

REPORTABLE

CASE NO: SA 5/2019



IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE STATE

Appellant

and

**ARUMUGAM THAMBAPILAI
LINDA SHIPANGA
TIMOTEUS AMUTENYA SAKEUS
FESTUS SHINDUME
ONESMUS SHEEHAMA**

**First Respondent
Second Respondent
Fourth Respondent
Fifth Respondent
Eighth Respondent**

Coram: FRANK AJA, ANGULA AJA and LIEBENBERG AJA

Heard: 7 April 2021; 21 June 2021; 2 – 3 August 2021

Delivered: 15 October 2021

Summary: The accused persons (some of whom have since passed on) were charged with 16 counts of fraud, theft, attempting to defeat the course of justice, forgery and uttering and theft by conversion in respect of claims made against the Motor Vehicle Accident Fund (the MVAFF). Specifically, accused no.1 was charged with all 16 counts whilst the remaining accused persons were each charged with the count specific to their MVAFF claim alongside accused no.1.

The court *a quo* found that the State failed to prove its case beyond a reasonable doubt and acquitted all the remaining accused persons in respect of the charges they

faced. Further, the court *a quo* accepted (a) the defence of 'lost in translation'- where a witness would testify that he or she told accused no. 1 something during consultation and accused no. 1 will testify that the witness told him something else. They would then both blame the interpreter which created a dilemma if the interpreter is not called as a witness; and (b) the defence that there was no intention to defraud the MVAFF if the standard claim form and supporting documentation forwarded to the MVAFF contained contradictory information, the MVAFF had the duty to scrutinise all documents forwarded to them and should have noticed these discrepancies. These defences led to the acquittal of the accused persons.

On appeal (before the merits were considered), the court dealt with preliminary issues raised by the parties. Firstly, the State brought an application for condonation and reinstatement of the appeal which had lapsed because the record was not filed timeously. This application was unopposed. Secondly, the accused persons (or some of them) raised preliminary issues relating to the timeous filing of the notice of appeal, the adequacy of the grounds set out in the notice of appeal, the completeness of the record and certain irregularities in the investigation and prosecution, especially of accused no. 1.

Held that, the State made out a case for the condonation of the late filing of the record and reinstatement of the appeal.

Held that, on the points *in limine* raised on behalf of the accused persons (especially accused no.1), the court found no merit in the points taken relating to the timeous filing of the notice of appeal, the incompleteness of the record; and that the investigation was fraught with irregularities. The court further found that the grounds of appeal are not so bad in law as to render the whole appeal invalid.

By reiterating certain legal principles applying to criminal matters, the court found that: (a) the accused's guilt must be established beyond reasonable doubt and not on the balance of probabilities. This court must be satisfied that defence's version is beyond

reasonable doubt false to sustain a conviction; (b) as the appeal is an attack on the factual findings of the court *a quo*, it should be noted that in the absence of demonstrable and material misdirection by the court *a quo*, the factual conclusions it reached will be presumed to be correct and will only be disturbed if the recorded evidence show such factual conclusions to be clearly wrong; (c) whereas criticism directed at specific witnesses or evidence is, of course, of relevance, this should not lead to a compartmentalisation of the matter and the final conclusion as to the effect of the evidence and the effect thereof; and lastly, (d) on the approach to the evidence, the test when drawing inferences in criminal law requires the inference to be the only reasonable inference and not the most probable of a number of inferences that can be drawn.

Held that, the court *a quo* was wrong to accept the 'lost in translation' defence because the interpreter was not called as a witness. The court *a quo* should have rejected the evidence of accused persons based on the totality of the relevant evidence.

Held that, this court refuses to accept and agree with the oversimplification of the evidence with the 'lost in translation' defence without a proper consideration of the context of each count. It is held that, the failure to call the interpreter as a witness was not fatal to the State's case and that the accused should have been convicted in respect of these charges.

Held that, where it is shown that false statements were knowingly made in the MVAFF claims and that they were done by or with the knowledge of an accused, this would be sufficient to establish fraud and to attempt to suggest that if the assessor at the MVAFF, instead of focusing on the claim form, had trawled through all the documents submitted to the MVAFF, he or she would have discovered that there were discrepancies is without merit.

Held that, fraud is committed where a false representation is made 'knowingly, without believing in its truth or recklessly, careless whether it be true or false'.

Held that, although criminal trials are focussed on the principle of fairness to both the prosecution and the accused, a trial must be conducted within the confines of the well established procedures and this does not exclude the way witnesses are treated. Witnesses are not to be dealt with at the convenience of the defence.

Held that, a trial court must oversee the trial process and where deviation from the normal parameters is justified, it must be careful to ensure that witnesses are not exposed to oppressive conduct that is tantamount to such witnesses being worn down or harassed to exhaustion.

The appeal succeeds to the extent set out in the order and the order of the court *a quo* acquitting the accused persons is set aside.

APPEAL JUDGMENT

FRANK AJA (ANGULA AJA and LIEBENBERG AJA concurring):

Introduction

[1] On 2 August 2010, 13 persons were summoned to appear in the High Court to plead on charges pressed against them in relation to their conduct in respect of claims made against the Motor Vehicle Accident Fund (the MVAf). These charges involved conduct allegedly amounting to fraud, theft, attempting to defeat or obstruct the course of justice, forgery and uttering and theft by conversion. The accused persons were not all implicated in all of the 16 charges pressed by the State. In fact only one accused is alleged to be involved in all 16 charges namely the legal

practitioner who at all relevant times acted as such relating to the claims filed with the MVAf relevant to the charges.

[2] As is evident from what is stated above it was envisaged that the trial would commence with the 13 accused persons. This did not happen. Accused no. 7 (David Shikale) had passed away and accused no. 9 (Hilma Martin) was absent and could not be traced and the State decided to proceed with the trial in her absence. Subsequent to the remaining accused persons' pleas of not guilty and during the course of the prosecution's case, prosecution was stopped against accused no. 10 (Shetunyenga Shivute), accused no. 11 (Elizabeth Ambata Shivute), accused no. 12 (Iyambo Iyambo) and accused no. 13 (Silas Kandenge). The number of accused persons dwindled even further when accused no. 6 (George Hatutale) passed away prior to the State's case being finalised and accused no. 3 (Martin Eriki) passed away prior to the handing down of the judgment *a quo*. This left only accused no. 1, 2, 4, 5 and 8 in place when the verdict was pronounced. These five persons are the respondents in this appeal.

[3] The trial itself was a stop-start affair due to many postponements and carried on intermittently for about five years culminating in an *ex tempore* judgment being pronounced on 9 December 2015 acquitting all the remaining accused persons. The State called 46 witnesses. From the accused persons' side, accused no. 1 (Arumugam Thambapilai), accused no. 2 (Linda Shipalanga), accused no. 5 (Festus Shindume) and accused no. 8 (Onesmus Sheehema) testified. The record is voluminous and contains 4977 pages. I mention this so that the onerous duty that

faced the presiding judge can be seen in context when I raise certain criticisms on how the trial was conducted at the end of this judgment.

[4] As mentioned, the court *a quo* acquitted all the remaining accused in respect of the charges they faced. The State, with leave, appeals against the acquittal of the relevant accused, namely accused no. 1, 2, 4, 5 and 8. In this judgment I shall refer to the respondents as they were in the court *a quo*, namely as the accused with reference to the relevant ranking that applied in the court *a quo*, ie first respondent will be referred to as accused no. 1 and the others by their rankings *a quo*.

[5] Before I deal with the merits of the appeal it is necessary to deal with certain preliminary matters raised on behalf of the accused persons or some of them. These relate to the timeous filing of the notice of appeal, the adequacy of the grounds set out in the notice of appeal, the completeness of the record and certain irregularities in the prosecution, especially of accused no. 1. In addition to these issues raised on behalf of the accused persons, the State brought an application for the appeal to be reinstated as it had lapsed because the record was filed late.

[6] It was submitted on behalf of some accused persons that the notice of appeal was filed out of time and as there was no condonation application for this non-compliance there was no proper appeal before this court. On behalf of the State it was submitted that the notice of appeal formed part of the record, condonation was sought for the late filing of the record and that the accused persons were aware of the grounds of appeal contained in the notice of appeal from the time the original notice

of appeal was filed timeously and hence, even if there was non-compliance with the requirements in this regard the accused persons suffered no prejudice.

Notice of appeal

[7] In terms of s 316 of the Criminal Procedure Act 51 of 1977 as amended (the CPA) the Prosecutor-General may appeal against any decision given in favour of an accused person and in terms of the procedures involved, the requirements stipulated in s 316 of the CPA shall apply *mutatis mutandi* in respect of such appeals.

[8] In terms of s 316(1) of the CPA, an application for leave to appeal must be launched within 14 days (or within such extended period as allowed by the court). Section 316(2) stipulates that the grounds of appeal must be spelled out in the application for leave to appeal which, in essence, constitutes the notice of appeal. If the leave to appeal is refused, the Supreme Court can be approached pursuant to s 316(6) by way of a petition within 21 days of such refusal (or within such extended period as the Supreme Court may allow). If the petition is granted the judges who determined the petition may refer the matter to the Supreme Court for consideration per s 316(8)(d).

[9] In terms of rule 10(1) of the Rules of the Supreme Court, once leave to appeal has been granted the appellant must file the relevant number of copies of the record within three months of such leave being granted or within such longer period as the parties may agree to in writing.

[10] It goes without saying that where the State seeks leave to appeal, the accused persons have knowledge of all the steps taken by the State in this regard and may provide their input at all the relevant stages. The notice of appeal containing the grounds of appeal accompany the application for leave to appeal is served on them or their legal practitioners. They are entitled to partake and make submissions when the application for leave to appeal is heard. When such application is refused and the State petitions the Supreme Court, the petition is served on them or their legal practitioners and they are entitled to respond to the petition if they so wish.

[11] The grounds of appeal contained in the application for leave to appeal form the backbone of the State's case in this whole process. This is the basis for the application for leave to appeal and some or all of these grounds also form the basis of the petition. If leave is granted either by the court *a quo* or on petition by the Supreme Court, such leave will also be granted based on all or only some of such grounds.

[12] As is evident from what is stated above, the application for leave to appeal (with the grounds of appeal) is the document that initiates the whole application for leave to appeal and as I read ss 316 and 316A, it is a once-off document. If the High Court grants leave, the registrar of the High Court must give notice accordingly to the registrar of the Supreme Court in terms of s 316(5). If leave is granted pursuant to a petition there is obviously no need to inform the registrar of the Supreme Court as he or she is the official who will inform the parties to the petition of the result thereof.

[13] All that needs to happen once leave has been granted to appeal to the Supreme Court and whether leave has been granted by the High Court or on petition is for the record to be filed as required by rule 10(1). The record must obviously contain the application for leave to appeal which will contain the grounds of appeal and also the order granting leave to appeal so that the Supreme Court is made aware of the ambit of the leave granted, ie whether all the grounds or only some of them will be relevant for purposes of the appeal. The parties will obviously know this before the record is filed as they would have partaken in the process leading up to leave to appeal being granted.

