

SOUTH AFRICA / JUDGMENT

Hendricks v S (A 532/2009) [2010] ZAWCHC 594 (1 December 2010)

[2010] ZAWCHC 594**COURT**

Western Cape High Court, Cape Town

BEFORE

W.H. Van Staden, W.J. Louw

CASE / FILE NUMBER

A 532/2009

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO. A 532/2009

In the matter between::

ANVER HENDRICKSAppellant

and

THE STATERespondent

JUDGMENT

DELIVERED ON 1 December 2010

W.H. VAN STADEN, AJ

1. The Appellant appeared in the Regional Court, Cape Town, on a charge of corruption in terms of Section 1(1)(b)(i) of the Corruption Act No. 94 of 1992. He pleaded not guilty but was convicted on 15 January 2008. On 26 February 2008 he was sentenced to 3 years imprisonment in terms of Section 276(1) (h) of the Criminal Procedure Act, Act 51 of 1977.
2. The relevant allegations contained in the charge sheet can be summarised as follows:
 - 2.1. Kwani (Pty) Ltd ("Kwani") entered into a written agreement with Flemming Comp (Pty) Ltd doing business as Afro Comp International ("ACI") on 27 February 2000.

2.2. The Appellant, the duly authorised agent of Kwani, signed the agreement on behalf of Kwani. Joseph Clifford Flemming ("Flemming"),

the sole director of ACI, signed the agreement on behalf of ACI. 2.3. By virtue of his employment as Maintenance and Support Manager as well as Training Centre Manager with Portnet, the Appellant had the duty to avoid preferring any one third party above another, with regard to Portnet business. 2.4. The Appellant agreed to receive or attempted to obtain a "benefit of whatever nature which was not legally due".¹ The benefit would be received from Flemming and/or ACI by the Appellant or anyone else. The nature of this benefit was not specified with more particularity in the charge sheet. 2.5. The activities of the Appellant were wrongful in the sense of being corrupt. 2.6. The Appellant had the intention that he should commit or omit to do any act in relation to his duties and power by virtue of his employment, to wit the preferment of ACI in its business relations with Portnet. It is however immaterial whether Flemming and/or ACI had the intention to reward the Appellant for his corrupt actions.

BACKGROUND

FACTS

3. ACI, the company of which Flemming was the effective owner, was a small black-owned company supplying IT (information technology)

products and services. Portnet was one of ACI's biggest clients. Best (Pty) Ltd ("Best") an established IT-business, was also a product and service provider of Portnet and had the sole rights to distribute and implement a financial system called

Prophesy, which was utilised by Portnet. Best was a solely white-owned company that needed a black empowerment entity to partner it in a skills-transfer process so that Best could continue servicing the IT software at Portnet. 4. At all relevant times black economic empowerment and skills transfer to achieve transformation in the IT-sector was of great

importance to Transnet and more particularly its subsidiary Portnet. 5. The Appellant was the acting Maintenance and Support Manager of Portnet and was in charge of the maintenance and support of all systems at South African Ports, including the billing system, the financial system, the maintenance management systems, the property management system and other smaller systems. Each of these systems had a support team with a project manager. This is how the Appellant described his designation and the scope of his employment in his evidence. In the charge sheet it is alleged that the Appellant was also the Training Centre Manager of Portnet. The state witnesses were not certain about the exact job description, except for Jonck who was clearly wrong in this respect. There appears to be no reason why the Appellant's evidence about the nature of his employment should not be accepted. 6. The Appellant was mandated by the Executive Manager of IT & S of Portnet, Mr Musala Mosogomi, to assist Best to participate in the transformation process at Portnet. During his cross-examination the Prosecutor asked Appellant why his evidence concerning this mandate was not put to the witness Jonck. The legal

representative appearing for the Appellant objected and explained that Jonck was not a party to the meeting when the mandate was given to the Appellant. The Regional Magistrate then stated that, at that time, it was the first time that she had heard about the mandate. This is not correct. The state witness Flemming specifically referred to Appellant as "the policeman for Portnet", sanctioned by management to oversee that true empowerment takes place. The state witnesses Levendal and Flemming as well as the defence witness Griesel, confirmed that black economic empowerment was a priority for both Portnet and the Appellant. All the witnesses in fact confirmed that Appellant went out of his way to promote BEE. ACI for example, was persuaded by Appellant to promote empowerment by making donations to institutions such as schools. In the circumstances I accept that the Appellant was not only mandated as set out above, but was also seriously involved in promoting BEE within Portnet. 7. In attempting to fulfil this BEE-mandate, the Appellant was convinced that a joint venture between Best and ACI was advisable.

