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

Reportable:	**NO**
Of interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **A138/2020**

In the matter between:

TNT LIOMA Appellant

and

THE STATE Respondent

Coram: NM MBHELE DJP, JP DAFFUE J et PR CRONJE AJ

Heard: 16 SEPTEMBER 2024

Delivered: 06 MARCH 2025

Summary: The appellant was convicted in the court a quo by a single judge, sitting with an assessor, on two counts as an accomplice to fraud, several counts of contravening section 5 of the Prevention of Organised Crime Act 121 of 1998 and one count of contravening section 38(1)(a)(iii) of the Public Finance Management Act 1 of 1999 and sentenced to 10 years' imprisonment of which three years was suspended on certain conditions. On appeal to the full bench, with leave of the Supreme Court of Appeal, the convictions on all counts were set aside.

ORDER

The following order is made:

1. The appeal against the convictions and sentence is upheld.
2. The order of the court *a quo* is set aside and substituted with the following: "Accused 1 is acquitted on all counts and discharged."

JUDGMENT

Daffue J (Mbhele DJP and Cronje AJ concurring)

Introduction

[1] The appellant was convicted in the court *a quo* for crimes allegedly committed during the latter part of 2001 and the beginning of 2002. He was eventually charged with 12 other accused persons. A fourteenth accused died prior to the commencement of the criminal trial. The criminal trial case number is 89/2012, but the trial eventually commenced five years later in 2017. On 29 May 2017 the accused persons were called upon to plead. The trial was a lengthy and drawn-out affair. The presiding judge was assisted by one assessor. We are now called upon, about 23 years after the offences were allegedly committed, to decide whether the appellant was correctly convicted and appropriately sentenced.

[2] The allegations of criminality against the accused persons emanated from the Free State Department of Education's procurement process during 2001 for the supply of text books to schools which was advertised under tender E7 2001/2002 – 2004. I shall hereinafter refer to the particular department as the Department and to the tender as tender E7. The appellant – accused 1 in the court *a quo* - was the acting Head of Department (HOD) at the time. His co-accused were either successful tenderers, or people related to successful tenderers.

[3] On 14 February 2018 the court *a quo* delivered its judgment. The appellant, to wit Tebogo Nhlanhla Tlhaole Lioma, was convicted on 19 counts, being counts 6, 20, 47 to 54, 57 to 64 and 69. These are in respect of:

a. counts 6 and 20: as an accomplice to fraud;

b. counts 47 to 54: contravention of s 5 of the Prevention of Organised Crime Act 121 of 1998 (POCA), read with ss 7A and 8 of that Act;

c. counts 57 to 64: contravention of s 5 of POCA, read with ss 7A and 8 of that Act; and

d. count 69: contravention of s 38(1)(a)(ii) read with s 136 and s 86(1) of the Public Finance Management Act 1 of 1999 (the PFMA).

The court *a quo's* references in its order to s 38(1)(a)(ii) and s 136 of the PFMA are incorrect. The relevant sub-section must be s 38(1)(a)(iii). Also, there is no s 136 in the PFMA; the reference should have been to s 36. The appellant was found not guilty and acquitted on the remainder of the charges against him.

[4] On 26 June 2018 the court *a quo* took the counts together for purposes of sentence and sentenced the appellant to 10 years' imprisonment, 3 years of which was suspended for 3 years on condition that the appellant is not found guilty of fraud or theft committed during the period of suspension.

[5] The court *a quo* dismissed the appellant's application for leave to appeal against his convictions and sentence. On 7 March 2019 the Supreme Court of Appeal granted leave to appeal to the full court of this Division.

[6] Some of the appellant's co-accused were acquitted and some convicted in respect of certain counts. Although we are only concerned with the appellant's appeal, I shall when appropriate refer to the court *a quo's* pronouncement on the evidence and guilt pertaining to some of the accused.

The grounds of appeal

[7] The appellant's grounds of appeal may be summarised under three separate legs, to wit alleged unfairness of the trial, material misdirections by the court *a quo* pertaining to the convictions and thirdly, the inappropriateness of the sentence. Having said this, I do not intend to quote the grounds of appeal in any detail, but to put the reader in the picture I mention those considered relevant.

[8] The main grounds of appeal pertaining to convictions are that the court *a quo* erred in:

a. convicting the appellant as an accomplice to fraud in respect of counts 6 and 20;

b. finding that the appellant faced a fair trial as provided for in s 35(3) of the Constitution, specifically pertaining to the interception of telephone conversations and the undue pressure on witnesses such as Dr Rakometsi to incriminate the appellant falsely;

c. failing to find that the ultimate approval of tenders was done at a provincial level;

d. failing to draw an adverse inference against the State for its failure to call available witnesses to show that the appellant influenced the tender process;

e. in accepting the evidence of Mr Moeng, but should have rejected his evidence in totality;

f. convicting the appellant for assisting another to benefit from the proceeds of unlawful activities as provided for in s 5 of POCA;

g. failing to find that the State deliberately failed to lead Mr Spies, the forensic auditor on the issue that the appellant lived beyond his means and consequently no cross-examination followed;

h. finding that the appellant had to balance his books by receiving money from successful tenderers;

i. relying on a conclusion by Mr Spies that the appellant was guilty of contravening s 38(1)(a)(ii) read with ss 136 and 86(1) of the Public Finance Management Act 1 of 1999 (PFMA).

Did the appellant have a fair trial?

[9] The appellant submitted, relying on s 35(3) of the Constitution, that he was subjected to an unfair trial. Appellant's counsel, Ad HJ Potgieter, submitted to the court *a quo* as well as on appeal that the appellant did not have a fair trial. Fairness according to him extends to a fair investigation process and this did not occur *in casu*. He submitted that it was established beyond doubt that appellant's telephone was monitored and that certain calls were intercepted. The appellant only reported tampering of his telephone calls during 2007 whilst the SAPS members already left the particular building during December 2004. The court *a quo* observed that Dr Rakometsi, who deposed to a witness statement for the prosecution, but was eventually called by the appellant in his defence was very critical of Col Senatla and offended by his behaviour. The allegations by Col Senatla about phone interception was denied by Col Erasmus as well as W/O Terblanche. Both of them made favourable impressions as witnesses on the court *a quo*. The court *a quo* was of the view that Col Senatla was a biased witness. In any event, he played a minor role in the investigation.

[10] The court *a quo* also held that Mr Spies was never cross-examined in respect of affidavits taken down by Col Senatla, including the unsigned statement of Dr Ramoketsi who found their way to Mr Spies, as if that could have influenced his findings. The court *a quo* was indeed satisfied that Mr Spies made an independent evaluation of all the documents made available to him.