[14] It follows from the above that the point taken in relation to the late filing of the notice of appeal is without merit. The application for leave to appeal containing the grounds of appeal was filed timeously. It is the record which contains the application for leave to appeal (as it should) that was filed late and for which condonation is sought by the State.

Condonation for the late filing of the record

[15] The record was not filed timeously which meant the appeal was deemed to have been withdrawn.¹ An application was brought to seek condonation for the late filing of the record and to have the appeal reinstated.

[16] In the condonation and reinstatement application the late filing of the record is explained. The petition was successful and the prosecution (appellant) and the

¹ Rule 9(1)(c) of the Rules of the Supreme Court.

respondents were informed of this on 28 November 2018 whereafter the prosecutor on the same day addressed a letter to the registrar of the High Court seeking the record of the proceedings. He followed up the letter by a personal visit to complete the pro forma document for requesting records. Because the presiding judge was an acting judge he did not have a secretary and could not personally be contacted despite making efforts in this regard. The record could not be traced in 2018 prior to the traditional Christmas holidays. On 14 January 2019 the prosecutor was informed that the record had been found. The voluminous nature thereof has been mentioned above and it proved a daunting task to trace all the documentary exhibits which caused the record to be filed out of time.

[17] None of the accused persons took issue with the facts set out by the appellant. No notice of opposition to this application was filed nor any opposing affidavits. As the appellant was given leave to appeal it was self-evident that it had an arguable case which was not without merit and, hence, that it had established prospects of success. As mentioned, the application was unopposed² and the court was satisfied that the State made out a case for the condonation of the late filing of the record and for the reinstatement of the appeal.³ Such an order was accordingly granted.

Incompleteness of the record

² *Ugab Terrace Lodge CC v Damaraland Builders CC* (SA 51/2011) [2014] NASC (25 July 2014).

³ *Jonas v Ongwediva Town Council* 2020 (1) NR 50 (SC).

[18] On behalf of accused no. 1 it was submitted that the record was not complete in certain material aspects and that the appeal should thus be struck from the roll.

[19] The alleged shortcomings were stated in the heads of argument filed on behalf of accused no. 1 to be the following:

- (a) The list of witnesses that formed part of the indictment was not included;
- (b) List of annexures discovered by the State was not included;
- (c) The pre-trial memorandum filed in the court *a quo* was not included;
- (d) The 'material portions of the evidence/proceedings' of what transpired between the State and accused no. 3 when a plea of guilty by accused no. 3 was considered had not been transcribed and included;
- (e) The ruling of the court *a quo* dismissing an application for a discharge was not included; and
- (f) Certain pages were not bound in the correct chronological sequence which rendered a reading of the record 'extremely difficult, if not impossible'.

[20] I must confess I have difficulty seeing how any of the alleged shortcomings were material to the determination of the appeal. As pointed out by counsel for the State in the heads of argument, not a single reference is made as to how the alleged shortcoming in the record prejudiced accused no. 1 in the appeal. The fact that the shortcomings are said to be 'material' does not make them material. They must be

shown to be material in terms of their prejudicial effect on the case of the accused. This was simply not done.

[21] The evidence of all the witnesses who were called were recorded and the accused were in possession of witness statements of all the witnesses that the State intended to call. What possible purpose could the inclusion of the witness list in the record serve to determine the appeal? Counsel for accused no. 1 did not give any reason for the materiality of this list nor can I think of any.

[22] In the same vein, there is no suggestion that documents or 'annexures' relevant to the evidence were not included in the record. What purpose the list of annexures referred to would serve if being part of the record was not explained. Once again I cannot see the relevance of including a list of annexures in the record when the annexures deemed relevant by the parties were produced by them during the hearing of the evidence. Those not introduced were obviously not regarded as important or material to the case.

[23] The pre-trial memorandum certainly may be relevant and material but as it was not referred to in the evidence at all, nor in the heads of argument of any of the accused, it was clearly not considered material for purposes of the appeal. To refer to its potential materiality in general terms, as counsel for accused no. 1 did, served no purpose and amounts to speculation. Counsel for accused no. 1 could not refer the court to the memorandum's materiality to the case of his client in this appeal and hence, could not establish the materiality of this omission in the appeal record.

[24] Similar comments apply to the points raised in connection with the plea-bargaining between accused no. 3 and the State. How the fact that the plea-bargaining process was aborted (as the State was not prepared to accept a plea from accused no. 3 that did not implicate accused no. 1), is of any relevance to the merits of the appeal against accused no. 1 simply escapes me. The State was entitled to assess the intended plea of accused no.3 based on the information in its possession before coming to a decision to either accept or reject such a plea. It would in any event be the evidence of accused no. 3, if any, that would be relevant ultimately and not the plea-bargaining process to assess the case against accused no. 1. The plea-bargaining process, especially in the circumstances where there is nothing on record relating to this process implicating accused no. 1, is simply irrelevant to the case of accused no. 1 on the merits.

[25] The reasoning of the court *a quo* in respect of s 174 application is also not of any moment in this context. It is simply the view of the trial judge based on a different test as at the end of the State's case and without having considered the evidence of the accused persons at all. However, interesting and useful as it may have been, its omission cannot affect the outcome of the case against accused no. 1 at all, never mind materially.

[26] Whereas the out of sequence binding of some pages was inconvenient and irritating, the scale thereof was not such as to make the reading of the record impossible. Neither I nor any of my brothers were unable to follow the record, nor was

the complaint raised on behalf of any other accused. It follows that this 'omission' was not material in the circumstances.

[27] In the premises the submissions by counsel for accused no. 1 that the appeal should be struck from the roll due to the incompleteness of the record cannot be sustained.

[28] A final point relating to the record taken on behalf of accused no. 1 related to the signature on the notice of appeal which was not that of the Prosecutor-General but someone else's. It was in fact signed by the prosecutor himself. However, the fact that the Prosecutor-General supports the appeal is abundantly clear from her signature on the application for leave to appeal which contains the grounds of appeal and her affidavit in support of the application to condone the late filing of the record and to reinstate the appeal. In these circumstances there is no merit in this point on behalf of accused no. 1.

Investigation and prosecution fraught with irregularities

[29] It was submitted on behalf of accused no. 1 that the investigation and prosecution relating to accused no. 1 was not 'objective, nor credible and fraud (*sic*) with irregularities' and that one can infer that accused no. 1 'was the object of a persecution by the authorities, including the police and the MVA Fund'.

[30] The first aspect to note is that no special entry was made as provided for in s 317 of the CPA. This means that the irregularities must appear from the record and

further must be of such a nature to lead to an inevitable acquittal of the accused. If the irregularities, even if established, was not of such a nature, and the guilt of the accused is established on such evidence that is untainted by the irregularities, the fact of the irregularity(ies) will not avail the accused.⁴ In short, not every irregularity is a vitiating one. Only material irregularity or irregularities will assist an accused person. The position is summed up in s 322 of the CPA as follows: (I quote only the relevant portion).

‘ . . . no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.’

[31] To criticise the evidence of the witness Monica Denis, who was a single witness, and to suggest that her evidence cannot be relied upon unless corroborated is no indication of any irregularity but simply a question of credibility. How this feature can somehow undermine the integrity of the investigation is incomprehensible. The same applies to the fact that the prosecutor decided not to call some interpreters in the office of accused no. 1. The accused was in possession of the witness statements and was free to consult and call them as witnesses once the State had closed its case had he so wished.

[32] It appears from the evidence that in certain cases witnesses were approached on more than one occasion to revisit certain aspects in statements previously provided to the police. According to the counsel for accused no. 1 this was because

⁴ *S v Felthun* 1999 (1) SACR 481 (SCA) at 485i-486a, *S v Khoza & others* 2010 (2) SACR 207 (SCA) para 46.

the police wanted these witnesses to falsely incriminate his client. Whereas it is correct that some witnesses were approached more than once to amplify or clear up inconsistencies in their statements, it appears that this was at the request of the office of the Prosecutor-General. This is not unusual. The office of the Prosecutor-General receives dockets relating to investigations by the police and if it is not satisfied that all angles relevant to a successful prosecution have been addressed, instructions will be given to the police to obtain further statements to address these issues of concern. There is nothing awry in this conduct. The office of the Prosecutor-General is the office charged with prosecutions and the police is the office that must do investigations which they forward to the office of the Prosecutor-General for the purpose of prosecution. It is for the latter to decide whether the police docket forwarded to them contains sufficient information to prosecute, and if not, to establish whether there indeed is such information available. To do this, certain further information is obtained via the police who in turn must usually do so by obtaining further statements from a person who already furnished statements to them or new witnesses. It is so that continuous multiple statements sought from a specific witness may create an impression that a witness is being intimated to come up with a specific version. However this is not the facts in this matter. It must be borne in mind that there is no suggestion that some witness statements had been withheld from the accused and that only their final statements were disclosed to the accused. This meant that where more than one statement was taken from witnesses the accused persons knew full well what was added to the earlier statements and could cross-examine on this piecemeal process to get the full version of the witness. I am thus of

the view that this alleged 'irregularity', even if it was one, was not material in the context of establishing the guilt or otherwise of accused no. 1.

[33] Many witness statements, if not all, were not properly confirmed under oath and this was the next line of attack on behalf of accused no. 1. This is a disturbing feature in the case and I deal with it in some more detail further in this judgment. It however does not avail accused no. 1 to bolster the submission relating to material irregularities in the proceedings. This is so because these statements, even though technically not affidavits, were discovered to the accused persons; witnesses did testify based on them and were cross-examined based on the contents thereof. The evidence of the witnesses were under oath. This meant that, whereas the witnesses, probably unbeknownst to them, could not have faced criminal consequences for deviating from the statements, their credibility could be tested in the usual manner through cross-examination by reference to the statements. This irregularity simply could have no influence on the outcome.

[34] The manner in which the arrest of accused no. 1 took place was raised as a factor to establish the alleged 'persecution' of accused no. 1. I am satisfied that there is nothing in this point to establish an intention to act against accused no. 1 regardless of his guilt or otherwise. He had closed his business account. The Law Society of Namibia of which he was a member as he practised as a legal practitioner, had been given notice that he ceased to practise and, taking cognisance of the fact that he came to Namibia from Sri Lanka, the police official involved was, in my view, not required to approach other banks to enquire whether they had accounts in the name of accused no. 1. If he is aggrieved by his arrest he had a civil claim in this

regard. The point is that no inference of bad faith can be drawn from the conduct of the arresting officer and, this being so, the manner of his arrest does not bolster the submission that the whole trial against him amounted to a 'persecution' instead of a prosecution.

