REPORTABLE

CASE NO: CA 24/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JOEL PAULUS **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM SHIVUTE J et GEIER AJ

Heard on: 31 January 2011

Delivered on: 19 May 2011

SUMMARY

Criminal Law **–** statutory offence – whether *mens rea* is an essential ingredient of the offence created by section 35 (1) of the Anti-Corruption Act, Act no 8 of 2003 – the question whether or not *mens rea* is an element of the offence under consideration essentially to be established by interpreting the statute in question in order to deduce therefrom the essence of the legislatures intentions where the legislation merely prohibits conduct without reference to the element of *mens rea* -

Criminal Law **–** statutory offence - whether *mens rea* is an essential ingredient of the offence created by section 35 (1) of the Anti-Corruption Act, Act no 8 of 2003 – the question whether or not *mens rea* is an element of the offence under consideration essentially to be established by interpreting the statute in question - the point of departure is the general rule : "... *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended innocent violations thereof to be punishable – Decisions of *R. v H.* 1944 AD 121 at pages 125, 126, R v Wallendorf and Others 1920 AD 383 at p 394S v Arenstein 1964 (1) SA 361 AD *S v* Maseka 1991 NR 249 HC at p 253 B approved – this approach is fortified by the rule that penal statutes are to be benevolently interpreted (in favorem innocentia) as well as by the presumption (since mens rea is an element of common law crimes) that the legislature does not, in the absence of clear language to this effect, intend to alter the common law -

Criminal Law **–** statutory offence - Courts have evolved a special approach to discover whether the presumption is to be given effect to or not – court to have reference to what is termed 'other considerations' or "'various' considerations' in order to determine whether or not the legislature has intended strict liability in a statute - *inter alia* - language and context of the prohibition - the scope and object of the statute - the nature and extent of the penalty imposed - the ease with which the prohibition can be evaded if reliance could be placed on the absence of *mens rea* and the reasonableness or otherwise of holding that *mens rea* is not an ingredient of the offence - Particular importance to be attached to the language and context of the prohibition - The mere fact that a provision was couched in absolute or prohibitory language is not a decisive criterion that the intention was to create strict liability - the presence of certain adverbs which qualify the prohibited conduct and refer to a certain mental state of mind (usually awareness of the nature of his or her conduct) of the

person engaging in the positive conduct, is a strong indication that *mens rea* is an ingredient - the ordinary grammatical meaning of the verbs employed to describe the prohibited conduct bears an implication that the person indulging in such conduct is aware of the nature of his or her conduct and knowingly indulges in it, it is regarded as an indication that *mens rea* is required - “the aspect of ‘reasonableness’ towards both the state and the accused of excluding *mens rea* is another factor which is increasingly taken into account in determining whether strict liability was intended. A finding of strict liability is prejudicial towards the accused in that it is a “travesty of justice” that a completely innocent person be found guilty, while a finding of *mens rea* is prejudicial to the state in that it incurs the additional load of proving *mens rea*. The mere fact that a nominal fine can be imposed on an accused who is held strictly liable, does not remove the basic injustice and thus cannot serve to justify strict liability. If the result of excluding *mens rea* is the punishment of innocent conduct other than the conduct, which the legislature clearly intended to punish, while the inclusion of *mens rea* will result in only the latter being punishable, strict liability is not intended. The legislature does not intend absurd results and the exclusion of *mens rea* leads to such unreasonable results that it can be said to be absurd. Courts are inclined to adopt this reasoning where the description of the *actus reus* is couched in wide terms - A quantitive criterion has in this respect evolved through which the reasonableness or otherwise of excluding *mens rea* as an element of the offence is determined - and whether or not - the application of these criteria - individually or cumulatively - results in the conclusion that strict liability was intended -

Criminal Law **–** statutory offence - created by section 35 (1) of the Anti-Corruption Act, Act no 8 of 2003 – interpretation of – Court on application and consideration of quantitive criteria concluding that *‘mens rea’* an element of the offence created in section 35(1) of the Anti Corruption Act 2003 –

Constitutional Law – Article 7 rights - no person to be deprived of personal liberty except according to procedures established by law – in accord with *“fundamental principle of democratic societies’* that *“ ... people who are not at fault should not be*

deprived of their freedom by the State and only persons who have committed an unlawful act intentionally or negligently may be punished through the deprivation of liberty.... " Court also on application of the said fundamental democratic principle and Article 7 of the Namibian Constitution concluding that *'mens rea'* an element of the offence created in section 35(1) of the Anti Corruption Act 2003 – *S v Coetzee & Others* 1997 (1) SACR 379 CC at p 438 – 442, paras [162] to [175] and p442 -443 paras [176] – [177] approved –

Constitutional Law – Article 12 Trial Rights – consideration of whether doctrine of strict liability infringes on the presumption of innocence as contained in Article 12(1)(d) of the Namibian Constitution and therefore on the fair trial rights enshrined in Article 12(1)(a) – court finding the strict liability doctrine also in conflict with one of the most fundamental rules of criminal justice system, namely that it for the prosecution to prove the guilt of the accused person, and that such proof must be proof beyond reasonable doubt', which, normally, includes proof of the culpability, that the person has committed the unlawful act either 'intentionally' or 'negligently' - The effect of strict liability would be to relieve the prosecution of the burden of proving that the accused person has committed the unlawful act either 'intentionally' or 'negligently' - such situation could result in a conviction despite the existence of a reasonable doubt as to the accused's guilt.

Constitutional Law – Article 12 Trial Rights – consideration of whether doctrine of strict liability infringes on the presumption of innocence as contained in Article 12(1)(d) of the Namibian Constitution and therefore on the fair trial rights enshrined in Article 12(1)(a) – court finding that the strict liability device would render the presumption of innocence ineffective as an accused person might be deprived of the benefit conferred by the right enshrined in Article 12(1)(d) of the Constitution. This deprivation would therefore not only infringe directly on the accused persons constitutional rights as enshrined in Article 12 (1)(d) but also ultimately on the fair trial rights conferred on such persons by Article 12(1)(a) - Court also against the requirements of Articles 12(1)(d) and 12(1)(a)

of the Namibian Constitution concluding that *'mens rea'* an element of the offence created by section 35(1) of the Anti Corruption Act 2003 -

Criminal Law **–** statutory offence – created by section 35 (1) of the Anti-Corruption Act, Act no 8 of 2003 – *mens rea* in what form – Court holding upon consideration of the quantitive criterion – ie the cumulative effect of various factors – individually and cumulatively - that *dolus* is the form of *mens rea* required for a conviction in terms of section 35(1) of the Anti Corruption Act 8 of 2003 –