Such a joint venture could benefit both Best and ACI. Best could assist ACI to develop skills and a portion of Best's business of supplying financial services to Portnet could be transferred to ACI. Best on the other hand could, by utilising ACI as a sub-contractor,

comply with BEE-requirements and retain some Portnet business. 8. Appellant was seen by ACI as the key person to assist ACI to develop skills and to obtain additional contracts. Levendal was satisfied that Appellant had influence and was able to ensure that invoices are correctly processed and that payments would be fast-forwarded. The Appellant was therefore requested by ACI and Best to facilitate a joint venture agreement between ACI and Best. Negotiations ensued and Appellant mentioned to the parties involved in the negotiations that the implementation of the SAP (R3 system), an IT financial system, was part of the future projections of Portnet and that a tender process for the operation of this system would be implemented. Appellant's idea was that ACI should be developed to such an extent that it would be able to compete favourably in this tender process. Apart from Appellant, Flemming, Mr Jaap Griesel ("Griesel") of Best and ACI's auditor Mr Levendal, as a representative of ACI, also took part in the negotiations. 9. Griesel informed Levendal that the shelf-company Kwani, of which he was in effective control, rather than Best, should be a party to the agreement with ACI. Levendal was tasked to draft this agreement which was finally entered into on 27 February 2000. The salient terms of this agreement are the following: 9.1. Kwani is duly represented by Appellant (paragraph 2 of the agreement). 9.2. Appellant shall attend monthly (or fortnightly) progress meetings in a non-executive capacity (paragraph 5). 9.3. Kwani must provide adequate collateral security for ACI to obtain a suitable overdraft facility, large enough to enable ACI to continue unrestricted with normal business operations and the envisaged larger output and capacity. In the interim a facility of R 200 000.00 will be established by ACI for Kwani (paragraph 6 to 9). 9.4. For the duration of the joint venture between the parties all cheques made out for an amount exceeding R 7 500.00, will require

prior notification to Appellant (paragraph 10). 9.5. Kwani will receive a management fee of R 5 000.00 per month, payable to a nominated management company (paragraph 12.1). 9.6. As compensation for Kwani's services it would receive 30% of the profit during the period from

availing the overdraft facility until Kwani becomes a shareholder of ACI (paragraph 12.2). 9.7. Kwani has the option to obtain 30% of the total issued shares of ACI (paragraph 13). The agreement will commence upon the successful increase of the overdraft facility and will terminate upon the restructuring of the ACI Group (paragraph 15).

2.2. The Appellant, the duly authorised agent of Kwani, signed the agreement on behalf of Kwani. Joseph Clifford Flemming ("Flemming"),

the sole director of ACI, signed the agreement on behalf of ACI.

2.3. By virtue of his employment as Maintenance and Support Manager as well as Training Centre Manager with Portnet, the Appellant had the duty to avoid preferring any one third party above another, with regard to Portnet business.

2.4. The Appellant agreed to receive or attempted to obtain a "benefit of whatever nature which was not legally due".¹ The benefit would be received from Flemming and/or ACI by the Appellant or anyone else. The nature of this benefit was not specified with more particularity in the charge sheet.

2.5. The activities of the Appellant were wrongful in the sense of being corrupt.

2.6. The Appellant had the intention that he should commit or omit to do any act in relation to his duties and power by virtue of his employment, to wit the preferment of ACI in its business relations with Portnet. It is however immaterial whether Flemming and/or ACI had the intention to reward the Appellant for his corrupt actions.

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Prophesy, which was utilised by Portnet. Best was a solely white-owned company that needed a black empowerment entity to partner it in a skills-transfer process so that Best could continue servicing the IT software at Portnet.

4. At all relevant times black economic empowerment and skills transfer to achieve transformation in the IT-sector was of great

importance to Transnet and more particularly its subsidiary Portnet.

