

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, BHISHO)

In the matter between:

Case No: CC 7/2009

THE STATE

And

BONGILE SAMUEL NKOLA	Accused No 1
SCHOOL FUNRITURE & TIMBER PRODUCTS (PTY) LTD	Accused No 2
FMMC HOLDINGS (PTY) LTD	Accused No 3
SETH OWUSU	Accused No 4
ZISANI NOTSHAYE	Accused No 5
MPANGWA ZANELE MCALENI	Accused No 6

Coram: **Chetty, J**

Date Heard: **3 – 5 May 2011; 1 – 4 August 2011; 8 August 2011;
10 – 11 August 2011; 24 – 27 January 2012; 30
January 2012 – 3 February 2012; 8 – 10 February
2012; 13 February 2012; 23 February 2012**

Date Delivered: **13 June 2012**

Summary: ***Criminal Law – Fraud – Misrepresentation constituted by
statements of fact embodied in tax invoices – State adducing no***

*evidence that accused completed supporting documentation –
Participation by accused not proved – Intent to defraud not
established*

JUDGMENT

Chetty, J

[1] The accused were initially indicted during February 2005 under case no 36/2005 together with two other persons on one hundred and nineteen (119) counts of fraud and money laundering in contravention of section 4(b)(ii)(bb) read with sections 1(2), 1(3) and 8 of the **Prevention of Organised Crime Act**¹. Their erstwhile co-accused fell by the wayside and in terms of a new indictment served on them four (4) years later under case no CC7/2009, the remaining accused –

- (a) Accused no 1, *Bongile Samuel Nkola*, the sole director, owner and shareholder of accused no's 2 and 3, in his personal capacity;
- (b) Accused no 2, School Furniture and Timber Products (Pty) Ltd, a corporate body within the meaning of section 332 of the **Criminal Procedure Act**² (the Act), represented by accused no 1;

¹ Act No, 121 of 1998

² Act No, 51 of 1977

- (c) Accused no 3, FMMC Holdings (Pty) Ltd, a corporate body within the meaning of section 332 of the Act, represented by accused no 1;
- (d) Accused no 4, Mr *Seth Owusu*, the financial manager of accused no's 2 and 3, in his personal capacity;
- (e) Accused no 5, Ms *Zisani Notshaye*, a dispatch clerk in the employ of accused no 2, in her personal capacity; and
- (f) Accused no 6, Ms *Mapangwa Zanele Mcaleni*, a dispatch clerk in the employ of accused no 3, in her personal capacity

now stand arraigned before me on forty-eight (48) counts of fraud.

[2] Section 332 of the Act governs the prosecution of corporate bodies and provides in subsection (1) as follows –

“(1) For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law –

- (a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
- (b) the omission, with or without a particular intent, of any act which ought to have been but was not

performed by or on instructions given by a director or servant of that corporate body,

in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body.” (the underlining is mine)

[3] The criminal prosecution has its genesis in a tender awarded to accused no's 1, 2 and 3 by the Eastern Cape Department of Education (the department) to supply certain schools in the Eastern Cape with school furniture. The gravamen of the charges is rather inelegantly formulated as follows –

“15. The accused submitted invoice (*sic*) and/or claim documentation to the Department as payment for their deliveries. The Department only effected payment for delivered furniture once the furniture had indeed been delivered at the respective schools and only when somebody representing the school had signed as proof that the amount and good quality furniture had been delivered /received.

16. The said signatures (as proof of delivered / received goods) appeared on two separate documents, namely on so-called “delivery notes” and/or “goods receipt vouchers”. These said documents accompanied amongst other documentation, the invoice, and/or claim documentation when the

accused submitted them to the Department for payment. The Department also duly paid the accused the money it owed as per the amounts as claimed according to the invoice and/or claim documentation.

17. The accused however, before invoicing the Department, made alterations on the said “delivery notes” and “goods receipt vouchers”. The effect of these alterations was that the said “delivery notes” and “goods receipt vouchers” suddenly reflected that higher amounts of furniture were delivered at the time when the accused submitted their invoices to the Department for payment.
18. The Department therefore made payments to the accused on the strength of false invoices and/or claim documentation, which said documentation reflected payments for furniture that had in fact not been delivered at the time the Department had received the invoice and/or claim documentation.”

The indictment furthermore notified the accused of the applicability of subsections (2), (3), (4), (6), (10) and (11) of section 332 of the Act.

[4] At the onset of the trial the accused, who were then represented by Mr *Ford* and Mr *Taljaard*, pleaded not guilty to the charges and in a written plea explanation alleged, *inter alia* –

- “(1) That certain alterations were from time to time

made to certain delivery notes and goods receipt vouchers . . . but that such alterations were made in good faith by those making them and were intended to correct errors and omissions and were not made for the purpose contended for in the indictment.

(2) Their right to a fair trial had been severely compromised by the conduct of the Directorate of Special Operations (the Scorpions)”

[5] Admissions made pursuant to the provisions of section 220 of the Act were to the following effect –

“ The Department notified accused no’s 2 and 3 in writing of the quantity of furniture to be delivered at each particular school,
After being awarded the tender and having been notified in writing, accused no’s 2 and 3 delivered quantities of furniture to the schools identified,
The “Goods receipt voucher” forms are copied forms supplied by the Department and the “Delivery note” forms are forms supplied by accused no’s 2 and 3,
The Department duly paid accused no’s 2 and 3 the amounts set out in column G of Annexure A to the indictment as payment in respect of the invoices referred to

in column F of annexure A to the indictment”

Annexure A is a schematic diagram of the various components of the individual charges which is self-explanatory and, by way of example, appears thus –

ANNEXURE AVAILABLE ON PDF

[6] After various preliminary skirmishes between the state and the defence, which, for reasons that will become clear in due course, and hence require no elucidation, the trial finally got under way several months later with Mr *Nelson* now lead counsel for the accused. In the interim, accused no 2 had been liquidated and the prosecution against it stopped pursuant to the provisions of section 6(b) of the Act. During the presentation of the state case, Mr *Cilliers* informed me that he would lead no evidence on counts 1, 2, 14, 15, 23, 26, 27, 30, 32, 42, 44, 45, 46 and 48, expressly abandoned those counts and in argument conceded that the accused were entitled to an acquittal thereanent. In respect of the remaining thirty-four (34) counts, he however submitted that the state had discharged the onus resting upon it.

