THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 428/17, 491/17, 635/17, 636/17

In the matter between:

ALFEUS CHRISTO SCHOLTZ	**FIRST APPELLANT**
TRIFECTA INVESTMENT HOLDINGS (PTY) LTD	**SECOND APPELLANT**
TRIFECTA HOLDINGS (PTY) LTD	**THIRD APPELLANT**
TRIFECTA TRADING 434 PROPERTY 4 (PTY) LTD	**FOURTH APPELLANT**
TRIFECTA TRADING 434 PROPERTY 5 (PTY) LTD	**FIFTH APPELLANT**
TRIFECTA TRADING 434 PROPERTY 7 (PTY) LTD	**SIXTH APPELLANT**
TRIFECTA TRADING 434 PROPERTY 11 (PTY) LTD	**SEVENTH APPELLANT**
JOHN FIKILE BLOCK	**EIGHTH APPELLANT**
CHISANE INVESTMENT (PTY) LTD	**NINTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Scholtz & others v The State* (428/17, 491/17, 635/17, 636/17) [2018] ZASCA 106 (21 August 2018)

Coram: Leach, Mathopo, Van der Merwe and Mocumie JJA and Mothle AJA
Heard: 3 May 2018
Delivered: 21 August 2018

Summary: Corruption under ss 3 and 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 – what constitutes – offence committed even if gratification paid after the event.

Sentence to be imposed in respect of offence of corruption – factors relevant thereto – little weight to be afforded to compensatory order.

ORDER

On appeal from: Northern Cape Division of the High Court, Kimberley (Phatshoane J sitting as court of first instance):

A In case numbers 428/17 and 635/17:

1 The appeal of the first appellant against his conviction of corruption on count 16 is upheld and such conviction and the sentence imposed on that count are set aside.

2 The appeals of the first, second and third appellants against their conviction of money laundering on count 34, as well as the appeals of the first and third appellant against their conviction of money laundering on count 35, are upheld and such convictions and the sentences imposed in respect thereof are set aside.

3 Save as the foresaid, the appeals of the first to seventh appellants are dismissed and their convictions, as well as the sentence of 15 years' imprisonment imposed on the first appellant in respect of count 15, confirmed.

B In case numbers 491/17 and 636/17:

1 The appeals of the eighth and ninth appellants (the ninth and tenth accused) against their convictions of money laundering on count 35 are upheld, and their convictions and sentences on that count are set aside.

2 Save as the foresaid, the appeals of the eighth and ninth appellants against their conviction on count 15 and the eighth appellant against the sentence of 15 years' imprisonment imposed on that count are dismissed, and that sentence is confirmed.

C The Registrar of this court is directed to forward a copy of both this judgment and the record to the Law Society of the Northern Provinces for it to consider possible disciplinary action in the light of para 213 of the judgment.

JUDGMENT

Leach JA (Mathopo, Van der Merwe and Mocumie JJA and Mothle AJA concurring)

Introduction and background

[1] Flowing from the circumstances under which certain commercial properties were leased to the Northern Cape's Department of Social Services and Population Development, 12 accused, including the nine appellants, were arraigned in the Northern Cape Division of the High Court, Kimberley on a plethora of charges, that included various counts of corruption, money laundering and fraud.

[2] The trial was a lengthy and drawn out affair, during the course of which several of the charges were withdrawn. Commencing on 3 February 2014, it ran intermittently until judgment on the merits was delivered on 13 October 2015. At the end of the State's case, the accused applied for their discharge and when that application was refused, they applied to the learned judge to recuse herself. That, too, was refused. Such refusal will be dealt with more fully in due course. During the course of presentation of the defence case, but after she had testified, the eighth accused, Ms Y Botha, died of cancer.

[3] In any event, at the end of the day the court a quo convicted the first accused, Mr Scholtz, and the second to seventh accused, companies in which he had an interest, on count 8, a charge of corruption. The first and third accused were also each convicted on a further charge of corruption, count 16, as well as money laundering on counts 34 and 35. The second accused was also convicted of money laundering on count 34 but acquitted on a similar charge, count 35. Mr Block, the ninth accused, and his company Chisane Investment (Pty) Ltd, the tenth accused, were both convicted on count 15, a charge of corruption, as well as of money laundering on count 35. Accused 11 and 12, respectively Mr Alwin Botes and his company, Itile Supply Services (Pty) Ltd, were acquitted on all charges. Substantial fines were imposed on the second to seventh accused, whilst the first and ninth accused were sentenced to an effective 15 years' imprisonment. As the tenth accused was bereft of assets, no sentence was imposed on it.

[4] The court a quo granted those accused who had been convicted, leave to appeal to this Court against their convictions, but refused them leave in regard to their sentences. The first and ninth accused (who are the first and eight appellants) later obtained the leave of this Court to appeal against their sentences. Flowing from this, for some inexplicable reason four different appeal files were opened, each with its own appeal number: case no 428/2017 in regard to the convictions of the first to seventh appellants (the first to seventh accused); case no 491/2017 in respect of the convictions of the ninth and tenth accused (the eighth and ninth appellants); case no 635/2017 relating to the first appellant's sentence; and case no 636/2017 for the eighth appellant's sentence. However, as the appeals against both the appellants' convictions and the sentences of the first and eighth appellants were otherwise treated as a single appeal, I intend to provide a single judgment. In doing so, as certain of the accused initially before the court a quo are not parties to this appeal, I shall

where convenient refer to the individual appellants either by name or by their accused number as reflected in the record.

[5] As it will appear more fully in due course, the charges on which the appellants were convicted relate to a number of lease agreements concluded by various State entities or departments in the Northern Cape with members of what is known as the Trifecta Group of Companies (the second to seventh accused) during the period May 2006 to August 2008. As appears from the documentation included in the record, a company named Trifecta Trading 434 (Pty) Ltd was registered under number 2003/018438/07 on 1 August 2003. Its name was changed with effect from 18 January 2006 to Trifecta Holdings (Pty) Ltd (the third accused). Trifecta Investment Holdings (Pty) Ltd (the second accused) was registered, albeit under a different name, under number 2006/011099/7 on 11 April 2006. The majority of its shares were held by the Casee Trust, a private trust of the first accused, Mr Scholtz, and the Shosholoza Trust, the family trust of Mr Breda. The second accused is the majority shareholder of the third accused whilst the latter is either the majority or sole shareholder of the fourth, fifth, sixth and seventh accused which were used to acquire and then rent out properties. (The documentary evidence is to the effect that the fifth accused is wholly owned by the third accused. Information was placed before the Department of Social Services that 75% of its shares were owned by the Shosholoza Trust and the remaining 25% by the Casee Trust. This conflict was not explained in the evidence and is of no great impact.)

[6] Corruption is all too often an issue which has to be determined by way of inference drawn from the proven facts. In this regard, like pieces in a jig-saw puzzle, a number of events need to be taken into account to determine the full factual matrix from which inferences may permissibly be drawn. For this reason it is necessary to consider in detail the evidence on record in order to determine whether the court a quo correctly convicted the appellants.

[7] The first accused (and first appellant), Mr Scholtz, is a businessman based in Pretoria, engaged in the private equity sector of the economy. He administered a private equity fund which advanced funds for investment in commercial ventures and, as a quid pro quo, obtained shares in the companies used to conduct such ventures (generally a minimum of 25% of the shareholding). In this way, as more fully set out below, he became a shareholder in the Trifecta Group of companies, of which Mr Sarel Breda, another Pretoria businessman, was a director and shareholder.

[8] Mr Breda was running a company, known as Granite City, which dealt in granite slabs and granite installations. He and Mr Scholtz had first met in the year 2000 when he approached Mr Scholtz for financial assistance for a large contract he had obtained to do the granite installation in a well-known Johannesburg hotel that was being converted into a conference centre. Mr Scholtz provided the necessary finance. From this initial contact, the relationship between them blossomed and Mr Breda asked Mr Scholtz to help him as a business mentor. This he was prepared to do although, in accordance with his business model, he stated that he did not become involved in the day to day administration of any of the companies involved.

[9] At the time he first met Mr Breda, Mr Scholtz was one of a number of partners in a private equity fund which invested mostly in the telecommunication and service industries. In 2004, however, he started his own private equity fund and broadened the scope of his investments to include, amongst others, various property developments and a diamond dealing house to which he introduced Mr Breda. This, in turn, led to Mr Breda being engaged as a so-called ‘spotter’ who made regular visits to mining companies and diggings to seek out diamonds in which to invest.

[10] In late 2004, or early 2005, on reading an article in the *Business Day* newspaper, Mr Scholtz learned that the Northern Cape lacked the necessary infrastructure and housing to accommodate provincial government departments. Leasing suitable accommodation to the State thus appeared to be a potentially lucrative source of income, particularly for an entrepreneur having Black Economic Empowerment (BEE) credentials. He envisaged a business model of acquiring largely rundown buildings such as hostels, hotels or blocks of flats, renovating and refurbishing them, and then leasing them to provincial government departments.

[11] He explained this to Mr Breda, a historically disadvantaged individual, who had BEE credentials and was regularly in the Northern Cape on his diamond spotting rounds. He asked Mr Breda to make enquiries in regard to the possibility of such a business venture in the province. Although Mr Breda subsequently confirmed that there was indeed a potential market, he 'disappeared for a while' – as Mr Scholtz put it. However, in October 2005, Mr Breda reappeared and asked Mr Scholtz for financial assistance, explaining that he had already made offers to acquire properties in the Northern Cape with the intention of renting them to the State. The inference is inevitable that pursuant to their earlier discussion, Mr Breda had decided to invest in fixed properties for that purpose.

[12] According to Mr Scholtz, he agreed with Mr Breda that any business venture on which they embarked should involve the participation of a broad base empowerment group of previously disadvantaged individuals, preferably women and children. Mr Scholtz claimed that he did not know any previously disadvantaged persons in the Northern Cape other than Mr Breda and, for that reason, it was decided that Mr Breda would identify people or entities as potential BEE participants in the venture. They agreed that any shareholding would have to be transferred to the BEE participants without requiring payment

from them or, at most, payment at par value of the shares. Their shareholding would be held by Mr Breda in his Shosholoza Trust, pending transfer to the identified participants. Mr Scholtz claimed that his involvement in the venture at that stage was minimal and consisted in the main of the provision of capital requirements which he provided through his family trust, the Casee Trust.

[13] It is necessary at this stage to take a step back in time and detail how Mr Breda had come by this investment opportunity. He was apparently a prominent member of the African National Congress (the ANC), the ruling political party both in national government and in the Northern Cape. So was the ninth accused (but eighth appellant), Mr John Fikile Block, who had served as the provincial secretary of the ANC in that province for more than a decade. From March 2001 to December 2003, Mr Block had also been the MEC for the Department of Roads, Transport and Public Works (for convenience I intend to refer to it simply as the Department of Public Works). And although Mr Block was not holding a provincial government post at the time, his star was on the rise and he was shortly due to become the ANC's provincial chair. In any event, he subsequently became an ANC member of the Northern Cape's legislature and, on 2 December 2008, was appointed MEC for the Department of Education. He served in that capacity until 11 May 2009 when he was appointed MEC for Finance. It is clear from this that Mr Block was a man of considerable political influence in the Northern Cape. He was also a director of his private company, Chisane Investment (Pty) Ltd, the tenth accused (the ninth appellant), which had been registered on 18 February 2004.

[14] Mr Scholtz's information that there was a dire need for office space in the Northern Cape to accommodate government departments and State agencies, was correct, and it is clear from the undisputed evidence of the witness, Mr E J Crouch, who was the Director of Property Management in the Department of Public Works, that Mr Breda had solicited Mr Block's help to

secure leases with State entities. The head of that department (the HOD) was Mr Selemela who, in 2005, had appointed Mr Crouch as head of a recently established property unit whose function was to provide accommodation for all the various provincial State departments.

Supply Chain Management Procedures

[15] It is convenient at this stage to deal with the prescribed procedures to be followed in procuring accommodation for a department or State entity. As a starting point, s 217(1) of the Constitution prescribes that when an organ of State in the national, provincial or local sphere of government contracts for goods or services 'it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective'. Pursuant to this the Public Finance Management Act 1 of 1999 (the PFMA), as amended by the Public Finance Management Amendment Act 29 of 1999 – the purpose of the latter Act being to amend the former to provide for the application of the former to provincial governments – was enacted to regulate financial management in national and provincial governments and, as set out in its long title, 'to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively . . .'.

[16] Under s 36 of the PFMA every department must have an accounting officer. Section 38 of the PFMA goes on to lay down the general responsibilities of accounting officers. Inter alia, the accounting officer for a department must maintain an 'effective, efficient and transparent systems of financial and risk management and internal control' – s 38(1)*(a)*(i) – and 'an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective' – s 38(1)*(a)*(iii). The accounting officer is also 'responsible for the effective, efficient, economical and transparent use of the resources of the Department' – s 38(1)*(b)*. Moreover, under s 76 of the PFMA the National Treasury must make regulations or issue instructions applicable to

departments concerning a variety of matters, including financial management and internal controls of all institutions to which the PFMA applies – s 76(4)*(b)* – and the determination of a framework for an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective – s 76(4)*(c)*.

[17] On 5 December 2003, the National Treasury issued what became known as the Supply Chain Management Regulations[1] which obliged national and provincial departments to establish a system of Supply Chain Management (SCM) for the acquisition of goods and services. These regulations were repealed with effect from 15 March 2005 by the Treasury Regulations for departments, trading entities, constitutional institutions and public entities, (the Treasury Regulations). Promulgated under s 76(4)*(c)* of the PFMA, they were similar in nature, albeit more extensive, than the regulations they repealed. Regulation 16 thereof also provides for a SCM framework to apply to all national or provincial departments whilst reg 16A3.1 provides that the 'accounting officer or accounting authority of an institution to which these regulations apply must develop and implement an effective and efficient supply chain management system in his or her institution for the acquisition of goods and services'. Regulation16A3.2 goes on to require such an SCM system to be 'fair, equitable, transparent, competitive and cost effective . . .'. Then, importantly, reg 16A6 provides:

'16A6.1 Procurement of goods and services, either by way of quotations or through a bidding process, must be within the threshold values as determined by the National Treasury.

16A6.2 A supply chain management system must, in the case of procurement through a bidding process, provide for –

(a) the adjudication of bids through a bid adjudication committee;

(b) the establishment, composition and functioning of bid specification, evaluation and adjudication committees;

[1] 'Regulations in terms of the Public Finance Management Act, 1999: Framework for Supply Chain Management, GN R1734, *GG* 25767, 5 December 2003.'

(c) the selection of bid adjudication committee members;
(d) bidding procedures; and
(e) the approval of bid evaluation and/or adjudication committee recommendations.'

[18] In April 2006 the Northern Cape government published its provincial SCM policy to give effect to its statutory obligations contained in the legislative matrix set out above. This policy proclaimed that it had been adopted in September 2005 by the provincial government under the PFMA and the regulations under that Act published in Government Gazette 25767 on 5 December 2003. However as appears from what I have said above, those were the Supply Chain Management Regulations that had been repealed six months previously and, presumably, it was intended to refer to the Treasury Regulations which had come into operation on 15 March 2005.

[19] Be that as it may, both the Treasury Regulations and the SCM policy contain various provisions relevant to the present matter. Regulation 16A8.3(a) provides that a SCM official or other role player 'must recognise and disclose any conflict of interest that may arise' while reg 16A8.3(c) stipulates that such a person 'may not use their position for private gain or to improperly benefit another person' and reg 16A8.3(d) in turn requires officials to 'ensure that they do not compromise the credibility or integrity of the [SCM] system through the acceptance of gifts or hospitality or any other act'.

[20] Importantly, clause 9 of the SCM Policy goes on to provide that goods and services may be acquired by way of different delegation levels. Thus telephonic quotations up to R10 000 per case required three quotations, and the one accepted had to be confirmed in writing for purposes of audit. Formal written quotations, with a minimum of three per case, were required for acquisitions of a transaction value over R10 000 and up to R200 000. A competitive bidding process for acquisitions exceeding R200 000 per case was prescribed with bids to be advertised in the Government Tender Bulletin, the

Diamond Fields Advertiser and Die Volksblad and, where applicable, in the Northern Cape Regional Newspapers. I should mention that this echoes Treasury reg 16A6.3(c) which requires bids to be advertised in the Government Tender Bulletin for a minimum period of 21 days before closure, save in urgent cases.

[21] The provisions of reg 16A6.2 quoted above are also echoed in the SCM Policy which requires bids for the acquisition of goods and services to be evaluated initially by a Bid Evaluation Committee (BEC) whose recommendation is thereafter to be taken into consideration by a Bid Adjudication Committee (BAC). As was explained by the witness Ms Potgieter, who was at the time the director of asset management in the provincial Treasury, under the Province's SCM Policy a recommendation made by the BAC will be considered by the HOD, who has the discretion to agree or disagree, or to alter the terms on which the relevant department would commit.

[22] However reg 16A6.4 provides that if in a specific case it is 'impractical to invite competitive bids', the accounting officer may procure the required goods or services by other means and, in that event, 'the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer'. The necessity to act in this way was stressed by the National Treasury in its practice note SCM 2 of 2000 circulated to all accounting officers on 10 May 2005. Ms Vosloo also testified that a deviation from the official acquisition process on inviting competitive bids for specific procurement would only be justified in an 'extremely urgent or emergency situation'.

[23] Clause 24 of the SCM Policy is also pertinent to the issues that arise in this matter. It provides as follows:

'UNSOLICITED BIDS

- The Accounting Officer should refrain from considering unsolicited bids received outside a normal bidding process as it eliminates transparent competitive acquisition processes.
- If an unsolicited bid is considered due to an exceptional product benefit, or cost advantages of a person or company is the sole provider of a product or service the following procedure must be followed:-
  - The Adjudication Committee must consider the unsolicited bid, the meeting must take into account any comments submitted by the public and have to acquire written inputs from Provincial Supply Chain Management prior to making a recommendation to the Accounting Officer.
  - If any recommendations of the Provincial Supply Chain Management Unit are not followed, the Accounting Officer must submit to the Auditor-General and the Provincial Supply Chain Management Unit the reasons for rejecting or not following these recommendations. Such submissions must be made **before** any commitment is made or contract entered into. The Auditor-General and Provincial Supply Chain Management Unit will have 30 days from receiving the submission to provide inputs to the Accounting Officer during which period no contract may be concluded.'

[24] Bearing these requirements in mind, I turn now to consider the circumstances under which the various leases which form the heart of the charges against the accused came to be concluded. I shall deal with each of the properties in the order in which the leases were concluded.

