

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF

JUDGMENT



NAMIBIA

CASE NO.: CC 44/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

The State

and

**Simon Nama Goabab
Abraham John George**

**First Accused
Second Accused**

Neutral Citation: *The State v Simon Nama Goabab and Abraham John George (CC 44/2008) [2013] NAHCMD 3 (11 January 2013)*

CORAM: Tommasi, J

Heard on: 30 November 2012

Delivered on: 11 January 2013

JUDGMENT

TOMMASI J:

[1] Accused 1 was indicted on three charges of having contravened section 43 (1) read with sections 32¹, 43(2), 43(3), 46² and 49³ of the Anti-Corruption Act, 2003 (Act 8 of 2003). The alternative charges were: count 1 – fraud; count 2; fraud and theft; and count 3 - having contravened section 83(2) read with sections 2 and 106 of the Road Traffic and Transport Act, 1999 (Act 22 of 1999). Accused 2 was indicted on only the first two charges.

Count 1

[2] The first charge was that accused 1 and 2 contravened section 43(1), read with sections 32, 43(2), 43(3), 46 and 49 of Anti-Corruption Act, 2003 (Act 8 of 2003) - Corruptly using office or position in a public body to obtain gratification:

“In that on or about the **01st day of March 2007** and at or near **Windhoek** in the district of **Windhoek** the accused, being public officers, to wit: First accused, **a Secretary (Permanent Secretary) to the National Assembly, Government of the Republic of Namibia** and Second accused, **an accountant (Acting Deputy Director for general services) to the National Assembly, Government of the Republic of Namibia**, did wrongfully, unlawfully, directly or indirectly and corruptly conspire or act in concert to use their offices or positions in a public body, namely: **The National Assembly, Government of the Republic of Namibia** to obtain a gratification for the first accused and/ or the second accused's benefit or that of another, to wit: to hire a motor vehicle with registration number N 82959 W from Budget Rent A Car for fifteen (15) days using the Government of the Republic of Namibia Purchase Order and Claim Form number M03S6090 at the government rental rate of a total amount of N\$ 5 055.00 for the said 15

¹ Definitions

² 46 Attempts and conspiracies

A person who-

(a) attempts to commit an offence under this Chapter;

(b) conspires with any other person to commit an offence under this Chapter; or

(c) abets, induces, incites or commands another person to commit an offence under this Chapter,

commits an offence and is, on conviction, liable to the punishment prescribed for that offence by this Act.

³ 49 Penalties

A person convicted of an offence under any provision of this Chapter is liable to a fine not exceeding N\$500 000 or to imprisonment for a term not exceeding 25 years, or to both such fine and such imprisonment

days, which rate is cheaper than the private rate which costs N\$ 6 780.00 for 15 days, thus creating the impression that the said vehicle was hired by the National Assembly and/ or the Government of the Republic of Namibia and that the invoice would be settled by the National Assembly and/ or the Government of the Republic of Namibia whereas in truth and in fact the accused persons when they hired the said vehicle well knew that it was not hired by or for official purposes of the Government of the Republic of Namibia, but that it was hired for private use by the first accused and / or second accused and thus misrepresented to Budget Rent A Car that it was being hired by the Government and further the accused persons well knew that they had no authority or permission from the Public Service Commission and/or the Government of the Republic of Namibia to hire the said vehicle as stated above, and did then and thereby means of the said false pretences cause actual or potential prejudice to Budget Rent A Car and/or National Assembly and/or the Government of the Republic of Namibia to the amount of N\$ 6 780.00, thus the accused did abuse their offices or positions for gratification and contravened section 43(1) of Act 8 of 2003.”

[3] Accused 1 was appointed by the Speaker of the National Assembly on 6 November 2006 as the secretary of the National Council in terms of article 52⁴ of the Constitution of Namibia. Accused two was the Chief Accountant and acting as the Financial Advisor at all material times.

[4] On 1 March 2007, accused 1 required a vehicle as his vehicle was not available. Accused 1, as part of his remuneration package received a monthly motor vehicle allowance. Certain conditions contained in a document titled “motor vehicle scheme” were attached to this benefit. The most important conditions for the purpose of this charge, was that accused 1 had to purchase a suitable vehicle which he had to use for both private and official purposes, and that he had to make private arrangements if the vehicle purchased in terms of the motor vehicle scheme was unavailable. Accused 1

⁴ Article 52 provides for the appointment of the secretary and other officers of the National Council

(1) Subject to the provisions of the laws pertaining to the public service and the directives of the National Assembly, the Speaker shall appoint a person (or designate a person in the public service made available for that purpose), as the Secretary of the National Assembly, who shall perform the functions and duties assigned to such Secretary by this Constitution or by the Speaker.

(2) Subject to the laws governing the control of public monies, the Secretary shall perform his or her functions and duties under the control of the Speaker.

(3) The Secretary shall be assisted by officers of the National Assembly who shall be persons in the public service made available for that purpose.

testified that, given the fact that his own vehicle was unavailable, his main objective was to have access to a vehicle for mobility. As such accused 1 was required in terms of the conditions under which he received the allowance, to make private arrangements.