[11] During oral argument Mr Potgieter did not pursue his argument contained in his heads as well as the grounds of appeal pertaining to unfairness of the trial. However, he remained steadfast in his approach that the appeal should succeed in respect of the convictions.

[12] I could not find any evidence obtained through the alleged secret interception of phone calls. Having considered the record, submissions and the judgment of the court *a quo* on this aspect, I am satisfied that this ground of appeal has no merit and should be rejected. The appellant did in fact have a fair trial.

The parties' submissions on appeal

[13] Mr Potgieter submitted on behalf of the appellant that several misdirections had been committed by the court *a quo*, that the appellant should have been discharged on all counts and therefore, the appeal is bound to succeed. I shall revert to his submissions.

[14] Adv BG Claassens was not the prosecutor in the court *a quo*. She submitted in her written heads of argument that there is no merit in the appeal and that it should be dismissed. On that version the court *a quo* did not make any misdirections. Furthermore, she submitted that it is apparent that the appellant had contact with tenderers before, during and after the tender process, that money was exchanged with the successful tenderers and that the appellant seemed 'to have a finger in every pie' during the tender process. Eventually she submitted in her heads of argument that the only reasonable inference to be drawn 'is that the appellant's greed and financial gain ... outweighed his required sense of duty to ensure that a proper, fair, and transparent process was followed.'

[15] Ms Claassens conceded during oral argument that the convictions in respect of contravention of s 5 of POCA could not stand. In her view it would have been more appropriate for the State to rely on s 6 of POCA. Consequently, she conceded that the appeal in respect of counts 47 to 54 and 57 to 64 should be upheld. After some deliberation she also conceded that the conviction in respect of count 69 was problematic, considering how the count was formulated. It is alleged in the indictment pertaining to count 69 that count 78 was contravened. Although count 69 was formulated as mentioned above, Ms Claassens submitted that the appellant contravened s 38(1)(a)(iii) of the PMFA in respect of the tender process as a whole, bearing in mind his role therein. Initially she was steadfast that a conviction on count 69 would be appropriate. Fact of the matter is that although the court *a quo* convicted accused 13 of fraud in respect of count 69, no conviction followed in respect of count 78. There was no evidence of any telephonic contact between appellant and accused 13, or of any money flowing between these two persons.

[16] Ms Claassens argued that the appellant made himself guilty of 'something' in respect of counts 6 and 20, bearing in mind the money received and the telephone calls between him and successful tenderers. She did not insist that the conviction of the appellant as an accomplice should stand, especially in respect of count 6. She believed that the State had made out a better case in respect of count 20, having relied on the evidence of the s 204 witness, Mr Moeng. In conclusion she submitted that the convictions should be set aside and substituted with convictions for contravening s 38(1)(a)(iii) of the PFMA in respect of counts 6 and 20 only. According to her, the appellant should have established who were the persons/entities behind the tenderers, notwithstanding her concession that the appellant was not involved in the initial tender processes. It should be noted that the appellant was charged in the alternative with contravening the relevant section of the PFMA in respect of count 6, but not count 20.

The test to be applied in criminal proceedings and on appeal

[17] It is trite that the onus rests on the State to prove the guilt of the accused beyond reasonable doubt. If there is a reasonable possibility that the accused might be innocent, acquittal should follow.[1] It is also trite that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated

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[1] *S v Mbuli* 2003 (1) SACR 97 (SCA) para 57.

by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. It is generally accepted that the trial court had the advantage of seeing and hearing the witnesses and was in the best position to determine where the truth lies. The following *dictum* in *S v Francis* is apposite:[2]

'This Court's powers to interfere on appeal with the findings of fact of a trial Court are limited (*R v Dhlumayo and Another* 1948 (2) SA 677 (A)... Bearing in mind the advantage which a trial Court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this Court will be entitled to interfere with a trial Court's evaluation of oral testimony' (other case references omitted).

[18] *S v Doorewaard and Another*[3] Ponnan JA remarked as follows:

'Prosecutors have at their disposal the full machinery of the state. It is for a prosecutor to establish, through the presentation of evidence, the guilt of the accused beyond reasonable doubt. The prosecutor must provide proof of the accusation made. To that end, the prosecutor must place before a court credible evidence in support of the alleged crime. It is for a prosecutor to evaluate the conduct of the police and the strength of the state's case that will be actively presented to a court. It is not the function of a prosecutor 'disinterestedly to place a hotchpotch of contradictory evidence before a court, and then [to] leave the court to make of it what it will'.'

[19] It is appropriate to consider the test to be applied in adjudicating circumstantial evidence. I shall show during the evaluation of the evidence and the court *a quo*'s reasoning that the appellant was not convicted on credible direct evidence, but on circumstantial evidence. I therefore deem it appropriate to mention the applicable legal principles at this early stage. The approach to circumstantial evidence has been outlined as follows in the *locus classicus*, *R v Blom*[4]:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.'

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[2] 1991(1) SACR 198 (A), at p 204.

[3] 2021 (1) SACR 235 (SCA) para 81.

[4] 1939 AD 188 at 202-203; see also R v De Villiers 1944 AD 493 at 508.

[20] In *S v Reddy*[5] the court aptly relied on the following quotation:

'A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish.....Not to speak of greater numbers, even two articles of circumstantial evidence, though each taken by itself weigh but as a feather, join them together, you will find them pressing on a delinquent with the weight of a mill-stone...'

Having recorded the principles in considering circumstantial evidence, it is important to differentiate between proven facts on the one hand and mere conjecture or speculation on the other. If there are no positive proved facts from which the inference can be made, the method fails. Speculation should be avoided to draw the only reasonable inference that an accused is guilty.

Evaluation of the evidence and the court a quo's reasoning

[21] It is now time to consider the grounds of appeal in respect of the second issue raised by the appellant, to wit the alleged misdirections committed by the court *a quo*.

Some common cause facts

[22] Mr Potgieter presented the court in paragraph 6 of his heads of argument with a detailed list of common cause facts. Ms Claassens admitted the correctness thereof in paragraph 3.2 of her heads of argument. I do not intend to quote these, but will throughout the judgment refer to some common cause facts.

[23] Although the Tender Board Act 2 of 1994 was repealed on 10 April 2001, shortly before the start of the procurement process, document FST36 dealing with general conditions to be complied with in tender processes was still used. Mr Spies, a chartered accountant in the employ of Deloitte at the time, did a forensic analysis. He did not express an opinion on the legality of the FST36, but emphatically admitted in his evidence that it lay a basis for a fair and transparent process. He could not find material fault with the process followed by the Department, but merely questioned what might have occurred outside meetings to flout the process.

