

SOUTH AFRICA / JUDGMENT

S v Golding and Others - In Respect of Section 174 Applications (CCC63/2019) [2023] ZAKZDHC 35 (30 May 2023)

[2023] ZAKZDHC 35

COURT

Kwazulu-Natal High Court, Durban

BEFORE

M R Chetty

CASE / FILE NUMBER

CCC 63/2019

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO: CCC 63/2019

In the matter between:

THE STATE And DESMOND KHALID GOLDING Accused 1 CEASER WALTER MKHIZE Accused 2
SOFT SKILLS COMMUNICATIONS 100 CC Accused 3 (Represented by Ceaser Walter Mkhize)
SHAKA HOLDINGS Accused 4 (Represented by Ceaser Walter Mkhize) ZANDILE NONJABULO
MBONGWE Accused 5 MAQHOBOWA TRADERS CC Accused 6 (Represented by Ceaser Walter
Mkhize and Zandile Nonjabulo Mbongwe) NOTHANDO ZUNGU Accused 7 ISHASHALAZI
PRODUCTIONS CC Accused 8 (Represented by Nothando Zungu) MABHELENI LEEWAS NTULI
Accused 9 SUPER SIZE INVESTMENT 20 CC Accused 10 (Represented by Mabheloni Leewas Ntuli)
NONHLANHLA BRENDA NINELA Accused 11 MZWANDILE BASIL NINELA Accused 12 ISHINGA
HOLDINGS Accused 13 (Represented by Nonhlanhla Brenda Ninela and Mzwandile Basil Ninela)
NTOKOZO NDLOVU Accused 14 DMD (PTY) LTD Accused 15 (Represented by Ntokozo Ndlovu)
MICHAEL MABUYAKHULU Accused 16

JUDGMENT IN RESPECT OF SECTION 174 APPLICATIONS

1. The accused face a plethora of charges which emanate from the KwaZulu- Natal's Department of Economic Development and Tourism's (DEDT) agreement to fund the organising and staging of the North Sea Jazz Festival in Durban in 2012 ("NSJF"). As the State has set out in the indictment and summary of substantial facts, the main role players in this

- saga are Accused 1, the former Head of Department and Accounting Officer for the DEDT who signed the contracts on behalf of the department, paving the way for the allocation of funds to the event organisers, being Accused (3) Soft Skills Communications, and its controlling mind, Accused (2).
2. The State alleges that the funding agreement was tainted with irregularity that permeated the process leading to Cabinet approval to pay the amount of R26,8m to Accused 3, despite the company holding the licencing rights under the banner of the North Sea Jazz Festival (a Dutch entity called Mojo) having cancelled those rights with its local staging partner, MPM Productions. That occurred by letter dated 2 October 2012 to MPM Productions, the local organisers of the festival. The letter cancelled the agreement between the rights holder to the NSJF (Mojo) and MPM, due to non-payment of certain licence fees.
 3. The State contends that despite this cancellation, which had come to the knowledge of Accused 1, the payment of R26,8m was nonetheless made into the account of Accused 3 on 21 November
2012. In essence, the State submits that Accused 1 knew that the concert could not be staged and that the funds should never have been paid out to Accused 3 in the circumstances. What followed, with a degree of haste, was a payment from these funds to a host of other entities comprising among them, the various accused..
4. The Accused, on the other hand, contend that there was no irregularity in the payment for the brand activations or marketing of the NSJF in Rotterdam (R969 000); or for the activations in Curacao (R644 000) or in respect of the final payment of R26,8m to Accused
 3. They contend that these payments were preceded by properly generated invoices, and thorough evaluation and assessment prior to payment. In the case of the payment of R26,m, it is common cause that this was preceded by a series of meetings of the Major Events Sub-Committee, a structure comprised of officials and political heads (MEC's), who after extensive deliberations, recommended the approval for the funding of the project to the Cabinet, which acted on the recommendation.
 5. It is against this backdrop that the accused are charged with corruption, fraud, money laundering, breaches of the Public Finance Management Act (PFMA), as well as theft. I propose to deal with the charges as they have been proffered against each accused, recognizing that in many instances the counts overlap against several of the accused.
 6. Section 174 of the Criminal Procedure Act permits a trial court to return a verdict of not guilty at the close of the case for the prosecution, if the court is of the opinion that there is 'no evidence' (meaning evidence upon which a reasonable person might convict). *S v Lubaxa* 2001 (2) SACR 703 SA para 10. *S v Khanyapa* 1979 (1) SA 824 (A) at para 838F. All of the accused have now launched applications in terms of s174. The recurring argument on behalf of all of the accused at the end of the State's case is that to place an Accused on his defence in circumstances where the State has not made out a prima facie case would serve no other

purpose but to feed hope that should they testify, they may incriminate themselves and supplement the deficiencies in the State case. To allow the accused to testify, it was submitted, would offend against their right to remain silent and the presumption of innocence.

7. Put different, what the accused now contend after many months of evidence led by the State is encapsulated in *S v Mathebula & others* 1997 (1) SACR 10 WLD, where it was held:

"...the spirit purport and objects of chapter 3 of our Constitution can lead to no other conclusion but that the concept of a fair trial in these circumstances means that one can justly and fairly say to the State: "You had your chance to prove the Accused's guilt. You failed to prove a prima facie case against the Accused. You cannot now seek the Accused's or the Co-Accused's assistance to do what you could not do".

See too *S v Jama & another* 1998 (2) SACR 237 N

8. In addition, as the charges against many of the accused stem from having unlawfully benefitting from the original transaction of R28,5m paid to Accused 3, Soft Skills, the consequential charges of money laundering can only succeed if the State makes out a case in respect of the fraud or corruption associated with the original transaction, and that the accused knew or ought reasonably to have known that the amounts received by them were the proceeds of crime, or attributable to unlawful criminal activity. In the absence of such proof on the main counts, the money laundering charges are doomed to fail.

I propose to deal with the charges as they have been proffered against each accused, recognizing that in many instances the counts overlap against several of the accused.

9. Accused 1 is charged with 6 counts. He pleaded not guilty to all the charges against him, and tendered a statement in terms of section 115 of the Criminal Procedure Act 51 of 1977 (CPA). It was submitted in the section 174 application that the State has failed to make out any prima facie case against accused 1 in respect of all the charges, this despite him having set out extensively in terms of s115(1) of the CPA the basis of his defence. Admissions in a plea explanation in s115 are considered evidential material, but not evidence - unless formally recorded in terms of s 220. In *S v Malebo en Andere* 1979 (2) SA 636 (8) it was held

'Admissions which are not recorded in terms of s 220 stand on the same footing as extra-judicial admissions, but, as they are made in court before the judicial officer, the fact that they were made does not have to be proved further. They constitute evidential material in regard to the facts therein, but they do not necessarily prove the facts automatically and conclusively as would an admission under s 220. They are only part of the evidential material, and can, according to the circumstances, even by themselves be conclusive.'

See *S v Mjoli and Another* 1980 (3) SA 172 (D) at 179:

'In contrast with admissions covered by s 220 stand all others properly before the Court. By themselves they do not prove the facts admitted. They are nevertheless evidence of such facts. They go into the scale, to be weighed with everything else there.'

As set out in *S v Hendricks* 1995 (2) SACR 177 (A) at 183H:

'The short point is that what is said by the accused when pleading to the charge, may, depending on the circumstances, yield material upon which the prosecution will be entitled to rely in discharging the burden of proof which rests upon it.'

10. The accused's statement in terms of s115 allows the prosecution to

narrow the focus of its case. I will deal with this in more detail when considering the position of Accused 16, who also made a detailed plea explanation. It is perhaps appropriate to set out in summary, the explanation of accused 1, inasmuch as he is one of the main role players in these proceedings, and was directly involved in the contracts that led to the funding for the NSJF, and the subsequent events following the cancellation of the festival.

11. In his plea explanation Accused 1 stated that on being appointed as the Head of Department of the Department of Economic Development and Tourism (DEDT) in March 2012 he received proposals from various persons wanting sponsorships from the Department. One proposal received was from accused 3, SOFT SKILLS COMMUNICATIONS 100 CC (Soft Skills) seeking sponsorship for an international jazz and soul festival. At around the same time, accused 1 was informed by the Head of Ministry in the province, Mr Sethene, that another company called MPM had approached accused 16 with a pitch to host a similar event, the NSJF. The province was eager to host a flagship event and, after meeting with representatives of MPM, accused 1 was advised that MPM held the rights to stage such a festival in South Africa. Eventually it was suggested to MPM that they join forces with Soft Skills, which was achieved. The objective was of ensuring local partnership and economic empowerment, particularly as MPM were based in Gauteng and Soft Skills was a local company.

12. An initial meeting of the respective entities wishing to stage the

festival took place in April 2012. A second meeting resulted in the presentation of their proposal at which the National Minister of Arts and Culture was also present, and who indicated that his Department would support the hosting of the festival with an amount of R10m. A further meeting took place in Cape Town, where members of the major events cabinet subcommittee (MESC) were present. They expressed an interest in bringing the concert to KZN and resolved that it would be tabled before Cabinet in respect of funding to be allocated. At around the same time, accused 16 received an invitation from Mojo to attend an upcoming concert in Rotterdam in July 2012, and in light of the in principle decision to host the festival sometime in 2013, it was decided that an official delegation, with the approval of the Premier, would attend the upcoming event in Rotterdam.

13. The provincial government was eventually represented by the MEC for

Finance and her Head of Department. According to accused 1 in June 2012, as the MESC had resolved to recommend the hosting of the NSJF, a contract was drawn up between the DEDT and the joint venture partners, comprising MPM and its local partner, Soft Skills. These contracts were checked by the legal services department, and were approved by the senior manager Adv Nkatha. On that basis, accused 1, signed the contract on behalf of the Department. As far as accused 1 was concerned, the provincial delegation was attending the function in Rotterdam for the purpose of brand activation, and the marketing of bringing the festival to Durban in the following year.

14. At the time when the joint venture partners made their submission to the MESC, it was made clear that their proposed budget did not include expenses associated with the activation or marketing of the planned the event. After the initial contract was concluded between the joint venture partners and the Department, it was discovered by Mr Shezi, the former Deputy Director (Corporate Services) in the DEDT, that MPM did not meet the necessary requirements to be on the provincial government supplier database. For that reason a second contract was drafted with Soft Skills being substituted as the contracting party in place MPM. This second contract was drawn by Mr Shezi on the instructions of accused 1, and signed by him after it had been vetted by both Mr Shezi and Adv Nkatha.

