

REPORTABLE

CASE NO: SA 57/2013

IN THE SUPREME COURT OF NAMIBIA

In the matter between

VINSON HAILULU

Appellant

and

DIRECTOR, ANTI-CORRUPTION COMMISSION

First Respondent

ANTI-CORRUPTION COMMISSION

Second Respondent

NATIONAL UNION OF NAMIBIAN WORKERS

Third Respondent

**MAGISTRATE, MAGISTRATES' COURT,
WINDHOEK**

Fourth Respondent

PROSECUTOR-GENERAL

Fifth Respondent

Coram: MAINGA JA, O'REGAN AJA and MOKGORO AJA

Heard: 4 April 2016

Delivered: 6 October 2016

APPEAL JUDGMENT

O'REGAN AJA (MAINGA JA and MOKGORO AJA concurring):

[1] This appeal is brought by Mr Vinson Hailulu, former Chief Executive Officer of the National Housing Enterprise (the NHE) against a decision of the High Court. The appeal arises from review proceedings that were launched

urgently by appellant in December 2008 following his arrest on 27 November 2008 by officials of the Anti-Corruption Commission (the Commission), the second respondent. Appellant asserted that the investigation instituted into his conduct by the Commission and his subsequent arrest were unlawful on various grounds, including that there was no reasonable basis for the investigation and that it had been instituted at the behest of the National Union of Namibian Workers (the Union), the third respondent.

[2] In his review proceedings, appellant sought the review and setting aside of the Commission's decisions to conduct an investigation into his conduct in terms of s 18(1)(b) and 18(3) of the Anti-Corruption Act 8 of 2003 (the Act), as well as declarations that his arrest had been unlawful, that the bail conditions imposed had been unlawful, and that the criminal proceedings in the Magistrates' Court were invalid. Although appellant initially also launched a constitutional challenge to s 43 of the Act, that challenge was subsequently abandoned.

[3] The High Court granted an order declaring appellant's arrest and detention on 27 November 2008, as well as the bail conditions imposed upon appellant subsequent to the arrest, to have been unlawful but it declined to grant the other relief sought by appellant. Appellant then launched an appeal against the High Court's refusal to review and set aside the decisions made in terms of s 18(1)(b) and 18(3) of the Act. The first, second and fifth respondents (the respondents) oppose the appeal, but have not lodged a cross-appeal against the declaration of invalidity made by the High Court in

respect of appellant's arrest or the bail conditions imposed upon appellant. Neither the Union, the third respondent, nor the Prosecutor-General, the fifth respondent, oppose the appeal.

Facts

[4] Shortly after appellant was appointed Chief Executive Officer of the NHE in 2005, he commenced a restructuring process, approved by the NHE Board that resulted in the retrenchment of some of the employees of the NHE in late 2006. The retrenchment was opposed by the employees affected, and with the assistance of the Union the employees adopted a range of means to resist the retrenchment. An urgent application was launched in the High Court in November 2006, which was dismissed in January 2007. The Union also declared a labour dispute at the Office of the Labour Commissioner, and a conciliation meeting was held in November 2006 where it was agreed that the retrenchment packages should be negotiated. At about the same time, according to appellant, one of the Union's affiliates, the Namibia Financial Institutions Union, issued a press statement criticising appellant, and suggesting that he was corrupt, in particular, because he had 'favourites' in the workplace. The Union then wrote to the Commission on 24 May 2007 suggesting that there was 'wasteful' expenditure at the NHE and that an investigation was warranted. Following the letter, the Union supplied the Commission with a file of documents relating to its allegations concerning the appellant's conduct at the NHE.

[5] The negotiations regarding retrenchment packages were unsuccessful, although some employees chose to accept the packages offered by the NHE even though the Union did not support their doing so. The dispute relating to the remaining employees was referred to the District Labour Court in May 2007.

[6] In October 2007, while appellant was on business in Cape Town, an employee of the Commission, Mr Masule, informed NHE that the Commission was investigating appellant and sought permission to interview employees of the NHE and to gain access to documentary records. By telephone, appellant granted these requests. After his return from Cape Town, appellant met with Mr Masule on 12 October 2007. Mr Masule gave appellant a list of thirteen charges that were being investigated. The charges included three allegations that appellant had either promoted or appointed staff members at the NHE without following the correct procedures; four allegations that he had used an NHE credit card for personal expenditures or unauthorised cash withdrawals; an allegation that appellant had an improper business relationship with the chairperson of the NHE Board as well as two allegations concerning travel benefits that he made available to the chairperson of the board; and an allegation that appellant had arranged for an employee of NHE to perform work at appellant's home.

