

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

JUDGMENT

CASE NO.: CC 14/2016

In the matter between:

THE STATE

v

ERWIN ROSALIA LUDOVIC SPRANGERS

ACCUSED

Neutral Citation: *S v Sprangers* (CC14/2016) [2020] NAHCMD 410 (11 September 2020)

Coram: RAKOW, AJ

Heard on: 6,7,8, 9, 10, 12,13,14,15,16 August 2019; 30 & 31 October 2019; 1& 25 November 2019; 27 January 2020; 6, 11 & 15 May 2020; 27 & 28 July 2020

Delivered on: **11 September 2020**

Flynote: Criminal law – Accused charged with one count of fraud – four counts of theft by conversion – alternatively theft – contravening section 4 (b) (i) – read with sections 11 of the Prevention of Organised Crime Act 29 of 2004 – read with section 94 of the Criminal Procedure Act 51 of 1977 – Fraud not proved beyond a reasonable doubt – accused found not guilty. Accused found guilty on counts 2 to 7.

Summary: The accused together with the second accused who was acquitted in terms of section 174 of the Criminal Procedure Act 51 of 1977, was charged with one count of fraud, 4 counts of theft by conversion alternatively theft and initially contravening section 6 read with sections 1, 7, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004, being the acquisition, possession or use of proceeds of unlawful activities. This charge was later amended to a charge of contravening section 4(b) (i) read with sections 1, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004, read with section 94 of the Criminal Procedure Act 51 of 1977 being money laundering, disguising unlawful origin of property on divers' occasions.

Held that fraud consists in unlawfully making, with intent to defraud, another. In order to secure a conviction on fraud the state had to prove (i) a misrepresentation; (ii) prejudice or potential prejudice; (iii) unlawfulness; and (iv) intention.

Held that misrepresentation may however take a variety of forms. They may be made by entries in books or records or by conduct or even by silence when there is a duty to speak.

Held further that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or

whether it falls short and thus falls within the area of a reasonable alternative hypothesis.

Held furthermore that it is clear that the court must look at the evidence as a whole and not piecemeal and there is a duty on the court to weigh the evidence of the state as well as that of the defence and then come to a conclusion based on the probabilities of the case. This process entails looking at the merits and demerits of each of all the evidence.

Held that in evaluating the evidence placed before court and looking at the probabilities of the evidence the court rejects the version of the accused and find it not reasonably possible true. Although there are discrepancies in the evidence of the state witnesses, the court also takes into account that these happenings took place about 10 years ago and find that the evidence presented by the State is probable and rejects the version of the accused.

Held further the court is not convinced that the accused had a fraudulent intention to defraud the complainant during the conversations where the development of the plots were discussed. Therefore finds the accused not guilty of fraud – count 1.

Held furthermore that the court is however satisfied that counts 2 – 6 the court is satisfied that the accused misappropriated property, in this instance the funds of the complainant which was placed in his control for the purpose of developing and/or purchasing fixed property, which he did not do and as such converted the money for his own use. The court however takes into account that the accused returned U\$50 000 from this money to the complainant. The accused is therefore found guilty on counts 2, 3, 4, 5 and 6.

Held furthermore that the court is further satisfied that the accused is guilty of contravening section 4(b)(i) read with sections 1, 8 and 11 of the Prevention of

Organised Crime Act, 29 of 2004, read with section 94 of the Criminal Procedure Act 51 of 1977 – Money Laundering – Disguising unlawful origin of property on divers occasions in that he knew that the money in his account was proceeds of unlawful activity in that it was proceeds from his theft from the complainant, he proceeded to transfer the bulk of it to his home loan scheme which transfer had the effect of concealing, or disguising the nature, origin or source of the property or its ownership or the interest the complainant had in it. The accused is therefore found guilty of count 7.

ORDER

1. Count 1 of Fraud – Not guilty.
2. Count 2 – 6 the offence of theft by conversion – Guilty.
3. Count 7 the offence of Contravening section 4(b)(i) read with sections 1, 8 and 11 of the Prevention of Organised Crime Act, 29 of 2004, read with section 94 of the Criminal Procedure Act 51 of 1977- Guilty.

JUDGMENT

RAKOW, AJ

[1] The accused together with the second accused who was acquitted previously, was charged with one count of fraud, 5 counts of theft by conversion alternatively theft and initially contravening section 6 read with sections 1,7,8 and 11 of the Prevention of Organised Crime Act 29 of 2004, being the acquisition,

possession or use of proceeds of unlawful activities. This charge was later amended to a charge of contravening section 4(b) (i) read with sections 1, 8 and 11 of the Prevention of Organised Crime Act 29 of 2004, read with section 94 of the Criminal Procedure Act 51 of 1977 being money laundering, disguising unlawful origin of property on divers' occasions.

[2] The State alleged that these charges stemmed from allegations that accused 1 was an estate agent trading as, or practicing as such under the name and style of Kintscher Estate Agents and Auctioneers and having his principal place of business at 17 Shop 14A, Woermann & Brock Mall, Tobias Hainyeko Street, Swakopmund, Republic of Namibia. It is further alleged that the accused worked at Kintschner Estate Agents, who owned two separate bank accounts at First National Bank Namibia, Swakopmund branch, namely: a business cheque account with number 554 6004 0542 and a Kintscher Estates Trust banking account with number 554 6004 3934.

[3] It is further alleged that accused and the complainant one Francois Olenga knew one another since 2003 and had some business dealings in the past. During January 2010 the complainant and the accused agreed orally that the complainant will deposit U\$900 000 (N\$6 785 318.76) into the Kintscher Estate Agents and Auctioneers trust banking account for the purposes of developing the complainant's undeveloped properties at erf 4136 and erf 4120 in Swakopmund and/or purchase of further properties by the complainant. The agreement was then that the Accused would hold and keep in trust the said funds on behalf of Francois Olenga and would use the said funds only for the purposes approved by the said Francois Olenga and that he would immediately, upon his request, pay back the said monies to Francois Olenga. The money was paid over during 5 different transactions during the period February to July 2010. The state then alleged that the Accused did not use the money as agreed to and as approved by Francois Olenga, but used it for his own purposes and failed to pay back the money upon the request of the complainant.