Criminal Law **–** statutory offence – created by section 35 (1) of the Anti-Corruption Act, Act no 8 of 2003 – *mens rea – onus of proof* - whenever mens rea an element of a statutory offence, and whatever the form of mens rea required, the state to prove the required mens rea beyond a reasonable doubt -This burden remains on the state throughout the case - but where the state has led evidence that the prohibited act has been committed by the accused, an inference can be drawn - depending on the nature of the actus reus and other circumstances -that the accused committed the act with the necessary mens rea - This results in a duty being cast on an accused, who relies on the absence of mens rea to adduce evidence to rebut the so-called prima facie case made out by the state -This duty is not tantamount to an onus of proof on a balance of probabilities and the accused accordingly acquits him- or herself of this duty if he or she adduces evidence which, on an evaluation of the evidence as a whole, creates a reasonable doubt as to whether there was mens rea on his or her part – In present case Appellant discharging onus – conviction thus set aside on appeal -

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and

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CORAM: SHIVUTE J et GEIER, AJ Heard: 31 January 2011 Delivered: 19 May 2011

JUDGMENT:

GEIER, AJ.: [1] The Appellant was convicted in the Otjiwarongo's Magistrates Court on one count of contravening section 31 (1) (a) of the Anti Corruption Act, Act no 8 of 2003. He was sentenced to pay a fine of N$ 10 000.00 or 4 years imprisonment of which N$ 5 000.00 or 2 years were suspended on the usual conditions. [2] An appeal against this conviction was noted on 11 February 2009. [3] A number of grounds of appeal were raised in such notice. The one central issue which my view however determines the outcome of this appeal was phrased as follows:

> "**That the learned magistrate (had) erred both in law and in fact in holding that the Appellant had the requisite intention when he solicited or accepted the N$ 2 000.00 from the Complainant**".

[4] Mr. Namandje who appeared on behalf of the Appellant in his Heads of Argument submitted in this regard:

> "**There was a glaring omission on the part of the learned Magistrate to specifically analyse (the) evidence with a view to finding that the State proved all elements of the charge including but not limited to the element of a subjective intention to receive gratification as a(n) inducement and the element of inducement itself. Section 35 (1) (a) of the Anti-Corruption Act is, with minor differences, the same as Section 45 (1) of the old South African Ordinance Number 17 of 1939 as quoted in the matter of S v Ernst, 1963 (3) SA 666 (T), at p 667 C – 668 B:**
>
> > "***Sec. 45 (1) of the Local Government Ordinance, in so far as is presently relevant, reads as follows:***

> ***'Any servant of the council . . . who whether for himself or for any other person, corruptly solicits or receives, or agrees to receive from any other person any fee, advantage or reward (whether pecuniary or otherwise) as an inducement to or in consideration of or otherwise on account of his doing or forbearing to do anything in respect of any matter whatsoever or transaction (actual or proposed) in which the council is concerned, shall be guilty of an offence,' etc.***

Sec. 45 (2) is the complementary provision which penalises the other person for so seducing or trying to seduce any servant of the council in that manner.

The essence of the offences <u>is the actual subjective intention</u> and <u>state of mind of the accused</u>. Under sec. 45 (1) it must be proved that the servant solicited, received or agreed to receive the fee or reward (a) <u>as an inducement</u> to or in consideration of or on account of his acting or forbearing to act, and (b) dishonestly, i.e. knowing that it was in breach of his duty of good faith towards the council. The existence of that intention and state of mind can be proved (or negative) by any of the usual kinds of evidence and inferences relating thereto. Generally where the offer of the fee, etc., originates with the person then one can usually infer what the servant's state of mind was in accepting or agreeing to accept it from the giver's intention, manifested, expressly or impliedly, in offering it. That consensus ad idem would usually be sufficient to establish that the servant's state of mind corresponded with that of the giver. That is the common kind of case arising under sec. 45 (1)

to which the dicta of RAMSBOTTOM, J., in Ndobe's case refer. There the learned Judge at pp 563 – 4 said:

'If a fee or reward is received, <u>it must be received 'as an inducement'</u> to the recipient to do or refrain from doing something, or in consideration of his doing or refraining from doing. <u>That imports the idea of a mental state in the giver. A man can only receive something as an inducement to act or refrain from acting if it was in the mind of the giver to induce him to act or refrain from acting. That imports the idea of a mental state in the giver. A man can only receive something as an inducement to act or refrain from acting if it was in the mind of the giver to induce him to act or refrain from acting</u>, and he can only receive something 'in consideration of' his acting or forbearing to act if the giver intended the fee or reward to be in consideration of an act or forbearance . . .. A servant of the council receives a fee or reward 'corruptly' and 'as an inducement to or in consideration of' his acting or forbearing if he receives it knowing that the giver has given it with the intention of inducing him to eat or forbear from acting or in consideration of his acting or forbearing to act.'

***It does not, however, follow that the servant's intention and state of mind must necessarily in every case coincide with that of the giver. It could still be open to the servant to prove that despite the giver's intention, he did not accept the fee etc. corruptly as an inducement or consideration to act, or forbear from acting." (*Own emphasis).**

4.5.11 In relation to the above quotation the learned Magistrate failed to appreciate that the mental state of the giver must also be investigated for it must be an intention of the giver to induce the appellant to act or to refrain from acting. This is

lacking in the evidence of the State and in the finding of the Magistrate. In fact, it is clear from the evidence of Mr. Pretorius that he did not have any corrupt intention and did not give the money as an inducement to the appellant.

4.5.12 Further the provisions of Section 35(1)(a) are, with slight exceptions, the same as those of section 45(2)(a) of the old South African Act 4 of 1918. It may be helpful and conducive to clarity if we quote from the judgment of R v Durga, 1952 (4) SA 619 (N), at p 619 – 620:

"HOLMES, J.: The appellant was convicted, under the provisions of sec. 2(a) of act 4 of 1918, on 22 counts of corruption. He was employed by the Uvongo Town Board as an overseer of native labour gangs. His duties included the reporting of unsuitable workers with a view to their dismissal by the Board, and the recruiting of new workers. When a Native applied to the appellant for work, the appellant would tell him, falsely, that according to the law of the Town Board he would have to pay 5 s . down, and thereafter 5 s . per week in order to retain his work. The complainants testified to payments made by them as the result of this representation by the appellant. They believed the representation.

Sec. 2(a) of Act 4 of 1918, in so far as here relevant, reads as follows:'If any agent corruptly accepts or obtains . . . from any person . . . any gift or consideration as an inducement or reward for doing or forbearing to do . . . any act in relation to his principal's affairs, or for showing . . . favour to any person in relation to his principal's affairs, . . . he shall be guilty of corruption . . .'

During the hearing of the appeal, an added ground was handed in by consent. It was to this effect: the complainants made the payments in the belief that the law of the Town Board required them to do so, and therefore it could not be said that the payments were corruptly given, and in consequence it could not be said that the appellant corruptly accepted them as an inducement within the meaning of sec. 2(a).

