

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING IN TERMS OF SECTION 174 OF THE CPA 51 OF 1977

Case no: CC 09/2022

In the matter between:

THE STATE

and

RICARDO NESTOR

ACCUSED

Neutral citation: *S v Nestor* (CC 09/2022) [2023] NAHCMD 739 (16 November 2023)

Coram: CHRISTIAAN AJ

Heard: 19 October 2023

Delivered: 16 November 2023

Flynote: Criminal procedure – Application in terms of s 174 of the Criminal Procedure Act 51 of 1977 – Discharge of accused in terms of s 174 – Applicable test – Whether there is evidence on which a reasonable court acting carefully may convict – Principles restated – Approach where State’s case is based on circumstantial evidence – Inferences may be drawn from established facts to prove allegations.

Summary: The accused, *inter alia*, stands charged with 10 counts and alternative counts ranging from various charges of corruption, fraud and theft, money laundering,

forgery and uttering a forged instrument, knowing it to be forged as stipulated under the Prevention of Organised Crime Act 29 of 2004 read with the provisions s 94,155, and 156 of the Criminal Procedure Act 51 of 1977. He pleaded not guilty to all counts and at the close of the State's case, the accused brought an application for his discharge in terms of s 174 of the Criminal Procedure Act 51 of 1977. The application for discharge by the accused only concerns counts 1, 2, 3, 4, 5 and 6, on the main and alternative counts. The application is opposed by the State.

Held that: Where there is no *prima facie* case against the accused which he should answer to in the respective charges against him, discharge will be granted.

Held further that: Where it is alleged that the state's case is based on circumstantial evidence, inferences may be drawn from established facts and this is a factor to take into consideration when considering an application of this nature.

Accused consequently discharged where the State has failed to make out a *prima facie* case against him.

ORDER

In the s 174 application for discharge brought by the accused, in respect of counts 1, 2 (main and alternative counts), 3, 4 (main and alternative counts) 5, 6 (main and alternative counts), the accused is found not guilty and discharged.

RULING IN TERMS OF SECTION 174 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977

CHRISTIAAN AJ:

Introduction:

[1] At the close of the State's case, the defence brought an application for the

discharge of the accused, asserting that the State did not lead sufficient evidence upon which a reasonable court acting carefully, may convict the accused on the preferred charges. The accused is in total charged with 10 counts and alternatives counts, to which he pleaded not guilty.

[2] The application for discharge by the accused concerns counts 1, 2, 3, 4, 5, and 6, on the main and alternative counts. The State is opposing the application for discharge.

[3] The counts are conveniently categorised, stemming from three different events namely:

3.1 Counts 1 and 2 and alternatives, relate to the transfer of an amount of N\$10 000 000. from the FNB NAMAGRA Call Account to FNB NAMAGRA Business Account and thereafter several payments made to various entities both in Namibia and South Africa.

3.2 Counts 3 to 4 and alternatives, related to the transfer of an amount of N\$55 481.91 out of the business account of Spot- on Discount Liquor Store into an account by the name "Trader".

3.3 Counts 5 to 6 and alternatives, relate the transfer of N\$34 500 and N\$34 000 by Mr Van Wyk, and this relates to his personal finances.

[4] Mr Lilungwe appeared for the State whilst Mr Titus represented the accused.

[5] The State and defence counsel, in addition to their oral submissions, favoured this court with comprehensive heads of argument. I am indebted to them.

The charges

[6] The charges as preferred by the State are extensive and have been fully canvassed in the indictment and on the record. I shall therefore only refer thereto succinctly as I am loathe to overburden this judgment any more than is necessary.

[7] Their summary of substantial facts in terms of s 144(a) of the CPA, read as follows:

'The accused is a former information and technology student at the Institute of Information and Technology (I.I.T) and police officer in the Namibian Police Force. Through his studies at I.I.T

he gained knowledge on computer software and programming. The accused fraudulently accessed the bank accounts of three business entities, upon which he transferred large sums of money to either himself or accounts which he had access to. In two of the three cases he used the same modus operandi where he fraudulently used municipal accounts of unsuspecting victims and used those municipal accounts to open Altcoin and Bitcoin Trader accounts in South Africa.