[35] The aborted plea-bargaining process between the State and accused no. 3 is also raised in this context. I dealt with the issue above and as is clear from what I stated above, there was nothing untoward in the conduct of the State. During the trial, the State withdrew the case against the co-accused of accused no. 1 on count 16. According to counsel for accused no. 1, this is also indicative of the unfair manner accused no. 1 was treated as the accused originally implicated in count 16 (including accused no. 1) were all implicated in acting in concert and with a common purpose but despite this, the State continued with the prosecution against accused no. 1 after withdrawing the case against the other accused. There is no basis for this submission, although the relevant accused were charged with acting with a common purpose they were also individually charged with the offence.

[36] The last two grounds relied upon to make out a case for the alleged irregularity in the proceedings were the lack of credibility of the bank officials with regard to a deposit of N\$11 000 into the bank account of accused no. 1 and the role of the investigators of the MVAf in the police investigation. The complaint relating to the credibility of the bank officials are of no moment as accused no. 1 was found not guilty in respect of the count relevant to their evidence and there is no appeal against his acquittal on that count (count 7). Because of certain information coming to the

knowledge of the MVAF an investigation was launched in respect of certain claims emanating from the office of accused no. 1. This resulted in charges being lodged by the MVAF with the police. So as to identify certain people relevant to the police investigation, the officials of the MVAF on some occasions, accompanied the police to identify persons and were present when police investigations took place and when witness statements were taken. Whereas it may have been undesirable for the officials of the MVAF to be present as stated, there is no evidence whatsoever that their presence somehow prevented the police from doing their work in a proper manner. It follows that the complaint is likewise not supported by any evidence.

Adequacy of grounds of appeal

[37] The grounds of appeal were the subject matter of an attack on behalf of all the accused. The general thrust being that the grounds were so vague that it was impossible to meaningfully respond thereto.

[38] Grounds of appeal should notify the opponent(s) of the case that must be met and the court of the points the appellant intends raising. The grounds must thus not be so widely framed to allow the appellant carte blanche to raise any point, or so vaguely framed that there is no certainty as to the issues raised, or so ambiguously framed that the court and the respondent(s) must guess what is intended.⁵ Thus a ground of appeal to the effect that the conviction was against the evidence and the probabilities or that the State failed to prove its case beyond a reasonable doubt in effect discloses no ground of appeal for the reasons already mentioned.⁶

⁵ *S v Van Heerden & another* 2010 (1) SACR 529 (ECP) para 4.

⁶ *S v Kruger* 1970 (2) SA 233 (N), *S v Matuba* 1977 (2) SA 164 (O) and *S v Horne* 1971 (1) SA 630 (C).

[39] Having said that, the grounds of appeal must be seen in the context of the judgment that is the subject matter of the attack. If it is a one pager and in itself very vague, then the grounds would differ totally from a case where a long judgment which deals in detail with the evidence is concerned. This is so because in the former case the reasoning of the presiding officer may not be clear at all and based on conclusions stated without mentioning the facts supporting such conclusions, whereas in the latter case, the position would obviously be different. One cannot expect an appellant to guess what was relied upon for the conclusions reached, when the factual basis for such conclusions are not stated.

[40] Whereas there may be grounds in the notice of appeal that are so vague as to not constitute proper grounds, there are also grounds that set out the basis of the appeal sufficiently. It will serve no purpose to set out all the grounds save to state that it contains six general grounds in respect of all the counts and thereafter grounds in respect of each and every count. In respect of both the general grounds and the grounds relating to specific counts there is the same general trend. One, and possibly two of the grounds, are not compliant with the requirements relating to grounds of appeal. For example, in respect of count 1, five grounds are raised of which one does not pass muster as a ground of appeal. This is the trend in respect of all the counts appealed against ie there are grounds that do not comply with the requirement relating to grounds of appeal and there are grounds that do comply. The point however is that there is sufficient particularity in the majority of the grounds raised and those grounds are sufficient for the purposes of this appeal.

[41] It follows that the grounds of appeal are not so bad in law as to render the whole appeal invalid. The result thus is that, the appeal is to be dealt with on the merits and that the objection raised against the grounds of appeal cannot be sustained.

The office of accused no. 1

[42] Accused no. 1 was, at all relevant times to the commission of the alleged offences an admitted legal practitioner with his office at Ondangwa. From the evidence, it is clear that he had a reputation in the area for assisting people who had claims against the MVAFA.

[43] Because accused no. 1 could not speak or understand either of the two versions of the Oshiwambo language commonly spoken in the area of his operations, he had to consult with clients through interpreters who had to translate from the local vernacular to English and vice versa during such consultations. To this end accused no. 1 employed four secretaries who fulfilled the dual role of secretaries and interpreters for him.

[44] When a client came to his office, the secretaries would sit in a row behind a table and anyone of them that was available at that time would attend to the client. The secretary concerned would open a file for the client containing basic information such as his or her name, contact number(s), address, occupation and nature of the enquiry on the file. Thereafter the client would be introduced to accused no. 1 for a consultation. One of the secretaries (not necessarily the one that captured the initial

information) would accompany the client to accused no. 1 to act as an interpreter during the consultation between accused no. 1 and the client.

[45] It goes without saying, seeing the role of the secretaries, that their ability to understand and speak English was a prerequisite for their appointment. Accused no. 1 testified that he even used them when consulting clients at court. He expressly mentioned that he used one secretary, namely Monica Denis for this purpose. This is an important factor to take into consideration where the 'lost in translation'⁷ defence is raised.

[46] When it comes to claims against the MVAf, certain standard lists and documentation would be prepared and this was well known to the secretaries. Thus, once a client had consulted with accused no. 1 and the nature of the claim was evident a 'Special Power of Attorney' had to be signed by the client mandating accused no. 1 to institute a claim against the MVAf, to obtain relevant medical records; and to negotiate and compromise the claim with the MVAf. Furthermore, the client had to sign an authority to grant the MVAf access to the relevant medical records. The client was also given a list of documents to collect for the claim such as, marriage certificates, birth certificates of children, post-mortem report, death certificate, driver's licence, report of the investigation officer of the accident etc.

[47] Accused no. 1 would normally lodge a claim with the MVAf under cover of a letter indicating that a claim was being filed with the letter and stipulating all the

⁷ See para [50] of this judgment below.

documents accompanying the claim and setting out a brief summary of the nature of the claim ie that the applicant's claim is as a result of death or is in respect of injuries where death did not result.

[48] In addition to the above, certain circumstances arose frequently for which templates were created for use by the secretaries. Thus, where relatives or friends incurred expenses related to the burial of a person who died in a motor vehicle accident, these could not be claimed by the production of invoices as these persons did not possess businesses and they had to attest to their expenses by way of affidavit. These were persons who transferred the body or who paid for the coffin or covered other funeral expenses. Templates of affidavits were created to claim these expenses. Thus, if a claimant informed a secretary that a relative paid for these expenses or some of it, the secretary would be able to create the appropriate affidavit and hand it to the claimant with the instructions to give it to the person who incurred the expense(s) so as to enable the latter to have it commissioned, normally at a police station. It goes without saying that where such templates are used to produce documents intended as affidavits, accused no. 1 had no personal knowledge of the contents thereof.

[49] Certain issues arose in the trial as a result of the manner in which accused no. 1's office operated.

[50] The first issue that needs mentioning relates to the main defence raised by accused no. 1 and which I shall refer to as the 'lost in translation' defence. Thus, as

will become apparent later in this judgment, a witness will testify that he or she told accused no. 1 something during consultation and accused no. 1 will testify that the witness told him something else. They would then both blame the interpreter which creates a dilemma if the interpreter is not called as a witness. This is a factual issue which I address in more detail when I deal with the charges separately below and where this defence was raised.

[51] The second issue that needs to be mentioned is one relating to documentation forwarded to the MVA. It arises in the following context. A standard claim form is submitted with certain documentation. The documentation is obviously intended to corroborate and support the information contained in the claim form. However, documentation is also (usually later) forwarded to the MVA that, in the details thereof, contradict the information contained in the claim form. Thus, eg the claim form will state the claimant is an unemployed housewife and this will be supported by an affidavit to this effect. In the affidavit accompanying the motor vehicle accident report it will indicate in the introduction thereof the claimant is employed. This discrepancy is not brought to the attention of the MVA. The defence is then raised that there could not have been an intention to defraud because the MVA was informed of the discrepancies as they had the duty to scrutinise all documents forwarded to them and should have noticed the discrepancies.

[52] In my view, there is no basis for the mentioned defence. This is so because there was always a risk that prejudice could be caused and as will become apparent, prejudice was actually caused in certain instances. 'There must be a risk that

prejudice could be caused. It is not required that prejudice would be caused. The risk need not be “reasonably certain” nor “probable”. It is enough that prejudice, which is not “too remote fanciful”, “could have been caused”.⁸

‘It seems . . . that if the representation is so obviously false that in the ordinary course of things it will not deceive anyone, then, provided it is unsuccessful, there is no potential prejudice. . . . Of course if the fraud actually did succeed because of the representee’s extraordinary ignorance of stupidity, there would be actual prejudice and it would be no defence to say that the representee ought not to have been such a fool.’⁹

It is thus, in my view, not a defence to say the discrepancies in the documentation should have been picked up by the officials of the MVA.

[53] Of course if the misrepresentation was of such a nature that the maker was motivated by misplaced humour or failed to see that harm could be caused by such representation that may negative *mens rea*.¹⁰ The same would, obviously apply where, eg one person supplies the false information and the other the true information without knowledge that the false information had also been supplied. In such case the person supplying the true information cannot have the necessary *mens rea* to defraud. Where the person who supplies the true information with knowledge that the false information was also supplied then the question arises as to the supplier of the true information’s state of mind. If the risk of prejudice is foreseen, as I discuss below, the provider of the true information, in such circumstances, remains in trouble.

⁸ J R L Milton *South African Criminal Law and Procedure* 1 ed (1996) vol 2 at 728.

⁹ Milton *supra* at 728 – 729.

¹⁰ Milton *supra* at 729.

[54] In my view, if it is shown that false statements were knowingly made in the MVAF claims and that they were done by or with the knowledge of an accused, this would be sufficient to establish fraud and to attempt to suggest that if the assessor at the MVAF, instead of focusing on the claim form, had trawled through all the documents submitted to the MVAF, he or she would have discovered that there were discrepancies is without merit. If the MVAF acted on the false statement then there was actual prejudice and there was always potential prejudice as these assessors would obviously primarily check to see whether the statements in the claim were supported by the documents referred to in the claim form for this purpose. In fact, as is clear from the facts, these claims were always falsified so as to obtain a larger payout from the MVAF than would be forthcoming had the truth been stated in such claim form.

[55] Furthermore, fraud is committed where a false representation is made 'knowingly, without believing in its truth or recklessly, careless whether it be true or false'.¹¹ To thus make representations in the claim form where one is in possession of documents indicating the contrary and to not draw the MVAF's attention to such discrepancies, is to make a reckless statement in the claim form, in my view.

