

SOUTH AFRICA / JUDGMENT

Botha NO and Another v National Director of Public Prosecutions (920/2017) [2018] ZASCA 146 (11 October 2018)

[2018] ZASCA 146

COURT

Supreme Court of Appeal

BEFORE

Majiedt, Swain, Mathopo, Schippers, Mokgohloa

CASE / FILE NUMBER

920/2017

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 920/2017

In the matter between:

GESIENA MARIA BOTHA NO FIRST APPELLANT

(In her capacity as executrix of
the late Yolanda Rachel Botha)

ANGELIQUE BOTHA NO SECOND APPELLANT

(In her capacity as trustee of
the Jyba Beleggings Trust,
registration no. T156/2010)

and

THE NATIONAL DIRECTOR OF

PUBLIC PROSECUTIONS RESPONDENT

Neutral citation: Gesiena Maria Botha N.O. & another v The National Director of Public Prosecutions (920/2017)

[2018] ZASCA 146 (11 October 2018)

Coram: Majiedt, Swain, Mathopo, Schippers JJA and Mokgohloa AJA

Heard: 11 September 2018

Delivered: 11 October 2018

Summary: Prevention of Organised Crime Act 121 of 1998 – Forfeiture proceedings in terms of ss 48 and 50 of the Act – Renovations of property and donation of shares constitute proceeds of unlawful activity – Proportionality enquiry – forfeiture order against entire property disproportionate – Objective of forfeiture restated – Not punishment but removal of incentives of crime.

ORDER

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

The appeal is upheld to the following extent:

1. The order of the court a quo declaring the entire property forfeited to the state is set aside and substituted with the following:
 - (a) The first appellant is ordered to make payment of an amount of R758 014.83 to the state within a period of 6 months from the date of this

judgment.

- (b) The said amount must be paid into the criminal assets recovery account number [...], held at the South African Reserve Bank.
 - (c) Proof of payment must be furnished in writing to the appointed curator bonis, Mr Johan van Wyk of Enslins Inc, Kimberley.
 - (d) Failing payment as contemplated in para (a) the appointed curator bonis is authorised to sell the property, Erf 3432, Kimberley, also known as 12 Jawno Street, Kimberley, by public auction or private treaty, at a reasonable price to the highest bidder and, subject to the rights of secured creditors, to pay the sum of R758 014.83 into the account mentioned in para (b) above and to disburse the net proceeds, after incidental expenses, to the estate late Yolanda Rachel Botha, number 394/2015.
2. The appeal against the order declaring the shares forfeited to the state is dismissed.
3. The respondent is ordered to pay the appellant's costs, such costs to include costs of two counsel.

Mokgohloa AJA (Majiedt, Swain, Mathopo and Schippers JJA concurring):

- [1] This is an appeal against the judgment and orders of the Northern Cape Division of the High Court, Kimberley, declaring an immovable property known as Erf 3432, Kimberley, situated at 12 Jawno Street, Kimberley (the property), and certain shares forfeited to the state in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA). The property is registered in the name of the late Ms Yolanda Rachel Botha (the deceased). The first appellant is the mother of the deceased and the executrix in her estate. The shares are held by the Jyba Beleggings Trust (Jyba Trust)[1] and the second appellant is a trustee of Jyba Trust. The forfeiture order was granted in terms of s 50 of POCA on the basis that the property and shares were proceeds of corruption and money laundering.
- [2] The issues in this appeal are whether the trial court correctly held that the property and shares constituted the proceeds of unlawful activities as provided in s 50(1)(b) of POCA; and whether it properly declared that the entire property should be forfeited to the state.

Background

- [3] The deceased was the Head of Department (HOD) of the Northern Cape Department of Social Services and Population Development (the

Department) from January 2001 until April 2009. She was a close and personal friend of the late Mr Sarel Breda. They were members of the African National Congress (ANC). Mr Breda died in a plane crash on 3 March 2009. Mr Breda and Mr Alfeus Scholtz were both directors and shareholders of the Trifecta Group of Companies (Trifecta). Mr Breda held his shares through his family trust, the Shosholoza Trust.