[7] The contention that the guilt of the accused had been established beyond a reasonable doubt was assailed on three separate and distinct bases. Firstly, given the fact that the state’s case was based entirely upon circumstantial evidence, the inference sought to be drawn was not only the only reasonable one

but was moreover not consistent with the proven facts; secondly, the evidence upon which the state relied for seeking a conviction was unlawfully obtained and on that ground alone warranted the accuseds' acquittal and, thirdly, the evidence adduced from the state witnesses was of such a poor quality that it warranted rejection. As far as the second ground of attack is concerned, I am unpersuaded that the evidence to which objection was taken was in any way either unlawfully obtained or acquired in violation of any right in the Bill of Rights. The remaining grounds however merit serious consideration.

[8] The state's case against the accused rests primarily on the testimony of a number of witnesses in the employ of the department i.e. headmasters, headmistresses, their deputies, heads of departments, educators, officials, administrative staff and security staff, governing body members and officialdom of the department. Each of these witnesses was called to testify to events which occurred in 2002/2003, in most cases, more than a decade ago. It is not in issue that whilst some of these witnesses were interviewed and statements minuted from them during that period, other witnesses were interviewed and their statements minuted shortly before they testified. Notwithstanding the effluxion of time, all these witnesses, without exception, steadfastly maintained that they could recall the minutiae of the deliveries to their respective schools. Common sense dictates otherwise. It is not in dispute that the first inkling they had that anything was remiss was when they were interviewed by the Scorpions about short deliveries. Those interviews were conducted in the main during 2002 and

2003 and during the trial during 2011 and 2012.

[9] It is furthermore not in issue that deliveries were made to the various schools in the Province at divers times whether during school hours or not, over weekends and during school vacations. In several instances furniture was received by governing body members and on occasion by district officials. Furniture destined for a particular school was moreover directed to another school and, in the overwhelming majority of cases, notwithstanding official policy, no asset registers were either kept or conscientiously maintained. In short, a complete aberration of the principals' and designated teachers' duty to maintain a register of assets. Photographs of certain schools and classrooms moreover attest to a complete lack of care for school furniture and other teaching accoutrements. These witnesses either feigned ignorance of the true state of affairs existing at their respective schools or remained steadfast that only certain limited amounts of furniture was delivered, which they contended factually found corroboration in the GRVs and delivery notes. But, as I shall in due course advert to, these documents do not by themselves warrant the conclusion that a fraud was perpetrated on the department. As the trial progressed a number of unsatisfactory features which are dealt with seriatim hereafter emerged which collectively, deleteriously affect the cogency of the argument advanced by Mr *Cilliers*.

The Verification/Audit Exercise

[10] Notwithstanding the adduction of evidence from several witnesses, the first and only inkling that a verification/audit exercise had been conducted into the delivery of the furniture emerged during the cross-examination of Mr *Dumisani Vincent Madlala (Madlala)*, a head of department at the Mabandla Senior Secondary school in Mzimkhulu. He was called in regard to count 39 and testified that on some unspecified date, ten (10) desks were delivered to the school and on another occasion nine (9) teachers tables. During cross-examination he was referred to a statement minuted from him on 3 August 2011 and in particular to a passage where he referred to a logbook. I interpolate to say that the extract from the logbook was annexed to his police statement and makes no reference to nine (9) tables. He was asked to proffer an explanation regarding the fourth (4th) entry on the second page next to the date, 5 November 2003, where the reason for the visit of one *L. Kasper* was recorded as “verification of furniture”. *Madlala*, save for stating that members of the Scorpions visited the school to investigate the delivery of furniture, proffered to have no knowledge of any visit by one *L. Kasper* who, according to the entry on 5 November 2003 visited the school for “verification of furniture”. His vague recollection was that *Kasper* had in fact met with the school principal, one Mr *Tshabalala*, since deceased.

[11] None of the witnesses who testified after *Madlala* adverted to any such departmental audit at their schools. The fact of the matter is that such an audit was in fact conducted. During the concluding stages of the trial, Mr *Cilliers* called

Mr *Nkosikaya Tshotsho (Tshotsho)*, the department's assistant director of asset management. His testimony directly contradicts virtually the entire body of evidence tendered hitherto that short deliveries had been made. *Tshotsho* testified about a departmental meeting attended by members of the South African Police Services where an instruction was issued to his unit to conduct an audit into the delivery of furniture to the respective schools. The outcome of this exercise he recounted in chief was "what I know is that after the meeting the furniture was checked". Under cross-examination the witness was referred to exhibit 9.11 a document styled "Department of Education, Internal Audit, Document name: Check list", and confirmed that the names were those of officials in the department who in fact visited his school and conducted an audit. The import of his evidence was clear. Had there been any disparity between the furniture ultimately delivered and payment received, he would have adverted thereto.

