THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 839/2023

In the matter between:

THE STATE	**APPELLANT**
and	
MBANA PETER THABETHE	**FIRST RESPONDENT**
LIMAKATSO MOOROSI	**SECOND RESPONDENT**
SEIPATI SILVIA DHLAMINI	**THIRD RESPONDENT**
IQBAL MEER SHARMA	**FOURTH RESPONDENT**
NULANE INVESTMENTS 204 (PTY) LTD	**FIFTH RESPONDENT**
DINESH PATEL	**SIXTH RESPONDENT**
ISLANDSITE INVESTMENT ONE HUNDRED AND EIGHTY (PTY) LTD	**SEVENTH RESPONDENT**
RONICA RAGAVAN	**EIGHTH RESPONDENT**

Neutral citation: *The State v Thabethe and Others* (Case no 839/2023) [2025] ZASCA 88 (12 June 2025)

Coram: SCHIPPERS, MEYER and MATOJANE JJA and MUSI and NORMAN AJJA

Heard: 7 March 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down is deemed to be 11h00 on 12 June 2025.

Summary: Application for leave to appeal – Criminal Procedure – reservation by State of questions of law under s 319(1) of the Criminal Procedure Act 51 of 1977 – respondents charged with contravention of s 86(1) of Public Finance Management Act, fraud and money laundering – found not guilty at close of State case – High Court committing numerous errors of law – reserved questions of law decided in favour of State – acquittal of respondents set aside – respondents may be retried before a different Judge.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Gusha AJ, sitting as court of first instance):

1 The application for leave to appeal is granted.

2 The questions of law reserved in questions 2, 3, 4, 5, 6 and 7 are decided in favour of the State.

3 Questions 8 and 9 are not properly reserved for want of a factual foundation.

4 The order of the Free State High Court dated 21 April 2023, in terms of which:

4.1 the second respondent was acquitted on Counts 1 and 2;

4.2 the first and third to eighth respondents were acquitted on Count 2;

4.3 the fourth, fifth, seventh and eighth respondents were acquitted on Counts 3 and 4; and

4.4 Mr Shadrack Cezula was not indemnified against prosecution under s 204 of the Criminal Procedure Act 51 of 1977,

is set aside.

5 It is ordered that the respondents may be retried for the same offences in respect of which they were acquitted by the Free State High Court on 21 April 2023, as if they had not previously been arraigned, tried and acquitted: provided that a different Judge shall preside over the trial.

JUDGMENT

Schippers JA and Norman AJA (Meyer and Matojane JJA concurring)

Introduction

[1] This is an application for leave to appeal referred for oral argument in terms of s 17(1)*(d)* of the Superior Courts Act 10 of 2013. It arises from a criminal case tried before Gusha AJ in the Free State Division of the High Court, Bloemfontein (the High Court), in which the respondents were found not guilty and discharged at the close of the prosecution's case. The applicant (the State) applied to the High Court to reserve certain questions of law under s 319(1) of the Criminal Procedure Act 51 of 1977 (CPA). The High Court dismissed the application, essentially on the basis that the questions sought to be reserved by the State were not clear, and are questions of fact, not law.

[2] Ordinarily, when a High Court refuses to certify a question of law under s 319(1) of the CPA, this Court exercises its discretion in favour of the State only if there is a reasonable prospect that (i) a mistake of law was made; and (ii) but for the mistake of law, the accused would have been convicted.[1] However, in this case the requirement in (ii) does not arise (save for the second respondent, who was found not guilty after she had closed her case), because the remaining respondents were found not guilty at the close of the State case in terms of s 174 of the CPA.[2] So, the question is whether, had the mistake of law not been made, there was evidence on which a reasonable person might convict the respondents.[3] Stated differently, it is whether at the close of the State case, there was no possibility of a conviction unless the respondents incriminated themselves.[4]

The indictment

[1] *S v Basson* 2003 (2) SACR 373 (SCA); 2003 3 All SA 51; 2004 (1) SA 246 paras 10-11.
[2] Section 174 of the CPA provides:
'**Accused may be discharged at close of case for prosecution**
If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'
[3] *S v Khanyapa* 1979 (1) SA 824 (A) at 838F.
[4] *S v Lubaxa* 2001 (2) SACR 703; 2001 (4) SA 1251 (SCA) *(Lubaxa)* para 15. This test was held to apply to a case in which there is a single accused.

[3] The respondents were indicted in the High Court on the following counts, in broad summary:

(a) On Count 1, the first and second respondents were charged with contravening s 86(1) of the Public Finance Management Act 1 of 1999 (PFMA), read with ss 38(1)*(b)*, 38(1)*(c)*(ii), 38(1)*(n)* and 38(2) thereof. The State alleged, inter alia, that they committed the Free State Department of Agriculture and Rural Development (the Department) to a contract in the sum of R24 984 240, without following a tender process; that they failed to ensure effective and transparent use of the Department's resources; and that they failed to take steps to prevent irregular, and fruitless and wasteful expenditure.

(b) Count 2 charged the first to eighth respondents with the crime of fraud. The State alleged that acting in common purpose, they unlawfully and intentionally conspired with one another and others, and made the following misrepresentations to the Department. A letter dated 3 October 2011 from Worlds Window Impex India PvT Ltd (Worlds Window), had been received by the Department in the ordinary course of business. Worlds Window genuinely intended to participate as a strategic partner in the Department's Mohoma Mobung Project (the Project). Worlds Window required the appointment of the fifth respondent, Nulane Investments 204 (Pty) Ltd (Nulane), to do a feasibility study for the Project, which made it impossible to follow the Department's normal procurement processes. A request, motivation and approval to deviate from these processes, dated 6 October 2011, was valid and bona fide. The amount of R24 984 240 charged by the fourth, fifth and sixth respondents for the feasibility study, was justified. The payments made to Nulane in terms of the contract concluded with it, were lawful. By means of these misrepresentations the respondents induced the Department, to its prejudice, to procure the services of Nulane in contravention of the Constitution, the PFMA and the

Department's procurement processes; to conclude a contract with Nulane; and to pay it R24 984 240. When they made the misrepresentations, the respondents knew that the Department had not received the Worlds Window letter; that it had not advertised a need for a service provider to undertake any feasibility study for the Project; that the deviation from the procurement processes, the appointment of Nulane and the contract concluded with it, was unlawful; that the contract price was inflated; and that the payments to Nulane were not lawfully due.

(c) On Count 3 the fourth, fifth, seventh and eighth respondents were charged with money laundering in contravention of s 4 read with ss 1 and 8(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA). The State alleged that between November 2011 and July 2012, these respondents unlawfully conspired with one another and others, and shared a common purpose to launder R19 070 934, which Nulane unlawfully obtained from the Department through the contract, and which represented the proceeds of unlawful activities (the proceeds). The respondents arranged for the proceeds to be transferred from Nulane's Bank of Baroda account to the offshore Standard Charter Bank (SCB) account of Gateway Limited (Gateway), a company in the United Arab Emirates (UAE), under the pretext that the sum of R19 070 934 was payment by Nulane for services rendered in terms of a contract between Nulane and Gateway. This arrangement by the respondents had the effect of concealing or disguising the nature, source, location, disposition and movement of the proceeds, or the ownership thereof, in breach of s 4(1) of the POCA.

(d) Count 4 charged the fourth, fifth, seventh and eighth respondents with fraud. It was alleged that these respondents, acting in common purpose to defraud, intentionally misrepresented to the Bank of Baroda, the Reserve Bank of South Africa or the National Treasury and their employees, that payments of R8 800 000 and R10 200 000 made in 2012 by Pragat to

Nulane's Bank of Baroda account, were made in the ordinary course of business; that Nulane had concluded an agreement at arm's length with Gateway; and that the amount of R19 070 934 transferred to Gateway was due and payable to Gateway as a result of a legitimate transaction. By means of these misrepresentations the respondents induced the Bank of Baroda, the Reserve Bank of South Africa or the National Treasury, to their actual or potential prejudice, to grant permission for the transfer of funds in circumstances where that permission should not have been granted as it resulted in an outflow of funds from South Africa, and impacted improperly on the balance of payments and the regulation of currency exchanges between South Africa and the UAE. It also had the effect of placing the proceeds of fraud beyond the reach of the South African regulatory and criminal justice authorities. When the respondents made these representations, they were aware that the payments by Pragat to Nulane's Bank of Baroda account were not made in the ordinary course of business; that the contract between Nulane and Gateway was not a transaction at arm's length; that the agreement between them was illegitimate; and that the amounts paid to Gateway were the proceeds of unlawful activities described in Counts 1, 2 and 3.

[4] All the respondents were legally represented and pleaded not guilty to the charges. They made no statements to indicate the basis of their defence as contemplated in s 115 of the CPA, save for the second respondent. The sixth respondent made certain admissions in terms of s 220 of the CPA.

[5] The second respondent's s 115 statement was essentially the following. On 7 October 2011 she approved a recommendation that the Department deviate from the Supply Chain Management (SCM) Policy and Treasury Regulations to appoint Nulane 'to perform due diligence and feasibility studies' for the Project

(the deviation request). She did so because Mr Shadrack Cezula, then the Acting Director: SCM, and the first and third respondents had endorsed the deviation request. The second respondent admitted, in terms of s 220 of the CPA, that her signature on the contract concluded with Nulane 'appears legitimate'.

[6] The sixth respondent, Mr Dinesh Patel, made the following s 220 admissions, inter alia. He is the brother-in-law of the fourth respondent, Mr Iqbal Meer Sharma, a businessman. The fourth respondent is the sole director and shareholder of Nulane, a South African company which held accounts at the Bank of Baroda (account number 9[...]) and Nedbank (account number 1[...]). The seventh respondent, Islandsite Investment One Hundred and Eighty (Pty) Ltd (Islandsite), is also a company registered in South Africa.

[7] The trial was conducted over some six weeks. The State called approximately 20 witnesses. The first and the third to eighth respondents were found not guilty and discharged at the close of the State case. The second respondent did not apply for a discharge in terms of s 174 of the CPA. She closed her case, chose not to testify and called no witnesses. She was found not guilty on Counts 1 and 2.