[4] The Accused pleaded not guilty to all the counts and made a statement in terms of section 115 and 220 of the Criminal Procedure Act, Act 51 of 1977. He explained that he knew the complainant since 2003 and during one of the meetings between him and the complainant they discussed various matters amongst others which was his interest in antique furniture and other artefacts. The complainant also indicated that he often had business ventures in and with people in China and often travels there. He then informed the complainant that he was in possession of two Chinese vases which he then showed to the complainant as it was kept in the safe in his offices. The complainant then took photos of the vases as well as a video and indicated that he might be able to get a buyer for the vases. This was during 2008 or 2009. On 9 December 2009 the complainant phoned him and informed him that he has a potential buyer for the vases at U\$1 250 000 and they discussed the commission the complainant is to earn on the sale. He was again phoned by the complainant on 27 January 2010 who informed him that he is now with the buyer in Ukraine and that there was conditions attached to the way in which the payments will be effected. During February 2010 he received the first payment that was deposited in his business account and four additional deposits followed. The payments were for monies due and payable to him in respect of the selling of an antique vase which turned out to be an 18th century Qiaolong Chinese vase.

[5] The Accused made certain formal admissions in terms of section 220 of the Criminal Procedure Act, 51 of 1977. He admitted that he was an estate agent practicing under the name of Kintscher Estate Agents and Auctioneers. His wife was initially a partner of the business but resigned on 28 August 2008, effectively from 28 February 2009. He further admitted that Kintscher Estate Agents & Auctioneers had accounts at First National Bank being account number 554 600 405 42 and a trust account with the number 554 600 439 34. He further did not know who exactly transferred the money into the business account of Kintscher Estate Agents & Auctioneers as he was told that the buyer of the vase wished to remain anonymous. He will not dispute it if it is claimed by Mr. Olenga that he instructed the transfer of the money.

[6] The matter initially started out before my sister Justice Shivute and one witness, Moses Kamanguma was called by the state, during whose evidence Justice Shivute became aware of a possibility of a conflict of interest and she recused herself. The matter then started *de novo* before me. There was further a civil matter heard also in this court by my brother Justice Masuku, where the complainant successfully sued the accused for the recovery of a sum of money.

The evidence

[7] To prove their allegation, the state called a number of witnesses. The 1st witness that was called was Jozsef Feher. He lives in Hungary and he worked with the complainant Francois Olenga from 2001 to 2008/2009. In 2010 he was still the Director of Breadfield Trade Limited Company. It was a trading company, originally established by Ukrainian citizens to trade in Ukrainian grain, agricultural equipment, machine tools, motors, engines etc. The witness met Francois Olenga when he wanted to buy agriculture machinery from the Ukraine. On 1 February 2010 the witness was contacted by Francois Olenga who told him that he wants do an investment in Namibia and that he would like to buy real estate or further real estate in Namibia. In the books of Breadfield there was money allocated to Mr. Olenga that he earned as commission on the delivery of some machines. Their agreement was that if a deal goes through successfully, then he would earn commission on it. This commission was never paid out in the past and the complainant now gave instructions to the witness to transfer the money to Swakopmund, Namibia. Initially he had to transfer U\$10 000. The complainant sent an email to the witness with the beneficiary bank name and address, which was FNB, the swift code of the beneficiary bank as well as the name of the beneficiary, which was Kintscher Agents and Auctioneers. He also provided details of the payment. He then proceeded to give instructions to MKB Bank, the former foreign trading bank of Hungary, to do the payment.

[8] Two days after the initial transfer, on 22 February 2010, the witness was asked by Mr. Olenga to transfer a further amount of U\$290 000 to the same

account, which he did. He received similar instructions in June and July 2010 and made three transfers amounting to the amount of U\$600 000, being U\$200 000 each. Each time the instructions were for real estate investment in Swakopmund. The money was paid via a corresponding bank in America, Deutsche Bank Trust Company America, as the payment was made in US\$. In 2013 Mr Olenga informed him that he is having trouble regarding the transfers and he needed the swift copies of the transactions. Mr Feher then asked MKB bank to provide him with copies of the swift transactions as Mr Olenga wanted some proof that the payments that were made. He also asked MKB bank to make corrections to the initial original documents to make sure that they mentioned exactly that the payments were made on behalf of Francois Olenga for an agreement of the purchase of properties. These rectified documents were received on 8 December 2015. Two employees of the bank also accompanied him to a notary public to sign all the documents on behalf of the bank. These documents were handed up as exhibits and gave details about each of the transactions into the business account of Kintscher Estate Agents and Auctioneers. The initial payment held an instruction saying it was the first down payment for service fees and according to the witness this meant that it was the first down payment for the fees that his company owed to Mr. Olenga. This was then later correct to read first down payment for service fee payment on behalf of Mr. Francois Olenga for purchase of properties.

[9] The 2nd payment contained details indicating that it was the first down payment for purchase contract but nothing more, this was then changed to reflect the name from who the payment originated, Francois Olenga for the purchase of properties. On 5 March 2010, another payment was made in the amount of U\$200 000 with the description that it is for the first down payment for real estate. This was later changed to read first down payment for real estate payment on behalf of Mr Francois Olenga for purchase of properties. Again on 6 July 2010 a payment of U\$200 000 was made with the original description indicating that it was the 4th down payment for real estate as purchase agreement DD 03.03.2010. This was later changed to indicate that it was 4th down payment for

real estate as purchase agreement DD 03.03.2010 payment on behalf of Mr Francois Olenga for purchase of properties. The next transaction took place on the same day for the same amount, to wit U\$200 000. The remittance information read 5th down payment for real estate as purchase agreement DD 03.03.2010 which was then later changed to read 5th down payment for real estate as purchase agreement DD 03.03.2010 payment on behalf of Mr Francois Olenga for purchase of properties. On all these transfers the fees were for the account of the receiver and therefore deducted by the bank doing the transfers from the transferred amount. He further testified that Mr Olenga never spoke to him regarding a Chinese vase, just that the payments were for a purchase agreement dated 3 March 2010 for real estate properties.

[10] During cross-examination of Mr Feher it was clarified that Breadfield Trading Company was never a banking institution nor was it a financial institution. He also testified previously in the civil matter that was before court. He confirmed that when you sent a large amount of money via bank transfer, you must indicate for what it is, this you do with the swift message that accompanies such a transfer. There was further agreements between the sellers in Ukraine and Mr Olenga indicating what amount of commission would come to Breadfield and then between Breadfield Company and Mr Olenga. Mr Olenga earned 4% commission on transactions of the company during the 7 – 8 years of their relationship. The turnover was approximately U\$25 000 000 which amounted to commission for Mr Olenga in the amount of approximately U\$900 000. He also made about 5 – 10 other payments, in the amount of about U\$300 000 on behalf of Mr Olenga to other countries like Germany. Mr Olenga kept his commission on the books of Breadfield and did not earn any interest on the said money. It was later shown that a certain Francois Reisenberger who resides in Germany and received monies due to Mellowstone Trade was the son of the complainant and he received money on a number of occasions from Breadfield Trade. During cross examination he further testified that the instructions as to how and when the money should be paid over as well as for what was to be written in the comment part as received from Mr Olenga via email. The contract he referred to

as dated 03.03.2010 was information he also received from Mr Olenga but he presumed it would be for real estate or fixed property but he has never seen the said agreement.