[24] It is unnecessary to provide full details as to the personnel involved and the processes followed by the Department in awarding tenders to the 37 successful tenderers pertaining to tender E7. At a meeting on 4 June 2001 a decision was taken

[5] 1996 (2) SACR 1 (A) at p 8i.

to advertise tender E7. The appellant was neither involved in this process, nor in the needs analysis undertaken before then. The late Mr Komail dealt with the tenders from inception of the process. He, as Assistant Director in the Department, was responsible for book provisioning and the tender section. The relevant section in the Department received the tenders on 6 July 2001. Appellant was still not part of this process. Mr Komail in his aforesaid capacity made recommendations to the Departmental Tender Committee of which the appellant was the chairperson. Ms Joubert and Ms Kent did secretarial duties at the Departmental Tender Committee meetings which were recorded, but their evidence does not at all point in the direction of appellant's alleged guilt.

[25] The tender section was headed by a Mr SP Motaung, whilst the book provisioning section was headed by Ms L de Witt. The reception and evaluation of the received tenders were done within the structures of Mr Komail and Mr Motaung. The appellant played no role in the evaluation process.

[26] The Departmental Tender Committee did not start the evaluation process afresh, searching through documents that have been produced by tenderers. Two Departmental Tender Committee meetings took place on 20 September 2021 and 24 September 2021 respectively. Submissions were made by Mr Komail at the first meeting. Eventually a recommendation of 37 tenders was made to the Interdepartmental Tender Committee of the Free State Province by the Departmental Tender Committee members and not by the appellant acting on his own. This first-mentioned committee is also referred to as the Central Procurement Evaluation Committee (CPEC). The CPEC resolved on 27 September 2001 on provincial level to accept the proposed 37 tenders whereupon appellant signed memoranda of agreement with the successful tenderers on 23, 25 and 26 October 2001 respectively. The Department already knew on 10 October 2001 that the CPEC had accepted the recommendations, although the official letter of Mr De Beer only arrived on 12 October 2001.

The State's case

[27] The State did not call any of the Departmental Tender Committee members or any other person involved in the procurement process in an attempt to prove that the appellant manipulated the process and/or proposed that specific tenders be approved.

The court did not heed the warning enunciated in *S v Teixeira*[6] to the effect that a trial court may make a negative deduction from the State's failure to call an available witness. I quote:

'It was submitted by counsel on behalf of the State that an inference adverse to appellant could equally be drawn from the fact that Tshabalala was not called to testify on behalf of the defence. In this regard, counsel for the State contended on appeal before this Court that during the trial counsel for appellant indicated that Tshabalala might be called to testify on behalf of the defence and had been furnished with Tshabalala's statement made to the police. This was an *ex parte* statement made by counsel acting for the State on appeal. I propose to ignore it, because counsel who acted for the appellant at the time did not appear before this Court, and no reference is made thereto in the record of the proceedings. In my opinion, the failure by the State to call Tshabalala to testify as a witness justifies the inference that in counsel's opinion his evidence might possibly give rise to contradictions which could reflect adversely on Sarah's credibility and reliability as a witness.'

[28] I am satisfied that the court *a quo* erred in failing to draw an adverse inference from the State's failure to call any witnesses who sat on the Departmental Tender Committee with the appellant, especially insofar as the evidence of the two witnesses who were merely involved in administrative capacities did not meaningfully assist the State's case at all. It has not been recorded that these members were not available anymore. The same applies to other employees in the procurement process. An adverse inference should have been drawn against the State.

[29] The court *a quo* gave the impression that the witness, Ms JS Joubert, testified that the appellant as HOD and chairperson of the Departmental Tender Committee had the final authority to approve or reject a tender.[7] This is not correct. Ms Joubert pertinently testified as follows in cross-examination:[8]

'Ma'am then just the last question that I have in this aspect, that departmental tender bid committee makes a further recommendation --- (intervenes) --- That is correct.

To the provincial tender committee, were you aware of that committee? It serves under the Department of Treasury in the Province. It was called the CPEC. --- I am not aware of that.

Yes, --- Ja.

And you will also then not take issue with me that the head of the Department is not the last point of authorisation of a tender? --- Yes.

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[6] 1980 (3) SA 755 (AD) at 764A-B.

[7] Judgment: para 14.

[8] Record: pp 149&150.

It is done at the level of Province. --- Treasury, yes.
Do you agree with me? --- Yes.'

The witness tried to show in re-examination that Treasury sometimes had the final say, but otherwise the HOD approved the final submission although she could not remember what occurred in this instance.[9]

[30] The court *a quo* recorded the following pertaining to Ms Joubert's evidence:
'After opening the tender, it was evaluated by the people responsible for book provisioning who made the necessary recommendations to the Departmental bid committee chairperson and members who thereafter made a final recommendation to the HOD for approval.'[10]
It continued:
'The departmental committee was chaired by Mr Lioma, being accused 1, and Mr Komail made submissions to this committee for recommendation and approval. In cross-examination she testified that the HOD did not play any role initially and only after the final recommendation was made, did he have the authority to approve or reject it. The process itself was handled by Mr Komail and the HOD did not know who submitted the applications. The recommendation was made to the Department bid committee in the format of written submission by Mr Komail. He (sic) testified that the Departmental tender bid committee acted on the aforesaid recommendation.' (emphasis added)[11]

[31] Ms Joubert's evidence should have alerted the court *a quo* to an established procedure adopted in the procurement process. It could never have been expected of the Departmental Tender Committee to again go through each of the more than 360 tenders with a fine comb. Mr Spies accepted this to be the standard practice. That committee and appellant relied on the ground work having been done earlier. Therefore, Mr Komail presented this committee with written submissions only. There is nothing unusual or unfair about such an approach. I reiterate that Mr Spies admitted that the processes followed by the Department were fair, although he criticized the acceptance of some tenders, or the rejection of others.

[9] Record: p 150.
[10] Judgment: para 13.
[11] Judgment: para 14.