[12] Allied to this hitherto undisclosed revelation is the further factor that in each of the counts preferred against and persisted with against the accused, officials in the employ of the department certified that the furniture had in fact been delivered. When the trial proper commenced Mr *Cilliers* handed in a batch of documents, exhibit C, as an example of documents to which reference would be made in each of the counts. One of these documents headed "Payment Transaction - Form Code 1450" contains two (2) affirmations, the first relating to receipt, the second to payment. The former reads –

"I certify that the above order has been executed satisfactorily and the goods have been received in good order and to

specification and that all records have been up-dated. Disallowances Advice No applies to short deliveries and returns”

The latter -

“I certify that this order satisfies the requirements as to charges, in accordance with the contract/agreement tariff that the said charges are fair and reasonable, that the payee is entitled to this payment. That the necessary invoices or other payment documents are attached, that the disallowances have been made and that payment is authorised.”

In argument before me, Mr *Cilliers* submitted that properly interpreted, the certification merely recorded that *ex facie* the GRVs and delivery notes, the orders placed had been successfully executed. That may be so but it is a factor which must be considered in conjunction with all the other evidence.

[13] The exact same forms constituted part of the documentation relevant to each individual count and it is common cause that its completion and signature was a prerequisite to payment being effected to accused no's 2 and 3 by the Treasury. The evidence adduced on behalf of the state by the entire body of educators is completely at variance, not only with the affirmations contained on the aforementioned document, but moreover with the evidence of *Tshotsho*. There is no explanation for this anomaly. It is as a result of this conflict in the evidence presented that Mr *Nelson* submitted that on the state case itself no under deliveries had been proven and that the accused were on this ground

alone entitled to an acquittal. The fact that deliveries may well have followed on the submission of the tax invoices to the department does not inure to the benefit of the accused.

[14] It is not in issue that in several instances short deliveries were in fact made to individual schools. Corrective measures introduced subsequently cannot alter this fact. Various witnesses testified that although the delivery notes reflected the delivery of a particular consignment of furniture, those occurred over a period of time and not necessarily when the first delivery was made. However upon a holistic appraisal of the evidence the inference cannot properly be drawn that it, *per se*, constitutes fraud.

[15] It will be gleaned from the foregoing that the misrepresentation relied upon is the submission of altered goods receipt vouchers (GRVs) and/or delivery notes in substantiation of tax invoices submitted to the department whereby payment for the goods reflected thereon was claimed. cursory examination of the GRVs and delivery notes reveal that, at face value, alterations were indeed effected. Mr *Nelson* readily conceded that these were done but emphasized that it was *bona fide* and gleaned from information extrapolated from waybills which accompanied each delivery. The waybills, he submitted, proved that notwithstanding the information contained in the GRVs and delivery notes, all the furniture for which payment was claimed, was in fact delivered to the respective schools. The existence of waybills featured prominently in the prosecution. It first

surfaced in an opposed application in the Bhisho High Court for an order directing the National Director of Public Prosecutions to restore waybills seized from the premises of the second and third accused pursuant to a search warrant, issued on 2 July 2003 in terms of the provisions of section 29(5) of the **National Prosecuting Authority Act**³. In dismissing the application⁴ the learned judge added the caveat –

“. . . the conclusion to which I have come is not that it has been established that waybills were not amongst the documents seized. The effect thereof is only that the applicants have not succeeded in establishing on a balance of probabilities, on the evidence placed before me, that this occurred.”

It is common cause that certain waybills to which reference will be made hereinafter were in fact returned to the accused by the Scorpions. But, as counsel repeatedly emphasized, these constituted a fraction of what the Scorpions seized from the accuseds' premises. It is however unnecessary for purposes of this judgment to decide this question because in the final analysis, nothing turns on this.

[16] The record of those proceedings was introduced into the trial as exhibit H by the state in terms of the provisions of section 235 of the Act immediately prior

³ Act No, 32 of 1998

⁴ An appeal to the Full Court was dismissed.

to Mr *Cilliers* tendering the evidence of Mr *Sonwabiso Mboniswa (Mboniswa)*, at the time, one of the Scorpions' special investigators. The record was handed in, counsel for the state informed me, to be used, *inter alia*, to cross-examine the accused when they testified and *Mboniswa* was referred in chief to various annexures to affidavits and in particular to his evidence in the proceedings concerning the waybills. *Mboniswa* was a thoroughly unreliable witness upon whose evidence I can place no reliance whatsoever. Although the record does not constitute *prima facie* proof of any fact therein contained, I cannot ignore the fact that the accused's defence to the charges was inextricably linked to the existence of waybills, a fact confirmed by *Mboniswa*.

[17] The danger of inferring fraud merely from the apparent alteration of the GRVs and delivery notes is accentuated by the following examples –

Counts whence waybills feature

Count 48

[18] Immediately prior to the adduction of evidence in respect of count 40 Mr *Nelson* informed me that Mr *Cilliers* had indicated that he no longer intended to adduce any evidence on count 48. He nonetheless, as part of his armoury for cross-examination, handed up a batch of documents pertaining to count 48 including waybills which conclusively established that notwithstanding the content of a statement minuted from the head of department Mrs *Mandisa Muriel Mballo (Mballo)*, the GRV and the delivery note upon which the state premised its case

that the accused had misrepresented that it had supplied “ten (10) teacher chairs, eight (8) teacher desks, seventy-two (72) medium chairs and twenty (20) lab tables”, the tax invoice submitted to the department correctly reflected the quantity of furniture delivered to the respective school.

Count 45

[19] When the matter resumed on 24 January 2012 Mr *Nelson*, in a pattern which would unfold many times, expressed his extreme displeasure at a sudden change to the order of witnesses of which they had been precognised. Anticipating evidence to be adduced in respect of count 45, a different count was now to be commenced with *viz* count 8. Nonetheless and as part of his address he handed in a batch of documents “F45”. The indictment alleged that the fraud consisted in the unlawful claim involving nine (9) A-2 dual desks, twenty (20) utility cupboards and eight (8) teacher cupboards. Counsel for the state in turn informed me that he was no longer proceeding with counts 1, 32, 44, 45 and 46 and had reservations whether or not to proceed with counts 28, 30 and 48.