The Northern Cape Training Centre and the Kimberlite Hotel, Kimberley

[25] It was in respect of the Northern Cape Training Centre (NCTC) and the Kimberlite Hotel, Kimberley that Mr Breda had approached Mr Scholtz for financial assistance in October 2005. As appears from what follows, the procedures relating to the leasing of property outlined above were not followed in respect of these properties. Mr Crouch testified that on Tuesday, 17 May 2005, he received a telephone call from Mr Block, who was at the time the

Deputy Chair of the ANC in the Northern Cape. Mr Crouch, who was also a member of the ANC, knew who Mr Block was and what position he held. He had served as a director in the Department of Public Works when Mr Block had been the MEC for that department in 2001 to 2003. Mr Block had it seems long been a prominent member of the ANC and, as already mentioned, was shortly to become the provincial chair of the party. He referred to him as the 'Big Chief'.

[26] In any event, Mr Block told him that he had sent Mr Breda to see him, that Mr Breda was also 'in the building environment' and that he should see how he could help him. Mr Crouch stated that in the light of the position Mr Block held, he took this as an instruction to help Mr Breda. When asked why he had not objected to this, he said that Mr Block had been his leader for many years, had previously been his MEC, and that, in the Northern Cape, everyone listened when Mr Block spoke.

[27] In any event, Mr Block gave him Mr Breda's cell-phone number and said he should contact him. Even before he could do so Mr Breda, who he had not previously met, arrived at his office and introduced himself, stating that he had been sent by Mr Block. He further explained that he had two properties in Kimberley available to lease to the State. These were the NCTC building and the old Kimberlite Hotel,

[28] As head of the property unit, Mr Crouch had recently received requests for accommodation from two government departments, the Department of Sport, Arts and Culture and the Department of Agriculture and Land Reform (again for convenience I shall truncate the names of these departments to the Department of Sport and the Department of Agriculture, respectively). He therefore told Mr Breda that he would make arrangements to meet with the HOD's of these two departments and for them to inspect the buildings to see if they would be suitable. He also explained that protocol demanded that the

service provider, in this instance Mr Breda, should not be present at any inspection. He later reported his meeting with Mr Breda to his own HOD, Mr Selemela, to whom I shall later refer.

[29] After this initial meeting, Mr Breda came to visit Mr Crouch's office on several occasions, and pestered him about progress on the proposed leases, despite it being explained that certain procedures had to be followed before leases could be concluded. Eventually Mr Crouch telephoned Mr Block, to explain to him that prescribed procedures had to be followed and that members of his staff were beginning to feel uncomfortable as a result of Mr Breda's visits and wanted to know why he was being afforded priority. Mr Block brusquely answered by telling Mr Crouch to see to it that the question of office accommodation for the Department of Sport be finalised.

[30] The following day, Mr Breda again arrived unannounced at Mr Crouch's office and told him that the 'Big Chief' had said he should come and fetch him and take him to inspect the buildings. Mr Crouch complied and accompanied Mr Breda, first to the NCTC building. In an entry in his diary dated 15 September 2005, he recorded that Mr Breda had told him that he was busy finalising the purchase of the building and that, although it did not at the time provide adequate office accommodation, he would see to it that it would be altered to meet the needs of the Department of Sport.

[31] From there they proceeded to the Kimberlite Hotel which had been proposed as accommodation for the Department of Agriculture. Whilst inspecting that property, which as it stood also did not provide adequate office accommodation but which Mr Breda said he would rectify to meet what was required, the HOD of the Department of Agriculture, Mr Mothibe, and another representative of that department, Mr Thabang, arrived to view the building.

[32] It is necessary to record at this stage that on 12 July 2005 the Premier of the Northern Cape had addressed the following letter to the MECs of the various Provincial Departments:

'RE: LEASE AGREEMENTS

In terms of Chapter 13 sub-paragraph 13.2.4 of the Treasury Regulations promulgated in terms of the Public Finance Management Act No 1 of 1999 as amended. "The accounting officer of an institution may, for the purpose of conducting the institution's business, enter into lease transactions without any limitations provided that such transactions are limited to operating lease transactions".

With immediate effect, the Head of Department and Accounting Officer of the Department of Transport, Roads and Public Works shall cease to enter into any lease agreements on behalf of other Provincial Departments in due observance of the Public Finance Management Act and its Regulations.

However, the department of Transport, Roads and Public Works will advise the Departments on how best and effective to utilize the available space in terms of standing National Public Works norms and standards.

For those departments where the Department of Transport, Roads and Public Works is responsible for budgeting and paying for office accommodation on behalf of other departments, the Department of Transport, Roads and Public Works must engage other departments including Provincial Treasury to agree on the amounts to be transferred to the different departments in the adjustment estimates and over the medium term expenditure framework.

Agreement must also be reached between departments and the Department of Transport, Roads and Public Works with regard to the date on which departments must take full responsibility for the budgeting and payment of such leases.

Your cooperation in this regard will be highly appreciated.'

[33] The effect of this directive was to divest Mr Crouch of his capacity to negotiate leases on behalf of various provincial departments, and that it was thereafter up to the various HODs to rent accommodation for their departments. Mr Crouch said he became aware of this letter at the time of the inspection of the NCTC Building and the Kimberlite Hotel. However he explained that as he

had years of experience in the Department of Public Works, he understood his continuing role to be to provide support and advice to the various other departments.

[34] Some two weeks later, on 28 September 2005, Mr Crouch again went to view the Kimberlite Hotel building. On this occasion he was accompanied, inter alia, by Mr Breda, Mr Mothibe and Ms T M Joemat-Pettersson, the latter being the MEC for Agriculture and Land Affairs in the province at the time, who appeared to support the idea of the Department of Agriculture renting the building. On that occasion Mr Breda made it clear that he was the owner of the building, although he had earlier indicated that he was still in the process of purchasing it. Further meetings between Mr Crouch, the HOD and various other officials of the Department of Agriculture were held during October 2005 at which the lease of the Kimberlite Hotel building, the alterations that would be necessary to meet the department's requirements and the floor planning necessary to accommodate the department's personnel, were discussed. Clearly the project was viewed as viable by the provincial authorities, and it must have been at about this time that Mr Breda went to see Mr Scholtz and told him about the business opportunity he had negotiated but in respect of which he needed finance as already mentioned.

[35] Despite these meetings having concentrated on the Kimberlite Hotel, the proposed lease of the NCTC building had not been lost in the wash. The HOD of the provincial Department of Sport was at the time Mr Henry Esau who had been with Mr Mothibe of the Department of Agriculture during the inspection of 15 September 2005. On 22 October 2005, Mr Crouch received a call from Mr Esau asking him to attend a meeting at the guesthouse of Mr Breda's wife. On his arrival, he found Mr Esau in the company of Mr Breda. They had already signed a written lease agreement in respect of the NCTC building and he was requested to sign as a witness. This he did, without demur.

[36] The parties to this lease were, on the one hand, the Department of Sport, on whose behalf Mr Esau had signed as lessee, and a company cited as 'Trifecta Trading (Pty) Ltd reg nr 2003/018138/07' represented by Mr Breda, who had signed as lessor. As appears from what has already been mentioned, the company having that registration number is the third accused, Trifecta Holdings (Pty) Ltd. However nothing turns on the failure to set out its name fully on this lease. The crucial fact is that Mr Breda, acting on behalf of the third accused, leased the NCTC building to the Department of Sport for a period of 15 years with effect from 1 January 2005, renewable for another 15 years. The rental agreed commenced at R108 000 per month but was to increase to R200 000 per month for the second six month period, to R240 000 per month after a year, and thereafter at 8% per annum.

[37] Two days after the signing of the lease of the NCTC building, Mr Crouch attended another meeting with Mr Breda and the HOD of the Department of Agriculture, Mr Mothibe. This time they discussed the plans for the Kimberlite building and the renovations that were required. At a subsequent meeting on 7 November 2005, Mr Mothibe and Mr Crouch discussed various aspects of a proposed lease relating to the Kimberlite Hotel. Shortly thereafter at yet a further meeting, Mr Mothibe expressed his satisfaction with the building and stated he would finalise the lease.

[38] Following these meetings, on 9 November 2005 Mr Mothibe and Mr Breda, respectively representing the Department of Agriculture and Trifecta Holdings (the third accused), signed a written agreement in terms of which the department leased the Kimberlite Hotel for a period of ten years, commencing on 1 March 2006, at a rental of R150 000 per month. The lease was signed at the residence of the MEC, Ms Joemat-Pettersson, and was also witnessed by Mr Crouch.

[39] After the conclusion of both the NCTC and Kimberlite Hotel leases, Mr Crouch addressed separate letters relating to each property to Mr Breda. In each he stated that all protocols, norms, standards, terms and conditions as prescribed by the Department of Public Works had been followed. He testified that he had been instructed to write these letters by the HOD of his department, Mr Selemela, and had done so despite knowing that, as a matter of fact, the necessary protocols and procedures prescribed for provincial government leases already mentioned above, had not been followed. Whether they ought to have been is a dispute to which I shall return in due course.

[40] It was only after these leases were concluded, that the Kimberlite Hotel and the NCTC building were acquired by members of the Trifecta Group; the former being purchased on 11 November 2005 for R7.3 million and transferred to Trifecta Trading 434 (Pty) Ltd on 21 December 2005; the latter being purchased on 23 December 2005 for R1.3 million and transferred to Trifecta Holdings (Pty) Ltd on 25 May 2006. Both these purchases appear to have been funded by way of advances secured by mortgage bonds registered by commercial banks over the properties.

The Oranje Hotel, Upington

[41] In any event, the conclusion of the leases of the NCTC Building and the Kimberlite Hotel was not the end of negotiations between Mr Breda and the provincial government in regard to office accommodation. Section 4 of the South African Social Security Act 9 of 2004 provides for the establishment of the South African Social Security Agency (SASSA) as the agent for the administration and payment of social assistance. In September 2005, the Chief Financial Officer of the Department of Social Development, Mr Thabo Holele – who was also the chair of the provincial bid adjudication committee (the BAC) established under the SCM policy – sent a written request to the Department of

Public Works to start an open tender process to acquire office accommodation for SASSA 'across the length and breadth of the Province'.

[42] This request followed a discussion Mr Holele had held with Ms Yolanda Botha who, as appears from what follows, played a pivotal role in the further leases which lie at the heart of this case. Ms Botha had qualified with a BA degree and a teaching diploma in 1989 and, the following year had commenced work as an English teacher at a secondary school in Upington. In March 1994, she experienced a meteoric rise when she was appointed an ANC national senator, a post she held until 1996. Thereafter she served as an ANC member of the Northern Cape's provincial legislature from 1997 to 2001, and was appointed the HOD of the Department of Social Services in 2001, a post she held until April 2009. She thereafter served as an ANC member of parliament. She was the eighth accused in the court below but, as mentioned at the outset, tragically passed away from cancer before the conclusion of the trial.

[43] In a letter to the provincial tender board dated 17 October 2005, after stating that it was fundamental to the transition of social services for SASSA to acquire office space in the region, Mr Holele recorded that the immovable property known as 43 Market Street, Upington (also known as the Diesel Electric building) was suitable for a SASSA regional office. He set out the terms on which its owner, Mr W Schmidt, was prepared to extend a lease for five years and recommended that a lease on those terms be concluded. His recommendation was supported by Ms Botha as HOD of Social Services.

[44] The Diesel Electric property was examined by an architect and various departmental officials on 13 December 2005, and found to be suitable for SASSA's needs. It was 1270 m^2 in extent, comprised two floors and could be converted into 46 offices, 32 on the ground floor. Although there were certain alterations that would have to be effected to accommodate SASSA at a cost of

some R450 000, Mr Schmidt was prepared to bear these expenses himself. However, despite these advantages, the MEC of Social Services, Mr G Akharwaray did not agree to the property being leased without more ado, stating that the matter 'must be put on tender with a view to empowering BEE players in that area'.

[45] As a result, on 2 November 2005, Ms Botha telefaxed a memorandum to Mr Holele and Ms Daleen Vosloo (the latter being the assistant director of administration in the Department of Social Services) informing them that the MEC, Mr Akharwaray, had told her that he would not sign any lease agreement relating to accommodation for SASSA until it had been subjected to a bidding process. She instructed that all SASSA leases and procurements for office space should be put on tender in order to advance BEE.

[46] Pursuant to this, on 7 November 2005 Ms Vosloo wrote to the Provincial Tender Board. She explained that the MEC required bids for the provision of office accommodation for SASSA in Upington and asked for permission to advertise the invitation of bids for accommodation only in the local newspaper, a publication that rejoices in the name of 'Gemsbok'. Such restricted advertising flew in the face of the Treasury Regulations as well as the Northern Cape's SCM policy which required that leases be advertised for a period of at least 21 days in the Government Tender Bulletin and two local newspapers. Without waiting for the requested permission, an advertisement was placed in the Gemsbok on 9 November 2005. The following week, on 14 November 2005, Ms Vosloo sent a memorandum to Ms Botha, Mr Holele and the Director of Social Assistance Grants, advising them that, in response to this advertisement, bid documents had been issued to two prospective bidders in respect of the Diesel Electric and Umbra buildings in Upington. It was only four days later that the Tender Board, in a letter addressed to the HOD, approved Ms Vosloo's

request to allow publication of the invitation for bids to take place solely in the Gemsbok.

[47] In any event, the Umbra building was not up to the mark. Indeed it appears from a letter dated 10 October 2005, sent by the head of Corporate Services of the Department of Social Services to Ms Vosloo, that the building had already been inspected and found to be unsuitable for SASSA's needs. On the other hand, the Diesel Electric building was suitable, but its owner, Mr Schmidt, lacked BEE credentials. It was due to this that negotiations with him eventually broke down.

[48] But Ms Botha knew Mr Breda, whom she described as being her 'comrade friend'. She contacted him and ascertained that he was prepared to lease the old Oranje Hotel building in Upington to SASSA. As a result, she gave his contact details to Ms Vosloo who, on 7 February 2006, sent an email to Mr Thabo Masasa of SASSA to tell him of this 'good news'. She went on to state that Mr Breda had 'HDI status' (meaning he was a 'historically disadvantaged individual'); that Mr Masasa should liaise with Mr Breda to view the building and with Mr Kevin Ryland in regard to the terms of a lease; and that she would only become involved should the rental exceed R500 000 per annum as, in that event, special approval (presumably under the SCM policy) would be needed.

[49] On 15 February 2006 a company known as Marssen 2 (Pty) Ltd was registered and, on 20 February 2006, Mr Breda and Mr Scholtz were appointed its directors. On 7 March 2006, its name was changed by special resolution to Trifecta Trading 434 Property 5 (Pty) Ltd, ie the fifth accused. As appears from a deeds office report, the fifth accused obtained transfer of the old Oranje Hotel building on 3 March 2006, almost a month after Ms Vosloo's email to Mr Masasa.

[50] Ms Vosloo testified that due to the negotiations around the Diesel Electric building having come to nought, Ms Botha's introduction of Trifecta had been a relief. Be that as it may, and in circumstances not unattended by confusion, the Department of Social Services proceeded to enter into a written lease agreement of the Oranje Hotel. On 20 March 2006 Mr Breda directed a letter to the Department of Social Services on behalf of the third accused, confirming details of the rental of the property which 'excluded VAT'. A formal lease of the building, now between the department and the fifth accused, was signed by Ms Botha on behalf of the department that same day, ie about six weeks after she had introduced Mr Breda to officials of the department. Mr Breda signed the lease on behalf of the fifth accused on 28 March 2006.

[51] This lease was concluded without the Tender Board's approval. On 28 March 2006 a written submission, prepared by Ms Vosloo but signed by Mr Holele, was sent to the Tender Board. It stated that the 'proprietor of the Oranje Hotel, Trifecta Holdings (Pty) Ltd' (the third accused and not the fifth accused who was by then the registered owner) had offered 2 600 m^2 of the Oranje Hotel building at R49 per m^2 (excluding VAT) per month for a period of five years with the option to renew for a further five years; the all-inclusive monthly rental would be R145 236; annual escalation would be fixed at 7.5%; the annual income would exceed the standing delegation of R500 000 to provincial departments in respect of rental for office accommodation; the HOD would enter into a lease agreement on behalf of SASSA; and that officials from SASSAs national office had approved of the building as its district office. It concluded with a request that the provincial Tender Board ratify a lease on those terms. This request was approved by Ms Botha as HOD under her signature on 29 March 2006.

[52] When testifying, Ms Botha could not explain why she had signed the lease before the Tender Board had even been asked to approve the lease and

before she had given her approval as Head of Department. It may be that she signed the contract on the expectation that it would be ratified by the Tender Board. Her doing so, however, is not the only unsatisfactory aspect of her conduct relating to this lease.

[53] In a letter addressed to the Department of Social Services for the attention of Ms Vosloo, the Tender Board recorded that it had approved the request to rent a portion of the Oranje Hotel 'at a cost of R49 m^2 excluding VAT for 5 years with 7.5% escalation annually'. It concluded 'the Board further noted that your HOD [ie Ms Botha] has signed the contract and this is ratified'. This letter was dated 24 March 2006, but as it purported to be in answer to the submission of 28 March 2006, it was presumably incorrectly dated. To compound the confusion, there exists a memorandum dated 30 March 2006, submitted to the Tender Board for discussion and decision, in which the head of the provincial SCM recommended a lease of the Oranje Hotel on the identical terms proposed by Mr Holele in his written submission to the Tender Board of 28 March 2006. This, too, must have pre-dated the Tender Board's ratification of the lease, and corroborates a finding that the letter dated 24 March 2006 was not written on that day.

[54] That is not the only issue on which there is a lack of clarity. The contract signed by Ms Botha is for 2 640 m^2 of rental space as opposed to the 2 600 m^2 that had been offered by Mr Breda and referred to by both Mr Holele in his submission of 28 March 2006 and the Tender Board's memorandum of 30 March 2006. Furthermore, the all-inclusive rental was agreed in the lease at R147 740.40 per month and not R145 236 per month as it initially been set out in the request for approval of 28 March 2006. These differences notwithstanding, what is truly remarkable is that Ms Botha went ahead to rent premises approximately double the size and twice as expensive as the Diesel Electric building that had been found to be suitable for SASSA's needs. This

alone speaks for Ms Botha committing the Department of Social Services to an unnecessarily expensive lease.

[55] There are further circumstances relevant to the impropriety of this lease. As I have said, it was negotiated to provide SASSA with office accommodation. SASSA had instructed all its regional offices that lease contracts were not to be longer than three years. Despite this, Ms Botha had negotiated a five year lease. On 7 March 2006 she had written to SASSA asking for a variation and suggesting a period of five years. It was only on 30 March 2006 that the Chief Executive Officer of SASSA wrote to Ms Botha and informed her that, taking into consideration the scarcity of office accommodation in the area, permission was granted to deviate from the instruction to allow for a lease period of five years. This approval was also only granted after Ms Botha had already committed the Department of Social Services to a five year lease.

[56] Furthermore, on 29 March 2006, the day after the lease had been signed but before SASSA granted permission for a five year lease, Ms Botha on behalf of the Department of Social Services, Mr Breda on behalf of the fifth accused, and Mr F Makiwane purporting to represent SASSA, concluded a written agreement under which the department ceded its rights and obligations under the lease to SASSA with effect from 1 May 2006. Why this was done with such rapidity, one does not know. What becomes clear, however, is that the leased building was not ready for SASSA to use.