5. The Appellant was the acting Maintenance and Support Manager of Portnet and was in charge of the maintenance and support of all systems at South African Ports, including the billing system, the financial system, the maintenance management systems, the property management system and other smaller systems. Each of these systems had a support team with a project manager. This is how the Appellant described his designation and the scope of his employment in his evidence. In the charge sheet it is alleged that the Appellant was also the Training Centre Manager of Portnet. The state witnesses were not certain about the exact job description, except for Jonck who was clearly wrong in this respect. There appears to be no reason why the Appellant's evidence about the nature of his employment should not be accepted.
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7. In attempting to fulfil this BEE-mandate, the Appellant was convinced that a joint venture between Best and ACI was advisable.

Such a joint venture could benefit both Best and ACI. Best could assist ACI to develop skills and a portion of Best's business of supplying financial services to Portnet could be transferred to ACI. Best on the other hand could, by utilising ACI as a sub-contractor, comply with BEE-requirements and retain some Portnet business.

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the operation of this system would be implemented. Appellant's idea was that ACI should be developed to such an extent that it would be able to compete favourably in this tender process. Apart from Appellant, Flemming, Mr Jaap Griesel ("Griesel") of Best and ACI's auditor Mr Levendal, as a representative of ACI, also took part in the negotiations.

9. Griesel informed Levendal that the shelf-company Kwani, of which he was in effective control, rather than Best, should be a party to the agreement with ACI. Levendal was tasked to draft this agreement which was finally entered into on 27 February 2000. The salient terms of this agreement are the following:
 - 9.1. Kwani is duly represented by Appellant (paragraph 2 of the agreement).
 - 9.2. Appellant shall attend monthly (or fortnightly) progress meetings in a non-executive capacity (paragraph 5).
 - 9.3. Kwani must provide adequate collateral security for ACI to obtain a suitable overdraft facility, large enough to enable ACI to continue unrestricted with normal business operations and the envisaged larger output and capacity. In the interim a facility of R 200 000.00 will be established by ACI for Kwani (paragraph 6 to 9).
 - 9.4. For the duration of the joint venture between the parties all cheques made out for an amount exceeding R 7 500.00, will require prior notification to Appellant (paragraph 10).
 - 9.5. Kwani will receive a management fee of R 5 000.00 per month, payable to a nominated management company (paragraph 12.1).
 - 9.6. As compensation for Kwani's services it would receive 30% of the profit during the period from availing the overdraft facility until Kwani becomes a shareholder of ACI (paragraph 12.2).
 - 9.7. Kwani has the option to obtain 30% of the total issued shares of ACI (paragraph 13). The agreement will commence upon the successful increase of the overdraft facility and will terminate upon the restructuring of the ACI Group (paragraph 15).
10. The Appellant, as was envisaged in paragraph 23, signed the agreement "For Kwani". 11. The Appellant did not receive any direct financial benefits from either ACI or Flemming. 12. Neither of the state witnesses, Levendal or Flemming, or the defence witness Griesel, appears to have perceived any of the actions of the Appellant as being corrupt. The auditor Levendal specifically stated that he accepted the bona fides of the Appellant. The fact that he knew that the Appellant was attempting to develop ACI as a BEE-compliant supplier of Portnet was one of the factors convincing him of such good faith. 13. The changeover between Best and ACI actually took place and requests for services were directed to ACI by Portnet and ACI started invoicing. Levendal had regular contact with Appellant mainly to speed up payment of invoices. There can be little doubt therefore that the Appellant in the course of his employment did in fact use his influence to favour ACI. As stated hereunder that is of course not necessarily enough to justify a conviction on a charge of corruption. 14.