The accused accessed the FNB NAMAGRA Call Account and transferred from it an amount of N\$ 10 000 000 to FNB NAMAGRA Business Account and thereafter made several payments to various entities both in Namibia and South Africa.

The accused further accessed the accounts of S R Van Wyk, Spot-On Discount Liquor Store and Meransha Properties CC and he performed the following transactions:

- (a) He transferred an amount of N\$55 481.91 from Spot-On Discount Liquor Store to a Trader account in South Africa.
- (b) He transferred an amount of N\$34 500 from S R Van Wyk's Bank Windhoek personal account to a Bank Windhoek account of Spot-On Discount Liquor Store.
- (c) He transferred an amount of N\$34 000 from Meransha Properties CC Bank Windhoek account to a Bank Windhoek account of Spot-On Discount Liquor Store.

The accused hacked the email of Antonio Jose Dos Santos Mansinho and informed him that the banking details of Walcon Construction CC had changed from Bank Windhoek account number 8001103105 to Standard Bank account number 60002817879 which was his personal account number. After changing the banking details of Walcon Construction CC Taiyo Namibia (Pty) Ltd, he paid an amount of N\$720 000 into his Standard Bank personal account and he used the money for own use and benefit.'

[8] It is important to note that the accused pleaded not guilty to all the charges preferred against him and offered no plea explanation. The state led evidence of 17 (seventeen) state witnesses. I shall briefly return to this when assessing the application for discharge of the accused by the defence at the closure of the state's case.

The law

[9] Section 174 of the CPA application pending before this court provides;

'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'

[10] There is no doubt that the words 'no evidence' has on numerous occasions been interpreted in several cases such as *S v Nakale and others*¹ where it was held that 'No evidence' means no evidence upon which a reasonable court acting carefully may convict. That interpretation was further endorsed by the Supreme Court in *S v Teek*².

[11] The importance of s 174 was discussed in the matter of *S v Katanga*³, where the court held the following: 'Section 174 is crucial in our criminal justice system as it reminds courts that, the main purpose of the CPA is to strive for orderly and fair criminal justice. This section obliges courts, at the close of the State's case, to assess the evidence led thus far and determine if it is of such nature that a reasonable court acting carefully may convict on the charge or any other offence. The court is under strict obligation to observe and protect the accused's right against self-incrimination, which is inclusive of the right to remain silent coupled with the right to be presumed innocent'

[12] The courts are further allowed to exercise their discretion judiciously when it is apparent that there is no evidence against the accused person upon which the court might convict. In such cases, the court will have the duty to invoke the provisions of s 174 whether an accused is legally represented or not. Whether to discharge an accused at the close of the state's case or not is a decision that falls within the trial court and such a discretion must be exercised judicially.

[13] It is a basic principle of our law that a person ought not to be prosecuted in the absence of minimum of evidence upon which he or she might be convicted, merely on the expectation that at some stage, he or she might incriminate himself. Thus Article 12(f) of the Namibian Constitution provides:

'No persons shall be compelled to give testimony against themselves or their spouses....

It therefore follows that if one has to be prosecuted, there ought to be some evidence upon which a reasonable court acting carefully may convict. It has also been restated that at this stage the witness's credibility plays a very limited role. In the case of *Mpetha and others*⁴, the court held that, if a witness gives evidence which is relevant to the charges being considered by the court then that evidence can only be ignored if it is of such poor quality that no reasonable person could possibly accept it... Before credibility can play a role at all, it is a very high degree of untrustworthiness that has to be shown.'

¹*S v Nakale and others* 2006 2 NR 455 (HC).

²*S v Teek* (1) (SA 44 of 2008) [2009] NASC 5 (28 April 2023).

³*S v Katanga* (CC 23/2018) [2019] NAHCMD 402 (10 October 2019).

⁴*S v Mpetha and others* 1983 (4) SA 262 C.

[14] The court, when considering an application for a discharge in terms of s 174 must assess the evidence and determine whether there is no possibility of conviction without the accused testifying and providing incriminating evidence.

[15] Having outlined the legal position, I now turn to analyse the evidence. The facts of this case are very laborious as evinced by the number of witnesses called and the duration of this trial. For purposes of this application, I do not intend summarising the evidence or repeat the summary relied on by the state when opposing the application and will merely consider those facts considered decisive in determining the issue at hand.