In my view the ground of appeal is sound. On a plain reading of sec. (2)(a) it seems to me clear that if the giver is innocent of any notice to induce or reward the agent, it cannot be said that the latter has accepted or obtained a gift or consideration as an inducement or reward. I agree, with respect, with the reasoning of VAN DEN HEEVER, J. (as he then was) in Rex v Sesing, 1940 OPD 78 at p. 88, to which Mr. Macaulay, for the appellant, referred the Court. The learned Judge there says, in connection with sec. 2(a) of act 4 of 1918: 'A recipient cannot induce himself to do or refrain from doing. It seems to me, therefore, that the Legislature could have meant nothing more than this: If you accept, knowing that the giver meant to seduce.'" (Own emphasis)

Having regard to the above position of the law, the conviction of the appellant is bad both in fact and law and should not stand. This court has accepted that in interpreting the provisions of the word "corruptly" as used in the Anti-Corruption Act mens rea remains an element.See: The Prosecutor-General v Teckla Nandjila Lameck and 7 Others, Case Number POCA 1/2009, Judgment delivered on 22 January 2010 third sentence of paragraph 29 which reads as follows:

> ***"As Mr Gauntlet(t) correctly submits in the supplementary heads of argument, mens rea remains an important element of the offence of corruption created by s33 of the ACA, read with s3(2) of the PSCA."***
>
> ***See also: R v Mbata, 1954 (1) NPD 538 at p 540 D-H***"_ _

[5] In the Respondent's written Heads of Argument drawn by State Counsel Moyo it was simply submitted that *"the wrongfulness and unlawfulness" of his (the Appellant's) conduct is proscribed by the Act. The word 'corruptly' as used and defined in the provisions of the said Act assumes a special technical meaning and renders the provision a strict liability offence"*. No authority was advanced for this sweeping proposition. [6] Ms. Husselmann who appeared on behalf of the Respondent at the hearing of this matter simply submitted in her Supplementary Heads of Argument that *"the respondent reiterates its submission in the main Heads of Argument regarding strict liability. It is submitted that the Appellant's actions were done 'corruptly' as defined in Act 8 of 2003. See: The Prosecutor-General v Teckla Nandjila Lameck and Others Case No POCA 1/2009 an unreported judgment of the High Court of Namibia delivered on 14/08/2009 by Damaseb JP at Frank AJ at paragraph 31 and 35".* During argument she maintained this position.[7] The first question to be determined therefore is whether *mens rea* is an essential ingredient of the offence created by section 35 (1) of the Anti-Corruption Act, Act no 8 of 2003? **IS *MENS REA* AN ELEMENT OF SECTION 35 (1) OF ACT 8 OF 2003** [8] The section provides that:

> "**An agent commits an offence who, directly or indirectly, corruptly solicits or accepts or agrees to accept from any person a gratification –**
>
> **as an inducement to do or to omit to doing anything,**
>
> **as a reward for having done or having omitted to do anything,**

in relation to the affairs or business of the agents principal.

[9] It is to be noted that the concepts of '*agent', 'corruptly', 'gratification', 'principal', 'public body' and 'public officer'* are all defined in the Act."[1] [10] The word *'agent'* is defined to mean *'a person employed by or acting for another in any capacity whatsoever and includes a public officer or an officer serving in or under any public body'*.[2][11] '*Corrupty*' means " ... in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to: any employment relationship;

any agreement; or

the performance of any function in whatever capacity[3]; 'Gratification' ... 'includes -money or any gift, loan, fee, reward, commission, valuable security or property or interest in property of any description, whether movable or immovable;

any office, dignity, employment, contract of employment or services and any agreement to give employment or render services in any capacity;

any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

any valuable consideration or benefit of any kind, any discount, commission, rebate, bonus, deduction or percentage;

any forbearance to demand any money or money's worth or valuable thing;

any service or favour, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal

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[1] See section 32 : definition 'agent'
[2] Section 32 : definition ''*agent*' at sub- par (f)
[3] Section 32 : definition 'corruptly'

nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty;

any right or privilege;

any aid, vote, consent or influence, or any pretended aid, vote, consent or influence;

any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs[4];

'Public officer' is defined to mean *'a person as a member, an officer, an employee or a servant of a public body and includes ... a staff member of the public service, including the police force* ...[5]

'Public body' in turn means *'any ministry, office or agency of Government[6]'.*

The word *'principal'* is defined to mean to *' ... include(s) any employer ... in case of a person serving in or under a public body, the public body and in the case of a person acting in the representative capacity, the person on whose behalf the representative acts[7]*.

[12] Accordingly Section 35 (1) has to be read with these definitions in mind. [13] Finally it is to be noted that Section 35 (4) expressly also provides that

"***If, in any proceedings against an agent for an offence under sub-section (1), it is proved that the agent corruptly accepted or obtained to obtain or to agreed to accept any gratification, having reason to believe or suspect that the gratification was offered or given as an inducement or reward contemplated in that section, it is no defence that the agent –***

Did not have the power, right opportunity to perform or not to perform any act contemplated in that sub-section;

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[4] Section 32 : definition 'gratification'
[5] Section 32 : definition ''*public officer*' at sub- par (a)
[6] Section 32 : definition ''*public body*' at sub- par (a)
[7] Section 32 : definition ''*principal*'

Accepted the gratification without intending to perform or not to perform the Act in relation to which gratification was given, or

failed to perform or not to perform the Act in relation to which gratification was given."

[14] Section 35(1) thus creates the statutory offence in respect of the corrupt giving or the corrupt acceptance of gratification in respect of agents. Section 34 creates the complimentary offence in respect of the 'inducer or 'giver' of the gratification. [15] 'According to the observations made by Beadle CJ in *S v Zemura*[8] statutory offences may be classified into three main categories which may conveniently be stated as: (1) strict liability; (2) *mens rea* in the form of *culpa* (negligence); and (3) *mens rea* in the form of *dolus* (intention)[9].[16] "The first category involves those offences where the statute imposes strict liability. In such cases, the State is required to do no more than establish that the accused committed the acts constituting the offence and, despite the fact that he might satisfy the Court that he had no *mens rea* when he committed those acts, he is nevertheless guilty."[10] This quite clearly is what state counsel had in mind.[17] "The second category relates to those offences where the *onus* is on the State to prove that the accused committed the acts constituting the offence, but thereafter an evidential *onus* is thrust on the accused to disprove the inference that he had the requisite *mens rea (culpa)* when he committed those acts. In discharging the evidential *onus*, it is enough for the accused to give an explanation which will at least raise a reasonable doubt in the mind of the Court as to whether or not he had such a guilty mind when he committed the acts alleged in the charge. In other words, it suffices for the accused to give an explanation which, on a balance of probabilities, shows that he had no *mens rea* in the form of *culpa* when he committed the alleged acts."[11][18] "The third category is about those offences where the *onus* is on the State in the first instance to prove, not only that the accused

[8] 1974 (1) SA 584 (R,AD) at 586 -7
[9] S v Maritz 2004 NR 22 HC at p 23J – 24A
[10] *S v Maritz* at p 24B
[11] *S v Maritz* at p 24G - H

committed the acts constituting the offence, but also his guilty state of mind when he committed them. In other words, no inference of *mens rea* in the form of *dolus* is drawn from the fact that he committed the prohibited acts. The State must prove positively that he committed them with a guilty mind. Hence, the mere fact that he committed the prohibited acts is not sufficient evidence from which to draw such an inference. Offences falling within this category are usually characterised by words such as: 'knowingly', 'wilfully', 'intentionally', 'wrongfully', 'unlawfully', *et cetera*."[12]

[19] During argument Mr Namandje did not clarify, which category he had in mind. From the quoted passages from his Heads of Argument, which refer to 'subjective intention' and the 'state of mind of the accused' it must be inferred however that reference is made to *mens rea* in the form of '*dolus*'.