[32] Ms L Kent was responsible for the keeping of the minutes of the Departmental Tender Committee meetings. Although she remembered that the appellant acted as chairperson, she could not remember that he tried to promote a certain tender. She was of no further assistance, although she indicated that the recording machine was switched off from time to time on instructions of appellant. One would have expected her to remember what was discussed during those crucial times, but she could not shed any light on the subject matter. The court *a quo* summarised her evidence as follows:

'... She gave details about the discussion during the tender meetings where accused 1 acted as the chairperson. She cannot remember that accused 1 had at any stage tried to promote a certain tender.'[12]

[33] The vagueness of these two ladies who were responsible for secretarial work only, should have alerted the State to obtain available witnesses involved in the chain from receipt of the tenders, the initial evaluation thereof and the eventual awards to the successful tenderers. In the absence of such evidence the court *a quo* should have made a negative inference which it failed to do. It would indeed be reasonable for the court *a quo* to conclude that the State knew that the evidence of any such witnesses would be detrimental to the State's case and/or such evidence would not support the conclusions which the State sought the court to arrive at.

[34] Mr Moeng is a single witness who was warned by the court *a quo* in terms of s 204. He testified on behalf of the State in order to obtain a conviction on count 20 in respect of fraud allegedly committed by accused 6 and 7 and of the appellant as an accomplice to fraud. The State relied on a combined summons and particulars of claim issued out of this court in terms whereof *inter alia* accused 6 and 7 claimed that they were in a partnership with Mr Moeng in respect of the tender eventually awarded to Moeng Enterprise. Mr Moeng testified during his evidence that these averments were false as he was merely assisted by the two accused during the completion and submission of his tender forms.

[35] Not once in his witness statement, deposed to on 30 April 2004, did Mr Moeng state that he had given cash and/or a cheque directly to the appellant. Out of the blue, in a significant turnaround, he stated during his *viva voce* evidence that he had paid

[12] Record: para 39.

cash directly to the appellant after the tender had been awarded to him in December 2001. According to him he paid an amount of between R3 000 and R5 000 directly to the appellant. He also mentioned at a stage that he paid the appellant by cheque. The matter stood down for the witness to find the cheque referred to, but he could only find one cheque in the amount of R5 000 dated February 2003 made out in favour of accused 6.[13] This is more than a year after the award of the tender. It is a serious concern that Mr Moeng made his witness statement more than a decade and a half before his *viva voce* evidence was led and then, when everything was still fresh in his memory, failed to inform the SAPS official who took down his statement that the appellant had arrived at his house in a BMW and that he had paid him directly. Thirteen years later he came with this revelation in court for the first time.

[36] The record shows that Mr Moeng was a poor witness who contradicted himself. It is no surprise that the court *a quo* discharged accused 6, 7 and the appellant on extortion and corruption counts, to wit counts 21, 22 and 23, after the close of the State's case. The court *a quo* recorded the concession by Mr Swanepoel on behalf of the State as follows:

'Although the question of credibility should not be decisive at this point, he conceded that the evidence of Mr Moeng was of such a poor quality that it can only be relied upon where it is corroborated. We agree with Mr Swanepoel in this regard.'

[37] The court *a quo* accepted in its judgment that there was 'a ring of truth' to Moeng's evidence, relying on the particulars of claim pertaining to the partnership allegation referred to above. The court *a quo* erred in failing to accept that Mr Moeng denied any existence of a partnership. Clearly, tender monies were shared amongst Mr Moeng and accused 6 and 7. Accused 6 was adamant that a partnership was created and he was the author of the particulars of claim presented as exhibit by the State. The witness' version that accused 6 took cash for other people, including Mr Komail and the appellant, was not only denied by accused 6, but the witness was totally confused about his alleged direct payment to appellant. In conclusion, his *viva voce* evidence is in direct conflict with his witness statement wherein he explicitly stated that he never paid any monies directly to the appellant. According to him, his

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[13] Judgment: para 28.

failure to mention such an important incident in his statement should be described as 'it slipped his mind.'[14]

[38] Mr Majola, accused 6, denied Mr Moeng's version. According to him Mr Moeng was in financial difficulty and asked his assistance with a tender as Mr Majola was previously the chairperson of the Tender Board. They, accused 6 and his brother, accused 7, and Mr Moeng agreed to form a partnership in order to apply for the tender and the execution thereof if successful. Accused 7 provided the initial capital required. Mr Moeng initially complied with his obligations and the first amount received from the Department was split equally. Each partner received R25 000. Thereafter Mr Moeng reneged on the agreement, causing Mr Majola to issue summons.

[39] I indicated above that a cautionary approach was required pertaining to the evidence of a s 204 witness and that safeguards were required, usually by way of corroboration. No safeguard could have been found by the court *a quo*, save possibly for six telephone calls between Mr Moeng and the appellant which were made after the award of the tender and when he was expecting payment from the Department. This witness' version is so improbable that it should have been rejected as false.

[40] If the test applicable to circumstantial evidence was considered, which the court *a quo* did not do, it could not have found that the only reasonable inference to be drawn from the proven facts was that Mr Moeng and the appellant had discussions about payments to be made to the appellant in respect of the tender. More importantly, that the appellant was guilty as an accomplice.

[41] Mr LA Molefe, accused 2's driver, was called to testify on behalf of the State. He signed documents to apply for a tender, which according to him, later appeared to be in the name of Mabolela Distributors. Accused 2 promised him a house, a car and cash if the tender application succeeded. The tender was awarded, but accused 2 did not honour his promise.[15] According to him accused 2 and the appellant were close friends. At a stage the appellant attended a wedding at accused 2's house. After the proceedings he loaded five or six bottles of whiskey into the appellant's car on instructions of accused 2. Later on, the witness changed his version, testifying that he

[14] Judgment: paras 21,23&27.
[15] Record: 1282-3.

had in fact loaded five to ten bottles of whiskey into appellant's car. It was denied by the appellant that he received any liquor from accused 2.

[42] Mr Spies testified about the tender process. He confirmed that 37 tenderers out of a total of 364 were awarded tenders for the distribution of learning support material and text books to schools in the Free State. The appellant signed the tender contracts, valid for three years. The court *a quo* recorded that he was told that Mr SP Motaung, accused 4, was the person who evaluated the tenders and who made the eventual recommendations to the Departmental Tender Committee. We know that to be wrong; it was Mr Komail who did this. He was also told that this whole tender process was manipulated. This must be read in the context set out above and Mr Spies' evidence that a proper approach was followed. Relying on hearsay information, he stated that officials of the Department of Education were paid by the successful tenderers.