The basic facts established in evidence

[8] In 2012 the Free State Provincial Government introduced the Project. It was a public-private business partnership concept, aimed at generating income through farming, manufacturing and expanding infrastructure in the rural areas of the province; creating agribusiness and value chain enterprises; reducing the costs of logistics to farmers; alleviating poverty; and advancing black economic empowerment. The private sector was encouraged to invest in the Project.

[9] It is a matter of public knowledge that the Department adopted the Project on 22 March 2012.[5] Even before its adoption, on 3 October 2011 Worlds Window, a company incorporated in India which trades in scrap metal, addressed a letter to the Department (the Worlds Window letter). The State alleged that this letter was not received by the Department in the ordinary course of business. In the letter Worlds Window expressed its intention to participate in the Project as a strategic partner 'under the Public-Private Partnership (PPP) framework of South Africa', which it said was projected at R1 billion. Worlds Window stated:

'We agree in principle to participate on an equal (50/50) partnership basis to fund this project, which we understand has been initially projected at R1 billion. This, however, would be subject to a proper due diligence process conducted by a reputable Agency covering the commercial aspects of the project with detailed business plans which we would request the Department to conduct in order for us to take an informed decision in the matter.

We would request that the above due diligence and planning exercise be conducted by an Agency of our choice to provide the necessary comfort to our stakeholders. In the event that you are in agreement with our proposal, we would request you to revert to us in the affirmative and we will immediately advise you of the details of the proposed Planned Agent.'

[10] The State alleged that the Worlds Window letter started a process of fraudulently extracting public funds from the Department. These funds were then laundered through, inter alia, the fifth respondent, Nulane, Islandsite, Pragat Investments (Pty) Ltd (Pragat), Tegeta Resources (Pty) Ltd (Tegeta), Oakbay Investments (Pty) Ltd (Oakbay), Gateway and the Sahara Group of companies (Sahara). Tegeta, Oakbay and Sahara are companies owned by the infamous Gupta family, who the Zondo Commission of Enquiry into State Capture found, were involved in the corrupt capture of various government departments and state-owned enterprises in this country, to 'help themselves to the money and assets of the people of SA'.[6]

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[5] The Weekly. Available at <www.theweekly.co.za>. Accessed 7 April 2025.
[6] State Capture Commission Report, Vol 4, Part 4, p 1041 para 2493.

[11] Based solely on Worlds Window letter, the Department appointed Nulane to carry out due diligence and feasibility studies, at a cost of nearly R25 million. It is common ground that Nulane was appointed without a tender process in violation of s 217 of the Constitution,[7] purportedly in terms of the deviation request.

[12] Mr Cezula drafted the deviation request three days after the date of the Worlds Window letter. It was not disputed that he did so on the instruction of the third respondent. The first respondent, as the Head: Rural Development and the third respondent, the Chief Financial Officer (CFO), recommended the deviation request and the appointment of Nulane. The second respondent, in her capacity as the Accounting Officer of the Department, approved the deviation request. These facts, and the signatures of these respondents on the deviation request, were not disputed. The reason advanced for the deviation was that Worlds Window required the appointment of its own agent 'to be able to have the confidence in the due diligence and feasibility study', apparently because it knew of the quality of Nulane's work. Nulane was not identified as the agent in the Worlds Window letter.

[13] The deviation request records that the SCM Policy and Treasury regulations allow the Department's accounting officer to dispense with the official procurement process only in an emergency or exceptional case. The process can be dispensed with only if the goods or services sought to be procured are available from a single provider; when acquiring special works of art or historical objects where the specifications are difficult to compile; and in any

[7] Section 217(1) of the Constitution provides:
'Procurement. – (1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

other exceptional case where it is impractical or impossible to follow the normal procurement process.

[14] This was no exceptional case. Despite this, the memorandum states:

'The appointment of Nulane Management Services *makes it impossible for the department to follow the normal procurement processes due to the fact that it is a condition from the intended Strategic Partner*, the World Window Impex India PvT Ltd, that for them to be able to have comfort and confidence in the due diligence and feasibility study, *they require them to use the services of Nulane Management Services* as they know the quality of work they performed in similar projects around the world. ***Refer to the attached letter***.'[8]

[15] According to the deviation request, the budget required for Nulane's services was R25 million. This was recommended and approved by the first, second and third respondents.

[16] On 28 October 2011 the Department concluded two contracts in virtually identical terms with Nulane. Nothing however turns on this, because the Department paid Nulane in terms of a contract signed on its behalf by the second respondent, in her capacity as the Department's Accounting Officer. The third respondent signed the contract as a witness. The sixth respondent signed the contract on behalf of Nulane in his capacity as Project Director. The first respondent was designated in the contract as the Department's Project Officer. He certified that Nulane had done the work and was entitled to payment.

[17] The contract describes the services to be rendered by Nulane as 'Undertaking a study for the development of a Concept Document' and 'Identifying a possible strategic Investment Partner' for the Project (which,

[8] Emphasis added.

according to the Worlds Window letter, was supposed to be Worlds Window itself).

[18] The amount payable under the contract was R24 984 240. Of this amount 50% was payable to Nulane 'as mobilisation funds in advance' (the advance payment). Contrary to what is stated in the Worlds Window letter, the contract makes no provision for a 50/50 partnership between Nulane and the Department. In fact, Nulane contributed not one cent to the Project.

[19] Neither did Nulane undertake any feasibility study, nor identify a strategic investment partner. Instead, it immediately subcontracted the feasibility study to Deloitte Consulting (Pty) Ltd (Deloitte) on 20 October 2011. The evidence disclosed that the sixth respondent represented Nulane throughout its engagement of, and negotiations with, Deloitte. Nulane instructed Deloitte to perform 'high level due diligence on identified projects in the Free State'. Deloitte rendered this service at a cost of some R1.5 million and invoiced Nulane in February and April 2012.

[20] Gateway, based in the UAE, was part of the scheme to defraud the Department. On 2 December 2011 Nulane, represented by the fourth respondent, concluded a contract with Gateway in terms of which services, described as a 'statement of work', would be 'performed by Gateway' (the Gateway contract). This work supposedly included developing an understanding of the challenges facing black smallholder farmers in the Free State, and utilising an investment fund to create economic opportunities for smallholders and infrastructure investments. The Gateway contract states that the Department has awarded a contract to Nulane; that Gateway would present invoices for fees and expenses monthly, which Nulane would pay into a bank account designated by Gateway

from time to time; and that the value of Gateway's 'services' is USD 2 550 000. These facts also, were not disputed.

[21] It was also not disputed that despite rendering no services to Nulane, Gateway received a total amount of R19 070 934, out of the R24 984 240 that the Department paid to Nulane. Neither was it disputed that the sum of R24 984 240 was moved by way of numerous transactions into the bank accounts of various companies associated with Nulane and Gateway, through layers of transactions, in which Islandsite and its financial manager, Ms Ronica Ragavan, the eighth respondent, played a prominent role. Where appropriate, we refer to Ms Ragavan as 'the eighth respondent'. As is shown below, this was done to distance the funds from their criminal source – the fraud on the Department.

[22] So, what was established in the evidence, is that Nulane rendered no services to the Department. All it did was to engage Deloitte to do a feasibility study at a cost of about R1.5 million. Despite this, the Department paid Nulane a total of R24 984 240. These facts also, are common ground. The amount was paid as follows:

(a) R12 492 120 on 8 November 2011;
(b) R4 164 040 on 22 December 2011;
(c) R4 000 000 on 2 April 2012;
(d) R4 328 080 on 19 April 2012.

[23] The movement of these funds paid by the Department to Nulane, was determined by Mr Thesele Rankuoatsana, a financial investigator with the National Prosecuting Authority. He analysed the information contained in five bank accounts, namely the Nulane Nedbank account number 1[...]; Burnelia (Pty) Ltd (Burnelia) Standard Bank of South Africa account number 2[...]; Pragat

Investments (Pty) Ltd (Pragat) Absa account number 4[...]; Islandsite Absa account number 4072171431; and Nulane Bank of Baroda account number 9[...].

[24] Mr Rankuoatsana testified that the bulk of the R24 984 240 was transferred, back and forth, through the Burnelia Standard Bank account, Nulane's Bank of Baroda account and the Pragat Absa account. These accounts were utilised as conduits for the transfer of funds to and from the Islandsite Absa account.

[25] The State also established that the transfer of funds into the Nulane Bank of Baroda account from the Nulane Nedbank account was always followed immediately by a transfer to the Pragat Absa account with no transactions in between. Likewise, the payment into the Nulane Bank of Baroda account from the Pragat Absa account was always followed immediately by a transfer to the Nulane Nedbank account or the Gateway SCB account, with no transactions in between.

[26] All these payments were made with no reference on the bank statements to any document or transaction supporting the origin of, or the reason for, the funds that were being transacted through the accounts of the various companies. This *modus operandi* was never challenged by the respondents. In short, the prosecution proved, prima facie, that the true nature, source, disposition, movement, rights with respect to, or ownership of the bulk of the R24 984 240 paid by the Department to Nulane, was concealed or disguised.

[27] The evidence showed that the fourth respondent, Mr Iqbal Sharma, was a signatory to the Nulane accounts, both at Nedbank and the Bank of Baroda. The State demonstrated that Islandsite played a central role in utilising the Burnelia Standard Bank account, Nulane's Bank of Baroda account and the Pragat Absa

account as conduits for the movement of funds to and from Islandsite's Absa account.

[28] The funds paid by the Department to Nulane were also channelled through a 'cash focus system' held at Absa Bank by Sahara. Ms Linda Channing, a retired employee of Absa Bank, testified that the cash focus system is a facility that enables a customer to load multiple accounts on to the system for the movement of funds. The system manager (also known as a 'super user') has full control of it and can add various bank accounts to, and other persons as operators of, the system. In this case, the manager of the cash focus system was Mr Atul Gupta. He had unlimited access to the system, and was able to move funds, through the operators, without limitation, to and from accounts which he had linked to the system. The evidence was that Sahara Holdings (Pty) Ltd, Sahara Systems (Pty) Ltd, Sahara Consumers (Pty) Ltd, Sahara Distribution (Pty) Ltd, Oakbay, Tegeta, Pragat and Islandsite, formed part of the cash focus system.

