THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 240/2011

In the matter between:

JACOB SELLO SELEBI **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Selebi v State* (240/2011) [2011] ZASCA 249 (2 December 2011)

Coram: Mthiyane DP, Snyders, Bosielo, Leach and Theron JJA

Heard: **1 & 2 November 2011**
Delivered: **2 December 2011**

Summary: **Criminal Law – Prevention and Combating of Corrupt Activities Act 12 of 2004 – conviction in contravention of s 4(1)*(a)* — On appeal appellant found to have received payment and provided quid pro quo for such payment as envisaged in s 4 of Act 12 of 2004.**

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Joffe J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

MTHIYANE DP (BOSIELO and THERON JJA CONCURRING)

Introduction

[1] This is an appeal from a judgment of the South Gauteng High Court, Johannesburg (Joffe J) in which the appellant, Mr Jacob Sello Selebi, a former National Commissioner of Police and former Head of Interpol, was convicted of corruption in contravention of s 4(1)*(a)* of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (the PCCA Act) read with ss 1, 2, 21, 24, 25 and 26 of the PCCA Act and sentenced to 15 years' imprisonment. The judgment is available online as *S v Selebi* (25/09) [2010] ZAGPJHC 53 (5 July 2010). In summary his conviction arose from his dealings with Mr Glen Norbet Agliotti and the appeal is against the finding by the trial court that he had received certain payments and benefits in kind from Agliotti and provided quid pro quo for such payments and/or benefits.

[2] The appellant appeals to this court against conviction, but not sentence, with leave of both the court a quo and, in one respect, this court

(Nugent and Snyders JJA). Leave of the court a quo was limited to the question whether the State had proved beyond reasonable doubt that the appellant had received payment from Agliotti. This court, on petition, extended it to include the question whether 'the State has proved that the [appellant] has provided Agliotti with any quid pro quo as a result of gratification received from Agliotti as envisaged in terms of Section 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004'.

[3] The indictment alleged that at the relevant time there existed a corrupt relationship between the appellant and Agliotti. In terms of this relationship the appellant received from Agliotti sums of money and clothing for himself and, on one occasion, for his sons. It further alleged that the appellant received the aforementioned payment (gratification) in order to act in a manner prescribed in s 4(1)*(a)*(i)-(iv) of the PCCA Act and the appellant did so act by way of quid pro quo. As to the details thereof it was alleged that the appellant: (a) shared secret information with Agliotti regarding an investigation against him conducted by the United Kingdom law enforcement authorities; (b) protected Agliotti from criminal investigation; (c) shared with Agliotti information about South African Police Service (SAPS) investigations; (d) shared secret and/or confidential information with him; (e) agreed to and/or attempted to influence the investigative and/or prosecutorial process against one Muller Conrad Rautenbach; (f) shared with one Stephen Colin Sanders and/or one Clinton Nassif and others tender information relating to impending contractual work to be performed in Sudan; and (g) assisted Agliotti and/or Agliotti's associates to receive preferential or special SAPS services.

[4] The appellant pleaded not guilty to the charge. In his plea explanation in terms of s 115 of the Criminal Procedure Act 51 of 1977 the appellant alleged that the prosecution against him was not bona fide but was instituted with an ulterior motive. He said that the case against him was manipulated with the mala fide intention to discredit him so as to ensure the continued existence of the Directorate of Special Operations (DSO). The DSO was at the time under threat of closure and placement within the SAPS. The appellant denied that he had received any payments or gifts from Agliotti, either for himself or for any other person. He maintained that he and Agliotti were friends, and nothing more.

[5] The two key witnesses for the State on the question of payments and gifts to the appellant were Agliotti and Dianne Muller. The credibility of these two witnesses was severely attacked by the defence. Counsel contended that they had conspired to give false evidence against the appellant. Therefore, the resolution of the question whether the appellant received payment and gifts from Agliotti and whether his conduct fell within the scope of the provisions of s 4(1)*(a)* of the PCCA Act is, in this appeal, depended upon the acceptance of the evidence of these two witnesses. At the conclusion of the trial the court accepted their evidence. Agliotti's evidence was accepted only where it was corroborated in material respects by Muller and other independent evidence. The court had no hesitation in accepting the evidence of Muller whom it found to be a satisfactory witness.