[11] Witness number 2 for the state was Francois Olenga, the complainant. He is a citizen of DRC and is a General in the military in DRC. Before living in the DRC, he lived and worked in Germany where he was a representative of a number of companies and he introduced these companies to business in Angola, other African countries as well as ex-Soviet Union countries. He was a broker. He met the 1st accused before court when he went to Swakopmund with General Andima as he was interested in buying properties in Swakopmund. He purchased one plot in 2003 and another in 2005, both times using the firm of the accused. The accused managed both properties and assisted him to pay levies until 2009. During early 2010 the accused advised the witness to develop the said properties by building flats on the said properties as the municipal bills would escalate because the land remains undeveloped. They had discussions regarding the way forward. The accused further advised him that he needed money to go forward so that they can contract some building companies that will be involved in the development. The witness was together with Mr Kamunguma when these discussions took place. It was not a written agreement and he expected the accused to fly out to Kinshasa in order for them to meet and have a look at plans etc. The wife of the accused, who was the 2nd accused initially was also at the office but she only served them with tea and coffee, she did not participate in the discussions. He informed the accused that the money should be kept in a trust account and if it is not used for the purpose they agreed upon, being the development of the plots; it must be paid back to the witness. It was an explicit term according to the witness that he should give his consent for the use of the money. He trusted the accused as they had known each other for some time and had previous business dealings and the accused also stayed in the DRC in the 1960's before his father left for South Africa.

[12] The witness further agreed with the accused that he would come to the DRC with the plans for further discussions. He arranged for a visa for the accused, which the accused collected from the embassy but he never used it. After their agreement for the development of the plots, the witness returned to Kinshasa and then travelled to Kiev in the Ukraine. The complainant phoned the accused and requested him to send the banking details of his trust account. He received the information and forwarded it to Mr Feher to proceed with paying over the money. He gave Mr Feher an order to pay over the money, a total of U\$900 000. Mr Feher advised him to pay over only U\$10 000 initially to check if the account provided to him by the accused was functioning and he had to confirm that the money was indeed received by the accused. He phoned the accused and he confirmed that he received the money. This was in February 2010 and Mr Feher would give him a copy every time a transfer was made, and each time he would phone the accused to confirm that the money was indeed received. It was his money that Mr Feher sent every time.

[13] The witness and Mr Kamunguma visited the accused in Swakopmund after the transfer of the money and he wanted to see how far the plans were and the accused did not show him anything. He however took him to see some ready build flats, one which was on the market for N\$4 000 000 and another for about N\$6 000 000. The witness indicated that it was too expensive; they should revert to their previous plan. After that meeting the witness returned to DRC and tried to contact the accused several times without any success. He was looking for him because he needed the plans so that he could give his consent for the development to start. The witness returned to Namibia and he and Mr Kamunguma went to Swakopmund, wanting to see the accused. At the office of the accused they were informed that the accused is in South Africa. This was between November and the end of the year. He then went to another estate agent to assist him with the sale of his properties. He saw a certain Diane from Ushi and Diane real estate. He informed her that he was looking for the accused but could not find him as he is in South Africa and she was surprised and said

that she saw the accused that morning, and offered to take them to the new house of the accused. Mr Kamunguma then went with her.

[14] The witness returned to the office of the accused shortly thereafter the accused and Mr Kamunguma arrived at the office. The accused had a beard and his hair was coloured pink. He then requested the accused to refund him his money. At that stage it was U\$850 000 because at a previous occasion the witness requested the accused to refund U\$100 000 to him and he said he could not, he could only sent him U\$50 000, which he then did. He did not receive any further money and then decided to see a legal practitioner about recovering his money. He was informed the first time about the Chinese vase by his legal practitioner at his offices. The witness denies ever seeing the vase or knowing anything about this vase.

[15] During cross examination Mr Olenga indicated that he is not needy and that he has assets worth some millions of U\$. The witness and Mr Kamunguma were friends and had a company together which did not do any business. It seems that some previous transactions between Mr Olenga and Mr Kamunguma was found by the Supreme Court as possible money laundry transactions, but Mr Olenga was not before that court, only Mr Kamunguma and their company. This was however in 2014 and 2016, sometime after these transactions. The initial purchase prices for the plot was paid by General Andima with monies transferred to him by the witness and then August 26 on his behalf as they could at that stage not sent foreign currency out of the DRC and the Namibian forces assisted them. He gave Mr Feher instructions to clarify the swift transfer instructions. The contract between him and the accused was a verbal contract to develop the said properties and he sent the instructions to Mr Feher but cannot remember if it was in French or English as it was 10 years ago. The date 3.03.2010 might be the date of the oral contract or might be a total error, but it was never any agreement regarding a vase. The witness is not sure that everything that was said to Mr Feher was interpreted correctly with the instructions that went with the swift

payments. Mr Kamunguma was present during the first meeting except for about two or three minutes when he went to answer his phone call.

[16] He admits that in the civil case he never testified that he had money on the books of Breadfield Company. It was his share for goods sold. If it was light agricultural machines he earned 3% share, if it was heavy agricultural machines he earned 5%. He received commission because he created business opportunities for Breadfield Company. Breadfield Company was involved in a number of business ventures. It also seems that the witness testified that he would provide local currency to ships and other businesses transporting some of the goods purchased, like to Ukraine Cargo Airways in exchange for US dollars. It was also through this company that he met Breadfield Company.

[17] The witness was advised by the accused to re-sell the two plots he had. It was also on the books for sale at the business of the accused. He testified that the oral agreement that was reached between him and the accused was reached in January 2010. The accused also paid levies and other municipal expenses and when the witness came to Swakopmund, he would show him proof of these payments. He would either give the accused cash or would transfer money to the account of the accused for this purpose. The witness recalls that he asked the accused to purchase him some kitchen items from money that he gave to him and to send the kitchen items to him to the DRC. The accused was supposed to come to Kinshasa to discuss the plans for the building and because he was interested in investing in Kinshasa. During May 2011 the witness and the accused met again and he demanded his money back. It was the same time that he went to Ushi and Diane real estate to sell the plots. In August 2011 he gave instructions to his attorneys in Namibia to institute action against the accused to recover his money. In December 2010 he travelled to Swakopmund but did not see the accused. The witness is not sure of the dates as this happened 10 years ago. The witness further insisted that it was possible to meet the accused during the four days he was in Namibia during January 2010 and that he never said the wife of the accused was at the said meeting. This meeting took place 3 weeks to

1 month before the phone call to get the banking information of the accused, which call took place on 27 January 2010.