Count 41

[20] The fraud alleged related to the claim for payment for delivery of sixty (60) A-2 dual desks, twenty (20) 3-5 dual desks and five (5) chalkboards. During their examination in chief the witnesses called by the state *viz* Mrs *Monica Nontobeko*

Dzingwa (Dzingwa), the principal and her deputy *Mr Joseph Mzwandile Hloaisi (Hloaisi)*, remained steadfast that only four (4) easels, twenty (20) utility chairs, two (2) teacher cupboards and twenty-seven (27) desks had been delivered to the school. When the waybill was presented to her during cross-examination she was reluctantly constrained to agree that other deliveries in fact occurred. So too, *Hloaisi*.

Count 37

[21] The misrepresentation relied upon relates to a tax invoice submitted to the department for payment in respect of ninety (90) 3-5 dual desks, one hundred (100) A-2 dual desks, seventy (70) 6-8 dual desks, ten (10) chalkboards and fifteen (15) easels. It is not in issue that on 18 June 2003 the third accused delivered one hundred and seventy (170) combination desks, fifteen (15) chalkboards and six (6) easels to the school. In the course of her cross-examination *Ms Beauty Noncedo Magadule (Magadule)*, the educator who appended her signature to the GRV and delivery note was shown an unrelated waybill and asked whether she had seen a similar document previously. She replied in the negative. When exhibits 37.13 and 37.14 were shown to her she admitted that the signature appended thereon was hers. When the follow-up question was put concerning the waybill, she retracted her answer and denied that the signature was hers. It is obvious that she lied. The waybill established that the full complement of furniture was in fact delivered to the school. The fact

that some of the items were delivered on a date later than that reflected on the GRV and delivery note does not warrant an inference, as the only reasonable one, of an intent to defraud.

Count 36

[22] Count 36 involves the unlawful claim of a host of furniture and paraphernalia. During the cross-examination of the principal, Mrs *Memorial Balungile Koba (Koba)*, a waybill reflecting the delivery of thirty (30) infant chairs and fifty (50) combination desks was shown to her. She acknowledged that the signature on the waybill was that of an educator at the school but proffered to have no knowledge of such a delivery. What adds to the confusion is her admission that the thirty (30) infant chairs reflected on a schedule prepared by the Scorpions and which she signed also appeared on the waybill. The contemporaneous statement which she made to the Scorpions omits any reference to either the thirty (30) infant chairs or the fifty (50) combination desks reflected on the waybill. Mrs *Koba* was moreover a most unreliable witness and the very real possibility exists that there may well have been further deliveries.

Count 35

[23] Count 35 involves the unlawful claim of fifty (50) 3-5 dual desks, one hundred (100) A-2 dual desks, eighteen (18) teacher cupboards, eight (8) green

boards and fourteen (14) easels. It is common cause that only the thirty-four (34) 6-8 dual desks and one (1) teacher table was delivered on 17 February 2003 as per the delivery note kept by the principal, Mr *Gcobani Mgubuli (Mgubuli)*. The submission of the same delivery note (no 5428) reflecting additional items than the original retained by Mr *Mgubuli* immediately raises one's suspicion but the subsequent delivery of additional furniture as per the waybills, albeit several months after the submission of the tax invoice to the department negates any suggestion of fraud. Although the submission of the tax invoice reflecting all the desks and paraphernalia and inviting payment was premature, an intention to defraud is not the only reasonable inference to draw given the *modus operandi* of the companies and the subsequent admission by the accused that there may well have been under deliveries.

Count 29

[24] Count 29 concerns the unlawful claim of two hundred and seventy (270) 9-10 dual desks, nine (9) teacher cupboards and fifty (50) lab stools as per the tax invoice submitted to the department during September 2002. The GRV and delivery note upon which the misrepresentation was based reflected that three hundred (300) dual desks, ten (10) teacher cupboards and eighty (80) lab stools had been delivered on 17 September 2002. During the examination in chief and the initial cross-examination of the principal, Mrs *Mpondokazi Maureen Luhabe (Luhabe)*, she remained quite adamant that only thirty (30) combined desks and

one (1) teacher cupboard had been delivered to her school. In response to a question posed by me, she recalled that subsequent deliveries were made during 2005. Mr *Cilliers* then referred her to delivery notes dated 2004/2005 which reflected the delivery of desks and tables to the school. These delivery notes she ventured she obtained from the school principal and secretary long after she had retired and in response to the subpoena served on her. Under cross-examination she was asked if she recalled a person by the name of Mr *Ngozo* at the school. She replied in the affirmative. A blank waybill was presented to her and she was asked whether she could recall having seen a similar document to which she responded in the negative. She was then referred to a waybill exhibit 29.13 which reflected a delivery of ninety (90) desks and a signature by *Ngozo* and a waybill reflecting the delivery of one hundred and eighty (180) desks signed for by herself. The production of these documents prompted her to say that these deliveries were in fact those made during 2005. Her evidence hereanent is clearly a reconstruction and totally unreliable. The desks reflected on invoice no's 210433 and 210191 totalled three hundred and three (303). Simple arithmetical calculation shows that the desks per the waybills precisely matched the number of desks on the tax invoice.