Issues on appeal

[6] There are two issues to be decided in this appeal. The first is whether the State succeeded in proving that the appellant received payments and/or other benefits for himself and other people from

Agliotti. The second is whether it proved that the appellant provided Agliotti with any quid pro quo for such payment or gratification received as required by s 4 of the PCCA Act. The question whether the appellant received payment and/or other benefits requires a consideration of whether he received such gratification with a corrupt intention.

The law applicable

[7] Corrupt activities by public officers are punishable under s 4(1) of the PCCA Act, which reads as follows:

'(1) Any—

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

(b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person,

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

(i) that amounts to the—

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

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

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

(ii) that amounts to—

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

(*bb*) a breach of trust; or

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

(iii) designed to achieve an unjustified result; or

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

is guilty of the offence of corrupt activities relating to public officers.' (Emphasis added.)

[8] In this case we are concerned with a public officer (the appellant) who accepted gratification (money and clothing) from a person (Agliotti), in return for information and favours. It is not in dispute that the appellant was at all relevant times a public officer. He is alleged to be a recipient and not a giver of the gratification referred to in s 4(1)*(a)* in order to act in a manner envisaged in s 4(1)*(a)*(i) of the PCCA Act. The essential elements of the general crime of corruption committed by a recipient are the following: (a) the acceptance; (b) of a gratification (payment or some other benefit); (c) in order to act in a certain way (the inducement); (d) unlawfulness; and (e) intention.[1] Although 'unlawfulness' is not expressly mentioned in the definition of the crime, commentators are of the view that it must nevertheless be read into it. It connotes that the act (in this case the acceptance of payment) should be unjustified as this is a requirement of every crime. In general 'unlawfulness' means 'contrary to the good morals or the legal convictions of society'[2]. The same applies to 'intention'. Therefore it has to be considered even though it is not specifically mentioned.

[9] The first element (acceptance) is self explanatory and does not require any elucidation. As for the second element (gratification) it is said to include 'money, whether in cash or otherwise'.[3] The third element (inducement) depends on whether receipt of the gratification is directed at procuring the recipient to act in one or more of the ways as set out in the subsection. I have dealt with 'unlawfulness'. Just as with 'unlawfulness', 'intention' referred to in (e) above, is not specifically mentioned in the definition section of the PCCA Act but the definition must be construed

[1] C R Snyman *Criminal Law* 5ed (2008) at 412.
[2] Snyman at 418.
[3] See section 1 of the PCCA Act.

as requiring intention.[4] The recipient must have the required intention at the moment he receives the gratification.[5] Snyman says:

'[I]ntention always includes a certain knowledge, namely knowledge of the nature of the act, the presence of the definitional elements and the unlawfulness. A person has knowledge of a fact not only if she is convinced of its existence, but also if she foresees the possibility of the existence of the fact but is reckless towards it; in other words she does not allow herself to be deterred by the possibility of the existence of such fact. She then has intention in the form of *dolus eventualis*.[6]'

The facts

[10] I turn to payments (gratification), the benefits (quid pro quo) allegedly provided by the appellant to Agliotti, such as the reports by the United Kingdom law enforcement authorities and the extent to which they indicate the presence or absence of corrupt intent on the part of the appellant.

Payments

The investigation by KPMG

[11] It is convenient to commence the discussion of the question of payments by reference to an investigation by KPMG into the source of the funds from which Agliotti allegedly made payments to the appellant. The enquiry into how the funds were channelled from Johannesburg Consolidated Investments Limited (JCI) to Spring Lights 6 (Pty) Ltd (Spring Lights) and from which Agliotti paid the appellant was amply covered by Joffe J in a detailed and careful judgment. I can do no better than to borrow from his considered analysis. He described this aspect of the enquiry as follows. In June 2006 JCI and Rand Gold and Exploration

[4] Snyman at 419.
[5] Snyman at 419.
[6] Snyman at 419.