[29] Counsel for Islandsite and Ms Ragavan put it to Mr Rankuoatsana that she was 'the financial manager of Islandsite'; that she was one of the operators of the Islandsite account; and that 'she would discuss with the operators [of the system] the cash flow needs of the companies and the operators'. Counsel also referred Mr Rankuoatsana to various ledgers of Islandsite which records Ms Ragavan as the 'user' in relation to various deposits into Islandsite's Absa account, described in Islandsite's ledger as a 'transf-loan Pragat Investment . . . Ronica'.

[30] One of these deposits is an amount of R9.8 million, which Pragat moved into Islandsite's account on 8 November 2011. On that day the Department paid R12 492 120 into Nulane's Nedbank account. This amount was the advance payment in the contract awarded to Nulane, which was part of the proceeds of the fraud. On the same day, ie 8 November 2011, Nulane moved R10 million of the

R12 492 120 to Pragat's bank account; and Pragat, in turn, moved R9.8 million of the R10 million to Islandsite's bank account.

[31] In the next movement of funds relating to the advance payment, Nulane paid R2 million of the initial R12 492 120 into Pragat's bank account on 11 November 2011. On the same day, Pragat moved R2 million to the Islandsite bank account, which contains the same reference as the R10 million deposit, ie 'transf-loan Pragat Investment . . . Ronica'. That same day ie 11 November 2011, Islandsite, in turn, moved R2 million through the cash focus system to another company, Annex Distribution (Pty) Ltd (Annex Distribution). The latter company is part of Sahara Holdings (Pty) Ltd. Mr Rankuoatsana testified that the directors of Annex Distribution are Mr Atul Gupta, Ms Chitali Gupta and Ms Ragavan.

[32] Crucially, none of these transactions were disputed, let alone denied, by either Islandsite or Ms Ragavan. Prima facie, the facts show that Ms Ragavan, in her capacity as the financial manager of Islandsite, and as a director of Annex Distribution, knew or must have known that the advance payment constitutes the proceeds of the fraud perpetrated on the Department. These are but two transactions which called for an explanation by Ms Ragavan.

The High Court's judgment

[33] In the High Court, the State rightly conceded that it did not make out a case against the first respondent in respect of Count 1. Section 86(1) of the PFMA provides that an accounting officer is guilty of an offence if that officer wilfully or in a grossly negligent way fails to comply with the provision of s 38, 39 or 40 of that Act. The first respondent was not an 'accounting officer' as contemplated in s 36 of the PFMA.

[34] The second respondent was the Accounting Officer of the Department as defined in the PFMA. However, the High Court did not consider s 86(1) of the PFMA at all, and the judgment contains no reasons for the discharge of the second respondent on Count 1.

[35] The court found that Count 2 was based mainly on the evidence of Mr Cezula, the deviation request and the Worlds Window letter. It found that the State case was 'stillborn', solely on the following grounds: the State did not adduce evidence to authenticate disputed documents; the investigators were inept; and the evidence and documents were handled in a lackadaisical manner. Even if it could somehow be argued that the Judge had misdirected herself on the admissibility of disputed documents, given the evidence presented, the answer as to what could be done with the documents, was, as the Judge put it, 'zilch'.

[36] The High Court found that Mr Cezula was an evasive witness; that he 'was hell bent on distancing himself from committing the offence of fraud'; and that he sought to downplay his role in the preparation of the deviation request. It held that Mr Cezula had to admit that he had committed fraud to avail himself of the indemnity under s 204 of the CPA; and that there was no corroboration for his version regarding the compilation of the deviation request.

[37] The court went on to find that neither the facts nor Mr Cezula's evidence showed that 'there was any prior agreement between him and any of the accused' to act in concert to defraud the Department. Given the lackadaisical way the matter was investigated, the Judge said, 'to find that common purpose under these circumstances existed would be a quantum leap'. The court found that Mr Cezula had lied and that it could not attach any weight to his evidence. The fact that the third respondent had not disputed that she signed the deviation request did not corroborate his evidence. The court concluded that Mr Cezula's evidence and

mendacity spoke for themselves, and made an order that he was not indemnified in terms of s 204 of the CPA.

[38] On Count 3 the court found that the State 'failed to pass the barest of threshold', and the question as to who facilitated almost R25 million of taxpayers' money leaving the fiscus, and why, remained unanswered. The Judge said that the concessions by the State witnesses concerning the flow of the funds which the Department paid to Nulane, 'put the death knell on the state's case'.

[39] Regarding Count 4, the court held that the State did not prove a misrepresentation to the Bank of Baroda, the National Treasury and the Reserve Bank. There was also no evidence that the accused had acted in concert in the commission of the offence in Count 4.

[40] In the result, the court found the second respondent not guilty on Counts 1 and 2. In terms of s 174 of the CPA: the first respondent was found not guilty on Count 1; the first and third to eighth respondents were found not guilty on Count 2; and the fourth, fifth, seventh and eighth respondents were found not guilty on Counts 3 and 4. Mr Cezula was not indemnified against prosecution in terms of s 204 of the CPA.

The questions of law

[41] The State submits that the High Court should have reserved the following questions of law in its favour:

(a) Question 1: Whether on the proven facts, the conduct of respondents 1, 2, 3, 4, 5, 6, 7 and 8 prima facie was brought within the ambit of the offences of s 86(1) of the PFMA, fraud and money laundering, as charged respectively.

(b) Question 2: Whether in the light of the prima evidence that was placed before the court, the decision to discharge the respondents at the end of the State case, contrary to legal precedent, was such an error of law that it constituted a gross irregularity in the trial, which prejudiced the State and should be set aside.

(c) Question 3: Whether the Judge erred in law by misinterpreting, misapplying or overlooking legal precedent as authority for the discharge of the accused under s 174 of the CPA, specifically whether the Judge applied the law in the context of a case involving several accused who may implicate each other.

(d) Question 4: Did the court err in terms of the law of documentary evidence in that after the court found exhibits TJM 11 (sundry payment advice), TJM 12 (transaction log sheet) and TJM 13 (Nulane tax invoice dated 12 March 2012 for the amount of R8 328 080) to be originals, the Judge later ruled the very same documents inadmissible?

(e) Question 5: Whether the court, in respect of its ruling on 23 February 2023 that documents tendered in evidence by the State were inadmissible, wrongly applied the best evidence rule, did not exercise its discretion judicially or was influenced by wrong principles.

(f) Question 6: Did the court, in its application of the doctrine of common purpose, contrary to established law, wrongly expect the State to prove a prior agreement between the parties, or that they knew each other?

(g) Question 7: Whether the court correctly applied s 204(2) of the CPA, that requires a witness to answer frankly and honestly all questions put to him.

(h) Question 8: Whether the court misdirected itself by conflating the question of the indemnity of a witness in terms of s 204 of the CPA with the discharge of an accused under s 174.

(i) Question 9: Whether the Court's failure to make findings of fact as enjoined by s 146*(a)* of the CPA and Article 9 of The Code of Judicial

Conduct adopted in terms of s 12 of the Judicial Service Commission Act 9 of 1994 rendered the trial unfair.

[42] Three preliminary points are required to be made at the outset. First, the State rightly abandoned its request that question 8 be reserved as a question of law: there are no facts showing that the High Court had conflated the question of indemnity of a witness under s 204(2) with s 174 of the CPA.[9] The State also conceded that there are no facts to support its request in question 9 that the alleged failure of the Judge to comply with the Code of Judicial Conduct drafted in terms of the Judicial Service Commission Act 9 of 1994, rendered the trial unfair. However, it persisted in its submission that the court failed to make findings of fact as enjoined by s 146*(a)* of the CPA.[10] This submission is incorrect: the court made numerous findings of fact, as is evidenced by its judgment summarised above.

[43] Second, a recurring theme in the respondents' submissions is that the questions sought to be reserved are inaccurately framed; and that the facts upon which the point hinges are neither clear, nor fully set out in the record together with the question of law, as required by *Schoeman*.[11] However, this submission is baseless, as is shown below.

[44] Third, a disturbing finding by the Judge – central to the entire case – is that the State case was abortive from the outset. The Judge put it thus:

'The state contrary to the application to have the documents provisionally admitted into the record, did not lead a single witness and or evidence who successfully authenticated the

[9] Question 8 reads: Whether the Court misdirected itself when conflating the question of indemnity of the witness in terms of s 204(2) of the Act with the judgment in terms of s 174 of the Act.
[10] Question 9 states: Whether the Court's failure to make findings of fact as enjoined by s 146*(a)* of the Act and Article 9 of The Code of Judicial Conduct adopted in terms of s 12 of the Judicial Service Commission Act 9 of 1994 rendered the trial unfair.
[11] *Director of Public Prosecutions, Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA) para 39.

disputed documents. What this court instead heard was the ineptitude of the investigators and indeed the lackadaisical manner in which evidence and disputed documents [were] handled and a government department who seemingly evinced a wilful disregard to the manner in which official documents were to be kept and archived. *Just on these aspects only, the State case as presented was still born.*'[12]

[45] A court is obliged to consider the totality of the evidence before coming to a conclusion on the guilt or innocence of the accused.[13] The failure to do so, constitutes an error of law. In this regard, the dictum of Sopinka J in *Morin*,[14] is instructive:

'A trial judge must consider all of the evidence in relation to the ultimate issue but unless the reasons demonstrate that this was not done, the failure to record the fact of it having been done is not a proper basis for concluding that there was an error of law in this respect.'

[46] This is a case where the reasons demonstrate that the trial Judge failed to consider the totality of the evidence. Given the finding that the State case was stillborn from the outset, solely for the reasons advanced by the Judge, the inference is inescapable – and the judgment itself shows – that the Judge had closed her mind to the evidence adduced by the State. In other words, the finding that the case was stillborn because of the State's failure to present evidence to authenticate documents, the incompetence of the investigators, and the Department's failure to safeguard documents, was fundamental to the decision to acquit the respondents in terms of s 174 of the CPA.

[47] We revert to this fundamental error of law when dealing with the various questions of law. At this point it is appropriate to consider question 6 – whether

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[12] Emphasis added.
[13] *S v Van Der Meyden* 1999 (1) SACR 447 (W) at 448H.
[14] *R v Morin* [1992] 3 SCR 286 (*Morin*); *JMH v Her Majesty The Queen and Director of Public Prosecutions* [2011] 3 RCS 197; 2011 SCC 45 para 31. *Morin* fn 14 at 296*f*.

the High Court misapplied the doctrine of common purpose – given its centrality to Counts 2, 3 and 4.