- [4] The case of the National Director of Public Prosecutions (NDPP), in summary, was that between 1 December 2006 and 1 August 2008, the deceased in her capacity as the HOD facilitated and secured the award of tenders involving six lease agreements to Trifecta, to the value of some R81 million, on very favourable terms. In the process she flouted tender procedures to the detriment of the state. In return, Trifecta paid for renovations to the property in the order of R1.2 million and the deceased received 10% shares of Trifecta which at the time was valued at R28 million. The NDPP alleged that the costs of the renovations to the deceased's property and shares were gratification for intervening in the procurement process, allowing deviations therefrom and abusing her authority, and thus were the proceeds of corruption.
- [5] The relationship between the deceased and Trifecta was uncovered by the Mail & Guardian newspaper in February 2011. It reported that the deceased and her family received kickbacks from the company to which she assigned

tenders worth millions when she was an official in the Northern Cape Province. Within a year of being awarded the tenders, Trifecta

effected renovations to the deceased's Kimberley home, worth at least R500 000. The deceased, who subsequently became a member of Parliament, did not declare these benefits as she was by law required to do.

- [6] This led to an investigation by Parliament and the deceased appeared before the parliamentary Joint Committee on Ethics and Members' Interests (the committee), charged with non-disclosure of benefits received from Trifecta and wilfully misleading the committee on the value of those benefits, by submitting a sworn statement which was false. She was found guilty on both charges. The committee found that the renovation of her house was a benefit accrued from an improper or generally corrupt relationship between the deceased and Trifecta. She was also found guilty of wilfully misleading the committee by submitting a false loan agreement in terms of which Trifecta supposedly loaned her R500 000 to pay for the renovations, when in truth, costs thereof exceeded R1.2 million. On the shares, the committee held that these also constituted a benefit which the deceased failed to declare.
- [7] Pursuant to the investigation and findings of the committee, the state charged the deceased, Mr Scholtz and others with, inter alia, offences under ss 4 and 13 of the Prevention and Combating of Corrupt Activities Act (the Corruption Act)[2]. The state alleged that the deceased, whilst HOD, had circumvented prescribed procurement procedures to ensure that the six lease

agreements were awarded to Trifecta; and that she corruptly accepted gratification in the form of renovations to her property, the shares in Trifecta and R15 000 in cash, in exchange for awarding the lease agreements.

- [8] The deceased gave evidence during the criminal trial but passed away before the matter was finalized. On 13 October 2015 the high court handed down judgment in the criminal proceedings. The court made adverse findings against her but did not pronounce on her guilt, as she had passed away.

The relevant statutory provisions

- [9] Section 48(1) of POCA provides that the NDPP may apply to a high court for an order forfeiting to the state all or any of the property that is subject to a preservation order. It is common cause that a preservation order in respect of the property was granted on 29 October 2012 and confirmed on 14 December 2012.
- [10] Section 50(1) provides that the high court shall, subject to s 52 make an order applied for under s 48(1) if the court finds on a balance of probabilities that the property concerned –
- ‘(a) is an instrumentality of an offence referred to in schedule 1; or
- (b) is the proceeds of unlawful activities.’
- [11] Section 217 of the Constitution of the Republic of South Africa provides:

‘217 Procurement –

- (1) when an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or service, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective;
- (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for –
 - (a) categories of preference in the allocation of contracts; and
 - (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination.
- (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented.’

The leases

- [12] It is necessary to set out in brief, in the paragraphs that follow, the circumstances under which the leases were granted. Trifecta acquired well-constructed but run down commercial buildings predominantly in towns in the Northern Cape, Free State and North West Provinces at low prices. These buildings would be repaired and refurbished and let.
- [13] During 2005 the South African Social Security Agency (SASSA) was separated from the Department in the Northern Cape. There was therefore a need for office accommodation. The tender process was opened for the acquisition of such office accommodation. Ms Magdalene Vosloo, a senior manager for the Supply Chain Management of the Department was a member of the Provincial Tender Board from 2004 until
2006. The deceased appointed her as a member of the Department Bid Adjudication Committee (BAC). She reported to Mr Thabo Holele (Mr Holele), the CFO of the Department who was also appointed as the head of BAC by the deceased.
- [14] As is shown below, the deceased ignored tender procedures, ensured that leases on extremely favourable terms were granted to Trifecta and knowingly allowed the Department to pay Trifecta rental, despite the fact that buildings were not ready for occupation. In various leases, the deceased was instrumental in increasing the rental and the tenure of leases to double the lease period, contrary to what was approved by the tender board.
- [15] Trifecta purchased the old Oranje Hotel building in Upington on 3 March 2006 and it was registered in its name on 3 July 2006. The deceased introduced Mr Breda to Ms Vosloo and informed her that Mr Breda was willing to lease the building to the Department, and the lease was signed some six weeks after the deceased’s introduction of Mr Breda. Given her position, the deceased’s involvement in the Upington lease agreement was improper. The commencement date of the lease was 1 May 2006, but the building was not ready for