[20] "The authorities are agreed that the question whether or not *mens rea* is an element of the offence under consideration is essentially to be established by interpreting the statute in question in order to deduce therefrom the essence of the legislatures intentions where the legislation merely prohibits conduct without reference to the element of *mens rea"*.[13]

[21] In *S v Maseka* the Namibian High Court observed that "*... The defence of ignorance of the law is a defence in common law crimes as well as in the case of statutory offences, unless the legislature has expressly or by clearest implication provided for strict liability."*[14][22] Also in the present instance therefore, the point of departure, to answering this question, in line with the leading South African authority of *S v Arenstein*[15]*,* must be the general rule :

> "**... *actus non facit reum nisi mens sit rea*, and that in construing statutory prohibitions or injunctions, the Legislature is presumed, in the absence of clear and convincing indications to the contrary, not to have intended**

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[12] *S v Maritz* at p 24 I – 25A

[13] See for instance F v Els 1972 (4) SA 696 (T) at 699F-H, S v Erasmus 1973 (4) SA TPD at p 483H – 484 See also S v Williams en Andere 1968 (4) 81 (SWA) at p 85H-86F

[14] *S v Maseka* 1991 NR 249 HC at p 253 B

[15] 1964 (1) SA 361 AD

innocent violations thereof to be punishable. (*R. v H.* 1944 AD 121 at pages 125, 126, *R v Wallendorf* and Others 1920 AD 383 at p 394)."[16]

[23] In *The Law of South Africa – LAWSA* -[17] the learned authors *St Q Skeen and Hoctor* have summarised the applicable starting position as follows :

"***The basic approach which has emerged is that, in accordance with the fundamental principle embodied in the maxims actus non facit reum, nisi mens sit rea and nulla poena sine culpa, the legislature is presumed, unless there are clear and convincing indications to the contrary, not to have intended innocent violations of statutory prohibitions to be punishable.[18] This approach is fortified by the rule, where there is ambiguity[19], that penal statutes are to be benevolently interpreted (in favorem innocentia) as well as by the presumption (since mens rea is an element of common law crimes) that the legislature does not, in the absence of clear language to this effect, intend to alter the common law.[20]"***

[24] In the Volume 3 of *South African Criminal Law and Procedure*, 2nd edition by the learned authors *Milton, Cowling and Hoctor* it is stated that " ... the South African Courts have evolved a special approach in applying this presumption. In essence this is to have reference to what is termed 'other considerations' to discover whether the presumption is to be given effect to or not."[21] [25] It emerges that these 'other' or "'various' considerations have been utilized by the courts in numerous decisions in order to determine whether or not the legislature has intended strict liability in a statute[22]. 'These are *inter alia* the language and context of the prohibition, the scope and object of the statute, the nature and extent of the penalty imposed, the ease with which the prohibition can be evaded if reliance could be placed on the absence of *mens rea* and the reasonableness or otherwise of holding that *mens rea* is not an

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[16] *S v Arenstein* at p 365 C; see for instance also *S v Maritz* 2004 NR 22 HC at p24 C-D, which in turn refers to *S v Gampel Brothers & Barnett (Pty) Ltd and Another 1978 (3) SA 772 (A) at 783C – 784B*

[17] Second Edition - Replacement Volume 6 of 2010

[18] *S v Arenstein* (*supra*) p 365E, *Ismail v Durban Co-Operation* 1971 (2) SA 606 N at p 607E-F

[19] *S v Qumbella* 1966 (4) 356 (A) at 359, *S v De Blom* 1977 (3) SA 513 (A) at 532

[20] S v Naidoo 1974 (4) SA 574 N 598A –

[21] Page 11 service no 9 of 1997

[22] See generally *South African Criminal Law and Procedure*, 2nd Ed. Vol 3 p11 ; *LAWSA* Repl. Vol 6 p111

ingredient of the offence.[23]" [26] "Great difficulty is often experienced in the application of these 'criteria' and they have been described as 'ambivalent', yet it is settled law that the court must employ them in determining the legislative intention. It must consider whether the application of these criteria, individually or cumulatively, results in the conclusion that strict liability was intended."[24] [27] "Particular importance is attached to ... the language and context of the prohibition. The mere fact that a provision was couched in absolute or prohibitory language is not a decisive criterion that the intention was to create strict liability. ... The courts have frequently held that the presence of certain adverbs which qualify the prohibited conduct and refer to a certain mental state of mind (usually awareness of the nature of his or her conduct) of the person engaging in the positive conduct, is a strong indication that *mens rea* is an ingredient. The following are such adverbs which are frequently employed in legislation: "knowing(ly)", "wilful(ly)"," "cruelly"," "maliciously", "wittingly", and "falsely". Similarly, if the ordinary grammatical meaning of the verbs employed to describe the prohibited conduct bears an implication that the person indulging in such conduct is aware of the nature of his or her conduct and knowingly indulges in it, it is regarded as an indication that *mens rea* is required."[25] [28] It will have been noted that also "the scope and object of the Act as a whole must be considered in determining whether *mens rea* is an element of the offence created. Where the object of the statute is to safeguard the public welfare, health, interest and safety, this has been regarded as a feature favouring an intention to create strict liability," ... Because most statutory prohibitions are intended to be in the public interest, this feature is currently not regarded as a strong indication of strict liability."[26] [29] "Recourse is frequently made to the nature and extent of the prescribed penalty to determine whether strict liability was intended. The general rule is that where the prescribed penalty is severe and substantial, it will not be lightly assumed that the legislature intended innocent violations to be punishable."[27] The existence of a heavy penalty is

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[23] *LAWSA* – Repl. Vol 6 - 2010 - p119 para 111 - *S v Mari*tz at p 25G-H
[24] *LAWSA* – Repl. Vol 6 - 2010 - p119 para 111
[25] *LAWSA* – Repl. Vol 6 - 2010 - p119 para 111
[26] *LAWSA* – Repl. Vol 6 - 2010 - p120 para 111
[27] *LAWSA* – Repl. Vol 6 - 2010 - p120 para 111