Question 6: Misinterpretation and misapplication of common purpose

[48] The misapplication of the law – ordinarily when the wrong legal standard is applied to the evidence – is an error of law. It carries the risk of a wrong conviction (in this case an acquittal) and an unfair trial.[15]

[49] The facts upon which this question hinges, in sum, are these:

(a) Contrary to the High Court's finding, the State had alleged that the relevant respondents acted in common purpose when committing the offences referred to in Counts 2, 3 and 4.

(b) When the deviation request was drafted on 6 October 2011, Nulane had not been registered with the Department as a service provider. Therefore, its bank details were unknown to the Department. Mr Cezula testified that these details were furnished by the third respondent.

(c) The reason for the deviation is contrived and unlawful.

(d) Two virtually identical contracts were concluded between the Department and Nulane with an effective date of 1 November 2011 and an expiry date of 28 February 2012. Nulane was appointed to produce a feasibility study for the Project. This service is neither unique nor innovative. Nulane was paid R24 984 240 for it. Nulane immediately engaged Deloitte to render the service and paid it R1 536 457.86.

(e) Worlds Window and its directors are business associates of Islandsite, its directors, and Ms Ragavan.

(f) The first, second and third respondents acted in concert in unlawfully appointing Nulane, and paying it. Immediately after Nulane was paid, the

[15] *Tuta v S* [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) (*Tuta*) para 51; *Villacrop Protection (Pty) Ltd v Bayer Intellectual Property GMBH* [2022] ZACC 42; 2023 (4) BCLR 461 (CC); 2024 (1) SA 331 (CC) para 64.

funds were transferred to and from the bank accounts including Islandsite, Pragat, Oakbay, Tegeta and Sahara, through Sahara's Absa cash focus account.

(g) The facts show that the fourth, fifth, seventh and eighth respondents shared a common purpose when laundering the funds and committing fraud, referred to in Counts 3 and 4, respectively.

(h) The High Court wrongly rejected Mr Cezula's evidence on the basis that it did not evince any prior agreement between him and any of the accused to defraud the Department.

[50] The respondents submit that question 6 does not raise a question of law and that the existence of common purpose is a fact-based enquiry. They say that the State should have presented evidence from which the inference of a common purpose could be drawn.

[51] Regarding question 6, the High Court stated:

'[A] proper reading of the judgment reveals that at no stage did the court intimate that common purpose can only be established by proving prior agreement between the accused. In fact what was found is that the applicant did not prove any common purpose between the accused. This is a factual finding.'

[52] But that is not so. The court applied the wrong legal standard in determining that the State had not proved, prima facie, that the respondents had acted in common purpose to defraud the Department. This plainly, is a question of law. The judgment speaks for itself. The Judge said:

'The facts as placed before me and indeed the evidence of Mr Cezula do not evince that there was any prior agreement between him and any of the accused and or a decision to act in concert with any of the accused to defraud the Department, in any event none was alleged in the indictment, and even [if] it were so alleged, Mr Cezula testified that, save for accused 1-3, he did not know the other accused at all.'

[53] This is a misconception of the doctrine of common purpose. There are two categories of common purpose: (i) a prior agreement to commit a common offence; and (ii) active association and participation in a common criminal design with the requisite intention to commit a crime.[16]

[54] The High Court's misconception of common purpose is exacerbated by the finding that there was 'no *decision* to act in concert' to defraud the Department, and no such decision was alleged in the indictment. However, Counts 2, 3 and 4 state, in terms, that the respondents unlawfully, intentionally and falsely colluded and conspired with one another and or others; and acted in common purpose to commit the offences charged. The State thus alleged common purpose based on a prior agreement, or active association or participation in a common criminal design.

[55] It is not necessary to analyse the evidence on each of these counts in detail. Prima facie the evidence shows a carefully planned scheme, in which the respondents pursued a common purpose to defraud the Department and launder the proceeds.

[56] The Department did not publicly call for a feasibility study for the Project. It did not receive the Worlds Window letter; it was produced by the third respondent. Without the deviation request, no contract could have been awarded to Nulane. That request, in turn, could never have been approved without the co-operation of the first, second and third respondents, by virtue of their positions in the Department. There is accordingly direct prima facie evidence that Worlds Window, Nulane (and its director, the fourth respondent) and the sixth respondent (who instructed Deloitte) are involved in the fraud on the Department referred to in Count 2; and that the proceeds, derived from that fraud, were laundered almost

[16] S V Hoctor and C R Snyman *Snyman's Criminal Law* 7 ed (2019) at 225 and 227.

immediately after each payment by the Department to Nulane, in which Islandsite and Ms Ragavan played a central role. Thus, the participation of each of the respondents is an essential link in the chain of criminal conduct in carrying out the scheme, designed to defraud the Department out of almost R25 million.

[57] Prima facie, therefore, the State established common purpose based on a prior agreement, which may be inferred from the facts; or active association and participation by the respondents in a common criminal design, with the intention of committing the offences alleged in the indictment. The High Court's application of the wrong legal standard regarding common purpose, resulted in the acquittal of all the respondents on Count 2; the acquittal of the fourth, fifth, seventh and eighth respondents on Counts 3 and 4; and an unfair trial. The Constitutional Court has held that '[t]he right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state'.[17]

[58] However, the minority judgment concludes that 'there was no evidence on which [Ms Ragavan] could be convicted after closure of the State's case', and that she was correctly discharged. The grounds for this conclusion, in sum, are these. Ms Ragavan was not at the scene and did not commit any act of association, when the fraud referred to in Counts 2 and 4 was perpetrated. There is no proof that the money advanced to members of the cash focus system, was money from the Department. This judgment conflates her role with that of the directors of Islandsite. Ms Ragavan's task as financial manager was to keep proper books, which she did. Islandsite 'was the puppet master' and there is no possibility that any of the respondents might incriminate Ms Ragavan.

[17] *S v Jaipal* [2005] ZACC 1; 2005 (4) SA 581 (CC); 2005 (5) BCLR 423 (CC); 2005 (1) SACR 215 (CC) (*Jaipal*) para 29.

[59] We respectfully disagree. Prima facie, the evidence establishes the following. First, as demonstrated above, the respondents carried out a common purpose to defraud the Department and launder the proceeds. Second, the funds transacted through Islandsite's account emanated from the Department. Third, it is inconceivable that Ms Ragavan, the financial manager of the 'puppet master', Islandsite, and an operator of its bank account, was not involved in the fraud and money laundering; she is no ordinary bookkeeper. Fourth, this involvement called for an explanation from Ms Ragavan.

[60] What remains concerning this question, is the High Court's conclusion that to find common purpose 'would be a quantum leap', because of the lackadaisical manner in which the case was investigated. This conclusion merely underscores the fact that an objective assessment of the evidence was overshadowed by the court's finding that the State case was stillborn, because of the ineptitude of the investigators and the failure to secure official documents. This error of law, to which the minority judgment pays no regard, is reinforced by the following groundless statement by the Judge:

'At the risk of repetition, to say that the manner in which this investigation was conducted is a comedy of errors would be the understatement of the millennia.'

[61] The High Court's error of law is inimical to the interests of justice: the Constitutional Court has stated that the aim of the doctrine of common purpose is to impute the acts of a perpetrator to all the co-perpetrators, to overcome an otherwise unjust result which offends the legal convictions of the community.[18] This aim was undermined by the application of the wrong legal standard to common purpose. This, in turn, directly influenced the High Court's decision that there was no evidence that the respondents had committed the offences; and that

[18] *S v Tshabalala and Another* [2019] ZACC 48; 2020 (3) BCLR 307 (CC); 2020 (2) SACR 38 (CC); 2020 (5) SA 1 (CC) para 56.

a conviction was not possible, except if they incriminated themselves. It follows that question 6 must be answered in favour of the State.

Question 4: Admission of documents and then ruling them inadmissible

[62] The High Court's finding that the prosecution had not discharged the onus of proving the admissibility of documents, raises a question of law.[19]

[63] The facts on which this point hinges, in sum, are the following:

(a) The acquittal of the respondents was based on the fact that the original documents did not serve before the court. This had an impact on the Judge's assessment of the undisputed factual evidence.

(b) On 23 February 2023 the Judge ruled that a sundry payment advice (Exhibit TJM 11), a transaction log sheet (Exhibit TJM 12) and a tax invoice issued by Nulane dated 12 March 2012 in the sum of R8 328 080 (Exhibit TJM 13), were originals and admissible in evidence.

(c) Ms Setoane Motshumi, the author of the transaction log sheet, confirmed its contents. So too, did the author of the sundry payment advice, Mr Kenosi Thubisi. He testified that the second respondent had authorised the payment of R8 328 080 to Nulane. She did not dispute this.

(d) However, the judgment contradicts the court's earlier ruling that these documents were admissible. The Judge said:

> 'All the evidence that they [the State] sought to rely on to prove authenticity came to nought save for the evidence of Mr Cezula.'

(e) Later the Judge said:

> '[A]ll other copies of documents sought to be relied on by the State are now with the benefit of having had regard to the evidence led up to this point, ruled inadmissible.'

[19] *Rex v Nchabeleng* 1941 AD 502 at 504; *Magmoed v Janse van Rensburg and Others* 1993 (1) SA 777 (A); [1993] 4 All SA 175 (AD) (*Magmoed*) at 823B-G; affirmed in *S v Basson* 2005 (1) SA 171 (CC) paras 49 and 60.

[64] In refusing to reserve this question as one of law, the Judge said, 'the answer is to be found in the judgment'; and it 'is not a question of law at all, if anything it is once more an illustration of how the applicant misconstrues the judgment complained of'. Then it is said the question 'is quintessentially a matter of evaluation of the evidence as presented'; and that the ruling of 23 February 2023 was provisional.

[65] None of these statements is correct. What is more, they are compounded by the court's finding that the State case was abortive from the outset, because of the incompetence of the investigators and the lack of interest in handling evidence and documents.

[66] The undisputed evidence is this. Mr Cezula drafted the deviation request on the instruction of the third respondent. The first, second and third respondents signed the deviation request. This led to the conclusion of the contract with Nulane to conduct feasibility studies at a cost of almost R25 million. The second respondent signed that contract on behalf of the Department. The first respondent certified that Nulane had rendered the services under the contract and was entitled to payment. And the Department paid Nulane R8 328 080 for which it had been invoiced, albeit that the payment was made in two tranches.

