service 67) at ch14-p16B.

representation at all relevant times, did not object to the charges being vague or ambiguous or request that he be furnished with further particulars before he entered his plea. He undoubtedly understood the charges.

- [59] Regarding the reference to s 38(1)(a)(iii) in the charges it is not in dispute that the department had in place an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective. No evidence was adduced to show that the systems were inadequate or fell short. The case against the appellant was that when he concluded the leases he had failed to apply the procurement process that is fair, equitable, transparent, competitive and cost-effective.
- [60] Fruitless and wasteful expenditure is defined in s 1 of the PFMA as expenditure which was made in vain and would have been avoided had reasonable care been exercised whereas irregular expenditure means expenditure, other than unauthorised expenditure, incurred in contravention of or that is not in accordance with a requirement of any applicable legislation, including- (a) the PFMA; or (b) the State Tender Board Act 86 of 1968, or any regulations made in terms of that Act; or (c) any provincial legislation providing for procurement procedures in that provincial government. In respect of s 38(1)(c)(ii) it should be mentioned that the State led no evidence in respect of any payment that ostensibly could have amounted to fruitless and wasteful expenditure.
- [61] The State argued that it was never its case that the services Hoffe Park rendered were unnecessary and or that the department did not require students' accommodation and or that value did not enure to the benefit of the department. In light of this submission, it seems to me that the appellant cannot be said to have failed to take effective and appropriate steps to prevent fruitless and wasteful expenditure and losses resulting from criminal conduct and I do not read the trial court's reasoning to be that the appellant committed the department to such expenditure. What the court mentioned in passing was that had the BSC, BEC and

the BAC been engaged in the procurement process it would have assisted the appellant in making an informed decision before he signed the leases; would have led to proper leases being drafted and obviated “possible” fruitless and wasteful expenditure. Largely, the State’s argument is that the procurement of leases, absent a fair and competitive bidding process, resulted in irregular expenditure.

[62] As regards the contravention of s 39 of the PFMA, it is to be remembered that unauthorised expenditure is defined in s 1 as (a) overspending of a vote or a main division within a vote; (b) expenditure not in accordance with the purpose of a vote or, in the case of a main division, not in accordance with the purpose of the main division. Here too, there was no evidence adduced which demonstrated that the appellant failed to ensure that effective and appropriate steps were taken to prevent unauthorised expenditure. This also applies to ss 40, 44 and 64 of the PFMA. Very little is said in the charge sheet on the appellant’s alleged breach of these sections. It seems to me that their inclusion in the charge sheet was superfluous. However, it is difficult to conceive of any adverse effect this might have had on the appellant’s fair trial rights. In addition, I am unpersuaded that they render the charges susceptible to being quashed in the circumstances where the appellant was alive to the precise nature of the allegations against him.

[63] Turning to the merits. It bears repeating that to give effect to s 217 of the Constitution the Minister of Finance has in terms of s 76 of the PFMA issued the Treasury Regulations. More central to the present case is regulation 16A which governs supply chain management. Regulation 16A6.4 provides:

“If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority.”

[64] National Treasury Practice Note No.8 of 2007/2008 is promulgated in terms of s 76 (4) (c) of the PFMA. Item 3.4. thereof applies where goods and services are above the transaction value of R 500 000 (VAT included). It provides:

“3.4.1 Accounting officers/authorities *should* invite competitive bids for all procurement above R 500 000.

3.4.2 Competitive bids *should* be advertised in at least the Government Tender Bulletin and in other appropriate media should an accounting officer / authority deem it necessary to ensure greater exposure to potential bidders. The responsibility for advertisement costs will be that of the relevant accounting officer / authority.

3.4.3 Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer / authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer / authority or his / her delegate. Accounting officers /authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process.”

[65] The State argued that regulation 16A6.4 did not find application because the procurement of student accommodation was not an emergency; it had not been urgent, and neither were the transactions in issue concluded in a case of a sole supplier. It is not in dispute that the value of each of the leases far exceeded the threshold of R500 000. It is also common cause that the appellant did not invite competitive bids when he procured students' accommodation. His defence in essence is that it was impractical to procure any alternative accommodation, therefore, in terms of the Treasury Regulation 16A6.4 he approved that Hoffe Park

be procured. He accordingly appended his signature to the deviation documents which he intimated were forwarded to the Provincial Treasury. He repeatedly stated that SCM had regard to the relevant statutory framework when they procured Hoffe Park which included catering, security and other services they offered in terms of the leases.