[56] Accused no. 1 worked on a contingency fee in respect of all the MVAF matters that formed the subject matter of the charges. His rate was between 30 and 35 per cent of the amount (if any) eventually paid by the MVAF in respect of a claim.

¹¹ Milton *supra* at 731.

[57] Before I deal with the individual charges it is apposite that I refer to certain legal principles. Firstly, as it is a criminal matter, the accused's guilt must be established beyond reasonable doubt and not on the balance of probabilities. Thus, if there is a reasonable probability that an accused version may be substantially true such accused must be acquitted.¹² Stated differently, the court must be satisfied that the defence's version is beyond reasonable doubt false to sustain a conviction.¹³ As this appeal involves an attack on the findings of fact made by the court *a quo* it should also be noted that in the absence of demonstrable and material misdirection by the trial court, the factual conclusion by the court *a quo* will be presumed to be correct and will only be disturbed if the recorded evidence shows such factual conclusions to be clearly wrong. Whereas criticism directed at specific witnesses or evidence is, of course, of relevance, this should not lead to a compartmentalisation of the matter and the final conclusion as to the effect of the evidence is to consider the totality of the evidence and the effect thereof.¹⁴ Lastly, on the approach to the evidence, the test when drawing inferences in the criminal law requires the inference to be the only reasonable inference and not the most probable of a number of inferences that can be drawn.¹⁵

Count 1: Fraud – accused no. 1 and no. 2

[58] In this matter the two relevant accused persons were charged with defrauding the MVAf to the tune of just over N\$270 000 being the amount MVAf paid out to

¹² *R v Difford* 1937 AD 370 at 373 and *Hoff v S* (CA 46/2017) [2018] NAHCMD 366 (31 October 2018).

¹³ *Hoff* supra paras 41-43 and *S v HN* 2010 (2) NR 429 (HC) paras 113-114.

¹⁴ *Moshepi & others v R* (1980-1984) LAC 57 at 59F-H and *S v HN* above.

¹⁵ *R v Blom* 1939 AD 202.

accused no. 2 in respect of a claim from her and on behalf of a minor son for loss of support as a result of the death of her husband, the father of her minor son in a motor vehicle accident. The amount was calculated on the basis that accused no. 2 was an unemployed housewife who had no earnings when in truth she was employed as a soldier by the Ministry of Defence (MoD) earning a salary which meant she was the breadwinner of the family and was not entitled to any compensation.

[59] It is clear that accused no. 2 was at all relevant times employed by the MoD and had this been known to the MVAf, they would have paid nothing in respect of the loss of support claim as she earned much more than her deceased husband. It is also clear that in the official claim form she was stated to be a 'housewife'. In one of the letters accompanying the claim accused no. 1 states that accused no. 2 is ' . . . unemployed', and further that 'she does not have the intention to get married again'.

[60] The evidence of accused no. 1 and no. 2 to explain the misrepresentation is a 'lost in translation' one. Accused no. 1 stated that he relied on the instructions he received from accused no. 2 (through interpreters) and accused no. 2 stated that she cannot understand how the false representation came about as she told the interpreter the truth, namely that she was in the employ of the Namibian Defence Force.

[61] Accused no. 2 maintains she told the secretary (Monica Denis) at the office of accused no. 1 that she was employed and she does not know how it happened that the statement presented to the MVAf that she was an unemployed housewife came

about. Accused no. 1 of course states that he was informed through the interpreter that the accused no. 2 was a housewife and did not have any other source of income.

[62] The 'lost in translation' defence was accepted by the judge *a quo* who was of the view that, as the interpreter was not called as a witness, the court could not reject the evidence of accused no. 1 and no. 2 and this is what, in essence, led to the acquittal of these two accused on this charge. For the reasons that follow I cannot agree with this approach which appears to me an oversimplification of the evidence and without a proper consideration of the context of the meaning of 'housewife' in the local vernacular and the level of accused no. 2's competency in the English language.

[63] According to accused no. 2, she did not read the statements prepared in the office of accused no. 1 but signed them without reading them as she trusted accused no. 1 to record what she told him correctly. These statements indicated that she was an unemployed housewife and were used to support this statement in the claim form presented to the MVAf.

[64] The fact that she informed Monica Denis that she was employed is corroborated by Monica Denis who, as the usual practise at the office was adhered to, opened a file for her which probably included an indication that her employer was the MoD. The legal practitioner for accused no. 2 attempted to establish that an error in translation could have taken place as in Oshiwambo the term 'housewife' was in a sense ambiguous. This was however basically destroyed in the context of this witness in cross-examination by counsel for accused no. 1 who first established that her

English was not as bad as was suggested as she was taught in this language up to grade 12; that it was the working language in the army, and she even completed a computer course in this language. She conceded that at the time she engaged accused no. 1 she could read and write English. She understood the word 'unemployed' and with respect to 'housewife' she said '. . . I understood housewife and unemployed to mean the same thing'. In my view, this is the end of the 'lost in translation' defence of accused no. 1 as it is clear that had there been a wrong translation in this regard, accused no. 2 would have picked this up and corrected it and any contrary understanding in the mind of accused no. 1 would have been cleared up.

[65] What about accused no. 2? Did accused no. 1 explain to her that the claim to the MVAF would be premised on her being an unemployed housewife and that her employment with the NDF would not be mentioned as this would adversely affect what she would be paid, or did accused no. 1 simply decide to do this out of his own accord?

[66] As mentioned above, accused no. 2's version is supported by witness Monica Denis. The 'affidavit' drafted in the office of accused no. 1 and deposed to by her before the police witness Kapia however, expressly states in English that 'I am a housewife and do not have any other income'. As indicated, accused no. 2 indicated that this document was not read to her by Monica Denis. She also denied that she informed Monica Denis that accused no. 1 informed her that she must state she is unemployed despite her instructions that she was employed by the NDF.

[67] It has been stated in a contractual context that:

'When a man is asked to put his signature to a document he cannot fail to realise that he is called to signify, by doing so, his assent to whatever words appear above his signature.'¹⁶

This in my view is equally applicable to documents that have nothing to do with contracts and furthermore, it is also applicable to persons who affix their thumbprints to documents. In other words, this can be stated as a general rule as far as this matter is concerned. Accused no. 2 obviously realised this and this is why she stated that she did not read the statements herself, nor were the statements indicating that she was an unemployed housewife read to her. This is in relation to the two statements made to Kapia in both of which she stated that she was unemployed. She denied having said this or that it has been read back to her prior to her signature. As pointed out by counsel for accused no. 1 in cross-examination, she did not take the statement she received in the office of accused no. 1 for commissioning to the Ondangwa Police Station which was close to the office of accused no. 1, but took it to Oshivelo as, according to her, she wanted to do it in front of Kapia who dealt with the case. It is highly unlikely that she would not have read the statement en route to Oshivelo from Ondangwa.

[68] It is clear that accused no. 1 and no. 2 attempted to not incriminate each other. The problem is one of 'lost in translation'. Thus accused no. 2 says she informed

¹⁶ *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) at 472A.

accused no. 1 that she was employed but did this through an interpreter and her legal practitioner attempted to lay a basis for this misunderstanding as discussed above. Accused no. 1 says his instructions via the interpreter were that she was indeed an unemployed housewife but he, of course, cannot say what the interpreter told him was the correct translation of what the interpreter was told.

[69] In my view, a case has been established against both accused no. 1 and no. 2. Accused no. 2 could not have known that it would make a material difference to the amount she could claim if she stated to the MVAf that she was unemployed. Thus, she initially informed Monica Denis that she was employed by the NDF. This is confirmed by Monica Denis. Thus, it is highly unlikely that she did not inform accused no. 1 of this fact. Indeed she said she did. From what I have stated above, this fact could not become 'lost in translation', to read 'unemployed housewife'. Here the working knowledge of the English language of accused no. 2 was such that she would have corrected the interpreter if the interpreter translated 'employed by the Namibian Defence Force' to mean 'unemployed housewife'. It could only have been accused no. 1 who, at that stage, as between the two of them, knew in law that it would be more beneficial for her to state to the MVAf that she was unemployed. Did he discuss it with her and did she go along with this then? The evidence indicates that she did. She made two statements to this effect. Whereas the first one can be explained to some extent that she just mentioned where she lived as a housewife. The second one was created in the office of accused no. 1 (which on his own version would have been scrutinised by him) and made it quite clear that this was for a claim against the MVAf. As the practise was that statements got read to clients, Monica

Denis probably read it to accused no. 2, but even if she did not, why did she take it away to Oshivelo and not have it commissioned in Ondangwa? Furthermore, she must also have read it on her way to Oshivelo as she clearly knew she was going to sign it and what it meant. She knew it would be used in the claim filed with the MVAf and signed it 'recklessly, careless whether it be true or false'.

[70] The defences based on the fact that the inquest record forwarded to the MVAf indicated that she was employed by the MoD and that the affidavit in relation to the identity of her late husband, is without merit in view of what I set out when regard is had to the facts. Affidavits in statements not directly related to the claim lodged with the MVAf indicates her true status but those specifically created to support her claim states that she is an unemployed housewife. It is true that the evidence is clear that accused no. 1 is the person that played the leading role in the false representations being made to the MVAf but accused no. 2 was aware of this and associated her with this course of conduct and, as is evident, she received an amount from the MVAf in excess of what she should have had they acted on the true position.

[71] As far as count 1 is concerned a further false presentation alleged related to the income of the deceased husband of accused no. 2. That this statement was false was not established. On the contrary the facts indicate that he probably did earn the N\$3050 per month that was presented to the MVAf.

[72] In the result, accused no. 1 and no. 2 should have been convicted on count 1 as their guilt on this count was proved beyond reasonable doubt.

Counts 2 – 6: Accused no. 1 and no. 3

[73] These charges relate to a claim filed with the MVAf by accused no. 1 on behalf of accused no. 3. As mentioned in the introduction accused no. 3 passed away subsequent to the end of the trial but prior to judgment being given.

[74] I do not deem it necessary to deal with these charges at length. For completeness sake it should be mentioned that count 2 avers that accused no. 1 and no. 3 made false representations to the MVAf in respect of accused no. 3's relationship to a deceased person (Petrus Shigwedha) and falsely claimed that accused no. 3 was the guardian of the deceased's eight year old daughter in a claim of N\$186 029,92 filed with the MVAf and hence committed fraud against MVAf. Further misrepresentations related to alleged expenses incurred in the burial of the late Mr Shigwedha and in relation to earnings of the late Mr Shigwedha.

[75] As far as the relationship between the late Mr Shigwedha's daughter and accused no. 3 is concerned this was conveyed to accused no. 1 by accused no. 3. There is no evidence to suggest that accused no. 1 should have had any reasonable doubt what he was informed by accused no. 3.