Count 28

[25] Count 28 concerns the unlawful claim relating to the deliveries to the Mbondoleni J.S School, the allegation being that whilst the delivery note and

GRV signed for by the chairperson, Mr *Albert Mbulelo Mdutyana (Mdutyana)*, only reflected the delivery of twenty-two (22) desks it was forged to reflect additional furniture and paraphernalia. The tax invoice forwarded to the department mirrored the quantity *qua* the forged GRV and delivery note and constituted the misrepresentation relied upon. A strange feature of this count is that none of the witnesses including the principal, Mrs *Peters*, nor *Florence Muriel Nontutuzelo Mdingi (Mdingi)*, who admitted her signature on the letter recording the delivery of forty-two (42) desks and six (6) chalkboards bore any knowledge of such a delivery having been made. What adds to the mystery is that a waybill (exhibit 28.14) reflects the identical items.

Count 24

[26] Count 24 involves the Lower Seplan Secondary School in Lady Frere and relates to the submission of a fraudulent tax invoice reflecting that the school received three hundred and fifty (350) desks; twenty (20) teacher cupboards and seventy (70) lab stools whereas the only furniture received by the now deceased Mr *Dyasi* was that reflected on a GRV no 25268 retained at the school. The tax invoice bears the Provincial Treasury's stamp and is dated 13 December 2002. During his evidence in chief the school principal, Mr *Luvuyo Justice Madikwa (Madikwa)*, referred to the GRV emanating from the second accused and testified

that *Dyasi* showed him the fifty (50) desks and fifty (50) chairs which had been delivered. When the third accused's delivery note was shown to him he initially confirmed that twenty (20) teacher desks were delivered but corrected his evidence by stating that in fact these were chairs and not desks. I interpolate to state that the GRV refers only to fifty (50) desks. He furthermore adverted to further desks delivered to the school during 2004. In cross-examination he stated that one hundred (100) were delivered. Under further cross-examination he proffered to have no knowledge of one hundred and thirty (130) desks being received by one *Zuziwe Magwaca (Magwaca)* as per a waybill addressed to his school but confirmed that *Magwaca* was a teacher at the school. When the latter testified she denied all knowledge of having received the delivery of one hundred and thirty (130) desks reflected on the waybill bearing her name. During *Madikwa's* cross-examination, an entry in a hardcover book, which the witness had brought with him was referred to which recorded that on 12 November 2003 certain officials *to wit, Soka, Sokanyile and Ndzani* had visited the school. The book furthermore recorded that a certain Mr *Myotelwa* visited the school on 2 December 2002 and delivered desks and chairs. Under the rubric "remarks" in the fourth column on page five (5) of the book corresponding to the visit by the aforementioned official the words "in order" appear. The only reasonable inference is that the officials must have been satisfied that the furniture and paraphernalia had been delivered in accordance with the tax invoice.

Count 21

[27] Count 21 concerns the unlawful claim for sixty (60) 3-5 dual desks, seventy (70) A-2 dual desks and fifteen (15) teacher cupboards to the Masonwabe Senior Primary school in Engcobo. The state case is premised upon the allegation that whilst only thirty (30) 6-8 dual desks was delivered the accused submitted a tax invoice claiming payment for all the aforesaid furniture. As a precursor to the adduction of evidence relative hereto, Mr *Cilliers* informed me that one of the witnesses he intended to call had shown him a copy of a school register which he intended to refer the witness, the school principal, *Nolethu Nobusiwe Jezile (Jezile)* to. An extract from the register, exhibit 21.14 was handed in during the course of her testimony reflecting that the only furniture received at the school during 2003 was thirty (30) 6-8 dual desks. The first witness called on this count, Mrs *Elizabeth Kulukazi Dolopini (Dolopini)*, recounted that when she signed the GRV and the delivery note, the only entry related to the thirty (30) 6-8 desks. *Jezile's* evidence echoed that of *Dolopini*. During cross-examination she was referred to the paragraph of her police statement and confirmed that this was the only furniture received by the school. To corroborate her evidence she referred to the entry in the school register. Further cross-examination revealed not only the complete inaccuracy of the register but moreover the unreliability of her earlier testimony. When the waybill, exhibit 21.11 was shown to her by Mr *Cilliers*, she identified both her signature and the school stamp appended thereon and suddenly remembered that prior to the delivery of the thirty (30) desks, one hundred and twenty (120) desks had

been delivered to the school. It is common cause that the school register contains no record of this delivery. The very real possibility exists that the fifteen (15) teacher cupboards could also have been delivered given the fact that the one waybill discovered established not only that the one hundred and twenty (120) desks had in fact been delivered but also the unreliability of both *Dolopini* and *Jezile*.

Count 20

[28] Count 20 involves the claim for payment of one hundred (100) 3-5 dual desks, one hundred (100) 6-8 dual desks and twenty-four (24) teacher cupboards. The state contends that although only eighty (80) dual desks were delivered, the accused submitted a tax invoice to and received payment for the entire complement of furniture referred to above. Mrs *Beauty Yako (Yako)*, a head of department at the Vulinkundla J.S. School, testified that the delivery note signed by her and photocopied for record purposes recorded the delivery of only eighty (80) dual desks and surmised that the additional furniture reflected on the GRV and delivery note forwarded to the department with the tax invoice had been entered thereon at a subsequent stage. When her statement was put to her wherein she stated that an additional fifty-nine (59) desks had been delivered to her school she suddenly recalled the delivery but added that this occurred during the school vacation. During cross-examination a waybill recording the delivery of an additional eighty-two (82) desks as a first load was shown to her for comment.

She however decried all knowledge of any such delivery. The school principal, Ms *Dambisa Sheila Mbambani (Mbambani)* admitted under cross-examination that her signature and school stamp were appended to the waybill but could furnish no explanation for this. It is common cause that her police statement was only minuted shortly before she testified when more than ten (10) years had elapsed since the delivery. Mrs *Yako* was moreover constrained to admit that at some stage, fourteen (14) teacher tables were delivered to the school although she made no mention of this in her police statement. It emerged under cross-examination that save for ten (10) teacher tables, arithmetic calculations established that two hundred and eighty (280) desks had been delivered to the school.