accordingly a very strong indicative factor. [30] "The ease with which liability can be avoided if *mens rea* is an ingredient of the offence in question is an important consideration. ... Where, as a result of its nature, proof of the commission of the prohibited conduct logically leads to an inference of *mens rea*, no easy evasion is possible. ... If the nature of the prohibited conduct does not warrant such an inference and proof of *mens rea* is well-nigh impossible, the court will readily accept that strict liability was intended."[28] [31] Finally I should point out that amongst all the possible factors, (and in this regard it should be noted that the factors mentioned in this judgement are not to be regarded as an exhaustive list), “the aspect of ‘reasonableness’ towards both the state and the accused of excluding *mens rea* is another factor which is increasingly taken into account in determining whether strict liability was intended. A finding of strict liability is prejudicial towards the accused in that it is a “travesty of justice” that a completely innocent person be found guilty, while a finding of *mens rea* is prejudicial to the state in that it incurs the additional load of proving *mens rea*. The mere fact that a nominal fine can be imposed on an accused who is held strictly liable, does not remove the basic injustice and thus cannot serve to justify strict liability. If the result of excluding *mens rea* is the punishment of innocent conduct other than the conduct which the legislature clearly intended to punish, while the inclusion of *mens rea* will result in only the latter being punishable, strict liability is not intended. The legislature does not intend absurd results and the exclusion of *mens rea* leads to such unreasonable results that it can be said to be absurd. The courts are inclined to adopt this reasoning where the description of the *actus reus* is couched in wide terms.”[29] [32] “A very important factor relating to the criterion of reasonableness is the number of people who will innocently transgress the prohibition and the incidence and ease with which innocent transgressions may take place. If the nature of the *actus reus* is such that large numbers of people will innocently contravene the prohibition, it is clearly unreasonable that strict liability be imposed. Contraventions by large numbers of people are more likely to occur where the prohibition is directed at the public in general rather than at a specific class of person. Where it is clear that only

[28] *LAWSA* – Repl. Vol 6 - 2010 - p121 para 111
[29] *LAWSA* – Repl. Vol 6 - 2010 - p122 para 111

a few people will innocently transgress the provision, reasonableness does not militate so strongly against strict liability. Even if the provision will not be transgressed by a large number of persons, but the individuals may often and very easily contravene the provisions while engaged in innocent conduct, reasonableness demands that *mens rea* be included as an element of the offence. The courts have thus in this respect evolved a quantitative criterion to determine the reasonableness or otherwise of excluding *mens rea* as an element of the offence."[30] **THE LANGUAGE AND CONTEXT OF SECTION 35(1)**[33] In applying the aforesaid principles it appears firstly that there is nothing in the language or context of Section 35(1) which is indicative of an intention to make innocent violations of the section punishable. [34] Indeed the definition of the word 'corruptly' indicates that a contravention of a law, provision, rule etc. is contemplated. The adverb 'corruptly' clearly needs to be read with the verbs 'solicit', 'accept' and 'agree'. The adverb 'corrupt' in this instance qualifies an agent's conduct of 'soliciting', 'accepting' or agreeing to accept 'a gratification' in relation to the affairs of the business of the agent's principal. Over and above the meaning assigned by the definition of the word 'corruptly' in section 32 of the Anti Corruption Act, 'the word 'corruptly' in itself denotes something which is spoiled, degenerate, debased or depraved'[31]. 'In the context of statutory offences the legislature commonly resorts to the term when proscribing the practices involving a dishonest obtaining of peculiar gain or other advantage'[32] ie. here 'a gratification'. As the language so utilised in section 35(1) implies an awareness of the nature of the prohibited conduct on the part of the person engaging in it, this would be the first important indicator that *mens rea* is an element of this statutory offence.**THE SCOPE AND OBJECT OF THE ACT**[35] It needs to be taken into account that the Anti-Corruption Act 2003 was clearly promulgated to combat the scourge of corruption. It was obviously enacted for the public benefit and interest and in this regard fulfils an important role. Although this factor has been regarded as a feature favouring an intention to create strict liability[33] I am in agreement

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[30] *LAWSA* – Repl. Vol 6 - 2010 - p122 para 111
[31] *South African Criminal Law and Procedure*, 2nd Ed. Vol 3 p22 para 2-28
[32] *South African Criminal Law and Procedure*, 2nd Ed. Vol 3 p22 para 2-28
[33] Per Gutsche J in *R v Bekker* 1941 EDL 118 at 119

with the sentiments expressed by the courts[34] that this factor is not to be regarded as a very strong indicator. **THE PENALTY ASPECT**[36] This is the criterion, which according to the learned authors *Milton, Cowling and Hoctor*[35]*, in South African Criminal Law and Procedure* is the one that is 'most consistently applied'. They submit that "the premise underlying this criterion appears to be that most statutory offences of are of a regulatory nature and not *malum in se*. As such they are visited with only slight penalties intended more to rebuke than to punish. It is therefore inappropriate to embark on an extensive investigation of the accused's state of mind before imposing the penalty On this premise the criterion then operates on a basis that the more severe the penalty the less likely the implication that *mens rea* is to be excluded."[36] [37]

Section 49 of the Anti-Corruption Act 2003 provides that "a person convicted of an offence under any provision of Chapter 4 of the Act is liable to a fine not exceeding N$ 500 000.00 or to imprisonment for a term not exceeding 25 years, or to both such fine and such imprisonment". [38] It appears immediately that section 49 is not merely 'regulatory in nature'. Its intention is also not simply 'to rebuke rather than to punish'. If regard is had to the severity of the penalties prescribed in section 49, it becomes clear that it would be more than 'appropriate to embark on an extensive investigation of the accused's state of mind before imposing the penalty.' Surely the dictates of an accused's fair trial rights, as proscribed by Article 12(1)(a) and (d) of the Constitution would also demand such investigation. I will return to this aspect below.[39] Also in this case this criterion strongly militates against a finding that strict liability was intended. It simply is highly unlikely that the legislature ever intended innocent violations of the section 35(1) of the Anti Corruption Act 2003 to be punishable to such extent. **IMPLEMENTATION** [40] As regards the ease with which liability could be avoided should it be found that *mens rea* is an ingredient of Section 35 (1), I hold the view that transgressions of Section 35 (1) lend themselves to fairly easy proof of the

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[34]*S v WC & M Botha (EDMS) Bpk en 'n Ander* 1977 (4) SA 38 (T) at p42 and *S v Pretorius* 1964 (1) SA 735 (C) at 740, were Corbett J (as he then was) pointed out : … the criterion … 'cannot be regarded as a very strong indication [of legislative intent] since most statutory prohibitions are conceived in the public interest'.

[35] 2nd Ed. Vol 3 p11 para 4.5

[36]*R v H* 1944 AD 121 at 126; *S v Arenstein* 1964 (1) SA .361 (A) at 365; *S v Henwood* 1971 (4) SA 383 (SR) at 391 A; *South African Criminal Law and Procedure*, 2nd Ed. Vol 3 p15 - 16 para 4.5

commission of any prohibited conduct particularly because of the wide ambit of conduct which falls within the ambit and scope of the section because of the all-encompassing nature of the definitions created in section 32. Once such conduct has been proved it would very often in any event lend itself logically to an inference of *mens rea.* Thus no easy evasion is possible in principle. [41]The wide scope and ambit of the type of conduct which can be brought into the net of the statute, is on the other hand indicative of how easily innocent transgressions of the statute can occur. As however innocent transgressions of the Act are presumed not to be have been intended to be punishable by parliament, this is a further strong indication that *mens rea* was intended all along to have been an element of this offence.