[57] I have already mentioned that the building was about double the size of the Diesel Electric building, a property which met SASSA's needs. That it was just too big is borne out by the fact that, in fullness of time, various portions of the leased premises which were surplus to requirements were sub-let. It is also clear that, as it stood, the building needed a great deal of work to put it into a condition in which SASSA could use it. On 19 May 2006, Mr Breda,

presumably acting on behalf of the fifth accused,[2] wrote as follows to the Department of Social Services for the attention of Ms Botha:

'Your department entered into a lease agreement with Trifecta for and on behalf of the South African Social Security Agency on 28 March 2006 for premises at Upington. The rental agreement was based on the assumption that a minimum of modifications would be required prior to the occupation of the South African Social Security Agency in May 2006.

The South African Social Security Agency (SASSA) wishes to obtain a specific corporate identity for their premises throughout the Northern Cape Province. Due to this requirement it will necessitate various additions, modifications and remodelling of the existing premises to obtain the objective of SASSA. SASSA requested the modification and remodelling to be according to their specifications and requirements. Various structural changes will be necessary to the premises which will necessitate the involvement of professional practitioners to ensure the correct methods and principles are adhered to during the modification and alteration phase.

The capital cost to the premises to achieve the minimum requirements and specifications of SASSA will be R3 839 995.00 inclusive of VAT. See attached annexure A for a breakdown on the capital cost to modify the premises to the requirements of SASSA.

SASSA indicated that they do not have the capital to fund the modifications in their current budget but are willing to discount the capital cost over the lease period.

Trifecta is willing to assist SASSA to achieve their objective to obtain specific corporate identity on the basis of discounting the capital cost over the lease period.

Please note that Trifecta can only accommodate these modifications if the lease period is a minimum of 120 months.

It is important to note that the modifications and alterations to the premises will take place over a period of approximately 90 days from the day that the Department of Social Services and Population Development agrees to the implementation of the modification to the current lease agreement to accommodate the specific requirements of SASSA. SASSA indicated that they wish to take physical occupation of the premises by 1 September 2006. We can only partly accommodate their requirement if we receive the final lease agreement before 31 May 2006.

The Department will however be responsible for the rental during the modification and alteration phase.'

[2] But using the letterhead of Trifecta Trading 434 (Pty) Ltd.

The letter continued to state that the fifth accused was prepared to assist SASSA by doing the envisaged alterations and providing a further 140 m^2 of floor space if the rental was increased by more than R20 per m^2 from R49 to R69,80 per m^2 with the annual escalation being increased from 7.5% to 8% and the lease period doubled to ten years (despite SASSA's original request that it be no longer than three years). Moreover, despite this and the fact that the building was only likely to be ready in September, it wished rental to be payable with effect from 1 May that year.

[58] Subsequent to this, the Department of Public Works inspected the Oranje Hotel premises – which I should mention had been transferred into the name of the fifth accused on 3 July 2006 pursuant to a written deed of sale by which it purchased the property for R14 million – presumably in order to consider its position. In a written report dated 5 July 2006, it set out the various alterations that would be needed. The same day Ms Botha co-signed a letter on behalf of SASSA to the Department of Public Works, a copy of which was sent to Mr Crouch, requesting help to urgently estimate the cost of the proposed alterations to the building 'as we (are) already in the third month of the lease agreement, and have not as yet taken occupation of the premises'.

[59] Ms Botha also telephoned Mr Crouch to request his help in obtaining an estimate of costs for alterations to the building. Although such costing was not part of his responsibilities, he requested his regional office in Upington to do the necessary. When there was some delay in this regard, Mr Crouch received a call from Mr Block who asked how far the costing exercise had proceeded. He explained that work had commenced but that certain procedures had to be followed. To this Mr Block brusquely replied that Mr Crouch should see to it that the process should be speeded up and finalised or else he would come and do the work himself. As a result of this, Mr Crouch contacted his subordinate in

Upington responsible for doing the costing and instructed him to hurry things along.

[60] Thereafter, on 17 August 2006, SASSA and the fifth accused, represented by Mr Breda, signed a lease agreement for the Oranje Hotel premises which reflected the increases Mr Breda had sought in his letter of 19 May 2006. It appears from a letter of 11 April 2017 which Mr Breda sent to SASSA, that the latter was given what he referred to as 'beneficial occupation' on 1 December 2006 but only took physical occupation of the property on 3 January 2007. However in terms of the leases, from May 2006 it paid rental in the sum of R235 930.98 per month for seven months (a total of R1 651 516.86) to the fifth accused despite not being in occupation. Simply put, the fifth accused, aided and abetted by Ms Botha's interventions ended up with a lease extremely beneficial to it and binding for a far longer period than SASSA had wanted. Flowing from this lease, until January 2012, SASSA paid in excess of R18 million in respect of rental for the property.

14 Riebeeck Street, Springbok

[61] The lease of the premises at 14 Riebeeck Street, Springbok, was concluded a few months after the Upington leases. On 17 August 2006, the Physical Unit of the Department of Social Services visited Springbok together with Mr Breda who showed them a block of flats which he said he was going to convert into offices. On 30 August 2006, Mr R M Saal, the Manager of that unit, sent a memorandum to Mr Holele in regard to the crucial need for office accommodation in Springbok, and sought permission to advertise a bid in the local newspapers. In a subsequent memorandum dated 13 October 2006, Mr Saal reported to Ms Vosloo on the visit of 17 August and stated that there was at the time insufficient office space in Springbok for the various departments that were there as well as the officials of SASSA, and that there was no option but to acquire more accommodation. Since, so he said, the property Mr Breda had

pointed out was the only other accommodation available in the town, he recommended that the Department of Social Services look into the possibility of leasing it.

[62] In any event, on 15 September 2006 advertisements inviting bids for office accommodation were placed in the Diamond Fields Advertiser, the Noordwester and Die Plattelander by Ms Flatela, who was at the time the secretary to the BEC and BAC. The advertised closing date for bids was 29 September 2006, with a period of lease being set out as three to five years with an option to renew for a similar period, the date of commencement being January 2007. On the instructions of Ms Botha, the lease period was subsequently changed to 'negotiable' and an erratum to this effect was advertised in the press.

[63] The fifth accused submitted a bid in response to this advertisement. Under its contracting information, responsibilities and condition (again submitted under a letterhead of Trifecta Trading 434 (Pty) Ltd) it recorded that the floor size it offered was 1300 m^2 with the final measurements to be confirmed on occupation, and an annual escalation of 8%. The rental was offered at a monthly rental of R65 per m^2 excluding VAT, R120 per m^2 for parking and R165 per m^2 for shaded parking. The minimum lease period of 120 months (ten years) was proposed with an option to renew for a further 60 months (five years).

[64] On 5 October 2006, Ms Vosloo wrote to Ms Botha informing her that only one bid, that of the fifth accused, had been received, but that on receipt of the fifth accused's registration certificate, the list of shareholders did not correspond to the information contained in the bid documents which rendered the bid invalid. She stated that there was severe pressure to obtain alternative accommodation in Springbok, and sought permission to advertise a fresh bid for

one week in three local newspapers. Ms Botha approved this shortened period. She explained when testifying that she had done so as the tender had already been previously advertised and there was an accommodation crisis.

[65] A bid for office accommodation at Springbok was re-advertised as a result, with the closing date of 16 October 2006, the lease period being 'negotiable' and a date of commencement being January 2007. As the court a quo observed, what was remarkable about this is that in the initial cancelled bid the fifth appellant had offered a ten year lease despite the advertisement having stipulated that it was to be for a period of three to five years, and this subsequent advertisement did not refer to the shorter period its predecessor had contained. The re-advertisement was also not placed in the Government Tender Bulletin. According to Ms Botha, this was as it took a week for the Government Tender Bulletin to process an advertisement and the delay would be too long.

[66] Although only one prospective bidder, Trifecta (accused 5) requested the bid documents on 11 October 2006, two bidders responded to the advertisement – accused 5 and accused 12, the latter's bid documents having been submitted in person by accused 11, Mr Alvin Botes. Both offered the same building for rental. Indeed both bids were virtually identical, the only difference being that accused 5's bid made no provision for shaded parking as was the case in accused 12's bid.

[67] On 18 October 2006, Ms Flatela sent a memorandum to Ms Botha informing her that the bid of accused 5 scored 97.16 points out of 100 and that of accused 12, had scored 70.31 points. The same day both the BEC and the BAC held meetings and resolved to approve accused 5's offer subject to various conditions. These included a lease period of five years with an option to renew for another five years; the installation of air-conditioning; and that the escalation be increased to 9.5% from the 8% tendered.

[68] In the normal course, the BEC would first make an evaluation of a bid and make a recommendation that the BAC would then consider. This did not happen in this instance. Instead the BAC first decided to accept the fifth accused's bid and thereafter the members of the BEC were requested 'to concur with the recommendation as approved by the Adjudication Committee and to sign on the space below' – which they all did. In any event, once this had taken place, the recommendation that the fifth accused's offer be accepted subject to those conditions was placed before Ms Botha for her approval as HOD. This she gave on 19 October 2006, but:

'With the proviso that we change the lease period to 120 months with an option to renew for another 120 months (10 years). It makes sense since it will provide institutional stability for department.'

[69] Ms Vosloo promptly informed Mr Breda that the fifth accused's offer had been accepted, subject to a ten year lease renewable for ten years and an annual escalation of 9.5% applicable for the duration of the lease; that there be secure lockable overnight parking for 10 to 15 official vehicles; that air conditioning and an electronic alarm system be installed; and that all renovations were to be completed before occupation.

[70] Pursuant to this, the fifth accused and the Department of Social Services concluded a written lease agreement in Kimberley on 3 November 2006, signed by Mr Breda and Ms Botha on behalf of the respective parties. It recorded a commencement date of 1 March 2007, a commencement rental of R65 per m^2 per month, a parking rental of R680 per month and a resulting total monthly rental of R74 780 with an escalation of 9.5% and a determination date of 28 February 2017. Clause 14.2 thereof recorded that the written lease contained the whole agreement between the parties and that representations or guarantees not therein contained would not be binding.

[71] The written lease failed to deal with the various conditions (such as the provision of parking and the installation of air conditioning or an electronic alarm system) that had been set out in Ms Vosloo's letter to Mr Breda of 19 October 2006. This failure was to be the source of trouble the following year. In August 2007, there was a disagreement as to whether the Department of Social Services was obliged to pay for parking at the premises. In an email Ms Vosloo sent to Mr Vuba of the department's legal support services on 28 August 2007, she stated that it was not supposed to pay for parking at all as it had been included in the VAT exclusive rental of R65 per m^2 and that the lease agreement was incorrect as it did not correspond with the offer that had been accepted. She also stated that the department had increased the annual escalation of 8% to 9.5% as 'compensation for the parking, alarm system, air conditioning and blinds'.

[72] Mr Vuba included these contentions in a letter he addressed to the fifth accused, in which he also alleged that the office space in fact measured almost a 170 m^2 less than that agreed upon, and that there were no lockable overnight parking base, no shaded parking base, no toilet facilities for people with disabilities, no air conditioning, no electronic alarm system and no access ability into the building for the disabled. He went on to record that the department viewed these deficiencies in a serious light, and that the State's resources were being unjustly used. He concluded by placing the fifth accused on terms to remedy things within 30 days failing which, so he stated, the lease might be terminated.

[73] Mr Vuba took it upon himself to forward a copy of this letter to Rand Merchant Bank, which held a bond over the property, presumably in respect of funds advanced to the fifth accused to enable it to purchase it. The fifth accused, or presumably Mr Breda on its behalf, took exception to this and contacted

Ms Botha. She, in turn, telephoned Mr Vuba that night and angrily instructed him to immediately withdraw the letter to the bank. He complied. On 31 August 2007, he wrote to Rand Merchant Bank saying that he had discussed the matter with Mr Breda, had resolved the outstanding issues in the lease and would not be taking steps to terminate it as the matter had been 'amicably resolved'. This was a clear distortion of the truth.

[74] When testifying, Ms Botha stated that Mr Vuba had overstepped the mark and that he ought to have brought the financial officer of the department to see her to find a solution before sending out this letter. I should mention at this stage that the court a quo found this to be 'a glaring demonstration of the extent to which Ms Botha went to protect the pecuniary interest of Trifecta and, as it turned (out), her own'. As appears from what follows in due course, that comment is justified.

[75] Be that as it may, in mid-2010, an addendum to this lease was eventually signed in which the Department of Social Services agreed to lease additional space in the Social Services Place Campus from the fifth appellant. But even then, none of the difficulties set out by Mr Vuba were addressed.

Summerdown Place, Kuruman

[76] The events leading up to the conclusion of a lease in respect of this property bear in many respects a striking similarity to those relating to the Springbok property. As mentioned in para 60 above, on 17 August 2006 Mr Breda viewed the property in Springbok with members of the physical unit of the Department of Social Services. The following day they all went to Kuruman where offices purportedly owned by Mr Breda were inspected. And just as he had done in respect of the Springbok property, on 30 August 2006 Mr Saal addressed a memorandum to Mr Holele in which he stressed the dire need for the Department of Social Services to acquire office accommodation in

Kuruman and requested leave to advertise for office accommodation in the local newspapers.

[77] In his subsequent memorandum of 13 October 2006 (the same memorandum already mentioned in respect of the Springbok accommodation) Mr Saal reported to Ms Vosloo that Mr Breda's premises 'would, with a few alterations, accommodate the department's increased multi-disciplinary staff' and recommended that the department 'explore the possibility of entering into a lease agreement with the said proprietor as these office space will indeed satisfy our Department's need in terms of office accommodation'.

[78] In any event, in late September 2006 an advertisement was placed in a number of newspapers in which bids were invited for the lease of office accommodation in Kuruman, commencing January 2007 for a negotiable period with an option to renew. Once again, and not surprisingly, Mr Breda used a Trifecta company in order to make such a bid. On this occasion, however, he used the sixth accused, Trifecta Trading 434 Property 7 (Pty) Ltd. This was a company that had been incorporated in 2006 under the name Genvest 96 (Pty) Ltd, the name of which was changed to Trifecta Trading 434 Property 7 (Pty) Ltd on 3 March 2006, In October 2006 its auditor confirmed that 75% of its shares were held by Trifecta Holdings (Pty) Ltd (the third accused) of which, in turn, Mr Breda's Shosholoza Trust held 75% of its shares, with the remaining 25% being held by Mr Scholtz's Casee Trust.

[79] In any event, both the sixth accused and a company known as TEB Properties CC responded to the advertisement. The sixth accused offered 1 300 m^2 of the premises I shall refer to as Summerdown Place at a rental of R65 per m^2 per month excluding VAT for a period of ten years, with the option to renew for a further five years and an annual escalation of 8%, with the lease to commence on 1 December 2006. The precise terms of the opposing bid of

TEB Properties CC are unknown as its bid documents disappeared at some stage and were never made available to the court a quo. However, in a letter addressed by Ms Vosloo to the department on 23 October 2006, it is stated that the offer was to construct a new building on an erf in Kuruman's central business district with a proposed date for occupation being 'April or May 2007'. As appears from this letter, comparison between the two offices resulted in the sixth accused achieving a total score of 97.16 out of a 100 whilst TEB Properties CC scored but 54.15.

[80] On 25 October 2006, the BEC discussed these competing bids. It recommended the acceptance of the sixth accused's bid 'on condition that lease period be reduced to five years instead of the ten years as offered'. Five days later the matter came before the BAC which recommended not only that the lease period be five years with an option to renew for another five but that there should be an electronic alarm system installed and maintained, with monitoring of the alarm to be paid by the department. Presumably this second recommendation was due to the suggestion of Ms Vosloo in her email to Mr Holele of 25 October 2006 reporting on the status of various bids for office accommodation, apparently in preparation for the BAC meeting.

[81] Ms Botha, as HOD, was not happy with this. She approved the BAC's approval but again added the proviso that the lease period 'be extended to ten years (120 months) with an option to renew for another ten years and at 9.5% annual escalation'. Effectively Ms Botha demanded that the original offer of a ten year lease be accepted despite the views of the evaluation and adjudication committees on the duration of the lease. She also demanded that an escalation 1.5% higher than that asked by accused 6 be paid, and that the option to renew be extended from the five years offered to ten years.

[82] The increase of the rental period from five years to ten years was a source of some dissatisfaction. The day after Ms Botha had insisted upon the longer period, Mr Holele, the chair of the BAC wrote to her, explaining the rationale for recommending a five year lease period. He stated that the manager of Supply Chain Management had contacted several banks to ascertain whether financial institutions had a policy regarding the approval of loans based on the duration of the lease period. Absa Bank had informed him that a ten year loan is not a prerequisite for approval and that such lease agreements are not common practice 'as it borders on ownership'. Standard Bank had stated that the general norm for duration of leases was three years. Moreover the MEC for Finance had been critical of ten year leases and, after long leases of that nature had been agreed by other departments in the province, had concluded that leases for longer than five years should be discouraged. In the light of these considerations, the BAC had deemed it necessary to propose a five year lease period.

[83] This letter was received by Ms Botha on 2 November 2006. Within four days the concerns of the BAC had been magically swept away. On 6 November 2006, Ms Vosloo, as head of SCM, wrote to inform Ms Botha that the members of the BAC had agreed to revise the lease period to ten years and, in order to facilitate an installation of an electronic alarm system, to increase the annual escalation from 8% to 9.5%. The increase in the duration of the lease was alleged to be due to Rand Merchant Bank, the entity that was going to provide accused 6 with the funds to acquire the building and to make the necessary alterations, having insisted that 'the minimum period of lease' should be ten years.

[84] In argument, much was made of Rand Merchant Bank's attitude to show that Ms Botha had not off her own bat sought to increase the duration of the lease as she had done in the other leases dealt with above. However, no

representative from the bank was called to say this had been its attitude and a letter from the bank tendered into evidence to support this allegation does not in fact do so. Dated 4 October 2006, it requested various documents which it stated were 'still outstanding and will be needed to finalise the above transaction'. These included copies of the lease clearly setting out its terms including the minimum initial gross income, the annual rental escalation and the minimum period of lease being ten years. Clearly all the bank did was call for a copy of the lease agreement containing the terms which it had been informed had been agreed upon. It did not prescribe what the terms of the lease should be. And even if it had, that was no good reason for the department to embark upon expenditure it did not want to incur. It is clear that the BAC succumbed to the pressure of Ms Botha. The production of this letter was just an excuse for its change of stance.