15. In order to pay for the expenses associated with the activation in

Rotterdam, accused 3 (the formal contracting party with the Department) presented an invoice for the sum of R 969,000 to DEDT.

Accused 1 requested Mr Shezi to ensure that payment of the invoice was made, as the delegation was already in Rotterdam for the purposes of the activation. Accused 1 confirmed that before the payment could be made, it was approved by the Treasury as well as by Mr Shezi. In August 2012, another delegation attended an activation in Curacao, for which an amount of R644 100.00 was paid to accused 3. On 10 October 2012, the MESC recommended to Cabinet that the festival be funded in the amount of R 26.8 million. This was confirmed in a resolution on the same day.

16. In October 2012 accused 1 became aware that the licensing arrangement

between Mojo and MPM was cancelled due to non-payment of licensing fees. Even after the cancellation, accused 1 was involved in

negotiations with Mojo to try to resuscitate the agreement, and an agreement to this effect had been reached on the basis that payment would be made before 1 December 2012 of the outstanding amounts. The request for payment was reviewed by the Treasury, who was satisfied that the request was in order and accordingly authorised the release of funds to accused 3, as per the invoice presented. This payment was made directly by the Treasury into the account of Accused (3).

17. Subsequently discord set in among the joint venture partners, and the director of MPM, Ms Camille, formed a new company called Profile Communications. In light of the close relationship between Mr Luyken of MOJO and Ms Camille, attempts were made to have the Department now contract with the new company, Profile Communications, in place of Soft Skills. In light of the disputes among the joint venture partners reaching a level at which it prejudiced the hosting of the event, a decision was taken by the MESC to cancel the agreement to host the festival in 2013, upon which accused 1 in February 2013 wrote to accused 3, requesting a statement of account. The statement of account reflected that there was still an amount of R 11.1 million remaining from the funds which were paid by the DEDT in November
2012. Eventually action was instituted against accused number 3 to pay back the money to the Department. This action has not yet been finalised, and was instituted under case number one, 1167/2014.

This constituted the plea explanation on behalf of accused 1.

18. I now turn to deal with the charges against accused 1.

A Contravention of section 86 of the Public Finance Management Act 1 of 1999 (Count 1) Inter alia that he failed to take effective and appropriate steps to prevent unauthorised, irregular and I or fruitless expenditure and losses resulting from criminal conduct.

The PFMA separately defines "unauthorised expenditure", "irregular expenditure" and "fruitless and wasteful expenditure". It was submitted that although these are discrete offences they have been combined without any indication in the indictment of how accused 1 failed to comply therewith. Unauthorised expenditure is expenditure which has not been budgeted for. All monies paid by the DEDT towards the hosting of the NSJF were paid pursuant to the submission of invoices. These invoices were vetted by officials in the department, alternatively the expenditure was properly considered by structures within the Provincial Government, and finally by resolution of Cabinet on 10 October 2012. This was the evidence of the State through Mr Magagula.

19. Irregular expenditure is expenditure incurred in contravention of, or not in accordance with, a requirement of any applicable legislation. It is submitted on behalf of Accused 1 that no evidence was led by the State that the NSJF expenditure was irregular. The evidence of Mr Magagula, Mr Shezi and Ms Mapisa all admit that the expenditure was not irregular. Similarly, there was no evidence presented that there was any 'fruitless and wasteful expenditure' which could be attributed to Accused 1 in relation to the NSJF.
20. Fruitless and wasteful expenditure is defined in the PFMA as expenditure that is made in vain and could have been avoided had reasonable care been exercised. Mr Shezi gave evidence regarding the steps which were taken by Accused 1 before the R969 000 was paid. The State's evidence proves that accused 1 acted diligently and with care before payments could be made in regard to the NSJF. Mr Shezi testified that he had concerns about making

any payments to service providers in the absence of Cabinet's approval of a budget for the festival. In order to achieve 'risk management' advice was sought at the suggestion of Accused 1 from Chief Director of Budget at the Treasury, Legal Services, Financial Services before authorising payment of the amount of R969 000 for the activations that took place in Rotterdam in early 2012.

21. The evidence of Mr Shezi is to the effect that his main concern was

that amounts for the activations in Rotterdam and the final payment of R26,8m could not be paid without Cabinet approval. After obtaining advice from Tania Stileu from the Treasury, she confirmed that in the absence of Cabinet approval the activations invoice for R969 000 could be paid from within the DEDT's own budget. Accused 1 informed Mr Shezi that the activation had been discussed at the MESC meeting which confirmed that an MEC should represent the province at the upcoming festival in Rotterdam, and that the Committee had shown an 'in-principle' support for the festival coming to Durban.

22. The evidence of Mr Shezi was that based on the advice from Treasury,

as well as the minutes of the Sub-Committee meeting referred to above, he processed the payment for the amount of R969 000. He

testified that upon being shown the minutes of the Sub-Committee meeting, he was aware that a delegation from the province was going to the meeting in Rotterdam and he was satisfied that payment could be made. He signed the invoice for the payment of R969 000, which was paid on 4 July 2012.

23. The same caution was exercised with regard to the conclusion of contracts, where Accused 1 insisted that these pass through the vetting process in the Legal Services department before he could sign and thereby bind the DEDT. His actions throughout are consistent with the exercise of "reasonable care" as required by the PFMA.

24. The State's reliance on the evidence of Ms Mapisa does not assist it in proving a case on Count 1 against Accused 1. She testified that she and Mr Shezi jointly assessed together with Accused 1 the risks associated with the project, in particular the payment in advance for services. After careful consideration they decided that the payment should be made. It was submitted on behalf of Accused 1 in order to succeed, the State is required to show gross negligence on the part of Accused 1, where he acted with a total lack of care and without regard for the interests of the Department. There is no evidence to sustain such a finding.

25. Counsel for Accused 1 referred the Court to the Treasury's Guideline on Fruitless and Wasteful Expenditure[1] defines "reasonable care" as "applying due diligence (careful application, attentiveness, caution) to ensure that the probability of a transaction, event or condition not being achieved as planned is being managed to an acceptable level". An examination of the evidence of the State shows that before the payment of R26.8 million was made, Accused 1 requested and received a written assurance from Mojo that the NSJF would proceed despite its earlier communication to Soft Skills that the rights to host the festival

were withdrawn. This is evident from the email interchange between Shezi, Mapisa and Accused 1 in which the latter was in contact with Mr Jan Willem Luyken, the owner of Mojo as at 14 November 2012 to resuscitate the NSJF, which Mojo had earlier

cancelled with MPM. The emails reflect that Mr Luyken was prepared to allow the festival to take place in Durban in November 2013 on the basis of payment of certain artist's fees before 1 December 2012. Accused 1 asked for the input of Shezi and Mapisa urgently to avoid another failure to meet the deadline, and avoid another cancellation. None of this evidence has been gainsaid by the State.

26. Mr Shezi and Ms Mapisa further testified that the decision to pay was discussed and debated between the three. They were all satisfied that payment should be made under the circumstances which prevailed at the time. Mr Shezi testified that he would not have made payment if he was not satisfied that it was legitimate. He testified further that he was not put under any undue influence to do anything unlawful. The evidence of the State's own witnesses confirm that Accused 1 regularly requested advice and collaboration, and that he delegated tasks to his unit heads and depended on their expertise and advice. In particular, Shezi confirmed that all contracts had to pass through the vetting of Legal Services before he got the go ahead to sign on behalf of the Department. This was confirmed by the former Legal Advisor, Mr Nkatha. The same would apply with Treasury officials. None of this evidence is challenged.
27. The conduct of Accused 1, as testified to by the State witnesses, in which he gave regular updates to members of the Technical and Subcommittee on Major Events is not indicative of someone perpetrating fraud or corruption, which the State in its final argument, submitted happens often "behind closed doors". The minutes of the meeting on 23 January 2013 (Exhibit T3) reflect that Accused 1 distributed a memorandum he had addressed to Accused 16 on 12 December 2012 updating him on the status of the NSJF and that further negotiations were taking place with Mojo to rescue the concert. He further recorded that in the event of these negotiations breaking down, that the engagement with Mojo be terminated.
28. The evidence before the Court is that when the project became untenable due to the infighting between MPM and Soft Skills members, Accused 1 proposed to the Subcommittee on Major Events at the meeting on 13 March 2013 that the project should be cancelled. (Exhibit S6) He also proposed that civil recovery proceedings should be instituted against accused 3 and its directors should accused 3 fail to honour its obligations in terms of the agreement
29. It is significant that at the meeting of 13 March 2013, at which MEC Cronje and Mr Magagula were present, with both of them harbouring suspicions over the NSJF ever since their trip to Rotterdam for the activations, Accused 1 made a presentation to the Major Events Sub Committee and asked that they make a recommendation that :

- i. that the disputes between the partners of those organising the event were prejudicing its hosting;
- ii. that MPM had misrepresented to the province that it initially had the exclusive rights to stage the NSJF;
- iii. that the Committee recommend terminating the contracts with Soft Skills, Profile Communications and Mojo;
- iv. That these parties be asked within 7 days of the termination of the contracts to be placed on terms to return all monies in their possession, failing which legal action would be instituted.

After a closed session of the MEC's (including Cronje), it was decided that a further report be prepared by the co-chairs of the Technical Committee, being Accused 1 and Mr Magagula.

30. I now turn to consider the Annual Reports of the DEDT for the years

2012/2013; 2013/2014 and 2014/2015 which were introduced under cross examination. This is relevant as regards any count relating to Accused 1's breach of his duties under the PFMA. The annual reports confirm that the Auditor-General did not categorise the expenditure for the NSJF as being either irregular, fruitless and wasteful or unauthorised. On the contrary, the Auditor-General who is obliged to assess that whether Accused 1, as the accounting officer in his department established and implemented a system of internal control. The AG made no adverse findings against Accused 1 in any of the annual reports. The monies paid out in respect of the NSJF did not receive any classification contemplated in section 38 suggesting irregularity or a breach of the PFMA. There is nothing from the State to gainsay this conclusion. It is the only inference that can be drawn from a scrutiny of the annual statements. The funding was later classified as "recoverable."