[67] So, Nulane's original tax invoice of 12 March 2012 for R8 328 080, the original payment advice reflecting this amount, and the evidence of Ms Motshumi and Mr Thubisi, confirm the undisputed evidence. The finding that all the evidence on which the State relied to prove the authenticity of documents came to nought, is inexplicable and irrational. So too, the ruling that having regard to the totality of the evidence, the copies on which the State relied were inadmissible. Question 4 must therefore be answered in favour of the State.

Question 5: misapplication of the best evidence rule

[68] The admissibility of evidence raised by this question, determined by legal principles and rules, is a question of law. The basic facts relevant to this question, in sum, are the following:

(a) Dr Takisi Masiteng, the current HOD, testified that the Department had moved offices during 2012 to 2013; that its documents were packed and transported by a private moving company; and that there was confusion as to the whereabouts of the documents. The State witnesses testified that the Department conducted searches on two different occasions in 2021 (nine years later). This evidence met the legal standard of a diligent search.

(b) During these searches, the originals of only a sundry payment advice, a transaction log sheet and a tax invoice issued by Nulane dated 12 March 2012 in the sum of R8 328 080, were located. Copies of, inter alia, the Worlds Window letter, the deviation request, the contract to Nulane, the SCM Policy and a report by Deloitte, were also found.

(c) The State presented evidence by various witnesses to identify certain documents as true copies. Mr Petros Mofokeng identified the contract between the Department and Nulane, as one of the documents which he had considered when making payment to Nulane in 2012. He also identified an invoice from Nulane to the Department; and a sundry payment form completed by the Department authorising the payment of that invoice to Nulane, in March 2012. He identified his, and the first respondent's signature, on the payment form.

(d) Mr Cezula confirmed that the deviation request was a true copy of the document that he had prepared. Dr Masiteng confirmed that the copy of the SCM Policy was the policy of the Department applicable at the relevant time. This policy was approved by the first respondent, then the Accounting Officer. The authors of the Deloitte report identified it as their

work product, save that there were changes to the report made by unknown persons.

(e) The court however found that 'nothing in the evidence as presented by the state suggests that a bona fide and thorough search for these documents was conducted'; and that it was not satisfied that the originals were lost.

(f) After they were retrieved, the documents were stored overnight at a police station. The Judge said that these documents 'were mishandled with no correct chain of custody being complied with'. However, the respondents did not suggest that the documents were fabricated or tampered with. Further, the State witnesses identified the documents as those seized by the police, and the relevant respondents admitted signing the deviation request and payment advice.

(g) The Judge found that the State case was stillborn, solely because of the ineptitude of the investigators and the lackadaisical way evidence and disputed documents were handled.

[69] The High Court stated that this question is purely one of fact and that the best evidence rule had not been satisfied. The court further stated that the question whether it had exercised its discretion judicially, is a fact-based enquiry.

[70] The High Court misapplied the best evidence rule, or more correctly, the rules relating to the admission of documentary evidence. The finding that the State case was stillborn for the reasons advanced, was fatal to the Judge's approach to the admission of documentary evidence.

[71] The court's finding that the searches by the Department were neither bona fide nor diligent, or that the investigators were inept, has no foundation in the evidence. And the chain of custody point is a red herring: there was no suggestion

that the documents were tampered with, and the bulk of the documents found during the searches were not disputed by the respondents.

[72] The appointment of Nulane did not occur in a vacuum. Prima facie, the Worlds Window letter and the deviation request, which triggered all the offences, were proved by secondary evidence, namely that of Mr Cezula. The first and third respondents did not dispute that they had recommended the deviation request; and the second respondent, that she approved the request and Nulane's appointment. It is common ground that the Department paid Nulane R24 984 240. The Deloitte report, albeit with amendments, was identified by its authors as their work product, which was sent to Nulane. The State produced original documents proving the payment of R8 328 080 to Nulane. The movement of funds after the Department paid them to Nulane, was also not disputed.

[73] The High Court misapplied the best evidence rule. It failed to apply the principle that secondary evidence may be admitted and relied on, and that the weight to be attributed to it will depend on the circumstances of the case.[20] This is an error of law. It is compounded by the Judge's finding that even if there was a misdirection on the admissibility of documents, that in the face of the evidence, the Judge could do 'zilch' with the documents. The use of this colloquialism is unfortunate; it does not belong in a judgment. It follows that question 5 must be decided in favour of the State.

Question 7: misinterpretation and misapplication of s 204 of the CPA

[74] As with the other questions of law, the respondents submit that this question is inaccurately framed; and that the facts upon which the point hinges are not clear. The respondents are however mistaken.

[20] See generally D T Zeffert and A T Paizes *The South African Law of Evidence* 3 ed (2017) at 955.

[75] The legal point raised in question 7 is clear. It is whether the High Court erred in its interpretation and application of s 204 of the CPA.

[76] The facts upon which question 7 hinges, are equally clear and concise. They can be summarised as follows:

(a) The court found that a noteworthy feature of Mr Cezula's evidence was that he had not once implicated himself in the commission of the fraud perpetrated on the Department. At best, he admitted contravening the PFMA.

(b) Mr Cezula's evidence that he had prepared the deviation request on the instructions of his supervisor, the third respondent, was not disputed. The court ignored Mr Cezula's evidence that the deviation request was unusual; that he was under pressure from the third respondent to draft the request without the standard documents required by the SCM processes; and that the required checks on the service provider (Nulane) concerning its performance, had not been done.

(c) The Judge erred in finding that Mr Cezula was obliged to testify that he had the intention to commit fraud.

[77] Counsel for the seventh and eighth respondents submit that question 7 is quintessentially one of fact; and that the court did not find that Mr Cezula had to admit he had committed fraud. It is further submitted that there was no misapplication of the law and that even if there was, it does not affect the acquittal of the respondents.

[78] The High Court held that this question 'in so far as it is disguised as a question of [law], is of no moment'. The Judge said that in the application for the discharge of the respondents, the State had submitted that the court, when dealing with the provisions of s 204, had correctly applied that provision and properly

warned Mr Cezula, which put paid to the question. The Judge went on to say that in any event, 'on this score too, the judgment is instructive'.

[79] The judgment however demonstrates that the court misconstrued and misapplied s 204 of the CPA. The Judge rejected Mr Cezula's evidence on the ground that he refused to admit that he had committed fraud. Here too, the judgment speaks for itself:

'What is noteworthy of his evidence in chief as well as during cross examination is that, not once, did Mr Cezula implicate himself in the commission of the offence of fraud. Tried as he did, not even Mr Serunya [the prosecutor] could get Mr Cezula to admit to committing an offence, let alone fraud. Instead he testified that he committed an error of judgment. At best what he admitted to was contravening the Public Finance Management Act.'

[80] In her evaluation of Mr Cezula's evidence, the Judge said:

'To avail himself of the indemnity however, he should have either testified that he had the intention to defraud the Department and acted in accordance therewith. In the absence of an express admission of committing fraud, he should at the very least have given factual evidence fulfilling the essential elements of fraud from which this court could then infer the commission of the offence of fraud. He did not do that.'

[81] Nothing could be clearer. This is a misinterpretation and misapplication of s 204(1)*(b)* of the CPA. It requires the witness to give evidence and answer any question put to him by the prosecution, the accused or the court, regardless of whether the reply may incriminate him in relation to the specified offence. It does not require the witness to admit to the specified offence. If the court is of the opinion that the witness has answered the questions put to him frankly and honestly, he must be discharged from prosecution.[21]

[21] Section 204(2) of the CPA.

[82] Aside from rejecting Mr Cezula's evidence based on a wrong legal principle, the order that he is not indemnified against prosecution, is a further error of law, with grave consequences for Mr Cezula. This order was made without granting him an opportunity to be heard, to which he has a right or legitimate expectation.[22] This is a gross irregularity.[23]

[83] The respondents' submission that the misapplication of s 204 has no effect on their acquittal, is startling. Mr Cezula's evidence concerning the preparation of the deviation request is foundational to the State case on all four counts. The rejection of his evidence on the basis that he failed to admit to fraud, was not only a misinterpretation and misapplication of s 204: the High Court also ignored the totality of the evidence, and the common cause facts regarding the deviation request, as is demonstrated above.

[84] The High Court misconstrued and misapplied s 204 of the CPA. This resulted in a rejection of Mr Cezula's evidence and a refusal to grant him indemnity. In turn, this rendered his evidence, which the Judge herself noted was essential to prove Counts 1 and 2, of no probative value. Question 7 likewise, must be decided in favour of the State.

Question 2: Was there legal evidence justifying the discharge of the respondents under s 174 of the CPA?

[85] The State submits that the decision to discharge the respondents at the close of the prosecution's case, contrary to legal precedent, was an error of law and constituted a gross irregularity in the trial. The errors of law referred to above resulted in the conclusion that there was no legal evidence upon which a

[22] See A Kruger *Hiemstra's Criminal Procedure* 3 ed at 23-50 and the authorities there cited.
[23] *Mohammed v Attorney-General of Natal and Others* 1996 (1) SACR 139 (N) at 145h.

reasonable person might convict, as contemplated in s 174 of the CPA. As such, it is a question of law.[24]

[86] The basic facts relevant to question 2 can be summarised as follows:

(a) The Worlds Window letter dated 3 October 2011, was used to motivate a deviation from the Department's procurement processes.

(b) On 6 October 2011 the deviation request was prepared on the instruction of the third respondent. It was recommended by the first respondent and approved by the second respondent on 7 October 2011.

(c) Nulane's name does not appear in the Worlds Window letter. It was not registered as a service provider with the Department, and did not apply to be registered as such when the deviation request was drafted.

(d) Nulane subcontracted the services to Deloitte at a cost of R1 538 457.86.

(e) The Department paid Nulane R24 984 240, purportedly for the services.

(f) The fourth respondent signed the Gateway contract on behalf of Nulane.

(g) The respondents did not dispute the movement of the funds after they were paid to Nulane by the Department.

[87] When the evidence is measured up to the legal standard in s 174, prima facie, the State established evidence on which a reasonable person might have convicted the respondents. This applies to all four counts.