Company Limited reported certain suspected offences to the DSO. KPMG was then appointed by the DSO to assist them in an investigation which was called ‘Empire K’. The Empire K investigation in turn led to a further investigation by KPMG which related to the appellant. KPMG was asked to analyse the appellant’s bank accounts, credit card accounts, investment accounts and foreign currency trades performed by him and on his behalf by the SAPS. They were also asked, given a certain category of transactions identified by Agliotti in a draft affidavit, to determine whether they could identify any transaction with those characteristics in the bank statements of Spring Lights and to determine the funding of Spring Lights. Mr Dean Friedman, who conducted the investigation on behalf of KPMG, testified that on 24 August 2005 Messrs Brett Kebble, Roger Kebble, John Stratton and Hendrik Christoffel Buitendag resigned from the Board of Directors of JCI. Thereafter a new board was appointed. The new board instructed KPMG to perform an investigation into JCI and its subsidiaries. In December 2005, as part of this investigation, difficulty was encountered with regard to payments made to Spring Lights. An enquiry was sent to Agliotti on 19 January 2006 in which he was requested to provide ‘a list of individuals and/or entities who received payments during the course of [his] assignment’ and to indicate the total amount that Spring Lights received from JCI directly and indirectly. He was also asked if he himself had received any payments from third parties who effected payment on behalf of JCI. The enquiry was responded to in April 2006. In regard to payments received by individuals or entities during the course of Agliotti’s assignment between 5 December 2003 and 31 January 2005 are payments amounting to R2 224 186. The recipients were not identified. What however became clear from the investigation was that Agliotti made payments of over R2 million to individuals during that period.

[12] The results of the KPMG investigation were compiled in a report entitled 'Report on factual findings' dated 19 March 2009. The judge went on to describe how the paper trail led to the appellant. The portion of the report pertaining to him reflects the total income and expenditure as reflected in the appellant's bank account for the period 13 January 2003 to 4 January 2007. According to Friedman, and as it appeared from that report, the income in the appellant's bank account exceeded the expenditure by R152 970.45. An amount of R400 000 which was reflected as an item of expenditure was utilised by the appellant to acquire a unit trust investment for his own benefit. Accordingly, at the end of that period the appellant was better off than at the commencement thereof by the value of the unit trust investment and the surplus of R152 970.45 received in his bank account during the relevant period (13 January 2003 to 4 January 2007). The investigation involved an examination of alleged payments to the appellant from cash drawn from the Spring Lights account, details of the transactions in the appellant's bank account, details in the appellant's two credit card accounts and the appellant's and his wife's foreign exchange transactions and the source of information in respect of the latter. The forensic investigation also involved a monthly comparison, for the period February 2003 to December 2006, of receipts and expenditure from the appellant's bank account and credit cards.

[13] The investigation then proceeded to focus on the period March 2004 to December 2005 with regard to cheque payments made from the appellant's bank account, cheques cashed on that account, cash withdrawals and the appellant's credit card expenditure. It revealed the following: (a) there were no cash withdrawals in January, February, March, June, July, October, November and December 2005 from the

appellant's bank account; (b) no cheques were cashed on the account in April, May, July, October and November 2004 and from January 2005 to December 2005; (c) in January, February and October 2005 no cheque payments were made from that account; (d) there was a significant reduction in credit card expenditure in the months from January to April 2005 and July 2005. For example credit card expenditure was only R465.35 in January 2005 and R188.12 in February 2005; (e) for the ten-month period March to December 2004, the total of cash withdrawals from and cheques cashed on the account amounted to R126 048. For the 12-month period from January to December 2005 the total of cash withdrawals and cheques cashed amounted to only R358; and (f) the total expenditure from the appellant's bank account for the period March to December 2004 amounted to R430 899.90. It only amounted to R231 028.67 for the period January to December 2005. According to Friedman the pattern of reduced expenditure continued into 2006 and only started picking up during July 2006.

[14] The trial judge then dealt with the evidence of Friedman who identified seven such cheques that corresponded to the allegations made by Agliotti in his draft affidavit. These are: (a) a cheque for R10 000 dated 14 June 2004 bearing the annotation 'JSGA'; (b) a cheque for R10 000 dated 8 November 2004 bearing the annotation 'COP'; (c) a cheque for R5 000 dated 18 November 2004 bearing the annotation 'COP'; (d) a cheque for R200 000 dated 13 December 2004; (e) a cheque for R100 000 dated 20 December 2004 bearing the annotation 'COP'; (f) a cheque for R55 000 dated 12 April 2005 bearing the annotation 'Gr Chief'; and (g) a cheque for R30 000 dated 28 September 2005 bearing the annotation 'Chief'. These cheques amount to R410 000 and were cashed between 14

June 2004 and 28 September 2005. They are set out in the following schedule:

Cheque Number	Counter foil Note	Cheque date	Bank stamp Date	Cheque Amount R
0127	'CASH JSGA'	14 June 2004	14 June 2004	10 000.00
0201	'CASH COP'	8 November 2004	8 November 2004	10 000.00
0204	'CASH COP'	18 November 2004	18 November 2004	5 000.00
0222	'CASH 200 000'	13 December 2004	13 December 2004	200 000.00
0226	'CASH CoP'	20 December 2004	20 December 2004	100 000.00
0271	'CASH GR Chief'	12 April 2005	13 April 2005	55 000.00
0355	'CASH Chief'	28 September 2005	28 September 2005	30 000.00
Total				410 000.00

On the above analysis the appellant would as at the end of December 2004 have had in his possession extra cash on hand amounting to at least R325 000 (being R410 000 less R85 000), which would then account for the drop in expenditure between January 2005 and December 2005. The cash movement in the appellant's account during the period March 2004 and December 2005 as described by Friedman and in particular the reduced expenditure during January and February 2005 are illustrated in the following schedule:

Month	Cheque payments	Cheques Cashed	Cash withdrawals	Credit cards Expenditure	Aggregate Total R
Mar-04	34 281.00	5 088.00	22 000.00	1 550.00	62 919.00
Apr-04	34 187.23	0.00	5 000.00	941.35	40 128.58
May-04	39 888.55	0.00	1 000.00	7 562.49	48 451.04
Jun-04	27 033.84	13 000.00	10 000.00	1 841.78	51 875.62
Jul-04	15 808.72	0.00	16 000.00	3 904.28	35 713.00
Aug-04	29 265.39	6 000.00	11 000.00	7 825.17	54 090.56
Sep-04	24 767.45	2 160.00	10 800.00	2 504.32	40 231.77
Oct-04	31 826.61	0.00	15 000.00	3 242.67	50 069.28
Nov-04	9 377.90	0.00	3 000.00	3 186.95	15 564.85
Dec-04	18 370.60	3 000.00	3 000.00	7 485.60	31 856.20
Jan-05	**0.00**	**0.00**	**0.00**	**465.35**	**465.36**
Feb-05	**0.00**	**0.00**	**0.00**	**188.12**	**188.12**
Mar-05	19 397.50	0.00	0.00	876.15	20 273.65

Apr-05	11 830.86	0.00	1 000.00	944.75	13 775.61
May-05	15 585.91	0.00	16 300.00	10 462.98	42 348.89
June-05	40 781.70	0.00	0.00	1 152.80	41 934.50
Jul-05	22 406.00	0.00	0.00	0.00	22 406.00
Aug-05	25 287.99	0.00	13 000.00	9 254.37	47 542.36
Sep-05	20 381.66	0.00	5 500.00	1 069.37	26 951.03
Oct-05	0.00	0.00	0.00	2 351.41	2 351.41
Nov-05	3 246.73	0.00	0.00	1 123.21	4 369.94
Dec-05	3 825.00	0.00	0.00	4 596.81	8 421.81

[15] If Agliotti is to be believed, during November and December 2004 the appellant received R320 000 made up of the proceeds of two cheques (one of R200 000 and the other R100 000) amounting to R300 000 in total and a further R20 000 that he alleged he paid from his pocket. However, the trial court entertained a doubt as to whether the appellant received payment of the proceeds of the cheque of R200 000 and gave the appellant the benefit of that doubt. So do I.

[16] During cross-examination Friedman was asked whether he had encountered Spring Lights account cheques or counterfoils to cheques in which reference was made to John Stratton either by name or by use of the initials ‘JS’. He replied that he had no independent recollection of such cheques. He was then asked to inspect Spring Lights’ cheques and counterfoils to ascertain whether there were any which referred to John Stratton as ‘JS’. Friedman did the exercise and found three such cheques. The cheques were made out to Monster Marketing CC. The first cheque no 159 dated 3 August 2004 was in the amount of R182 274.30. The cheque stub is annotated ‘JSMB’. The second cheque, which is cheque no 193 dated 12 October 2004 was in the amount of R18 607.44. The cheque stub is annotated ‘JS Car’. The third cheque no 213 dated 1 December 2004 was in the amount of R18 607.44. The cheque stub is annotated

'Car JS'. It is clear from the evidence of Friedman as set out above that payments that bore the initials 'JS' referred to payments to Stratton in respect of his motor vehicle. It is also clear that the amounts with which Agliotti was allegedly able to effect the payments, that are the subject of the dispute in this matter, were drawn from the Spring Lights account, which was used by JCI as a corporate vehicle to channel funds to Agliotti.