[43] Mr Spies eventually ascertained that money had been paid into the bank accounts of some officials. He analysed nine accounts of the appellant for the period 1 March 2001 to 30 April 2004 and found that appellant had received R19 600 from recommended and approved tenderers. These payments were from *inter alia* accused 5, accused 2, accused 10 and the late Mr Lekitlane. The court *a quo* recorded that a total amount of R81 160.97 was received from other individuals and further cash deposits in the amount of R54 600 were made. The appellant's income from the Department totalled R682 877.18, whilst his expenses totalled R883 023.63, giving a shortfall of R200 146.45. Accordingly, an amount totalling R204 702.65 was deposited into the appellant's bank account which was not received from his employer, the Provincial Government. According to Mr Spies' report appellant was living beyond his means. This was not fully canvassed during his *viva voce* evidence and he was not cross-examined in that regard, an aspect complained about by Mr Potgieter. The figures presented by the court *a quo* relating to the evidence of Mr Spies do not correlate,[16] *ie* the total of cash deposits varied between R54 600 and eventually R32 500.

[16] Judgment: paras 59-61.

[44] It is unnecessary to consider Mr Spies' conclusion in his report that the appellant lived beyond his means and that he had to receive money from successful tenderers to make his books balance. The appellant testified about extra money received from legitimate entities such as lawyers, Sovereign Motors, insurance companies and the like. His version could not be doubted, especially insofar as much thereof has been confirmed in the evidence of Mr Spies.

[45] The court *a quo* recorded that Mr Spies summarised his findings in his final report by stating:[17]

'The overall process followed appears to be fraught with inconsistencies and allegations of undue preference and therefore not fair, equitable, transparent, competitive and cost-effective'.

Emphasis is placed on the word 'appears' in the quote above. If Mr Spies was emphatic in his conclusion, he would have used conclusive language. This uncertain conclusion must be considered in light of the State's failure to call available witnesses. I refer to Mr Spies' evidence that manipulation of the process might have occurred outside official committee meetings, but that the process itself could not be faulted. No official within the structure of the Free State Province was called to confirm that an improper procurement process was followed. Even if mistakes were made, that would have occurred during the initial evaluation processes. The best procurement process does not prevent dissatisfaction. The numerous tender disputes brought to our courts for adjudication serve as proof that there will always be dissatisfied unsuccessful tenderers.

[46] I repeat that it is incomprehensible that the State did not call any of the Departmental Tender Committee members, especially insofar as the two ladies who did secretarial duties could not assist at all. Save for the Departmental Tender Committee members, the State could have and should have called any of the other role players, *ie* those involved prior to the matter going to the Departmental Tender Committee, or those at provincial level, in order to show that the appellant advanced the tenders of any of the successful tenderers and particularly those relating to appellant's co-accused.

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[17] Judgment: para 68.

The appellant's version

[47] In dealing with the appellant's version, corroborated to an extent by the common cause facts, the court *a quo* did not consider the following *dictum* in *S v Shackell*[18] which could not be ignored:

'[30] ..... It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, <u>a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true....</u>'(emphasis added)

[48] Unlike as could have been expected, the court *a quo* gave little attention to the version of the appellant in respect of the procurement process. It dealt with his version relating to the Departmental Tender Board meetings in two short paragraphs, to wit paragraphs 72 and 76. In paragraph 76 the court *a quo* made the following observation:

'As far as his role is concerned accused 1 testified that he was not just a rubberstamp, he actively partook in the process. He conceded that he was part of the process and that he perused the documents of the 37 tenderers.'

[49] The appellant never conceded that he had perused the documents – the full sets of tender documents – of all the tenderers. In fact, it is common cause that Mr Komail did not present the Departmental Tender Committee with the full sets of documents of each and every tenderer. He made submissions only which would be brief summaries of the evaluations done and the recommendations. Mr Spies confirmed this.

[50] Most importantly, unlike as the court *a quo* tried to convey, the buck did not stop at the appellant as HOD. The CPEC was, based on the common cause facts, the last point of authority. The appellant was merely tasked to sign the memoranda of agreement with the successful tenderers once the complete process had been

[18] 2001 (2) SACR 185 (SCA) para 30.

followed. It is emphasised that there is no evidence that appellant ever had sight of the full sets of tender documents of the tenderers and in particular, any of the documents of his co-accused and/or their companies and/or entities and/or relatives. No evidence has been led that he was supposed to know the names of the natural persons who tendered under the names of companies, or the like.

Telephone calls and flow of payments

[51] The appellant's telephone calls were properly explained. Accused 2's daughter stayed with him and monies received was for her boarding and the child's expenses. Accused 2 made payments to the appellant in this regard and also asked accused 5 to pay the appellant on his behalf. The appellant received the meagre amount of R2 000 from accused 5 who made the payment on the defence version on instructions of accused 2. The company in which accused 5 had an interest successfully tendered under the name of MD Services. Accused 2 made equally small payments to the appellant in the total amount of R8 600. The majority of these payments in amounts of R5 000, R2 000 and R1 000 were made from July 2002 to August 2003. Ms Lesetla, accused 10, made a payment in the amount of R3 000 to the appellant just after she had received the first tender payment. She made two further payments of R2 000 each in January and June 2002 respectively. The appellant stated that he did not know from where she obtained the funds. Fact is that the record shows that he paid more money to her than the amount received. His version that he lent money to her, which she paid back, could not have been rejected as false. There is just no logical explanation why the appellant, who allegedly insisted on being paid for assistance with tenders, would pay money to Ms Lesetla, save in circumstances mentioned by him. A former accused, the late Mr Lekitlane also paid money to the appellant. In that case the money was paid long before the procurement process was even contemplated. Surely, this could not be relevant to prove the appellant's guilt.

[52] The calls between appellant and Mr Moeng were made after the tender was awarded and whilst Mr Moeng was awaiting payment. It would be speculative to find that these had to do with the appellant's alleged unlawful involvement. His explanation should have been accepted, especially insofar as Mr Moeng presented a contradictory version. Surely, accused 2's daughter who stayed with the appellant would have telephonic contact with her father during the relevant period. This explains many of the calls. It is also a fact that accused 2 and the appellant are friends.

The appellant as an accomplice in respect of counts 6 and 20

[53] Mr Potgieter incorrectly relied on *S v Wannenburg*[19] insofar as he quoted from the heading of the reported judgment. The facts *in casu* are totally distinguishable from the facts in *Wannenburg*. In that case the charge sheet alleged that the appellant himself made the representations and not that he assisted another person or persons who had made the misrepresentations in order to commit fraud. Bozalek J[20] correctly stated the legal principle as follows:

'In my view, where it is clear that the accused can only be held liable as an accomplice, the indictment should specify this and the basis of the accomplice's liability. Judging from the evidence in the present matter, on the charges as framed, it is difficult to see how the State could ever have hoped to secure the appellant's conviction on any basis other than that of an accomplice.'