[5] Accused 1 requested accused 2 to facilitate the renting of a vehicle. It is common cause that a conversation took place between accused 1 and accused 2. The exact nature of this conversation was not clear but, from the testimony of accused 2, it appears that an agreement was reached between them in terms whereof accused 2 would facilitate the procurement of the rental of a vehicle for accused 1 in his private capacity by using a purchase order and claim form ordinarily used for the procurement of goods and services for the National Assembly. Accused 1 in turn agreed to pay for the rental. Having reached this understanding, accused 2 instructed Ms Beukes to phone car rental companies to ascertain the availability of a vehicle to be used by accused 1 for 15 days. Mr Stramis entered the office whilst Ms Beukes was phoning different car rental companies and was enlisted to assist without being informed of the purpose for which the vehicle would be used. Mr Stramis secured a quotation from Budget Rent A Car at government rates which was substantially less than those rates quoted for private individuals. Accused 2 instructed Ms Beukes to complete a manual purchase order and claim form. The form was signed by accused 1 in his capacity as accounting officer and thereafter handed to Mr Stramis who collected the vehicle. Mr Stramis handed the keys to the secretary of accused 1. Accused 1 used the vehicle for 10 days at a total cost of N\$4379.54. The invoice and original purchase order was returned to National Assembly but was not attended to by the person on whose desk it was left to be processed by the time it was seized by an investigating officer of the Anti Corruption Commission approximately three months later.

[6] The State's case was that the use of the purchase order and claim form to rent a vehicle for accused 1 at reduced government rates constituted a contravention of section 43 (1) of the Anti-Corruption Act.

[7] The purchase order and claim form is a treasury form designed for official expenses. This was not merely a request for service but a document which would entitle Budget Rent A Car to demand payment for services which essentially was rendered to

accused 1 in his private capacity. National Assembly was in turn bound to pay for such services once the invoice was presented for payment.

[8] Accused 1's defence was that he communicated to all the staff involved that the rental of the vehicle would be for his own account. His request/instruction to accused 2 however was not only to arrange a vehicle for his own use and thereafter to commit himself to Budget Rent A Car for the payment after the expiry of the 15 days, but to use government's process to procure the vehicle hence the instruction by accused 2 to Ms Beukes to complete a government manual purchase order.

[9] Accused 1 was aware that an official purchase order and claim form was used to procure the rental of a vehicle for his private use. This is apparent from his testimony that he signed the document in order to have access to a vehicle. This was consistent with the evidence of Ms Beukes who testified that the purchase order and claim form was completed in his presence. It is further consistent with the evidence of accused 2 who testified that accused 1 wanted National Assembly to facilitate the rental of the vehicle.

[10] Accused 1 acted in his capacity as the Secretary of the National Assembly at the time Accused 2 at the material time was Acting Deputy Director of General Services which directorate is responsible *inter alia* for transport of the National Assembly.

[11] Section 43(1) provides as follow:

"A public officer commits an offence who, directly or indirectly, corruptly uses his or her office or position in a public body to obtain any gratification, whether for the benefit of himself or herself or any other person".

The State was required to prove beyond reasonable doubt each element of the offence created by section 43(1).

[12] The definition of a public officer as per section 32 of the Act is defined as follow:

"public officer" means a person who is a member, an officer, an employee or a servant of a public body, and includes-

(a) a staff member of the public service, including the police force, prisons service and defence force, or of a regional council or a local authority council;

(b) a member of the National Assembly, the National Council, a regional council or a local authority council;

(c) a judge of the Supreme Court or the High Court or any other member of the judicial authority;

(e) any person receiving any remuneration from public funds;

(f) if the public body is a corporation, the person who is incorporated as such.

[13] Whilst Mr Murorua acting for accused 1 herein conceded that accused 1 is a public officer, this was strenuously denied by accused 1 during his testimony. Given the denial by accused 1, I shall briefly deal with the issue whether or not accused 1 who acted in his capacity as the Secretary of the National Assembly, was a public officer as defined by section 32 of the Anti-Corruption Act. The definition includes "any person receiving any remuneration from public funds". Accused 1 admitted that his remuneration was paid from monies appropriated by Parliament for that purpose. This essentially means that accused 1 received his remuneration from public funds. Accused 1 is therefore a public officer as per the definition of the Anti-Corruption Act. Accused 2 equally is a public officer as per the aforementioned definition. I am satisfied that the State had proven beyond reasonable doubt that accused 1 and 2 are public officers as defined in section 32 of the Anti- Corruption Act.

[14] A further issue in respect of the persons who could commit the offence in terms of section 43(1) was raised by Mr Mororua, counsel for accused 1 and Mr Grobler counsel for accused 2. It was argued that the offence can only be committed by two persons, a corruptor and a corruptee. This is the traditional or common law interpretation of the offence of corruption. It was however the specific intention of the legislature to expand the definition of corruption so as to include acts involving only one

party. At the first reading of Deputy Minister of Justice (Hon Kawana) pertinently stated the following:

“According to that perception (traditional perception), an act of corruption always involves two parties – the one given or offering consideration to gain an unfair advantage.