occupation until 1 December 2006. Despite this, the deceased authorised the payment of rental to Trifecta for the entire period that the Department did not have occupation of the building.

- [16] Moreover, the deceased allowed the rental, annual escalation rate and tenure of the Upington lease agreement to be increased to Trifecta's advantage, contrary to what had been approved by the tender board. The commencement rental was reflected as 2965 m2 at R69.80 per m2 instead of R49m2; the annual escalation rate was 8% instead of 7.5%; and the tenure of the lease was 10 years instead of five years.
- [17] The deceased signed the 14 Van Riebeeck Street, Springbok lease agreement with Trifecta on 3 November 2006. Trifecta only purchased the building six months later – on 19 July 2007 – but the lease agreement recorded the commencement date as 1 March
2007. In addition, she changed the annual escalation rate from 8% to 9.5% and increased the lease period from five to 10 years.
- [18] The deceased signed the Summerdown Place, Kuruman lease agreement on 14 November 2006. She changed the lease period from five years to 10 years, after the deceased informed the BAC that Trifecta's financier required a longer lease to be able to provide finance for the purchase of the building. The deceased increased the annual escalation rate from 8% to 9.5%. She also increased the rental from R40 per m2 which was the fair market rental value in Kuruman as at 1 February 2007, to R74.10 per m2.
- [19] In the Keur en Geur Building, Douglas lease agreement, the tender board approved a lease for a floor size of only 205 m2. However, the deceased instructed the Department to enter into a lease with Trifecta for the entire building – 400 m2, under the pretext that the Department could use the additional office space as a registry and conference facility.
- [20] The rental in respect of the lease of floors 5, 6, and a portion of floor 7 of the Du Toitspan building in Kimberley was increased from its fair market rental value of R50 per m2 as at 1 December 2006, to R65 per m2. The tenure of the lease was five years and Trifecta was given an option to renew the lease for a further five years. Further, the bid for the lease of floors 9, 10 and 11 Du Toitspan building in Kimberley, was not advertised. The deceased signed the lease without the necessary procurement process being followed. In addition, the Department hired another portion of the same building from Trifecta at a substantially higher rental and annual escalation rate, and for a substantially longer period, than the lease it had in respect of the other portions of the same building.
- [21] The deceased's response to all of this was that she had acted consistently with the BAC's recommendations and wholly within her powers, treasury regulations and the supply chain management policy and in the best interests of government, in facilitating and concluding the lease agreements.

- [22] That is not so. The court a quo correctly held that the deceased had intimate knowledge of the supply chain management policy and the regulations governing the award of tenders. However, she deliberately breached the regulations in entering into the lease agreements with Trifecta. She interfered with the duties of the tender board, and used her influence as HOD to get the Department to approve terms highly favourable to Trifecta, but which were detrimental and not cost-effective to the Department.
- [23] The question then arises: why did the deceased favour Trifecta in the way she did? The reason is not far to seek. Trifecta did renovations to the deceased's home to the value of approximately R1.2 million; and promised the deceased a 10% shareholding in the Trifecta Group, as gratification for the award of lease agreements of some R81 million, as contemplated in s 3 of the Corruption Act.[3] The Act defines 'gratification' as including, 'money whether in cash or otherwise . . . any donation, gift, loan, fee, reward . . . or any other similar advantage' or 'any valuable consideration or benefit of any kind'.
- [24] On the probabilities, this explains why Trifecta instructed its own contractor to effect the renovations as a Trifecta project, and why the costs of the renovations to the deceased's property were concealed in Trifecta's books as expenses incurred in respect of Trifecta's own building. It also explains the deceased's attempts to deceive the parliamentary committee into accepting that the renovations to the property were financed by a loan of R500 000 that she obtained from Trifecta; and why that loan was never reflected in Trifecta's books prior to the commencement of the parliamentary enquiry. And the deceased's involvement in the conclusion of the leases also explains why she received the shares: her explanation that it was out of pure benevolence and because Mr Breda was 'eccentric', strains credulity. I revert to these aspects below.