[18] He tried to contact the accused telephonically but was not successful. He came to the conclusion that the accused was avoiding him because he changed his appearance so that the witness would not recognise him, he sold his old residence so that the witness would not be able to go to his house, he darkened his office windows and installed CCTV cameras and his receptionist informed the witness that he was in South Africa whilst he was not. He was also avoiding calls from Mr Kamunguma. This led to the witness not trusting the accused and asking his money back. The accused responded by saying it is a lot of money, he will need some time to pay the money back. He did not repay it and that is why the witness is of the opinion that his money was stolen.

[19] The next witness that was called by the State was Moses Pasana Uanjanda Kamunguma. He is employed by August 26 agencies and is a friend of the complainant Mr Olenga. They became friends after the complainant bought the properties in Swakopmund. Mr Olenga would have meetings with the accused in the presence of the witness and pay bills for the properties where the witness was present. The accused advised the complainant towards the end of 2009 or beginning of 2010 that he should develop the two properties. The complainant then decided that he would send money to the accused to do that. This was agreed at the offices of the accused in Swakopmund. The discussion was that the municipality tariffs were increasing because it is vacant land and not developed. The specifics of the agreement that the witness remembers is that the money will be used for the development of the two properties and probably of acquiring new either plots or finished goods and also for the development of the plans thereof. The complainant returned during the same year but the witness cannot remember the month and informed the witness that he sent U\$900 000 for the development. The accused and the complainant met and discussed the development plans and that the accused would visit the DRC and bring the plans with. They also discussed other business developments in the DRC. At the end

of the year the complainant came again and they could not get hold of the accused.

[20] It was during the end of 2010 and beginning of 2011 that this witness made calls to the accused but could not reach him. If he called the office he was told that the accused is not available or that he is in South Africa. In 2011 the complainant decided that no development is happening on the plots, they must just be sold. They then engaged another estate agent, Ushi and Diana and they sold the plots. They asked for the documentation of the two plots which was with the accused. They tried to contact the accused but were told he is not in the office, he is not in Swakopmund. They returned to the offices of Ushi and Diane and told them that they could not get the documentation because the accused is not in town where they were informed that he was seen that morning. He and a lady, he thinks it is Diane, then drove around town and to the house of the accused where he greeted the accused and informed him that the complainant is waiting for him at the office. The accused then got into the witness car and they drove to the office of the accused. The complainant confronted the accused about the fact that he did not do any development and that he did not come to the DRC. The witness cannot remember whether there was any response on this but he remembers the complainant telling the accused that he just want his money back. The number of a local account of the complainant was later sent to the accused with the mobile of the witness. The amount he was supposed to return was U\$850 000. He cannot remember any commission being discussed at any meeting, neither the purchasing of a vase.

[21] Under cross examination he admitted that he gave evidence in the civil trial. He and the complainant were best friends. He was asked to comment on the fact that he testified that the accused paid the municipal accounts of the complainant for the Swakopmund properties for the first time in these proceedings; it was never mentioned in the civil proceedings, the other criminal proceedings or any of his statements. He explained that he was previously never asked about it. He could not remember whether the first meeting was at the end

of 2009 or beginning of 2010. His statement indicated that it was January 2010. He admitted that he asked on 23 September 2005 on behalf of the complainant that both the properties be sold. He set up the meeting where the development of the plots was discussed. This is usually done by phone but he could not explain why there was no phone call from his phone number registered on the MTC network to the accused's phone number for the months December 2009 to January 2010. The wife of the accused was also at the office during the first meeting although she did not attend the meeting.

[22] He went to the house of the accused in May 2011 and he found him there. He immediately recognized him. His hair and his beard were brownish but he in one of the proceedings also testified that it was changed to pink. He could not remember anything about a brick making machine that was bought by the complainant. According to him the amount of U\$900 000 was not discussed at the initial meeting, he only came to learn about it at a later stage. He and Mr Olenga had registered a company in 2014 McNguma and Olenga Trading CC and he received about N\$2 800 000 from Mr. Olenga. This transaction was later classified as a money laundering transaction by the Supreme Court.

[23] The state then proceeded and called Werdi Engelbrecht. She was employed at Ushi and Diane Properties in 2011. They are estate agents. During March 2011 they were looking for vacant plots close to the ocean and noticed a property with a for sale sign – erf 4236. They got hold of the owner, the complainant, via email and asked him if they can sell the property on his behalf. He indicated that he had no problem, they can continue and that he had another erf he also wanted to sell. They then sold both the properties and the complainant flew in and came to their offices on a Saturday to sign the deeds of sale for the properties. They had to obtain the original CC documents for the properties which were in the possession of the accused but could not reach the accused as he was not available on a number of occasions. They then contacted the complainant and informed him of this. The complainant said that he would return to Swakopmund and meet with the accused.

[24] On 26 May 2011 she met with the complainant and Mr Kamunguma at their offices to discuss the documents still outstanding to finalize the sale of the plots. The complainant explained that they could not get hold of the accused as he was out of town. Diane then explained that it is not so as they saw the accused that morning. They then agreed that the complainant would wait at the office of the accused and the witness and her colleague Diane would take Mr Kamunguma to the property of the accused. Mr Kamunguma then met with the accused and they were told that they could return to their office. After that the complainant brought the documents to them that were needed for the sale of the property. She saw the accused regularly but never got the idea that he changed his appearance. She also never noticed that he grew a beard or dyed his hair pink.

[25] The State also called Sidney Tjipuka who is employed by First National Bank as an ethics manager currently but during 2010 – 2018 he was a forensic investigator at the bank. The Forensic Department works with external stakeholders regarding investigations that are taking place and has the mandate to be the link between the Bank and external Law Enforcement Agencies. In exercising his duties, he has access to electronic bank records that is held on a very secure system. After he was served with a section 179 notice (Section 179 of the Criminal Procedure Act, 51 of 1977) in this specific matter, he provided the documents that were requested in that notice. The documents he provided dealt with the various mandates and signing powers on the two accounts held by Kitscher Estate Agents and Auctioneers. As this evidence mainly dealt with the mandate of the then 2nd accused, it is not necessary to proceed in too much depth in his evidence as the accused admitted the existence of both these account and that he is a signatory to these accounts.