However, for the sake of consensus on this hotly debated issue, we have expanded the definition of corruption so as to include also related acts of a corrupt nature which ordinarily would not fall under the traditional perception of corruption, in other words, acts involving only one party. . .”

[15] Section 43 makes provision for a public officer who uses his/her position or office corruptly for gratification. Noting in the wording of this section indicates that a second person is required to complete the offence. Other provisions of the Anti Corruption Act, such as those considered *Teckla Lameck and Another v The President of the Republic of Namibia and six others*⁵ decision, proscribe offences which require the involvement of more than one person. Section 43(1) falls within the category of offences which are capable of being committed by only one person in the public service.

[16] The element of corruptly as defined in section 32 of the Anti-Corruption Act has been struck down in *Teckla Lameck* judgment: The following was stated by Smuts J (Hoff J and Miller, AJ concurring) at paragraph [91] of that judgement:

“Mr Trengrove correctly concluded that the requirement of unlawfulness as applied to the crime of corruption is particularly difficult to formulate, involving as it would, the community’s perceptions of justice or equity and its legal convictions. But the legislature has in ACA attempted to do that and in doing so, seeks to criminalise certain conduct with reference to non-compliance with non-binding measures by means of this definition when the term is read as an element of the offence referred to. As Mr Gauntlet submitted this is compounded by incorporation of a conflict to the “spirit of those non-binding measures. Despite Mr Trengrove’s explanation for the definition (as an attempt to codify the concept of unlawfulness), it would seem to me to be unduly vague and not meet the test of indicating with reasonable certainty what is hit by it to those who are bound by it, as is required by the principle of legality. The removal of the phrase “against the spirit”: would not in my view cure the provision from this

⁵ Sections 33, and 42(2) of the Anti-corruption Act. Case number: A 54/2011 unreported High Court judgment delivered on 20 February 2012

inherent vagueness. This definition should thus in its current form be struck down and the appellants are entitled to their relief sought in paragraph 9 of the notice of motion.”

And further in paragraph 93 of the same judgment stated the following: ‘. . . That term would need to be interpreted by the courts. In doing so, the courts would have regard as to how the term is understood including its dictionary definition, its definition in international instruments and how it has been interpreted by other courts in giving content to that concept. As to the latter, the South African High court set out a widely accepted understanding of the term “corruptly: contained in that country’s corruption Act of 1992 as follows:

“Then finally it remains to make clear that such given is done corruptly if it is done with the intention of persuading or influencing the recipient to act other than in impartial or proper discharge of his or her prescribed duties to the advantage of the donor or some other indicated person. As part of this requirement, the giving of the benefits or offer must be unlawful. Which means it is of a nature not sanctioned by society’s perceptions of what is just or acceptably proper, and it is this requirement that excludes such as a reward for some service done well enough to deserve some recognition, or lunches or entertainment facilities for clients or customers that are common practice among business activities, though that may depend on the nature and extent of the benefit.”

[17] It must be born in mind that the court in the Teckla Lameck case essentially dealt with the provisions of section 33 and 42(2) of the Anti Corruption Act which requires the involvement of a second person. It should further be noted that South African Corruption Act 94 of 1992 makes provision for the prohibition of an offer or acceptance of a benefit for commission of an act in relation to certain powers or duties. By its very nature the offence created therein requires the involvement of two persons contrary to section 43 of the Anti-Corruption Act of Namibia which was intended to expand the definition to include a scenario where a public officer on his own commits an offence if he/she uses his office or position corruptly for gratification.

[18] Section 43 (1) in its wording proscribes the prohibited conduct i.e. the corrupt use of a position or office by a public officer for purposes of personal gain. Although ‘unlawfulness’ is not expressly mentioned in the definition of the crime, it is well established that it must nevertheless be read into it. It requires that the act should be unjustified or contrary to the legal convictions of society. The Supreme Court in the

appeal by the State against the discharge of the accused herein⁶ held that: “. . . the word “corruption” at its lowest threshold when used in the context of the public service, include the abuse of a public office or position (including the powers and resources associated with it) for personal gain. The synonyms of “corruptly” include immorally wickedly, dissolutely and dishonestly.”

[19] In this case the act is the corrupt use of the position or office and when this definition is applied to the evidence as at the end of the State’s case the following conclusions may be reached.

[20] Accused 1, as Secretary of the National Assembly was appointed in terms of article 52 of the Constitution. Whilst it does not specify the duties of his position it in general terms provides as follow: “Subject to the laws governing the control of public monies, the Secretary shall perform his or her functions under the control of the Speaker” This provision in the Constitution, the supreme law of this country, placed a legal duty on accused 1 to perform his duties in subject to the laws governing the control of public monies. The purchase order and claim form was an official form prescribed and approved by Treasury to procure goods and services in relation to the administration of the affairs of the State. The document, by its very nature, creates a legal obligation for National Assembly to expend public funds once same is signed and presented to the supplier of goods and services. Accused 1 was empowered by virtue of the position he held to use the official purchase order and claim form for the purposes for which it was intended. Accused 1 therefore had authority to use the form for lawful purpose i.e. for the administration of affairs of the State. This does not include the use thereof for private transactions. Accused 1’s argument that he was justified by virtue of his authority to do so cannot reasonably be correct as it clearly falls outside the scope of his authority. His concession that he should have approached Mr Harker, the deputy secretary, to sign the form is indicative of his understanding that his conduct was wrong. The only reason why accused 1 did not follow best practices was the knowledge that it would not be approved. No lawful authority or justification existed for accused 1 to have made use of the form to procure the rental as part of a private arrangement. Every tax