[66] It should therefore be determined whether the appellant properly invoked and complied with regulation 16A6.4 read with Practice Note No 8 item 3.4 when he dispensed with the bidding process. Otherwise put, whether the appellant was justified in relying on regulation 16A6.4.

[67] It is so that where it is impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer may procure the required goods or services by other means. The Constitutional Court considered the meaning of term “impractical” in *RAiN Chartered Accountants Incorporated v South African Social Security Agency*<sup>10</sup>. Madlanga J there said:

“To use the hackneyed but useful legal phrase, what is impractical must surely depend on the circumstances of each case. In some instances, impracticality may manifest in absolute impossibility to engage in a competitive bidding process. Below that there may be a range of what constitutes impracticality. At the centre though must be the question whether a competitive bidding process is well and sensibly suited for the circumstances. A dictionary meaning of “impractical” is “not adapted for use or action; not sensible”. Ultimately what is impractical is a matter of a judgement call to be made by the Organ of State concerned. But what the Organ of State may decide is not unbounded; it must be informed by the operative word – “impractical”. And that is an objectively accessible notion.”

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<sup>10</sup> *RAiN Chartered Accountants Incorporated v South African Social Security Agency; In re: Black Sash Trust and another v Minister of Social Development and others (Corruption Watch (NPC) and another as amici curiae)* 2021 (11) BCLR 1225 (CC) para 30.

- [68] To demonstrate that Hoffe Park was a sole supplier the appellant relied on Ms Selemela's evidence and two letters his successor, Ms GE Matlaopane, addressed to Transnet on 22 August 2013 and 06 February 2014, which expressed the department's "intention to engage directly with Transnet in the occupation of Hoffe Park premises". The letter of 22 August 2013 reads:

"The Department of health would hereby like to declare its intent to engage directly with Transnet in the occupation of Hoffe Park Premises (Kimberley).

The department has been requested to vacate its Nursing and EMS College from NIHE main campus building at the end of December 2013, so as to make way for the new Sol Plaatje University. As a result, this has placed the department in a difficult position due to the non-availability of alternative office accommodation.

The hostel accommodation is currently leased from JP Hugo Residence BK on a month-to-month basis at an exorbitant amount. We also see this as [an] initial step to build on our future long-term partnership with Transnet."

- [69] It was contended for the appellant that the above correspondence showed that, following the appellant's departure from the department, there was still no alternative building to accommodate the students under one roof. In addition, it was argued that the court paid no attention to the fact that Ms Matlaopane, despite having incurred more expenditure and having concluded oral leases, was not arraigned for any financial misconduct. Instead, so it was argued, the expenditure she incurred was lumped together with the expenditure the appellant allegedly incurred.
- [70] It was revealed, parenthetically during the trial, that following the appellant's departure from the department and at the end of the third lease sometime in 2012, the department, then headed by Ms Matlaopane, as reflected in the letters she directed to Transnet dated 22 August 2013 and 06 February 2014 above, continued with the lease of a month-to-month basis or engaged the services of

Hoffe Park which resulted in the total rental paid being in the order of R96 million. Ms Matlaopane was not before the trial court for trial. The circumstances which led her to conclude the leases were never placed before the trial court nor was she called to cast further light on the letters she penned. However, what was said concerning Ms Matlaopane is a cause for concern and may require an investigation by those charged with that responsibility, if so advised.

- [71] On Ms Selemela's evidence, prior to the appointment of Hoffe Park, her chief director requested the college to verify whether the accommodation could be directly obtained from Transnet as the owner of the premises. What this means is that JP Hugo residence was not the sole supplier. Transnet may well have been a potential bidder. It is remarkable that in the preamble to the leases Hoffe Park misrepresented that it was the owner of the leased premises.
- [72] The process Ms Selemela says she embarked upon, of identifying a suitable building through a search she conducted around Kimberley is completely irregular and ought not to be countenanced. This would naturally thwart the greater participation by potential suppliers in what ought to have been an open tender process. Item 2.2 of the National Treasury Practice Note 6 of 2007/2008 underscores that the SCM process of procuring goods and services by means of public advertisement, including its publication in the Government Tender Bulletin, gives effect to the constitutional prescripts that all potential suppliers be afforded the right to compete for public sector business through competitive bidding. In my view, the competitive bidding process was appropriate for the procurement in issue. Any "judgment call" by the appellant was ill-considered and irrational. No criticism can be accorded to the trial court's remarks that the application of the normal procurement process ought to have been explored to test the market before the deviation was employed as this fortified transparency and would have served to establish whether the leases were cost-effective. It should be added that that would have also dispelled any doubt on the availability of suitable alternative students' accommodation.