REASONABLENESS TOWARDS STATE AND ACCUSED[42] In this regard it is taken into account that a finding of strict liability would, in principle, be prejudicial towards the accused in that it would be a “travesty of justice” that a completely innocent person be found guilty, while a finding of *mens rea* would on the other hand be prejudicial to the state in the sense that it incurs the additional load of proving *mens rea*.[37] [43]

Given the extremely wide ambit of conduct which is imported into section 35(1) by way of definition, it does not take much to conclude that the application of the strict liability principle may result in the punishment of innocent conduct rather than the conduct which the legislature clearly intended to punish. The inclusion of *mens rea* will result in only the latter being punishable. The legislature does not intend absurd results. The exclusion of *mens rea* could lead to such results if the court would conclude that section 31(a) would be a strict liability offence. Obviously the court would be inclined to adopt an interpretation of the statute which would avoid such result. In such circumstances the ’balance of convenience’ so-to-speak, favours the causing of the ‘inconvenience’, of ‘imposing the additional burden of proving *mens rea*’, on the state**THE CONSTITUTIONAL CONSIDERATIONSARTICLE 7**[44] The constitutionality of strict liability received the attention of the South African Constitutional Court in *S v Coetzee & Others*[38] when it considered the constitutionality of sections 245 and 332(5) of the Criminal Procedure Act 51 of 1977.[45] In *S v Coetzee & Others* O’ Regan J

[37] LAWSA op cit at p 122
[38] 1997 (1) SACR 379 CC

embarked upon a highly instructive comparative consideration of South African, American, English, Australian, New Zealand and Canadian case law[39] before she concluded:

> *"**[176] The striking degree of correspondence between different legal systems in relation to an element of fault in order to establish criminal liability reflects a fundamental principle of democratic societies: as a general rule people who are not at fault should not be deprived of their freedom by the State. This rule is the corollary of another rule which the same comparative exercise illustrates: when a person has committed an unlawful act intentionally or negligently, the State may punish them. Deprivation of liberty, without established culpability, is a breach of this established rule. Where culpability is established, and the conduct is legitimately deemed unlawful, then no such breach arises. [177] What is also clear, however, from an examination of our law and that of foreign jurisdictions, is that it is widely recognised (both in our common law and in the law of other countries) that the culpability required to establish criminal liability need not in all circumstances be evidenced by direct intent (dolus directus) on the part of the accused to commit a criminal act. In our own law other forms of intent, such as dolus eventualis, have been recognised as sufficient to meet the requirement of culpability and, in certain circumstances, the law has recognised that even negligence or culpa, can be sufficient to give rise to criminal liability...**".*[40]

[46] This so-called *"fundamental principle of democratic societies'* that *" ... people who are not at fault should not be deprived of their freedom by the State and only persons who have committed an unlawful act intentionally or negligently may be punished through the deprivation of liberty.... "* is also embodied in Article 7 of the Namibian Constitution.[41] Any *' ... deprivation of liberty, without established culpability ..., i.e. on the basis of the strict liability doctrine only,* would thus not only be

[39] At p 438 – 442, paras [162] to [175]
[40] At p442 -443 paras [176] – [177]
[41] No persons shall be deprived of personal liberty except according to procedures established by law.

a breach of the aforesaid *"fundamental principle of democratic societies'* but would also be in breach of Article 7.**ARTICLES 12(1)(a) and (d)**[47] Strict liability offences relieve the State of the burden to prove *mens rea*. Once the *actus reus* is proved the accused becomes 'liable without fault.'[48] The question which immediately arises is, whether or not, the doctrine of strict liability infringes on the presumption of innocence as contained in Article 12(1)(d) of the Namibian Constitution and therefore on the fair trial rights enshrined in Article 12(1)(a)?[49] It does not take much to realise that the strict liability doctrine is also in conflict with one of the most fundamental rules of our criminal justice system, namely that it for the prosecution to prove the guilt of the accused person, and that such proof must be proof beyond reasonable doubt', which, normally, includes proof of the culpability, that the person has committed the unlawful act either 'intentionally' or 'negligently'. The effect of strict liability would obviously relieve the prosecution of the burden of proving that the person has committed the unlawful act either 'intentionally' or 'negligently'. Such a situation could result in a conviction despite the existence of a reasonable doubt as to the accused's requisite *mens rea* [50] I have in this regard already alluded to the possibility that innocent transgressions of the Anti Corruption Act 2003 can occur. This would be in spite of the presumption of innocence. The strict liability device would therefore render the presumption of innocence ineffective as an accused person is in such circumstances deprived of the benefit conferred by the right enshrined in Article 12(1)(d) of the Constitution. This deprivation would therefore not only infringe directly on the accused persons constitutional rights as enshrined in Article 12 (1)(d) but also ultimately on the fair trial rights conferred on such persons by Article 12(1)(a).[51] All the above listed 'considerations', ie. those taken into account by the courts traditionally, as well as the referred to constitutional aspects, then, 'quantitatively', lead me to the inescapable conclusion that *'mens rea'* is an element of the offence created in section 35(1) of the Anti Corruption Act 2003.[52] I should mention that both Ms Husselmann and Mr Namandje referred the court to the judgments handed down by this court in *The Prosecutor-General v Teckla Nandjila Lameck and Others Case No POCA 1/2009.* [53] Ms Husselmann cited the so-called *'unreported judgment'*[42] *of the High Court of*

[42] 2009 (2) NR 738 HC at p 749 and 750

Namibia. delivered on 14/08/2009 by Damaseb JP at Frank AJ at paragraphs 31 and 35". I was unable to see how the relied upon passages constitute authority for the proposition that the offences under consideration there, namely sections 33 and 42(2) of the Anti Corruption Act 2003, are strict liability offences. This was an issue which the court just did not have to decide in that case. The court was concerned, in the main, with the question, and in the context of considering certain *in limine issues,* on an extended return day of *a* 'restraint order' issued in terms of the Prevention of Organised Crime Act 2004, and, whether or not, a *prima facie* case had been made out in respect of certain offences, inclusive of the offences created by sections 33 and 42(2) of the Anti Corruption Act 2003.[43] [54] Mr Namandje did indeed rely on an, as yet, unreported judgement, namely on paragraph [29] of the judgment which was handed down by the court on 22 January 2010 and were the court commented that " ... *as Mr Gauntlet(t) correctly submits in the supplementary heads of argument, mens rea remains an important element of the offence of corruption created by s33 of the ACA, read with s 3(2) of the PSCA* … ". It appears however from the referred to *'supplementary heads of argument'*, that the aspect of strict liability was not addressed in any further detail, nor was any authority for that submission cited. This is not surprising given the issues which the court had to determine in that matter.[55] Both the referred to 'unreported' decisions therefore did not take the matter further and were not of assistance to the court.**THE FORM OF MENS REA**[56] The next stage of the enquiry would be to establish which form of *mens rea* applies in this case - is it *dolus* or *culpa* i.e. intentional wrongdoing (*dolus*) or negligence (*culpa*)? [57] It would appear that also here "the general point of departure is that the form of *mens rea*, which the legislature will usually have in mind is *dolus* and that only in exceptional cases *culpa* will suffice."[44] "According to this approach *dolus* is the form of *mens rea* required in common law crimes and a statutory provisions should be interpreted to deviate as little as possible from the common law. With other words it would appear that the courts usually accept that the legislature has *dolus* in mind and only *culpa* in exceptional cases as otherwise a criminal liability would be greatly extended and could