⁶ The State v Simon Nama Goabab and Abraham John Gorge, an unreported Supreme Court decision delivered on 15 November 2012

payer has an interest to see that those who are entrusted with administering public funds (public officers) should not abuse its authority to use official forms binding State Revenue for private transactions. Accountability and transparency are core values which motivated the legislature to hold public officers criminally liable for any abuses of powers or authority. The extent and nature thereof would equally be important factors to consider. Some conduct may be of such trifling nature as to not warrant a conviction and others may fall under misconduct which should be managed and dealt with internally. Using treasury forms for private purposes does not fall in the latter two categories despite the fact that no sanctions may be applicable. Public officers, particularly accounting officers being the custodians of State Revenue, are in a position of trust and should perform their duties in the interest of affairs of the State. Under these circumstances, accused 1, when he used the authority, entrusted to him by virtue of his position acted against the legal convictions of society and in the absence of any lawful justification, acted unlawfully. Furthermore by using the said form, accused 1 acted dishonestly when he misrepresented the true state of affairs to Budget Rent A Car i.e. that the rental of the vehicle was not to be used for official use by National Assembly but for his own use. This conduct of accused 1 was thus unlawful.

[21] The State's case against accused 2 was that he had acted in concert or with accused 2. Accused 2 argued that was instructed by accused 1 to procure a vehicle for his private purposes by using the normal procedure for procurement of vehicles for official use by National Assembly. He essentially raised obedience to orders as justification. Accused 2 knew that accused 1 was not entitled to use the procurement procedure of National Assembly to secure the rental as he was a recipient of a motor vehicle allowance. Accused 2 was well aware of the fact that accused 1 had to make private arrangements. Accused 2 when asked whether accused 1 caused him to execute his duties in a manner other than he would ordinarily have done he responded as follow: "To be honest, yes" He further testified that under normal circumstances he would not have rented a vehicle for accused 1 but he just carried out orders. This is indicative of the fact that accused 2 knew that it was wrong under the circumstances to make use of National Assembly's processes to secure a rental for accused 1. Accused 2 cannot under these circumstances rely on obedience to orders as a ground of

justification. Accused 2 further agreed with accused 1 to process the procurement of the vehicle and used his position as Acting Deputy Director of General Service to facilitate it.

[22] It must however be determined by this court whether accused 1 had the requisite intention when he used his powers flowing from his position, to sign the purchase order and claim form to obtain gratification for his own benefit or for the benefit of any other person. Again, although the element of intention is not specifically mentioned, it has been held in *S v Paulus* 2011 (2) NR 249 HC that offences created by section 35(1) require mens rea in the form of dolus. Counsel were ad idem that this was equally applicable to the offence created by section 43(1).

[23] At the time accused 1 signed and caused the purchase form and claim form to be presented, his main objective was to rent a vehicle for his own use and to pay for the expense. There is no reason for this court to disbelieve accused 1 when he testified that he intended to pay as his intention was communicated to accused 2 and Ms Beukes. On 24 April 2007 accused 1 received the invoice and whilst the second rental which forms the basis of count 2 herein was paid with a government cheque, this invoice remained unpaid. Under these circumstances it must be inferred that accused 1 still intended to pay for this rental in terms of the agreement reached with accused 2. Accused 2 testified that his understanding was that accused would pay as soon as he received the invoice and it was noted that it was unpaid. The evidence reflects that the purchase order and claim form remained unprocessed when it was seized. Accused 1 testified that he was prohibited from making contact with the witnesses as part of his bail conditions. This evidence was uncontested and constitutes a legitimate justification for not making payment. Accused 1 fully intended to pay for the benefit of having used the vehicle.

[24] The State averred that accused 1 received gratification in the form of reduced tariffs reserved for government. Yolande Beukes testified that accused 2 requested her to phone different car rental places to get a car for 15 days for accused 1. This instruction related to the availability of a vehicle for 15 days. She was not instructed to phone only those car rental companies which had entered into an agreement with

government for beneficial rates. Mr Stramis joined them in the office after the initial instruction was given and he assumed that the vehicle would be used for official purposes. Contrary to the testimony of Ulf Dieter Thaumuller that government rates are cheaper than walk in clients, it appears that this was not a hard and fast business principal as they afforded accused 1 the same rates on the second occasion when he personally rented a vehicle. It was further conceded under cross-examination that government rates are not disclosed to the general public. Accused 1 and 2 testified that they were not aware of the beneficial rates for government. Given the evidence herein the version of the accused herein is reasonably possibly true and I find that the State has not succeeded in proving beyond reasonable doubt that accused 1 or 2 used the purchase order and claim form to obtain reduced rates for the rental of the vehicle.