Submissions

Counts 1 and 2 – NAMAGRA case

[16] Mr Titus submitted on behalf of the accused that, guided by established principles regarding the requirements laid down in s 174 of the CPA, no evidence has been adduced by the State against the accused which a reasonable court, acting carefully, may convict. Hence, the accused should be found not guilty and discharged on counts 1 to 6 (main and alternative counts). In respect of the NAMAGRA charges (count 1 and 2(main and alternative)), it is argued that the evidence presented did not establish that the accused had access to the computer of Carmen Bianca Wietrich. He further argued that the State did not present any evidence that explains how the accused would have gained access to the bank account of NAMAGRA using Carmen Bianca Wietrich's computer or credentials.

[17] With regards to the State's contention that the accused logged into the internet banking profile of NAMAGRA, it was argued that the State has not in the slightest, presented any evidence that this was indeed the case. Instead, the State's witness, Inspector Kalimbo suggested that the computer of Carmen Bianca Weitrich was hacked and access to the computer was gained remotely. This claim, Mr Titus argued was baseless and not supported by the evidence, as Ms Wietrich testified that her computer was examined by an expert who found no evidence of a hack. He further argued that the court can only make such inferences where they are consistent with positive proved facts.

[18] Counsel's further contention is that there is no evidence linking the accused to any part of the offences under counts 1 and 2, and more particularly, evidence that the accused had associations with the employees of NAMAGRA, Samele Nkosi or with Lethuvoyo Trading and Projects. It was further argued that there was no evidence that the accused withdrew any of the 39 e-wallet payments made from the NAMAGRA account, or

that he was in possession of the cellphones or sim cards to which these e-wallet payments were made. There was no evidence that he was identified by any of the security cameras the he withdrew any of this money sent via e-wallet. Mr Titus argued that no statement was obtained from Sanele Nkosi and Lethuvuyo Trading, and the State could also not explain who they were.

[19] Regarding evidence about the devices of the accused that were seized, counsel argued, that there was no evidence found on any of the accused's devices that remotely link him to any of the transactions related to NAMAGRA.

[20] With regards to the municipal bill in the name of Carmen Bianca Wietrich, counsel argued that it is clear from the evidence that this statement is a forged document, which contains on it information from another account holder, Delie Enterprises. He argues that no associate of Delie Enterprises gave evidence in this court and it is further not disputed by the State that the accused has no association with Delie Enterprises and that the State did not present evidence that connects the accused in any manner to any documents belonging to Delie Enterprises.

[21] It is further submitted that the State is seeking this court to find that this municipal statement is linked to a payment made from the NAMAGRA account to an Altcoin Trader account in South Africa, and there is no evidence to support that contention, as no individual was called to confirm the information. It was therefore submitted that the State is asking this court to rely on inadmissible hearsay evidence if the court has to make an inference on the strength of the document. On the same basis, it was argued that there is no evidence which establishes a causal link between the accused and the alleged fraud.

Counts 3 and 4 – Spot-on Discount Liquor Store

[22] Pertaining to the charges of Spot- on Discount Liquor Store, it was argued that the evidence on record is that an amount of N\$55 481.91 was transferred out of the business account of Spot- on Discount Liquor Store and into an account by the name of 'Trader'. It is further argued that it is unknown what this account is or who it belongs to, as the details pertaining to the name of the person who owns the account, the bank at which it is kept, and opening documents were not presented to court. There is therefore no evidence presented to court that this account is in any manner associated with the accused.

[23] Counsel further argued that the only evidence in connection with counts 3 and 4 is

a municipal statement in the name of Josef Petrus. Again the only evidence that is undisputed is that this statement appears to have been manipulated using information belonging to Delie Enterprises. He contends that there is no evidence on record that this statement was used in the furtherance of an offence of theft and fraud. There is no evidence that this statement was used to open the Altcoin Trader account or 'Trader' Account. There is no evidence that an Altcoin trader account even exists in the name of Josef Petrus. It was therefore argued that the charges in count 3 and 4 are baseless speculation.