[76] What is left is forged signatories and false affidavits with regard to payments in respect of the funeral expenses of the deceased Petrus Shigwedha allegedly made to Petrus Abiater and Jusso Nkandi. There is however no link to accused no. 1. The salary of the deceased was not inflated in this claim to the MVAf and the funeral

expenses totalling to N\$2000 falsely claimed is of so little moment that it is unlikely that accused no. 1 would have used this to bolster the claim for his personal benefit. In any event there is also no evidence that accused no. 1 had any say or influence on the false statements being obtained and supplied in this regard.

[77] In my view, accused no. 1 was correctly acquitted on these counts. I cannot accept the submissions by the State in respect of these counts that accused no. 1 had a duty to check the veracity of the instructions or that he had a duty to check the authenticity of signatures on the affidavits or the veracity thereof where these were in essence affidavits drafted from usual templates based on instructions and handed over to accused no. 3 to provide to the intended deponents so as to have them commissioned. It is not the duty of a legal practitioner to question instructions unless there arises something that calls for such course of action. Nothing of this sort happened in this matter and accused no. 1 cannot be faulted by acting on his instructions. In my view he was thus correctly acquitted on these counts.

Count 7 and 8: Accused no. 1

[78] These counts relate to a claim handled by accused no. 1 on behalf of Wilhelmina Haipya. It is alleged that accused no. 1 stole N\$36 255,27 from Ms Haipya when he arranged for cash payment for her after her MVAf claim was accepted and a payment was made by the MVAf in respect thereof (count 7). Count 8 is a count of attempting to defeat or obstruct the course of justice in that accused no. 1, when he heard there was an investigation into claims against the MVAf lodged

by him on behalf of clients, informed Ms Haipya to tell the investigator(s) that she was satisfied with the payment made to her.

[79] Ms Haipya was a client of accused no. 1 who instituted a claim for a loss of support with the MVAFF on her behalf after the death of her husband in a motor vehicle accident. Ms Haipya is a semi-literate person who worked as a cleaner at a school.

[80] The MVAFF paid an amount of N\$389 008,10 to the trust account of accused no. 1 in settlement of the claim of Ms Haipya. Ms Haipya was called to the office of accused no. 1 where she was informed of the amount awarded to her. At the office accused no. 1 drew two cheques. One in favour of Ms Haipya in the amount of N\$250 255,27 and one in favour of himself to make up the balance of the total amount which represent his agreed fee, ie N\$134 752,83.

[81] Accused no. 1 accompanied Ms Haipya and Monica Denis to Standard Bank where Ms Haipya would receive her money in cash as she had no bank account. Because of the amount involved the teller, after identifying Ms Haipya and clearing this with his manager, arranged for them to go to a separate room. Accused no. 1 also indicated that he wanted his cheque drawn in his favour to be paid out in cash. In this room the money was separately counted and handed to the respective recipients.

[82] Accused no. 1 instructed Ms Haipya to put her money in her bag which she did and accused no. 1 put his money in a briefcase. They then left in the car of accused

no. 1 to Swabou where he already arranged for the manager to open accounts for Ms Haipya. After the introduction, he left Ms Haipya and Monica Denis behind to attend to the opening of the account.

[83] At a later stage when the matter was investigated it appeared that, from Standard Bank up to the point where the accounts were opened at Swabou N\$36 255,27 had disappeared. In other words, if the total amount of the cheques are taken as a starting point then what was deposited (taking into account the N\$4000 given to Ms Haipya) at Swabou was N\$36 255,27 less than what should have been deposited if it is accepted that the correct amount was handed to Ms Haipya at Standard Bank.

[84] How the N\$36 255,27 disappeared remains a mystery. The evidence with regard to the counting process and all the persons involved were so inconclusive that the State did not appeal the acquittal of accused no. 1 on count 7 and I do not deal with this count any further. The relevance of the above summary will become apparent when I deal with count 8 below.

[85] When accused no. 1 came to know about the investigation he contacted Ms Haipya and informed her that she must tell the investigators that she is satisfied with the money she received. Monica Denis confirms this. Accused no. 1 says he contacted all his clients to inform them they must refer the investigators to his office as he had all the records.

[86] Accused no.1's explanation as to what he allegedly told his clients can, in my view, be safely rejected. Why would he inform all his clients when not all of the clients would necessarily be investigated. It is highly unlikely that he would broadcast over the radio (which is the manner in which he normally used in respect of clients who lived where there was no cellphone reception) that he was being investigated and that clients must refer the investigators to him. More to the point, why would he inform Ms Haipya, that she should inform the investigators that she was happy with the pay-out if he did not know that she had an issue with it or that there was a problem in this regard? That he would have informed all the clients is highly unlikely. Hence, the question arises why only some clients? How would he know which clients would potentially be of interest to the investigators and incriminate him with some wrong doing? Why contact Ms Haipya if he did not suspect there was an issue with regard to the payment to her?

[87] Although it is not clear, it seems to me that Ms Haipya herself did not even realise there was a problem with her payment prior to this being pointed out to her during the investigation.

[88] Even, accepting for the moment, that accused no. 1 only wanted to avoid the inconvenience of having to discuss the case of Ms Haipya with the police as he did nothing wrong in respect of her claim his conduct was such to attempt to obstruct or defeat the course of justice. In the circumstances it was not a serious offence but it nevertheless constituted an offence. It was not correct as submitted on his behalf and

accepted by the court *a quo* that an acquittal on count 7 would automatically also amount to an acquittal on count 8.

Count 9: Accused no. 1 and no. 4

[89] In this count it is alleged that the relevant accused committed fraud in that they represented in a claim to the MVAf that accused no. 4 lost his right hand in a motor vehicle accident and that, at the time, accused no. 4 was a civil servant earning just over N\$4100 per month. This in circumstances where the evidence proved that accused no. 4 lost his arm long prior to the accident and was unemployed.

[90] This claim arose from a vehicle accident that occurred on 21 December 1999. Accused no. 4 suffered neck injuries. A claim was lodged with the MVAf indicating that he had lost a hand and on the basis that he was a civil servant who earned N\$4179,25 per month.

[91] It is common cause that the loss of the right hand occurred as a result of a snake bite when accused no. 4 was a child and that he was unemployed at the time of the MVAf claim. Accused no. 4 was attended to initially by Monica Denis. He informed her that the loss of his hand was not caused by the accident relevant to the claim he wanted to institute. She, as was the practise, referred him to accused no. 1. Accused no. 4 is illiterate. The power of attorney indicates an instruction to investigate 'an incident which occurred on 21 December 1999 in which I was injured and lost my right hand'.

[92] The MVAF claim indicates that accused no. 4 is a self-employed bricklayer. However, his monthly earnings are stated to be N\$4179,25. It indicates further that he suffered from no physical defects prior to the accident and a claim for general damages of N\$200 000 is made. Photos of accused no. 4's upper body were also forwarded to the MVAF indicating the fact that accused no. 4 had no right hand. (When this claim was not dealt with promptly and it became apparent that the MVAF had issues with it accused no. 1 amended the claim to N\$25 000).

[93] In respect of count 1, the 'lost in translation' defence is again raised. Thus, accused no. 4 who is illiterate and spoke via a secretary as an interpreter insists that he never informed anyone that he lost his arm in the accident of December 1999. Accused no. 1, of course, heard differently.

[94] The cross-examination by counsel for accused no. 4 focused on a difference between losing a hand and an arm in Oshiwambo to attempt to show how interpreters can make errors. In view of the photos this is largely irrelevant. There is no basis, other than speculative, as to how 'I did not lose my arm in the accident' can be translated to 'I lost my arm in the accident'. The chances that the secretary who interpreted this part of the consultation between accused no. 1 and no. 4, having regard to what I have already stated in connection with the general qualifications relating to the English language is highly unlikely. Accused no. 4 is an illiterate person who would have used the very common expressions in this regard and for an interpreter whose home language was the same as that of accused no. 4 to misunderstand him can safely be rejected.

[95] Accused no. 4's mother (Helena Alweendo) testified that accused no. 4 'never worked in his life'. Yet the document to support this MVA claim is a document relating to his brother's salary as a civil servant. He testified that he always walked around with a briefcase and he gathered all the documents he could find at his home and presented it to the secretaries at accused no. 1's office where they picked out this document. He, of course, seeks to hide behind the fact that he is illiterate, in this regard. This explanation is so fanciful that it can also be rejected without further ado.

[96] Whereas it can be accepted that he signed the MVA claim form without reading it and maybe even before it was completed by accused no. 1, seeing the practise in the office, the question is why he thought it was necessary for naked upper body photos indicating that he lost an arm if he wanted to claim for neck injuries? Why was no photograph taken to indicate such injuries if there were any? In addition with the proof of income, he clearly must have known that he sought to bolster his claim with a document relating to his brother. Accused no. 4 must have known this salary slip would be used to bolster his claim as there was no other reason for him to produce such document.

[97] Furthermore, accused no. 4's case is only stated in cross-examination. There is no plea explanation and also no evidence from his side.

[98] Accused no. 1 says that accused no. 4 told him he lost his arm in the accident. That is what he heard through the interpreter. Because of standard procedures, the

secretary must have asked him for a photo as proof thereof and in fact states that where there is a loss of limb the MVAf requires such photographs. In my view, the reliance on the misunderstanding in translation can safely be rejected. Monica Denis had no problem in this regard and it is also not explained how a simple question in the MVAf claim ie 'Was he/she suffering from any physical defect or infirmity immediately prior to the accident' would not have elicited the same answer as the one given to Monica Denis.

[99] It is also extremely unlikely that accused no. 4 would have produced his brother's payslip unless someone informed him it would increase the pay-out from the MVAf. As already mentioned, he is an illiterate person and would have no inkling as to the requirements to file a claim with the MVAf. There is only one person who could advise this course of action and that was accused no. 1.

[100] Once again, certain documents were sent to the MVAf (medical passport and accident report) that should have alerted them (and maybe it did) that there was a problem with the claim. Accused no. 1 also eventually wrote a letter to state that the claim was limited to N\$25 000 as accused no. 4 was a passenger. In my view, as already stated, this does not mean that there was no potential prejudice nor that there was no intent to defraud when the claim was lodged with the MVAf.

[101] The case of accused no. 4 is similar to that of accused no. 2 from which it is clear, in my view, that accused no. 1 was not averse to defrauding the MVAf if he thought he could get away with it. It was also obviously to his benefit as his fee would

increase where the pay-out increases and he thus manipulated this amount to make the claim worth his while. In the case of accused no. 2, he realised he would get virtually nothing if she was the breadwinner and in the case of accused no. 4 he realised the neck injuries which were clearly not serious and would obviously not render the same return as a lost arm. The approach is also evident from his conduct in the Nangha-case (count 15 with which I deal below).