[25] Accused 1 testified that his main objective was to have access to a vehicle. No reason was advanced why he did not arrange this privately. Accused 2 however shed some light on the real reason why accused 1 opted to use the National Assembly's procurement procedure to secure the vehicle. From his testimony it transpired that accused 1 had difficulties. Under normal circumstances the renting a vehicle is secured by withholding an amount as a security or deposit on the credit card. The full amount invoiced would become due and payable upon the return of the vehicle. Accused 1 intimated that he had imminent traveling commitments. From this one may infer that he did not want to use the funds available on his credit card to secure the rental or to pay immediately. The procedure for government does not amount to a credit agreement as the amount payable would become due and payable once the service has been rendered in full and the National Assembly is provided with the original purchase order and invoice for processing. Given the extent of government's operations it would take time to process claims. This procedure was well known to accused 1 and 2 and this court can only conclude that they intended to delay the payment of the invoice. This essentially was the argument Mr Small, counsel for the State. He held the view that this was gratification as provided for by the definition of gratification.

[26] Gratification is defined in section 32 as follows:

"gratification" includes -

- (a) money or any gift, loan, fee, reward, commission, valuable security or property or interest in property of any description, whether movable or immovable;
- (b) any office, dignity, employment, contract of employment or services and any agreement to give employment or render services in any capacity;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (d) any valuable consideration or benefit of any kind, any discount, commission, rebate, bonus, deduction or percentage;
- (e) any forbearance to demand any money or money's worth or valuable thing;
- (f) 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 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;
- (g) any right or privilege;
- (h) any aid, vote, consent or influence, or any pretended aid, vote, consent or influence;
- (i) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs;⁷

[27] As can be seen from the above, the definition covers a wide scope of what can be defined as gratification. In Teckla Lameck case this was held not to be impermissibly wide and I agree with the sentiments expressed in that judgment. In terms of section 84 of the Criminal Procedure Act 51 of 1977 the accused must be given full particulars of the case which he/she has to answer to. One would expect of the State, particularly given the wide scope of the definition of gratification, to specify the nature of the gratification. The gratification stipulated in the charge sheet was that the accused 1 obtained a reduced rate reserved for government. Mr Small was hard pressed not to concede that this was not in fact proven beyond reasonable doubt but argued for the first time that gratification in the form of a time delay was intended. The right to be

⁷ See: Section 32 of the Anti-Corruption Act, 8 of 2003

informed of the charge against him is not only contained in the Criminal Procedure Act but is also intrinsic value of a fair trial. The right to a fair trial guaranteed in terms of article 12 of the Constitution of Namibia requires that an the accused must know the necessary particulars of the charge in order for him to know the case he has to answer to. To now hold that the nature of the gratification was different to the gratification contained in the charge sheet would infringe on the accused right to a fair trial. ⁸

[28] I am not persuaded that the State proved beyond reasonable doubt that accused 1 and 2 had the commit the offence proscribed by section 43(1).

Alternative Charge of Fraud

[29] The alternative charge to count 2 was that accused committed fraud. The details of this charge were the following:

“In that on or about the **01st day of March 2007** and at or near **Windhoek** in the district of **Windhoek** the accused, being public officers, to wit: First accused, **a Secretary (Permanent Secretary) to the National Assembly, Government of the Republic of Namibia** and Second accused, an **accountant (Acting Deputy Director for general services) to the National Assembly, Government of the Republic of Namibia** did wrongfully, unlawfully, falsely and with intent to defraud conspire or while acting in concert give out and pretend to: **Ulf Dieter Thaumuller and/or Budget Rent A Car that the National Assembly and/or the Government of the Republic of Namibia was hiring a motor vehicle with registration number N 82959 W from Budget Rent A Car using the Republic of Namibia Purchase Order Claim form number M0356090 for fifteen (15) days at a total amount of N\$5 055.00 and that the invoice for such rental will be settled by the Government of the Republic of Namibia, they further misrepresented to the National Assembly and/ or the Government of the Republic of Namibia that it was responsible to hire the above-mentioned motor vehicle and did then thereby means of the said false pretences induce the said Ulf Dieter Thaumuller and/or Budget Rent A Car and/or The National Assembly and/or The Government of the Republic of Namibia to the actual loss or potential prejudice of Ulf Dieter Thaumuller and/or Budget Rent A Car and/or The National Assembly and/or The Government of the Republic of Namibia to the amount of N\$ 6 780,00,. . .”**

⁸ See S v Wannenburg 2007 (1) SACR 27 (C) A

[30] I have concluded that accused 1 and 2 acted unlawfully in that they had falsely misrepresented to Budget Rent A Car that the rental was for the benefit of National Assembly whereas in fact it was for the benefit of accused 1. The quotation obtained was for 15 days but the actual period of rental was 10 days. The quoted amount for 15 days was N\$ 5055 whereas the actual cost for the rental amounted to N\$4 379, 54. The evidence of the State as well as that of the accused does not justify a conclusion that accused 1 had misrepresented to those who were tasked with the completion of the purchase and claim form that National Assembly would be liable for the payment of the expense. The State however successfully proved that accused 1 and 2 acted unlawfully when they misrepresented the true nature of the transaction to Budget Rent A Car

[31] The State bore the onus to prove that the evidence adduced proves beyond reasonable doubt that accused 1 and 2 when they made the misrepresentation to Budget Rent A Car intended to defraud National Assembly or Budget Rent A Car. I have dealt with the intention of accused 1 when he approached accused 2 to use the procurement system of National Assembly to rent a vehicle and the same would be equally applicable to the intention to defraud National Assembly.