[26] Yakumina Fredricka Hugo testified that she worked at First National Bank (FNB) as the Back Office Manager at the Treasury Department working with foreign currency. She oversees all incoming and outgoing foreign transactions for the whole FNB bank. All transactions come in through a SWIFT society of

worldwide international electronic transfers. It will then go in a queue on the system to the specific branch where it is assigned to. The branch will then go on the system and see the transaction and who the beneficiary is. They will then call the customer and inform the customer that funds have been received and asked the customer to come in and sign a balance of payment form. On this form the customer must identify what the funds are for. A number of documents was handed to this witness whom she used to explain her evidence. Each of the four larger transactions has its own set of similar documents. There is however no set for the U\$10 000 payment. The first page will be an advice – within the bank, informing the bank officials who the customer is and what amount was received and the rate that is offered for buying the foreign currency that is received. This rate will be a rate that is offered by the buying room and communicated to the customer. He then either accepts or rejects the rate. The 2nd page is headed inward swift and will set out the Remitter's details and the inward swift amount that is received. This is a document used by the bank to confirm with their trading partners or other banks who "buys" the U\$ currency from them, the particulars of the transaction. The 3rd form is one titled Customer Offer to sell Foreign Currency Cross Border Foreign Exchange Transaction Reporting. This document contains the information of the customer, the Remitter/Instructing Parties Details, a category code and a description and then an instruction by the receiver indicating what must happen to the money as well as a declaration of balance of the money received is being withheld *in leu* of Exchange Control Regulations. His signature also indicates that he is selling the foreign currency as set out above. The category code displayed on these forms is captured together with the other information on a system that is linked to the Bank of Namibia. The code 602 indicates that the customer either sold property outside or bought property for somebody else inside the country.

[27] The amounts paid into the account of Kitscher Estate Agents and Auctioneers were as follows:

- On 23 February 2010 – N\$2 202 265.93

- On 8 March 2010 – N\$ 1 467 161.15
- On 7 July 2010 – N\$ 1 519 124.24
- On 7 July 2010 – N\$1 518 135.20

[28] The detail on the incoming swift that was provided by the sender of the swift will be available to the receiving bank. According to the witness these instructions cannot be changed at a later stage. The transaction code can be completed by the bank employees; they have the information available to categorize the transaction. She herself did not work with this transaction on the client side.

[29] The last witness called by the State was Lydia Kawuwa. She is employed by FNB and was based at their Swakopmund branch during 2010. She was a teller supervisor and part of her functions included the supervision of the forex transactions which included the authorization of forex transactions. If an amount in foreign currency comes in or goes out that is more than N\$50 000 it must be authorized by the supervisor. It is the teller's duty to call the customer when he or she receives an inward swift transaction because the teller must confirm whether the customer is aware of the transaction. The customer is also informed of the rate for converting the money from foreign currency to Namibian dollar and must be in agreement with such rate. If the customer agrees to the offer, they will provide the information of which account should be credited with the amount. She perused the same set of documents that was handed to the previous witness and confirms that she was indeed the person who checked these transactions. She explained that the 4th document attached to each bundle is the settlement receipt that will be printed to indicate that the money was indeed deposited into an account and will be generated by the system. The forms are completed by the teller dealing with the transaction and signed by the customer. In all four these instances the money was meant for the account of Kitscher Estate Agents and Auctioneers and originated from Breadfield Trade Ltd. She was not present when the documents were completed.

[30] The signature of the customer was also verified and that is the signature of Mr Sprangers, the accused. The form is given to the customer before they sign with the intention that the customer must check that everything is correct when they sign.

[31] The State closed their case and at this stage the 2nd accused brought an application in terms of section 174 of the Criminal Procedure Act, 51 of 1977 for acquittal which was granted by the court. The matter then proceeded against the current accused only. The defence elected to call one witness and proceeded to call the accused person. He testified that he met the complainant in June 2003. He is an estate agent that was at that time operating in Swakopmund under the name of Kitscher Estate Agents and Auctioneers. The complainant purchased a plot from him during that time and the deposit was paid by the complainant and the remainder of the purchase price by August 26 Holding Company. The complainant purchased two properties with his assistance. These properties remained for sale on the books of the accused as the complainant wished to resell them for a profit.

[32] From time to time he would receive calls from the complainant requesting that they meet where they would then arrange to meet when the complainant came down to Swakopmund. It happened once that the complainant did not arrange beforehand and then found the accused not in Swakopmund when he arrived there. That was the reason why these meetings were scheduled in advance via phone calls. In 2005 he received instructions from Mr. Kamunguma to sell one of the plots but the price was too high. In 2008 during a meeting with the complainant, the complainant informed him that he is also involved in the sale of artefacts, African artefacts and other stuff like machinery and that he has a lot of contacts in China. The accused then told him that he has an antique Chinese vase, a Qianlong vase and the complainant immediately showed interest in the vase, and as the vase was in a safe in his office, he showed the vase to the complainant and told him he got the vase from his sister.

[33] The accused got the vase from his sister in 1984 together with a Chinese bowl. His sister in turn got these items from his aunt who was in Belgium in 1980 during a visit. His sister, who is deceased, informed him that it is an antique vase from the 1870's and it was in a wooden box. During cross examination the accused proceeded and described this vase as a pear shaped vase with copper coloured dragons and clouds to the top of the vase and dark blue at the bottom. When he later got married, his wife did not like the vase and he moved it to the safe in his office. After showing it to the complainant the complainant took pictures of it and a video of him and the vase and then informed the accused that he might have Chinese people that might be interested in buying a vase like that. The accused told him that if the price is right he would sell it. On 9 December 2009 he received a call from the complainant asking whether he still had the vase and informing him that he has an offer of U\$ 1 250 000 for the vase. He was very surprised and when he asked who the buyer was, the complainant said that the buyer wished to remain anonymous. The complainant indicated that he wished to receive commission in the amount of N\$1 000 000.

[34] During this same conversation the accused informed the complainant that he received a call from a legal firm because the complainant is in arrears with his rates and taxes and that the lawyers intend to sell his even if he does not pay the arrear rates and taxes. The next day he received an email from the son of the complainant asking if the trust account details were still the same as he wanted to make a payment for the payment of the rates and taxes. He did not hear anything further from the complainant and thought that the deal regarding the vase was too good to be true and went on holiday to South Africa on 26 December 2009. They left Namibia via Vioolsdrift on 29 December 2009, the accused, his wife and their son. He returned via Walvisbay with his son on 17 January 2010 as they flew back because the schools were to start. He flew back to Cape Town on 20 January 2010 and returned on 24 January 2010 together with his wife by car. They spent 25 January 2010 in Windhoek and only arrived back in Swakopmund on 26 January 2010. He handed in copies of his and his wife's passport showing the dates they left the country and returned. On 27

January 2010 he received a call from the complainant who informed him that he was in Kiev in Ukraine and that the sale transaction of the vase is set to go through. The complainant explained to him that the payment will be made in various payments in U\$ into the account of the accused. The complainant could not say how much the first payment would be but that approximately U\$450 000 would be paid by mid-March and the buyer will come and collect the vase when U\$900 000 was paid. After they had collected the vase, the outstanding balance would be received within 3 months.