[85] In any event, this led in mid-November 2006 to the conclusion of the written lease agreement between the sixth accused and the Department of Social Services relating to the Summerdown Place property in Kuruman for a ten year period at a rental escalation of 9.5%. Thereafter on 15 March 2007, Ms Botha and Mr Scholtz signed an addendum to this lease in Kimberley which sought to correct the amounts payable in respect of parking space on the schedule to the main agreement. (I should mention that Mr Scholtz, in attempting to distance himself from knowing how these leases had come about, stated that he had not been in Kimberley from 2005 until after the death of Mr Breda in 2009. This addendum gives the lie to this allegation, as it records he signed it in Kimberley on behalf of the sixth accused). In this way in respect of both properties viewed during the outing in which Mr Breda had gone with members of the physical planning unit to visit Springbok and Kuruman, a Trifecta company ended up securing a lease on better terms than what it had offered in the first place. And again, Ms Botha played a vital part in ensuring that outcome.

The Keur en Geur Building, Douglas

[86] Ms Botha played a similar role with a similar result in respect of a lease relating to the Keur en Geur Building, in Douglas. As appears from the judgment of the court a quo, a full set of the procurement documents relating to that lease could not be found. However, what can be established is that a lease for office accommodation in Douglas for a period of three to five years was invited in an advertisement and that, as a result of the directive from Ms Botha, it was re-advertised under an erratum for a period described as 'negotiable'.

[87] At the time there were no more than two State employees that were being accommodated in Douglas, a social worker and her assistant. The initial need of the Department of Social Services was assessed as being 205 m^2 for a total of nine single offices. In a memorandum dated 13 October 2006 prepared by Mr K Ryland, (who was at one time an accused but against whom charges were dropped) Ms Vosloo was informed that he had visited the premises with Mr Breda who was willing to lease office accommodation of about 500 m^2 to the department, and recommended that the possibility of concluding such a lease be assessed and considered. In a subsequent memo of 16 October 2006 addressed to Ms Botha, it was stated that a bid had been advertised in three local newspapers; that Mr Breda in his capacity as trustee of the Shosholoza Trust had submitted a bid by the closing date of 29 September 2006; that offer was for 400 m^2 (as opposed to the required 205 m^2) at a monthly rental of R50 per m^2 excluding VAT with an annual escalation of 9.5% for a period of ten years with an option to renew for another five years.

[88] The minutes of a BEC meeting held on 17 October 2006 reflect that it was recommended that Shosholoza Trust's bid should be accepted on condition that the lease be negotiated for 205 m^2 for a period of five years, with an option to renew for another five years, at a monthly rental of R40 per m^2 excluding

VAT. These conditions were agreed by the BAC at its meeting the following day. That committee also agreed to the proposed annual escalation of 9.5%.

[89] However, in an email sent to Mr Holele on 25 October 2006, Ms Vosloo indicated that the building was 400 m^2 in extent but that the Department of Social Services only wanted some 200 m^2 and could not pay for office space it was not going to use. According to her, the Shosholoza Trust had said that it could not subdivide the property and had therefore refused the department's offer. Ms Vosloo thus suggested the possibility of placing SASSA officials in the building so that the department and SASSA would in effect share the lease.

[90] According to Ms Vosloo, she and Mr Saal were subsequently called by Ms Botha to her office where she instructed them to accept the extra 200 m^2 and said that the additional space would be used for registry and board room purposes. When testifying, Ms Botha agreed that she and Mr Holele had approved the full 400 m^2, with the additional 200 m^2 that the department did not require for office space to be used for a registry, a kitchenette, a store room and a board room as, according to her, it made sense to have such facilities available. She also said that it was a case of all or nothing as Trifecta (or more properly the Shosholoza Trust) was offering 400 m^2 and that the department had to take the whole if they wanted to get the 205 m^2 portion it wanted.

[91] Nothing seems to have happened about Ms Vosloo's suggestion of making portion of the building that had been offered available to SASSA. On 13 March 2007, however, the BEC reconsidered the bid and accepted Shosholoza Trust's offer of the whole 400 m^2 of the building for a lease period of five years at a monthly rental of R49 per m^2 excluding VAT and an escalation of 9.5% for the duration of the lease. Its explanation for doing so was that Mr Saal of physical planning had indicated in writing that the department would use the extra space. However, Ms Botha testified that she and the

department's financial officer had discussed the matter and decided to take the total area offered. Two days later, at its meeting on 15 March 2007, the BAC accepted these recommendations.

[92] A written lease of the building including a rental schedule table from 1 August 2008 to 31 July 2013 was signed by Mr Breda on behalf of the Shosholoza Trust and Ms Botha on behalf of the tenant, the latter having signed on 15 January 2009. As set out below, the lease was later ceded to the second accused. Once more, as a result of Ms Botha's actions the Department of Social Services ended up being bound with a Trifecta lease of premises it really did not need, but at substantial cost to the department. Moreover, as was rightly found by the court a quo, there was in fact no urgency to procure this lease if regard is had to the lapse of time after the terms had been agreed until the lease was signed. It is important to also point out that there were but two persons who required accommodation in Douglas when the lease was negotiated and there was still just two persons using the building four years later. Bearing all of this in mind, the court a quo had ample justification when it said the following in regard to this transaction:

'On the basis of the largely common cause facts with regard to the procurement of this lease, it can hardly be said that Ms Botha acted in the best interest of her department . . . the department initially required 205 m^2. It was saddled with 400 m^2 . . . The 195 m^2 difference [calculated] at the rental escalation rate of 9.5% over the five year lease period . . . came down to a total of R790 106.57.'

[93] In any event, in a letter dated 10 December 2008, approximately a month before she signed the lease, Ms Botha informed Shosholoza Trust that the Department of Social Services had no objection to the lease being ceded by the trust to the second accused, Trifecta Investment Holdings (Pty) Ltd. When he testified, the first accused explained that the cession had been necessary as Mr Breda had signed an agreement of sale on behalf of Shosholoza Trust to purchase the property in issue. The latter, however, could not pay for it, whilst

the second accused could arrange the finance. This illustrates what appears to have been part of Mr Breda's modus operandi: secure a lease with the department and then acquire the property so leased with the financial assistance of Mr Scholtz.

The fifth, sixth and a portion of the seventh floor of the Du Toitspan building, Kimberley

[94] As had occurred in other instances, the process in respect of this property commenced with Mr Saal, as Head of the Physical Planning Unit of the Department of Social Services, directing a memorandum dated 14 September 2006 to Mr Holele relating to the dire need of office accommodation in Kimberley. This he stated was due to the office accommodation then occupied by the Department of Social Services not meeting its needs and as various units of the department needed to be relocated. He stated that the Physical Planning Unit had assessed the office space requirements of the department and that a total of approximately 1 150 m^2 was required in a building that had to be accessible to disabled persons. He concluded by requesting approval for the advertisement of office accommodation in the local newspapers in order to secure a suitable office block for the department.

[95] Interestingly, although the memorandum was dated 14 September 2006, it bears a date-stamp showing that it was only received on 16 October 2006, more than a month later. In any event, this led to an advertisement for office accommodation required by the Department of Social Services for a negotiable period commencing December 2006 being advertised in both the Diamond Fields Advertiser and Die Volksblad newspapers. It was not advertised in the Government Tender Bulletin.

[96] In a bid made in response to this advertisement on 3 November 2006, the fourth accused (Trifecta 434 Property 4 (Pty) Ltd) offered 1 150 m^2 office space

in the Du Toitspan building, Kimberley at R65 per m^2 per month excluding VAT and shaded parking at R68 per parking per month excluding VAT, for a minimum period of 60 months (five years) with an option to renew for a further 60 months. Interestingly, to the very square meter, the floor size contained in this offer was that set out in the memorandum Mr Saal had sent to Mr Holele dated 14 September 2006. One is left to wonder whether this was a mere coincidence.

[97] A competing bid was received from a company known as Gallovents Fifteen (Pty) Ltd, which alleged that it was a Northern Cape company but gave a Beacon Bay, East London postal address and an East London telephone number. In a memorandum directed to Ms Botha dated 14 November 2006 the competing bids were scored and resulted in the fourth accused being allocated 94.66 points out of a hundred and Gallovents bid being scored at 88.59 points (it had offered 1 642m^2 of office space at R45,60 per m^2 per month). The offered recommendation was that the fourth accused's offer of R65 per m^2 per month excluding VAT, basement parking of R68 per month excluding VAT, a lease period of five years and an annual escalation of 8% with occupation being given on 1 December 2006, be accepted. A material factor in favour of the fourth accused was stated to be that the extent of office space it offered met the department's need of 1 150m^2 whereas the competing bid offered a larger area.

[98] The fourth accused's bid was endorsed and recommended, first by the BEC on 17 November 2006 and, thereafter, by the BAC on 27 November 2006. On 28 November 2006, Ms Botha as HOD approved these decisions.

[99] Despite these terms having been agreed upon, it appears as if no formal lease agreement was signed at that stage. Some two months later, on 29 January 2007, Mr Saal addressed a memorandum to Ms Vosloo stating that it had since been discovered that an extra 400 m^2 of office space was required to

accommodate the intended officials that had to be relocated to the Du Toitspan building. He recorded that negotiations had been held with 'the proprietor of the building to accommodate our needs' following which it had been agreed that 'the additional 400 m^2 office space be allocated to the Department of Social Services . . . but that only 200 m^2 will be billed for, thus creating a saving of R13 000 per month'. He therefore requested that an additional amount of R13 000 (excluding VAT) per month for the extra 200 m^2 was required as well as one extra cleaner to clean the seventh floor, and that a lease agreement would be concluded once permission was granted for the additional funds.

[100] Without being placed before either the BEC or the BAC for consideration of the rental of this additional 400 m^2 of floor space, a formal written agreement was signed on 23 April 2007 by Mr Breda on behalf of the fourth accused and, on 25 April 2007, by Ms Botha on behalf of the Department of Social Services. It recorded the size of the rented premises at 1 656 m^2 to be rented at R65 per m^2 per month (excluding VAT). How that size of the leased premises was arrived at is not clear, bearing in mind that the initial agreement was for 1 150 m^2 to which a further 400 m^2 was agreed upon. This should have made it 1 550 m^2 rather than 1 656 m^2. Moreover the additional 400 m^2 was only going to be charged for on the basis that it was 200 m^2 so the rental of 1 656 m^2 at R65 per m^2 appears to be incorrect and too high.

[101] That is not the only difficulty. An annual escalation rate of 8% in regard to rental had been approved by the BEC, the BAC and Ms Botha. No mention was made of any change in the escalation rate in the memorandum of Mr Saal of 29 January 2007 which recorded the further negotiations that had been held. The formal lease relating to the increased area when prepared therefore recorded an annual escalation of 8% but that appears to have been deleted and a figure of 9.5% inserted in longhand in its place. How this came about one does not know

(the record also contains a signed copy of the lease without this alteration.) The court a quo justifiably commented on this as follows:

'There is no justification why the additional 400 m^2 was not subjected to an open tender process. The argument that it was only practical and logical not to subject the additional 400 m^2 to a competitive bidding process in view of the fact that Trifecta was already leasing part of the property to the department is unpersuasive. The additional 400 m^2 to Trifecta's initial 1 150 m^2 comes down to 1 656 m^2. Almost the size of the space (1 642 m^2) that had been offered by Gallovents. This stripped the tender process of an element of fairness which requires the equal evaluation of tenders.'

That this latter comment was justified in particular by reason of the competing bid of Gallovents having been disqualified in the first instance for offering 492 m^2 more than Trifecta. The end result was that the latter ended up leasing almost that space area to the department but at a substantially higher rental than if Gallovents's offer had been accepted.

The ninth, tenth and eleventh floors of the Du Toitspan building

[102] On 2 June 2008, a little over a year after the Du Toitspan lease had been concluded, Mr Breda wrote to the HOD of Social Services (who was at the time Ms Botha but the letter was marked for the attention of Mr Saal) referring to negotiations in connection with the Du Toitspan building and stating:

'In line with the request from your Department to amend the current lease on the facilities in the Du Toitspan Building to include the following facilities, we reflect the amendment in this offer to lease:

Description	Floor Area (m^2)	Current Utilisation	Amended Utilisation
Floor 5	670.50 m^2	670.50 m^2	670.50 m^2
Floor 6	259.00 m^2	259.00 m^2	
Floor 9	807.28 m^2		807.28 m^2
Floor 10	807.28 m^2		807.28 m^2
Floor 11	807.28 m^2		807.28 m^2

To affect the amended request to reduce the floor area utilisation on floors 5 and 6, Trifecta and the Department will amend the current lease agreement for floors 5 and 6, signed in December 2006, to reflect the new requirement on these floors and will enter into a new lease agreement for the additional requirement as set out in this offer.

As discussed with the Department of Social Services and Population Development (DSS & PD) representatives, we confirm that the following rental parameters will be applicable for floors 9, 10 and 11 of Du Toitspan building:

A. Contracting information, responsibilities and conditions:

Premises:	Floors 9, 10 and 11 of Du Toitspan Building, Kimberley
Floor size:	Approximately 2 421.84 square metres, final measurements to be confirmed on occupation.
Rental per month:	R70-20 per square metre per month excluding VAT.
Parking rental per month:	Undercover parking bays: R185-00 / parking bay per month.
Initial lease period:	Minimum 120 months.
Option period:	60 Months after expiry of initial lease period.
Annual Escalation:	10% annually
Lease Commencement Date:	1 August 2008 (if lease is signed before 30 June 2008).'

[103] This letter appears to have set the ball rolling. On 12 June 2008, Mr Saal indicated in a memorandum that the acquisition of new or additional office accommodation would be inevitable as there were a number of vacancies which had to be filled. He suggested that certain units be relocated to the external office accommodation at the Du Toitspan building and that he had held a discussion with the owner of the building who had told him that he had office space available. He recommended that approval be granted to enter into a lease agreement in respect of this office space.

[104] Ms Botha's response was immediate. The same day, she and Mr Breda signed an addendum to the previous lease to the effect that the portion of floor 7 presently being let would not be required once the department took occupation of additional space on floors 9, 10 and 17. They also signed a separate lease agreement relating to floors 9, 10 and 11, reflecting rental of R70.20 per square metre per month for 2421.84 m^2 (that being the total extent of the space to be let on floors 9, 10 and 11 as reflected in Mr Breda's letter of 2 June 2008) with an escalation of 10% per annum for a period of eight years (from 1 August 2008 to 31 July 2016), and an option to renew for five years.

[105] In this way the fourth accused came to lease another portion of the same building, but at a substantially higher rental and a higher escalation rate and for a substantially longer period than the lease it had in respect of the other portions of the building. And all of this was done in great haste, without any of the procurement processes prescribed by the statutory matrix already mentioned having been followed, and with substantial financial consequences to the department. The rental for the additional floors as set out in the schedule to the lease amounted to R193 815.01 per month with effect from 1 August 2008, increasing to R377 690.63 per month by 1 August 2015.

[106] The day after this lease and addendum were signed, Mr Holele addressed a letter to the Head of the Department of Social Services (farcically that was Ms Botha, the person who had signed the lease and addendum) to attempt to justify the deviation from normal procedures, stating:

'1. The Department is under severe pressure to obtain additional office accommodation due to the population of the organogram – with specific reference to the Social Welfare Services' Programme.

2. In 2006 the market for office accommodation was tested under Bid NC/SOC/0020/2006. Only two (2) prescribed by the Procurement Policy Framework Act 05 of 2000.

3. The Department successfully negotiated leasing of office accommodation on floors 9, 10 & 11 in addition to floors 5 & 6, Du Toitspan Building.
4. It would be in the best interest of the Department to enter into a separate lease agreement for floors 9, 10 & 11 as the rental per m^2 differs from that of floors 5 & 6:
   - Floors 9, 10 & 11: R80.03 / m^2 (incl. VAT)
   - Floors 5 & 6: R74.10 / m^2 (incl. VAT)
5. It is therefore recommended that the appended addendum to agreement of lease as well as the lease agreement between Trifecta Trading 434 Property 4 (Pty) Ltd be signed.'

[107] The reasoning set out in this letter is insupportable for various reasons. First, the fact that the market may have been tested two years previously, and generated but two bids of which the fourth accused's was accepted, did not mean that any bid for any other portion of the building made by the fourth accused would necessarily be the best course for the department to follow. Circumstances may well have changed and, without going through the normal bid procedures, the existence of alternative or more desirable accommodation would not be established. In this respect, there is no suggestion, nor could there be, that Trifecta was necessarily the sole provider of office accommodation in Kimberley, particularly in the light of the earlier bid of Gallovents.

[108] Second, concluding a lease in this way also flew in the face of clause 24 of the SCM Policy in that account was taken of an unsolicited bid outside a normal bidding process – which even if it was to be considered, required the BAC to consider it and make a recommendation only after taking into account comments submitted by the public and after obtaining written input from the Provincial SCM.

[109] Third, there can be no suggestion of extreme urgency justifying a deviation from the official acquisition process as required by the provincial SCM Policy (as referred to in paragraph 19 of this judgment). Ms Botha

testified that there was an urgent need to require the office space because posts had been advertised, appointments had to be made, there was a lack of office space and the department needed more floors in the same building. That may have been the case, but that falls short of the extreme urgency the existence of which is required before the prescribed procedures may justifiably not be followed. And Mr Holele, while conceding the existence for the need of office space, when pressed in cross-examination was not prepared to concede that such need was urgent. Thus while accepting that there was a need the evidence did not establish an urgency so extreme as to justify the Treasury Regulations and the SCMA Policy being ignored.

[110] In these circumstances there was no justification for a departure from the normal procedures, and the letter Mr Holele quoted above was clearly nothing more than a blatant *ex post facto* attempt to justify the unjustifiable, addressed as it was to the person who had already signed the lease agreement. It seems to me to be clear that Messrs Breda, Holele and Saal, together with Ms Botha, just took it upon themselves to re-organise the lease of the building as if they were not bound by any restrictions or procedures. This resulted in the department becoming obliged to make substantial rental payments on a monthly basis without the safeguards of the SCM Policy being met – payments that operated to the financial benefit of members of the Trifecta group.

Matters arising out of these leases

[111] As appears from what I have set out above, the modus operandi of Mr Breda in securing these leases appears in the main to have been this: in line with Mr Scholtz's vision of acquiring and refurbishing largely run-down buildings in order to lease them to provincial government departments, he would identify a property which might be suitable to be converted into office

accommodation; he would then introduce such property to the provincial government, mostly before the formality of an advertisement calling for bids for accommodation having been published; he would then negotiate the terms of the lease for such property; in the event of such negotiations being successful and a lease either having been concluded or likely to be agreed, he would then acquire the property using one of the Trifecta group of companies or, on one occasion, his own private trust which later ceded the lease to a Trifecta company. Any person able to assist this business scheme would obviously be of significant advantage to the Trifecta group and those who benefitted through it.

[112] As appears from the history set out above, the conclusion of these leases was riddled with irregularities. Indeed, the Treasury Regulations and the rules of the SCM Policy were honoured more in their breach than in their observance. Inter alia, and without intending to be exhaustive:

(a) In respect of not one of the leases was a bid advertised in the Government Tender Bulletin for a minimum period of 21 days before closure as required by Treasury reg 16A6.3(c) and clause 9(iii) of the SCM Policy. In the instances of the leases of the Springbok, Kuruman and Du Toitspan buildings, tenders were advertised for less than that period and only in local newspapers.