[32] Dorothy Silishebo testified that she would not have processed the purchase and claim form since it was a manual purchase order but would have referred it to Ms Beukes for more information. Accused 2 indicated that he had opted for this procedure to safeguard against an automatic payment by National Assembly. Since the form was left unattended it is not possible for the court to conclude beyond reasonable doubt that accused 1 intended that National Assembly should pay the expense despite the delay in effecting the payment.

[33] I have furthermore addressed the issue of whether Budget Rent A Car suffered a loss as a result of the difference in the rate for government and private persons and there is no need to restate it. Budget Rent A Car would have, according to accused 1 and 2 have been paid if accused 1 had been confronted with the original purchase order and claim form and invoice. I find myself unwilling to speculate as to what would have

happened if accused 1 had refused to pay the invoice once confronted with his initial promise to settle the account. Furthermore accused 1 or 2 never instructed Mr Stramis to secure a preferred rate. Mr Stramis of his own accord secured the preferential rates for government. Ms Beukes testified that she requested Mr Stramis to assist her and clearly failed to communicate the fact that the vehicle was in fact for accused 1. If anything, the intention was not to effect immediate payment. Any prejudice resulting from such intention was not actively pursued by the State.

[34] Given the failure of the State to prove beyond reasonable doubt that the accused had the requisite intention to defraud either the National Assembly or Budget Rent A Car, the accused would be entitled to an acquittal on the alternative charge of fraud.

Count 2

[35] The main charge against the accused in count 2 reads as follows:

“In that between the **15th day of March and 24th day April 2007** and at or near **Windhoek** in the district of **Windhoek** the accused, being public officers, to wit: First accused, a **Secretary (Permanent Secretary) to the National Assembly, Government of the Republic of Namibia** and Second accused, **an accountant (Acting Deputy Director for general services) to the National Assembly, Government of the Republic of Namibia**, did wrongfully, unlawfully, directly or indirectly and corruptly conspire or act in concert to use their offices or positions in a public body, namely: **The National Assembly, Government of the Republic of Namibia** to obtain a gratification for first accused and/or second accused, to wit: to hire a motor vehicle with registration number DDS 937 FS from Michael Goagoseb and/or Steven Ndengu and/or Budget Rent A Car for forty -one (41) days for a total amount of N\$ 18 497,20 for private use by accused one and/ or accused two, at the expense of or by paying for the said rental by using a cheque, number 14612068 of the National Assembly and/or the Government of the Republic of Namibia, thus creating the impression that the said motor vehicle was hired by the National Assembly and/or the Government of the Republic of Namibia Whereas in truth and in fact the accused persons when they hired the said vehicle well knew that it was not hired by or for official purposes of the National Assembly and/or the Government of the Republic of Namibia, but that it was hired for private use by the first accused and/or second accused and thus misrepresented to Michael Goagoseb and/or

Steven Ndengu and/ or Budget Rent A Car that it was being hired by the National Assembly and/or the Government and further that the accused persons had no authority or permission from the Public Service Commission and/or the National Assembly and/or the Government of the Republic of Namibia to hire the said vehicle as stated above, and did then and thereby means of the said false pretences cause actual or potential prejudice to the National Assembly and / or the Government of the Republic of Namibia and/or Budget Rent A Car to the amount of N\$ 18 497,20, thus the accused did abuse their offices or positions for gratification and contravened section 43(1) of Act 8 of 2003.”

[36] Accused 1 on his return from Botswana on 15 March 2007, rented another vehicle from Budget Rent A Car for his own use. This time however, he entered into a private agreement with Budget Rent A Car and presented his credit card in order for them to secure a guaranteed amount as a deposit. On 24 April 2007 the vehicle was returned. This time accused 1 with the assistance of accused 2 actually effected payment by issuing a government cheque to settle a private debt of accused 1. The detailed facts of this matter has been summarised in the previous judgment and there is no need to restate it herein as much of the material facts are not in dispute. The material facts of this transaction was that accused 1 with the assistance of accused 2 used their respective positions to pay a private account of accused 1 out of State Revenue. It was further not disputed that accused 1, at the time he approached accused 2 to make the payment communicated his intention to repay National Assembly and did indeed repay National Assembly after some time. It was an undisputed fact that, although accused 1 communicated the possibility that it should be deducted from his salary, that he did not do so at the time the payment was made or at any time thereafter up until the time of his arrest.