The suspensive condition of the contract requiring that Kwani initially had the obligation to increase ACI's overdraft facility by R 200 000.00 was never fulfilled and the joint venture agreement referred to in paragraph 8, above never came to fruition. 15. At the trial the State tendered the evidence of three witnesses. The Appellant gave evidence and Griesel was also called as a defence witness. 16. The facts outlined above are facts which emerged during the trial and which are either not in dispute or cannot reasonably be disputed. CERTAIN ASPECTS OF THE EVIDENCE FOR THE STATE 17. The first state witness, the auditor of ACI, (Levendal) testified that during the negotiations. Griesel made certain oral statements concerning the Appellant. Griesel informed him that he did not want his or Best's name mentioned in the agreement. He requested that Kwani should be included as a contracting party rather than Best. Griesel also told Levendal that he and Appellant were joint owners of Kwani, that Appellant was a director of Kwani and that Appellant would be signatory to the bank account of Kwani. He furthermore stated that Appellant would be compensated for his services rendered with a management fee. 18. The second state witness, Flemming, was clearly upset and emotional about the fact that the promises of ACI being developed and favoured by Portnet in its attempts to promote empowerment, were not kept. Flemming confirmed that apart from the fact that the Appellant signed the agreement, he did not receive any benefit whatsoever from Flemming or ACI. His evidence does not create the impression at all that he perceived his or ACI's actions as constituting bribery of the Appellant.

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19. The third witness was Mr F H A Jonck, the assistant manager of Transnet Group Audit Services ("Jonck"). He was requested

to investigate a complaint apparently lodged by Flemming. In many respects his evidence appears to relate to the conclusions that he reached after interviews with interested parties. 20. Jonck stated in his evidence that, on his interpretation of paragraph 12 of the agreement, the interests of the Appellant and Kwani was identical and that the 30% profit realised during that period would be due to the Appellant. According to Jonck the Appellant furthermore would have received the R 5 000.00 administration fee referred to in the contract. In his interview

with the Appellant Jonck confronted him with his interpretation that the Appellant was not entitled to sign the agreement, as he would receive benefits in conflict with the terms of his employment. 21. Jonck also said that Appellant told him that he never read the contract and that he was under the impression that he had signed the contract as a witness and not as a representative of Kwani. THE DEFENCE CASE 22. In his evidence the Appellant maintained that it was his intention to sign the agreement as a witness only and not as a representative of Kwani. In this respect he was supported by Griesel. Suffice to

say, the Regional Magistrate was clearly correct in rejecting this evidence. The fact that the Appellant's evidence was unacceptable in one respect, does not however mean that his evidence should be rejected in totality. False evidence does not necessarily justify an inference of an accused person's guilt or that his evidence in other respects are not acceptable. A possible reason for the Appellant untruthfully denying his involvement in the agreement as a representative of Kwani, may be the fact that Jonck confronted

Appellant with his personal view that the Appellant had acted unlawfully when signing the agreement on behalf of Kwani⁴. THE REGIONAL MAGISTRATE'S APPROACH 23. The Regional Magistrate stated that the court was faced with two conflicting versions as to how the Appellant came to sign the agreement and in what capacity he did so. The Magistrate accepted the version of the state witnesses that the Appellant signed as a representative of Kwani and rejected the version of the Appellant that he signed the contract as a witness. The Regional Magistrate was clearly correct to reject the evidence of the Appellant and Griesel that the Appellant intended to merely sign as a witness. 24. The Regional Magistrate however went further and concluded that by signing as a representative on behalf of Kwani the Appellant became a party to the contract "and as such he entered into a corrupt relationship". As I point out hereunder when dealing with the requirement that the appellant must have acted corruptly, that is, unlawfully, the question is whether there is no justification for his conduct.⁵ In my view, the evidence shows, as indicated hereunder,⁶ that his conduct of entering into the agreement was probably justified.

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THE REGIONAL MAGISTRATE'S APPROACH

23. The Regional Magistrate stated that the court was faced with two conflicting versions as to how the Appellant came to sign the agreement and in what capacity he did so. The Magistrate accepted the version of the state witnesses that the Appellant signed as a representative of Kwani and rejected the version of the Appellant that he signed the contract as a witness. The Regional Magistrate was clearly correct to reject the evidence of the Appellant and Griesel that the Appellant intended to merely sign as a witness.
24. The Regional Magistrate however went further and concluded that by signing as a representative on behalf of Kwani the Appellant became a party to the contract "and as such he entered into a corrupt relationship". As I point out hereunder when dealing with the requirement that the appellant must have acted corruptly, that is, unlawfully, the question is whether there is no justification for his conduct.⁵ In my view, the evidence shows, as indicated hereunder,⁶ that his conduct of entering into the agreement was probably justified.