Count 1

[88] The second respondent, the Department's Accounting Officer, signed the deviation request – which she admitted. In approving the deviation, she committed the Department to a contract of nearly R25 million, without following a tender process. She thus failed to ensure the effective and transparent use of the Department's resources, and incurred irregular, and fruitless and wasteful

[24] *Magmoed* fn 19 at 823B-G; *Basson* fn 19 para 49.

expenditure. This conduct, prima facie, is a contravention of s 86(1) of the PFMA.[25] Put differently, the High Court failed to consider whether the proven facts constituted the commission of the offence charged in Count 1 – a question of law that should have been reserved in favour of the State.[26]

[89] The following statement by the Judge when acquitting the second respondent, is directly at odds with the evidence. The Judge said:

'We have sat through six weeks of this trial. Not even once, especially in your instance, not even once was this court ever favoured with even an iota of evidence linking you to any wrongdoing.'

Count 2

[90] As stated, the respondents participated in a carefully planned scheme in which they pursued a common purpose to defraud the Department and launder the proceeds. The prima facie case against each participant in this scheme; the entitlement of Nulane to nearly R25 million; and the grounds upon which Islandsite and Gateway (in the UAE) were entitled to receipt of the Department's funds, cried out for an explanation by the respondents.

[91] More specifically, the prima facie evidence on which a reasonable person might have convicted the respondents includes the following, and called for an explanation by the respondents:

(a) It is not coincidental that the same officials, ie the first, second and third respondents were involved in the deviation request, and the conclusion and implementation of the contract with Nulane.

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[25] Section 86(1) of the PFMA provides:
'An accounting officer is guilty of an offence and liable on conviction to a fine, or to imprisonment for a period not exceeding five years, if that accounting officer wilfully or in a grossly negligent way fails to comply with a provision of section 38, 39 or 40.'

[26] *Magmoed* fn 19 at 808A.

(b) Unsurprisingly, the Worlds Window letter does not identify the agent required to be appointed. It states: 'we will immediately advise you of the details of the planning agent'. So, the only inference to be drawn is that the first, second and third respondents must have known the identity of the agent – Nulane; and there must have been collusion between Nulane and the respondents.

(c) The Worlds Window letter also does not authorise nor require the conclusion of any contract between the Department and the unknown agent. This raises the question: Where did the estimated budget of R25 million in the deviation request come from?

(d) Contrary to what is stated in the letter, Worlds Window never entered into any public-private partnership with the Department.

(e) The fourth respondent is the sole director of Nulane and knew or must have known (i) that it did not participate in any tender process; (ii) that it had been put up as the agent of Worlds Window to extract public funds from the Department; (iii) that Worlds Window had no intention of entering into any public-private partnership with the Department; (iv) that Nulane was not entitled to payment of almost R25 million; (v) that the Gateway contract was a sham; and that the scheme was designed to fraudulently extract funds from the Department and launder the proceeds to the UAE.

(f) Nulane submitted invoices to the Department and received payment of nearly R25 million, knowing that: (i) it had not participated in any tender process; (ii) it had not done the work (the feasibility study was outsourced to Deloitte at a cost of approximately R1.5 million); (iii) it was not entitled to payment of nearly R25 million; and (iv) the bulk of that amount would be laundered to Gateway in the UAE.

(g) The sixth respondent signed the contract as the Project Director of Nulane. Therefore, he must have been aware of the fraud perpetrated by the first to fifth respondents in engineering the award of the contract to Nulane.

(h) Islandsite and Ms Ragavan could not have accepted the funds which emanated from the Department, without being aware of the entire scheme, specifically the payments to Nulane, which have their source in the fraudulent award of the contract to it. Islandsite, acting through one of its directors, Mr Atul Gupta, and its financial manager, Ms Ragavan, was the recipient of the bulk of these funds. Both Islandsite and Ms Ragavan actively participated in the receipt and movement of the funds. Ms Ragavan, who is responsible for the monitoring, protection and oversight of Islandsite's finances, never raised any query about the source or entitlement of any transferee to the advance payment, nor indeed about the total funds of R19 070 934 moved to Gateway in the UAE. Gateway received this amount under the pretext that it constituted payment by Nulane for services rendered in terms of the Gateway contract.

[92] Prima facie, the evidence showed that the Worlds Window letter and the deviation request are inextricably linked. These documents form the basis of everything that followed. Remarkably, the High Court did not see it that way. In acquitting the second respondent, the Judge said:

'All that I know is that someone compiled a submission that flew in [through] the window. Someone signed L Moorosi. They did not even take the trouble, and it could have been so easily ascertained just to compare L Moorosi to your ordinary handwriting and your ordinary signature. They did not do that.'

[93] This, when the second respondent in her plea explanation admitted signing the deviation request. And it was not disputed that Mr Cezula had drafted it, nor that the first and third respondents had also signed the request. What is more, counsel for the third respondent when cross-examining Mr Cezula, suggested that the first respondent may have given the Worlds Window letter to him. What was never disputed, was that the letter was attached to the deviation request. In fact, it was put to Mr Cezula: 'you had the attached Windows India letter there', when

he brought the deviation request to the third respondent for her recommendation. Further, the High Court's finding that the State 'did not take the trouble to investigate the origin of the letter', suggesting that the Worlds Window letter has no evidential value, also demonstrates the pervasiveness of the finding that the State case was stillborn.

[94] For the above reasons, the State, prima facie, established that the respondents had committed the fraud described in Count 2. Their acquittal on this count is baffling.

Count 3

[95] The respondents did not dispute the movement of funds referred to in this charge. The thrust of the defence by the Islandsite and Ms Ragavan was that these funds constituted loans made and received by Islandsite, which fulfilled a treasury function within the cash focus system.

[96] In cross-examination, counsel for the seventh and eighth respondents put the defence thus:

'COUNSEL: But you say in your report and I can go to the passages. Often you say there is nothing in the bank statement to indicate what this was for, like an invoice number. Remember that?

MR RANKUOATSANA: Yes

COUNSEL: But these companies know each other very well. They know if Islandsite sends money to Oakbay it is a loan. Oakbay sends it back, it is a repayment of the loan. They do not have to talk to themselves in their own bank statements, saying what did you do with the money that you sent to Oakbay? They know it is a loan. Why do they write to themselves and tell them what they – themselves [know] what they are doing? You would expect that of them.'

And later:

'COUNSEL: You see Islandsite was a holding company and a treasury function.

MR ZAMA: Ja

COUNSEL: So it was not trading, it was borrowing and lending, borrowing and lending.'

[97] However, this defence raised more questions than answers. The minority judgment does not grapple with this. The evidence, particularly in the light of Islandsite's 'treasury function', called for an explanation from the fourth, fifth, seventh and eighth respondents, for the following reasons:

(a) Islandsite is neither a trading company nor a financial services provider. If it serves a treasury function – managing the financial resources of a business to reach it goals and the risks associated with its assets – then it is inconceivable that there would be no reference on bank statements to any document or transaction supporting the origin of, or reason for, the funds transacted through the accounts of the various companies.

(b) The entities involved in the movement of funds extracted from the Department are companies, not natural persons. One would therefore expect that there would be an indication of the nature and source of the funds in each transaction, and the entitlement of each company to receive them.

(c) Funds are transferred from company to company with no reference on the bank statements as to the source of these funds and what they are for. How do the companies in between the various transactions know what these funds are intended for, and which companies are entitled to them?

(d) If these numerous, rapid, transfers of funds on the same day are genuine, why does Islandsite first transfer the funds to various companies before the so-called loan ends up with the company it is supposedly intended for? Why does Islandsite not transfer the funds directly to the company receiving the 'loan'?

(e) Loans are used by companies to generate income. Why then would a company which receives a 'loan', pay back the 'loan' to Islandsite or another company on the same day?

(f) If Islandsite is truly making these 'loans', then it makes no commercial sense for it to immediately or within a very short space of time, borrow the

same or similar amount from the entity to which it had just made that loan. Aside from this being commercially insensible, it is inconsistent with a function of a treasury house, whose main purpose is to generate capital, ensure the financial well-being of a company and mitigate risk.

[98] So, far from being the 'death knell' to the State case, prima facie the evidence of Messrs Rankuoatsana and Zama established the movement of the funds from the Department to Nulane's Bank account, from which they were rapidly transferred from one account to another through the cash focus system, and through layers of artificial transactions set out in Count 3. Islandsite and Ms Ragavan played a pivotal role in the co-ordination of these transactions, which were designed to distance the funds from their criminal source – the fraud on the Department – and to make detection of the source as difficult as possible. This, prima facie, is a typical case of money laundering as contemplated in s 4(1) of the POCA.[27] The relevant respondents should not have been acquitted on Count 3.

Count 4

[99] Count 4 can be dealt with briefly. The High Court failed to apply the elements of fraud. It is trite that fraud consists of an unlawful, intentional misrepresentation which causes actual prejudice or is potentially prejudicial to

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[27] Section 4 of POCA provides:
'**Money laundering**
Any person who knows or ought reasonably to have known that property is or forms part of the proceeds of unlawful activities and-
(a) enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether such agreement, arrangement or transaction is legally enforceable or not; or
(b) performs any other act in connection with such property, whether it is performed independently or in concert with any other person,
which has or is likely to have the effect-
(i) of concealing or disguising the nature, source, location, disposition or movement of the said property or the ownership thereof or any interest which anyone may have in respect thereof; or
(ii) of enabling or assisting any person who has committed or commits an offence, whether in the Republic or elsewhere-
(aa) to avoid prosecution; or
(bb) to remove or diminish any property acquired directly, or indirectly, as a result of the commission of an offence,
shall be guilty of an offence.'

another.[28] The transactions constituting the movement of funds and specifically, the payments of R8 800 000 and R10 200 000 by Pragat to Nulane's Bank of Baroda account; and the transfer of R19 070 934 from Nulane to Gateway, were not disputed. When making these payments the relevant respondents unlawfully and intentionally misrepresented that these payments were in the ordinary course of business and legitimate transactions, to the prejudice or potential prejudice of the Bank of Baroda, the Reserve Bank of South Africa and/or the National Treasury.