31. The Annual Report for 2012/2013[2] makes reference to the payment of R26,8m paid in respect of the NSJF in respect of 'advance payments' in terms of contracts which will be delivered in the following financial year. The Notes to Annual Financial Statements for the year ending 31 March 2013 records that the amount of R26,8m was referred to as a 'supplier debt', that the NSJF was cancelled and the "department will look to recover this amount from the service provider".[3] This is consistent with the evidence of the State that Accused 1 was the first official at the sub-committee, according to the minutes of the meetings, who suggested that civil action be instituted against the service providers for recovery of the amounts paid by the DEDT. At around the same time, it should be noted, Accused 16 in his capacity as the Chair of the Major Events Sub Committee reached the same conclusion that in light of the discord among the organisers of the NSJF, it had to be cancelled.

32. Count 1 also alleges that accused 1 failed to take steps not to commit the Department to any liability for which money has not been appropriated. The NSJF funds were appropriated for. That evidence was led by Mr Magagula. Exhibit E34 is the recommendation made by the MESC on 10 October 2012 that Cabinet approve R28m be appropriated

from the Strategic Cabinet Initiative Budget (Strategic Funds Budget) for the event. Cabinet endorsed the recommendation on the same day in terms of Cabinet Resolution No. 341, 10 October 2012. The State's own witness, MEC Cronje, was part of the collective of political office bearers, including Accused 16, who took the decision.

33. It was contended in light of the above that the State has adduced no evidence to support any of the allegations made in count 1.

Fraud (counts 5 and 6)

Accused 3 was entitled to invoice (and be paid by) the Department of Economic Development and Tourism for activations

34. Accused 3 was the service provider tasked with carrying out activations in Rotterdam. It was entitled to invoice the Department for that service. Accused 1 sought advice from not less than four people in the provincial government and not one of them stated that accused 3 was not entitled to invoice and be paid by the Department

for activations. One such person was Mr Magagula, the HOD of Treasury.

35. Fraud has been defined as unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or potential prejudice to another[4]. It requires the requisite mens rea describes by Snyman as:

"There is a clear distinction between an intention to deceive and an intention to defraud. The former means an intention to make somebody believe that something which is in fact false, is true. The latter means the intention to induce somebody to embark on a course of action prejudicial to herself as a result of the misrepresentation. The former is the intention relating to the misrepresentation, and the latter is the intention relating to both the misrepresentation and prejudice"[5]

36. Fraud is a crime based entirely on intention and this intention must be proved in both its forms: intent to deceive and intent to defraud[6]. The law is clear on the necessity for precision in the drafting of the indictment in a fraud case, particularly a complex one. The State is obliged to produce proof, not only that accused 1 has committed fraud, but that he has committed fraud in the manner alleged in the indictment. *S v Heller and Another* 1964 (1) SA 524 (T) at paragraph 535.

37. In *Essop v S* (AR 931/2004) [2014] ZAKZPHC 45 (23 May 2014) the court

held that the purpose of a properly formulated charge sheet is to bring awareness and clarity as to what the State intends proving.

When an accused has to infer from facts, he/she has to make a deduction which creates uncertainty. The Court added further:

[12] The charge sheet as it presently stands does not contain any allegation of prejudice (express or implied) and is clearly defective. In *S v Hugo*[29] in spite of the further particulars being furnished it has been held that an accused is entitled to be informed with at least a reasonable degree of clarity what case he has to meet. Such is especially true of an indictment alleging fraud. The Court found that an accused should not be left to speculate about an element of the crime....

"An accused person is entitled to require that he be informed by the charge with precision, or at least with a reasonable degree of clarity, what the case is that he has to meet and this is especially true of an indictment in which fraud by misrepresentation is alleged. (Cf. *R v Alexander and Others* 1936 AD 445 at p. 457; *S v Heller and Another* 1964

(1) SA 524 (T) at p. 535H). (Emphasis added.)

Rex v Alexander and Others it was stated:

The purpose of a charge sheet is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him."

38. The State's argument is based on the contention that Accused 1 misrepresented that Soft Skills stated or indicated that they had a licencing agreement with the rights owners of the NSJF, Mojo. It was submitted that there is no evidence to sustain this charge in as much as the first presentation to the Chair of the Sub Committee by MPM Productions reflects in Exhibit (E51) that "MPM has the exclusive rights to organise the North Sea Jazz Festival in South Africa, in partnership with Mojo Concerts". The Joint Venture Agreement concluded between the DEDT and MPM Productions and their local partner, Soft Skills Communications (Accused

3) records that the "Joint Venture Parties" have acquired the rights to organise and stage the Durban NSJF. This clause is repeated in Exhibit (E21) which was concluded subsequently between the DEDT and Soft Skills only on the basis that the provincial government was unable to contract with MPM as it was not on the government supplier data base and because the Joint Venture was not VAT registered. For those reasons the Joint Venture parties concluded an agreement and took a resolution that Soft Skills (Accused

3) would represent that Joint Venture in contracting with the DEDT.

39. There is no evidence before this Court that the resolution signed by Accused 7 on behalf of the Joint Venture was fraudulently done. As counsel for Accused 7 pointed out, the only way this document can be contested is by the State calling Ms Cornille of MPM Productions, which it failed to do despite the reassurance that it would almost 2 years ago from the date

when the applications in terms of s174 were made. Moreover, E8 is consistent with the evidence given by Mr Shezi to Accused 1 to overcome the hurdle that MPM was not VAT registered and therefore not an entity with whom the DEDT could contract in terms of the Supply Chain Management Rules. E8 is worded in those terms and reads as follows:

"This serves as confirmation that having interacted with the finance component of the Department regarding the payment of our invoices for the North Sea jazz project, we have been advised that payments cannot be made into the JV account. This is due to the fact that the JV is not registered on the KZN database and our partners MPM are also not registered as well the fact that they are not yet registered for VAT therefor monies cannot be paid into the JV account.

We have agreed as a JV that due to the above stated predicament, monies be paid into soft skills communications while we try and get all paperwork in place."

40. Mr Shezi testified that he came up with the idea that the Department

should contract with one of the JV parties in order to resolve the payment issues. He testified that it was not the first time that such arrangements were made, as long as the obligations of the JV remained in place, as was the case in this instance. Shezi testified that the resolution from accused 7 came after he discussed the payment issues with her and how they could be resolved. There is no basis for the allegation that Accused 1 misrepresented that the payment must be made to accused 3 and not to the JV. The resolution letter had nothing to do with accused 1. He was not part of the discussion between Mr Shezi and accused 7 nor was he privy to the arrangement of the JV partners in conducting its affairs.

Corruption

- Accepting a benefit - contravening section 4(1) of the Prevention and Combatting of Corrupt Activities Act 12 of 2004 (count 2 and alternatives thereto, and count 4)

41. In respect of count two it is contended that, between November 2012 and February 13, Accused 1 accepted, either directly or indirectly, from accused 2,3,9 and 10 a gratification of R1m, for his benefit or for that of another person, in order to act illegally or dishonestly in order to achieve an unjustified result. It is contended that accused 1 facilitated the appointment of Soft Skills to partner with MPM in the hosting of the NSJF. Accordingly, it is alleged that accused 1 is guilty of corruption, as it relates to public officers.

42. As stated earlier, the evidence on record is that the DEDT was unable

to contract with MPM as the latter did not have a VAT registration, nor was it on the provincial government's supplier database. It was Mr Shezi who suggested to accused 1 that one party to the joint venture partnership could agree that it was representing the parties in terms of the contract with the Department. Accordingly, accused 7 signed a resolution on behalf of the joint venture parties, enabling accused 7 to represent Soft Skills as a contracting party, on behalf of the JV. There is no evidence by any witness of a payment of the amount of R1m by any of the accused to accused 1.

Money Laundering (counts 45 and 46)

Accused 1 is charged together with accused 2,3,9 and 10 on the basis that in February 2013, they ought to have known that an amount of R1m was the proceeds of unlawful activities, and that they acted in a manner to conceal or disguise the movement of the said amount. As stated earlier, there is no evidence of gratification whatsoever against accused 1. To the extent that the amount reflected in this charge is similar in the amount of the property transaction that attorney Mr Pearton testified to, the sum total of his evidence is that he became aware that accused 1 was a client of his firm, the matter being handled by a colleague who was unable to testify for health reasons. Mr Pearton testified in relation to the bank statements of the firm of attorneys Thorpe & Hands indicating a series of deposits made in February 2013 into the firm's trust account. At the end of February 2013, a total of over R1 million was transferred by Thorpe & Hands into the account of another law firm.

43. Counsel for the state submitted that the court should draw inference

from the cash deposits made into the trust account of the attorney. There is simply no evidence to correlate any of these payments to any of the other accused before court or to suggest in any way that these payments constituted gratification, or are otherwise the proceeds of crime. In any event, the fact that cash deposits were made into the account of the firm of attorneys does not warrant an inference being drawn of illegal conduct on behalf of accused one. There is also no evidence to suggest that these funds came from accused 9, as stated in the reply to the request for further particulars. As stated earlier, it is simply unsubstantiated and a stretch too far to contend that accused 1 received a payment from accused 3 in exchange for awarding the North Sea jazz Festival to it. A sniff of suspicion is not enough.

44. To the extent that the request for further particulars indicates that accused 1 misrepresented to the Department, represented by Ms Mapisa and Mr Shezi, that accused 3 (Soft Skills) had a valid licensing agreement to host and stage the North sea jazz Festival, this contention is not supported by any evidence. On the contrary the documentary evidence presented to the court suggests that it was MPM which held out itself as the local partner with rights to stage and host the forthcoming Jazz Festival in Durban. This is evident from the JV agreement, which I will consider below.

45. Section 174 of the CPA provides that:

"If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty. It is trite that there should be reasonable and probable cause to believe that an accused is guilty of an offence before a prosecution

is initiated[7]. In *S v Lubaxa*[8] the SCA held that if there is no possibility of a conviction other than if the accused enters a witness box and incriminates himself, a failure to discharge an accused in those circumstances would be a breach of rights guaranteed by the Constitution. The SCA held:

"it ought to follow that if a prosecution is not to be commenced without a minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights ..." [9]

46. The Constitutional Court in *S v Molimi*[10] stressed that there is no onus on the accused to prove his innocence. A mere suspicion, strong as it may be, is not sufficient to confirm a conviction. In *S v Doorewaard and Another*[11], the court held that the function of the prosecutor to place credible evidence before the court in support of the alleged crime. It was not the function of the prosecutor to then leave it to the court to make of it what it will. In this matter, the prosecution has led numerous witnesses over many months. Despite the promise that the evidence would live up to the expectation of the opening arguments presented by the State, the evidence was left yearning. It fell short of the summary of substantial facts set out in the indictment.