(b) The NCTC building and the Kimberlite Hotel leases were concluded without any SCM protocols being observed: this to the knowledge of both the MEC's of the respective departments that took occupation of the properties, Mr Esau and Ms Joemat-Pettersson, and despite Mr Crouch's so called 'comfort letters' to the contrary effect written by him on the instruction of his HOD, Mr Selemela – which must be construed as a clear attempt at a cover-up.

(c) Unsolicited bids were entertained in breach of the SCM Policy, not only in respect of the NCTC Building and Kimberlite Hotel as already mentioned, but also in respect of the Oranje Hotel, Upington and the ninth, tenth and eleventh floors of the Du Toitspan building, Kimberley.

(d) In a similar vein, in respect of the leases of 14 Riebeeck Street, Springbok and Summerdown Place, Kuruman, although the department did advertise for bids for office accommodation in Springbok and Kuruman, it did so only after members of its Physical Unit had visited those centres with Mr Breda and being shown the buildings which were later leased. In these cases, too, Mr Breda's approach must effectively be construed as being an unsolicited bid in respect of each property rather than one solicited by a bid advertisement.

(e) In respect of the Springbok lease, the BEC did not sit to evaluate tenders. Only once the lease was awarded was it approached to ratify it.

(f) Similarly, the unsolicited bid in respect of the Oranje Hotel in Upington resulted in Ms Botha signing a lease before its terms had been discussed and accepted by the provincial Tender Board, as was required until 30 June 2006. As already mentioned, she was unable to give a coherent explanation as to why she had done so.

(g) What is truly alarming is that Ms Potgieter, who was at the time the Director, Provincial Asset Management in the Provincial Treasury of the Northern Cape, testified that there was nothing unusual in a HOD signing a lease contract for accommodation without it having passed through the SCM Policy procedures which was later ratified by the Tender Board, particularly in cases of urgency and emergency. Also disturbing is that despite the terms of the SCM Policy and Treasury Regulations, she testified further that it was not the practice at the time to advertise in the Government Tender Bulletin before procuring services, save for tenders in excess of R40 million – this apparently in an effort to encourage BEE procurement. Fortunately, she stated that in terms of a practice introduced in 2011, tenders in contracts above R500 000 had been advertised in the Government Tender Bulletin.

(h) It is also necessary to comment on the evidence by Mr Selemela who, from 2004, was the HOD of the Department of Public Works in the Northern Cape Province. Called by the ninth accused Mr Block, he testified that during his ten year period as HOD of the Department of Public Works, no tender

processes were followed nor tenders invited in procurement of office accommodation and that, rather, the department requiring office accommodation would seek out an appropriate building then negotiate with the owner. Mr Crouch would then give advice in regard to the norms and standards in respect of the category of employees to be accommodated and the extent of the spaces they required. If this was in fact the true state of affairs, it shows a deplorable neglect of prescribed constitutional and statutory procedures. The court a quo found his evidence in this regard to be 'disquieting' and flew in the face of the province's procuring procedures. It went on to find Mr Selemela to have been a poor and unreliable witness 'whose evidence became debased when he intimated that he could not recall if the tender process had not been followed'. One is left with the distinct impression that he set out to denigrate Mr Crouch, an important State witness, and to try to minimise the defects in the procedures to which his political cronies had been parties.

The failure to recuse

[113] Before dealing with the merits of the convictions, it is necessary to deal with an *in limine* argument that this appeal should be allowed as the learned judge in the court a quo ought to have recused herself after she had failed to discharge the accused at the end of the State's case. At that stage of the proceedings the accused applied for the discharge on all counts in terms of the provisions of s 174 of the Criminal Procedure Act 51 of 1977 which provides that if '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'.

[114] As appears from what follows in this judgment, the accused were not convicted on any of the charges of fraud which were laid against them and, as already mentioned, the State has conceded that the charges of money laundering cannot be sustained. On the other hand, there clearly was evidence

incriminating the accused on the charges of corruption levied against them. Their contention, both in the court a quo and in this Court, that they were entitled to a discharge on all counts cannot be entertained.

[115] However, in refusing the application for a discharge under s 174, the court a quo observed as follows:

'There is a common thread that runs through the charges which can be gleaned from the evidence presented by the State. There is also a synergy which can be gathered from the accused's plea explanations, the line of cross-examination by the defence counsel and their argument in respect of this application which points to some collaborative effort and scheme amongst the accused not to incriminate each other. This is a factor which I permissibly take into account.'

Arising from this, but before the defence case commenced, all the accused applied by way of notice of motion supported by a founding affidavit deposed to by the first accused for the learned judge to recuse herself. It was alleged that her ruling created a perception of bias on her part. This argument was dismissed by the court a quo but repeated again in this Court.

[116] The essence of the appellants' argument was that the trial court had made a final decision that there had been a synergy in collaborative effort in the conduct of their defence which, taken together with her refusal to discharge them on various charges in respect of which the State had conceded it had not proved its case, created a reasonable apprehension of bias on her part.

[117] In my view there is no merit in this argument. For there to be a reasonable perception of bias, a proper factual basis must be laid – see *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) paras 45 and 48. In my view, no such basis was established. Although collaboration between the defence was mentioned, it is clear from the judgment on the discharge application that no final decision in that regard had been made. Furthermore, the court a quo was not bound by the

concession of counsel for the State in regard to the guilt or otherwise or the accused in regard to any of the charges laid against him. And in hearing an application for a discharge, a court is called upon to exercise its discretion. That is what it did. So even if this Court, on reflection and with the benefit of the entire record, is of the view it would have exercised its discretion differently, that is no reason to hold that a failure to have done so automatically resulted in a reasonable perception of bias.

[118] Accordingly, in the present case, although the reasoning of the court a quo in regard to the refusal of the application may have lacked cogency in certain respects, the necessary factual basis upon which reasonable persons, objectively applying themselves to the facts, would have formed a reasonable apprehension of bias, was not established. The court a quo correctly rejected the application for recusal.

The offence of corruption

[119] At common law, it is a crime for a person to offer or give to an official of the State, or for any such official to receive from any person, an unauthorised consideration in respect of such official doing, or abstaining from, or having done or abstain from, any act and exercise of his or her official capacity. Thus in *R v Chorle* 1945 AD 487, in which the common law in regard to the offence was discussed, the appellant had given money to a municipal official to induce him to use his influence to expedite the issuing of a building permit. This Court held that he had committed the common law offence of bribery. The learned judge went on:

‘The law of bribery is designed to protect the State against those who by gifts tempt its officials to use their opportunities as such to further private interests in State affairs and there is no reason why the law, which in its original form was wide enough to secure that protection, should, by restrictive interpretation, be cut down to something less than is necessary to achieve its object.’

[120] As was pointed out by this Court in *S v Shaik & others* 2007 (1) SACR 247 (SCA) para 71, s 2*(b)* of the Prevention of Corruption Act 4 of 1918 extended the crime of bribery from employers of the State to agents who by definition included, amongst others, employees in general. That Act was replaced by the Prevention of Corruption Act 6 of 1958 (the 1958 Act), s 2*(b)* of which provided that any person who 'corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do or for having done or forborne to do any act in relation to his principal's affairs or business' was guilty of an offence.

[121] The Corruption Act 94 of 1992 (the Corruption Act) repealed both the 1958 Act as well as the common law offence of bribery. It did away with the requirement that the relevant penalised act had to relate to the affairs of a principal and replaced it with a requirement that it had to relate to the powers and duties of the person sought to be influenced by the giving or offering or paying of a benefit.[3]

[122] The Corruption Act, in turn, was repealed by the PCCA Act. Section 3 of the latter contains the formulation of a general crime of corruption while s 4, which is of similar connotation, provides specific provisions in respect of corruption relating to public officers. Section 3 reads as follows (the reader is advised to take a deep breath):

'3. Any person who, directly or indirectly –

(a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or

(b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person,

in order to act, personally or by influencing another person so to act, in a manner –

(i) that amounts to the –

[3] *Shaik* para 73.

(aa) illegal, dishonest, unauthorised, incomplete, or biased; or

(bb) misuse or selling of information or material acquired in the course of the,

exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;

(ii) that amounts to –

(aa) the abuse of a position of authority;

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules,

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

is guilty of the offence of corruption.'

[123] As the learned author Prof Snyman points out, if this lengthy definition is stripped of conjunctive words or phrases, it is possible to abbreviate it to read as follows:

'Anybody who

(a) accepts any gratification from anybody else, or

(b) gives any gratification to anybody else

in order to influence the receiver to conduct herself in a way which amounts to the unlawful exercise of any duties, commits corruption.'[4]

It must be immediately recorded that 'gratification' is a word of wide connotation. Its definition in s 1 of the PCCA Act includes money, a gift, a loan, an interest in property, any favour or advantage of any description, and any real or pretended aid or influence (the list goes on and on).[5]

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[4] C R Snyman *Criminal Law* 6 ed 2014 at 403.

[5] The definition is as follows:

'gratification', includes –

(a) money, whether in cash or otherwise;

(b) any donation, gift, loan, fee, reward, valuable security, property or interest in property of any description, whether movable or immovable, or any other similar advantage;

(c) the avoidance of a loss, liability, penalty, forfeiture, punishment or other disadvantage;

(d) any office, status, honour, employment, contract of employment or services, any agreement to give employment or render services in any capacity and residential or holiday accommodation;

[124] It is not necessary to repeat the full terms of s 4 of the PCCA Act and the offence it creates of corruption relating to a public officer. Although its provisions are fuller than those of s 3, conceptually they are the same. What is of relevance is that in each section both the giver of the gratification and its receiver, commit the crime. Corruption by the recipient is set out in subsecs 3*(a)* and 4*(a)* while corruption committed by the giver of the inducement is set out in subsecs 3*(b)* and 4*(b)*. The one is in effect a mirror image of the other.

[125] Prof Snyman gives the following comparison between the crimes in the 2004 Act and those in the 1992 Act:[6]

'If one compares the definition of the crime in the 2004 Act with that in the 1992 Act, it is clear that the provisions of the 2004 Act is applicable only to cases in which X gives a gratification or benefit to Y (or Y accepts it from X) in order to persuade Y to act in a certain way *in the future*. In terms of the rules relating to bribery and corruption which applied before 2004, the crime could also be committed if X gives a gratification or benefit to Y (or Y accepts it from X) in order to compensate Y (or as a *quid pro quo*), for something which Y had already done *in the past*. In this respect the definition in the 2004 Act is narrower than that in the 1992 Act. It is surprising that the giving or acceptance of a gratification as compensation for something which the receiver has already done in the past, is not incorporated in the definition in the 1994 Act, since this rule has formed part of the crime for centuries. It formed part of the *Placaat* of the States General of the United Netherlands of

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(e) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(f) any forbearance to demand any money or money's worth or valuable thing;

(g) any other service or favour or advantage of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and includes the exercise or the forbearance from the exercise of any right or any official power or duty;

(h) any right or privilege;

(i) any real or pretended aid, vote, consent, influence or abstention from voting; or

(j) any valuable consideration or benefit of any kind, including any discount, commission, rebate, bonus, deduction or percentage.'

[6] C R Snyman *Criminal Law* 5 ed (2008) at 410-411.

1651 – a document which is among the most important sources of the common-law crime of bribery. Thus, if X has passed her practical examination for a driver's licence and has received her licence, and only thereafter gives the official who gave her the pass mark R500 for awarding her the pass mark, she does not commit corruption in terms of the 2004 Act. In terms of the 1992 Act she would have committed the crime.' (Footnotes omitted.)

[126] Prof J R L Milton in his seminal work *South African Criminal Law and Procedure* Vol 3 (Statutory Offences – Binder 1) at D3-5 expressed a similar view. He stated:

'Writers have stated that the 2004 Act suffers by comparison with its "commendably brief" predecessor, given its prolix and complex definitions, and the large measure of repetition in the Act. Of greater concern is that the Act, the purpose of which is to strengthen measures to prevent and combat corruption, actually has a narrower definition of corruption than the definition applied in the 1992 Act, in that it punishes those instances where gratification is given in order to bring about a particular action in the future, and does not apply to compensation for an action brought about in the past. Prior to the inception of the Act, whether under the 1958 Act in association with the common law crime of bribery, or whether in terms of the 1992 Act, both these forms of corruption were(?) subject to criminal sanction.

The lacuna is obviously contradictory to the aims and purposes of the 2004 Act. Given that the Act, which has been enacted to strengthen and not weaken the fight against corrupt activity, has omitted an entire category of conduct previously held to be unlawful, could it not be argued, in the light of the above reasoning relating to Section 12(2)*(a)* of the Interpretation Act, that it was indeed the intention of the legislature to revive the common-law crime of bribery when it repealed the 1992 Act? In this way the law at least extends the corrupt compensation for past deeds in respect of state officials, whereas the alternative interpretation simply means that the new legal regime seeking to counteract corruption is more narrowly defined, and thus weaker, than in the past.'

[127] Whether the PCCA Act in its repeal of the Corruption Act has revived the common law crime of bribery, is a thought provoking question.[7] But it is of academic interest only in the present case as none of those accused charged with corruption under the PCCA Act were charged in the alternative with common

[7] See further J Burchell *Principles of Criminal Law* 4 ed at 782.

law bribery. Thus even if entitled to an acquittal on the corruption charges, they could not in the alternative be convicted of common law bribery, even if that offence is to be regarded as revived. Hopefully the Executive, which daily expounds the necessity of fighting corruption, will take heed of the concern expressed by these learned authors that the Corruption Act has in fact weakened the fight against corrupt activities, a result that was probably not intended.

[128] The views of Professors Milton and Snyman were drawn to the attention of the court a quo, which responded in its judgment as follows:

'I am of the view that the prevention and combating of corruption and corrupt activities will be rendered meaningless if the Act was interpreted to narrowly regulate conduct where a gratification or benefit is given or offered by a donor to the recipient in order to persuade the recipient to act in a certain way only in the future. This could not have been the intention of the legislature having regard to the purpose of the Act, its preamble and the manner in which this offence has been dealt with in the past by our Courts. On the whole I am of the view that the giving or acceptance of a gratification as compensation for something which the receiver has already done in the past should be read as forming part of the modern day offence of corruption as set out in ss 3 and 4 of the Act. If not miscreants could simply conspire to deliver or transfer the gratification subsequent to the unlawful deed and thereby render a portion of ss 3 and 4 of the Act nugatory.'

[129] I have difficulty with this analysis. The court a quo's professed difficulty with accepting that the section restricted liability to instances where the gratification was offered in order to persuade the recipient to act in a certain way in the future appears to be premised upon its view that if that were so, miscreants could avoid criminal liability by simply arranging for the gratification to be paid or delivered after the event. But it seems to me to be clear that offenders could not avail themselves of this simple ruse to avoid criminal liability. As is set out in both s 3*(a)* and *(b)* the offence is committed when a person either accepts or gives the gratification or when such person 'agrees or offers to' accept or give the gratification. Thus the offence is

committed on agreement to give or even on merely offering to give the gratification. The sections in their normal connotation therefore envisage that a person who undertakes to act in a way which constitutes corruption commits the offence, even if the promised gratification is only forthcoming after the event.

[130] It also seems to me to be clear that agreement between a corruptor and corruptee on precisely what actions is required for any gratification to be given need not be reached, and a general common understanding suffices. Thus in *S v Selebi* 2012 (1) SACR 209 (SCA) the appellant, who at the relevant time had been the head of the national police service had received payments from Mr Glenn Agliotti.[8] This Court found that when Mr Agliotti had made such payments, the appellant had known they were intended to induce him as the head of the national police to afford Mr Agliotti some favour in one way or another and that this was sufficient for purposes of the offence.[9] It also held that the appellant must have realised that the generosity and payments he had received had created a dynamic whereby he, in his post, would be indebted to Mr Agliotti and would have to remain willing to do him favours in the future, and this constituted corruption as envisaged under s 4 of the PCCA, irrespective of whether any *quid pro quo* was in fact given (although it found that gratification had in fact been given).

[131] It seems to me then that where one party does a 'favour' amounting to the unlawful exercise of any duties on behalf of the other, on the understanding that a gratification of some sort as defined will be forthcoming in due course, it is neither necessary for the nature or amount of that gratification to be specifically agreed, nor for it to have been given, before the crime of corruption is committed.

[8] *Selebi* para 112.
[9] *Selebi* para 41.

Count 15

[132] In the light of the above, I turn to consider the convictions of the appellants. For convenience I intend to deal at the outset with the convictions of the ninth and tenth accused, Mr Block and his company Chisane Investment, on count 15, a charge of corruption in alleged contravention of s 3*(a)* of the PCCA Act. In paragraph 152 of the charge sheet it was alleged they were guilty of that offence:

'152. IN THAT during the period between March 2006 and April 2008 and at or near Kimberley in the regional division of Northern Cape and within the area of jurisdiction of this Honourable Court, the Accused, did directly or indirectly accept or agree or offer to accept any gratification from Accused 1 and or Accused 2 and or Accused 3 and or the late Mr Sarel Breda to wit, the following payments;

152.1 R 228 000,00 (paid to Accused 10 on 07 March 2006);

152.2 R 500 000,00 (paid to Accused 9 on 26 April 2006);

152.3 R 338 521,25 (paid to Duncan and Rothman Attorneys for the benefit of Accused 9 on 20 August 2007);

152.4 R 298 151,95 (paid to Accused 9 between 30 October 2007 to 29 April 2008);

153. Accused 9 also received the following gratification from the aforesaid Accused and or the late Mr Sarel Breda;

153.1 He received 25 Ordinary Shares in Trifecta Resources and Exploration (Pty) Ltd (on 08 September 2006) which is a subsidiary of Accused 2 and or Accused 3;

153.2 His guest house situated at 382 and 383 Shimane Street, Upington, was renovated to the amount of R346 919,74.

154. Accused 9 received the aforementioned gratifications for the benefit of himself and Accused 10 in order for Accused 9 to personally act or by influencing another person, to wit Mr Crouch, so to act in a manner-

(i) That amounts to the –

(aa) illegal, dishonest, unauthorised or biased exercise, carrying out or performance of any powers, duties or functions arising out of a contractual or any other legal obligation;

(ii) That amounts to –

(aa) the abuse of a position of authority; or

(bb) a breach of trust; or

(cc) the violation of a legal duty or a set of rules;

(iii) designed to achieve an unjustified result; or

(iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,

155. to wit, that Accused 9 influenced and or instructed Mr Ebrahim Crouch to act in a manner that would ensure that the Department enters into a Lease Agreement with the Trifecta Group of companies and or with Mr Breda in respect of the Kimberlite Hotel building and The Northern Cape Training Centre building; and or

156. that Mr Ebrahim Crouch acts in a manner that would ensure that the prescribed procurement processes of the Department are circumvented or that Mr Crouch influences the Departmental employees not to adhere to the prescribed procurement processes when procuring Kimberlite Hotel building and The Northern Cape Training Centre building for office space as aforesaid.'