BENEFITS 25. As stated above⁷, according to Levendal, Griesel informed him about the nature of the Appellant's involvement with ACI. When Levendal testified about what Griesel told him, the legal representative appearing for the Appellant objected. Although the prosecutor specifically indicated that the state would call Griesel as a witness, the Regional Magistrate made a finding that Levendal's evidence in this respect was not hearsay, because Appellant was, according to the witness, present when Griesel made the said hearsay statements. This finding was wrong. In terms of Section 3(4) of the Law of Evidence Amendment Act 45 of 1988, "hearsay evidence" "means evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence"; The evidence in question is clearly hearsay evidence⁸. The Regional Magistrate was entitled to allow Levendal's evidence of what Griesel told him on a provisional basis, since the prosecutor indicated that Griesel would be called as a witness. Levendal's evidence is therefore not hearsay for the purposes of this judgment, since Griesel was called by the Appellant to give evidence for the defence⁹. In his evidence, however, Griesel disavowed the alleged remarks and the evidence was therefore inadmissible¹⁰. Although one cannot but agree with the Magistrate that Griesel was not an impressive witness, the fact nevertheless remains that Griesel denied that he made the statements ascribed to him by Levendal. 26. The Regional Magistrate stated in her judgment that

both Griesel and Appellant indicated to Levendal that the agreement must be entered into with Kwani rather than with Best. Levendal limited the source of this statement to Griesel only. 27. As stated above¹¹, the state witness Jonck also testified that in his opinion the Appellant improperly stood to gain some of the benefits accruing to Kwani in terms of the agreement and that he confronted the Appellant with this view during their interview. The Regional Magistrate

adopted the same line of reasoning. 28. Despite the fact that the Appellants' evidence that he signed the contract as a witness must be rejected, there was a total lack of evidence to the effect that the Appellant would personally receive any benefits from the agreement in question. In order to justify a conviction on a charge of corruption in terms of Section 1(1)(b)(1) of the Corruption Act No. 94 of 1992, it is however not necessary for the accused to receive any benefit personally. The accused may be guilty of the offence if a benefit or a potential benefit accrues to another person¹². In terms of the agreement with ACI, Kwani stood to gain benefits. The State therefore discharged the onus of proof in this respect. THE DUTY OF THE APPELL CONTRACT WITH PORTNET 29. In the charge sheet it was alleged that by virtue of his employment agreement with Portnet the Appellant had the duty to avoid

preferring any one third party above another with regard to Portnet business¹³. 30. The Appellant was not only mandated to assist Best to participate in the transformation process at Portnet, but was specifically and actively involved in the promotion of BEE. The exact terms of the Appellant's employment contract with Portnet is therefore an important issue. 31. Jonck was the only witness called to prove the terms of Appellant's employment contract with Portnet¹⁴. Jonck's evidence of the terms of this employment agreement was vague and unspecific. A reading of Levendal's evidence appears to confirm that the employment agreement in question was in writing. As a general rule the contents thereof should therefore be proved by producing this contract¹⁵. It is furthermore relevant to note that Jonck was under the impression that Appellant was a Project Manager in the IT-division

of Portnet. The Appellant's evidence referred to above is clear in this respect. He was the acting Maintenance and Support Manager of Portnet and a number of Project Managers reported to him. Jonck was therefore mistaken as to the exact job description of the Appellant. The question arises as to whether this mistaken perception (of Appellant's job description) could have resulted in Jonck reaching a incorrect conclusions about the scope and nature of Appellant's duties as an employee of Portnet. 32. The Magistrate's finding :hat the Appellant 'In his capacity as project manager of Portnet could not perform work outside Portnet without authority as that would amount to a conflict of interest", is therefore not justified. This finding is based on the evidence of Jonck which should not have been accepted in respect of this

important issue. 33. In the circumstances I conclude that the State has failed to prove the nature and extent of the Appellant's duties in terms of the employment agreement, with Portnet, one of the elements of the charge against the Appellant. 16 ACTING CORRUPTLY 34. Section 1(b)(i) of the Corruption Act, Act 94 of 1992, provides that an accused person who agrees to receive or attempts to obtain any benefit, must act corruptly to be guilty of the offence¹⁷. 35. As stated above it must be accepted that Appellant was mandated by the management of Portnet to act as