[7] Appellant was given an opportunity to respond to the thirteen charges, which he did in an eleven-page memorandum. There is a dispute between appellant and the Commission as to whether appellant was given a

reasonable time in which to respond. Nothing turns on this dispute in this appeal. Subsequent to these events, appellant also complied with a request to make his laptop available to the Commission, which was retained by the Commission from November 2007 till mid-2008.

[8] The trial relating to the dispute over the retrenchment was heard in the Labour Court between January 2008 and July 2008. Judgment was delivered on 27 October 2008. The court ordered the reinstatement of eleven employees and NHE decided to appeal the decision. According to appellant a senior union official called him and advised him not to note the appeal but according to appellant he told the union official that he would not be dissuaded from pursuing legal avenues available to the NHE. Some days later, appellant says he was contacted by a labour consultant who told him that the same union official had asked the consultant to warn appellant not to pursue the appeal, because it would 'cost him (the appellant) dearly'. Later on the same day, appellant says the same consultant informed appellant that he would be arrested the next day if he pursued the appeal.

[9] Several weeks later on 20 November 2008, NHE successfully approached the Labour Court for an order suspending the order of reinstatement made by the District Labour Court. On 26 November 2008, according to appellant, the same union official came to appellant's office in an angry mood and threatened appellant with arrest.

[10] It is common cause that the following day Mr Masule, the Commission's investigator arrived at the offices of the NHE. He arrested appellant without a warrant and took him to the Magistrates' Court. There is a dispute between appellant and respondents as to whether Mr Masule was accompanied by the union official and the retrenched workers. Appellant was released on bail on the same day on condition that he hand over his office keys and that he not come within 100 meters of the NHE offices until 8 December 2008.

[11] Appellant argues that these facts demonstrate that the decisions taken by the Commission were not based on a reasonable assessment of the evidence, that the Commission acted at the behest of the Union and that the decision to investigate appellant was therefore unlawful.

[12] The Commission admits that it received a complaint of corrupt practices against appellant from the Union. Moreover, it does not deny that the trade union and its members engaged in a campaign against appellant following NHE's decision to retrench some of its staff. However, the Commission denies that it acted in concert with or at the behest of the Union in initiating its investigation into appellant's conduct. It also asserts that the charges levelled against appellant were not frivolous. Accordingly, it is the Commission's case that its investigation into appellant's conduct at the NHE was properly and legitimately instituted and that the Commission did not act unlawfully in conducting its investigation.

Relevant legislative provisions

[13] The Act provides for the establishment of the Anti-Corruption Commission, as well as the procedures for the Commission to investigate corrupt practices. The Act provides that the Commission may initiate investigations of its own accord¹ or on the basis of information furnished to the Commission by a person² who suspects, on reasonable grounds, that the information concerns a corrupt practice, a term which is defined in the Act.³

[14] Section 18 provides for the procedure to be followed by the Commission when it has received information from a member of the public. It reads as follows:

- (1) The Commission must –
 - (a) receive information furnished to it by any person who alleges that another person has or is engaged, or is about to engage, in a corrupt practice; and
 - (b) examine each alleged corrupt practice and decide whether or not an investigation in relation to the allegation is warranted on reasonable grounds.
- (2) When deciding whether an investigation into an alleged corrupt practice is warranted, the Commission may consider –
 - (a) the seriousness of the conduct or involvement to which the allegation relates;

¹ Section 20(1) of the Act.

² Section 17 of the Act.

³ Section 1 of the Act, read with Chapter 4 of the Act, and see *Lameck & another v President of the Republic of Namibia & others* 2012 (1) NR 255 (HC), in which the definition of 'corruptly' contained in s 32 of the Act was declared to be inconsistent with the Constitution and invalid.

- (b) whether or not the allegation is frivolous or vexatious or is made in good faith;
 - (c) whether or not the conduct or involvement to which the allegation relates is or has been the subject of investigation or other action by any other appropriate authority for the purposes of any other law;
 - (d) whether or not, in all the circumstances, the carrying out of an investigation for the purposes of this Act in relation to the allegation is justified and in the public interest.
- (3) If the Commission decides that an investigation in relation to the allegation is warranted on reasonable grounds, it must decide whether the investigation should be carried out by the Commission or whether the allegation should be referred to another appropriate authority for investigation or action.
- (4) For the purposes of performing the functions under this section the Commission may –
 - (a) make such preliminary inquiry as it considers necessary;
and
 - (b) consult any other appropriate authority.’

[15] Section 19 then provides that the Commission must inform the person who furnished the Commission with information concerning a corrupt practice if it decides that further investigation is not warranted, or if it refers the allegation to another authority for further action.