[43] See for instance p744 – 746 para's [22] to [23], page 748 para [30] and page751 para [39]
[44] LAWSA op cit at p125-126 para 112

even lead to unjust results".[45][58] Again a number of considerations have evolved through which the intention of the legislature is to be ascertained,[46] which again include factors such as language, context, object, ease of evasion, reasonableness, etc.[47] [59]

Accordingly I will assume as the point of departure that *dolus* is the form of *mens rea* which the legislature had in mind when it enacted the Anti Corruption Act No 8 of 2003. [60] In accordance with what was stated in *S v Arenstein*[48] that ' ... the degree of blameworthiness required for a culpable violation of a statutory prohibition is in the first place to be sought in the language of the lawgiver ... ', I take into account that ' ... the requirement of intentional wrongdoing is usually indicated by the use of words such as 'wilfully', 'intentionally' or 'maliciously' ... '[49].. [61] I have already indicated above that the definition of the word 'corruptly', as used in section 35(1) as read with section 32 of the Anti Corruption Act 2003, indicates that a contravention of a law, provision, rule etc. is contemplated, that the adverb 'corruptly' needs to be read with the verbs 'solicit', 'accept' and 'agree' and that the adverb 'corrupt' in this instance qualifies an agent's conduct of 'soliciting', 'accepting' or agreeing to accept 'a gratification' in relation to the affairs of the business of the agent's principal. This aspect as well as the factor that 'the word 'corruptly' in itself denotes something which is spoiled, degenerate, debased or depraved', together with the use of these words, in this context, as read with their ordinary grammatical meaning, implies an awareness of prohibited conduct and thus indicates that the requirement of *dolus* was intended. [62]

I again take into account the nature and severity of the penalties prescribed by section 49, which factors, on their own, strongly militate towards liability based on *dolus*.[63] Finally I take into account that the obligation to prove an element of an offence, which falls particularly within the knowledge of an accused, such as *dolus* or *culpa*, makes it more difficult for the prosecution to secure a conviction. I am however not persuaded that this difficulty is unreasonable in the overall context of our criminal justice system, were the discharging of the burden of proof is a function which the

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[45] LAWSA op cit at p 126
[46] LAWSA op cit at p 126
[47] LAWSA op cit at p 126 -128
[48] At p 366 D
[49] at p 366 D

criminal justice system in any event imposes on the prosecution, in the normal course.

[64] The cumulative effect of the above listed factors then drive me to the conclusion that *dolus* is the form of *mens rea* required for a conviction in terms of section 35(1) of the Anti Corruption Act 8 of 2003.**THE ONUS OF PROOF**[65] Also in this regard the applicable position has been usefully analysed by the learned authors of *LAWSA*[50] where they state:

> *"**... whenever mens rea is an element of a statutory offence, and whatever the form of mens rea required, the state must prove the required mens rea beyond a reasonable doubt. This burden remains on the state throughout the case but where the state has led evidence that the prohibited act has been committed by the accused, an inference can be drawn, depending on the nature of the actus reus and other circumstances, that the accused committed the act with the necessary mens rea. This results in a duty being cast on an accused, who relies on the absence of mens rea to adduce evidence to rebut the so-called prima facie case made out by the state. This duty is not tantamount to an onus of proof on a balance of probabilities and the accused accordingly acquits him- or herself of this duty if he or she adduces evidence which, on an evaluation of the evidence as a whole, creates a reasonable doubt as to whether there was mens rea on his or her part.**"*

[66] This would be in accordance with how Silungwe J, (Hannah J concurring), formulated the position In *S v Maritz* :

> "**... On the basis of the guidelines stated above, I reckon that the crime with which the appellant was charged in the present case falls within the 2nd category, to wit, mens rea in the form of culpa. Hence, proof by the respondent that the appellant committed the acts prohibited by the statute — which is not open to dispute — is sufficient to infer that he did so with a guilty mind, and sufficient to saddle him with the onus of giving an**

[50] At p 130 para113

explanation which, on a balance of probabilities, satisfies the Court that he had no mens rea when he committed the acts alleged in the charge...".[51]

THE FACTS LEADING TO APPELLANT'S CONVICTION[67] The appellant was charged as follows ;

"***That the accused is guilty of contravening Sec 35(1)(a) of the Anti-Corruption Act, Act 8 of 2003, read with Sections 32, 35(4), 46, 49 and 51 of the said Act. CORRUPTLY ACCEPTING OF GRATIFICATION BY AGENT {AS AN INDUCEMENT) In that upon or about 24 OCTOBER 2006 and at or near FARM OVITUO ' in the district of OTJIWARONGO the accused did wrongfully and unlawfully, directly or indirectly and corruptly solicit or accept or agree to accept from MR WESSEL STEYN PRETORIUS a gratification: to wit: N$ 2 000-00 as an inducement to something in relation to the affairs or business of his principal, to wit: to do investigations and/or affecting an arrest on cases allegedly committed on OVITUO FARM and fuel or transport costs to be incurred as a result of affecting such arrest.***"

[68] It should be mentioned that, as far as the obvious defect in the charge was concerned, namely in regard to the omission of the necessary allegation that the accused acted as agent of a particular principal, such defect was cured by evidence. The parties did not make an issue of this.[69] The material evidence on the charge was then briefly summarised by appellant's counsel as follows:

"**The appellant prior to the 24th of October 2006 was suspended from his work as a police officer. This includes the period covering the 24th of October 2006.**[52]

On the 24th of October 2006 he was approached by one Wessel S Pretorius, a retired doctor and farmer who asked the appellant to assist him to trace a suspected thief. The approach by Pretorius was due to the

[51] At p 27 C
[52] The date on which the alleged offence was committed.

fact that his previous contacts with the Namibian Police to assist him did not bear any fruit.

Frustrated by the inaction of the Namibian Police at Otjiwarongo and knowing the appellant as having been a good police officer he approached him to assist him in tracing the suspect.

After being informed by the appellant that he was off duty and/or suspended he gave him an amount of N$ 2 000.00 (TWO THOUSAND NAMIBIA DOLLARS) as money for petrol. He referred to the payment as "*reimbursement*".

The money was for petrol and for travelling expenses.

The witness conceded that he was informed that the appellant was on suspension when he requested him to assist him to trace the suspects.

Most importantly, as soon as the appellant was requested to assist he informed the two State witnesses that he would be willing to help them save that he was off duty and he had no vehicle.

The issue of paying for the applicant's travel expenses only came after he had already agreed to assist Mr Pretorius. The money was therefore definitely not paid as an <u>inducement.</u>

The money was not paid as compensation for work but only for travelling expenses."