[100] The payment to Gateway referred to in Count 4 was impossible if Islandsite, acting through Ms Ragavan, had not paid an amount of R8.8 million to Pragat on 2 July 2012. On the same day, Pragat paid the same amount to Nulane's Bank of Baroda account. On 6 July 2012 Islandsite, via the cash focus system with the eighth respondent as the 'user', transferred R10.2 million to Nulane Bank of Baroda account. The eighth respondent thus facilitated the fraud in Count 4 by transferring both these amounts to Pragat and Nulane, respectively, via the cash focus system. Nulane applied on the same day, 6 July 2012, to the Bank of Baroda for the overseas transfer of funds to Gateway.

[101] The evidence prima facie shows that the fourth, fifth, seventh and eighth respondents knew or must have known that Gateway had rendered no services to Nulane, which entitled it to payment of any amount emanating from the Department. Prima facie these transactions themselves (and not evidence of a representation to the Reserve Bank, the Bank of Baroda or the National Treasury), constitute the fraud described in Count 4, which called for an explanation by these respondents. In addition, if Ms Ragavan was not registered by Mr Atul Gupta as a 'user' on the cash focus system, she had to explain how her name appeared as

[28] S V Hoctor and C R Snyman *Snyman's Criminal Law* 7 ed (2019) at 461; *S v Gardener* [2011] ZASCA 24; 2011 (1) SACR 570; 2011 (4) SA 79 (SCA) para 29.

a ‘user’ in relation to the transactions referred to above, as well as the transactions which resulted in the ultimate transfer of funds to Gateway in the UAE.

[102] Further, on the version of Islandsite and the eighth respondent put to the State witnesses, prima facie, they committed fraud: the payments to Gateway do not constitute ‘borrowing and lending’ by Islandsite functioning as a treasury house. Rather, these payments were purportedly made in terms of the Gateway contract. It follows that the respondents ought not to have been acquitted on Count 4.

Question 3: misapplication of s 174 of the CPA regarding multiple accused

[103] The basic facts on which this question hinges, in sum, are the following:

(a) Mr Cezula’s evidence that the third respondent had instructed him to draft the deviation request, was never disputed.

(b) The second respondent, in her plea explanation, said that she approved the deviation request because Mr Cezula, the first and third respondents had recommended it.

(c) The cross-examination on behalf of the first to sixth respondents demonstrated that they would implicate each other in the commission of the offences. For example, the third respondent denied that she was the source of the Worlds Window letter, and it was put to Mr Cezula that the first respondent could be the source of the letter. Similarly, in cross-examination the sixth respondent implicated the fourth respondent as having had knowledge of the award of the contract to Nulane.

(d) The first respondent signed a Nulane invoice (proved to be an original) dated 12 March 2012, certifying that Nulane had rendered services to the Department. The third respondent, as CFO, signed a sundry payment advice, also proved in evidence.

(e) Counsel for the sixth respondent put it to Mr Van Zyl of Deloitte that the emails concerning his engagement of Deloitte and the conclusion of the contract between Nulane and Deloitte, were sent on the instructions of Mr Ashok Narayan. This included an email sent by the sixth respondent to Deloitte on 25 October 2011 in which he insisted that the project must commence before December 2011.

(f) The fourth, fifth, seventh and eighth respondents did not dispute the movement of funds in relation to Count 3.

[104] The High Court held that question 3 is one of fact. For the reasons advanced above, it misapplied the principle in *Lubaxa*,[29] namely that if a prosecution should not be commenced without the minimum of evidence to secure a conviction, then it should cease when the evidence finally falls below that threshold, especially 'where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination'.[30] There was no risk of self-incrimination in this case: the State adduced evidence on all four counts, which called for an explanation from the respondents.

[105] In *Lubaxa* this Court said:

'Whether, or in what circumstances, a trial court should discharge an accused who might be incriminated by a co-accused, is not a question that can be answered in the abstract, for the circumstances in which the question arises are varied. While there might be cases in which it would be unfair not to do so, one can envisage circumstances in which to do so would compromise the proper administration of justice. What is entailed by a fair trial must necessarily be determined by the particular circumstances.'[31]

[29] *S v Lubaxa* 2001 (4) SA 1251 (SCA); [2002] All SA 107 (A) (*Lubaxa*) para 19.
[30] *Lubaxa* fn 29 para 19.
[31] *Lubaxa* fn 29 para 21.

[106] This is such a case. The acquittal of the respondents was unfair to the prosecution and compromised the administration of justice, in the light of the following facts. A prima facie case was established against the respondents. The second respondent admitted that she approved the deviation request because the first and third respondents had recommended it. The third respondent suggested that the first respondent was the source of the Worlds Window letter. The contract, and the payments to Nulane, were not possible without the first, second and third respondents working together. Likewise, the offences charged in Counts 3 and 4 could not be committed without the co-operation of the fourth, fifth, seventh and eighth respondents. The sixth respondent suggested that the fourth respondent knew about the award of the contract to Nulane.

[107] So, there was a real likelihood that the respondents would have incriminated each other in the commission and furtherance of the offences, had they been put on their defence. The High Court misapplied s 174 of the CPA: a court should not discharge an accused who might be incriminated by a co-accused. This was unfair to the State.[32] Therefore, question 3 must also be answered in favour of the State.

Conclusion

[108] It is unnecessary to deal with the remaining question of law by reason of the conclusions to which we have come. For the sake of clarity, the acquittal of Mr Mbana Peter Thabethe, the first respondent, on the charge of contravening s 86(1) of the Public Finance Management Act 1 of 1999, specified in Count 1, is unaffected by this judgment.

[32] *Jaipal* fn 17 para 29.

[109] The High Court made numerous errors of law that resulted in the acquittal of the respondents. This is unfortunate, particularly in a case such as this, where it was prima facie established that scarce public funds were unlawfully extracted from the Department and channelled to the UAE, by fraud and the misuse of power. This subverted the aims of the Project to generate income through farming and alleviate poverty, undermines the functionality of democratic institutions, and endangers the rule of law. The trial in the High Court can be summed up in a single sentence: This was a failure of justice. Regrettably, this erodes public confidence in the criminal justice system.[33]

[110] The following order is issued:

1 The application for leave to appeal is granted.

2 The questions of law reserved in questions 2, 3, 4, 5, 6 and 7 are decided in favour of the State.

3 Questions 8 and 9 are not properly reserved for want of a factual foundation.

4 The order of the Free State High Court dated 21 April 2023, in terms of which:

4.1 the second respondent was acquitted on Counts 1 and 2;

4.2 the first and third to eighth respondents were acquitted on Count 2;

4.3 the fourth, fifth, seventh and eighth respondents were acquitted on Counts 3 and 4; and

4.4 Mr Shadrack Cezula was not indemnified against prosecution under s 204 of the Criminal Procedure Act 51 of 1977,

is set aside.

5 It is ordered that the respondents may be retried for the same offences in respect of which they were acquitted by the Free State High Court on

[33] *Jaipal* fn 17 para 29.

21 April 2023, as if they had not previously been arraigned, tried and acquitted: provided that a different Judge shall preside over the trial.

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A SCHIPPERS

JUDGE OF APPEAL

_____

T V NORMAN

ACTING JUDGE OF APPEAL

Musi AJA (Dissenting)

[111] I have had the pleasure of reading the first judgment prepared by my colleagues Schippers JA and Norman AJA (first judgment). I agree with most of the reasoning and holdings in the first judgment. I, however, part ways with it regarding its application of the common purpose doctrine in order to hold the eighth respondent, Ms Ronica Ragavan, criminally liable.

[112] The facts have been set out in the first judgment. There are facts, not mentioned in the first judgment, which need to be mentioned in this judgment. The State, inter alia, called two witnesses to testify about money flows to and

from the different entities mentioned in the first judgment, Mr Rankuoatsana, a senior financial investigator attached to the National Prosecuting Authority (NPA) and Mr Zama, a Chartered accountant.

[113] Mr Zama conceded, during cross-examination, that his conclusion, with regard to Island Site's books of accounts (Island Site books), was totally wrong. This he attributed to the limited information that was given to him by the State. He further conceded that all the loans were reflected in the ledger accounts and bank statements of Island Site. Additionally, he categorically stated that he could not find anything wrong with Island Site's books, but he had a problem with Pragat's. Lastly, he confirmed that nothing was 'concealed, disguised or blurred' by the financial statements reflecting that Island Site charged interest on the money advanced to the companies in the focus group. This is what he said during cross-examination:

'Mr HELLENS: But what I want to put to you is, this reconciliation page 64.4, shows that your calculation that there was a wrong balance of 4.88 million, was entirely incorrect, and had to be taken the right entries in the ledger and the bank statements into account, you would not have had that difference of 4.8.

Mr ZAMA: Correct

Mr HELLENS: Fine, so there is nothing dubious about the bank account [of Islandsite], because the only thing that you said was dubious was this 4.8 discrepancy, which turns out not to be a discrepancy.

Mr ZAMA: Ja…

Mr HELLENS: Is there anything that you query about the books of account of Islandsite that makes a difference in this case?

Mr ZAMA: On my side, from Islandsite? Nothing, the only thing I have is on Pragat.'

[114] Mr Rankuoatsana, who testified about the money flows and not money laundering, also conceded that all the loan and repayment transactions in Island Site's books were fully documented in ledgers, bank statements and financial statements. He further accepted that there was *commixtio* (mixing together) in

Island Site's account, since most of the entities in the focus group paid back their loans into the Island Site account. During the period 8 November 2011 and 6 July 2012 the total movement of money was approximately R497 489 230.80. There is therefore no proof that the money lent or advanced to the other members of the focus group was the money from the Department.

[115] Additionally, he too conceded that there was nothing 'hidden, concealed, disguised or blurred' in Island Site's books. At the conclusion of Ms Ragavan and Island Site's counsel's cross-examination the following is recorded:

'Mr HELLENS: Okay. So, in conclusion, sir, we have a fully documented trail of the flow of the money between these various companies. Backed by bank statements, ledgers and financial statements, correct?

Mr RANKUOATSANA: That is correct…

Mr HELLENS: So, I want to put it to you sir, that having done our own exhaustive investigation of our own books of account, everything in your report is totally explicable in accounting terms. There is nothing suspicious or irregular about it. You do not differ from me, do you?

Mr RANKUOATSANA: I do not argue, since you have explained it was a loan between companies.'

[116] Neither of these two witnesses interviewed any of the Directors of Island Site. They also did not interview Ms Ragavan, its financial director. The picture which they painted is clear: there was nothing untoward with Island Site's books.