The learned judge continued:[21]

'In a nutshell, it is impermissible in my view, in circumstances such as these, to charge an accused with crime A and upon failure to prove same, to convict him of being an accomplice to crime B.'

The reason for this conclusion is the prejudice. The learned judge concluded that an accused is entitled to a fair trial in terms of s 35(3) of the Constitution and to be informed of the charge with sufficient detail to answer it, *inter alia* relying on *S v Singo*.[22]

[54] *Snyman*[23] authoritatively defines an accomplice as somebody that 'does not satisfy all the requirements for liability contained in the definition of the crime or who does not qualify for liability in terms of the principles relating to common purpose, but who nevertheless unlawfully and intentionally furthers its commission by somebody else.' Such person 'consciously associates himself with the commission of the crime by assisting the perpetrator or co-perpetrators or by giving them advice or supplying them with information or by offering them an opportunity or means to commit the crime or to facilitate its commission.'[24] A person cannot be an accomplice in respect of his own crime.[25]

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[19] 2007 (1) SACR 27 (C).
[20] *Ibid* p 33 f.
[21] *Ibid* p 33 j.
[22] 2002 (2) SACR 160 (CC) para 19.
[23] CR Snyman, Criminal Law, 6 ed pp 250-251.
[24] *Ibid*, relying on *S v Williams* 1980 (1) SA 60 (A) at p 63; *S v Maxaba* 1981 (1) SA 1148 (A) at pp 1155- 1156.
[25] *Snyman loc cit* at pp 266-267.

[55] It needs to be considered whether the court *a quo* correctly convicted the appellant as an accomplice in respect of the fraud allegedly committed by accused 2 and 3 in respect of count 6 and as an accomplice in respect of the fraud allegedly committed by accused 6 and 7 in respect of count 20 (the Moeng Enterprise). In my view it is not necessary for adjudicating this appeal to investigate whether fraud was in fact committed by either accused 2 and 3 (in respect of count 6) or accused 6 and 7 (in respect of count 20). There is a dearth of direct evidence to incriminate the appellant as alleged by the State. The court *a quo* was in essence called upon to rely on circumstantial evidence. In order to evaluate the evidence and the court *a quo's* findings, it is apposite to refer to the trite principles in this regard. It cannot be ignored that the court *a quo* acquitted accused 1, 2 and 3 on the counts relating to corruption, *ie* counts 4 and 5. The appellant was accused of receiving a benefit (count 5) and the other two for giving a benefit (count 4). This indicated doubt in the court *a quo*'s mind about the reasons for the payments.

[56] In both counts 6 and 20 the State alleged that the appellant was guilty as an accomplice to fraud in that, well aware of the true state of affairs, he used his influence to ensure that tenders were granted whereupon he signed the memoranda of agreement. Although accused 2 and the appellant were friends, there was just no direct or indirect evidence for the court *a quo* to convict. The appellant and accused 6 knew each other well, but there was insufficient evidence to convict the appellant. I am satisfied that if the test in respect of circumstantial evidence was correctly applied, the court *a quo* would have acquitted the appellant on both counts 6 and 20.

[57] The same principle mentioned above pertaining to the calling of available witnesses applies *mutatis mutandis* in respect of these counts. At Treasury level Mr De Wet was the chairperson of the CPEC at the time. Several high-ranking officials were members of the Departmental Tender Committee. Others were involved in the evaluation and selection processes undertaken before appellant and his committee became involved. Nobody was called to incriminate the appellant. Dr Rakometsi, listed as a State witness, was made available to the defence and was called to testify on behalf of the appellant. *Ex facie* the appeal record not a single suggestion was made to him by the prosecutor in cross-examination that the appellant had influenced the process in favour of those tenderers mentioned in the indictment. The court *a quo*

should have accepted the appellant's version as reasonably possibly true in both instances.

Convictions in respect of s 5 of the Prevention of Organised Crime Act 121 of 1998 (POCA): money laundering

[58] The State did not prove its case and this was eventually conceded by its counsel who appeared before us. The evidence will not be repeated. I will show that even if the appellant's version could be rejected as not reasonably possibly true, which is clearly not the case, the State did not come close to prove that s 5 of POCA had been contravened.

[59] The appellant was convicted for assisting another to benefit from the proceeds of unlawful activities in accordance with s 5 of POCA read with ss 7A and 8 thereof. Let it be repeated. The issue in s 5 is the assistance by an accused to another to benefit from the proceeds of unlawful action.

[60] The relevant counts are counts 47 to 54 relating to the Kopanang Women Enterprise and counts 57 to 64 relating to Matsapela Distributors. The State alleged in counts 46 to 54 of the indictment that the appellant was guilty of assisting another (the Kopanang Women Enterprise) to benefit from the proceeds of unlawful activities. Page 83 of the indictment refers to count 55 which cannot be correct. Count 55 is in respect of Matsapela Distributors.

[61] For one or other strange reason the court *a quo* convicted the appellant in respect of counts 47 to 54 only, totally ignoring count 46. The same omission occurred pertaining to counts 56 to 64. Again, the court *a quo* ignored count 56, but convicted the appellant in respect of counts 57 to 64. In Part C of the order[26] the court *a quo* found the accused persons, including the appellant, not guilty in respect of 'the other counts concerned' and discharged them. It is uncertain whether a typographical error crept in or whether a mistake occurred due to the confusion created with the amendments of the indictment. We, as the court of appeal judges, were initially presented with the wrong indictment as part of the appeal record which really made for difficult reading. Upon request during the appeal hearing we were presented with the ultimate indictment that served before the court *a quo*. The outcome of the court *a*

[26] Judgment: para 132

quo's findings is that the appellant was acquitted on counts 46 and 56 although there was no reason to differentiate these counts from the others mentioned above.

[62] It is apposite to deal with the legislation as well as authorities in this regard prior to briefly refer to some of the evidence. I shall do so now. Section 5 of POCA, as is the case with ss 4 and 6, deals with money laundering offences and has nothing to do with racketeering which is dealt with in s 2 of POCA. Section 5 in essence deals with an accused's assistance in the concealing or disguising of the proceeds of unlawful activities and reads as follows:

'5. Assisting another to benefit from proceeds of unlawful activities

Any person who knows or ought reasonably to have known that another person has obtained the proceeds of unlawful activities, and who enters into any agreement with anyone or engages in any arrangement or transaction whereby –

(a) The retention or the control by or on behalf of the said other person of the proceeds of unlawful activities is facilitated; or

(b) The said proceeds of unlawful activities are used to make funds available to the said other person or to acquire property on his or her behalf or to benefit him or her in any other way shall be guilty of an offence.' (emphasis added)

[63] Section 1 of the Financial Intelligence Centre Act 38 of 2001 (FICA) defines money laundering as 'an activity which has or is likely to have the effect of concealing or disguising the nature, source, location, disposition or movement of the proceeds of unlawful activities or any interest which anyone has in such proceeds, and includes any activity which constitutes an offence in terms of section 64 of this Act or section 4, 5 or 6 of the Prevention Act....'