[16] Section 21(1) provides that an authorised officer of the Commission may conduct any investigation that the Commission is empowered to undertake in terms of the Act. And s 21(2) provides that:

'Upon initiating or receiving a complaint which in the opinion of the Director warrants investigation on reasonable grounds, the Director must cause the complaint to be investigated as quickly as practicable.'

[17] Once the Commission has completed its investigation, if the Director of the Commission considers, in the light of the information obtained during the investigation, that a person has committed a corrupt practice, the Director must refer the matter to the Prosecutor-General,⁴ who will then decide whether to prosecute.⁵

Appellant's submissions

[18] Appellant argues that the Commission did not take a proper decision to investigate appellant in terms of s 18(1)(b) of the Act, nor did it take a proper decision as to whether to refer the investigation to another appropriate authority in terms of s 18(3) of the Act. Appellant asserts that valid decisions in terms of s 18(1)(b) and 18(3) are jurisdictional facts for any investigation by the Commission, and thus in the absence of valid decisions in terms of s 18(1)(b) and 18(3), all subsequent acts of the Commission relating to appellant were invalid and unlawful.

⁴ Section 31(1) of the Act.

⁵ Section 31(2) of the Act.

[19] Appellant challenges the lawfulness of the Commission's decisions on several overlapping grounds. In relation to the decision to institute an investigation in terms of s 18(1)(b), appellant argued that the following grounds of review should be sustained:

- (a) the Commission failed to take the provisions of s 18(2), and particular s 18(2)(a), (b) and (d) into consideration when making the decision to investigate the appellant;
- (b) the allegations against appellant did not disclose evidence that appellant was involved in a 'corrupt practice' as contemplated in ss 33 – 48 of the Act;
- (c) the decision was prompted by ulterior motives, taken in bad faith and for the purpose of achieving the reversal of the retrenchment of former employees of the NHE;
- (d) there was no rational or legitimate connection between the decision and the evidence before the Commission;
- (e) the decision was not warranted on reasonable grounds as required by s 18(2) of the Act;
- (f) the decision was based on irrelevant considerations; and
- (g) the Commission was biased against appellant.

[20] In relation to the decision in terms of s 18(3) of the Act, whether the investigation should be undertaken by the Commission itself or by another appropriate body, appellant argued that the following grounds of review should be sustained:

- (a) there had been no decision taken in terms of s 18(1)(b), a condition precedent to a decision in terms of s 18(3);
- (b) the decision was prompted by ulterior motives, taken in bad faith and for the purpose of achieving the reversal of the retrenchment of former employees of the NHE;
- (c) there was no rational or legitimate connection between the decision and the evidence before the Commission;
- (d) the decision was not warranted on reasonable grounds as required by s 18(3) of the Act;
- (e) the decision was based on irrelevant considerations; and
- (g) the Commission was biased against appellant.

[21] In particular, appellant argues that the Commission is under a duty to establish that the decision made in terms of s 18(1) to investigate the appellant was warranted on reasonable grounds, and that the Commission needs to show that in making its decision, it considered all the considerations

stipulated in s 18(2),⁶ including the question whether or not the allegation received by the Commission was frivolous or vexatious or not made in good faith.⁷

[22] Appellant also argues that given the language of s 21(2) of the Act the Director of the Commission was obliged to take the decisions in terms of s 18(1) and 18(3) of the Act, and that the record does not establish that the Director took those decisions.

[23] Finally, appellant argues that once the High Court concluded that the Commission had used the power of arrest conferred upon the Commission by the Act 'to advance the private cause of those who found themselves in a labour dispute' with the NHE 'is well founded',⁸ it followed that the criminal proceedings pending against appellant were invalid on that ground alone. Appellant also argues that should this court uphold its arguments in relation to the decisions as challenged, it will follow that the court should declare the criminal proceedings unlawful and invalid, on the basis that those proceedings were materially tainted by the absence of valid decisions in terms of s 18(1)(b) and 18(3) of the Act.

Respondents' submissions

[24] Respondents argue that appellant's assertion that there was a 'conspiracy' between the Commission and the Union is not established on the

⁶ The text of s 18 is set out at [para] 14 above.

⁷ See section 18(2)(b) of the Act which stipulates that the Commission may consider 'whether or not the allegation is frivolous or vexatious or is made in good faith'.

⁸ Judgment of the High Court, para 97.

record. Respondents assert that the Commission's denial of these assertions on the record is not fanciful or lacking credibility.

[25] Secondly, respondents argue that appellant construes the legislative purpose of the Act too narrowly. According to respondents, the Act expressly authorises investigation and prosecution of offences discovered in the course of the investigation of corrupt activities.

[26] Thirdly, respondents argue that appellant misconstrues s 18(1)(b) and 18(3) of the Act and that accordingly appellant's argument that the Commission acted *ultra vires* is misconceived.