The renovations

- [25] The evidence shows that Mr Scholtz instructed Pasch and Malan Builders to renovate the property and deal with the project as a Trifecta

project. The renovations were carried out from September 2009 to September 2010. Some of the expenses for the renovations were entered by Trifecta in its accounts ledger for the 1 March 2009 to 28 February 2010, as renovations of the Magombos Building, owned by Trifecta and used as its Kimberley head office. Later however, this was changed, supposedly to reflect expenses allocated to the deceased. The costs of the renovations were initially estimated at R500 000 but as the work progressed, the costs increased to over R1 million.

- [26] The deceased's version was that she required renovations to her house. The second appellant, who was employed at that time by Trifecta, advised her to engage Pasch and Malan building contractors, who were doing maintenance and construction work for Trifecta. She met with Mr Malan who gave her a quotation of R 410 000. She unsuccessfully applied to a bank for a loan for the renovations. The second appellant then advised her to ask for assistance from Mr Scholtz, which she did. He agreed to grant her a loan until she received her pension from government. He advised her that an acknowledgement of debt

would be prepared for her signature.

- [27] According to the deceased the renovations commenced during September 2009. However, an acknowledgement of debt in the sum of R500 000 in favour of Trifecta was signed in Cape Town only on 10 March 2010. Whilst the renovations were being carried out the deceased decided to add other improvements which increased the costs to approximately R1.2 million. She discussed this with Mr Scholtz who agreed to advance additional funds to her. On 20 June 2011 she signed another acknowledgement of debt in favour of Trifecta in the amount of R1 182 410.
- [28] However, the deceased's version differed from the one given to the parliamentary committee. In a letter to the committee in response to its request for her to provide the full cost of the renovations, she indicated that the costs were R500 000 and that she had obtained a loan from Trifecta for this amount. However, Mr Malan provided the committee with invoices which showed that as at October 2010, the costs of the renovations were in excess of R1.2 million. When confronted with these invoices, the deceased stated that she had made an error in her letter. She blamed the error on the fact that she had no legal background. The committee rejected this explanation: the deceased was a former HOD responsible for managing a department with large budgets. She could not have failed to understand the committee's letter requesting her to provide the full costs of the renovations to her home.

The loan agreement

- [29] The deceased advised the parliamentary committee that she had obtained a loan in the amount of R500 000 from Trifecta for the renovations to the property. On 28 March 2011 Parliament requested a copy of the loan agreement from Trifecta's auditors. However, Ms Pretorius, a partner in that firm, in an affidavit stated that she was not aware of any loan agreement between Trifecta and the deceased and that there was no record of such loan in the accounting records of Trifecta.
- [30] Ms Pretorius saw a copy of the purported loan agreement for the first time during April 2011, when it was handed to her by another partner in the firm. There was a summary of expenses in an amount of R 262 943.21 attached to the loan agreement. The balance of the renovations was in the amount of R903 295.06 (R1 166 238.27 – R262 943.21). Ms Pretorius provided a copy of the relevant journal entry in Trifecta's books for the year ending 31 March 2010, which reflected an amount of R 903 295.06 allocated to '[Trifecta] Investment Holdings' on 28 February 2011. Ms Pretorius also provided the Trifecta adjusting journal entries for the year ending 28 February 2011 which reflected that the amount of R903 295.06 was re-allocated to 'Y Botha' – the deceased.
- [31] Ms Pretorius confirmed that the amount of R903 295.06 was initially allocated as an expense incurred by Trifecta and thereafter changed to a 'loan' after the enquiry by the parliamentary committee. She found it strange that the loan agreement, allegedly signed in March 2010, was handed to her as auditor only in April