Kruger,[27] with reference to international experts on the topic of money laundering, makes the following comments:[28]

'Money laundering can be described as "the manipulation of illegally acquired wealth in order to obscure its true source or nature". It entails disguising the origins of money obtained through crime so that the funds appear to have been obtained legally. The funds are made to appear legal through a single transaction or a series of transactions. Thus is the money acquired by unlawful means made useful. As Bourne puts it:

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[27] A Kruger, *Organised Crime and Proceeds of Crime Law in South Africa*, 3rd ed p 55.

[28] Ibid.

"Criminals, and in particular organised crime syndicates engaged in a variety of unlawful activities such as drug trafficking, fraud, embezzlement, theft and smuggling of vehicles, weapons and works of art, are faced with a problem how to disguise, protect and legitimise the dirty money generated from their illegal activities"'

[64] I agree with Kruger[29] that s 5 creates an offence 'in respect of the person assisting another to benefit from the proceeds of unlawful activities' and that it does not seek to punish the person who obtained such proceeds. Put otherwise, 'it concerns the conduct of persons other than the initial perpetrator.' It is apparent that s 5 was enacted to prevent persons from acting in such a manner to legitimize the proceeds and to actually pull the wool over someone's eyes so that it appears as if the proceeds were derived from a legitimate enterprise. Intent or negligence would suffice for a conviction. Kruger refers to unusual conduct from which the intent to conceal may be inferred, such as handing cash to a person, for example to purchase a luxury motor vehicle. Often criminals would split the proceeds of unlawful activities into several small deposits which are then deposited into or transferred to different bank accounts. Often a relative's account is used. In conclusion, it is an offence under s 5 to assist another to benefit from the proceeds of unlawful activities.

[65] It is not necessary to deal in any detail with the differences between ss 4, 5 and 6 of POCA. It would suffice to indicate that s 4 can be contravened by one person only, for example by performing only an act in connection with the proceeds of unlawful activities which is likely to have the effect of concealing, or disguising the nature, source, location, disposition, or movement of the property, or ownership thereof, or of enabling or assisting any person who has committed an offence to avoid prosecution. In *S v De Vries and Others*[30] it was held that the appellant knew that the boxes of cigarettes were the proceeds of unlawful activities when he took these stolen cigarettes in as part of his stock in trade as if these goods were lawfully acquired. His conviction in respect of contravention of s 4 of POCA was upheld by the Supreme Court of Appeal. Nicholls J dealt with the differences between ss 4, 5 and 6 in *S v Van der Linde.*[31] The learned judge made the point that s 5 deals 'with the situation where a third party assists a person to benefit from the proceeds of his or her criminal

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[29] *Ibid* p 62, relying on *S v Eyssen* unreported CPD case no CC 31/06, a judgment delivered on 22 March 2007 at p 105.

[30] 2012 (1) SA (SACR) 186 (SCA); see also *S v Prinsloo & Others* 2016 (2) SACR 25 (SCA) where the court dealt with a contravention of s 4 of POCA.

[31] [2016] 3 All SA 898 (GJ) at paras 120, 127-129.

activities, by entering into an agreement with that person.' In my view, it is obvious that the judge had in mind as s 5 quite clearly reads. The agreement follows upon a prior criminal activity in order to assist the perpetrator.

[66] Contrary to ss 4 and 5, s 6 stipulates that any person who acquires, uses, or has possession of property and who knows or ought reasonably to have known that it is, or forms part of, the proceeds of unlawful activities of another person shall be guilty of an offence. In this case the activities targeted are the acquisition, use or possession of the proceeds of unlawful activity by another person. It is therefore this person and not the person who perpetrated the money laundering that is targeted insofar as this person is rendering assistance to the person who has committed the crime.[32]

[67] I return to s 5. It is apparent from the wording of s 5 that the following jurisdictional facts have to be proven for a conviction:[33]

a. there must have been an unlawful activity from which the proceeds were derived or received;

b. the accused knew or should reasonably have known that the property was derived from such unlawful activity;

c. the unlawful activity must have happened in the Republic or elsewhere;

d. the accused entered into any agreement with anyone or engaged in any arrangement or transaction whereby the retention of or the control by or on behalf of the said other person of the proceeds of the unlawful activities was facilitated, or such proceeds were used to make funds available to the said other person or to acquire property on their behalf or to benefit them in any other way.

[68] The gist of the indictment is that the appellant's signing of the two memoranda of agreement on behalf of the Department amounted to an arrangement and/or transaction whereby the retention of or control by or on behalf of the said other persons (the successful tenderers) of the proceeds of unlawful activities was facilitated.

[69] In my view the section is clear and if applied *in casu* the following had to be proved. The other persons (the tenderers in this case) must have obtained the proceeds of unlawful activities and the appellant (in this case) must have known or

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[32] Kruger *loc cit* p 64.

[33] Lebeya SG, *Understanding Organised Crime*, p 86.

reasonably ought to have known this. Then the appellant entered into an agreement with those tenderers whereby the retention or control of the proceeds of the unlawful activities was facilitated on behalf of the tenderers, or the proceeds of the unlawful activities were used to make funds available to the tenderers or to acquire property on their behalf or to benefit them.

[70] The State failed to prove the elements of the crime in both instances. The assistance by the appellant of the initial perpetrator, the tenderer, is what the legislature intended to curb and the State failed to prove this. On the State's version, which had to be rejected, the appellant did not assist in dealing with the unlawful proceeds, but shared therein. The memorandum of agreement with Kopanong Women Enterprise (tender 339) – in respect of counts 47 to 54 - does not constitute an agreement as intended by the legislature. The transaction or agreement that the legislature had in mind, considering the unambiguous wording of s 5, must have been entered into after receipt of the unlawful proceeds in order to assist the initial perpetrator to benefit, or as stated above, to pull the wool over other people's eyes so that it appears as if the proceeds were obtained legally. In any event, the court *a quo* accepted accused 8's testimony. She never incriminated the appellant. The few telephone calls between them could be expected bearing in mind her position within the Department. I also referred to the flow of money between accused 10 and appellant and the evidence of a loan to accused 10.