Issues for determination

[27] There is no cross-appeal against the High Court's order declaring appellant's arrest to be unlawful, the setting aside of the warrants of arrest and detention, and the bail conditions. The High Court's declaration of invalidity is therefore not an issue before this court although the consequence of the High Court's order remains an issue in the appeal.

[28] The issues for this court to determine are the following:

- (a) did the Commission take valid decisions in terms of s 18 of the Act to institute an investigation into the conduct of appellant?

- (b) what were the consequences of the High Court finding of fact that the Commission had used the power of arrest to further the interests of those engaged in a labour dispute with the NHE?

The statutory role of the Commission

[29] This appeal raises important questions concerning the proper interpretation of s 18 of the Act, and it will be useful before turning to the question how that section should be interpreted, to start by considering the statutory role of the Commission. The long title of the Act states, in part, that it is 'to establish the Anti-Corruption Commission and provide for its functions; to provide for the prevention and punishment of corruption . . .'. Section 2 provides that the Commission shall be 'an independent and impartial body' consisting of a Director, Deputy Director and other staff members. The Director and Deputy Director are nominated by the President, and appointed by the National Assembly.⁹ The Director and Deputy Director must be of 'good character' and 'high integrity' and possess knowledge or experience relevant to the functions of the Commission.¹⁰

[30] The functions of the Commission are set out in s 3 of the Act. They include receiving or initiating as well as investigating allegations of corrupt practices;¹¹ 'considering whether an investigation is needed in relation to an allegation and, if so, whether the investigation must be carried out by the Commission or whether the matter should be referred to any other appropriate

⁹ Section 4(1) of the Act.

¹⁰ Section 4(2) of the Act.

¹¹ Section 3(a) of the Act.

authority for investigation or action’;¹² consulting, co-operating and exchanging information with appropriate bodies in relation to corrupt practices;¹³ investigating conduct which may be connected with or conducive to corrupt practices;¹⁴ taking measures for the prevention of corruption;¹⁵ and disseminating information to the public about the functions of the Commission.¹⁶

[31] The powers of the Commission are set out in Chapter 3 of the Act, and include powers of search and seizure,¹⁷ the power to require a person to furnish certain information in writing,¹⁸ the power to require access to bank accounts,¹⁹ and the power to arrest persons without a warrant in certain circumstances.²⁰ These are substantial powers. As Damaseb JP observed in his judgment in this matter in the High Court:

‘The exercise of those powers has far-reaching implications for a person’s liberty, dignity, reputation and even livelihood and (they) must be exercised in good faith and for substantial reasons; certainly not in order to strengthen the hand of one person against another in their pursuit of civil, commercial or labour disputes against the person whose conduct is the subject of investigation and criminal prosecution by the law enforcement agencies.’²¹

¹² Section 3(b) of the Act.

¹³ Section 3(c) of the Act.

¹⁴ Section 3 (e) of the Act.

¹⁵ Section 3(f) of the Act.

¹⁶ Section 3(g) of the Act.

¹⁷ See ss 22, 23 and 24 of the Act.

¹⁸ See s 26 of the Act.

¹⁹ See s 27 of the Act.

²⁰ See s 28 of the Act.

²¹ See *Hailulu v Director, Anti-Corruption Commission and others*, unreported judgment of the High Court dated 19 July 2013, para 14.

The interpretation of s 18

[32] Core to appellant's case is his argument that the Commission did not take proper decisions within the meaning of s 18(1)(b) and 18(3) prior to instituting an investigation into his conduct. In particular, appellant argues that the Commission bears a duty to establish that it properly took into account the considerations mentioned in s 18(2) before deciding whether to proceed with an investigation of appellant's conduct. Appellant argues that proper decisions in terms of s 18(1)(b) and 18(3) are therefore jurisdictional facts that must exist before an investigation may commence.

[33] It is clear that once the Commission receives information in terms of s 17 of the Act, it must 'examine each alleged corrupt practice and decide whether or not an investigation in relation to the allegation is warranted on reasonable grounds'.²² Section 18(2) then elaborates that when deciding whether an investigation is warranted, the Commission may consider the seriousness of the conduct to which the allegation relates, whether the allegation is frivolous, vexatious or made in good faith, whether the allegation is being or has been investigated by any other body, and whether an investigation would be justified and in the public interest.²³

[34] Appellant argues that the Commission is obliged to take into account all four of the considerations specified in s 18(2) before deciding whether an investigation is warranted, while respondents argue that because s 18(2)

²² Section 18(1)(b) of the Act.

²³ Section 18(2) of the Act.

commences with the verb 'may consider', there is no such obligation upon the Commission.