Counts 5 and 6 – Meransha Properties CC

[24] Mr Titus argued that the state failed to lead any evidence in an attempt to prove the allegations in counts 5 and 6. He argued that the complainant, Ms Van Wyk, testified that amounts of N\$34 000 and N\$34 500 were transferred by Mr Van Wyk, the owner of Spot On and it relates to his personal finances. He argued that beyond this testimony, the state led no evidence to establish that an offence was actually committed, and there was no evidence upon which the court would be able to convict the accused.

[25] Mr Titus further argued that there is evidence of payments made to employees from the Spot-on current account totaling an amount of N\$60 000, but the State led no credible evidence that the accused was responsible for transferring various amounts of money to the employees.

[26] Counsel concluded his arguments by saying that in the absence of direct evidence, the state will be seeking this court to draw inferences from what it deems to be circumstantial evidence. He argued that the State failed to comply with the test outlined by *R v Blom*⁵ regarding circumstantial evidence, and that the inferences the State seeks the court to draw amount to speculation.

[27] Based on the above stated considerations, counsel concluded that there exists no possibility that a reasonable court, acting carefully, will convict the accused on any of the charges in counts 1 to 6. Hence, he is entitled to a discharge under s 174 of the CPA.

[28] Mr Lilungwe representing the State gave a brief summary of the evidence presented thus far which, in his view, establishes a prima facie case against the accused. For purposes of this application, I do not intend summarising the evidence or repeating the

⁵*R v Blom* 1939 AD 188.

summary relied on by the state when opposing the application and will merely consider those facts considered decisive in determining the issue at hand. Based on the evidence presented through the testimonies of State witnesses and other forms of evidence⁶ admitted into evidence, the following facts are for consideration:

28.1 On 13 August 2018, a surprised colleague thanked Ms Carmen Bianca Wietrich, the financial manager at NAMAGRA for bonus payment NAMAGRA made to his account. Well knowing that no bonus payments were made to staff members, she was alerted to access the bank accounts of NAMAGRA, with the aim of interrogating the information received. This led to her discovery of suspicious transactions of the call and business banking accounts of NAMAGRA. In respect of count 1, the accused is charged with the offence of fraud and an alternative count of theft of money in the amount of N\$10 million from the call account to the business account of NAMAGRA (Pty) Ltd. After the transfer of this money to the business account, several transfers totaling the amount of N\$5 515 000 were made to different accounts without the knowledge and consent of the complainant, Carmen Bianca Weitrich, the financial manager of NAMAGRA.

28.2 Carmen Bianca Weitrich testified that the transfer of the funds from the call account to the business account was not done by her, neither did she authorise anyone to do the transfers. A total amount of N\$5 515 000 was made to various accounts, three of them in the Republic of South Africa and two were made in Namibia. An amount of N\$4 million was transferred from the business bank account to an Altcoin Trader Account in the Republic of South Africa, N\$500 000 to Sanele F Nkosi and another N\$500 000 to Lethuvuyo Trading and Projects. About 16 employees of NAMAGRA received salary payments of N\$20 000 each totaling to an amount of N\$320 000 and an amount of N\$195 000 were made towards the payment of e wallets to 39 cellphone numbers. The state relied on the evidence of Carmen Bianca Wietrich and Ingrid Veeza Katjiukua, the forensic manager at First National Bank of Namibia.

28.3 As borne out by the testimony of witness Carmen Bianca Wietrich, she was the only one with access to the call account through her desk top computer via online banking with a password and digital certificate, only known by her. Ms Wietrich confirmed that she did not perform any of the suspicious and/or

⁶Documentary evidence.

fraudulent transactions reflected on NAMAGRA'S bank statements obtained from FNB. Ms Weirich denied having opened any Altcoin Trader account. During investigations, it was uncovered that there is a City of Windhoek municipal account in her name and that it was used to open an Altcoin account with her identity document, which she has denied, as the address reflected on the statement, does not belong to her. She further denied having opened any Altcoin Trader account or City of Windhoek Municipal account, as she is resident in Karibib.