an intermediary between Best and ACI and to promote black economic empowerment. All his actions, including the signing of the agreement as a representative, appears to be justifiable as the actions of an employee acting in the interest of his employer by promoting black economic empowerment. 36. The State witnesses Levendal and Flemming also do not appear to regard their own actions or the actions of the Appellant, as being corrupt. The Appellant's circumstances and conduct stands on more or less a similar footing as the facts in *S v Palm*¹⁸, where the accused was a member of a Close Corporation involved in the clandestine purchase of armaments for Krygkor during the 1980's. 37. In my opinion the State has failed to prove that the Appellant's activities were "corrupt" in the sense of being unlawful, i.e. that beyond reasonable doubt there has been no justification for his conduct. To the contrary, the evidence reveals a probability that his conduct was justified.

CONCLUSION

38. In all the circumstances I am of the view that the State has failed to prove the Appellant's guilt. I would allow the appeal and set aside the conviction and sentence imposed. W.H. VAN STADEN Acting Judge of the High Court I agree and it is so ordered. W .J. LOUW Judge of the High Court

BENEFITS

25. As stated above⁷, according to Levendal, Griesel informed him about the nature of the Appellant's involvement with ACI. When Levendal testified about what Griesel told him, the legal representative appearing for the Appellant objected. Although the prosecutor specifically indicated that the state would call Griesel as a witness, the Regional Magistrate made a finding that Levendal's evidence in this respect was not hearsay, because Appellant was, according to the witness, present when Griesel made the said hearsay statements. This finding was wrong. In terms of Section 3(4) of the Law of Evidence Amendment Act 45 of 1988, "hearsay evidence" "means evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence"; The evidence in question is clearly hearsay evidence⁸. The Regional Magistrate was entitled to allow Levendal's evidence of what Griesel told him on a provisional basis, since the prosecutor indicated that Griesel would be called as a witness. Levendal's evidence is therefore not hearsay for the purposes of this judgment, since Griesel was called by the Appellant to give evidence for the defence⁹. In his evidence, however, Griesel disavowed the alleged remarks and the evidence was therefore inadmissible¹⁰. Although one cannot but agree with the Magistrate that Griesel was not an impressive witness, the fact nevertheless remains that Griesel denied that he made the statements ascribed to him by Levendal.
26. The Regional Magistrate stated in her judgment that both Griesel and Appellant indicated to Levendal that the agreement must be entered into with Kwani rather than with Best. Levendal limited the source of this statement to Griesel only.

27. As stated above¹¹, the state witness Jonck also testified that in his opinion the Appellant improperly stood to gain some of the benefits accruing to Kwani in terms of the agreement and that he confronted the Appellant with this view during their interview. The Regional Magistrate

adopted the same line of reasoning.

28. Despite the fact that the Appellants' evidence that he signed the contract as a witness must be rejected, there was a total lack of evidence to the effect that the Appellant would personally receive any benefits from the agreement in question. In order to justify a conviction on a charge of corruption in terms of Section 1(1)(b)(1) of the Corruption Act No. 94 of 1992, it is however not necessary for the accused to receive any benefit personally. The accused may be guilty of the offence if a benefit or a potential benefit accrues to another person¹². In terms of the agreement with ACI, Kwani stood to gain benefits. The State therefore discharged the onus of proof in this respect.

THE DUTY OF THE APPELL CONTRACT WITH PORTNET

29. In the charge sheet it was alleged that by virtue of his employment agreement with Portnet the Appellant had the duty to avoid

preferring any one third party above another with regard to Portnet business¹³.

30. The Appellant was not only mandated to assist Best to participate in the transformation process at Portnet, but was specifically and actively involved in the promotion of BEE. The exact terms of the Appellant's employment contract with Portnet is therefore an important issue.

31. Jonck was the only witness called to prove the terms of Appellant's employment contract with Portnet¹⁴. Jonck's evidence of the terms of this employment agreement was vague and unspecific. A reading of Levendal's evidence appears to confirm that the employment agreement in question was in writing. As a general rule the contents thereof should therefore be proved by producing this contract¹⁵. It is furthermore relevant to note that Jonck was under the impression that Appellant was a Project Manager in the IT-division

of Portnet. The Appellant's evidence referred to above is clear in this respect. He was the acting Maintenance and Support Manager of Portnet and a number of Project Managers reported to him. Jonck was therefore mistaken as to the exact job description of the Appellant. The question arises as to whether this mistaken perception (of Appellant's job description) could have resulted in Jonck reaching an incorrect conclusion about the scope and nature of Appellant's duties as an employee of Portnet.