47. Reams of evidence was placed before the court through which we teased

through, expecting to find links joining the various accused to the "original" tainted transaction on the awarding of the contract to Soft Skills (Accused 3). As counsel for the State indicated in argument during the section 174 application, had the contract been left intact in the award to both Soft Skills and MPM, the allegations of impropriety do not arise. It would follow

therefor, that as the defence counsel have argued, the lingering question is whether this is really a prosecution driven by a disgruntled former party to the Joint Venture, in the form of Ms Cornille, of MPM Productions?

48. The State throughout held out the promise that Ms Cornille and / or Mr Luyken of Mojo would testify. This prospect lingered up until the day when the State closed its case, having initially indicated that it required time to finalise an application in terms of section 5(2) of the International Co-operation in Criminal Matters Act, 75 of 1996 in order to secure the attendance of Mr Luyken, only thereafter to advise the Court that the request for assistance to the Netherlands had only been dispatched a day earlier. Those efforts to locate the witness came to naught.

49. In respect of Accused No.1 there is evidence of a property transfer

pursuant to transactions in which an amount R1m is transferred into the account of his attorneys. He has admitted to this in his section 115 statement. If so, what crime is he alleged to have committed that requires him to enter the witness box? The State, it would appear, is unable to stitch together the disparate parts of the tapestry it has tried to weave. The accused has no

obligation to participate in this. The witnesses called by the State testified that accused 1 did not unduly influence them regarding the NSJF project. Some witnesses did not deal with accused 1 at all. It was submitted on his behalf by Ms Shazi that the fair trial rights dictate that Accused 1 must be discharged as there is no evidence upon which a reasonable court can convict him on any of the charges.

8. CHARGES AGAINST ACCUSED 2, 3, 4,5,6, 9 & 10

CEASER WALTER MKHIZE; SOFT SKILLS COMMUNICATIONS 100 CC; SHAKA HOLDINGS (both represented by Acc.2). ZANDILE NONJABULO MBONGWE, MAQHOBHA TRADERS CC (represented by Acc.2 and Acc 5); MABHELENI LEEWAS NTULI and SUPER SIZE INVESTMENTS 20 CC (represented by Acc. 9)

50. The charges against the accused 2,3,4,5,6,9,& 10 stem from the same factual matrix of the funding allocation towards the staging or hosting of the North Sea Jazz Festival as pertains to the

background

to the charges relating to Accused 1. In brief, the evidence reveals that in May 2012 MPM and Soft Skills made a presentation to the DEDT on hosting the North Sea Jazz Festival in Durban. The concept found favour with the DEDT who were interested in bringing a world class event to the province, with the potential to draw international tourists to the province. Various witnesses testified of the procedure followed in relation to proposals made to the provincial government for funding, which as I understood the evidence, took on the form of unsolicited bids, outside the ambit of the rigid procurement processes. Section 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". The Public Finance Management Act 1 of 1999 (the "PFMA"), as amended by the Public Finance Management Amendment Act 29 of 1999 which made the PFMA applicable to provincial governments - regulates financial management in national and provincial governments "to ensure that all revenue, expenditure, assets and liabilities of those governments are managed efficiently and effectively ...".

51. According to the evidence, the process followed after the initial

presentation by MPM and Soft Skills was for the concept to be evaluated by the Major Events Sub-Committee consisting of administrative functionaries and political office bearers which ended up giving an approval in principle and resolved to recommend the project for Cabinet approval. During the presentation by MPM and Soft Skills, the provincial government was advised that the budget presented for the hosting the concert would exclude the brand activations and marketing campaigns aimed at generating interest for the concert. Consequent upon the approval in principle by the Sub-Committee, an agreement was concluded between DEDT and the JV comprising MPM and Soft Skills. During the course of its deliberations, Accused 16 in his capacity

as the Chairman of the MESC, received an invitation from the owners of the NSJF brand to attend an activation in Rotterdam. The province undertook to cover the expenses of the Accused 3, who by this stage had already signed a contract with the DEDT to host the NSJF in 2013. Accused 3 was a partner in the Joint Venture together with MPM. As stated earlier, the contract was signed by Accused 1 after being vetted by Adv. Nkatha, the Head of Legal Services. Other witnesses spoke of this protocol introduced by Accused 1 as a rule.

52. The Rotterdam activations were tabled and funding therefor approved

by the provincial government structures. There can be no doubt that the activations would have come to the attention of the Cabinet as the MEC for Finance was asked to attend the activation in Rotterdam in place of Accused 16. Mrs Cronje testified that her trip abroad, in accordance with protocol, had to be approved by the Premier. There can be no suggestion that the activations were something that was either not approved by the MESC, or was undertaken without authority. It was also not disputed by witnesses that there would have been expenses which would have been incurred in the process of hosting these activations, including payment of hotels, air flights etc. This resulted in the JV submitting an invoice to the DEDT for R969 000.00 to cover the costs of the Rotterdam activations. Shezi then testified that the JV could not be paid as the JV was not registered on the DEDT supplier data base and MPM was not VAT compliant.

53. At his suggestion, a written resolution was then produced from the JV in which Soft Skills was authorised to be the sole contracting party on behalf of the JV. Shezi, with Nkatha's concurrence, made certain amendments to the initial contract to now reflect Soft Skills as the contracting party, thereby enabling the payment of R969 000 to be made. It was not disputed that the primary purpose of the above amendment was to urgently obtain payment from the DEDT as the Rotterdam visit had already commenced or was imminent. The payment of R969 000 was therefore legitimately required, and lawfully approved by the DEDT. Subsequent to the Rotterdam activation, a further activation and promotional trip was undertaken to the island of Curacao, in the Dutch Caribbean in August 2012. These expenses were also paid for by the DEDT.

54. It is common cause that the JV was primarily represented by Ms Cornille and Accused No. 7, who made the joint decisions and interfaced with DEDT, as representatives of their respective principals. It is also common cause that pursuant upon the Major Events Sub-Committee's 'approval in principle', preparatory work to stage the North Sea Jazz Festival proceeded in earnest. An example of the preparations is evident from the evidence of Mr Ntsetshie of Canoe Productions who entered into an agreement with Accused 3 to market the NSJF at the Chris Brown concert which was being held in Durban on 17 December 2012. Accused contracted with Canoe for an amount of R8m, but only paid R5m to the service provider. There was no indication from this witness that there was anything improper or untoward in the agreement, which he personally negotiated with Accused 2. The brand marketing took place as agreed between the parties at the concert.

55. The evidence led by the State witnesses, with the assistance of correspondence essentially from MPM, established that there were contractual and share-holder disputes within MPM, leading to two of the directors Mr Mangwedi and Mr Thabang Makwetla essentially being sidelined in the contractual dealings with the DEDT. In their place, Ms Camille assumed a prominent role on behalf of MPM. The infighting amongst the directors of MPM together with the non-payment of the licencing fee to Mojo eventually resulted in the concert being cancelled.

56. It was common cause that on 10th October 2012 Cabinet approved the project and funding for the NSJF and gave its post facto approval for the earlier expenditure in the amount of R969 000 on the recommendation of the Major Events Sub- committee. This was consistent with the evidence from Mr Magagula. The amount of R26,8m was paid to Soft Skills Account on 28 November 2012 on the basis of the Cabinet resolution. The evidence established through forensic investigator Mr Sagie Govender of UBAC who testified through a narration of the bank statements of Accused 3 (Soft Skills) that almost immediately after payment of R26.8m it disbursed monies to some of the Accused on invoices submitted for work done in relation to the concert.

57. After becoming aware of the cancellation of the licencing agreement

between MOJO and MPM, Accused 1 continued engaging with Mr Luyken of Mojo in an effort to resuscitate the agreement. These attempts were unsuccessful. The project was finally cancelled after a recommendation by Accused 16 in February 2013. It is common cause

that civil action was instituted by Accused 16 against Accused 3 (Soft Skills) and Profile Communications (the company associated with Ms Camille) for the recovery of the monies paid by the DEDT. The action, instituted under case number 1167/2014, has still not been finalised.

Ad Count 3 (Accused 2, 3, 7, 9, 10)

58. This count relates to corruption in which it is alleged that the

accused (without specifying which of them) awarded a R1m gratification to Accused 1 (Golding) in order to influence the awarding of the contract of R26.8m in respect of the NSJF to Accused

3. It is further alleged that the corruption is related to the granting of the contract. It was correctly pointed out by counsel that the indictment, although charging all of the accused of the offence of corruption, fails to set out the facts, attributable to each of the accused in relation to the offence, or whom it is alleged

is the corrupter in respect of this particular charge. Relying on the decision in *S v Msimango* 2018 (1) SA 276 A para 16 -18 it was submitted that the deficiencies in the indictment have not been made good by the evidence led by the state. (Section 88 of the CPA) In these circumstances, it was contended that there is no basis for the accused to have to rebut this charge. In addition, there was no evidence of any of these accused having offered a gratification to accused 1, nor has any evidence been led that suggests that that any of these accused improperly influenced the granting

of the contract to Soft Skills. On the contrary, the evidence reveals through a series of documents in which the proceedings before the Sub Committee were minuted that the granting of the contract followed rigorous interrogation, and the decision was eventually made by a collective of the members of the executive Council of the KZN provincial cabinet. The investigator, Mr Govender, analysed the bank accounts of all of the accused and was unable to attribute any evidence pointing to accused 1 having received a gratification in the amount of R1m from any of the accused on this count. It is also worth pointing out that according to the testimony of attorney Richard Pearton cash deposits were made into the firms trust account in February 2013. The charge sheet on the other hand, refers to a transaction in June 2012. Again, the evidence is that it is at odds with the averment in the indictment. The indictment does not specify what was supposedly done by accused 1 in exchange for the benefit of R1m. In the result, it is contended that accused 2, 3, 7, 9 and 10 be discharged. The prosecution in closing argument contended that the Court should draw an inference from these deposits. Surely, unlawfulness is an inference that cannot lightly be drawn from these facts. What if it was Accused himself who won money through betting at a casino? Is there an obligation for him to enter the witness stand to fill in the gaps in the State's case?