[35] It is clear from s 18(1)(b) that the Commission must decide whether an investigation is warranted on reasonable grounds. In determining whether reasonable grounds for an investigation exist, the Commission will have to be guided, amongst other things, by the key purposes of the Act, to prevent and punish corruption. Where an allegation evinces reasonable grounds for believing that a person is engaging in corrupt practices, an investigation will often be warranted. There may however be practical considerations that may suggest otherwise, for example, where an investigation of the alleged corrupt practices is being or has already been undertaken by another appropriate authority. The seriousness of the allegations, as indicated by s 18(2)(a) will also be a relevant consideration in many cases. The considerations that will be relevant to the s 18(1)(b) decision whether an investigation is warranted on reasonable grounds will, to some extent, depend on the nature of each case.

[36] Appellant argues that the Commission must take into consideration all the factors listed in s 18(2) of the Act in every case when deciding whether there are reasonable grounds to warrant an investigation as required by s 18(1)(b). There is a major difficulty for appellant's argument. The express language of s 18(2) stipulates that the criteria contained in its subsections 'may', not must, be considered by the Commission in deciding whether an investigation is warranted. The contrast between the use of the peremptory 'must' in s 18(1) and the permissive 'may' in s 18(2) is unmistakeable. It

suggests that the Commission must do what is stipulated in s 18(1) and may do what is suggested by s 18(2). To read both provisions as peremptory would require a court ignoring the clear differences of language between the two provisions. There is a further difficulty. When the Commission decides whether an investigation is warranted on reasonable grounds, it will have before it only limited information. In many cases, it will not be in a position to assess the criteria listed in s 18(2), such as whether or not the allegation is frivolous or vexatious or made in good faith, without instituting an investigation. The use of the permissive 'may' in s 18(2) suggests that the Commission need only consider the criteria in s 18(2) in making its decision whether reasonable grounds warrant an investigation if it is able to assess the relevant criteria on the information before it at the time. Accordingly, s 18(2) does not require the Commission to approach the criteria in s 18(2) with a tick-box mentality requiring each to be addressed and determined before deciding whether to institute an investigation.

[37] The consideration contained in s 18(2)(b) of the Act, that the Commission may consider whether the allegation is frivolous, vexatious or not in good faith, serves to remind the Commission that at times allegations of corruption will be made in bad faith, and such allegations may require special consideration. When an allegation is made in bad faith, there are two risks for the Commission – the first, is that the allegation may be false, and investigating the allegation may be a waste of time; and secondly, perceptions of the independence and impartiality of the Commission may be damaged if it

is seen to be willing to investigate complaints of corruption made in bad faith by third parties.

[38] On the other hand, if an allegation of corruption made to the Commission, albeit made in bad faith, can be said to contain sufficient information to suggest that there is a reasonable suspicion that a person is engaged in corrupt practices, the fact that the allegation may have been in bad faith in the first place would not, on its own, constitute a ground on its own for refusing to investigate the complaint. Were it to be otherwise, as at times appellant seemed to suggest, it would tie the hands of the Commission in a manner that might prevent it from carrying out its statutory functions.

[39] In assessing whether a decision made in terms of s 18(1)(b) to investigate an allegation of a corrupt practice has been validly made, a court will need to bear in mind that the decision is taken before the investigation has commenced, when the Commission will ordinarily have no information at its disposal other than the allegation of corrupt practice that it has received. Similarly, a decision taken in terms of s 18(3) of the Act, whether the Commission decides to refer a complaint to another appropriate body or to investigate the complaint itself, will be taken before the Commission has commenced its own investigation.

The Commission's decisions in terms of s 18(1) and 18(3) of the Act

[40] It is necessary now to consider the Commission's decision to investigate appellant in terms of s 18(1)(b), as well as its decision not to refer

the matter to another appropriate body in terms of s 18(3), such as the Namibian Police, whom the appellant suggested might have been appropriate.

[41] In assessing the decisions made by the Commission, this court must consider what information the Commission had at the time. It is clear that the Union referred the complaint to the Commission by way of a letter on 24 May 2007. That letter stated that the Union had 'received several complaints from several of the NHE employees regarding the alleged manner in which the NHE resources are managed'. The Union then stated that a file containing the Union's preliminary findings had been compiled and would be made available to the Commission.

[42] In his affidavit, Mr Masule indicated that he was the official appointed by the Commission to investigate the corruption allegations against appellant. He stated that he initially held a meeting with several members of the Union where he formed the view that the allegations made were serious and warranted an investigation as they included, amongst other things, nepotism and abuse of company resources for private benefit. Sometime after the meeting, during June 2007, according to Mr Masule, he received the file of documents from the Union. Once he had received the file, Mr Masule stated that he discussed the matter with the Director of the Commission who instructed him to commence a 'full-scale investigation' into the allegations.