- [73] An insuperable stumbling block in the appellant's case is that where there is a deviation from inviting competitive bids the involvement of SCM in the procurement process is unavoidable. Ms Selemela intimated that she was not involved in supply chain processes. Mr Faas's evidence was that Ms Selemela's office, in terms of the established protocol, made no contact with him as the director of SCM regarding the procurement of the nursing accommodation. She also did not have any communication with Mr Faas on any progress which concerned the procurement of student accommodation as she had testified. Mr Faas says his unit was never involved in the inspection of Hoffe Park prior to its procurement. This is so, he added, because that action is only implemented subsequent to the evaluation of the bids.
- [74] On Mr Faas's version, SCM naturally compiles the deviation because it would have had information why the primary procurement process (formal tender process) was unsuccessful or had not been followed. This deviation would be forwarded to the CFO and thereafter to the HOD. In the present case, Mr Faas intimated, when the HOD dispensed with the process, he did so without any motivation from SCM. The deviation document forms part of the payment batch and further included in this batch would be other supporting documents such as the initial submission, requisition, a letter of appointment of a service provider, the contract and the service provider's invoice.
- [75] Ms Karin Du Toit, employed at Auxiliary Services of the department initially and for a very short period "handled" sundry payments (payments made outside the scope of procurement process) for Hoffe Park. The payments were later on processed through the Human Resources Department. According to Mr Faas the method of payment employed was indicative that the procurement process and proper deviation had not been implemented. He explained that in respect of the so-called sundry payments, the supplier will provide an invoice to the end-user for services rendered or goods supplied as agreed with the end-user. Mr Faas stated that

ordinarily, where the normal procurement processes were followed, SCM would process payments through their Logistics Management. Mr Vermeulen corroborated in broad outline Mr Faas's evidence on procedural issues. He also testified that where the standard procurement process was followed there would have been a purchase order generated by the procuring institution's SCM which would identify the goods or services to be procured. The purchase order and other supporting documents would have formed part of the payment batch. In this case the purchase order was not extant. There was nothing against which to measure the invoices paid. While the appellant was not directly responsible for effecting sundry payment the evidence suggests that had he not signed the leases this form of payments would have been avoided.

- [76] The above evidence is fatal to the appellant's defence that he lawfully deviated from inviting competitive bids because Hoffe Park was the sole supplier of the services. Additionally, the appellant was statutorily enjoined to report, inter alia, the reasons for dispensing with the prescribed competitive bidding process within 10 working days to the Provincial Treasury and the Auditor-General (AG) because the transactions were above the value of R1 million (VAT inclusive) and had allegedly been procured in terms of regulation 16A6.4. The so-called deviation documents are nowhere to be found. In my view, the trial court cannot be faulted in having drawn an inference based on the aforesaid evidence that the sundry payments were made due to lack of proper procurement and that the lack of proper supporting documents were as a result of failure to inform the Provincial Treasury of the negotiations that went about between the contracting parties. The inference is also supported by Mr Faas's evidence that SCM had no record of the transaction because they were not involved in the procurement process.
- [77] The appellant's counsel argued tangentially that Ms Selemela's evidence contradicted that of Mr Faas in material respects. Counsel also criticises the trial court wrongly that it disregarded the discrepancies without any lawful basis. Counsel went on to unjustifiably accuse the magistrate of having impugned the

appellant's credibility without setting any evidentiary basis for discrediting him. It was further argued that the trial court erred in not considering the defence's impeachment of the credibility of Mr Faas about his repeated enforcement of the disputed leases whereas he decried their irregularity. Counsel did not direct us to specific discrepancies in the evidence of the two State witnesses which he argued were material.

- [78] It has consistently been the approach of our courts that an appeal court should be slow to upset the credibility findings by a trial judge, who was steeped in the atmosphere of a lengthy trial and had the advantage of seeing and hearing the witnesses. Such findings are only disturbed if there is a clear misdirection, or the trial court's findings are clearly erroneous.<sup>11</sup> It is so that there were some differences in Ms Selemela and Mr Faas's accounts. As alluded to, Ms Selemela intimated that she and some of the officials in SCM went in search of accommodation around Kimberley. She also explained that she inspected Hoffe Park with SCM following which SCM compiled a report and briefed the CFO. Ms Selemela may have been mistaken about the involvement of SCM. This is so because she gave various inconsistent responses on the question whether Mr Faas, as head of supply chain, would have been aware of the process the department undertook in securing the leases.
- [79] Mr Faas, on the other hand, was steadfast that his unit played no role and had no records which pertained to the procurement of the leases. The divergence, in my view, is immaterial. Mr Faas's credibility could not be impeached on the basis that he enforced the leases. He was obliged to attend to students' complaints in respect of, inter alia, the catering services and Hoffe Park's queries concerning their payments which emerged after the leases had been concluded because the horse had already bolted.