[70] It is clear from the facts, which were common cause, that the Appellant received the N$ 2 000.00 from Dr. Pretorius and that this was given to Appellant in order for him to use his private vehicle when assisting Mr. Pretorius and that the N$ 2 000.00 was

therefore not paid as a remuneration or as a fee, but in regard to the disbursements which would be incurred. [71] Appellant's conduct thus fell squarely within the ambit of the conduct prohibited by section 35(1) of the Anti Corruption Act.[53] The Respondent had thus succeeded in proving the relied upon *actus reus.* Also this was common cause. It appeared therefore that the respondent had made out a prima facie case against the appellant. [72] In such circumstances it became incumbent on Appellant to adduce evidence to rebut the *prima facie* case made out by the state.[73]

This then brings to the fore the final stage of the enquiry namely whether or not the Appellant had discharged the evidential *onus* of showing that he had no *mens rea* in the form of *dolus* and whether or not, on an evaluation of the evidence as a whole, the Respondent has proved the commission of the offence beyond a reasonable doubt. [74] The appellant testified as follows in chief :

> "Okay. What was your intention when you took the money one thousand Namibian Dollars cash and a cheque for one thousand Namibian Dollars? What was your intention for this money or with this money or taking this money? So, the money was not for me or as if I was benefiting anything from it. The money was just to put fuel into my vehicle as I was using the vehicle, Did you receive any benefit from this money? To tell the truth I did not benefit anything. I am actually the one who lost." .....And at the time of doing what you did, did you .think: you were doing anything wrong? No .....Did you have any corrupt intention when you did what you did? Not at all ... ... Do I understand you correctly you did not receive or accept this money as a gratification or as an inducement to do something? That is correct

[75] Under cross examination this testimony was not challenged.[76] In conjunction with this the complainant made the following concessions under cross examination :

> " ... Mr Pretorius if the State is now alleging here that the Accused person accepted this two thousand Namibian Dollars (N$2 000-00) as gratification or a reward for doing something. If he accepted this money to pay for the fuel to

[53] *As in this instance the accused, as agent (as defined), had 'corruptly' (as defined) received 'gratification' (as defined) to do something in relation to the affairs or business of his principal (as defined).*

drive all this way do you agree with me that there is no money for gratification, there is no money for reward? --- He was very sure of himself that he will find him in Okahandja and as I say no work, no pay, no results. But I think you are missing my point. My point is the intention of the Accused person was never to enrich himself in this it was just to fund the trip to pay for the expenses. Do you agree with that? Yes Do you agree that from that it doesn't look like the Accused person had any corrupt intention? No. Do you also agree that by handing the full amount of two thousand Namibian Dollars (N$2 000-00) back to you he actually made a loss? He had to make? ... ".

[77] The state witness Malherbe stated :

> " ... Now would you agree, actually you were very clear on that I just want to confirm that the whole if you can call it deal with the Accused person was that he gets the money for his expenses? That is correct. What is left he must give back? Yes ... " ...
>
> MR VON WILLIGH: Mr Marlherbe all I expect from you is to testify about your personal knowledge ? No That is the only thing? —- Okay, There was no fee involved for him? Nothing none so ever The allegation in the charge sheet against the Accused person is that he received two thousand Namibian Dollars for his own benefit and gratification. Do you agree with that? No.
>
> I have no further questions Your Worship ... "..

[78] In my view this evidence is clearly indicative that the appellant did not hold any actual subjective intention, nor that he was aware of the unlawful nature of his actions or of the possibility that his conduct might be unlawful, and despite such knowledge he nevertheless proceeded therewith.[79] Mr Namandje submitted in that regard that "there was a glaring omission on the part of the learned Magistrate to specifically analyse (the) evidence with a view to finding that the State had proved all elements of the charge including but not limited to the element of a subjective intention to receive gratification as an inducement and the element of inducement itself" ... [81] The

learned magistrate did indeed not consider this evidence and what the intention and state of mind of the Appellant was, when he agreed to assist Dr Pretorius in apprehending the suspected cattle thief as the following extract from the judgement in the court a quo shows :

> *" Basically the issue before Court is whether the acceptance of two thousand Namibian Dollars (N$2 000.00) was received as gratification or . inducement for the Accused person to do something. And also as previously read into the record the definition of corruption as well as that of gratification was also repeated here or rather corruptly that means in contravention of off or against the spirit of any law provision, rule, procedure, process system, policy, practice directive order or any other term or condition pertaining to any employment relation, any agreement or performance of function of any, in whatever capacity. And gratification is defined as to include money, or any gift, loan, fee or reward commission etcetera. And it was also evidence before this Court that there was in fact fuel at the police station during the period of the 24th of October 2006. And it was also the Court's opinion that Accused person could have told the Complainant that he was on suspension as he was approached, because of the fact that he was a police officer. Thirdly Accused was approached to go to Okahandja, but he end up in Omitara or Witvlei. And fourthly Accused also testified that he came back to fill up his car in Otjiwarongo. ... And Accused person only paid the two the two thousand Namibian Dollars to after it was reported to Inspector Marais as well as Inspector Khairabeb. The Court must, however, concede that this could have been an internal matter, but Accused knew, in fact knew that he should not have acted in such capacity as police officer as he was on suspension. And in him doing so he fell squarely with the definition of corruption in that he received money or a fee. And the Court is, therefore, satisfied that the State has proven its case beyond reasonable and Accused accepted two thousand Namibian Dollars (N$2 000.00). According to him its money for fuel to go to Okahandja which was roughly 120 kilometres from the complainant's farm. The Court is also of the opinion that amount of two*

thousand Namibian Dollars (N$2 000.00) was too excess irrespective whether the Accused person drove a 6 cylinder engine or not. And the Accused's version is rejected as follows as it would and is improper for Accused person to receive money in order to do something whilst knowing he could not even act in the capacity or a position as a police officer although according to him he acted as a friend. The Court, Accused is. found guilty as charged. ... ".

[82] The evidence of Dr Pretorius, Mr Malherbe and of Appellant, which must be accepted, shows that it was not for any dishonest or corrupt motive or purpose that the request for assistance was made and the N$ 2000.00 offered and accepted in respect of the disbursements that would be incurred. [83] The evidence also shows that both Dr Pretorius and Appellant acted in the belief that they were entitled to do so and that they were not transgressing the law.[54][87] Ultimately it appears therefore that the Appellant has adduced sufficient evidence to create a reasonable doubt as to whether there was the requisite *mens rea* on his part. It thus cannot be said in casu that, on the evaluation of the evidence as a whole, the Respondent here has proved the commission of the offence beyond a reasonable doubt

[86] I therefore find that the learned magistrate erred and misdirected herself in this regard.

[88] In the result the grounds of appeal raised in this regard are sound and the conviction and sentence of the Appellant are hereby set aside.

_____ **GEIER, AJ**

I agree_____SHIVUTE J

Counsel for Appellant **Mr Namandje**

Sisa Namandje & Co

Counsel for Respondent: **Ms Husselmann**

[54] See : *R v Geel* 1953 (3) SA 398 (A) at 402

On behalf of The State