[43] Respondents do not specify precisely when the decisions in terms of s 18(1)(b) and 18(3) were taken, but it appears from the record that once the Commission received the file of documents from the Union, and the matter was discussed by Mr Masule and the Director of the Commission, the decisions that the Commission would proceed with an investigation of appellant itself was taken. These were the decisions contemplated by ss 18(1)(b) and 18(3).

[44] Appellant's argument, in reliance on s 21(2), that the record does not show the Director took the decisions to institute an investigation by the Commission cannot succeed. On Mr Masule's evidence, it was after his meeting with the Director once the file of documents had been received from the Union that the Director instructed him to proceed with a full investigation.

[45] As discussed above, appellant argues that the Commission failed to take the provisions of s 18(2), and particular s 18(2)(a), (b) and (d) into consideration when making the decision to investigate the appellant. In this regard, appellant asserts that the Commission must establish that it did consider the issues listed in s 18(2) before making the decision to proceed with the investigation. Respondent argues that the language of s 18(2) does not impose an obligation upon the Commission to consider the factors listed in that section, but stipulates merely that in deciding whether an investigation is warranted the Commission may consider the factors listed in the subsection.

[46] As discussed above, respondent is correct to point to the permissive language of s 18(2). The subsection does not oblige the Commission to consider all factors listed in that section in every case. The governing test remains whether 'an investigation in relation to the allegation is warranted on reasonable grounds'.²⁴ That is the question for this court to consider in determining appellant's challenge.

[47] Moreover, appellant's argument that the Commission must be able to establish that it considered the factors listed in s 18(2) when making its decision in terms of s 18(1)(b) also cannot be accepted. Appellant's argument effectively seeks to shift the burden of proof to the Commission in the review proceedings. Although appellant's dismay at the Commission's decision to investigate him is understandable, a court should be slow to interpret s 18 to insert unnecessary hurdles in the path of the Commission when it seeks to commence an investigation into corrupt practices. While an investigation into corrupt practices will often cause inconvenience to the person who is the subject of the investigation, as do criminal investigations, that inconvenience is outweighed by the heightened public interest that requires that investigations into corrupt practices be swiftly and effectively instituted. Accordingly, unless an applicant can show, on the evidence before the Commission at the time that a decision is taken in terms of s 18(1) b), that there was no reasonable basis for the Commission to have made its decision, an application to review and set aside a decision made in terms of s 18(1)(b) will not succeed.

²⁴ See s 18(1)(b).

[48] Appellant's reliance on the decision *Matador Enterprises (Pty) Ltd v Minister of Trade and Industry & others; Clover Dairy Namibia (Pty) Ltd & another v Minister of Trade and Industry & others*²⁵ also does not assist appellant. That case concerned a completely different set of facts and legal issues. It concerned an application to review and set aside a notice issued in the name of the Minister of Trade and Industry in terms of the Import and Export Control Act 20 of 1994, restricting the importation of dairy products into Namibia. The High Court held that the record showed that the decision to impose the restriction was taken by Cabinet rather than by the Minister who was empowered in terms of the relevant legislation to take the decision. The court concluded that the record demonstrated that the Minister had failed properly to appreciate his powers and the statutory context within which they were to be exercised. This conclusion was one of several bases upon which the notice was set aside. The judgment in *Matador* does not establish that an administrative body empowered to make a decision will bear the burden of proving that it has taken the decision when challenged. In any event, in this case, the affidavits lodged by the Commission demonstrate that after receiving a report from Mr Masule in relation to his preliminary investigations, the Director instructed Mr Masule to launch a full-scale investigation, which he then did.

[49] On the facts of this case, it is thus clear that the Commission received a letter from the Union stating that it had received reports from its members that there were corrupt practices at the NHE. This letter constituted a notification to the Commission as contemplated by s 17 of the Act. A file of

²⁵ 2015 (2) NR 477 (HC).

documents outlining the nature of the allegations was provided by the Union following that letter. Upon receipt of the file, and after discussion between the Director of the Commission and Mr Masule, the Director of the Commission decided to institute an investigation as contemplated by s 18(1)(b) and 18(3) of the Act. It is clear from Mr Masule's affidavit that the allegations made by the Union contained allegations about nepotism and misuse of funds at the NHE. Such allegations relate to corrupt practices (as is discussed further below) and raise matters of public importance, that, as long as the allegations seem to have a reasonable foundation, warrant further investigation. Moreover, although it may have been open to the Commission to refer the investigation to the Namibian Police as appellant suggests, given the powers of the Commission to investigate allegations of corrupt practices there is no reason why the Commission was obliged to refer the investigation to the police.