[102] As far as this count is concerned, the defence of 'lost in translation' was accepted by the court *a quo* and both the accused persons were acquitted on the basis that the interpreter was not called and, hence, a case was not made out. For the reasons articulated above, I am of the view that the approach of the judge *a quo* was over simplistic and a proper approach to all the evidence meant the failure to call the interpreter was not fatal to the State's case and that the accused should have been convicted in respect of these charges.

Counts 10 and 11: Accused no. 1

[103] These counts relate to a claim against the MVAf by Sofia Katilamawe in relation to the death of her late husband, Thomas Kamati. Accused no. 1 is accused of working in concert with the late Filemon Nikanor Kamati to defraud the MVAf, and of forgery and uttering in respect of affidavits forwarded to the MVAf in support of the claim.

[104] It was established that the affidavits in support of the funeral expenses were false and so were the signatures on it. These affidavits were on the face thereof

deposed to by Otto Petrus in respect of the erection of the tombstone and by Eino David in respect of the transporting of the body. The amounts claimed were N\$2500 and N\$1500 respectively. As mentioned these 'affidavits' were forwarded to the MVAF in support of the claim of Ms Katilamawe in circumstances where it cannot be said that accused no. 1 was aware that they were in fact forgeries. Accused no. 1 was however informed at a later stage that the affidavits were forgeries by Mr Jesaya Shivute who was the person who actually incurred the funeral expenses. Mr Shivute also informed accused no. 1 that the deceased Thomas Kamati was married to someone else at the time of his death. These revelations did not disturb accused no. 1 who informed Mr Shivute that, as the claim had already been filed, it must not be delayed or something to this effect. It should have been obvious to accused no. 1 when this came to his knowledge that the funeral expenses he forwarded to the MVAF were based on forged affidavits and there could be an issue with regard to the fact that the deceased was civilly married to one person and in customary marriage with Ms Katilamawe. This meant that there were potential claimants in respect of the death of Mr Kamati from his other wife and children. In fact, it would be surprising if this is not the reason why Mr Shivute consulted him simply to be told that nothing could be done at that late stage. Accused no. 1 as legal practitioner must have known that he had to bring these new facts to the notice of the MVAF but decided not to do this and, in so doing, presented to it that the claim in respect of the funeral expenses was a valid claim when he knew it was based on forged affidavits. He even, after the forgeries came to his knowledge, sent one of those affidavits to the MVAF under cover of a letter so as to motivate the claim filed with the MVAF. He thus knew that he misrepresented the facts to the MVAF as they would assess the claim on the basis of

forged affidavits in respect of the funeral expenses. It follows that accused no. 1 should have been convicted of fraud of N\$4000 (N\$2500 plus N\$1500) in respect of count 10 as this count was proven beyond a reasonable doubt against him as is evident from the reasons set out above.

[105] Whereas it is correct that the findings of the court *a quo* had to lead to an acquittal on count 11 (forgery and uttering) it was unfortunately not the case in respect of the fraud claim as found by the court *a quo*. The question is whether accused no. 1 was under a duty to inform the MVAF of what came to his knowledge, i.e. the fact that the claims for funeral expenses he submitted were false and it is obvious that the MVAF should not have to pay it out. Was he supposed to tell the MVAF about the first wife and other dependants? It seems that the MVAF was happy to entertain the claim on the basis that the deceased and Ms Katilamawe had entered into a customary marriage. What they would have done, had they been informed that the deceased was at the time of his death still married in terms of the civil law to someone else and how this would affect payment by it to the dependants created by both marriages was not canvassed at all. In the circumstances it cannot be said beyond reasonable doubt that this would be prejudicial or potentially prejudicial to the MVAF (as opposed to the Shivute dependants). As accused no. 1 was not, at the time the forged affidavits were presented to the MVAF, aware that they were forgeries he was correctly acquitted on count 11 (forgery and uttering).

Counts 12 to 15: Accused no. 1, no. 5 and no. 6

[106] These counts relate to a claim lodged by accused no. 1 with the MVAf on behalf of Ndinelao Nandikale Nangha who was the mother of accused no. 5. I say Ms Nangha was the mother of accused no. 5 because, although the claim was lodged on 25 September 2000, Ms Nangha passed away on 19 February 2001 when the claim was still pending. As is evident from what is stated in the introduction above, accused no. 6 passed away during the course of the trial and his guilt otherwise is not necessary to determine.

[107] The death of Ms Nangha meant that her claim for loss of support would be reduced as she would only be entitled to support up to the date of her death. The MVAf was never notified of the death of Ms Nangha and thus made a payment on the basis that she was still alive. As the payment was to be made to Ms Nangha someone had to represent herself as Ms Nangha. This role was played by her sister Hilma Christiaan who presented herself at the bank as Ms Nangha on the instructions of accused no. 5. This is the fraud against the MVAf relied upon by the State (count 12). In addition, two affidavits prepared and purported to be signed by Ms Nangha were used in the processing of the claim. These affidavits are clearly forgeries as they were commissioned after the death of Ms Nangha and thus could not have been commissioned by her as they purport to be. One was an affidavit to establish the earnings of the late Erastus Shindume, the deceased husband of Ms Nangha. This is the basis for the charge of forgery and uttering in count 14. The second was an affidavit purported to be signed by Ms Nangha in which she accepted the offer of settlement of the matter as proposed by the MVAf. This is the basis of a further count of forgery and uttering, namely, count 15.

[108] Count 13 is a charge of theft by conversion based on the fact that the N\$75 906 paid in respect of this claim was not paid to the estate of Ms Nangha, namely, the Shindume children, but to accused no. 5.

[109] Accused no. 5 testified that he informed the secretary of accused no. 1, Monica Denis, of the death of Ms Nangha and provided her with the death certificate as well as a certificate indicating that he had been appointed as the executor of her estate. She took the death certificate from him and went to accused no. 1 with it. She came back from accused no. 1 and told him that he must not tell anyone about the death of his mother and returned the death certificate to him. He was later informed that the payment in respect of the claim was available. As his mother had passed away her sister (his aunt) Hilma Christiaan was now regarded as his mother in the Oshiwambo custom. He thus persuaded her to stand in for his deceased mother so that payment could be made to her. This was then arranged. He admitted that he used his thumbprint in one of the affidavits purporting to be deposed to by Ms Nangha (count 15). The other affidavit purporting to be that of Ms Nangha (count 14) was also marked by a thumbprint but the fingerprint expert could not identify whose print this was. Accused no. 1 maintained he was unaware of the death of Ms Nangha and as he was presented with the affidavits after they had already been commissioned he forwarded this in good faith to the MVAf without knowledge that they were false. According to him, when Ms Christiaan presented herself to receive the payment from the bank, he thought that she was Ms Nangha.

[110] The court *a quo* accepted the versions of accused no. 1 and accused no. 5 and acquitted them both on the counts under consideration. According to the court *a quo*, accused no. 5 lacked the necessary intent as he thought of Ms Christiaan as his mother and the version of accused no. 1 could not be rejected as Monica Denis was a single witness whose credibility was highly questionable and there was no corroboration for her evidence in respect of this count. There was, according to the court *a quo*, also no indication that accused no. 1 knew that the relevant affidavits were forged.

[111] I am afraid the version of accused no. 1 breaks down at the outset. It is quite evident, in my view, that accused no. 5 came to the office of accused no. 1 to present accused no. 1 with the death certificate of the deceased and the document indicating that he was appointed executor. The evidence of accused no. 5 and Monica Denis is to the effect that, Monica Denis went to the place where accused no. 1 was sitting in the office with this document to show it to accused no. 1. When she returned, she informed accused no. 5 that she was instructed to tell him that it was too late to change the claim and that he should not tell anybody about the death of claimant. The court *a quo* was thus not correct when it stated that the evidence of Monica Denis was uncorroborated. It is in fact corroborated by accused no. 5. Monica Denis, as a secretary probably did not know the significance of the death of Ms Nangha in respect of the claim lodged by her against MVAf and she had to consult accused no. 1 before she could respond to the information given to her by accused no. 5. She, on her version and that of accused no. 5, approached accused no. 1 with the death certificate. When she came back after a discussion with accused no. 1 she informed

accused no. 5 that the advice of accused no. 1 was that he should not tell anyone about the demise of his mother and handed the death certificate back to him. To suggest that she did this without discussing this matter with accused no. 1 can safely be rejected, in my view.

[112] Once it is established that accused no. 1 was informed of the death of Ms Nangha, as I have found, it follows in the train of this finding that accused no. 1 knew that the 'affidavits' purported to be deposed to by Ms Nangha after her death were forgeries and that he submitted them with the knowledge that they were forgeries. It further follows that accused no. 1 knew that Ms Christiaan was not Ms Nangha and that payment to her from the bank was based on a deception to the bank that Ms Christiaan was indeed Ms Nangha. Ms Christiaan went to the bank without her photo ID but presented the birth certificate of her late sister (Ms Nangha). This, in my view also clearly shows the hand of accused no. 1 who arranged for the visit to the bank although he did not accompany Ms Christiaan and accused no. 5 to the bank. Furthermore, when accused no. 1 received the offer of settlement from the MVAf in respect of the claim of Ms Nangha he already knew she had passed away. Despite this, the normal affidavit was prepared in his office indicating that Ms Nangha accepted the offer and 'commissioned'. There must have been some discussion between accused no. 1 and no. 5 as to how one was supposed to have an affidavit commissioned when the person indicated as deponent is not alive. It is clear that both accused no. 1 and no. 5 knew that, for them to obtain payment, these affidavits have to be forged.

[113] Accused no. 5, despite averring that he only acted on the instructions of accused no. 1, cannot in my view plead ignorance. His version is that as he had already informed accused no. 1 that the claimant had died, he got his aunt to accept the offer by the MVAf and, to obtain payment as she was now regarded as his mother, can only go so far. It cannot explain why she was presented with the deceased's birth certificate to obtain payment. Whereas he may be innocent in the failure to advise the MVAf of the death of Ms Nangha because of the advice received from accused no. 1, he clearly is guilty of the forgery and uttering charges with accused no. 1. He must have known that, if he told the bank that Ms Christiaan was not the person mentioned as the recipient for the payment, the bank would have refused to make this payment. He thus persuaded Ms Christiaan to pretend she was Ms Nangha. If he thought there was nothing wrong with his course of action as Ms Christiaan was now his mother by virtue of custom why did he not simply inform the bank of this fact? The answer is obvious. Payment would not have been made.

[114] Count 13 is theft by conversion and relates to the fact that the money paid out in respect of Ms Nangha's MVAf claim was not held in trust on behalf of the deceased's children. It seems this money was given to accused no. 5 who, amongst others, bought a vehicle after consultation with the family to be used as a taxi for the benefit of the family. This does not cover the full amount eventually paid to accused no. 5. In this regard accused no. 1 cannot be visited with the necessary intent as this incident with the payment of the car was based on the assumption that this would be to the benefit of the family. The same position applies, in my view to accused no. 5 in respect of the car. As far as the balance of the money paid to accused no. 5 is

concerned he cannot escape a conviction on count 13 as the intended beneficiaries received nothing. This means the amount involved in the theft by conversion charge is N\$24 000.