- 28.4 During cross examination, it was clarified that the computer of Ms Wietrich was equipped with a digital certificate and no other device can access the bank account other than the device on which the digital certificate is stored. It was further explained that Ms Wietrich used a desktop computer which was fixed permanently in the office, and that the accused never had any physical access to her computer nor has Ms Wietrich shared her login credentials with the accused. Ms Wietrich also testified that she had never seen the accused before. Ms Wietrich further testified that her computer was examined by an IT expert who found no evidence of a hack on her computer.
- 28.5 In respect of count 2, the accused faced a charge of money laundering read with the provisions of the Prevention of Organized Crime Act 29 of 2004, relating to the NAMAGRA charges.
- 28.6 In respect of count 3, the accused faced a charge of fraud alternatively theft. This count relates to Spot – on Discount Liquor Store and/or Lizane Van Wyk, in which an amount of N\$55 481.91 was transferred from an account of Spot-On Discount Liquor Store to a trader account number 62529626717 in the Republic of South Africa. Ms Van Wyk testified that at least four people had access to the internet banking profile of Spot-On Discount Liquor Store account and that none of them transferred the amount of N\$55 481.91 to a trader account in South Africa. She further testified that neither her nor any of the persons who had access to the bank account had made any internet transfers to ten employees totaling the amount of N\$60 000. Ms Van Wyk denied that she had any account of Altcoin Trader, neither did any of the other persons who had access have any Altcoin Trader Account.

- 28.7 In respect of count 4, the accused faced a charge of money laundering read with the provisions of the Prevention of Organized Crime Act 29 of 2004 relating to the Spot on Discount Liquor charges.
- 28.8 In respect of count 5, the accused faced a charge of fraud, alternatively theft by accessing the accounts of S R Van Wyk and Meransha Properties CC and transferred N\$34 500 from Mr Van Wyks personal bank account to a Bank Windhoek account of Spot On. It was further testified that an amount of N\$34 000 was transferred from Meransha Properties CC to a Bank Windhoek account of Spot-On. She further testified about payments made to employees from the Spot On current account totaling an amount of N\$ 60 000. Ms Van Wyk testified that she does not know who performed these transactions.
- 28.9 In respect of count 6, the accused faced a charge of money laundering read with the provisions of the Prevention of Organized Crime Act 29 of 2004 relating to the Spot on Discount Liquor and that of Meransha Properties, charges.
- 28.10 Ms Katjiukua testified that she contacted FNB South Africa and alerted them, that their client was defrauded and payments had gone to their accounts, and they got in touch with Altcoin where four million dollars had gone to try and stop and recover the amount. FNB South Africa informed her that some of the money was already redistributed from the FNB South Africa account to accounts held at Capitec. Ms Katjiukua informed the court that they were able to block the 39 e-wallet payments and the salary payments to stop further withdrawals against the payments.
- 28.11 Ms Katjiukua testified and informed the court that the four million Namibian dollars that was transferred to Altcoin was recovered, after the investigation team made direct contact with Altcoin South Africa and it was recovered from Altcoin. This amount was recovered to the NAMAGRA account. Ms Katjiukua further testified that their customer NAMAGRA had only one user authorised to load transactions, Ms Carmen Wietrich, who possessed a trusted device to the NAMAGRA internet banking profile. It was further testified that there was a digital certificate with a password issued to the customer. The alleged unauthorised transactions were performed from the trusted device and authenticated with the digital certificate.

28.11 Ms Tjiukua testified that another customer from Walvis Bay, Spot-On, also fell victim to the same fraudulent activity. As part of the internal investigation, she contacted Altcoin directly and requested them to provide her with the documents or the opening documents of NAMAGRA account that was used to open the Altcoin account, regarding the N\$4 million payment. Altcoin provided them with an identity document and confirmed that the account was opened in the name of Carmen Bianca Wietrich and with a water and electricity bill statement that was also provided to them to open the account. The same was done with the Spot-On investigation and identity document of Joseph Petrus and water and electricity bill account statement was provided for Spot-on. After the receipt of the documents, they were compared and it was observed that the documents were not original but counterfeit documents. A verification was done and confirmation was received from the City of Windhoek that the statement belonged to Dellie Enterprises.