Ad Count 5 (Accused 1, 2, 3, 7)

59. On this count, Mr Mkhize and Ms Zungu (representing Soft Skills) are charged along with accused 1 on the basis that they misrepresented to the DEDT that Soft Skills had a valid licence and partnership

agreement with Mojo to host the North sea jazz Festival in Durban and that it was entitled to invoice the Department for the amount of R28.5m for the hosting of the concert. In truth, it is contended by the state that Soft Skills, did not have a valid licensing or partnership arrangement with Mojo to host the event, and was not entitled to be paid the amount of R28.5m. The prosecution led the evidence of Mr Govender who narrated the bank transactions of the various accused. No evidence was presented to indicate that accused 1 received the amount of R1m from either accused 2, 3 or 7.

60. It was further submitted that the State again sought to charge several accused in respect of this count without relying on common purpose and without presenting any detail as to what the nature

of the misrepresentation was, or to whom it was made. In the alternative, the accused are charged with theft pertaining to the

amount of R 28.5 million, which it is alleged was stolen from the provincial government. There has been no evidence presented to

sustain a charge of theft, let alone for the accused to have to testify in their defence. Insofar as the alternate count of fraud is concerned, there is no evidence to suggest that Soft Skills misrepresented to the Department that it possessed the rights to host the festival. As submitted on behalf of accused 1, a contractual term attributes the obligation to host the concert to both

Soft Skills and MPM, who were parties to a joint-venture agreement. However, regard should also be had to exhibit R1, the joint venture agreement between MPM and Soft Skills. Clause 2.1 of this agreement states expressly that MPM has secured the exclusive rights to host the ·NSJF in Durban, in partnership with Mojo. This agreement was an annexure to the contracts E48 and E21. This undermines the basis for the charge against the accused. Counsel for the accused submitted that if the State wished to present any evidence to the contrary, it was obliged to call Ms Camille and Mojo, to present such evidence. This was not to be.

61. With regard to the payment of R28.5m, this payment was authorised by Mr Shezi and Mr Magagula. It was done pursuant to a Cabinet resolution, and payment was effected by the provincial Treasury. The basis for the payment is an invoice generated by Soft Skills, in accordance with the contractual terms set out in exhibit E48. That agreement has not been set aside as being unlawful or tainted by impropriety. As stated earlier, the lawfulness or otherwise of E 48 is the subject matter of civil litigation, which are still pending. It must also be borne in mind that Adv. Nkatha testified that he was responsible for the drafting of the first contract in which the joint venture partners undertook to host the festival. To the extent that reliance is placed on the second contract, this was drafted by Mr Shezi. In either event, both agreements were vetted by Nkatha as the head of the legal department. The circumstances leading to Soft Skills, representing the joint-venture, have already been set out above, and need not be repeated. In the absence of any evidence by MPM or Charmaine Camille that accused 7 did not have the authority to represent or contract on behalf of the joint-venture partnership, there is no evidence to gainsay the contention on behalf of Soft Skills. In the circumstances it was submitted that there is no obligation on either accused 2 or 7 to have to offer their testimony in the hope of closing the loopholes in the state's case.
62. I should also point out that to the extent that Mr Magagula considered the payment in a single tranche of R26.8m to be irregular, he eventually conceded that there was nothing improper or irregular about this, particularly where it is provided for in terms of a contract, which was the case here. Finally, the amount was paid to Soft Skills, following the passing of a resolution by the provincial Cabinet.

Ad Count 6 (Accused 1, 2, 3, 7)

63. The accused are charged with fraud, and in particular, it is alleged that between April and July 2012, accused 3 misrepresented that it was entitled to invoice the Department and to receive payment for activations in the amount of R 969,000. It is further contended in the indictment that accused 7 (Zungu) misrepresented that she was entitled to sign the resolution authorising her to act on behalf of MPM and Soft Skills for the purpose of receiving payment of R969, 000, in circumstances where Ms Zungu was not a director of Soft Skills and not authorised by MPM to act on its behalf. In the alternative, it is alleged that the accused are guilty of theft in the amount of R969, 000.00.

64. As set out earlier, the amount of R969, 000.00 was paid to Soft Skills on presentation of the invoice for expenses incurred in relation to the activation undertaken in Rotterdam. It is not disputed that accused 3 incurred expenses, which were required to be paid by the Department. As the evidence reflected, on submission of

the invoice, Shezi balked at payment as there was no Cabinet approval for the budget nor any contract in place for the hosting of the event. There had been an 'in principle' approval by the MESC for the hosting of the event. In any event, the amount was paid after Shezi had conferred with Treasury as to whether the invoice could be paid. The invoice was .also paid to accused 3, pursuant to the resolution signed by Accused 7 in which she stated that she was acting on behalf of the joint-venture party. As also set out earlier, the only basis on which the state could have established a prima facie case requiring the accused to enter the witness box, would have been the evidence of Ms Camille that the conduct of accused 7 was unauthorised, and unlawful, and constituted a misrepresentation to the prejudice of the provincial government. There was no evidence

to this effect.

65. The evidence of Mr Mangwedi does not support the contention that

accused 7 did not act on behalf of the joint-venture. On the contrary, he testified that accused 7 and Ms Camille were effectively

the liaison persons in respect of matters relating to the Department. In the result is contended that there is no evidence, or no prima facie case of theft or fraud made out by the State, requiring the accused to take to the witness stand.

Ad Count 10 & 11 and Alternatives (Accused 2, 3, 5, 6)

66. These counts relate to the payment of an amount of R300,000 into the bank account of accused 16 in November 2012. It is alleged that the accused 2, 3, 5 & 6 gave the said amount to accused 16 in order to influence him to award the contract for the NSJF to Accused 3. A scrutiny of the bank account of accused 16 by Mr Govender reflects that there was a transfer from the account of accused 6 into a Nedbank account 13[...] under the reference "Ndiyema". At the same time, accused 16, admits the deposit into his account but attributes this to an arrangement reached with a person (Xaba) whom he approached for financial assistance in order to settle a significant tax liability.

67. The state has not, through evidence or any documentation including

bank statements, established that accused 16 was known to accused 2,3,5 or 6. In addition, it is incumbent on the state to prove that accused 16, was influenced or manipulated in order to make decisions at the level of the MESC or Cabinet that resulted in the award of the contract for the NSJF to Soft Skills. Firstly, accused 16 has made a detailed plea explanation, which the state has not challenged with the evidence to the contrary. There is nothing to gainsay the explanation of accused 16 that the amount paid into his account was pursuant to a request to a friend to assist

him in order to settle a tax liability. In any event, insofar as accused 16's role or potential to manipulate or influence a collective decision of the subcommittee or of Cabinet is concerned, this has not been proven. It is difficult to see how accused 16 would have been able to achieve this, especially as the subcommittee only had authority to make recommendations. These recommendations were in any event the outcome of joint decisions by four political heads (MEC's) who served on the subcommittee.

68. The former MEC for Finance Cronje testified that she was present at the sub-committee meetings as well as at Cabinet when the resolution was passed authorising payment of R26.8 million to Soft Skills for the hosting of the concert. She was part of the decision, as one of the political heads. Despite her not being satisfied with the responses to queries raised following her return from the trip to Rotterdam, Ms Cronje nonetheless voted in favour of the resolution, in which the contract was awarded to Soft Skills. There was no suggestion in her evidence of any impropriety in the granting of this decision.

69. In the circumstances it is difficult to see what relationship was

established between any of the accused in this count, and accused 16. The resolution adopted by the subcommittee or Cabinet has not been shown to be corrupt, nor has any attempt being made to set it aside. In the absence of evidence of a corrupt relationship, it was submitted that there is no requirement that the accused "fill in the gaps" left in the State's case.

Ad Count 13 (Accused 2, 31 5, 61 16)

70. The same arguments as set out above applies equally to count 13, in which accused 2,3.5 and 7 are alleged to have engaged in money-laundering in respect of the amount of R300,000. This count is

dependent on a guilty finding on counts 10 to 12. The same arguments advanced in relation to the earlier charges are repeated in relation to this count. It bears noting that money-laundering involves activities aimed at concealing benefits that were acquired by criminal means for the purpose of making them appear legitimately acquired. Money-laundering is the deliberate concealment or

disguising the proceeds of illegal activity in order to make them appear legitimate. It requires that the state show that the accused

was aware of the illegal origin of the funds, and that they had the intent to conceal or disguise the proceeds of the illegal activity.

Ad Count 14 & 15 (Accused 2, 3, 9, 10, 11, 12, 13)

71. These counts pertain to an amount of R2 650, 000.00 which was, according to the state, part of the proceeds of unlawful activities. All monies paid to Soft Skills were the result of Cabinet approval for Soft Skills, as part of the joint-venture, to be paid as a service provider for the hosting of the NSJF scheduled for 2013. The

state has not established in any way that such monies were the proceeds of crime, or that the resolution made by Cabinet was improper or irregular or influenced by corruption. Similarly, there is no evidence to establish a prima facie case in respect of counts 17-52 and counts 53 to 61. In the absence of any impropriety in the decision by Cabinet to approve of the payment of R26.8 million to accused 3 as the entity responsible for the hosting of the concert, the charges of money laundering literally "do not get off the ground". In the circumstances it is also contended that the state has failed to prove that the transaction attributed to accused 6 is the same which resulted in the payment to accused 16, who somehow influenced or manipulated the decision of the subcommittee or of Cabinet. The outcome of these counts is inevitable.

C. Accused 7 Nothando Zungu and accused 8 Ishashalazi Productions CC also applied for a discharge in terms of s174. Accused 8 was represented at all relevant times by accused 7.

72. They are charged with the following counts - Count 3, corruption involving the sum of R1 million allegedly given to accused 1; Count 5, fraud pertaining to the payment of R28.5m; in the alternative theft of an amount of R28.5m; Count 6, fraud relating to the payment of R969,000.00 in the alternative theft of R969,000.00. Counts 20 and count 21 pertaining to alleged money laundering of R100,000.00; Count 33 money laundering of an amount of R300,000.00; Counts 36 and 37 of money laundering pertaining to the amount of R626,460.75; Count 40, theft of R272,000.00; Counts 51 and 52, money laundering of R98,920.00; and theft of R98,920.00.