[35] The accused then informed the complainant that he did not receive any payment for the arrear rates and taxes and the complainant asked him whether he would be prepared to pay it from the commission he is to pay the complainant and the accused agreed. He sent his banking account details to the hotel where the complainant was staying as the complainant requested for them. He then paid the outstanding rates and taxes to the lawyers. There was never any meeting in January 2010 where development to the plots was discussed. He did not expect any other foreign currency except the currency for the sale of the vase. He received the payments that were hereinabove listed in this matter.

[36] On 9 July 2010 he received a phone call from the complainant asking whether he received the payments and he said yes, he did. The accused asked the complainant when he can expect the persons to collect the vase and the complainant said he cannot tell him but it will be shortly. Then the complainant again phoned him and said that two Chinese gentlemen will come and pick up the vase but he did not know when. On 17 July 2010, a Saturday, he was at the office and two Chinese gentlemen approached the offices. His wife was sitting at reception and they wanted to see the accused. They were shown to his office and said they were sent by the complainant to collect the vase. He went to the safe and took out the box and showed them the vase. They said it was fine and left with the vase. At that stage he was still owed U\$350 000.

[37] The complainant phoned him again at the end of July to say that he would be visiting Namibia in September. The accused cannot remember the exact date but it was between 19 and 20 September 2010 that the complainant visited him again in Swakopmund. Mr. Kamunguma was with him, but he would always only greet and then leave. The complainant would phone him when the meeting was done and tell him to come and pick him up. The complainant informed him that the buyer is happy with the vase and that he is there to come and talk about his commission. The accused told him that he is not going to pay the full commission now as he did not receive the full purchase price and he already paid rates and taxes from the commission. During this discussion he was also informed by the complainant that he bought a brick making machine from Windhoek Machinery Fabric and whether the accused would arrange transportation for the said machine to Kinshasa, which the accused agreed to do. The complainant had a piece of land next to the Congo river which he apparently wanted to develop into a lodge and he offered the accused an opportunity to invest in the said project and the accused said he might be interested to invest in such a project and the complainant immediately invited him to visit the DRC, as he wanted the accused to invest the money of the sale of the vase in this project. The complainant then left and the accused drove to Windhoek on 23 September 2010 to see the representative of the DRC in Windhoek and to get his visa.

[38] He transferred N\$500 000 of the agreed commission to the complainant and arranged for the shipment of the brick making machine to Kinshasa. He claimed that he had documentary proof of the payment as well as the transportation that he paid. This was however never handed up to court. In total the accused received N\$6 785 318, 76. U\$350 000 was still outstanding on the purchase price of the vase. He decided that he is not going to the DRC because he did not receive the balance of the money and was no longer interested to invest in the DRC. The next time he heard from the complainant, was on 26 May 2011 when the complainant was in Swakopmund again. He had no telephonic communication with the complainant. On 26 May 2011 Mr. Kamunguma arrived at his house, saying that the complainant wants to see him. He then said lets go

to the office and saw the complainant who wanted the remainder of his commission. They spoke and the complainant left. The next was in November when he received a summons where the complainant claimed U\$900 000 from him.

[39] During cross examination the accused commented that in hind sight he thought that the money paid into his account in 2003 and 2005 might have been tainted, but it is just a suspicion. He agreed that when you want to build on an erf you need a plan and a builder to build, you need qualified people to do the job. In hind sight the accused is certain that the complainant wanted to use him to launder money. U\$1 250 000 for a vase did not seem a very high price for the vase. He did not have a picture of the vase or any documentation regarding the vase. He did not have any export documents for the vase, neither can he give the names of the two Chinese gentlemen who collected the vase. He does not know whether they are Chinese but according to him they looked Chinese. A certain Werner van Rensburg was also at his office when these men came there, but he is no longer in Namibia and is apparently in contempt of court because he did not appear in court. He handed over the vase because he already received the bulk of his money. He accepts that Mr Feher paid the money into his account but he is still not sure if it is the money of Mr Olenga. He is not disputing the evidence of Mr Feher that the money that was paid over to him was actually commission earned by Mr Olenga. He disputes that the complainant called him after each deposit to confirm that the money was received.

[40] He never informed the complainant that he is no longer coming to the DRC. He was sued for U\$900 000 whilst the only money he possibly could owe the complainant was U\$50 000 minus the legal fees he paid for the rates and taxes and the transportation for the brick making machine but he denies owing him anything as he did not get the full purchase price of the vase. The accused denies that when he signed the bank form that he certified that the content is correct. He said he only signed to agree that his account be credited and to certify that no balance of the money received is being withheld *in leu* of

Exchange Control Regulations. He did not read the description of the transaction which indicated that it is for properties or the other document that read house sale, fix assets. He was presented with the bank statements for the account of Kitscher Estate Agents and Auctioneers and he indicated that most of the transferred money he received was transferred electronically to his personal home loan.

[41] The court raised a question regarding the other item, the bowl with the accused and he confirmed that he still has it in his possession. He never had it appraised and does not know the value of it. His current wife and his ex-wife all had knowledge of the item, as well as his two eldest daughters. He has a personal account but mostly works with his work account and it will show as an income in his work account although it is his personal property that was sold. Some other personal property sales also went through his business account like the sale of his house and erf. After his evidence, the defence closed their case.

The legal aspects

The charges

[42] The definition of fraud as per *Hunt's South African Criminal Law and Procedure*¹ is that "Fraud consists in unlawfully making, with intent to defraud, another, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another." In order to secure a conviction on fraud the state had to prove (i) a misrepresentation; (ii) prejudice or potential prejudice; (iii) unlawfulness; and (iv) intention.² Regarding misrepresentation Thirion J in *S v Mbokazi* said the following:

'Misrepresentation may however take a variety of forms. They may be made by entries in books or records (*S v Heyne and Others* 1956 (3) SA 604 (A)) or by conduct or even by silence when there is a duty to speak. It would seem to me that the remarks of

¹ Volume II, revised second edition by JRL Milton, Juta, 1990 page 755.

² *S v Nkosi* 2019 (1) SACR 570 (GJ).