[50] In relation to the considerations set out in s 18(2)(b) of the Act, appellant points to the memorandum that he furnished the Commission in October 2007, in response to the list of thirteen charges given to him by Mr Masule. In that memorandum, appellant explained to the Commission that it was his view that the accusations made by the Union were related to the conflict that had arisen as a result of NHE's decision to retrench workers in 2006. Appellant argues that this information should have warned the Commission that it was possible that the allegations against appellant were frivolous, vexatious or not made in good faith, as contemplated in s 18(2)(b) of the Act.

[51] Appellant's memorandum to the Commission was provided some months after the investigation into appellant had commenced, and after the Commission had taken the decisions to investigate appellant itself in terms of s 18 of the Act. The Commission cannot be faulted for not having considered the memorandum before it took its decisions in terms of s 18.

[52] Appellant argues that the decisions in terms of s 18(1)(b) and 18(3) were prompted by ulterior motives, taken in bad faith and for purpose of achieving the reversal of the retrenchment of former employees of the NHE. However, at the time the decisions were taken in mid-2007, there is nothing on the record to suggest that the Commission was aware of the dispute at NHE, or the fact that the Union might not have been acting in good faith when it laid the complaint against appellant. Moreover, even if the Commission had considered that the Union was acting with an ulterior purpose in laying the complaint against appellant, that fact would not have been a bar to the Commission investigating the complaint. The question for the Commission would have remained whether there were reasonable grounds to warrant an investigation. As Damaseb JP observed in the High Court, 'information provided by grudge-bearing whistle-blowers is often the best source of information for investigators, especially in corruption cases which . . . are difficult to uncover . . .'.²⁶ The fact, therefore, that a complaint may be laid by someone for an ulterior motive does not have the automatic consequence that a complaint should not be investigated.

²⁶ See High Court judgment cited above n 21, para 70.

[53] Appellant also argued that the Commission's decisions should be set aside on the basis that the Commission was biased against the appellant, but appellant did not point to any evidence to suggest on what basis the Commission was biased against appellant at the time the decisions in terms of s 18(1)(b) and 18(3) of the Act were taken. Appellant relied on several decisions that are authority for the principle that where a power is not used for the statutory purpose for which it is conferred, but is used instead for an ulterior purpose, the exercise of the power for the ulterior purpose will be declared invalid.²⁷ This principle is a salutary one, and indeed it underpinned the High Court's decision to declare the arrest of appellant unlawful, but it does not assist appellant in relation to his challenge to the Commission's decisions to institute an investigation into his conduct. The record does not establish that at the time the decisions to investigate were taken, some eighteen months before the arrest of appellant, they were taken for an ulterior purpose. In the circumstances, the principle has no application to those decisions.

[54] It follows from what has been set out above that appellant's argument that there was no rational or legitimate connection between the decisions and the evidence before the Commission and its argument that the decisions were based on irrelevant considerations also cannot succeed. Once the Commission had been furnished with a complaint by the Union, together with a file of documents, and Mr Masule considered the allegations raised 'serious' issues, it was appropriate for the Commission to investigate the complaint.

²⁷ See *Van Eck NO & Van Rensburg NO v Etna Stores* 1947 (2) SA 998 (A) and *Pretoria Portland Cement Co Ltd & another v Competition Commission & others* 2003 (2) SA 385 (CC).

The statutory mandate of the Commission is to investigate allegations that it receives, if after examination it considers there are reasonable grounds to investigate the allegations.

[55] Finally, appellant argued that the allegations against appellant did not disclose evidence that appellant was involved in a 'corrupt practice' as contemplated in ss 33 – 48 of the Act. The High Court accepted that some of the thirteen charges outlined to appellant in October 2007 might not have constituted corrupt practices within the meaning of the Act, but it also concluded that the charges relating to the misuse of the NHE credit card and the extension of benefits to a business associate, would fall within the purview of the Act. This court has held that the definition of 'corrupt practice' in the Act has –

'Heralded a new dispensation in the definition, reach and scope of the offence of corruption. The offence is now broad in its reach and scope. This appears necessary because corruption may manifest itself in different shapes and forms. It is also notoriously difficult to prove, because it often does not take place in the full view of the public.'²⁸

[56] The High Court was undoubtedly correct that some of the thirteen charges that according to Mr Masule the Commission was investigating would, if proven, constitute corrupt practices within the scope of the Act. Appellant's argument to the contrary therefore cannot be sustained.

²⁸ See *S v Goabab & another* 2013 (3) NR 603 (SC) para 14.

[57] Accordingly, appellant's argument that the Commission did not take valid decisions in terms of s 18(1)(b) and 18(3) of the Act cannot be upheld.