28.12 Ms Katjiukua further testified that the accused holds an FNB current account, which is linked to an air pocket savings account. After going through the accused's bank accounts, Altcoin confirmed that the accused had an account with them and Altcoin provided the documents used by the accused to open the account, which were the accused's identity documents and a copy of the water and electricity bill from the Windhoek Municipality, which was in the name of the accused before court.

28.13 Under cross examination, the witness confirmed that she does not have qualifications in information technology. The witness further explained to the court how a customer intending to utilise internet banking is provided with a banking profile on which the customer is to create a password and the device would be issued with a digital certificate onto the device. The password is a personal identification number that is created by the user.

28.14 Ms Katjiukua's evidence centered mainly on how and where she acquired the documents (Exhibit F5, F6 and F7) that were handed over to the police. She was neither the author nor the custodian thereof. She also could not assist the court with regards to the whereabouts of the original documents.

28.15 At this stage already, it is apposite to mention that all these documents were copies and not the original documents. After some spirited objections

from the defence I provisionally admitted these into the record. A trial within a trial was held, and this documents were admitted as circumstantial evidence. As her evidence did not take the State's case any further on the issues in dispute I shall not take it any further than I have.

[29] When considering the applications made by the accused in view of the facts briefly summarised above, there appears to be no sufficient evidence before court from which a court, at the end of the trial, may draw inferences which satisfy the requirements laid down in *R v Blom*⁷. The State's case is primarily based on circumstantial evidence in respect of counts 1 - 6 (main and alternative counts) whilst there is no direct evidence linking the accused to the crimes committed. Though mindful of the fact that only the evidence of state witnesses is before court, the approach to circumstantial evidence is not to consider it in piecemeal, but rather to follow a holistic approach, at least as far as it concerns the individual charges (counts 1, 2, 3, 4, 5 and 6 with their alternative charges), brought against the accused. These charges, to a certain extent, are intertwined as the same modus operandi was evident, where municipal accounts of unsuspecting victims were used fraudulently to open Altcoin and Bitcoin Trader accounts in South Africa. In this instance, there is no direct evidence linking the accused to the charges. Neither could the municipal statements (Exhibit F5, F6 and F7) found during investigations link the accused, in the absence of evidence, authenticating the truth of the contents of these documents.

[30] When applying the principles stated above to the evidence presented during the State's case, it is my considered view that the State has not made out a prima facie case against the accused with regards to counts 1, 2,3,4,5 and 6 and their alternative counts, to which he should answer to. In coming to this conclusion, the following evidence (but not limited to) is taken into account:

[31] With regards to counts 1, 3, 5 and the alternatives, as per their indictment, what the state had to prove was misrepresentation on the part of the accused or that the accused took the money without the owner's permission, with the intent of permanently depriving the owner of it, and that this act was done dishonestly. With regards to counts 2, 4 and 6 as per the indictment, what the State had to prove was that the money was obtained through illegal activities and was then handled with the intent to conceal its origin and make it appear legal.

[32] Counts 1, 2, 3, 4, 5 and 6 with their alternatives primarily were premised on the evidence of Ms Wietrich, Ms Katjiukua, Inspector Kalimbo and Lizaan Van Wyk and Exhibits F4, F5 and F6. In a previous ruling, I ruled the Exhibits F4, F5 and F6 admissible as circumstantial evidence, they remained copies even after the State closed its case. Ms Katjiukua was called by the State ostensibly to authenticate the disputed documents, sadly this fell flat. Firstly, it became apparent during cross examination that she herself was not the custodian of the documents seized. The copies were received via electronic communication, from Mr Van Greunen, believed to be a General Manager at Altcoin Trader. She could not present any evidence to confirm that the Altcoin account that was opened in the names of Carmen Bianca Wietrich, Josef Petrus and Ricardo Nestor was opened by the accused, with the aid of Exhibits F4, F5, and F6.

[33] The State, contrary to the application to have the documents admitted into the record, did not lead a single witness and /or evidence that successfully authenticated the disputed documents. What this court instead heard was the ineptitude of the investigators and indeed the lackadaisical manner in which evidence and disputed documents was handled and Interpol who seemingly evinced a willful disregard to assist with the investigations and the tracing of Mr Van Greunen , a general manager at Altcoin Trader, an important witness that could testify to authenticate Exhibits F5,F6, and F7 and to present evidence, as to whom the Altcoin trader account belongs, who opened it and what documents were used to open the account. The State did not lead evidence to fortify Ms Katjiukua's evidence on this aspect. On these aspects only, the State's case as presented was still born.