2011. Ms Pretorius was of the view that the allocation to Trifecta of the expenses relating to the renovations to the property, was an irregularity that needed to be reported to the Independent Regulatory Board.
- [32] Further, Ms Buizer, a former office manager at Trifecta, in an affidavit stated that Mr Scholtz had instructed her to allocate the costs of the deceased's renovations to the Mogambos building, owned by Trifecta. At no stage was it indicated to her that the amount utilised for the renovations was a loan, as she would have followed a different procedure when capturing those amounts for accounting purposes. Ms Falck, who signed the loan agreement as a witness, stated that she did so at the request of Mr Scholtz. She did not make a note of the date on which she signed it. According to Ms Falck, the agreement was already signed by both Mr Scholtz and the deceased when she signed as a witness, and she confirmed that neither of the two signed it in her presence.
- [33] It is clear from the above that there was no loan agreement entered into between the deceased and Trifecta for the renovations. If there was nothing untoward about the costs of the renovations, why were they concealed under the Trifecta books? The inescapable conclusion is that Trifecta paid for the renovation costs as a gratification to the deceased for the award of lease agreements. Trifecta never intended that the renovation costs would be repaid; and likewise, the deceased had no intention of repaying those costs. This conclusion is fortified by the contradictory versions proffered by the deceased to the parliamentary committee and in these proceedings. The court a quo was thus correct in holding that the loan agreement was created after the fact to cover up the true reason behind the renovations.

The shares

- [34] The deceased stated that during 2005 she had a long conversation with Mr Breda in which they discussed their respective upbringing and background, politics and community affairs. Mr Breda indicated that he wanted to donate 10% of his shareholding in Trifecta to any person or entity which the deceased chose to nominate.
- [35] At the time of his passing on 3 March 2009, the deceased had not nominated any person to whom the shares should be transferred. The deceased said that she had forgotten about Mr Breda's promise until Mr Scholtz reminded her about it. Mr Scholtz requested her to nominate an entity, persons or a trust to be formed for the purpose of taking over 10% of Mr Breda's shares in Trifecta. The deceased nominated the Jyba Trust to receive the shares. A number of her relatives were beneficiaries of the Trust.
- [36] Again, this explanation differed from the deceased's evidence before the parliamentary committee. At that enquiry she said nothing about the alleged donation by Mr Breda of shares in Trifecta to a nominee of her choice. Instead, she informed the committee that the shares were given to the second appellant by Trifecta Investment Holdings because she was working there.

- [37] The Jyba Trust consists of beneficiaries who are all members of the deceased's family. Although she denied any link between her duties as HOD and the allocation of the shares, it is clear that she directly or indirectly benefited from those shares, because her relatives received rewards from Trifecta.
- [38] The most plausible and readily apparent inference to be drawn from the facts outlined above, in particular, the deceased's conduct in favouring Trifecta, is that the renovations to her property and the donation of the shares to the nominee of her choice, constituted gratification for her role in ensuring that the leases were awarded to Trifecta. This is underscored by her false explanations relating to the gratification to Parliament. She also lied about her close relationship with Mr Scholtz when Mr Malan stated that 'they know each other quite well'.
- [39] In my view, the court a quo was correct in finding that the costs of the renovations to the deceased's property which were hidden in Trifecta's books under the Magombos' project, and the 10% shareholding transferred by Trifecta to the Jyba Trust, were the proceeds of unlawful activities i.e corruption and money laundering.