[71] Insofar as counts 57 to 64 are concerned, the State's case on the facts is more troubling. No link, either telephonic conversations, or the flow of money, could be established between the appellant and accused 11 and 12. No money laundering was proved. Also, no agreement as intended by the legislature was entered into and proved. Having said this, it remains clear that the State failed to prove a case in terms of s 5 for the reasons mentioned above.

Count 69

[72] Count 69 of the latest indictment presented to us reads as follows:

'Accused 1

Contravention of section 38(1)(a)(iii) read with section 1, 36 and 86(1) of At (*sic*) 1 of 1999 the Public Finance Management Act

That the accused is guilty of contravention of section 38(1)(a)(iii) read with section 1, 36 and 86(1) of At (*sic*) 1 of 1999 the Public Finance Management Act and section 217(1) of act 108 of 1996 the Constitution of the Republic of South Africa

IN THAT on or about 10 October 2001 at or near the Sediba Building, Markgraaf Street, Bloemfontein and within the jurisdictional area of the High Court Free State, Bloemfontein he wrongfully, unlawfully and intentionally or in a grossly negligent way failed in his duty to comply with the duty imposed upon him by virtue of his office as Chief Financial Officer of the Department of Education of the Free State whereby he must have ensured and maintained an appropriate procurement and provisioning system which had to be, fair, equitable, transparent, competitive and cost effective when he, well aware of the Fraud that was being perpetrated mentioned in <u>count 78</u>, entered and signed the Memorandum of Agreement thereby perpetuating the earlier Fraud and thus the accused is guilty of a contravention of section 38(1)(a)(iii) Act 1 of 1999 the Public Finance Management Act.' (emphasis added)

[73] Count 78, relied upon in count 69, deals with one event that occurred on 27 January 2003 in terms whereof an amount of R34 531.51 was electronically transferred as is apparent from schedules 20, 21 and 22 of the indictment. Appellant and accused 13, Ms MM Letsela (also incorrectly referred to as accused 15 in the body of the count) were charged with contravening ss 4, 5 and 6 of POCA without these offences being pleaded in the alternative. It deals with an entity referred to as Matwabeng Distributors. Count 69 refers to accused 13, but no evidence has been tendered to prove the flow of money and/or telephonic conversations between accused 13 and the appellant. They were not charged with fraud. It needs to be emphasised that appellant was not convicted in respect of count 78 which forms part of the bundle of counts referred as counts 70 to 78. In this regard the court *a quo* held as follows:

'The State relies on contravening section 4 of POCA, namely money laundering. As stated above the element of secrecy lacks in this regard. The Court is therefore of the view that the accused are entitled to the benefit of the doubt. They must therefore be found not guilty and discharged with regards to counts 70 to 78.'

[74] The court *a quo* convicted the appellant in respect of count 69. I quote the order: 'Contravening section 38(1)(a)(ii) (*sic* - it should be s 38(1)(a)(iii)), read with section 136 (*sic*) and 86(1) of Act 1 of 1999 (Public Finance Management Act).'

[75] If it is accepted that a mere typographical error crept in during the transcription of the judgment, the appellant was convicted of contravention of s 38(1)(a)(iii) read with all the relevant sections of the PFMA. The appellant was convicted for not ensuring and maintaining an appropriate procurement and provisioning system which was fair, equitable, transparent, competitive and cost effective. If the count is read in totality, the court *a quo* intended to convict on the basis that the appellant was well aware of the fraud that was being perpetrated mentioned in count 78 only. As mentioned, count 78 forms part of the bundle of counts 70 to 78. The State sought convictions in respect of the contravention of ss 4, 5 and 6 of POCA without even pleading these counts in the alternative, but no conviction followed.

[76] Finally, I need to refer to Ms Claassens' submission mentioned above. She submitted that at best for the State the convictions should be set aside, but that the appellant be convicted of contravening s 38(1)(a)(iii) of the PFMA pertaining to counts 6 and 20. Contravention of s 38(1)(a)(iii) was pleaded as an alternative to count 6, but not to count 20. Therefore, the only possibility would be to uphold the appeal pertaining to the conviction of accomplice in count 6 and to substitute that with a conviction of contravening s 38(1)(a)(iii) of the PFMA.

[77] In order to consider whether the court *a quo* correctly convicted the appellant for contravening s 38 of the PFMA, it is reiterated that the common cause facts are crystal clear. The appellant acted on a month to month basis as HOD of the Department for a period of eight months during 2001. He inherited a procurement system. His permanent position at the time was that of Deputy Director within the Department. There can be no doubt that the Province was in a transitional period in respect of procurement at the time. The Tender Board Act 2 of 1994 in terms whereof procurement took place, was repealed on 10 April 2001. That Act could therefore not be applied in the evaluation of the specific tender E7, although the Department made use of the document, referred to as FST36, a product of the repealed Act. FST36 formed the basis for a fair and transparent tender process as admitted by Mr Spies. There might have been some uncertainty pertaining to procurement and the evaluation of tenders as no guidelines such as later provided in the Supply Chain Management Regulations existed at the time. At the same time the whole procurement process needed to be finalised with extreme haste in order to ensure that the relevant books

be procured and distributed to the various schools across the Free State Province before the end of the school year.

[78] The date of commencement of the PFMA was 1 April 2000. National Treasury issued the Supply Chain Management Regulations in terms of the PFMA as late as 5 December 2003.[34] The State did not at any stage rely on an *interim* procurement process adopted by the Provincial Treasury to provide for procedures during the time that the appellant acted as HOD.

[79] Having considered the totality of the evidence and the legislation, I am satisfied that Ms Claassen's submission should not be adhered to. Consequently, the appeal should be upheld and the appellant be acquitted on all charges.

Order

[80] The following order is made:

1. The appeal against the convictions and sentence is upheld.
2. The order of the court *a quo* is set aside and substituted with the following: "Accused 1 is acquitted on all counts and discharged."

[redacted]

JP DAFFUE J

I Concur

[redacted]

NM MBHELE DJP

I Concur

[redacted]

PR CRONJE AJ

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[34] GN R 1734 published in Government Gazette 25767 of 5 December 2003; see also *S v Scholtz and Others* 2018 (2) SACR 526 (SCA) at paras 15-17.

Appearances

For appellant:	Adv HJ Potgieter
Instructed by:	Giorgi & Gerber Attorneys
	Bloemfontein
For respondent:	Adv BG Claassens
Instructed by:	Director of Public Prosecutions
	Bloemfontein.