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<sup>11</sup> *AM and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA) para 8.

- [80] The trial court critiqued the appellant's credibility mainly because his memory conveniently faded when he had to give account on the documents the State intimated were nowhere to be found. Truth be told, the record is replete with many such instances of purported memory lapses.
- [81] On the foregoing exposition the deviation the appellant embarked upon smacks of impropriety and illegality. Accordingly, he did not comply, and ensure compliance by the department, with the provisions of the PFMA as envisaged in s 38(1)(n) and committed the department to irregular expenditure as contemplated in s 38(1)(c)(ii). For the impropriety to be criminal in nature and thus attracting a sanction in terms of s 86(1) of the PFMA the accounting officer concerned must have acted wilfully or in a grossly negligent way in his or her failure to comply with the provisions of s 38 of the PFMA. Ordinary negligence would not suffice to sustain a conviction under s 86(1).
- [82] I now consider whether the impropriety was wilful or negligent and if negligent to what degree. On this aspect the appellant argued that it was legally incompetent and a glaring misdirection for the trial court to have made a finding of wilfulness and gross negligence in contravention of s 86(1) of the PFMA, without a distinction between the two grounds of culpability. It was argued that the trial court not only conflated the two separate grounds but also failed to identify the aggravating factors upon which a finding of extreme gross negligence was grounded. Put differently, that there was a paucity of diligent analysis of the proven facts to establish ordinary negligence and further identifying aggravating features indicative of gross negligence.
- [83] The actions of the accounting officers are to be measured against the standard of the notional reasonable person. A notional reasonable person is a person of the same group or class as the accounting officer. It was argued for the appellant that whilst a higher standard of conduct can be expected from the holder of a public office such as an accounting officer, a high degree of perfection is not required. It

was further contended that without any evidence that the appellant failed to manage the revenue or financial resources of the department in a sound manner, no gross negligence could be imputed to him.

[84] In *MV S Tingas; Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas and Another*<sup>12</sup> Scott JA had occasion to distinguish between ordinary negligence and gross negligence. As to the latter he said:

“(T)o qualify as gross negligence the conduct in question, although falling short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.”

[85] The learned judge cited some examples from caselaw where gross negligence had been held to be established, which replicates 'the extreme nature of the negligence required to constitute gross negligence', such as 'no consideration whatever to the consequences of his acts'; 'a total disregard of duty'; 'negligence of a very serious nature'; 'a particularly high degree of negligence'; 'ordinary negligence of an aggravated form which falls short of wilfulness'; and 'an entire failure to give consideration to the consequences of one's actions'.

[86] I come to apply the principles enunciated above to the present case. That the appellant acted wilfully, in other words, intentionally or deliberately is out of the question as no evidence supports that conclusion. However, the fact that there was a need to accommodate the students did not warrant that the procurement processes be flouted. The evidence shows that following the failure to implement the correct deviation process the leases were procured in a slovenly fashion with the second lease concluded midstream the duration of the first and the third lease being signed five months after it had already commenced. Belatedly, the appellant sought to suggest that these were separate leases with none interrupting the other.

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<sup>12</sup> 2003 (2) SA 473 (SCA) para 7.

As already adverted to, this version was not put to any of the State witnesses. There is also no evidence to show that the leases were concluded on the strength of a single or multiple deviations. In addition, the accommodation Hoffe Park offered included other services, such as security, catering and laundry which could have been separately procured or put out on tender.