The consequence of the High Court's finding that the Commission had used the power of arrest to further the interests of those engaged in a labour dispute with the NHE?

[58] Appellant argues that the consequence of the High Court's finding that the Commission had used the power of arrest to further the interests of those engaged in a labour dispute with the NHE are that the criminal proceedings pending against appellant must be declared invalid. Respondent argues in response that criminal proceedings against appellant will only be instituted and prosecuted if the Prosecutor-General decides that there is a case to be made against appellant. Respondent argues that appellant makes no claim that there is a conspiracy between the Prosecutor-General and the Union and that therefore the court must assume that the Prosecutor-General will make the decision as to whether criminal proceedings should be instituted against appellant in a proper and lawful manner.

[59] Respondents are correct that decisions to prosecute for corrupt practices are taken by the Prosecutor-General.²⁹ If it appears to the Director of the Commission, once the Commission has completed its investigation, that any person has committed a corrupt practice, the Director must refer the matter, and all the relevant information to the Prosecutor-General. The Prosecutor-General will then decide whether to prosecute. Of course, once a

²⁹ See s 31 of the Act.

prosecution is initiated, the relevant court will determine in the criminal proceedings whether the accused person should be convicted.

[60] Appellant's argument seeks to forestall criminal proceedings. The fact that, as the High Court found, the Commission had used its power of arrest to advance the private cause of the Union and its members in this case, cannot have the consequence that if, on the evidence, the Prosecutor-General forms the view that a prosecution is warranted, a prosecution may not be brought. The Prosecutor-General is an office separate and distinct from the Commission, and there is no suggestion that there was any collusion between the Prosecutor-General and the Commission in this case. Accordingly, there is no basis for concluding that a decision taken by the Prosecutor-General regarding the prosecution of appellant will necessarily be tainted by the ulterior purpose that vitiated appellant's arrest. Accordingly, the High Court was correct in refusing to make an order declaring the criminal proceedings against appellant to be invalid and the appeal on this score must fail.

[61] Appellant also argued that the investigation undertaken by the Commission should also be vitiated by the High Court's finding that the Commission had used the power of arrest to further the interests of those engaged in a labour dispute with the NHE. However, appellant did not seek as a prayer for relief, that the investigation undertaken by the Commission should be set aside, and appellant's argument therefore seeks to support a prayer for relief which did not form part of the case made out by appellant.

[62] Appellant did seek an order reviewing and setting aside the Commission's decisions to investigate in terms of s 18(1)(b) and 18(3) of the Act. This prayer for relief was considered and rejected above. Those decisions could not have been vitiated by conduct that took place nearly eighteen months later. Accordingly, appellant's argument that the High Court's finding that the Commission had used the power of arrest to further the interests of those engaged in a labour dispute with the NHE should result in an order reviewing and setting aside the Commission's investigation cannot succeed.

[63] It is important to add that should a prosecution of appellant eventuate, it will be open to appellant to argue for the exclusion of any evidence tendered by the prosecution that appellant considers to have been improperly obtained. It will be for the trial court, in the first place, to decide whether there is any merit in any such argument.

Outcome of appeal

[64] Appellant's arguments on appeal have not succeeded and accordingly his appeal must fail.

[65] One last thing should be said. The fact that appellant has not succeeded in this appeal should not obscure the fact that it is a cause for grave concern that the Commission was found by the High Court to have advanced the cause of the Union and its members in effecting the arrest of appellant. Such conduct is deplorable and appellant is entitled to feel

aggrieved by it. The Commission is established as an independent and impartial institution to prevent and punish corruption. It is an institution of national importance pursuing a goal that is central to the wellbeing of Namibia's democracy. Its conduct must be beyond reproach. The achievement of the Commission's goal will be imperilled if its reputation is tarnished as it has been in this case by its unlawful conduct. Appellant may of course choose to pursue civil remedies against the Commission. Such remedies, however, even if successful, will not repair the Commission's reputation. Its reputation will only be repaired if the Commission by its conduct and the conduct of its officials demonstrates unwaveringly that it must and will always act in a manner that is independent, impartial and lawful.

Costs

[66] Appellant has not succeeded. There is no reason why costs should not follow the result.

Order

[67] The following order is made:

1. The appeal is dismissed.
2. Appellant is ordered to pay the costs of the first, second and fifth respondents in this court, such costs to include the costs of two instructed and one instructing counsel.

O'REGAN AJA

MAINGA JA

MOKGORO AJA

APPEARANCES

APPELLANT:

S Namandje

Instructed by Sisa Namandje & Co
IncFIRST, SECOND and FIFTH
RESPONDENTS:I V Maleka SC (with him G Narib)
Instructed by the Government
Attorney