[133] As appears from its terms, this charge relates solely to the department's leases of the Kimberlite Hotel and the NCTC building concluded in late 2005. It is clear from the circumstances that Mr Breda must have identified those buildings, which were owned by third parties at the time, as being run down but capable of being renovated and hired to government departments or entities; that he therefore approached Mr Block to use his influence to assist in procuring leases; and that as a result Mr Block phoned Mr Crouch and told him to help Mr Breda who was coming to see him. That this influenced Mr Crouch and the conclusion of the leases, is clear. It was on the strength of his introduction that Mr Breda made contact with Mr Crouch and despite the latter's protestations that due protocol had to be followed, events were set in train which led to the buildings being viewed and the leases being signed without the prescribed tender processes having been followed or the Tender Board's permission being obtained.

[134] Mr Block was not called to testify in his own defence, and as a result the court a quo, correctly in my view, accepted Mr Crouch's description of the telephone calls that had taken place between the two of them. Counsel for Mr Block, relying on the content of the Premier's letter of 12 July 2005 (quoted

in full in para 32 of this judgment) – in which it is stated that para 13.2.4 of the Treasury regulations was amended to read that the accounting officer of an institution (in these cases the HODs) may enter into leases of this nature 'without any limitations' – fell back on an argument that this meant that no protocols or SMC procedures had to be followed before the HOD's of the relevant departments signed the leases of the Kimberlite Hotel or the NCTC building, and thus there had been no irregularities in respect of these leases.

[135] Regulation 13.2 of the Treasury Regulations provides as follows:

'13.2 Lease transactions

13.2.1 For the purpose of this regulation, a lease is an agreement whereby the lessor conveys to the lessee in return for a payment or a series of payments the right to use an asset for an agreed period of time.

13.2.2 A lease is classified as a finance lease if it transfers substantially all the risks and rewards incidental to ownership of an asset. Title may or may not eventually be transferred.

13.2.3 An operating lease is a lease other than a finance lease.

13.2.4 The accounting officer of an institution may, for the purposes of conducting the institution's business, enter into lease transactions without any limitations provided that such transactions are limited to operating lease transactions.

13.2.5 With the exception of agreements concluded in terms of Treasury Regulation 16, the accounting officer of an institution may not enter into finance lease transactions.'

[136] The leases in question were clearly 'operating' leases as envisaged by this regulation, but the argument that by reason of reg 13.2.4 it was unnecessary for HOD's to comply with SMC procedures as they were empowered to enter into such leases 'without limitation' cannot be sustained. The regulation must be interpreted in context of the regulations as a whole, which make it abundantly clear that the SMC procedures are to apply to all departments relating to the acquisition of goods and services, be fair, equitable, transparent, competitive and cost effective and comply with the relevant legislation – see reg 16A. To argue that this one clause in a regulation essentially renders all these regulations nugatory has no foundation. To hold otherwise would give rise to the absurdity

that the requirements of the Constitution and the PFMA, relating to the establishment and functioning of the SCM detailed in paragraphs 15 to 23 of this judgment, could be ignored. Regulations cannot override the founding legislation under which they were made.

[137] Moreover, in the National Treasury's Practice Note SCM 2 of 2005 dated 10 May 2005, which applies 'to all national and provincial departments, constitutional institutions and public entities', provision is made for threshold values when procuring goods or services, hiring or letting anything, acquiring or granting any right or disposing of State property. In clause 4, it is specifically stated that accounting officers should invite competitive bids for all procurements above R200 000, and that competitive bids should be advertised in at least the Government Tender Bulletin and in other appropriate media.

[138] It is unnecessary for present purposes to determine the precise meaning of the words 'without limitation' used in reg 13.2.4. In my view, it was probably intended to connote that HOD's were not bound to a limitation in respect of the rental to be paid, but clearly it cannot be construed as providing an abandonment of the SCM procedures to be followed in procuring a lease. Regulation 13.2.4 certainly cannot be construed as providing a free hand to every HOD to contract as he or she wished without following any procurement protocols or applicable SCM policy. Nor does it appear ever to have been regarded in that light by the provincial government officials involved in procurement. That this is so is also borne out by the fact that SCM schemes were followed in most of the other leases which form the basis of the charges in this matter and, significantly, Mr Crouch's HOD ordered him to issue a declaration that all protocols had been observed in respect of these particular leases despite knowing the contrary was true. This was on obvious attempt to cover up which would hardly have been necessary if it was thought there were no such protocols applicable.

[139] There can thus be no doubt that the HOD's could not conclude leases with gay abandon without complying with SCM protocols nor that the leases of the Kimberlite Hotel and the NCTC building were concluded irregularly and in breach of the requirements of the SCM policy, which at that time required a fair, open and competitive process, advertisement for bids in the Government Tender Bulletin, and the approval of the Tender Board. The argument that the leases had not been irregularly concluded as the SCM procedures did not apply in their instances, borders on the spurious.

[140] I turn to deal with the question of gratification. It was common cause as a result of the plea explanation that the amounts referred to in paras 15.1-15.4 of the charge sheet 'were in fact paid and received'. However, in respect of the sum of R228 000 paid to the tenth accused, Chisane Investment in March 2006, the plea explanation proffered was that the amount was paid for 'consultancy services' rendered by accused 9 'in his capacity as the Director and a shareholder of Chisane Investment' to the Shosholoza Trust at the request of Mr Breda. And in respect of the sum of R500 000 paid to him on 26 April 2006, Mr Block's plea explanation was that he was paid the sum from a company of Mr Breda, Data Force Trading 53 (Pty) Ltd, also 'in respect of assistance provided in the management of business affairs in the Northern Cape, as well as other business areas outside Northern Cape where Mr Breda had interests'.

[141] The sole suggestion is, then, that these payments were due to Mr Block for having rendered 'consultancy services' (that the most vague and imprecise definition of work rendered) or for providing business 'assistance' (an equally amorphous description of what he had allegedly done) to justify these large amounts being paid to him. Had Mr Block in fact performed work or rendered services justifying those payments, it would have been a simple matter for him to have both explained what he had done in his plea explanation and then

entered the witness box and testified. For reasons best known to himself, he failed to do so. No one, not even Mr Scholtz, was able to explain the underlying causa of these amounts being paid. In the light of Mr Block's own plea explanation that he was unemployed at the time, and the fact that all he appears to have done in regard to Mr Breda or his companies was to introduce Mr Breda to Mr Crouch and then put pressure for leases to be concluded, I am driven to the inevitable conclusion that the payments were made as a *quid pro quo* for his doing so due to a prior agreement or understanding.

[142] It was argued, however, that these amounts were paid several months after the conclusion of the leases, so that no inference in linking them to the conclusion of those leases could be drawn. I do not agree. The leases were concluded by the third accused, an entity which required financial assistance in order to purchase the properties. Put simply, the third accused appears simply to have lacked the funds to immediately make such substantial payments. However, the two properties it had leased generated substantial incomes: the NCTC Building generated R108 000 per month with effect from 1 January 2006 and the Kimberlite Hotel R171 000 per month with effect from April 2006. The amounts of R228 000 and R500 000 paid in March and April 2006 were paid once the properties concerned had become income producing. There was therefore no substantial delay as was argued. Without Mr Block giving any explanation, the inference made by the court a quo that these substantial amounts were paid due to his involvement in the leases being procured was correctly drawn.

[143] Mr Block was at the time the Provincial chair of the ANC, and a man of considerable political influence. It was through his introduction that the two properties at the heart of this charge became known to the Department of Public Works and it was his influence which helped overcome Mr Crouch's resistance to the normal processes not being followed. But strictly speaking, it matters not whether his influence in fact led to the leases being signed. The offence of

corruption would have been committed if Mr Block undertook to use his political influence in an attempt to influence the department to conclude the leases and subsequently accepted a gratification for doing so.[10]

[144] And that is precisely what Mr Block did. There is no suggestion on the evidence that he had any other aims when he introduced Mr Breda to Mr Crouch and pressed him to assist Mr Breda in concluding the lease agreements The inference is therefore irresistible that these actions were the 'consultancy services' for which he was paid. He is clearly guilty of corruption relating to the amounts of R228 000 and R500 000 referred to in clauses 152.2 and 152.3 of the charge sheet, and to that extent was correctly convicted on count 15.

[145] But does his guilt on that count extend to the further gratifications he received as set out in the remaining sub-clauses of 152 and clause 153? In this regard, there seems to me to be no doubt that there was a 'generally corrupt relationship' – a somewhat notorious but apt description – which developed between Mr Block, on the one hand, and Mr Breda and his Trifecta companies, on the other. That Mr Block was prepared to use his political clout to advance Mr Breda's business interests, bears no doubt. It is borne out not only by the circumstances under which the Kimberlite Hotel and NCTC building leases were concluded, but also his intervention on behalf of Mr Breda in regard to the Oranje Hotel in Upington when he threatened Mr Crouch to hurry up or else he could personally come and do the work himself. It is also confirmed by the further payments which are the subject of this charge.

[146] It is common cause that an amount of R338 521.25 was paid to attorneys in respect of legal fees (he said in his plea explanation Mr Breda had agreed with Mr Scholtz to loan that sum to him); that between October 2007 and April

[10] See further Snyman fn 5 at 411.

2008 he had been paid the sum of R298 151.95 (in his plea explanation he stated this had been forthcoming from the Trifecta group as salary for services rendered to Trifecta Resources and Exploration (Pty) Ltd); that he had been given 25% of the issued ordinary shares of the latter company (Mr Breda and Mr Scholtz held the remaining shares); and that his guesthouse in Upington was renovated by a building contractor employed by the Trifecta group.

[147] Importantly, Trifecta Resources and Exploration, of which Mr Block had been given a 25% share, never traded or exploited any mining activities. To suggest that Mr Block was entitled to a salary for services rendered to a dormant company borders on the ridiculous. If there was an innocent explanation, why did Mr Block not testify to give it? The inference is clear that he had no such explanation.

[148] In regard to the improvements to the guesthouse, the evidence is in certain respects somewhat confusing. It was common cause at the stage of his plea explanation that the total cost of the renovations was R346 919.74. Although Mr Block did not specify precisely what the arrangement had been, he stated that Mr Breda had said that he 'would be of assistance when financial payment had to be made in that Trifecta had building operations in Upington at that stage and renovations to this amount was not an obstacle to be effected'. Quite what that means is not clear but it seems that the Trifecta group would presumably pay for the work.

[149] During the course of the trial, the contractor who performed the work, Mr Myles,[11] was called to testify. He explained that while doing the necessary renovations to the Oranje Hotel in Upington on behalf of the fifth accused, he was asked to quote on renovations to a disused funeral parlour in Upington which Mr Block intended to convert into a guesthouse. He did so and was in

[11] Incorrectly spelled as 'Miles' in the record.

due course employed to do the necessary work, although he was told Mr Block would be responsible for paying him. He submitted invoices to the fifth accused although, during the course of the contract, he was instructed by Mr Scholtz to clearly indicate which of the work he was doing related specifically to the guesthouse and to submit separate invoices in that regard. At some stage he was told to stop all work, but carried on for a while in the hope that he would in due course be paid.

[150] Under cross-examination by counsel for Mr Block, Mr Myles stated that he had been paid about R156 000 for the renovations to the guesthouse and that the amount of R346 919.74 (which had initially not been in dispute as being the cost of the renovations) was in fact his estimate of the balance still due, although it included a component relating to the work he had done after he had been instructed to stop. In this Court, counsel for Mr Block argued that we should accept that this latter sum constituted the gratification in issue, but this overlooks that, at the end of the day and once he had been able to consider the invoices and add them up, Mr Myles calculated that he had been paid about R251 000 for the work he had done at the guesthouse.

[151] However, these various payments were made long after the Kimberlite Hotel and NCTC building leases were concluded, and whilst they may have been forthcoming as an ex post facto gratification for those leases, it seems more likely that Mr Breda and Mr Scholtz were probably happy to have Mr Block, with his considerable political clout, ‘in their pocket’ so to speak and that they paid him these amounts in order to be able to use his political influence to their advantage from time to time. If that is so, the reasoning similar to that adopted by this Court in *Selebi*, both they and Mr Block, who must have been aware of why these amounts were being paid to him, probably made themselves guilty of the offence of corruption as envisaged by the PCCA Act.

[152] But that it is not an issue on which a final decision needs be reached as it is not the crime of corruption in respect of which the State charged them. The charge related solely to the conclusion of the 2005 contracts of lease of the Kimberlite Hotel and the NCTC Building, and it seems to me that the payments set out in paras 152.3 and 152.4 and the other gratifications particularised in para 153 of the charge, were probably not given and accepted as a quid pro quo in respect of those leases. Rather they were more likely to have been due to a continuing corrupt business relationship between the parties, albeit a relationship which had its roots in the initial two leases in respect of which the payments set out in paras 152.1 and 152.2 of the charge sheet (ie the amounts of R228 000 and R500 000) had been made.

[153] In my view, it therefore seems to me that the offence of corruption on count 15 has been established taking into account the initial two payments of R228 000 and R500 000, but that the other alleged gratifications, albeit paid and extended to Mr Block as part of a corrupt relationship, do not fall within the aegis of the charge. Thus whilst Mr Block may consider himself fortunate that he was charged in the manner in which he was, and had the charge been differently framed he may well have been found guilty of corruption relating to all the payments and gratifications alleged in the charge sheet. In the circumstances, although the conviction must stand it must be recorded that it relates only to the payments reflected in para 152.1 and 152.2 of the charge sheet, and does not embrace the further gratifications the State sought to prove against him on this count.

[154] In regard to Mr Block's company, Chisane Investment, it received the payment of R228 000 paid on 7 March 2006. Mr Block stated in his plea explanation that it related to consultancy services he had rendered on behalf of Chisane Investment. It was not suggested to this Court that even if Mr Block was guilty, he had not acted on behalf of the tenth accused to whom the

payment was made. There is thus no reason to interfere with the tenth accused's conviction on this count as well, albeit that its guilt does not include the gratification of the sum of R500 000 paid to Mr Block.

Count 16

[155] Only Mr Scholtz and the second and third accused were indicted on this charge which is the mirror image of count 15. It is alleged that Mr Scholtz, or the second accused, or the third accused, or the late Mr Breda, gave the gratifications referred to in count 15 to Mr Block or Chisane Investment as a *quid pro quo* for Mr Block influencing Mr Crouch to ensure that the Department of Public Works leased the Kimberlite Hotel and the NCTC Building.

[156] The court a quo convicted Mr Scholtz and the third accused on this count, essentially for the same reasons it had convicted Mr Block and Chisane Investment on count 15, namely, that Mr Block had exerted his political influence upon Mr Crouch to corruptly assist Mr Breda to secure the leases for the benefit of the third accused. However, it found the second accused not guilty on this count as it had only been incorporated in 2006, subsequent to the leases having been concluded, and could therefore not have been a party to the corruption.

[157] For the reasons already given in respect of count 15, even if there was an ongoing relationship of corruption between Mr Block, on the one hand, and Mr Breda and the Trifecta companies on the other, as a result of the charge having related solely to the Kimberlite Hotel and NCTC Building leases, only the payments of R228 000 and R500 000 can be regarded as gratifications that were given. On a similar basis of reasoning, any conviction on this count must be limited to those gratifications. The court a quo thus erred in founding its

conviction upon the further gratifications referred to by the State in the indictment.

[158] However, just as Mr Block and Chisane Investment were guilty of corruption in respect of the gratifications of R228 000 and R500 000, there can be no doubt that Mr Breda was similarly guilty of corruption by paying those sums as a *quid pro quo* for Mr Block agreeing to use his political influence to have the leases concluded. Mr Breda clearly acted on behalf of the third accused in doing so, and thus its conviction on this count, even though it relates only to the two payments I have mentioned, must stand.

[159] But what of Mr Scholtz? He alleged that he was unaware of these payments and the reasoning of the court a quo in founding him guilty on this count is by no means clear. There was certainly not a finding that he had personal knowledge of the payments of R228 000 and R500 000 and counsel for the State conceded in this Court that the evidence fell short of establishing beyond a reasonable doubt that Mr Scholtz in fact knew of these payments. In the circumstances, the appeal of Mr Scholtz on this count should succeed, as was correctly conceded by the State, and his conviction and sentence on this count set aside. This will be reflected in the order set out below.

Count 8

[160] That brings me to count 8, a further charge of corruption brought against Mr Scholtz and the Trifecta companies, the second to seventh accused. As it involved the alleged corruption of a public official, it was brought under s 4(1)*(b)* of the PCCA Act. In paras 127 to 129 of the indictment it was alleged that accused 1 to 7 were guilty of corruption (a deep breath is again advised):

‘127. In that during the period between 2005 and December 2009 and at or near Kimberley in the regional division of Northern Cape an within the area of jurisdiction of this Honourable Court, Accuse 1 to 7 and or the late Mr Sarel Breda, who was then a co-

Director in Accused 2, did directly or indirectly give or agree or offer to give any gratification to wit,

127.1 10% Shares held by Accused 2 to [Ms Botha)] and or to Jyba Investment Trust; and/or

127.2 Renovated the house of [Ms Botha] to the amount of R1 265 611,99; and/or

127.3 Cash payment in the amount of R15 000.00 to [Ms Botha],

128. for the benefit of [Ms Botha] and or for the benefit of Jyba Investment Trust, in order for [Ms Botha] to personally act in a manner –

(i) That amounts to the –

(aa) illegal, dishonest, unauthorised, incomplete, or biased exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; or

(ii) That amounts to –

(aa) the abuse of a position of authority,

(bb) breach of trust; or

(cc) the violation of a legal duty or set of rules

(iii) Designed to achieve an unjustified result,

129. to wit, that [Ms Botha] circumvented the prescribed procurement processes to ensure that the Department and or SASSA enter into the Lease Agreements referred to hereunder with Accused 1 to 7 on the terms beneficial to them.

129.1 Old Oranje Lease Agreement, Upington – Lease Agreement

129.2 14 Van Riebeeck Street, Springbok – Lease Agreement

129.3 Summer Down Place Office Campus, Kuruman – Lease Agreement

129.4 Keur en Geur Building, Douglas – Lease Agreement

129.5 Du Toitspan Building, Kimberley – Lease Agreement

129.6 Du Toitspan Building, Kimberley, Floors 9, 10 and 11 – Lease Agreement.'

[161] There can be no doubt that, in regard to the lease agreements particularised in para 129 of the charge, Ms Botha made decisions beneficial to the first to seventh accused. Not only was she responsible for awarding them the various leases, but in some cases did so on terms even more beneficial than those in respect of which they had originally tendered to contract. It is unnecessary to repeat all the various respects in which this took place. For present purposes it is sufficient to recall that:

(a) In the instance of the Oranje Hotel, Upington the Department of Social Services ended up leasing premises almost double the size of what was required and which still needed a considerable deal of work to put it into proper condition, for a longer period on that which was necessary, at a rental having an escalation higher than had been tendered, and without prior approval having been obtained from the Tender Board – and which resulted in rental in excess of R1.6 million being paid to the fifth accused over a further seven month period despite the premises not being fit for occupation.