Proportionality

- [40] Once it has been established that property was the proceeds of corruption and money laundering, the next step is to embark on a proportionality enquiry. The purpose of the proportionality enquiry is to determine whether the grant of a forfeiture order would amount to an arbitrary deprivation of property in contravention of s 25(1) of the Constitution.[4] In *Prophet v National Director of Public Prosecutions*[5] the Constitutional Court held that the proportionality enquiry requires a general approach of 'weighing the severity of the interference with individual rights to the property against the extent to which the property was used for the purpose of the commission of the offence, bearing in mind the nature of the offence'[6]
- [41] It was submitted that the forfeiture of the entire property amounts to an arbitrary and unconstitutional deprivation of property in relation to the first appellant, who had been occupying the property with the deceased during her lifetime. It was argued that the court a quo failed to take into account the fact that the deceased had repaid an amount of R411 054.66 to Trifecta in April 2011.
- [42] The court a quo held that there was no information placed before it that the first appellant's monthly income was insufficient to lease another property or book herself into an old age or retirement home. It accepted the evidence that the deceased had acquired her house through a mortgage bond with ABSA Bank in 2004 (long before the events giving rise to the POCA application) and that she had maintained regular monthly payments. The court took into account the valuation provided by the parties, did a mathematical exercise and arrived at a figure of R1 927 000.00 as the value of the property. It, however, held that since the

property was the proceeds of corruption and money laundering, forfeiture of the entire property was not disproportionate. The court then declared the entire property forfeited to the state.

- [43] The proper application of a proportionality analysis weighs the forfeiture and its effect on the owner concerned against the purpose that forfeiture serves. It has been held that the broader societal purpose served by POCA includes removing the incentive for crime.[7] This purpose has been found to be more relevant where one is dealing with the forfeiture of proceeds of unlawful activities as in the present case. The primary purpose of forfeiture is not to punish offenders, but to remove the incentive for crime (National Director of Public Prosecutions v Mohamed NO & others [2002] ZACC 9, 2002
- (4) SA 843 (CC) para 15). In any event, the NDPP made it clear in his replying affidavit that what was sought in the forfeiture order was not the entire property, but only the value of the renovations. Inexplicably, the High Court overlooked this fact. And, notwithstanding this unambiguous stance in the replying affidavit, the appeal was argued on behalf of the NDPP on the basis that the entire property should be forfeited.
- [44] I have already found that there was no loan agreement entered into between the deceased and Trifecta. However, it is not disputed that the deceased paid an amount of R411 054.66 to Trifecta as part of the costs expended on the renovations. Mr Malan calculated the renovation costs at R1 169 069.49. Therefore the amount paid by the deceased has to be deducted from the renovation costs.
- [45] I accordingly find that the forfeiture order made against the entire property is disproportionate and the appeal must be upheld in part. I can find no reason why the costs should not follow the result.
- [46] The appeal is upheld to the following extent:
- (a) The first appellant is ordered to make payment of an amount of R758 014.83 to the state within a period of 6 months from this judgment.
- ((b) The said amount must be paid into the criminal assets recovery account number 8030 3056, held at the South African Reserve Bank.
- (c) Proof of payment must be furnished in writing to the appointed curator bonis, Mr Johan van Wyk of Enslins Inc, Kimberley.
- (d) Failing payment as contemplated in para (a) the appointed curator bonis is authorised to sell the property, Erf 3432, Kimberley, by public auction or private treaty, at a reasonable price to the highest bidder and, subject to the rights of secured creditors, to pay the sum of R758 014.83 into the account mentioned in para (b) above and to disburse the net proceeds, after incidental expenses, to the estate late Yolanda Rachel Botha, number 394/2015.

2. The appeal against the order of the court a quo declaring the shares forfeited to the state is dismissed.
3. The respondent is ordered to pay the appellant's costs such costs to include costs of two counsel.

FE MOKGOHLOA

ACTING JUDGE OF APPEAL

APPEARANCES

For the Appellants: M A Albertus SC

G G M Quixley

Instructed by: Towell and Groeneald Attorney, Kimberley

Honey & Partners, Bloemfontein

For the Respondent: H J van der Linde SC

Instructed by: The State Attorney, Kimberley

The State Attorney, Bloemfontein

[1] Registration No. T156/2016

[2] Prevention and Combatting of Corrupt Activities Act 12 of 2004

[3] Section 3 of the Corruption Act provides that: '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 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- (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 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 an offence of corruption'.

[3] Section 3 of the Corruption Act provides that:

'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 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-
 - (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 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 an offence of corruption’.

[4] Mohunram v NDPP (Law Review Project as Amicus Curiae)

[2006] ZASCA 12; 2007 (4) SA 222 (CC)

[5] Prophet v NDPP 2006 (2) SACR 525 (CC)

[6] Ibid at para 58

[7] Ibid at fn 4 para 57

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