[115] It follows that the guilt of accused no. 1 and no. 5 was established beyond reasonable doubt as far as counts 12, 14 and 15 are concerned and that accused no. 5's guilt in respect of count 13 was also established beyond reasonable doubt, save that in respect of count 13 the amount involved was only N\$24 000.

Count 16: Accused no's. 1, 7, 8, 9, 10, 11, 12 and 13

[116] This charge relates to a claim lodged with the MVAf in respect of damages caused to accused no. 7 (David Shikale) flowing from injuries he sustained in a motor vehicle accident which caused the MVAf to make payment to accused no. 1 of N\$2 864 099 for the credit of accused no. 7. As is apparent from the introduction to this judgment, accused no. 7 passed away during the trial. Accused no. 9 was absent during the trial and the prosecution was stopped against accused no. 10, 11, 12 and 13 during the trial. It is thus only the position of accused no. 1 and no. 8 that needs to be considered in respect of this count.

[117] This count involves a claim by David Shikale arising from a motor vehicle accident on 13 September 2000. Accused no. 1 was approached at a late stage and after a claim had already been lodged with the MVAf on behalf of David Shikale assisted by Aaron Shikale. Allegations were levelled at David Shikale that he misrepresented his income to the MVAf by, among others, indicating that he was the

owner of the 'Push-and-pull bar' when he was not. Issues were also canvassed about the capacity of David Shikale who would have been accused no. 7, had he not passed away prior to the commencement of the trial. The possibility that the earnings and ownership of the bar was not misrepresented cannot be excluded and no conviction can ensue in respect of these issues in my view.

[118] The material allegations in respect of this claim relate to events prior to the involvement of accused no. 1 and involves the conduct of accused no. 8 who was a policeman at the time. There is no evidence to suggest accused no. 1 had any contact with accused no. 8 prior to being approached for assistance to expedite the claim already lodged with the MVAf. It follows that accused no. 1 cannot be associated with the conduct of accused no. 8 in this regard and he was thus correctly acquitted in my view. Accused no. 8 allegedly fabricated an accident report involving a car in which Mr David Shikale was not a passenger and which indicated that another car (fictional) was the cause of the accident in which Mr David Shikale was injured.

[119] Accused no. 8 was a member of the Namibian Police at all relevant times in relation to the lodging of a claim with the MVAf in respect of a motor vehicle accident in which Mr Shikale was involved. Accused no. 8 filed an accident report indicating that the accident happened on 13 September 2000 on the Oshakati – Omungwelum gravel road when a minibus driven by Petrus Nekundi overturned as a result of it being hit from behind by a Toyota Hilux bakkie which collision caused serious injuries to Mr Shikale who was a passenger in the minibus. In fact, Mr Shikale became a

quadriplegic as a result of the injuries he sustained. According to the claim, Mr Shikale was treated at the Oshakati State Hospital. Accused no. 8 also drew a sketch plan in respect of this accident. As mentioned above, based on this scenario, the MVAF eventually settled the claim of Mr Shikale for an amount in excess of N\$2,8 million.

[120] Upon investigation it appeared that the car that belonged to Mr Nekundi (who allegedly drove the minibus) with the same registration number as that mentioned in the accident report of accused no. 8, had not been in running order since 1996 and had been standing at Nekundi's house since that date. The damages evident to the stationary vehicle also did not correspond with those described in the accident report. In fact, the registration number of this stationary vehicle had, according to the official records, been allocated to another motor vehicle prior to the accident described by accused no. 8. It further turned out that Mr Shikale was a passenger in an Opel Kadet vehicle (and not a minibus) which was involved in an accident on a road between Oshivelo and Ondangwa. From the records kept at the Onandjokwe Hospital and the evidence of some of the nurses who were present when Mr Shikale was admitted, it is also apparent that Mr Shikale was involved in an accident between Oshivelo and Ondangwa. It needs to be mentioned that Onandjokwe Hospital is about 5 km from the location of the accident reported by accused no. 8 whereas the Oshakati Hospital is about 60 km from that location.

[121] Mr Thomas Uuanga testified that he was the driver of a white Opel Kadet vehicle when he hit a cow at about 19h00 just before Omuthiya on 13 September

2000. Mr Shikale was a passenger in his car. Mr Thomas woke up the next day in the Onandjokwe Hospital, which was the nearest hospital to the scene of the accident, and saw that Mr Shikale had also been admitted to this hospital.

[122] The police officers on duty on the day of the accident testified that accused no. 8 did not report the accident on that day otherwise it would have appeared in the 'Occurrence Book' and 'Report Received Book' in its proper place. The entry relating to the alleged accident was squeezed in subsequently in an open space in the relevant book which was supposed to be kept open. Significantly no docket in respect of the alleged incident could be found.

[123] The reason for falsifying an accident is clear. If the real accident was reported to the MVA, Mr Shikale's claim would have been limited to N\$25 000 as there was no other vehicle involved. The inference is inevitable that Mr Shikale (accused no. 7) and accused no. 8 falsified the accident report and misrepresented the position to the MVA to increase the amount Mr Shikale would be entitled to and hence with an intent to defraud the MVA in which they succeeded to the tune of N\$2 839 099 (N\$2 864 099 – N\$25 000).

[124] Accused no. 8 of course, insisted in his evidence that he did not falsify the accident report nor did he irregularly insert the fact of the accident he avers happened into the relevant police books. The documentary evidence, coupled with the other evidence from the personnel at the hospital, the police officers at the police station on the day of the incident, as well as objective facts relating to the accident in which the

Opel Kadet was involved, the evidence of the driver of the Opel Kadet that Mr Shikale was a passenger in his car and that the Onandjokwe Hospital was the obvious care centre in the circumstances, is so overwhelming that the evidence of accused no. 8 can safely be rejected.

[125] It was submitted on behalf of accused no. 8 that he simply acted on the information supplied to him and thus did not or could not have knowledge of the correctness or otherwise of the information provided to him. This is however not correct. On the version of accused no. 8 he visited the accident scene on 13 September 2000 and from the scene made telephonic contact with the police station to obtain a case number. That accused no. 8 on the day of the accident telephonically contacted the police station for a case number can safely be rejected on the evidence from the police officers on duty at the time and referred to above. Accused no. 8, on his own version, did not simply rely on what he was informed but in fact attended to the scene of the accident from which scene the alleged phone call to the police station was made. From the evidence it is abundantly clear that the accident scene he refers to in his report is fictional and he must have been aware of this. The driver he refers to was not the driver; the car he refers to could not have been on the scene; and there also could not have been any indications at the alleged scene of the accident he described in his accident report. The whole report was a fabrication and he knew it.

[126] The court *a quo* acquitted accused no. 8 on the basis that there was no proof that he acted in concert with accused no. 1 and, as the charges against accused no.

9, no. 10, no. 11, no. 12 and no. 13 had been stopped, the State failed to prove its case against accused no. 8. I must confess I do not understand this line of reasoning. Accused no. 8's role had to be assessed individually and once this is done, his guilt was established beyond any reasonable doubt as I have indicated above.

Observations relating to the conduct of the trial

[127] As indicated above the trial was a prolonged one interrupted by numerous postponements and also disruptions because of the many legal practitioners involved whom the judge *a quo* sought to accommodate. Not surprisingly, the legal practitioners raised many objections against the manner in which the evidence was led and to the admission of certain evidence. It is necessary that some of these procedural issues be commented on so as to restate certain principles that should have been adhered to, but were not, so as to ensure that these matters are correctly approached in future. I must point out that, apart from the legal representative for the State and accused no. 1 none of the other counsel who appeared in this court appeared for them in the court *a quo*.

[128] An objection was raised when the investigator of the MVAF gave evidence as to what motivated him to pursue the issues that became the subject matter of the charges in this prosecution. The objection was that it was hearsay and/or that he was summarising what other witnesses had already stated and was wasting time. He was then not allowed to proceed on this basis. Firstly, as the evidence was not presented as proof of its contents but to explain why he pursued the investigation it was not inadmissible hearsay. Secondly, as it was suggested on behalf of accused no. 1 that

he was busy with a witch-hunt against accused no. 1, his evidence and his motive for persisting with the allegations were highly relevant.¹⁷

[129] Whereas the focus in criminal trials is usually on fairness to the prosecution and the accused, this must be done within the confines of the well established procedures and cannot exclude the way the witnesses are treated. They are not simply to be dealt with at the convenience of the defence. The court oversees the process and can deviate from the normal parameters where this is justified but it must be careful to ensure that witnesses are not simply thrown under the bus. This applies even if this is by agreement between the prosecution and the defence, as happened in this matter. Thus, to call a witness to give evidence and be cross-examined on some charges and then let him or her stand down to come back one or more times where the same procedure in respect of other charges are followed because this is convenient for the prosecutor and apparently even more so for the defence is simply unheard of. This amounts to oppressive conduct towards such witnesses and is tantamount to allowing such witnesses to be worn down and to be harassed to exhaustion.¹⁸ A witness, when called, must testify about everything he or she knows and that is relevant to the matter before court. The fact that this may be inconvenient for the parties or their legal practitioners concerned is not a reason to deviate from this rule. There must be a better reason to allow, what is normally a harrowing experience for a witness, to be multiplied at the convenience of the legal practitioners representing the parties.

¹⁷ *R v Miller & another* 1939 AD 106 at 119.

¹⁸ *Bagley v Cole* 1915 CPD 776 at 780.

[130] The normal order of cross-examination in criminal cases is that counsel for the accused cross-examine in their order. Thus, counsel for accused no. 1 will start, thereafter counsel for accused no. 2 and so on. The same applies when the accused or their witnesses testify. In this case, counsel for accused no. 1 on occasion simply informed the court that the counsel for the other accused will first cross-examine and he will do so thereafter as his cross-examination will be lengthy. This is unheard of and should not have been allowed. It was done simply because he (and accused no. 1) would benefit from this as he would then know what was put on behalf of the other accused in respect of their involvement and the involvement of accused no. 1.

[131] Cross-examination should be conducted with restraint and dignity and whereas it is not always easy to determine when it is not, as the general rule is to afford the cross-examiner a wide latitude, there comes a point when the court should interfere and this is especially so when a witness has been so worn down that it is clear a decision has been made to simply concede the propositions so as to end the cross-examination to avoid the issue being raised for the umpteenth time. For the cross-examiner to, after endless cross-examination uphill and down dale, to refer to the witness as 'sweetheart' is totally unacceptable and should not have been countenanced. This kind of patronising and condescending attitude has no place in the courts.