Lord Halsbury in *Aaron's Reefs Ltd v Twiss* 1896 AC 273 (HL) which are quoted with approval in *S v Ressel* 1968 (4) SA 224 (A) are also apposite in the present case:

'It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed - by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue.'

[43] Theft by conversion is explained as follows in *CR Snyman's Criminal Law*³:

'X commits theft in the form of embezzlement sometimes also called theft by conversion, if he appropriates another (Y's) property which is already in his (X's) possession

The possessor commits theft as soon as he commits an act of appropriation in respect of the property with the necessary intention to appropriate, since in cases of embezzlement X already has possession of the property, the act of appropriation in those cases does not consist of both a positive and negative component as explained above, but only of a positive component that is the actual exercising of the right of an owner over the property.'

[44] Regarding a charge of contravening section 4(b)(i) read with sections 1, 8 and 11 of the Prevention of Organized Crime Act, 29 of 2004, read with section 94 of the Criminal Procedure Act 51 of 1977 – Money Laundering – Disguising unlawful origin of property on divers occasions, the following was identified in *S v Henock and Others* as elements of this offence:

'(a) Any person who knows, or ought reasonably to have known (*mens rea*), that

³ 6th edition, Juta, 2014 page 490.

property is or forms part of the proceeds of unlawful activities; and

(b) enters into an agreement, or engages in any arrangement, or transaction with anyone in connection with that property; or performs an act in connection with that property, independently, or in concert with someone else;

(c) which is likely to have the effect of concealing, or disguising the nature, origin, source, location, disposition or movement of the property, or its ownership, or interest someone may have in respect thereof; or

(d) enables or assists any person who has committed or commits an offence, whether in Namibia or elsewhere, to avoid prosecution; or

(e) remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence.'

Burden of proof

[45] It is well established in our law that the state bears the burden of proof beyond reasonable doubt that the accused had the necessary intention to commit the offences charged. The state is thus required to prove that the accused acted voluntarily and intended to commit each and every offence levelled against him. In *S v Radebe*⁴ the approach of the court in establishing what was proved was explained as follows:

'The correct approach is that the criminal court must not be blinded by where the various components come from but rather attempt to arrange the facts, properly evaluated, particularly with regard to the burden of proof, in a mosaic in order to determine whether the alleged proof indeed goes beyond reasonable doubt or whether it falls short and thus falls within the area of a reasonable alternative hypothesis.'

[46] In *S v Shackell*⁵ the following was said about the burden of proof carried by the State:

'(i)t is a trite principle that in criminal proceedings the prosecution must prove its

⁴ 1991 (2) SACR 166 (T).

⁵ 2001 (4) SA 1 (SCA) (2001 (2) SACR 185).

case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance, the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.”

[47] This is in line with what was said in *S v Singh*:⁶

‘Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.’

[48] It is therefore clear that the court must look at the evidence as a whole and not piecemeal and there is a duty on the court to weigh the evidence of the State as well as that of the Defence and then come to a conclusion based on the probabilities of the case. This process entails looking at the merits and de-merits of each piece of evidence.

⁶ 1975(1) SA (N) at 228 G-H.

Evaluation of the evidence

[49] In essence the payments that were received are not disputed. There was five payments totaling about U\$900 000 minus costs. These payments were paid into the business account of Kitscher Estate Agents and Auctioneers at First National Bank, Swakopmund on 10 February 2010, 22 February 2010, 5 March 2010 and two payments on 7 July 2010. It is further not disputed that these payments originated from Breadfield Trade Limited Company and was done by one Joseph Feher, the director of the said Breadfield Trade Limited.

[50] What is in dispute however, is the reason for these payments and what was discussed at the three meetings, being the December 2009 – January 2010 meeting, the August - September 2010 meeting and the 26 May 2011 meeting and then the content of a number of phone calls between the parties. The evidence presented by the State and the Accused differs significantly with regard to these interactions as is clear from the somewhat detailed summary of the evidence above.

[51] For the State it was testified by Joseph Feher that the complainant, Mr Olenga informed him that he wished to use his commission which was kept on the books of Breadfield Trade Limited Company to purchase property in Namibia. He then explained that he was provided by the receiver's account number and the instructions for these transactions by Mr. Olenga. He then also initially used references for the transactions relating to first down payment for service fee, first down payment for purchase contract, first down payment for real estate and fourth and fifth down payment for real estate as per purchase agreement dated 03.03.2010. The evidence of Mr Feher is therefore clear that it was Mr. Olenga's money that was paid over and that at the time he paid over the said money, he was under the impression that it was for the purchase of real estate. The criticism seems to be that on the bank statements of the business account of Breadfield, which was produced in the civil trial and again by Mr. Wessels in the criminal

trial, that transactions were only done and only to the same amount as what was received in their account shortly before the payment was made, and some of these transactions originated from a Mellowstone Trade with a reference to Francis Resienberger, who is the son of the complainant.

[52] The evidence of the complainant, Mr. Olenga who knew the accused since 2003 and who testified that they were friends. This was supported by the evidence of the accused. They would meet from time to time and during these meetings the witness would be accompanied by Mr. Kamunguma, the 3rd state witness. He gave the instruction to Mr. Feher to transfer money to the accused's business account, which supports the evidence of Mr. Feher. This was done after a discussion between him and the accused in December 2009 or January 2010, he cannot clearly remember, in which discussion the accused advised him to develop his two plots because the municipal rates and taxes included additional fees for undeveloped properties. This evidence is supported by the evidence of Mr. Kamunguma. He returned again in the later part of 2010 but cannot remember the date and was offered some flats but decided against it and indicated that he wishes to proceed with the development of the plots. During these meeting arrangements it was discussed that the accused would come to DRC. The accused then also obtained a visa for the DRC as a result of this meeting. Again Mr. Kamunguma's evidence supports this version.

[53] He testified that he offered the plots for sale to Ushi and Diane on the same day as the May 2011 meeting but this evidence is contradicted by the evidence of estate agent Verdi Engelbrecht as she testified that they already approached Mr. Olenga in March 2011 for a mandate to sell the plots and he in fact came to visit them to sign the contracts for these plots. During the May 2011 meeting he brought them the CC documentation of the plots which they could not retrieve from the accused previously. Mr. Olenga further testified that when he saw the accused in May 2011, he changed his appearance by growing a beard and dying his hair pink. This evidence is disputed by both Mrs Engelbrecht who

said the accused looked the same and Mr. Kamunguma who said his hair and beard was brownish.