(b) Contracts longer than had been advertised were concluded also in respect of 14 Van Riebeeck Street, (a lease of three to five years had been advertised; accused 5 had initially offered a lease of five years; on the insistence of Ms Botha the lease was eventually signed for ten years at an annual rental escalation of 9.5% rather than the 8% accused 5 had tendered) and Kuruman (again although both the BEC and BAC had recommended a lease credit of five years be approved Ms Botha again insisted that the lease period be ten years and that the annual escalation of the rental should be 9.5% rather than the 8% contained in the original tender made by the sixth accused).

(c) In respect of the Keur en Geur building in Douglas, Ms Botha instructed that the Department of Social Services should accept twice as much office space as was required, and an additional 400 m^2 was included in the lease without a competitive bidding process being adopted.

(d) In respect of the second Du Toitspan Building lease, the fourth accused came to lease the department another portion of the same building for a substantially longer period, and at a substantially higher rental and annual escalation rate, than the lease it had in respect of the other portions of the building – all of which was done on Ms Botha's instigation without necessary procurement processes being followed.

[162] Why would Ms Botha act in a way which substantially benefitted the Trifecta group to the disadvantage of the State in all these instances? The answer to this question is to be found in the creation of the Jyba Investment

Trust (for convenience I intend to refer to it simply as the 'Jyba Trust') which, it is common cause, came to hold 10% of the shares in the third accused, transferred to it from Mr Breda's Shosholoza Trust after the death of Mr Breda. It has five capital and income beneficiaries who were nominated by Ms Botha. They are the children of her brother and her sister. The trustees are Ms Angelique Botha, one of the beneficiaries who was employed by a Trifecta company, and Mr Ettiene Jacques Naude, an attorney practising in Pretoria who did work for Mr Scholtz and the Trifecta group.

[163] Ms Botha testified that in 2005, possibly about September or October that year, and at a time when she was the HOD of the Department, she had discussed the creation of a trust with Mr Breda. According to her, he had wanted to expand his business in the Northern Cape and had asked her for names for people to serve on a trust for business purposes who were likely to help him. However, according to Ms Botha, this was really no more than a passing comment and nothing more was said about the matter until after the death of Mr Breda on 3 March 2009. As some stage thereafter, according to Ms Botha, Mr Scholtz asked her about a trust and the transfer of shares, and she told him that her niece, Angelique, was already working for Trifecta and would be a good candidate for the trust as she was already in the property business. She then gave the names of her other nephews and nieces. This was her explanation as to how her nephews and nieces came to be the beneficiaries of a trust, which was then created solely for their benefit, holding assets which were valued at approximately R4.5 to R6 million.

[164] This is a somewhat vague and, in certain respects, an unconvincing and unlikely version, particularly if one bears in mind that both Mr Breda and Mr Scholtz were looking for persons to benefit who had skills and were likely to grow the business of the proposed trust. Indeed it was for this reason that Ms Botha proposed her niece, Angelique, who was already in the property

market, as a beneficiary – or so she alleged. But by the time Ms Botha testified in June 2014, six years later, three of the five beneficiaries of the Jyba Trust whom she had nominated were still minors who, six years previously, would almost certainly have lacked the required business skills and qualities required to grow the trust's business. The simple fact is she nominated people in her immediate family as the sole beneficiaries of this trust, and as a result they were duly appointed as such in the trust instrument. The obvious intent was to benefit them solely because of her close familial relationship with them.

[165] Mr Scholtz's explanation is also far-fetched. In his plea explanation he stated that when he first approached Mr Breda about doing business in the Northern Cape, they had discussed and agreed as follows ('the deceased' referred to is Mr Breda):

'7.1 Accused 1 insisted in the participation of a broad base empowerment group, preferably involving women and children.

7.2 In the light of the fact that Accused 1 did not know any previously disadvantaged individuals in the Northern Cape region other than the deceased, it was decided that the deceased will in due course identify people and/or entities that would become part of the broader base BEE participants in the business venture.

7.3 Accused 1 realised that neither the deceased, nor any other person who would participate in the business venture, would be in the financial position to contribute [meaningfully] to the business and that shareholding would have to be transferred to the BEE participants without requiring payment and/or at par value for shareholding.

7.4 Accused 1 further realised and accepted that any other shareholder, including the deceased, would not be in the financial position to contribute to the capital and expenses of the business venture and that he would have to provide all the required capital to establish the business.

7.5 The shareholding meant for further distribution to broaden the black economic empowerment base referred to above would in the meantime be held by the deceased in his Trust pending the transfer to further identified participants.'

[166] If Mr Scholtz was insistent upon a broad BEE group to participate in his business venture as he stated in this extract, why was he ultimately prepared to

pass on shareholding relating to his group, valued on his own evidence at about R4.5 to R6 million, to a trust which represented the interest of a few persons, mostly children, all of whom had close family ties with one person who had played a vital part in his business venture procuring leases with the Provincial Government? This bears the hallmark of corruption. And if his genuine intention was to have a broad based BEE participation in the venture, why was the trust not established at the outset and only years later after the death of Mr Breda?

[167] The key to the answer to these questions is to be found in the evidence of Mr Scholtz, not in the present proceedings but in a previous application brought as a matter of urgency by the joint trustees of the Shosholoza Trust against the second accused, the Casee Trust of Mr Scholtz, and numerous other companies, mostly of the Trifecta group, in which it was sought to interdict the alienation or encumbrance of various assets. Mr Scholtz deposed to an affidavit opposing this relief. Although it is unnecessary for purposes of the present case to traverse in detail the various factual allegations raised by the respective parties, what is of importance is that the 10% shareholding of the second accused which the Shosholoza Trust had been holding for the benefit of others, and its value, were dealt with in some detail. And in that regard, Mr Scholtz stated the following (again, the 'Deceased' referred to in these passages is Mr Breda):

'After taking the 10% shareholding which was being held by the Shosholoza Trust as nominee into consideration, the net result is a value of R24 913 774.41. Although the Shosholoza Trust was registered as a shareholder of 55% of the shares in the (second accused), the Shosholoza Trust represented by the Deceased had, to my personal knowledge, in 2005 undertaken to transfer a 10% shareholding in the first respondent to the nominee of Yolanda Botha, who was a close friend of the Deceased and influential in political circles. She had not yet nominated the entity to which the shares should be transferred at the time of the Deceased's death, and hence the reference to the "YB Trust" in the spreadsheet. That 10% shareholding is also reflected in the organogram, annexure "CS3" which I had handed to

and discussed with the first applicant at our meeting in March 2009, and was at no time queried or disputed by any of the applicants.

. . .

I refer to what I have stated above in regard to the undertaking given by the Deceased on behalf of the Shosholoza Trust, and accepted by Yolanda Botha, to transfer 10% of the shares held by the Shosholoza Trust in the (second accused) to the nominee of Yolanda Botha. This agreement was confirmed by both of them together to me in 2007 and on numerous subsequent occasions. It was expressly confirmed to me that until such time as she had decided upon and nominated the entity which was to hold the 10% shareholding, the Shosholoza Trust would continue to hold 10% of the shares in the (second accused) for and on behalf of the entity to be nominated by Yolanda Botha.'

[168] The second accused was only incorporated in April 2006, and to that extent the reference in this statement to the Shosholoza Trust undertaking in 2005 to hold 10% of its shares on behalf of Ms Botha's nominee is strictly speaking incorrect. But nothing really turns on this as it is common cause that 10% of the scheme would be held by a BEE entity, and the fact that the second accused was only incorporated on a later date and thereafter used as the overall holding company in the business scheme is neither here nor there. Its shares ended up being held by the Shosholoza Trust and the Casee Trust in a respective ratio of 55% to 45% - consistent with the acknowledgment by Mr Scholtz in this affidavit that he knew from the outset that 10% of the shares being held by the Shosholoza Trust were being held on behalf of an 'entity' to be nominated by Ms Botha.

[169] Of course on Ms Botha's version she knew nothing about a 10% share being held by the Shosholoza Trust awaiting her nomination of beneficiaries, and to that extent these two versions are irreconcilable. However, if Ms Botha had no reason to contemplate that such a valuable share of the business worth millions of rand would be made available to her or anyone else, which on her version is the case, why did Mr Scholtz suddenly make this fortune available to the Jyba Trust immediately after the death of Mr Breda? His explanation was

that he had done so as he and Mr Breda had held discussions on this issue in the few months before Mr Breda's death, that Mr Breda had said he would get on with establishing the envisaged trust and had told him that he had made contact with Ms Botha about it (she mentions no such contact). Mr Scholtz explained that he thus felt duty bound to give away 10% of the second accused's shares to a trust benefitting Ms Botha's relatives despite her having never been aware of any such intention beforehand.

[170] All of this is inherently improbable. It does not explain why even if Mr Scholtz felt obliged to implement the plan he had insisted upon from the outset of benefitting persons who would help the business grow, he ultimately chose just close family members of Ms Botha. Nor does it explain the delay of several years after the scheme was hatched until the plan was implemented. But the facts speak louder than words. The obvious explanation of why Ms Botha acted as she did to the advantage of companies in the Trifecta group was that she knew her actions would benefit either herself or an entity in which she would have a direct or indirect interest through the 10% share being held in the Shosholoza Trust. This is consistent with what Mr Scholtz said in his affidavit. As the beneficiaries of the entity Ms Botha ultimately nominated, the Jyba Trust, were all were close members of her family, the inference is irresistible that she had either them or her own interests at heart in concluding the various leases – and on terms more favourable to the Trifecta companies than those that had been tendered.

[171] Importantly, had Ms Botha's interest in the leases been known they would probably not have been concluded. Treasury Regulations 16A8.3 and 4, provide, inter alia:

'16A8.3 A supply chain management official or other role player –

(a) must recognise and disclose any conflict of interest that may arise;

(b) . . .

(c) may not use their position for private gain or to improperly benefit another person.

. . .

16A8.4 If a supply chain management official or other role player, or any close family member, partner or associate of such official or other role player, has any private or business interest in any contract to be awarded, that official or other role player must –

(a) disclose that interest; and

(b) withdraw from participating in any manner whatsoever in the process relating to that contract.'

[172] This explains why the 10% share of the business scheme (or more correctly the second accused which became its ultimate repository) remained vested in the Shosholoza Trust until Mr Breda met his untimely fate. Had the interest of Ms Botha been disclosed, the leases could not have been concluded. As appears from the bid documents, auditors had to certify who the individuals were behind bids, including the beneficiaries if trusts were involved in submitting bids. Had Ms Botha had an interest in a trust that was a party to a bid, it would have had to have been disclosed with the consequence that the bid would have been disqualified. For this reason it was necessary to obscure her interest by retaining the share in which she had an interest in the name of the Shosholoza Trust. Once Mr Breda had died, however, that state of affairs could no longer continue and the 10% share had to be allocated to a beneficiary. Ms Botha couldn't be seen to accept it and so she and Mr Scholtz agreed to the creation of the Jyba Trust to benefit her close relations.

[173] These conclusions are the result of inferential reasoning, drawn from the known facts, but no other reasonable inferences can be drawn from that which is known. It may well be that initially Ms Botha herself was the intended beneficiary of the 10% and that certainly seems a strong probability. But one cannot exclude that she may have intended to benefit another entity in which she had an interest. It matters not. She acted as she did to the detriment of the provincial coffers, and clearly made herself guilty of corruption.

[174] Of course the charge on count 8 is the mirror image of Ms Botha's corruption. In an attempt to avoid the consequences of her actions, Mr Scholtz testified that the affidavit had been drafted by counsel in the stressful circumstances of having to oppose an urgent application, and did not accurately reflect what he had said. According to him, he had mentioned that there would be a 10% holding in a BEE entity but not that such entity would be a nominee of Ms Botha. He said that he had pointed this inaccuracy out to counsel who had prepared the affidavit, whom he alleged told him that the issue was irrelevant and need not be changed as there was time pressure to file the affidavit. In support of these allegations he relied upon the testimony of his attorney, Mr Naude, who confirmed that Mr Scholtz had not been happy with the way the affidavit had been drafted on this issue.

[175] The affidavit concerned was drafted by counsel, Mr B Swart SC, who had been elevated to the status of senior counsel shortly before and was himself being led in the matter by another senior counsel, Mr M Maritz SC, who settled the affidavit. It was the product of several days' work, and was prepared after counsel had consulted with Mr Scholtz. Mr Swart emphatically denied that any inaccuracy had been pointed out to him, and stated that if it had he would neither have said it was irrelevant nor left it uncorrected.

[176] The court a quo believed him. It found the contrary evidence of Mr Scholtz and Mr Naude to be 'pathetic'. This was a factual finding, made by a court which enjoyed the benefit of seeing the witnesses and is thus not lightly to be interfered with by this Court on appeal. Moreover what was said in the affidavit provides the basis of a logical explanation for the 10% share having been retained in the Shosholoza Trust for several years during which Ms Botha as HOD of the Department went out of her way to advantage Trifecta at every

turn. There is no reason for this court to conclude that the court a quo erred in reaching the decision it did on this issue.

[177] The 10% shareholding in the second accused which ultimately found its way into the ownership of the Jyba Trust was clearly a gratification given as a *quid pro quo* for Ms Botha's assistance in concluding the various leases. The inference is irresistible that she acted as she did as she had been promised a gratification in the form of a shareholding in the scheme if she did so.

[178] Mr Scholtz tried to avoid the obvious consequences of this by falling back on his default contention that he had left the daily running of the business up to Mr Breda, that all he had done was arrange the finance and that he had not participated in or had knowledge of any negotiations relating to the conclusion of the leases. I accept Mr Scholtz, was based primarily at his office at his home in Pretoria and that he seldom ventured to the Northern Cape. However, one cannot lose sight of the fact that what he and Mr Breda swiftly built up was a multi-million rand business, and it seems highly unlikely that Mr Scholtz, a canny businessman, would entrust everything to Mr Breda, a far less experienced business person – and indeed one who had through lack of confidence asked him to be his mentor in business affairs. Even if he was not actively involved in negotiating the leases as he said, and despite having sung Mr Breda's praises and qualities as a businessman, it is extremely improbable that Mr Scholtz would not have learned of Ms Botha's involvement in the conclusion of a series of leases on good terms for the business in which he was investing great wads of money. And as appears from his affidavit in the previous matter, he was from the outset aware that Ms Botha was the person who was going to nominate the entity that would receive the 10% shareholding of this successful enterprise he had helped create.

[179] In these circumstances, it would be extending the bounds of credulity to accept that Mr Scholtz was obliviously unaware of all the negotiations relating

to the various leases. It is significant in this respect that the letter from Rand Merchant Bank on which so much reliance was placed by his defence to show that the bank had insisted upon a ten year lease for the Summerdown Place building in Kuruman, was sent by telefax to both Mr Scholtz and Mr Breda, a clear indication that Mr Scholtz was closer to the action than he was prepared to admit. Even if he did not have detailed knowledge of the day to day interactions between Mr Breda and Ms Botha, he must have known in essence that Ms Botha had acted to the advantage of the Trifecta group in concluding the leases. This also explains why immediately after the death of Mr Breda he took steps to ensure that the 10% share was moved out of the Shosholoza Trust for the reasons already dealt with in relation to Ms Botha's corruption. It was, after all, at his insistence that the trust was created.

[180] Be that as it may, Mr Scholtz caused the transfer of the 10% of the shares in the second accused to the Jyba Trust in consequence of an arrangement or understanding reached with Ms Botha during 2005. Mr Scholtz had personal knowledge of this arrangement, as he himself said in his affidavit. Despite his allegations to the contrary, the purpose of the 2005 arrangement was not the participation of a BEE group in the Trifecta group of companies. This is apparent not only from the failure to implement a BEE scheme before Mr Breda died but Mr Scholtz's failure to mention any such intention in his affidavit where he merely referred to Ms Botha as a close friend of Mr Breda and a person 'influential in political circles'.

[181] If not broad based BEE participation, what then was then was the aim and purpose of the 2005 arrangement? The following factors loom large in the search for the answer of this question. First, as I have said, after the 2005 arrangement Ms Botha consistently went out of her way and took considerable risks to ensure that the leases were concluded with the Trifecta group of companies and on the most favourable terms. Second, her nominee received

10% of the shares in the ultimate beneficiary of these leases, namely the second accused, the holding company of the Trifecta Group. Third, in his evidence at the trial, Mr Scholtz falsely denied that an arrangement to understanding had been reached with Ms Botha.

[182] In the circumstances the only reasonable inference is that, to the knowledge of Mr Scholtz, the 10% shareholding in the second accused constituted a gratification that had been promised to Ms Botha during 2005 in order for her to assist in securing leases for the Trifecta group of companies. On this basis, alone, Mr Scholtz is guilty of corruption on this count. For that measure, so are the other Trifecta companies, the second to the seventh accused, to the extent of their involvement, and it was not suggested otherwise in argument before us.

[183] The further issue which then arises is whether guilt in respect of the other gratifications specified in the charge has also been proved. The first of these was a sum of R15 000 paid in cash to Ms Botha. She alleged it was a donation to the ANC. She alleged that whilst the party was preparing for its 198th national celebrations in Kimberley during January 2010, she had a telephonic discussion with Ms Buizer during which she asked for a donation. This was forthcoming when Mr Daan Malan, a building contractor who was doing renovations on her house and whose company was employed by the Trifecta group to do refurbishment of buildings, arrived at her house and gave her R15 000 in cash which he said it come from Ms Buizer. According to her, she handed this money over to Mr Herman Willemse, the ANC provincial bookkeeper, for use in preparing for the conference.

[184] In any event, in a letter marked for the attention of Mr Scholtz and dated 29 December 2009, Ms Botha wrote to Trifecta Holdings Kimberley, expressing her thanks on behalf of the ANC for the support and donation. Mr Willemse

was also called to corroborate this. There were some differences between his version of the events and that of Ms Botha and, importantly, this sizeable donation in cash was never recorded in the ANC's books of account as it ought to have been, and this, according to Mr Willemse, was because everything was in a rush. One is left with the sneaking feeling that Mr Willemse's evidence was false and that he was attempting to protect another ANC colleague.

[185] The court a quo certainly felt so. The learned judge held that the R15 000 was not intended for the coffers of the ANC but for Ms Botha, and that Mr Willemse did not record the money simply because it was not given to him. She held that the letter signed by Ms Botha purporting to be from the ANC thanking Trifecta for the donation, which had surfaced late in the day, had been manufactured to justify the cash payment she had received.