73. In so far as the allegation in count 3 that Accused 7 paid an amount of R1m to influence Accused 1 to award the contract for the NSJF to Accused 3, there is nothing on record to support this allegation.

Apart from the recommendation being taken by a collective of the MESC, the final decision rested with the provincial Cabinet. One of the witnesses, MEC Cronje, was part of that process. She could not offer any evidence of impropriety or unlawfulness in the decision, neither was her HOD Mr Magagagula, despite both their suspicions that a contract had been awarded before Cabinet could ratify the process. As matters turned out, it was the evidence of the State witnesses that on 10 October 2012 Cabinet took a resolution in accordance with established protocols. There is no evidence to the contrary. In those circumstances and after having regard to the evidence of Mr Govender, who merely narrated the movement of money through the bank statements of the respective accused (which were admitted by the accused) there is no evidence of unlawful conduct against Accused 7 & 8.

74. In respect of counts in which accused 7 is charged along with accused 1, 2 & 3, it is alleged that accused 7 was not entitled to invoice the Department for the amount of R28,5m and did so on the basis of a misrepresentation to the Department. The indictment however does not indicate what the misrepresentation on the part of accused 7 may have been, inasmuch as it is not in dispute that she was not a director of Soft Skills, but merely the manager of the joint-venture. It is not alleged in the summary of substantial facts or in the indictment that

the joint-venture misrepresented certain facts to the Department, resulting in the provincial government paying the amount of R28.5m to its prejudice. Again, there is a paucity of evidence that does not establish a prima facie case in respect of this count.

75. In respect of count six it is alleged that accused 7, acting together with accused 1,2 & 3, defrauded the Department in the amount of R969,000. Accused 7 is alleged to have represented that she was a director of the joint-venture comprising MPM and Soft Skills. It has been consistently contended on behalf of accused 7 that she was not a member of soft skills, nor a director of the joint-venture. In any event, the amount of R969,000 was paid on presentation of an invoice from Soft Skills in respect of expenditure incurred in the activations in Rotterdam. As set out above, the activations were discussed at the MESC. The amount for the activations, it was made clear at the outset by MPM and Soft Skills, was excluded from the overall budget for hosting the conference. It must also be noted that Mr Mangwedi was responsible for founding MPM together with Ms Camille and Ms Makwetla. He confirmed that subsequent to the formation of the joint partnership with Soft Skills, accused 7 and Ms Camille were the representatives of the joint-venture (the 'face' of the joint-venture) in their liaison with the Department.

76. Mangwedi testified to having attended the activation for the concert

in Rotterdam, and that the departmental delegation which also attended as part of the activations, included the MEC for Finance. He further testified that during this time he was in touch with the representative of Soft Skills who had informed him that an amount of R850,000 was paid by the Department in respect of the activation program. This amount was paid directly to Soft Skills as the joint-venture did not have a joint bank account. Of this amount he testified that approximately R 200,000 was paid to MPM. He is unsure of how much of the money he received personally. It will be recalled that he was permitted to seek legal advice on the grounds that his evidence could incriminate him as benefitting from the proceeds of criminal activity. The state did not share that view. The point raised by counsel for accused 7 is that if the state contends that accused 7 is guilty of money laundering, then the same allegation should be levelled against the witness, Mr Mangwedi and anyone else from MPM, who may have received a portion of the monies paid by the Department. In addition, Mr Mangwedi testified that he could not recall bringing notice of the cancellation of the licensing agreement between MPM and Mojo to the attention of accused 7, despite Soft Skills being a member of the joint-venture. As with the other charges, there is nothing on the evidence to make out a case of fraud or theft by Accused 7, which requires her to enter the witness stand, only to possibly incriminate herself.

77. In respect of count 20 and 21, the accused is charged together with Mr Mkhize and Soft Skills of money laundering in the amount of R1 million and a second amount of R 100,000. As set out in relation to other counts of money laundering, any possible success by the state to lay the foundation for a conviction is that the accused must have been aware of the origin of the amounts received by them. If the amount of R1m or R 100,000 does not have its origin in an unlawful activity, and that the accused knew this to be so, there can be no success in a money laundering conviction. The state has failed to show that money was illegitimately

invoiced, was put into a legitimate stream of business by accused 7 or any of those charged with her, in an attempt to "clean" the money. Despite the state leading the evidence of its forensic investigator from UBAC, Mr Govender, who narrated the movement of money in and out of the accounts of the various accused, there was no evidence presented to the court suggesting that accused 7 is guilty of the offences charged.

78. In respect of counts 33, 36, 37 pertaining to money-laundering, for the same reasons as set out above, there is no evidence presented that accused 7 or 8 in any way knew or reasonably may have been expected to have known that these monies flowed from, or had their origins, in unlawful activity.

79. In respect of count 40, it is alleged that accused 7 stole an amount

of R 272,000, being the property of the provincial government. The evidence of the state to sustain this charge is that of Miss Kheswa, an event's organiser who is also a friend of accused 7. She testified that she had been tasked with the organising of the Gala dinner which was scheduled to take place on 11 December 2012. The date subsequently changed to 13 December. Eventually she was informed on 12 December that the event was being cancelled. She recalled also receiving a call from accused 7 to this effect. The witness testified in relation to exhibit fil, being an invoice from her company PMG Events and Promotions dated 1 December 2012, and directed to Soft Skills Communication, her client. The invoice was for the amount of R1 252 921.00.

80. She stated that it was in the industry norm that service providers

had to be paid in advance and in full even if the event was cancelled at the last minute, as in this case. She had however received a refund of R272 000, after she had paid all of the service providers. She was asked to refund this money to accused 7, which she did on 22 December 2012. She also testified to reimbursing an amount of R98,000 which was refunded by the ICC, following the cancellation of the event. This was after there had been a reconciliation of her accounts. Ms Kheswa also testified that her company received two payments of R626 460.75 from Soft Skills in respect of services rendered. This tallies with the amount referred to in counts 36 and 37.

81. In light of the evidence presented by the state, it was submitted by counsel that there is no evidence to suggest money laundering or theft on the part of accused 7 or 8. On the contrary, it was

contended by counsel that if any charge were to be proved, the rightful complainant would be Soft Skills rather than the provincial government.

82. It is submitted that having regard to Lubaxa it would be constitutionally unfair not to grant a discharge to accused 7 and 8 if one considers that if evidence were to remain as it is now after accused 7 has given evidence then, she is entitled to be found not guilty at this stage. It was contended that in opposing the application the State hopes to build its case arising out of accused 7 giving evidence, and any possible concessions.

D. ACCUSED 11, 12 AND 13

83. These accused are charged with money-laundering (counts 14 and 15);

in respect of which they are alleged to have received the amount of R2 650 000,00 from accused 3 in circumstances where they knew or ought reasonably to have known that the money formed part of the proceeds of corruption and fraud. The accused are also charged in counts 26 and 27, with money-laundering in that they knew or ought to reasonably have known that an amount of R200,00 received from accused 3.

84. At the commencement of the trial, the accused 11 & 12 pleaded not guilty to the charges against them and laid bare their defence, allowing the state to call witnesses to rebut their version. In her plea explanation, accused 11 stated that she was the person responsible for the day-to-day operations of the corporate entity,

lshinga Holdings. Accused 12 was a 50% shareholder in the business together with her. It was further set out in the plea that accused

3,10 and 13 had a working relationship prior to November 2012, and worked on various event management projects. Accused 11 in her statement indicated that she was approached by accused 9, on behalf of accused 2, who was looking for someone to carry out the event management for the Durban jazz Festival which was to take place later that year. Accused 11 thereafter discussed a working arrangement with Accused 9, who would be responsible for certain aspects of the marketing and design of the event, with the planning left to Accused

11. Accused 9 indicated that her portion of the work totalled R2,2m to which accused 11 added her contribution. An invoice in the total sum of R2 650 000.00 was submitted to accused 3, which effected payment into the bank account of lshinga Holdings on 30 November

2012. This transaction was confirmed by Mr Govender, who inspected the accounts of the accused. The gala dinner which accused 13 was engaged to stage, was eventually cancelled on 13 December 2012. As work had already been carried out on the event, accused 13 was entitled to the monies paid.

85. In addition, accused 13 was also approached to host an event associated with the North Sea Jazz Festival, to be held on 26 December 2012 at the Hazelmere dam. The event attracted international artists. Accused 13 was paid an amount of R422 000 for services rendered. On 6 December 2012 accused 9, with whom accused 11 had a working relationship, requested a loan of R200 000, and directed her to deposit R150,000 into the account of SUPER-SIZE INVESTMENTS (accused 10). Accused 11 was also requested by accused 9 to pay the balance

of R50 000 into the account of accused 3. According to accused 11, she understood this to be for the repayment of a loan.

86. Accused 11, 12 and 13 deny the charges against them, pointing out

that they admitted to the bank transactions, which were investigated by Mr Govender of UBAC. The amount received into the account from accused 3 was in respect of work and services which they had rendered. Mr Govender conceded that he did not investigate why the amount of R200,000 was paid by accused 13.

87. It was submitted by counsel on behalf of these accused that the state, despite being aware of the full extent of the plea explanation of the accused, failed to call any evidence implicating the accused in benefiting from the proceeds of corruption, or assisting in 'laundering dirty money'. It was submitted that the enquiry at this stage, in light of the section 174 applications, is whether the evidence presented by the state is of such poor quality that no reasonable person could possibly accept it. *S v Mpetha & others* 1983 (4) SA 262 (C). It was correctly submitted that the words 'no evidence' does not mean "no evidence at all" but rather "no evidence on which a reasonable court, acting carefully, might convict. See Lubaxa. Whether or not a discharge should be granted at this stage is a decision that falls in the ambit of the trial court's discretion. This discretionary power is one that must be, self-evidently, judicially exercised. *S v Dewani* 2014 (unreported, WCC case no CC15/2014, 8 December 2014; 2014 JDR 2660 (WCC) at para 8.

88. For the court to reject the application for discharge, it was submitted that the Court would be aiding the state's case to the prejudice of an accused who is presumed to be innocent. It is trite that the accused has no onus to prove his innocence, with the state bearing the onus to prove his guilt beyond reasonable doubt. As with

the other accused, it was submitted by counsel, relying on Lubaxa, that the only possibility which exists for a conviction of the accused is for them to enter the witness box and incriminate themselves. That would be an infringement of the accused's constitutional rights.