Count 17

[29] Count 17 concerns the alleged forgery of delivery note no 5290 to reflect more furniture than actually delivered. It is not in issue that the items reflected both on the delivery note and GRV and mirrored on the tax invoice submitted to the department matched the items listed on the department's internal requisition form. The witnesses who testified on this count, Mrs *Boniswa Hongo (Hongo)* and Mrs *Dideka Sithole (Sithole)*, both educators at the Nkwenkwezi Senior Primary School in Mthatha, both confirmed that a person by the name of *Portia Nozambo* was an educator at the school. When the waybill, exhibit 17.11 was

shown to Mrs *Hongo* she admitted that the name *P.B Nzambo* was the person she had referred to but bore no knowledge of such a delivery. So too, Mrs *Sithole*. The latter only made a statement to the police approximately ten (10) years after the delivery and although she steadfastly claimed to bear no knowledge of any other deliveries, was constrained to concede that according to the waybill Mrs *Nozambo* had signed for the additional one hundred (100) desks. The waybill establishes the unreliability of their earlier testimony and the very real possibility exists that the additional items reflected on the tax invoice could also have been delivered.

Count 16

[30] Count 16 involves the alleged fraudulent claim submitted to the department by the second accused for payment of one hundred (100) 6-8 dual desks and ten (10) teacher cupboards not delivered to the Ross Junior Secondary School at Ross Mission, Mthatha. It is common cause that a delivery note from the second accused recording the delivery of one hundred (100) dual desks was handed to Ms *Sindiswa Iris Dorothy Nobuntu Nonabe (Nonabe)*, a head of department at the school on 6 December 2002. Both she and the school principal, Mr *Themba George Richman Mtakati (Mtakati)* who testified on this count bore no knowledge of any other furniture having been delivered to the school. When a waybill, exhibit 16.16 recording the delivery of seventy-five (75) desks was shown to them under cross-examination both denied any knowledge

thereof. Mtakati however acknowledged that the recipient, *ex facie* the waybill, one *Maku*, was an educator at an adjacent school, Maxhela.

Counts 12 and 13

[31] Counts 12 and 13 concern the Vuselela Combined School, the former count, the submission of fraudulent tax invoices by the second accused and the latter, the submission of similar invoices by the third accused. It is common cause that on 3 December 2002, the second accused's driver handed a copy of a delivery note no 5275 to the deputy principal, Mr *Siseko Thompson Simani* (*Simani*). It is furthermore common cause that the additional items appearing on exhibit 12.3, the same invoice no 5275 do not appear on the one handed to *Simani*. During cross-examination he was referred to three waybills recording the delivery of three hundred and fifty three (353) desks and ten (10) teacher tables to the school. He identified the two signatures on the first, exhibit 12.3 as that of the principal, Mr *Tukwayo* and an educator respectively, and on the second and third as that of another educator, Mr *Kitshane* and was constrained to concede that an additional three hundred and fifty three (353) desks and ten (10) tables had been delivered to the school and corresponded with the number of items on the tax invoice.

Count 10

[32] Count 10 involves the Nompumelelo Senior Secondary School in Queenstown and a fraudulent claim for payment of four hundred and fourteen (414) dual desks, seventy-six (76) 6-8 dual desks, sixteen (16) needlework cupboards and seventy five (75) lab stools not delivered. The only witness called by the state on this court, an educator. Mr *Sandile Dyanti (Dyanti)* testified that the only furniture for which he signed was forty-six (46) desks and thirty-two (32) utility chairs. It is quite clear that the additional items reflected on the GRV and delivery notes were appended at a later stage. The witness was however constrained to concede that the additional items recorded on the waybill, exhibit 10.11 could have been received by the educator, *G.A. Ramabuda* whose name appeared thereon.

Count 9

[33] Count 9 concerns the alleged unlawful claim for payment of twenty (20) TR desks, ten (10) science tables, thirty (30) TR chairs and sixty (60) lab tables from the department. This count is premised on the alleged forgery of the GRV and delivery notes by the insertion of additional items than actually delivered to the school on 7 March 2003. Both witnesses who testified on behalf of the state, *Ms Balelwa Kuse* and *Mr Mbangi Patson Baliso (Baliso)*, an educator and principal respectively of the Mtebele Junior School in Queenstown were *ad idem* that only four (4) teacher tables were delivered to the school. During his evidence

in chief *Baliso* acknowledged that the school in fact also received twenty-seven (27) teacher chairs at some unspecified time after the initial delivery. During cross-examination *Baliso* was referred to a statement which he had made to the Scorpions on 11 November 2003 and acknowledged having informed them that during March 2003, four (4) tables, one hundred and sixty (160) dual desks and twenty-seven (27) teacher tables had been delivered to the school, he furthermore acknowledged that the signatures on the waybill recording the delivery of sixty (60) lab tables and twenty-seven (27) teacher chairs was that of an educator at the school, one Ms *Skepe*. These documents demonstrate quite unequivocally that the department was billed for substantially less furniture than actually delivered.

Count 8

[34] Count 8 involves the Edlelweni Public Primary School. The state alleges that the accused forged the GRV and delivery note to reflect the delivery of twelve (12) teacher tables, twenty-five (25) teacher chairs and twenty-five (25) teacher cupboards whereas only two (2) teacher tables were delivered on 7 March 2003. Ms *Nomnini Portia Mcithwa (Mcithwa)*, the school principal, and the only witness who testified on this count stated that only two (2) teacher tables had been delivered to the school on 7 March 2003. She furthermore acknowledged having signed a waybill recording the delivery of one hundred and

six (106) desks to her school. Her evidence generally was of such poor quality that I can place no reliance on her testimony that she only received two (2) teacher tables.