- [87] The evidence further shows that there had been no proper service level agreement which described the quality of additional services such as catering, cleaning, laundry, and security in detail and the price. There was no proper control on how the service provider invoiced the department and did so at his whim. The lack of involvement of SCM in the whole procurement process, in my view, signalled ostensible irregularity and must have alerted a conscientious and vigilant accounting officer to the inappropriateness of the transactions. The appellant had to respond with a high sense of duty to prevent the irregular use of taxpayer's monies which was clearly occasioned by a complete lack of effective oversight in this case. In its analysis the trial court incorrectly classified the conduct as both deliberate and grossly negligent. It is patently clear that the court made a mistake because wilfulness appears only once in its judgment whereas gross negligence covers a wider field of its reasoning. On the conclusion I have come to the misdirection is not of such a nature as to vitiate the proceedings. I am satisfied that the appellant was grossly negligent.
- [88] Finally, the appellant lamented on the inordinate delays in the prosecution of the offences which he claimed subjected him to forensic prejudice and breached his fair trial rights. The basic requirement that a trial must be fair is central to any civilised criminal justice system.<sup>13</sup> The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State.<sup>14</sup>
- [89] The appellant argued that the trial court gave little or no regard to the approximately nine-year delay from the completion of the investigation and the pressing of

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<sup>13</sup> *S v Jaipal* 2005 (1) SACR 215 (CC); (2005 (4) SA 581 (CC) para 26.

<sup>14</sup> *Ibid* para 29.

charges against him and that he had to rely solely on his memory to put up his defence. The delay, he contended, resulted in the State being unable to place before court documents which formed the basis of his defence. Instead, few documents were presented to the court on a piecemeal basis. The appellant further argued that all the necessary documents which informed his decision to deviate from the normal tender process, when he procured the leases, were not preserved and thus he could not be expected, ten years later, to recall the details that concerned his approval of the deviation in the circumstances where at the relevant time he approved numerous unrelated documents in the department.

- [90] It was further argued for the appellant that the State failed to comply with s 40(1)(a) of the PFMA which requires that the accounting officer for a department must keep full and proper records of the financial affairs of the department in accordance with any prescribed norms and standards and regulation 17.2.4 of the Treasury Regulations which provides:

“When financial information is required as evidence in proceedings before a court, Parliament, a provincial legislature, an official inquiry or otherwise, or for purposes of an audit, it must be secured in its then current form until no longer required, even if the National Archivist has authorised its disposal.”

- [91] The appellant argued that the trial court ought to have found that the quality and the nature of the evidence brought against him, some nine years after the commission of the alleged financial misconduct, constituted forensic prejudice and any piecemeal use of documents was unlawful and inconsistent with the said Treasury Regulation 17.2.4.

- [92] As already discussed, the I/O commenced with the investigation during 2014. The record indicates that on 24 March 2021 the matter was before the commercial crimes court for a pre-trial conference and was set down for trial on 14 September 2021 when it was postponed to 08 November 2021 due to the unavailability of the appellant’s counsel. On 08 November 2021 the trial date was arranged for the week of 28 March 2022. The trial itself got underway intermittently between the

period March 2022 and 25 May 2023 with final arguments heard on 04 August 2023 and the judgment on the merits was handed down shortly thereafter on 16 August 2023. There was never any complaint of dilatory tactics which had been employed during the trial.

- [93] The delay may well have occurred during the investigation. The difficulty here is that the appellant did not set out any basis for his contention that he suffered prejudice following the lengthy investigation. For instance, the I/O was never questioned on the delay that related to the investigation and or the date upon which the Hawks concluded such investigation. With the benefit of the record, we were able to ascertain that Mr Vermeulen's statement was obtained on 23 August 2019. It also came to light during the trial that a certain Mr Jonkers's statement was obtained in 2019 whereas that of Mr Gaborone on 31 March 2020, approximately two years prior to the commencement of the trial. It is generally notorious that investigations of serious commercial crimes often take long to conclude. Absent evidence showing that the I/O dragged his feet, in bringing the investigation to a close, it cannot be concluded that the appellant suffered prejudice on account of a protracted investigation.
- [94] The State argued that all the documents gathered during the investigation were discovered before the commencement of the trial. It further produced all the documents it had in its possession for purposes of the trial. What the evidence demonstrates is that the documents the appellant alleges were not preserved could not be found and may be non-existent. The appellant did not take issue or complain of a trial by ambush at any stage during the trial regarding the "piecemeal" manner in which he contended the documents were provided to him. To the contrary, the documents were handed in evidence by consent without any demur on his part. Under these circumstances the appellant failed to show that he suffered any trial-related or forensic prejudice. The trial was accordingly fair. It follows that the appeal must fail. In the result, I make the following order.

**Order:**

1. The appeal is dismissed.



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Phatshoane DJP

I concur



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Stanton J

**Appearances:**

For the appellant:

Adv M Mphaga SC with Adv J Modiba  
Instructed by Mjila and Partners Inc t/a Mhlabeni Inc,  
Kimberley.

For the respondent:

Adv IM Mphela  
Instructed by National Director of Public Prosecutions,  
Kimberley.