E. Accused (14) NTOKOZO NDLOVU & Accused (15) DMD CAPITAL (PTY) LTD

89. The corporate entity, accused 15, was represented at all material

times by accused 14. In May 2013 an amount of R3.3 million was paid into the account of accused 15 by accused 2, Mr Mkhize, who also represents the entity, Soft Skills, who was the recipient of the contract to host the North sea jazz Festival and subsequently paid an amount of R26.8 million by the DEDT. The state charged accused, 14 and 15, together with accused 2 & 3 with the offences of money laundering, alleging that the amount of R3,3m formed the proceeds of fraud and corruption and that the accused knew or ought to have reasonably known that the property was from the proceeds of crime. The only evidence presented by the state was that of the forensic investigator, Mr Govender, who is essentially narrated that after viewing the bank accounts of accused 15, an amount of R3.3 million was deposited into its business bank account. Later, there were payments out of the account bearing references to Forex trading. Nothing more was led in

relation to the transaction.

90. Accused 14, admitted to the transaction, and that the money in question was paid into his bank account by accused 2, Mr Mkhize. There was no evidence to indicate what this payment was for, or on what basis the accused could have reasonably known that it was from the proceeds of unlawful activity. More importantly, Mr Govender

confirmed that having investigated the transaction, he had not interviewed Mr Ndlovu (accused 14) as part of his investigation.

There is no evidence on record, suggesting that the money in question was paid to the accused, 14 and 15 to disguise its true nature or source. On the contrary, the evidence has established that the amount of approximately R26.8 million was paid to Soft Skills, following a Cabinet resolution authorising such payment. None of the three essential elements relating to the offence of money-laundering as defined in the Prevention of Organised Crime Act, 21 of 1998, it was submitted, have been met. POCA criminalises activities which are aimed at concealing the nature, source, location, disposition or movement of the benefits of crime. Generally, a person is convicted of money-laundering if he knows, or ought reasonably to have known that property is, or forms part of, the proceeds of unlawful activities. The critical aspect which the state is required to prove is that the accused knew or ought reasonably to have known that the property concerned constituted the proceeds of unlawful activity. It is trite that there is no basis for an accused to have to assist the state in making out a case against it. There is not a shred of evidence that has been presented, requiring the accused to take to the witness stand. It is for the State to prove each and every element of the offence alleged.

F. Accused 16

91. Accused 16 was charged with the following offences, which flow from a deposit of R300 000 into his account made by Accused 6, MAQHOBOWA TRADERS CC (represented by Ceaser Walter Mkhize (Acc.2) and Zandile Nonjabulo Mbongwe (5). The offences are :

Count 7

- Corruption - contravening section 7(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PRECCA) in that as a member of a legislative authority in December 2012. in his capacity as Member of the Executive Council (MEC) for the Department of Economic Development and Tourism (EDT) and Chairperson of the Major Events Subcommittee (MESAC) accepted a gratification of R300,000.00 from Accused 2, 3, 5 and 6 in order to abuse his position to achieve an unjustified result.

Count 8 - Contravening section 10(a) of PRECCA in that during December 2012, Accused 16 was party to an employment relationship in his capacity as MEC and a member of the MESAC, and received an unauthorised gratification of R300,000.00 from Accused 2, 3, 5 and 6 in respect of performing any act.

Neither of these counts make any reference to the NSJF.

Count 9 - Contravening section 4(1)(a) of PRECCA of corruption by a public officer. In December 2012, Accused 16 in his capacity as MEC and Chairperson of the MESC received an unauthorised gratification from Accused 2, 3, 5 and 6 in order to abuse his position to achieve an unjustified result. In the alternative it is contended that he contravened section 3(a) of PRECCA (general offence of corruption) in that MEC and Chairperson of the MESC received R300,000.00 from Accused 2, 3, 5 and 6 in order to abuse his position to achieve an unjustified result.

Count 12 - Contravening section 4 of the Prevention of Organised Crime Act 121 of 1998 (POCA) of money laundering in that on 30 November 2012 Accused 16 received the sum of R300,000.00 which was or formed part of the proceeds of unlawful activities of fraud and corruption in circumstances where he knew or ought reasonably to have known that this sum was the proceeds of fraud and corruption.

Count 13 - Contravening section 6 of POCA - money laundering. The essence of this charge is that on 30 November 2012 Accused 16 acquired, used or possessed the sum of R300,000.00 which was or formed part of the proceeds of unlawful activities.

92. Accused 16 pleaded not guilty to all charges and submitted a statement in terms of section 115 of the Criminal Procedure Act 51 of 1977 in which he made the following disclosure. He denies in relation to Counts 7, 8 and 9 (the corruption charges) that the amount he

received was unlawful or unauthorised gratification or that it had anything to do with the performance of his official duties, or in any way was a reward. In relation to Counts 12 and 13 (the money laundering charges) he denies that he knew or ought reasonably to have known that the sum of R300,000.00 paid into his bank account under the reference "Ndiyema" was or formed part of the proceeds of unlawful activities. He explained further that he had a substantial income tax debt due to the South African Revenue Services (SARS) in 2012 and received a final demand on 27 January

2012. On 14 November 2012, SARS issued a final notice to Accused 16 to pay his outstanding tax debt of R839 760.09 within two days, failing which it would obtain judgment against him. This notice is annexed to his section 115 statement. A good friend, Mzamo Xaba a successful businessman heard of his predicament and agreed to lend him R300,000.00 which was to be repaid when he was in a financial position to do so.

93. On 1 December 2012 R300 000.00 reflected in Accused 16's personal

bank account with the reference "Ndiyema", which is Accused 16's clan name which was known to Xaba. Accused 16's believed that the money was paid by Xaba, who informed the accused that he had made the payment. On 3 December 2012, Accused 16 transferred R250 000.00 of this money to SARS as part payment toward his tax debt. He repaid Xaba when he was in a position to do so. Xaba passed away in

2018. Accused only discovered after he was charged that the payment originated from Accused 6. He had no idea that Accused 6 received money from Accused 3. He only learnt later, after charges had been laid against him, that Accused 2 owed the late Mr Xaba R300 000, which Mr Xaba then asked that this amount be deposited into the account of Accused 16.
94. Accused 16 was unaware of the payment of R26 886 9L00.00 by DEDT to Soft Skills (Accused 3) on 30 November 2012 in connection with the North Sea Jazz Festival. This much was conceded by the State who stated that Accused 16 only knew of the payment to Soft Skills in February 2013. On that score, Accused 16 (on the State's version) could not have known or reasonably be expected to know that the R300 000 had its origins in the payment of R26,8m paid to Soft Skills.
95. While the Accused's 115 statement does not constitute evidence, the contents should not be ignored altogether. Its relevance lies in that it identifies the essential elements of the offences in the indictment which the State must prove. *S v Mjoli* 1981 (3) SA 1233 (A) 1247H; *S v Sesetse* 1981 (3) SA 353 (A) 373H
96. It was submitted that if the State has not provided any evidence at this stage to gainsay the version in Accused 16's plea, it will be an exercise in futility to place him on his defence to merely repeat this version knowing that there is nothing to the contrary. It was submitted that he cannot be placed on his defence in circumstances where he can only be convicted if he implicates himself or to test his version under cross-examination. He must first have a case to answer and if there is none, he should be acquitted at this stage. It was furthermore pointed out that none of the charges makes reference to the NSJF. It also does not make reference to any corruption by Accused 16 in relation to the NSJF. There is nothing in the summary of substantial facts to cure the defect and there is also no evidence which has been led to cure the defect. On this ground alone it was submitted that Accused 16 should not be put on his defence. Further all of the corruption charges refer to the period December 2012. Accused 16, on the evidence presented by the State had no further involvement in the matter until February 2013 when he came to know that Accused 3 had been paid out R26.8m. More importantly it has not been disclosed what was the essential quid pro quo expected of Accused 16 in exchange for receiving the R300 000. What unlawful act did he perform or authorise? It must be borne that throughout the process of the MESC and Cabinet, Accused 16 acted as part of a collective. At the MESC he could only (together with other political heads) make recommendations. The Committee had no power to make decisions or to authorise budgets or payment to any service provider. None of the state witnesses was able to offer any evidence to implicate accused 16 in any improper conduct either at the subcommittee level, or in the provincial Cabinet in relation to the NSJF. To this extent, the evidence of the state favours the accused, rather than operating against him.
97. Even the former MEC for Finance, Ms Cronje, testified to having a

good relationship with the accused. Even when she initially had misgivings of the activation process and had heard that a contract

had been concluded for the hosting of the concert, when she contacted accused '16, he referred the matter to accused 1, who was in his presence. Moreover, although Ms Cronje testified that she felt awkward at having raised the issue concerning the contract with MPM and soft skills, she had no stage attributed any of this to the approach of accused 16. When the joint memorandum by Mr Magagula and Ms Cronje eventually made its way before the sub-committee, accused 16 directed that copies of the contracts concluded between the Department and service providers, be distributed to all parties. A reflection of the vast number of exhibits handed in during the course of the proceedings indicates that accused 16 had no role with regard to the conclusion of contracts with service providers in relation to the hosting of the North Sea Jazz Festival. This role fell to the accused 1 and the officials in his department. Accused 16 played no role in assessing whether invoices could be paid, and was consequently unaware of when the eventual payout was made to soft skills in the amount of R26.8 million.

98. On that basis it is submitted that accused 16 could not have been expected to associate the payment of R300,000 into his bank account on 30 November 2012 with a payment which had been made in the amount of R26,8m to accused 3. Moreover, the payment into accused 16's bank account was not made by any entity associated with Soft Skills, who were the recipients of the R26,8m. It was instead paid by Maqhoboza Traders CC. There is no evidence whatsoever on record to indicate

that accused 16 knew, or was associated with Maqhoboza Traders CC. Even the cell phone records of Accused 2, 5 and 16 which were

analysed reveal no cell phone communications between them.