Count 5

[35] Count 5 involves an alleged unlawful claim for payment for the delivery of one hundred (100) 9-10 dual desks to the Nombulelo Senior Secondary School in Grahamstown. The state's contention is that the fraud is evidenced by an alteration to the quantity of desks (one hundred and twenty (120) instead of twenty (20)) actually delivered on 5 February 2003. It is apparent from exhibit 5.4, the tax invoice submitted to the department for payment, that the claim included the one hundred and twenty (120) desks. A waybill, which the principal, Mr *Mthuthuzeli Stanely Koliti (Koliti)* acknowledged bore the signature of the caretaker, one Mr *V.G Ngoqo*, recorded the delivery to have been effected on 6 April 2003. *Koliti's* statement however records that the chairs and cupboards had been delivered during 2002.

[36] The foregoing exercise of analyzing the documentary and *viva voce* evidence emphasizes the inherent danger of accepting, as a fact, that the mere submission of some GRVs and delivery notes, which at face value appear to have been altered and albeit amounting to a misrepresentation, constitutes the offence of fraud. The waybills to which I have adverted to in the preceding

paragraphs militate against a finding that the complement of furniture reflected in the tax invoices was not delivered to the respective schools. The inference which I have been asked to draw from the alterations and additions to the GRVs and delivery notes viz that the accused deliberately forged same is not the only reasonable one as contended for by the state. The other inference, equally consistent with the facts, is that the person(s) charged with submitting the tax invoices to the department made adjustments to the GRVs and delivery notes in conformity with the details appearing on the internal requisition documents in the *bona fide* and honest belief that the requisite furniture had been delivered. It is not in dispute that the tender awarded to accused no 1 and his companies was substantial.

[37] The geographic area within which the contractual obligations had to be performed was vast and it is evident from the testimony adduced that the problems which beset the deliveries was to a large extent the result of a lack of capacity on the part of the companies. The lack of sufficient particularity on the waybill to which I have adverted demonstrates the haphazard manner in which the deliveries were effected. The accused must have realized this and no doubt accounts for the letters written during early April 2003 to the department by him on behalf of the second and third accused concerning possible under deliveries and damaged furniture.

[38] Mr *Cilliers* however submitted that the letters were a stratagem by

accused no 1 to not only deflect attention from him but moreover to negate any suggestion that he bore knowledge of the under deliveries. Reliance on the investigation diary, exhibit M, in support of the submission is misplaced and speculative in the extreme. The sensitivity and covertness of the investigation militates against the accused having prior knowledge of the investigation. If he had, it is highly unlikely that the Scorpions would have been able to seize the voluminous documents in due course.

[39] It is not in issue that by letter dated 11 April 2003 accused no 1 on behalf of both the second and third accused addressed letters to all the district education offices within the Eastern Cape to the following effect –

“Our Ref .No. SFTP/EDU34
11th April 2003

ALL DISTRICT EDUCATION OFFICER
EASTERN CAPE PROVINCE
EASTERN CAPE

Dear Sir/Madam,

SUPPLY AND DELIVERY OF SCHOOL FURNITURE

Kindly take notice that the above company has embarked on massive delivery of school furniture to various schools in your district in the previous months. Associated with such a massive exercise, there are unforeseen problems in relation to shortfalls and broken furniture.

If there is a situation that would be similar to the above

problems, it would be appreciated if you could direct any queries or complaints on the supply and delivery of school furniture to the above address by post or telephone to the following distribution official:

NAME: : NOTSHAYA ZISANI
TEL : 040 656 3085 / 083 6670368
FAX : 040 656 3302

Thanks in anticipation.

Yours faithfully,

DIRECTOR
(B.S. NKOLA)

cc: HEAD OF PROVISIONING
DEPARTMENT OF EDUCATION
ZWELITISHA

ATT: MR ZIBI"

"Our Ref .No. FMMC/EDU1/15
11th April 2003

ALL DISTRICT EDUCATION OFFICER
EASTERN CAPE PROVINCE

Dear Sir/Madam,

SUPPLY AND DELIVERY OF SCHOOL FURNITURE

Kindly take notice that the above company has embarked on massive delivery of school furniture to various schools in your district in the previous months. Associated with such a massive exercise, there are unforeseen problems in relation to

shortfalls and broken furniture.

If there is a situation that would be similar to the above problems, it would be appreciated if you could direct any queries or complaints on the supply and delivery of school furniture to the above address by post or telephone to the following distribution official:

NAME: : ZANELE MCALENI
TEL : 047 5312791 / 083 7575968
FAX : 047 5312935

Thanks in anticipation.

Yours faithfully,

DIRECTOR
(B.S. NKOLA)

cc: HEAD OF PROVISIONING
DEPARTMENT OF EDUCATION
ZWELITISHA

ATT: MR ZIBI"

[40] It will be gleaned from the foregoing that the fundamental misrepresentation relied upon consists of the alterations on the GRVs and delivery notes to reflect the delivery of more furniture than was actually delivered on the dates reflected thereon. In virtually every single count the alterations made to the GRVs and delivery notes were effected to ensure conformity with the description and quantity of furniture recorded on the department's internal requisition forms. When the tax invoices were thus forwarded to the department

all the furniture and appurtenances in respect of which payment was claimed had not been delivered. The statement of fact embodied in the tax invoices and the documents tendered to validate the claims for payment, although *stricto sensu* amounting to a misrepresentation, cannot by itself however found a conviction for fraud – the state still bears the onus of proving that the accused participated in the commission of the offences and, in addition, that they had the requisite intention to defraud.