[117] The first judgment correctly states the general principles of common purpose but fails to apply it with regard to Ms Ragavan. When its reasoning with regard to Ms Ragavan is considered, it changed the rules of the common purpose doctrine. It did so by failing to draw the fundamental distinction between prior-agreement or conspiracy common purpose, express or implied and active association common purpose. The failure to distinguish the application of the two

forms of common purpose led, in my view, to an incorrect conclusion, in respect of Ms Ragavan. What are the rules of the doctrine of common purpose?

[118] In *Thebus*[34] Moseneke J, stated that '[t]he doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime…'. The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common design with the requisite blameworthy state of mind.[35]

[119] The first judgment finds, without a factual substratum, that the State established common purpose based on prior agreement or active association and participation. The State did not adduce any evidence whatsoever of a prior agreement. Specifically, the State did not adduce any evidence that Ms Ragavan was a party to any prior agreement or conspiracy. There is also no evidence on which to infer prior agreement. It is unsurprising that the factual premises used to make an inference of prior agreement is absent in the first judgment. An inference can only be made if there are two or more interrelated factual premises in support of the inference sought to be made; here there are none. The first judgment fails to state where the prior agreement was entered into; by whom it was entered into and why it says the Ms Ragavan was a party to the agreement or arrangement. There is insufficient evidence to infer, from the circumstances of this case, that Ms Ragavan was a party to any prior agreement.

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[34] *Thebus and Another v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); 2003 (2) SACR 319 (CC) para 18.
[35] Ibid paras 18 and 19.

[120] She was an employee of Island Site and not a director or the controlling mind of the company. There is no indication that she sat in any meeting with the directors of Nulane or Pragat. In fact, it was put to Mr Rankuoatsana that she did not know what Pragat's activities were. He had no comment. There is no evidence that she knew the source and origin of all the money that was generated by the companies in the focus group. It was pertinently put to the State witnesses that she did know about the business activities of all the companies in the group and they could not offer proof that she did. There is no indication that she sat in any meeting with the directors of Nulane or Pragat. That being the case, prior agreement common purpose had not been established either expressly or by inferential reasoning.

[121] The State therefore had to prove active association common purpose. The requirements for this form of common purpose were set out in *Mgedezi*,[36] in which the following, albeit in the context of murder, was said:

'In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. In order to secure a conviction against accused No 6, in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt.'

[122] To prove active association common purpose the State has to prove that the accused associated themselves, not with a wide and general design, but with

[36] *S v Mgedezi* 1989 (1) SA 687 (A) at 705I-706C.

a specific criminal act that the other participants committed.[37] The conduct of the individual accused should be considered.[38] The State must prove that the accused had the intention to commit the offence and that she committed an objectively determinable act of association before or during the commission of the crime.[39] Criminal liability based on active association common purpose is narrower than pre-agreement common purpose, which is wide and general. In *Dewnath*, this Court found that '(i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime'.[40]

[123] In *Govender*[41] the Court found that '[t]he concept of active association is wider than that of agreement, since it is seldom possible to prove prior agreement'.[42] The converse is true: once a prior agreement is proved, all the conspirators will be held criminally liable for the acts of the others regardless of whether they were on the scene or not, unless there is clear evidence of dissociation by one or more of the conspirators. To hold someone criminally liable for the acts of another when that person was not even at the scene is very broad. Active association common purpose is narrower because the accused must be on the scene and such accused's unlawful participation and *mens rea* must be individually assessed. The fact that it might be more difficult to prove prior agreement common purpose is an evidentiary issue, and has nothing to do with the scope of the two. Conceivably, it can, in some cases, depending on the

[37] S V Hoctor and C R Snyman's Criminal Law 7th ed (2019) at 229.
[38] *S v Le Roux* (444/08) [2010] ZASCA 7; 2010 (2) SACR 11 (SCA) ; [2010] 3 All SA 288 (SCA) (5 March 2010) par 17.
[39] *S v Khumalo* 1991 (4) 310 (A) 357A-E; *Jacobs and Others v S* [2019] ZACC 4; 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC) para 106.
[40] *Dewnath v S* [2014] ZASCA 57 para 15.
[41] *Govender v S* [2023] ZASCA 60; 2023 (2) SACR 137 (SCA).
[42] Ibid para 12.

evidence, be easier to prove active association than prior agreement because the accused must be on the scene.

[124] Furthermore, the statement in *Govender* is contrary to well established precedents of this Court, including *Dewnath*[43] and *Mgedezi*.[44] The Constitutional Court has cited *Dewnath* with approval in *Makhubela v S*; *Matjeke v S*.[45] *Govender* did not consider these precedents. The statement in *Govender* is also, as I have illustrated above, clearly wrong.

[125] In *Banda*[46] it was said that:

'An accused cannot be found guilty of sharing a common purpose with other accused by a process of osmosis.

In the absence of a prior agreement or conspiracy, the doctrine of common purpose may not be used as a method or technique to subsume the guilt of all accused without anything more. It cannot operate as a dragnet operation systematically to draw in all the accused. Association by way of participation, and the *mens rea* of each accused involved, are necessary and essential prerequisites.'[47]

[126] Ms Ragavan was not at the scene of the fraud. The first judgment could not point to a single act of association committed by her before or during the fraud. It uses the money flows after the fraud as an indication, without a factual basis, that she and Island Site were 'aware that the advance payment was part of the proceeds of the fraud on the Department, is buttressed by the next movement of funds relating to the advance payment'. Crucially, the first judgment does not state when she became aware. Time is of the essence in active association common purpose. All the financial transactions occurred after the fraud was already completed. The money was paid to Island Site by Pragat and not Nulane.

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[43] Ibid fn 40.
[44] Ibid fn 36.
[45] *Makhubela v S*; *Matjeke v S* [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) para 38.
[46] *S v Banda and Others* 1990 (3) (SA) 466 (BG).
[47] Ibid 501E-F.

There cannot be active association common purpose after the crime had been completed. Criminal liability cannot be based on the *ex post facto* (after the fact) ratification of another person's unlawful conduct.[48]

[127] The first judgment conflates Ms Ragavan's role with that of the directors of Island Site. The first judgment unfortunately resorts to treating Ms Ragavan and Island Site as an inseparable duo. They are not. Island Site, to state the obvious, is a separate entity. She was an employee of Island Site. Mr Atul Gupta was the controlling mind of the company. He and the other directors determined the operations and strategy of the company. Ms Ragavan's task, as financial manager, was to keep proper books. She did. Neither the financial investigator nor the chartered accountant could find anything wrong with the books. How can it be said that she facilitated loans just because her name appears next to some accounting transactions? It was not in dispute that she processed and posted transactions in the books, as part of her job. It would be surprising if she did not process any transactions at all. There is no evidence that she knew about the operations of Nulane or Pragat. What they did cannot be imputed on her without there being proof of an act of deception or *mens rea*, in the form of intent.

[128] Ms Ragavan was not on the scene of the fraud perpetrated on the Bank of Baroda or the South African Reserve Bank. The evidence establishes prima facie that Nulane, Pragat and Gateway were involved in this fraud. There is no evidence of her actively associating with those entities to defraud the two banks. She processed loans for some of them as an employee of Island Site. There is no evidence of an intent to defraud the banks. When an employee makes an accounting entry in the books such employee does not facilitate the transaction. The employee merely records what happened or what they were instructed to do. It is unhelpful to state, as the first judgment does, that she was not an ordinary

[48] *S v Motaung* 1990 (4) SA 485 (A) 520E-521C.

bookkeeper without setting out why a financial manager would, without more, be liable for the criminal acts of a company. There is no evidence that she transacted without an instruction from Mr Atul Gupta or that she did so on a frolic of her own.

[129] There is no indication, on the facts of this case, of the remotest possibility, not even probability, that any of the accused might incriminate Ms Ragavan. Assuming that prima facie money laundering had been established, Island Site was the 'puppet master' and there is a probability that it might be incriminated by the other accused. While it would not be in the interest of justice to refer Ms Ragavan to stand trial again when there was no evidence on which she could be convicted after the closure of the State's case, during the first trial, the same consideration does not apply to Island Site. Ms Ragavan was correctly discharged at the end of the State's case.

[130] I would have made the following order:

1 The application for leave to appeal is granted.

2 The questions of law reserved in questions 2, 3, 4, 5, 6 and 7 are decided in favour of the State.

3 Questions 8 and 9 are not properly reserved for want of a factual foundation.

4 The order of the Free State High Court dated 21 April 2023, in terms of which:

4.1 the second respondent was acquitted on Counts 1 and 2;

4.2 the first and third to seventh respondents were acquitted on Count 2;

4.3 the fourth, fifth and seventh respondents were acquitted on Counts 3 and 4; and

4.4 Mr Shadrack Cezula was not indemnified against prosecution under s 204 of the Criminal Procedure Act 51 of 1977,

is set aside.

5 It is ordered that the first to the seventh respondents may be retried for the same offences in respect of which they were acquitted by the Free State High Court on 21 April 2023, as if they had not previously been arraigned, tried and acquitted: provided that a different Judge shall preside over the trial.

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C J MUSI

ACTING JUDGE OF APPEAL

Appearances:

For appellant:	N Cassim SC with P Serunye and J Witbooi
Instructed by:	Investigating Directorate NPA, Brooklyn
	Director of Public Prosecutions, Bloemfontein
For first respondent:	T M Ngubeni
Instructed by:	Lugisani Mantsha, Johannesburg
	Bokwa Attorneys Inc, Bloemfontein
For second respondent:	T Masoetsa
Instructed by:	Moroka Attorneys, Bloemfontein
For third respondent:	W J Edeling SC
Instructed by:	Bokwa Attorneys Inc, Bloemfontein
For fourth and fifth respondents:	B Forbay
Instructed by:	Forbay Attorneys Inc, Pretoria
	Motaung Attorneys, Bloemfontein
For sixth respondent:	K C Oldwadge
Instructed by:	Martins Weir-Smith Inc, Edenvale
	Blair Attorneys, Bloemfontein
For seventh and eighth respondents:	M R Hellens SC and D J Joubert SC
Instructed by:	Krause Attorneys Inc, Johannesburg
	Honey Attorneys, Bloemfontein