[54] This witness was criticized for keeping such a large amount of money on the books of Breadfield and for the relationships between Breadfield and Ukraine Cargo Airways. He was further asked why he did not keep the said commission in a bank where you can earn interest on it. The argument made by Mr. Wessels on behalf of the accused is that it is quite clear that Breadfield was used to unlawfully channel proceeds of unlawful activities for various people. The court is however not satisfied that this was indeed established by Mr. Wessels. Also, that in the civil matter Breadfield was portrayed as a banking institution. Mr Feher however explained exactly the activities of Breadfield in his evidence.

[55] It was put to the witness that it was strange that no written contract was drawn up for the U\$900 000 that was paid over to the accused's business but the witness explained that he and the accused were friends and that he trusted him. In a similar vein Mr. Moyo on behalf of the State suggested that it is strange that the accused did not draw up any documentation for the sale of the vase.

[56] Mr Olenga testified that Mr. Kamunguma was part of these meetings that took place and was present during them except for the initial meeting where he stepped out for a short while to take a phone call. Mr. Kamunguma also testified that he was present except for the one time when he walked out to make some phone calls. This is denied by the accused who said that Mr. Kamunguma was never part of their meetings, he would only come in and greet him and then leave to be called when the meeting was over to pick up the complainant. The court however believe the version that Mr. Kamunguma was present at these meetings as he also testified to the content of some of these meetings, the visiting of other properties for sale during the 2nd meeting and the fact that the wife of the accused was in the office but not part of the meetings, just serving them refreshments.

[57] In a letter attached to the statement made by this witness to the police, on a Breadfield letterhead indicating that they wish to inform Kintscher & Company that the transfers of U\$900 000 in total was for the purchase of properties whilst both Mr Olenga and Mr Kamunguma testified that it was for the development of the plots, although the written statement of Mr. Kamunguma also refers to the purchase of property. On the other hand the accused denied that this money was received for any other purpose than the purchase of a vase although the content of the letter was never put to him in cross-examination.

[58] Mr Kamunguma testified that the accused paid municipal bills for the plots on behalf of Mr. Olenga, the complainant, although this was not part of any of his written statements. This was however also the evidence of Mr. Olenga that he would give money to the accused to pay his rates and taxes and confirmed by the accused himself. The evidence of Mr. Kamunguma that the reason why the complainant decided to develop the properties was because of the fact that the rates and taxes of undeveloped plots escalates was also not part of his written statements or as part of his evidence in the civil trial. Similarly, the fact that he testified that the accused was to travel to DRC to hand over and discuss the plans for the future development which is not mentioned in his written statements or before the Honourable Justice Shivute in the 1st criminal trial. The court however takes into account that this trial was stopped during cross-examination and it could therefore still have been mentioned. However, these statements are corroborated by Mr. Olenga.

[59] The accused's defense is essentially that he received the U\$900 000 as payment for an antique Chinese vase he sold. He received the vase from his deceased sister who received it from a deceased aunt. There is however no record of the existence of the said vase. In his plea explanation he indicated that he received two vases but in evidence he testified that it was a vase and a bowl. There is however no documentary proof or photograph of the said vase.

Although he testified that his wife and ex-wife and two eldest daughters knew of the existence of the vase, none of them were called to testify at the proceedings to confirm the existence of the said vase.

[60] The accused further testified that although he did not receive the full purchase price, in fact U\$3 500 000 was still outstanding, he handed over the vase to two unknown Chinese looking men who came to his office on a Saturday without any pre-arranged meeting or contact. They asked to see the vase and he handed it over to them. They did not sign any document taking delivery of the vase neither did the accused record their names or asked for any identification. They did not proof who they are or took with any documents regarding the vase. In *Olenga v Sprangers*⁷ Masuku J had similar sentiments when he said the following about this version which was also put forward in the civil matter:

'Furthermore, the whole story about how unknown Chinese men came to the defendant's estate agency to collect the vase is extremely fanciful. No one who is a businessman of the note, as the defendant was, could, allegedly on the strength of the plaintiff's unverified communication, hand over a vase worth, according to the defendant, N\$ 10 million, to unknown people, whose names and official identities were not recorded.'

This version of the vase was also never mentioned in the warning statement of the accused. The accused also has not made any attempt to have to bowl which he received together with the vase valued, although it might be potentially very valuable, just like the vase. There is just no evidence before this court that the vase in fact existed.

[61] The accused also testified that Mr. Olenga took photos of the vase and a video of himself with the vase. Mr. Olenga denies this and states that he never saw any vase. Mr Kamunguma who also attended these meetings denied any

⁷ (I 3826/2011) [2019] NAHCMD 192 (17 June 2019).

knowledge of a vase and the selling thereof. He has only heard about the vase during the civil case. Both he and Mr. Olenga denies that the payment of any commission was discussed during the August – September meeting or during the meeting of 27 May 2011.

[62] In evaluating the evidence placed before court and looking at the probabilities of the evidence the court rejects the version of the accused and find it not reasonably possible true. Although there are discrepancies in the evidence of the state witnesses, the court also takes into account that these happenings took place about 10 years ago and find that the evidence presented by the State is probable and rejects the version of the accused.

[63] The court however find that the elements of count 1, the Fraud count was not proved beyond reasonable doubt and the accused is found not guilty on count 1 as the court is not convinced that the accused had a fraudulent intention to defraud the complainant during the conversation where the development of the plots were discussed.

[64] The court however is satisfied that counts 2 – 6 were proofed and that the accused misappropriated property, in this instance the funds of the complainant which was placed in his control for the purpose of developing and/or purchasing fixed property, which he did not do and as such converted the money for his own use. The court however takes into account that the accused returned U\$50 000 from this money to the complainant. The accused is therefore found guilty on counts 2, 3, 4, 5 and 6.

[65] The court is further satisfied that the accused is guilty of contravening section 4(b)(i) read with sections 1, 8 and 11 of the Prevention of Organised Crime Act, 29 of 2004, read with section 94 of the Criminal Procedure Act 51 of 1977 – Money Laundering – Disguising unlawful origin of property on divers occasions in that he knew that the money in his account was proceeds of

unlawful activity in that it was proceeds from his theft from the complainant, he proceeded to transfer the bulk of it to his home loan scheme which transfer had the effect of concealing, or disguising the nature, origin or source of the property or its ownership or the interest the complainant had in it. The accused is therefore found guilty of count 7.

The court therefore finds the accused:

On Count 1 – not guilty

On Count 2 – guilty

On Count 3 – guilty

On Count 4 – guilty

On Count 5 – guilty

On Count 6 – guilty

On Count 7 – guilty

E RAKOW
ACTING JUDGE

APPEARANCES:

STATE

Mr Moyo
Of the office of the Prosecutor-General
Windhoek

ACCUSED:

Mr Wessels
Of Stern & Barnard
Windhoek