[34] Furthermore, save for the computer printouts of the municipal accounts in the name of Carmen Bianca Wietrich, Josef Petrus, Delie Enterprises and Ricardo Nestor, the documents remained copies too, and to add salt to injury, even those in the form they were presented in before the court, on the State's version, were altered. Again, no evidence was proffered to this court with regards to when, why and by whom the documents were altered. The State presented the evidence of Ms Sechogele, an employee of the City of Windhoek's billing department, who testified ex post facto, and her evidence is based on copies of documents she was favoured with. Her evidence does not take the State's case anywhere, save to only confirm that the documents presented to her were altered and are not municipal statements from the City of Windhoek. On the disputed documents, her evidence did not serve as authentication of same, she was neither the author thereof nor was she present when same were authored. On this aspect too, her evidence does not take the State's case any further.

[35] With regards to the process embarked upon by the billing department of the City of Windhoek, her evidence only served to show what is done to generate the monthly municipal bills, the security features placed on the municipal bill that will assist to identify the municipal bills, if they are altered and the registers used to record the details of those who apply for duplicate accounts. Differently put, her evidence was largely to demonstrate which processes were to be followed when municipal accounts are generated and what the security features were on the municipal accounts. In fact, she testified that according to their archive records, the municipal bill for Z Nestor was collected by someone who could not be linked to the accused. On this aspect too, her evidence does not take the State's case any further, as there was no evidence to show that the accused was the one who altered the municipal statements and that he requested for duplicate accounts of Z Nestor and Dellie Enterprises.

[36] Counts 1, 3 and 5 with their alternatives, Inspector Kalimbo testified that the computer of Carmen Bianca Weirich was hacked and access to the computer was gained remotely and that the same modus operandi was used to access the computer of Spot-On Discount liquor stores. Her evidence does not take the State's case anywhere, since the state failed to present evidence that the computers of Carmen Bianca Weirich and Spot-On Discount Liquor Stores was hacked. The accused electronic devices were seized and no evidence was found on any of the accused devices that remotely linked him to any of the transactions related to NAMAGRA and Spot-on Discount Liquor stores. Ms Weirich and Ms Van Wyk presented evidence to the court that confirms that their computers and/or accounts were not hacked, according to the IT specialist they have asked to investigate whether security was compromised.

[37] With regards to counts 1, 3 and 5 with their alternatives, the State was, amongst others, required to prove the elements of misrepresentation to NAMAGRA, Spot-On discount Liquor stores, Mr Van Wyk, Meransha properties, Bank Windhoek and FNB and that in misrepresenting as he did, the accused acted in concert with each other. Needless to say, no evidence from NAMAGRA, Spot-On discount Liquor stores, Mr Van Wyk, Meransha properties, Bank Windhoek and FNB was led in this court, that linked the accused to these offences. The State regrettably failed to pass even the barest of threshold; prima facie proof. An application for discharge cannot be refused in the hope that the accused persons will incriminate themselves when they give evidence, thereby closing material defects in the State's case.

[38] On Count 2, 4 and 6 the State had to prove that the accused laundered the proceeds of unlawful activities whilst they knew or reasonably ought to have known that the funds from NAMAGRA, Spot-On Discount Liquor stores and Mr Van Wyk were proceeds from unlawful activities. Having had regard to the evidence led, these counts and the decision I reach is probably the counts that will invoke a sense of loss, if not dejection, to the complainants. It is an inescapable fact that almost N\$10 million left the account of NAMAGRA of which a certain amount remains unrecovered. It is further inescapable that an amount of N\$55 481.91, N\$34 000 and N\$34 500, left the account of Spot-on Discount liquor and the personal bank account of Mr Van Wyk and Meransha Properties. The question that remains is why and who facilitated this. Regrettably, *in casu*, the institutions responsible to answer those questions failed, and this put the death knell on the State's case.

[39] The State regrettably failed to pass even the barest of threshold. At the risk of repetition; an application for discharge cannot be refused in the hope that the accused will incriminate himself when they give evidence, thereby closing material defects in the state's case.