[37] The conduct of accused 1 and 2, is almost identical to their actions in count 1 i.e. that they used their respective positions within the National Assembly to secure the payment knowing full well that it was wrong to do so. This is evidenced by the fact that they circumvented subjecting the transaction for scrutiny by the economising committee. The conduct of accused 1 can be defined as the unauthorized appropriation of credit which has been recognised as a form of theft.⁹Moreover, in this instance, their conduct

⁹ See Criminal Law by Snyman forth edition at page 494

was not only unauthorised and outside the scope of their lawful authority, but may very well constitute theft. Accused 1 appreciated that State Revenue was to be applied as appropriated by Parliament and approved by the President. The only lawful manner in which accused 1 could be advanced money from State Revenue, was in the form of his remuneration, alternatively, if it was approved that same could be deducted from his salary. Accused failure to arrange for such a deduction prior to making the payment in this instance deprives him of any lawful justification for misappropriating State Revenue. Accused 2 equally knew that it was wrong for accused 1 to settle his debt out of the account of National Assembly but nevertheless facilitated the payment.

[38] The unauthorized borrowing of money contrary to treasury instructions is unlawful and if done intentionally could constitute theft.¹⁰ This is committed when credit, in this case public funds, has been entrusted to a person to be applied by him for a certain purpose, and contrary to the conditions in terms of which the funds have been entrusted to him/her is applied for another purpose as is the case herein. Although accused 1, according to the testimony of accused 2, undertook to repay the amount once his difficulties with his credit card were resolved and if this was not resolved that he would make arrangements to have same deducted from his salary, this was not given effect to by accused 1 nor did accused 2 insist on first obtaining written permission from accused 1 to have the amount deducted from his salary. Moreover the undertaking to repay at some unspecified time was not in accordance with treasury instructions. It is further evident that accused 1 did not have sufficient liquid funds at the time when he authorised the use of public funds at his disposal to repay National Assembly. Whilst the repayment of the amount may mitigate the moral blameworthiness of the accused conduct, it is not a lawful justification.

[39] Accused 1, in his position as Secretary would not have approved payment of a debt of any of his subordinates contrary to treasury instructions or would not have approved payment for an advance on his/her salary without having the required consent to deduct it from his/her salary in monthly installments. His position was no different to

¹⁰ See *S v Mafarachisi* 1990 (1) SACR 612 (ZS)

that of any other employee in respect of the procedure to be followed for an advance payment of his salary but was able to do so by virtue of his position as Secretary of the National Assembly.

[40] Accused 1 therefore unlawfully and intentionally used his position in order to obtain a gratification in the form of a loan. Accused 2 by co-signing the General Expense Treasury form actively associated himself in the execution of a common purpose i.e. the unlawful and intentional use by accused 1 of his position to obtain gratification in the form of a loan for his own benefit. I am satisfied that the State has proven beyond reasonable doubt that accused 1 and 2 accused are guilty of contravening section 43(1) of Anti-Corruption Act.

Count 3

[41] The main charge in count 3 was that accused 1 had contravened section 43(1) in that he:

“... on or about the **25th day of May 2007** and at or near **Windhoek** in the district of **Windhoek** the said accused being a public officer, to wit: **a Secretary (Permanent Secretary) to the National Assembly and thus a member on the management cadre of the public service of Namibia and a receiver of the motor vehicle allowance** did wrongfully, unlawfully, directly or indirectly and corruptly use his office or position in a public body, **The National Assembly of the Republic of Namibia** to obtain a gratification for his own benefit or that of another person, to wit: **by driving a government motor vehicle with registration number GRN 343, belonging or assigned to Johannes Jacobs and/or Reinhardt Ricardo Stramis and/or Paulus Nathinge and/or the National Assembly and/or The Government of the Republic of Namibia** for his own personal gain/benefit or that of another without authority or permission to do so from the owner or the person lawfully in charge thereof and well knowing that being a receiver of a motor vehicle allowance he was not allowed to drive a government motor vehicle without authority or permission, thus the accused did abuse his office or position for gratification thereby contravening section 43 (1) of Act 8 of to 2003.”

[42] Accused 1 requested the use of an official vehicle and the keys were given to him. It is undisputed that accused used the vehicle the evening of 24 May 2007 and was in possession of the vehicle the next morning until such time as it was seized by police officers. Mr Jacobs testified that he informed accused 1 that the vehicle was needed to transport parliamentarians to the airport the next day and accused 1 undertook to return

the vehicle in time for this to be done. Accused 1 testified that his own vehicle was being repaired and he needed the official vehicle to attend an official function being the burial of the late Comrade R. Kabajani. Although accused 1 in his plea explanation indicated that he wanted to attend the memorial service of the late Comrade R Kabajani, I have no reason to believe that his evidence in respect hereof was untruthful.

[43] The key question for consideration is whether accused 1 had abused his position in order to obtain gratification. The State's submission was that accused 1 was the recipient of a motor vehicle allowance and was not, in terms of the rules governing the motor vehicle scheme, entitled to use an official vehicle. It was common cause that accused 1 received a motor vehicle allowance. The rules were issued in terms of section 35 of the Public Service Act, 1995 (Act 13 of 1995). The rules provide as follow:

"The member must utilize his or her vehicle for all official journeys arising from his duties. When a member cannot use the relevant vehicle e.g. when it is in for repairs he or she must make alternative private arrangements in regard to official traveling which are acceptable to the Permanent Secretary/Accounting Officer Government vehicles will not be provided."