[186] This payment is certainly shrouded in suspicion. Mr Scholtz exonerated himself and said that he knew nothing about it. But it could not have been made at the instance of Mr Breda who died nine months earlier, and who else would have authorised the payment of such a large sum by Trifecta Holdings? Furthermore, when Mr T S White, the forensic auditor employed to analyse the paper-trail of the leases and the amounts paid relating thereto, testified about this sum being paid, it was never put to him that it was a donation. Ms Botha's letter of thanks only surfaced during the evidence of Mr Scholtz, who testified much later. Conspicuous by her absence was Ms Buizer who made the money available and should have been able to throw light on the matter but for some reason was not called (Mr Scholtz testified that she had left his employ under a cloud of having misappropriated substantial sums of money, but that ought not to have necessarily prevented either the prosecution or defence from using her as a witness).

[187] One may have one's suspicions in regard to this payment, but it is not necessary to reach a final decision on the matter as, at the end of the day, the State conceded during argument before us that its evidence had fallen short of establishing beyond a reasonable doubt that Mr Scholtz had been aware of the payment, and that he should be given the benefit of that doubt. This concession was properly and correctly made.

[188] That brings me to final gratification relied upon by the State, namely, the cost of renovations to Ms Botha's house in Kimberley effected by Mr Malan during the period September 2009 to September 2010 whilst working as Trifecta's subcontractor and paid for by Trifecta. During about August or September 2009, Mr Malan was approached by Ms Angelique Botha, the niece of Ms Botha, who was employed by Trifecta as an administrative clerk in Kimberley, and asked whether he would do renovations at Ms Botha's residence. He later spoke to Ms Botha and told her to speak to Mr Scholtz as he did not perform private work but regarded himself as bound to work for Trifecta. Ms Botha therefore asked Mr Scholtz if he was prepared to assist her in financing the renovations of the house. He agreed, and did so knowing that financial institutions had refused to render Ms Botha assistance. He explained his willingness to help as Ms Botha told him that she would be able to repay a loan as she had left the service of the provincial government in order to become a Member of Parliament and was due to receive a substantial severance package.

[189] It appears that Mr Scholtz was prepared to carry Mr Malan's charges for doing this work as a loan. At the outset it was envisaged that it would be a loan in the vicinity of R500 000 but, as time progressed, the amount escalated to well over a R1 million. After Ms Botha had become a Member of Parliament, the Joint Committee on Ethics and Member's Interests considered a complaint against her, seemingly that the money spent on her house had been a corrupt

gratification. This led to Ms Botha producing a purported loan agreement between herself and the second accused, purportedly reduced to writing and signed in Cape Town on 10 March 2010. In a subsequent agreement signed by them on 20 June 2011 it was agreed that Ms Botha still owed R771 348.68 in respect of improvements done to her residence.

[190] Whether the first agreement had been falsified became an area of considerable investigation during the trial. It led to the court a quo insisting upon a forensic examination being carried out on the computer of Mr Naude, the attorney that I have mentioned. He was the author of the loan agreement, a copy of which was produced in court, and alleged that the hard-drive of the computer on which the original had been drafted had crashed. It was also contended that the loan agreement that was produced was a recent fabrication and that Mr Naude's computer had been loaded with software designed to prevent forensic examination.

[191] All of this related to an enquiry if there had in fact been a loan agreement or whether the renovations were performed by Mr Malan on behalf of the second accused as a gratuitous and corrupt gratification and the loan agreement produced in court was a subsequent false document. In the light of the view that I take of this matter, it is not necessary to reach a final decision on this point. Even if the cost of the renovations were regarded as a loan, it would still have amounted to a gratification if it was advanced and received in circumstances which satisfied the requirements of the offence of corruption as envisaged in s 4 of the PCCA Act.

[192] Nevertheless, sight must not be lost of the fact that the renovations were done for Ms Botha after she had left the employ of the provincial government. And like the payment of R15 000 mentioned above, this was well after the leases referred to in count 8, in respect of which gratifications contended for were allegedly advanced, had been concluded. In these circumstances, even if it

is accepted that the R15 000 paid and the renovations done flowed from a relationship of corruption, there is nothing to show that these two amounts were paid and received as gratifications in respect of leases that had been concluded, in most instances, years before. Indeed, on a similar basis of reasoning to that set out above in respect of Mr Block on count 15, they are more likely to have been gratifications paid and received as part of an on-going corrupt relationship where it was accepted by both sides that one hand would wash the other, so to speak, in respect of other favours already made or anticipated in the future.

[193] The State, however, limited itself to gratifications advanced to and accepted by Ms Botha for her actions in the conclusion of the earlier, specific leases mentioned in count 8. The charge on this count did not relate to the conduct of a general, on-going corrupt relationship between Ms Botha and her co-accused. Had that been the charge, the result may well have been different; but they cannot be convicted of a corruption with which they were not indicted.

[194] Consequently, although Mr Scholtz and the second to seventh accused were correctly found guilty of corruption on count 8, and their convictions on that count must stand, it does not embrace the R15 000 paid in cash to Ms Botha nor the renovations effected to her immovable property.

Counts 34 and 35

[195] These are charges of money laundering brought under ss 4 and 6 of the Prevention of Organised Crime Act 121 of 1998. It is unnecessary to detail the reasoning of the court a quo and why it convicted the first, second and third accused on count 34 and the first, third, eighth and ninth accused on count 35. Suffice it to record that the reasoning was somewhat disjointed, and counsel for the State, correctly in my view, conceded that their guilt on these counts, had not been established and that the appeal in their respect should therefore

succeed. That will be reflected in our order and nothing more needs to be said in relation thereto.

Sentence

[196] The second to seventh appellants having failed to obtained leave to appeal against their sentence, the appeal in respect of sentence is thus limited to the charges of corruption on which Mr Scholtz (count 8) and Mr Block (count 15) have been convicted. Corruption is an offence contained in Parts 1 and 2 of Chapter 2 of the PCCA. Each count involved an amount far in excess of R500 000. That being so, Part II of the Second Schedule to the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years' imprisonment unless there are substantial and compelling reasons justifying a lesser sentence.

[197] In that regard, as has been regularly stated, the legislature intended there to be a severe, standardised and consistent response where offenders commit these offences. Accordingly, whilst the courts have a residual discretion to decline to pass the prescribed minimum sentence, they should only do so where there are circumstances present which provide truly convincing reasons for a lesser sentence – see eg *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA) paras 8 and 25. The court a quo determined that there were no such circumstances in the case of either Mr Scholtz or Mr Block and, accordingly, imposed the prescribed minimum of 15 years' imprisonment. It is against these sentences that they appeal, contending that the court a quo erred in its conclusion in that regard and that there were in fact substantial and compelling circumstances justifying the imposition of a lesser sentence.

[198] In considering this issue, the severity of the offences in respect of which they were convicted must not be underestimated. In an affidavit filed in the matter of *South African Association of Personal Injury Lawyers v Heath &*

others 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) (*Heath*), the Minister of Justice, the fourth respondent in the matter, is reported to have said:[12]

'It is a regrettable and notorious fact that the levels of crime in South Africa are unacceptably high. One aspect of crime which requires special investigative measures relates to corruption and unlawful conduct involving State institutions, State property and public money. Very often, such conduct is perpetrated by public servants and State officials.'

[199] Like bribery, which it encompasses, corruption is 'a corrupt and ugly offence . . . an insidious crime difficult to detect and more difficult to eradicate' which 'if unchecked or inadequately punished by the courts, have a demoralising effect on business standards and fair trading'. (I adopt the phraseology of this Court in *S v Kelly* 1980 (3) SA 301 (A) at 313E-F.) Those comments, unfortunately, are still apposite today. And, as was said in *Heath* para [4]:

'Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.'

Similarly, this Court in *Shaik* observed that corruption 'eats away at the very fabric of our society and is the scourge of modern democracies', and that:[13]

'The seriousness of the offence of corruption cannot be overemphasised. It offends against the rule of law and the principles of good governance. It lowers the moral tone of a nation and negatively affects development and the promotion of human rights. As a country we have travelled a long and tortuous road to achieve democracy. Corruption threatens our constitutional order. We must make every effort to ensure that corruption with its putrefying effects is halted. Courts must send out an unequivocal message that corruption will not be tolerated and that punishment will be appropriately severe.'

[200] That the legislature intended corruption to be severely treated is not only reflected in the legislation relating to prescribed minimum sentences but also by

[12] *Heath* para 3.
[13] *Schaik* para 223.

s 26 of the PCCA which provides that a person convicted of an offence referred to in, inter alia, Parts 1 and 2 of that Act – which includes corruption – is liable upon conviction 'to imprisonment up to a period for imprisonment for life'.

[201] The argument on behalf of the first accused, as I understood it, was that the court a quo had erred or misdirected itself in not properly taking into account the value of the assets forfeited to the State by order of the court a quo pursuant to an application under the Prevention of Organized Crime Act 121 of 1998 (POCA). Section 18(1) of POCA provides that a court convicting an offender of certain offences may inquire into any benefit which the offender may have derived from the offence and that, if it finds that there has been a benefit so derived, may 'in addition to any punishment which it may impose in respect of the offence make an order against the defendant for the payment to the State of any amount it considers appropriate'.

[202] Pursuant to these provisions, the court a quo made a confiscation order against the first to seventh accused. Operating as a civil judgment, it obliges them jointly and severally, the one paying the other to be absolved, to pay to the Treasury sums totalling in excess of R60 million. It was argued that the effect of this order, taken together with the first accused's personal circumstances, resulted not only in there being substantial and compelling circumstances justifying a sentence less than that prescribed but that a non-custodial sentence would have be appropriate (a fine of R5 million together with a period of correctional supervision was suggested).

[203] In considering this argument, it must be remembered that the purpose of a confiscation order under s 18 of POCA is to remove the incentive for crime by stripping offenders of the proceeds of their misdemeanours, and not to punish them – see eg *National Director of Public Prosecutions & another v Mohamed NO & others* 2002 (4) SA 843 (CC) paras 15 and 16 and *National Director of*

Public Prosecutions v Gardener & another 2011 (1) SACR 612 (SCA) para 19. As this Court went on to say in *Gardener*:[14]

'It is plain that confiscation and sentence are to be treated separately – for good reason. The purpose of sentencing is to punish an offender for his or her criminal wrongdoing. The severity of a sentence is primarily intended to reflect the defendant's culpability in relation to the offence for which he or she is being punished. The main purpose of a confiscation order is to deprive offenders from deriving any benefit from their ill-gotten gains. The achievement of this purpose may have a punitive effect, but this is not its rationale. The severity of a sentence, therefore, generally ought not to have a bearing on the exercise of a court's discretion whether to make a confiscation order . . . .'

[204] It may be argued that if the sentence imposed on an offender is generally to be disregarded in considering whether a confiscation order should apply, the converse should also apply so that a confiscation order should generally be disregarded when sentence is considered. In my view, however, an inflexible rule to that effect would be unjust, especially in a case such as this where the effect of the amount of the confiscation order is substantial. Thus I must take into account the fact that compensation orders have been made. But as the rationale of a confiscation order is to deprive an offender of the benefits of his or her offence, it would be wrong to place undue emphasis upon it as a factor relevant to sentence.

[205] All this really means is that as opposed to a case in which a loss has been suffered, the loss will have been recovered if the confiscation order leads to a successful recovery. So whilst it may to that limited extent remain a factor to be taken into consideration together with all other factors relevant to the imposition of sentence, standing alone it should in no way be determinative of whether a prescribed minimum sentence ought not to be imposed. That is all the more so in a case such as this where the sentence prescribed, reflecting the severity of the crime, is a lengthy period of imprisonment.

[14] Paragraph 23.

[206] Life has visited personal tragedy upon the first accused. His late wife, who passed away in January 2013, was ill for a long time and had been virtually immobilised due to her sickness for years prior to her ultimate demise, during which period he cared for her, hand and foot. During the course of the trial he lost his son in a tragic farming accident. For all of this one has great sympathy for him. But imposing sentence is not a matter of maudlin sympathy. It is doing what is just having regard to all the relevant circumstances.

[207] The first accused is a successful businessman who, it is clear from the record, built up a number of successful enterprises as is evidenced by there being some 120-130 people employed in the various businesses in which he is involved and runs. A sentence of imprisonment will disqualify him from being a company director in the future. He is now a man in his late fifties, having been 56 years of age when sentence was argued in September 2016.

[208] Despite the natural sympathy one has for a man who suffered the tragic loss that he has, I am not persuaded that the personal circumstances of the first accused, taken together with the fact that a substantial confiscation order has been made, justifies a finding that there are convincing reasons for the imposition of a sentence less than that prescribed as a minimum. Successful business people should set the standard by acting properly, not corruptly. Corruption in the sphere of government contracts is an on-going blight upon our constitutional democracy, and those who offend must expect the full might of the law to be brought down on them. Even though the conviction on count 8 does not embrace either the renovations effected to Ms Botha's home nor the payment of the sum of R15 000, I am not persuaded that the prescribed sentence imposed by the trial court is shockingly inappropriate as was argued on behalf of the first accused. The appeal against the sentence of 15 years' imprisonment imposed on the first accused in respect of his conviction on count 8, must fail.

[209] Turning to the appeal of the ninth accused (the eighth appellant) Mr Block, much of what I have said above applies in his case with equal force. In his case, as well, a confiscation order was issued, albeit in a much lesser sum of R1 364 673.20. He was also ordered to pay a further sum of R123 047.82 relating to fees and disbursements incurred by a curator appointed by the court.

[210] Mr Block is now some 50 years of age (he was 48 years old at the time of sentence in the court a quo), married, with four dependent children, two of whom are minors. His counsel's statement that he maintains his elderly parents and extended family, that he has partially lost the use of his right arm as a result of a motor vehicle accident and that he suffers from high blood pressure, were not disputed. Nor was it disputed that after having been detained for a short period of time when he was 18 years of age, he initially left South Africa but returned in 1987, obtained an Executive Development Certificate from the University of Cape Town and was involved in community development projects for many years. He rose to achieve high office in the ANC having acted as the head of that party in the Northern Cape, and was a member of the Executive Council for the Northern Cape, both in the Department of Roads and later in the Department of Education and then the Department of Finance.

[211] In the light of all of this and the confiscation order, it was argued on behalf of Mr Block that a fine of R1 million, coupled with a suspended sentence of imprisonment, would be an adequate propitiation for his corruption conviction. I cannot agree. Mr Block was a political leader who achieved high political office. Unfortunately, he used his status to corruptly enrich himself. If there is any prospect of fighting the endemic corruption which exists in this country, it is for our political leaders to set the example and not to misuse public offices to corruptly obtain personal wealth. That is what Mr Block did, and it is necessary for an unequivocal message to be sent out that corruption on the part of politicians, especially those holding high office, will not be tolerated and that

punishment for those who act as Mr Block has done in this case will be severe – see in this regard *S v Shaik* para 223. Furthermore, as already stressed in regard to Mr Scholtz, the fact that a confiscation order has been made is in itself not a special and compelling circumstance justifying a sentence more lenient than that prescribed. In all these circumstances, the appeal by Mr Block against his sentence for corruption on count 15 must fail.

Summary and conclusion

[212] For the reasons set out above:

In case 428/17:

(a) the first to seventh accused were correctly convicted of corruption on count 8, and their appeal in that respect must fail;

(b) the appeal of the first accused in respect of his conviction of corruption on count 16 is to be upheld, and the conviction and sentence imposed on that count set aside;

(c) the appeal of the third accused in regard to its conviction of corruption on count 16 is to be dismissed;

(d) the appeals of the first, second and third accused against their conviction of money laundering on count 34, as well as the appeals of the first and third accused of money laundering on count 35, are to be upheld, and the convictions and sentences imposed upon them in respect of those counts set aside.

In case 635/17:

The appeal of the first appellant against his sentence of 15 years' imprisonment on count 8 must fail.

In case 491/17:

(a) The ninth and tenth accused were correctly found guilty of corruption on count 15, and their appeal on that charge must fail.

(b) The appeal of the ninth and tenth accused in respect of their conviction of money laundering on count 35 is to be upheld, and such conviction and sentence set aside.

In case 636/17:

The appeal of the ninth accused against his sentence of 15 years' imprisonment imposed for corruption on count 15 must be dismissed and such sentence confirmed.

[213] Regretfully, one final matter needs to be mentioned. I must express my disquiet about the conduct of Mr Naude, the attorney who I have mentioned. I have deliberately refrained from making definite factual findings in regard to certain of his actions in this matter as to do so without hearing him would be unfair. Nevertheless, from the evidence on record it seems that he may well have been a party to the fabrication of evidence, particularly in regard to the loan agreement purportedly concluded by Mr Scholtz with Ms Botha, as well as the attempted obstruction of the court a quo's inquiries in regard to that issue. And here I mention his contention that the hard drive of his computer had crashed and the allegation that he had loaded his computer with software designed to frustrate a forensic examination such as that ordered by the court a quo. Moreover his testimony on certain aspects conflicted with that of senior counsel, Mr Swart, whose evidence was believed by the trial court. A court is entitled to have absolute trust in the credibility of its practitioners and the sum of all these factors leads to the unfortunate suspicion that Mr Naude did not honour that trust. I put it no higher than that, but even on his own version of events he was a party to an affidavit from his client being placed before court which his client had told him was not accurate. In the circumstances I have no option other than to refer copies of the record of this appeal and this judgment to the Law Society of the Northern Provinces for it to investigate the matter and take such action as it deems fit.

[214] It is ordered as follows:

A In case numbers 428/17 and 635/17:

1 The appeal of the first appellant against his conviction of corruption on count 16 is upheld and such conviction and the sentence imposed on that count are set aside.

2 The appeals of the first, second and third appellants against their conviction of money laundering on count 34, as well as the appeals of the first and third appellant against their conviction of money laundering on count 35, are upheld and such convictions and the sentences imposed in respect thereof are set aside.

3 Save as the foresaid, the appeals of the first to seventh appellants are dismissed and their convictions, as well as the sentence of 15 years' imprisonment imposed on the first appellant in respect of count 15, confirmed.

B In case numbers 491/17 and 636/17:

1 The appeals of the eighth and ninth appellants (the ninth and tenth accused) against their convictions of money laundering on count 35 are upheld, and their convictions and sentences on that count are set aside.

2 Save as the foresaid, the appeals of the eighth and ninth appellants against their conviction on count 15 and the eighth appellant against the sentence of 15 years' imprisonment imposed on that count are dismissed, and that sentence is confirmed.

C The Registrar of this court is directed to forward a copy of both this judgment and the record to the Law Society of the Northern Provinces for it to consider possible disciplinary action in the light of para 213 of the judgment.

L E Leach
Judge of Appeal

Appearances

For First – Seventh Appellants:	MMW van Zyl SC
For Eighth & Ninth Appellants:	S Joubert SC
Instructed by: (First – Seventh)	WA du Plessis Attorneys c/o Mjila & Partners Attorneys, Kimberley
(Eighth & Ninth)	Mjila & Partners Attorneys, Kimberley Claude Reid Attorneys, Bloemfontein

For Respondent:	P Serunye (with him B Mdlalose and S Hanise)
Instructed by:	Director of Public Prosecutions, Kimberley Director of Public Prosecutions, Bloemfontein