32. The Magistrate's finding that the Appellant 'In his capacity as project manager of Portnet could not perform work outside Portnet without authority as that would amount to a conflict of interest', is therefore not justified. This finding is based on the evidence of Jonck which should not have been accepted in respect of this

important issue.

33. In the circumstances I conclude that the State has failed to prove the nature and extent of the Appellant's duties in terms of the employment agreement, with Portnet, one of the elements of the charge against the Appellant. 16

ACTING CORRUPTLY

34. Section 1(b)(i) of the Corruption Act, Act 94 of 1992, provides that an accused person who agrees to receive or attempts to obtain any benefit, must act corruptly to be guilty of the offence¹⁷.
35. As stated above it must be accepted that Appellant was mandated by the management of Portnet to act as an intermediary between Best and ACI and to promote black economic empowerment. All his actions, including the signing of the agreement as a representative, appears to be justifiable as the actions of an employee acting in the interest of his employer by promoting black economic empowerment.
36. The State witnesses Levendal and Flemming also do not appear to regard their own actions or the actions of the Appellant, as being corrupt. The Appellant's circumstances and conduct stands on more or less a similar footing as the facts in *S v Palm*¹⁸, where the accused was a member of a Close Corporation involved in the clandestine purchase of armaments for Krygkor during the 1980's.
37. In my opinion the State has failed to prove that the Appellant's activities were "corrupt" in the sense of being unlawful, i.e. that beyond reasonable doubt there has been no justification for his conduct. To the contrary, the evidence reveals a probability that his conduct was justified.

CONCLUSION

38. In all the circumstances I am of the view that the State has failed to prove the Appellant's guilt. I would allow the appeal and set aside the conviction and sentence imposed.

W.H. VAN STADEN

Acting Judge of the High Court

I agree and it is so ordered.

W .J. LOUW

Judge of the High Court

¹No evidence was adduced to prove that the Appellant in fact received or obtained any benefit.

2In *S v Boesak* 2003 SA 381 SCA on 397 E it was stated that "...it is clear law that a cross-examiner should put his defence on each and every aspect which he wishes to place an issue, explicitly and unambiguously, to the witness implicating his client." Jonck however, an investigator of Transnet, as correctly pointed out by the legal representative of the Appellant, was not present at the meeting where the Appellant was mandated.

3Paragraph 9.1 (Supra).

4See *S v Mtsweni* 1985

(1) SA 590 AA at 593 H to 594 D.

5Paragraph [34]

6Paragraph [35]

7Paragraph 18 (Supra)

8Schmidt; Bewysreg (4th Edition) paragraph B and C on page 476 and the definition of "hearsay evidence" in Section 3(4) of Act 45 of 1988, the Law of Evidence Amendment Act. In terms of Section 3(1)(c) of Act 45 of 1988, the court has discretion to allow hearsay evidence having regard to certain prescribed factors.

9Section 3(1)(b) of Act 45 of 1988.

10*S v Ndhlovu and Others* 2002

(2) SACR 325 in para 292 and para 34 on pages 342 and 343; Principles of Evidence (2nd Edition) PJ Schwikkard and Others para 13.6 on page 258 to 260...

10*S v Ndhlovu and Others* 2002

(2) SACR 325 in para 292 and para 34 on pages 342 and 343; Principles of Evidence (2nd Edition) PJ Schwikkard and Others para 13.6 on page 258 to

260...

11Paragraph 20.

12See paragraph 2.4.

13Paragraph 2.3 above.

14See paragraph 2.3 above for the corresponding allegations in the charge sheet.

15Schmidt op.cit page 344; Commentary on the Criminal Procedure Act, Du Toit and Others page 24-87.

16Paragraph 2.3 (Supra)

17CR Snyman - Strafreg (4de Uitgawe) paragraph 6(e) on page 398 and 399 and paragraph 8(e) on page 402 the term corruptly refers to unlawfulness and not to intention, that is, it refers to the requirement that there must be no justification for the conduct of the accused.

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(1) SACR 70 (T) at 79 c - h...

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