[132] Objections were raised when the prosecutor sought a postponement during examination-in-chief to consult with the witness in respect of an issue he indicated he did not previously consult with the witness. The objection was not based on

submissions that the prosecutor was remiss in his duties but was based on a submission that the prosecutor was not allowed to do so as the witness had already been sworn in and has given some evidence. The court allowed this consultation but subject to the presence of the defence counsel. There was however no basis for the objection. There is no rule as suggested. Witnesses may be consulted by their counsel up to the time their cross-examination starts.

[133] An objection was also raised that the prosecutor directed that a further affidavit be obtained during the course of the trial to address, what it was suggested, amounted to an issue that arose in cross-examination. This was left hanging in the air but was seemingly to cast suspicion over the manner in which the prosecution operated. Instead of the court nipping this totally meritless objection in the bud, it allowed it to be made as if there was something awry in the prosecutor's conduct. Just for clarity. If a prosecutor becomes aware of a lacuna in the case then there is nothing to prevent him or her from seeking a statement from a witness who has personal knowledge of the facts that can address such lacuna. There is no rule that prevents a prosecutor from having further statements taken and having regard thereto subsequent to taking a decision to prosecute.

[134] The person who investigated the claims at the MVAFF that eventually formed the subject matter of the charges in the prosecution, whilst doing his investigation, contacted some of the accused and, after identifying himself, asked them questions to which they replied. It was put to him that his actions in this regard was *ultra vires*. Not surprisingly he could not answer this. However, neither the prosecutor nor the court

took issue with this question. Quite how a private person who asks someone questions about anything to which there is a voluntary response can act *ultra vires* was not explained. Maybe everyone was too flabbergasted to note the absurdity of the point.

[135] Answers to questions which are solely relevant to a witness' credit are final. This is to avoid the trial being prolonged to investigate collateral issues.¹⁹ This rule was disregarded to such extent that on certain occasions the proceedings resembled dramatic versions of court cases in television series originating in the USA. Thus, a witness under cross-examination from counsel for accused no. 1 was asked whether she was in court when certain evidence was given. When she answered in the negative counsel for each of the co-accused was asked to inform the court what their instructions were on this point by the counsel busy with cross-examination. The court, instead of pointing out that if the other counsel deemed it necessary they could put it to the witness when it was their turn to cross-examine, the court then enquired from each of the other counsel what their instructions were. This amounted to an irregularity.²⁰ In addition, after the investigator of the MVAF said he did not know what happened to a charge laid against him by accused no. 1 and hence did not know if a *nolle prosequere* had been issued in respect thereof, counsel for accused no. 1 insisted that the prosecutor must find out whether such a *nolle prosequere* was indeed issued. Fortunately, on this occasion, the court did not see its way open to direct the

¹⁹ *S v Ffrench-Beytagh* (3) 1971 (4) SA 571 at 572, *S v Sinkankanka & another* 1963 (2) SA 531 (A) at 538-539 and *S v Cooper & others* 1976 (1) SA 932 (T) at 937.

²⁰ *Singh v R* 1941 NPD 11, *R v Zakeyu* 1957 (3) SA 198 (FC) and *R v Garamukunwa* 1963 (3) SA 91 (SR).

prosecution to do as requested by counsel. These theatrics by counsel were uncalled for and should have been reprimanded earlier rather than suffered with patience.

[136] One of the accused persons that the investigator for the MVAF approached during his investigation was accused no. 4. He informed accused no. 4 that he was investigating the claim of accused no. 4 against the MVAF and thereafter asked accused no. 4 questions to which accused no. 4 responded and, during such response, he made certain admissions. The investigator made notes of this discussion. At a later stage the police took a statement from accused no. 4. The admissibility of this latter statement was challenged and the court ruled it inadmissible. When the investigator gave evidence-in-chief and began to relate his discussion with accused no. 4 on the occasion he met with him in the absence of any member of the police, counsel for accused no. 4 objected to the admissibility of this evidence as, according to him, the evidence would in essence introduce (some) of the same admissions that were contained in the statement given to the police that had already been ruled inadmissible. According to counsel for accused no. 4, the court had already ruled that evidence to be inadmissible. The court agreed. This was clearly wrong. The written statement was ruled inadmissible on the basis that it was made to a police officer who did not give accused no. 4 a requisite warning or told him that he was entitled to legal representation prior to taking the statement. None of these considerations applied to the evidence of the investigator. It was in essence admissions voluntarily made to a civilian and there was no basis to disallow the evidence as being inadmissible.

[137] A disturbing feature appearing from the trial is the evidence that emerged that the police had no idea what it means to commission affidavits and the effect thereof. Whereas the police witnesses maintain that they read the purported affidavits to the indicated deponents for the latter to confirm the contents and thereafter asked them to sign, none of them complied with the further formalities relating to the taking of an oath expected from commissioners of oath. This means that the deponents generally signed these documents but the oath was not administered and the documents are thus not affidavits although they are stated to be such. The obvious result was that the witnesses could still be cross-examined on these documents based on the fact that they signed them but they were and are not at risk of being prosecuted for perjury where these documents contained falsehoods. That there was no apprehension of the importance of the nature of the affidavits was borne out by the evidence of Constable Alina Aligodi who was given a number of purported affidavits, already signed by witnesses, by an officer and instructed to 'commission' them. She simply proceeded to do so by completing the formalities despite none of the litigants being present or even in the same town. This practice by the police is unacceptable and one would never be able to prosecute a 'deponent' for perjury as mentioned above and this also means that a 'deponent' can lie with impunity as he or she will not suffer any consequences if they do and it goes without saying that this may cause problems to the criminal investigations which may be disrupted, distracted, and delayed as a result of a reliance on affidavits which are not correct. It goes without saying that persons will be more careful with the truth if they know that they may be prosecuted for perjury if they make false statements in affidavits which may lead to innocent

people being prosecuted or otherwise and/or convicted or to the wasting of the resources by the prosecutions in the conduct of the investigations.

Conclusion

[138] In view of the conclusions reached, the respondents, upon conviction, will have to be sentenced in respect of the crimes they have been convicted of.

[139] Counsel for the State submitted that the matter be remitted to the High Court for sentencing. If the judge *a quo* is available that is the obvious approach and there is an abundance of authority by way of example where this was done.²¹

[140] It is however unclear whether the judge *a quo* is still available. Section 275 of the CPA makes provision for the case where a matter is remitted to the magistrate's court for sentencing purposes and expressly provides that where the original magistrate is not available, the sentencing is to be done by another magistrate. The section unfortunately does not have a similar provision when it comes to such a remittal to the High Court. In South Africa they amended their CPA (which in its original form is the one Namibia inherited) by the insertion of s 275(2) to expressly provide for a referral to another judge where the original judge is no longer available to conduct the sentencing proceedings. There is thus a lacuna in this regard when it comes to Namibia. This is unfortunate and I can only trust this will be addressed at the next amendment(s) to the CPA. It is not desirable that this court should be the court of first and final recourse when it comes to sentencing which may happen in this matter should the judge *a quo* no longer be available.

²¹ See *S v Katamba* 1999 NR 348 (SC) and *S v Dias* (SA 53/2015) [2021] NASC (13 April 2021).

[141] In terms of s 322 of the CPA this court, on appeal, can give such judgment as ought to have been given *a quo*; impose such a sentence as ought to have been imposed *a quo* or in general make such 'order as justice may require'. This general power on appeal is reiterated in s 19 of the Supreme Court Act²² that refers to 'give any judgment or make any order which the circumstances may require'.

[142] In the circumstances where the judge *a quo* is no longer available and it is thus impossible to remit the matter to the court *a quo*, the question arises as to what order will meet the requirements of justice. Whether this court's reservoir of powers, express, implied or inherent, includes the power to refer the sentencing to another judge of the High Court were not addressed on behalf of the parties and in these circumstances I do not intend to provide an answer to this question. Such remittal would, if possible, in my view meet the requirements of justice. If such remittal is not possible the only other order that comes to mind and which in my view would meet the requirements of justice will be for this court to conduct the sentencing procedure and to sentence the accused for the crimes they have been convicted of. I shall thus frame the order in such way that the respondents are required to report to the High Court in Windhoek in person on a specific date for the purpose of the sentencing proceedings by which date there hopefully will be clarity as to the availability of the judge *a quo*. If he is available, he shall simply proceed with the trial and sentence the respondents. If he is not available this court will give directions after considering the submissions of the parties in this regard as to the further conduct of the matter.

²² Act 15 of 1990.

[143] It follows that the appeal succeeds to the extent set out below and the order *a quo* is to be set aside and substituted by the following order:

- (a) The order of the court *a quo* dated 9 December 2005 in which all the accused (the respondents in this appeal) were acquitted of all the charges pressed against them is set aside and substituted with the following order:
 - (i) In respect of count 1: accused no. 1 and no. 2 are found guilty of fraud.
 - (ii) In respect of counts 3 – 6: accused no. 1 and no. 2 are found not guilty and acquitted.
 - (iii) In respect of count 7: accused no. 1 is acquitted.
 - (iv) In respect of count 8: accused no. 1 is found guilty of attempting to defeat or obstruct the course of justice.
 - (v) In respect of count 9: accused no. 1 and no. 4 are found guilty of fraud.
 - (vi) In respect of count 10: accused no. 1 is found guilty of fraud.

- (vii) In respect of count 11: accused no. 1 is found not guilty and acquitted.
 - (viii) In respect of count 12: accused no. 1 and no. 5 are found guilty of fraud.
 - (ix) In respect of count 13: accused no. 1 is found not guilty and acquitted. Accused no. 5 is found guilty of theft by conversion in the amount of N\$24 000.
 - (x) In respect of counts 14 and 15: accused no. 1 and no. 5 are found guilty of forgery and uttering as charged.
 - (xi) In respect of count 16: accused no. 1 is found not guilty and acquitted. Accused no. 8 is found guilty of fraud in the amount of N\$2 839 099.
- (b) The Registrar of the High Court Main Division (Windhoek) shall set the matter down at 09h00 on 1 November 2021 before an identified judge for case management to facilitate the sentencing proceedings of the accused.

- (c) The respondents shall report in person to the High Court at 09h00 on 1 November 2021 at the court designated for the purpose of case managing their sentencing proceedings.

- (d) For the purposes of sentencing, the matter is remitted to the court *a quo*, provided the judge *a quo* is still available to conduct the sentencing proceedings.

- (e) Should the judge *a quo* not be available to conduct the sentencing proceedings, this court will hear submissions from the parties as to the appropriate course of action so as to sentence the accused for the crimes they have been convicted of.

FRANK AJA

ANGULA AJA

LIEBENBERG AJA

APPEARANCES

APPELLANT: E E Marondedze
Of The Prosecutor-General, Windhoek

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SECOND RESPONDENT: C Kavitjene
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FOURTH RESPONDENT: M Siyomunji
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FIFTH RESPONDENT: T P Brockerhoff
Of Brockerhoff & Associates Legal
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EIGHT RESPONDENT: I Semenya, SC
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