[40] Finally, the State implored on this court to look at the evidence presented in respect of counts 7,8,9 and 10, to assist the court in drawing inferences that would link the accused to the crimes committed in counts 1,2,3,4,5 and 6 with their alternatives. Counts 7 to 10 relate to alleged fraud perpetrated against Taiyo Namibia (Pty) Ltd where the accused is alleged to have forged an invoice of Taiyo Namibia's service providers, changing the recipients bank details to that of his own and in so doing, receiving a payment in the amount of N\$720 000 from Taiyo Namibia. It is clear from the aforementioned that the modus operandi and the evidence used to prove the State's case, is distinguishable from counts 1-6 with their alternatives. It was argued by the State that the approach to circumstantial evidence is not to consider it in piecemeal, but rather to follow a holistic approach, at least as far as it concerns the individual charges (counts 1, 2, 3, 4, 5 and 6 with their alternative charges) and counts 7-10, brought against the accused.

[41] The proper approach to circumstantial evidence is set down in *S v HN* 2010 (2) NR 429 (HC) in the headnote as follows:

'Where the court is required to draw inferences from circumstantial evidence, it may only do so if the "two cardinal rules of logic" as set out in *R v Blom* 1939 AD 188, have been satisfied. These rules were formulated in the following terms: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn. (2) The proved

facts should be such that they exclude every reasonable inferences from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct. The law does not require from a court to act only upon absolute certainty, but rather upon just and reasonable convictions. When dealing with circumstantial evidence, as in the present case, the court must not consider every component in the body of evidence separately and individually in determining what weight should be accorded to it. It is the cumulative effect of all the evidence together that has to be considered when deciding whether the accused's guilt has been proved beyond reasonable doubt. In other words, doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation, but those doubts may be set at rest when it is evaluated again together with all the other available evidence. There is thus no onus on an accused to convince the court of any of the propositions advanced by him and it is for the state to prove the propositions as false beyond a reasonable doubt. Caution must be exercised not to attach too much weight to the untruthful evidence of the accused when drawing conclusions and when determining his guilt.'

And further

[42] In *S v HN* 2010 (2) NR 429 (HC), the court importantly noted:

'Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts, which it is sought to, establish. In some cases, the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.'

[43] The State's case is primarily based on circumstantial evidence in respect of counts 1-6 (main and alternative counts), whilst there is no direct evidence linking the accused to the crimes committed. When considering the applications made by the accused in view of the facts briefly summarised above, there appears to be no sufficient evidence before court from which a court, at the end of the trial, may draw inferences which satisfy the requirements laid down in *R v Blom*.

[44] There have been no facts presented proving the accused accessed the computers, the login credentials or the internet banking profiles of either complainants. There is further no evidence that the accused received or benefited from the funds that were transferred from these accounts. The municipal accounts prove the fact that they have been altered, and therefore no further inference can be drawn from these documents. The State failed to establish a link between the accused and the transactions reflected on the accused bank account and NAMAGRA as 'Trader' and 'Altcoin Trader'. The State's case fails the first leg.

[45] There are several reasonable inferences the court is able to draw from the proven facts that were presented. The most obvious one is that Carmen Bianca Weirich and Lizane Van Wyk committed the acts, as there is no evidence from the State as to how their accounts and computers were accessed other than by themselves. The State's case dismally fails this second leg. It is my respectful view that the inferences the State seeks the court to draw amount to speculation or conjecture, as there are no positive proved facts from which the inference can be made.

[46] I have already bemoaned the lackadaisical manner in which this case was investigated and approached, I can therefore not take this aspect any further than I have, save to conclude with the following African Proverb; "Haste and hurry can only bear children with many regrets along the way".

[47] In the circumstances I make the following order:

In the s 174 application for discharge brought by the accused, in respect of counts 1, 2, 3, 4, 5, 6 (main and alternative counts), the accused is found not guilty and discharged.

P CHRISTIAAN
ACTING JUDGE

APPEARANCES

STATE: B Lilungwe
Of the Office of the Prosecutor-General,
Windhoek.

ACCUSED: A Titus
Directorate: Legal Aid, Windhoek.