99. It was submitted that the allegation that the R300,000.00 was a corrupt payment is placed in severe doubt by Accused 16's response on hearing that R26,886,900.00 was paid to Accused 3. Accused 16 responded by convening a meeting on 19 February 2013 and included Charmane Camille in an attempt to establish whether the NSJF could be rescued. It is common cause that Ms Camille did not attend this meeting. The State witness, Mr Sithembiso Nkatha stated that Accused 16 took the firm view at this meeting that the NSJF should be terminated and the funds recovered. This is conduct inconsistent with the averment that Accused 16 favoured Accused 2 or 3, who were all already in possession of the amount of 26.8 million. Both Mr Magagula and Ms Cronje agreed that the budget of R28 million approved by cabinet included the sum of R969,000.00 which had been paid for the Rotterdam trip, R644,000.00 for Curacao and R26,886,900.00 for the hosting of the NSJF in Durban. Mr Magagula also made the following crucial concession, which was later confirmed by Ms Cronje is decisive:

"Chetty J: Sorry. Do I understand from your answer to the question, is that even if E48, which is the joint venture agreement, had at the time when it was signed not been given the stamp of approval by cabinet then, that subsequent to your report, which you have been questioned on just now, and the post facto approval, that culminated in the approval process on the 10th October? --- That is correct". (Record of Mr Magagula's evidence at page 67, lines 7 to 13.)

This evidence, together with both Mr Magagula and Ms Cronje's evidence under cross examination, is that cabinet approved the payment of R969,000.00 for the Rotterdam trip after the fact and included it in the approved funding of R28 million.

100. It also bears noting that there is nothing in the evidence of the state witnesses that points to accused 16 wanting to avoid dealing with the problems associated with the joint-venture partners wanting to host the North Sea Jazz Festival. On occasion when the former MEC for Finance, Ms Cronje, was not present at a meeting where the project was being discussed, accused 16 ensured that a decision was held over until she was present at the next meeting. When the matter

had to be dealt with again, his conduct was inconsistent with that of someone engaged in corruption, which generally is carried out under a veil of secrecy or clandestinely. When a decision was finally taken to cancel the contract and to demand monies from the service providers, accused 16, was cited as the plaintiff in the civil action instituted for recovery of the amounts paid. It was submitted this behaviour is at odds with someone who has received a gratification of R300 000. Moreover, accused 16's plea explanation is supported by documentary evidence of the demand by SARS, and payment having been made to SARS after the deposit of funds into his bank account. This is consistent with his plea explanation. On this basis it was submitted that there is no evidence on which a reasonable person, acting carefully, could convict, accused 16.

Money-laundering

101. With regard to the money-laundering counts, there are two essential elements that must be proved by the state. The State must prove that the R300,000 was the proceeds of unlawful activities. If it does not, it was submitted the matter cannot proceed further and Accused 16 is entitled to be discharged. The unlawful activities alleged in both money laundering charges are corruption and fraud. If the State succeeds in proving that the sum of R300,000 was the proceeds of unlawful activities, it must then prove that Accused 16 knew or ought reasonably to have known that it is the proceeds of unlawful activities. There is certainly no evidence establishing, even at a prima facie level, that the sum of R300,000 paid into the account of Accused 16, was the proceeds of corruption.
102. In relation to whether or not the State has proved fraud, the payment of R969,000.00 (Count 6) was not induced by fraud as it was approved by Cabinet, free of any misrepresentation. In relation to the sum of R26,8m (Count 5), it was also approved by Cabinet resolution on 10 October 2012. The payment on 28 November 2012 was not induced by fraud in that the

invoice for R26,8m did not contain any misrepresentations. Mr Shezi stated that he and Ms Mapisa signed and approved the invoice on 20 November 2012 because there had been cabinet approval. Mr Frederick Pretorius, the Director of Financial Liabilities at Provincial Treasury testified that the payment of R26,m was presented to him as a normal payment by DEDT and he approved it on that basis. He was not induced by fraud to release that payment. There is no evidence that points -to payments by the Provincial Government to Soft Skills being induced by fraud. It follows that neither the sum of R969,000.00 nor the sum of R26,886,900.00 were the proceeds of fraud or unlawful activities. The State, on the evidence before this court, it was submitted, has not proved an essential element of the charge of money laundering and both charges must accordingly fail. It is submitted that Accused 16 is entitled to be discharged on Counts 12 and 13 on this ground alone.

103. In summary, the state has failed to show that accused 16 was aware that the money paid into his account could be attributed to accused 6, or that the origin of the deposit into his bank account could be traced to payment of R26,8m paid to Soft Skills on 28 November 2012. There is no evidence that Accused 16 was aware that Soft Skills had transferred money to Maqhoboza Traders CC and that Maqhoboza had used those funds to deposit the sum of R300,000 into his account. It was contended that as long as this is accepted, which it must be, there is no room for an inference that Accused 16 ought reasonably to have known that the deposit into his account emanated from Accused 3.
104. Lastly, while the state has led evidence of various witnesses and relied on numerous documentary exhibits, ultimately, the circumstantial evidence which the state relies on does not pass the threshold of a reasonable inference of guilt in respect of Accused
16. It was submitted that there is no room for the drawing of an inference, which can be the only reasonable inference to be drawn from the proven facts, that Accused 16 knew or ought reasonably to have known that the deposit of R300 000.00 into his bank account was the proceeds of unlawful activities.
105. I have already alluded to the principles and case authority in relation to the test in s174 applications. I do not propose repeating those in this conclusion. The question which must be answered at this stage of the proceedings, in the exercise of my judicial discretion, is whether there is "evidence upon which the Accused might reasonably be convicted". S v Lubaxa [11].
106. Kruger Heimstra's Criminal Procedure SI 16 (February 2023) at 22-76 - 22-77 says the following regarding s174 applications:

'In terms of section 174 there is no obligation to discharge, but a competence: the court "may" discharge, not "must". Also, according to the section, no qualifications or criteria are coupled to the exercise of the competence. On general principles the court must

therefore act judicially, with sound judgement in the interests of justice. It is agreed with Nepgen J in *S v Manekwane* 1996 (2) SACR 264 (EC) at 267j that it is wrong to attempt to be prescriptive as to when exactly and under what circumstances this discretion should be exercised in favour of the accused.'

107. In *Director of Public Prosecutions: Limpopo v Molohe and Another* (1109/19) [2020] 2020 (2) SACR 343 (SCA) (18 June 2020) para 31 the court held:

'The threshold requirement for a discharge at the end of the State's case in terms of s 174 is whether there is evidence upon which a court might reasonably convict. If there is no evidence the court is entitled to discharge the accused. The fact that there may be contradictions in the State's case, whether material or not, does not in itself give a judge the competence to discharge the accused.'

108. See also *S v Ebrahim* 2020 ,JDR 2881 (KZD) para 400-404 where the principle was restated that "no evidence" in the section does not mean no evidence at all but rather means no evidence on which a reasonable court, acting carefully, might convict the accused."

S v Doorewaard And Another 2021 (1) SACR 235 (SCA): the court relied on *S v Lubaxa* 2001 (2) SACR 703 (SCA) (see Molemela JA's judgment para 54 & 56; and Ponnann JA's judgment para 109-110)..

109. Lastly *Lubaxa* 2001 (2) SACR 703 (SCA) in para [11] says the following:

'[11] If, in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward - the accused may not be discharged and the trial must continue to its end. It is when the trial court is of the opinion that there is no evidence upon which the accused might reasonably be convicted that the difficulty arises. The section purports then to give the trial court a discretion - it may return a verdict of not guilty and discharge the accused there and then; or it may refuse to discharge the accused thereby placing him on his defence.

[12] The manner in which that discretion is to be exercised has always been controversial.

[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness box and incriminates himself. The failure to discharge an accused in those circumstances, if necessary *mero motu*, is in my view a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self- incriminatory evidence.

110. In the final result, that state has not lived up to the promise set out in its opening address and in the indictment. The state's case was plagued by the absence to call several key witnesses, in particular Ms Camille and Mr Luyken, who I understood to be based in the Netherlands. When this matter commenced, almost 2 years ago in the midst of the Covid pandemic, the Court was advised that steps would be taken to ensure that these witnesses

would testify. It was intimated that they would do so by video link due to the dangers of travelling abroad. That obstacle was removed with the reinstatement of international travel. The Court was made aware of no other reason why the witnesses were not available. Of the witnesses who were

available, their evidence with respect was limited to a rudimentary narration of documents. The so-called forensic investigators whose evidence the State sought to rely on were not qualified as such and therefor not much weight could be placed on their evidence. The State's case was hamstrung after numerous objections were raised, validly, to forensic reports and documents, the authenticity of which could not be proved. These are matters which the State, when embarking on a prosecution of this nature, was required to give careful consideration. The State must be diligent in its preparation, and remain so throughout the prosecution. The leading of evidence of financial transactions is critical to the outcome of cases of corruption and money laundering. The State is obliged to 'join the dots'. It is not for the Court to do so, or to speculate. The State has to do more than take the Court on a journey to "show it the path of the money". As the court in *Scholtz and others v S* (2018] 4 All SA 14 (SCA) pointed out:

[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."

111. In the final analysis, to require the any of the accused to be placed on their defence, in light of the evidence presented by the State, would be committing them to infringe their constitutional right to be presumed innocent. It is not in the interest of justice that they be obliged to be put on their defence when the State has presented no case for them to answer. The only hope that a conviction could result, on the evidence presented by the State in this matter, is for the accused to take to the witness stand and incriminate themselves. That is not in accordance with the proper administration of justice.

112. In the circumstances I make the following order:

1. The applications on behalf of all of the accused in terms of section 174 of the Criminal Procedure Act is granted.
2. All of the accused are found not guilty on all of the charges and discharged.

M R CHETTY

[1] Guideline on Fruitless and Wasteful Expenditure: Office of the Accountant-General; May 2014

[2] Pg.92 of Annual Report 20 I 2/13

[3] Exhibit E52

[4] *S v Gardener* 2011 (1) SA 570 (SCA) at para 29

- [5] Snyman Criminal Law 6 ed (2014) at 531
 - [6] See: Burchell Principles of Criminal Law 5 ed at 753
 - [7] See Beckenstrater v Rottcher and Theunissen 1955 (1) SA 129 (A)
 - [8] S v Lubaxa 2001 (2) SACR 703 (SCA)
 - [9] Lubaxa, *supra*, at page 707, para 19
 - [10] s V Molimi 2008 (2) SACR 76 (CC)
 - [11] S v Doorewaard and Another 2021 (1) SACR 235 (SCA)
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