Participation in the offences by Accused no's 1, 4, 5 and 6

[41] In his written submissions Mr *Cilliers* submitted that the *modus operandi* devised by the accused involved not only active participation *inter se* but also of others. By way of example he referred to the evidence of several witnesses who had testified that the drivers making deliveries had pertinently told them that they had been instructed not to leave any GRVs and delivery notes at the school. The difficulty with the submission concerning the alleged fraudulent complicity of the drivers in the scheme to defraud the department is that in several cases the GRVs and delivery notes were in fact left at some schools. The evidence of Mr *Mlandeli Mgcotelwa (Mgcotelwa)*, the erstwhile driver in the employ of the third accused that the drivers were specifically instructed not to leave GRVs and delivery notes at the schools, is in conflict with the aforementioned testimony. *Mgcotelwa* was an appalling witness and I can place no reliance on his evidence that one *Zanele* or accused no 4 instructed him not to leave documents at the

schools. He was a thoroughly untruthful witness. The further submission that the dispatch clerks which, in the context of this case, could only have been accused no's 5 and 6, completed the delivery notes and GRVs in such a manner as to facilitate subsequent false additions amounts to pure speculation. So too the submission made concerning accused no 4. There is no evidence even remotely suggesting that the GRVs and delivery notes were returned to accused no's 4, 5 and 6 and the submission that accused no 4 turned a blind eye to these shenanigans has no evidential basis. It is based entirely on conjecture.

[42] In similar vein, there is no direct evidence that accused no 1 participated in the offences charged. On the contrary and, as, adumbrated hereinbefore, accused no 1 alerted the department to the possibility that there may have been under deliveries and breakages. It is inconceivable, given the import of the letters, that he was aware of the falsity of the documents forwarded in substantiation of the payment claims. Notwithstanding certain unsubstantiated averments in the indictment, there is no evidence that accused no 1 himself altered the GRVs and delivery notes nor, for that matter is there any evidence that any of accused no's 4, 5 or 6 themselves had anything to do with falsifying the documents as aforesaid. The state adduced no evidence concerning authorship of the offending documents save for the bald allegation in the indictment that "all the acts . . . were performed or committed by the directors, servants or agents of accused no's 2 and 3" and that they "acted with a common purpose or in the execution of a conspiracy". All that the indictment alleged was

that accused no 1 was the sole director, owner and shareholder of accused no's 2 and 3 whilst accused no 4 was the "financial manager of accused no's 2 and 3" and accused no's 5 and 6 "dispatch clerks" on behalf of accused no's 2 and 3 respectively. The only clue as to the authorship of the falsified GRVs and delivery notes emerged during the cross-examination of witnesses by Mr *Nelson* when it was put to them that such person had passed away.

Conspiracy / Common Purpose

[43] I have in the course of this judgment adverted to the allegation in the indictment that the accused acted in furtherance of a common purpose or in the execution of a conspiracy to commit the offences charged. In our law a conspiracy connotes an agreement between two or more persons to commit, or to aid or procure the commission of a crime. The essence of the doctrine of common purpose is that if two or more persons having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of the common purpose is imputed to the others. However as *Snyman*⁵ points out "The basis upon which the doctrine (of common purpose) operates, is the individual accused's active association with the common purpose . . . the notion of active association is wider than that of agreement. Agreement, whether express or implied, is merely one form of active association."

[44] The state presented no evidence either justifying an inference that there

⁵ Criminal Law, C.R Snyman, 4th Edition at p263.

was such an agreement between the accused or any active association between any of them. As adumbrated hereinbefore, it relied upon the allegation in the indictment that the accused were “directors, servants or agents” of the two companies. It presented no direct evidence that any of the accused had completed the GRVs and delivery notes nor any evidence from which such an inference could legitimately be drawn. During argument I invited Mr *Cilliers*’ response as to the basis upon which the state had established its case against accused no’s 5 and 6 beyond a reasonable doubt. The failure to provide a cogent answer is not difficult to discern. Save for the bald allegation in the indictment that they were dispatch clerks for accused no’s 2 and 3 respectively, no evidence was adduced directly/indirectly implicating them in either the completion or submission of the GRVs, delivery notes or tax invoices to the department. Nor for that matter was any evidence adduced that accused no 1 or 4 had anything to do therewith. The fact that ultimately the department paid accused no’s 2 and 3 is irrelevant. The conduct requirement of the crime, viz, the misrepresentation embodied in the statement of fact upon which the Eastern Cape Treasury paid accused no’s 2 and 3, cannot be attributed to the accused by reason only of the fact that they were directors, servants or agents of the companies.

[45] As adverted to hereinbefore, it was pertinently put to several witnesses that the person who completed virtually all the documentation forwarded in substantiation that the goods had been delivered had since deceased. The clear and only inference to be drawn from the letters written by accused no 1 is that he

bore no knowledge of the falsity of these documents. It follows from the foregoing that the misrepresentation relied upon cannot be attributed to any of the accused. Simply put, this dearth in the evidence adduced on behalf of the state, is destructive of its case and the onus which rests upon it has accordingly not been discharged.

[46] There is however a further matter which invites comment. During the course of the trial a litany of accusations and allegations of impropriety were levelled against the prosecuting authority and those entrusted with the investigation of this matter. During the cross-examination of the police witnesses it was put to them that the investigation was accuated by ulterior motives to persecute accused no 1. What was put is pure speculation and nothing more. The obvious alterations and additions to the GRVs and delivery notes constituted sufficient reason to initiate the investigation undertaken by the Scorpions and it scarcely behoves accused no 1 or the other accused to now register a complainant thereanent.

[47] All that remains is a formal pronouncement of my verdict, which is that:

Each of the accused is found not guilty of the crime of fraud.