It further reads as follow:

"The allowance of those members who make use of the Motor vehicle allowance by receiving the allowance and using official cars during working hours will be stopped. It is the responsibility of the relevant Permanent Secretary of the relevant office/ministry/agency to curb such misuse or stop the allowance by referring the case to the Secretary to Cabinet to deal with them in terms of paragraph 6.3."

[44] From the above it is evident that the basic rule is that members receiving an allowance are not permitted to use government vehicles. The Accounting officers' discretion in terms of these rules appear to be limited to ensuring that the private arrangements made are acceptable. It however appears from the evidence of accused 1 which was confirmed by a State Witness, Mr J Jacobs that the rules were used as a guideline and that accused 2, as accounting officer, would from time to time use his discretion to allow members receiving a car allowance to make use of an official vehicle. The only sanction provided for in these rules is the stopping of the motor vehicle

allowance in cases of abuse. If it is read in conjunction with the Public Service Act, charges of misconduct may be laid against a member who receives a motor vehicle allowance for misuse of State property. In a nutshell the use of an official vehicle whilst receiving a car allowance is per se an abuse of government property and no provision is made for the permanent secretary or accounting officer to consider a request for the use of official vehicle in exceptional circumstances.

[45] Accused 1 maintained that the provisions of the Public Service Act and the Rules are not applicable to him in his position as the Secretary of the National Assembly. Article 52 of the constitution stipulates as follow:

- (1) "Subject to the provisions of the laws pertaining to the public service and the directives of the National Assembly, the Speaker shall appoint a person (. . .) as the Secretary of National Assembly who shall perform the functions and duties assigned to such Secretary by this Constitution or by the Speaker.
- (2) . . .
- (3) . . . "

[46] Mr Small referred me to *Mostert v The Minister of Justice* 2003 NR 11 where a similar provision was interpreted as it applies to magistrates. It is my understanding that in that matter it was held that while the independence of magistrates is not the same as judges, magistrates ought not to be treated as civil servants in terms of the Public Service Act. I am of the view that this authority does not support the argument of Mr Small. The Constitution provides that the Secretary performs his duties as assigned by the Constitution or by the Speaker which supports the argument of accused 1. Accused 1's duty no doubt included managing transport arrangement and the allocation of official vehicles and it was the expressed view of the Speaker that he did not expect to have been consulted by accused 1 on the use of official vehicles as same would fall under his authority as the Secretary.

[47] Even if I am wrong in this regard, it is my view that accused 1 was, as the Secretary the person in control and responsible for the vehicles allocated to National Assembly. I am further of the view that even though accused 1 in accepting the

allowance for a vehicle accepted the conditions attached thereto. It is evident from his conduct that he, instead of using an official vehicle appreciated that he had to make alternative arrangements.

[48] Accused 1 testified that he applied his discretion when he opted to use the vehicle. The evidence prove that the use was intended for an official function, was intended to be of short duration; and was intended to be used with due consideration of other equally important official purposes. Mr Small encouraged this court to hold that a strict interpretation should be attached to the rules governing the car scheme. This however is not the test. Accused 1 clearly had the authority to deal with the use of official vehicles. The question is whether the application of such discretion was unlawful. A slavish adherence to the rule which divest a Permanent Secretary or Accounting officer of his or her discretion to in exceptional circumstances, would have far reaching consequences for the efficient running of the affairs of the State. Where the discretion is reasonably applied for facilitate the performance of an official in their duties it cannot be said that it would be against the legal convictions of society. I am of the view that accused 1 had the authority and the decision was not unreasonable given the duration and purpose for which he intended to use the vehicle. I am not persuaded that the State had proven beyond reasonable doubt that accused 1 had acted unlawfully or corruptly. Accused 1 therefore is entitled to his acquittal on the main count.

[49] The alternative charge in count 3 reads as follows:

“In that upon or about the **25th** day of **May 2007** and at or near **Windhoek** in the district of **Windhoek** the said accused did wrongfully and unlawfully drive a motor vehicle with registration number **GRN 343** belonging or assigned to **Johannes Jacobs and/or Reinhardt Ricardo Stramis and/or Paulus Nathinge and/or the National Assembly and/ or The Government of the Republic of Namibia** without the consent of the owner, or a person lawfully in charge thereof “

[50] I have already alluded to the authority of accused 1 here above and find it unnecessary to repeat same herein. Accused 1 had the authority to delegate this function to his subordinates but was clearly authorized to use the vehicle under the circumstances. The State, as in the main count, failed to prove the elements of this

offence beyond reasonable doubt i.e that accused 1 unlawfully drove the vehicle without consent of the owner or a person lawfully in charge thereof. Accused 1 is equally entitled to be acquitted on the alternative count.

[51] In the result the following order is made:

1. Accused 1 and 2 are acquitted and found not guilty of the main and alternative charge in count 1.
2. Accused 1 and 2 are convicted of the main charge contained in count 2.
3. Accused 1 is acquitted of the main and alternative charge in count 3.

Tommasi J

APPEARANCE

STATE :

DF. Small

Instructed by the Office of the Prosecutor
General

FIRST ACCUSED:

LH. Murorua

Of Murorua & Associates

SECOND ACCUSED:

ZJ. Grobler

Of Grobler & Co.