Individual payments and gifts

[17] I turn to a discussion of the individual payments which the trial court found to have been proved against the appellant. These are:

(a) R110 000;

(b) R30 000 by means of a cheque dated 28 September 2005, the counterfoil of which indicates that it is payable to 'Cash (Chief)';

(c) R10 000;

(d) an unspecified amount of US Dollars; and

(e) gifts.

(a) *Payment of R110 000*

[18] The trial court's approach to the question of payments was to accept that those payments were made to the appellant where there was corroboration for Agliotti's evidence, firstly, because of the credibility finding made against him and secondly, because he was a single witness in respect of some of the payments.[7] As far as the two big payments of R200 000 and R120 000 are concerned the court found that there was no corroboration for Agliotti's evidence in respect of the payment of R200 000. There was however what the court described as potential

[7] It must be remembered that Agliotti was a witness in terms of s 204 of the Criminal Procedure Act 51 of 1977 who had been warned as such by the trial court before giving evidence. Section 204 requires a witness to answer all questions put to him or her truthfully and honestly and, if necessary incriminates himself. If the court is satisfied that a witness has complied with this standard the court will grant him or her immunity from prosecution.

corroboration in respect of the payment of R120 000. The court then proceeded to deal with the first payment of R110 000. It bears mention that the payment of R110 000 was largely derived from the proceeds of a cheque for R100 000 dated 20 December 2004 which was drawn to cash. The counterfoil of the relevant cheque has the word 'CoP' noted on it. The court found this to constitute potential corroboration for the payment of R120 000. The note on the counterfoil was made by Mr Martin Flint, the Chief Financial Officer of Spring Lights. Agliotti, in his evidence, pointed out that he assumed that 'CoP' referred to the appellant. The trial court dealt with and analysed in detail the evidence of Flint in respect of this cheque. Flint testified that when Agliotti asked for a cash cheque he would furnish him with a brief description of the purpose of the cheque. Flint would make a note of this on the counterfoil to enable him to identify the payment if Agliotti ever queried it. Flint maintained that what was written on the counterfoil was always based upon that which Agliotti had told him. In respect of the note 'CoP' Flint testified that he had no idea what it meant. During cross-examination he said he thought it related to a retired policeman called Bezuidenhout. Bezuidenhout had suffered a serious accident and Agliotti had agreed to help him. Flint recalled that the policeman concerned came to Maverick's[8] old offices where he would be given payment. Flint however later recalled that at the time that this particular cheque of R100 000 was made out Maverick had moved to a new office. Flint had no recollection of Bezuidenhout calling at the new premises to collect cheques.

[8] Dianne Muller was a member of a close corporation known as Monster Marketing CC trading as Maverick. In order to attract tender-related work from the Government, Maverick made an agreement with JCI pursuant to which Maverick Masupatsela (Pty) Ltd was formed and started trading as such in 2005. After Brett Kebble's death in September of that year the agreement was cancelled, whereafter business was carried on under the name Maverick Experience Exhilarator (Pty) Ltd.

[19] Flint's ignorance of the origin and meaning of the annotation 'CoP' on the counterfoil left the trial court with the impression that he was endeavouring to exculpate himself from any wrongdoing. The court however found it significant that Flint associated the payment with a policeman, or albeit the retired policeman, Bezuidenhout. Having regard to the probabilities the court concluded that the counterfoil of the cheque for R100 000 which read 'CoP' was likely to refer to the appellant and thus provided some corroboration for Agliotti's evidence.

[20] Secondly, the court found that Muller's evidence also provided corroboration for this payment having been made to the appellant. It is true that there are many differences between the evidence of Agliotti and that of Muller in respect of this payment. Firstly, on Agliotti's version Flint cashed the cheque and handed the R100 000 to Muller in the offices of Maverick before Agliotti had arrived at Maverick's premises. Agliotti said he only handed Muller R20 000 in cash to add to the R100 000. This is however contradicted by Muller. Muller testified that Agliotti had handed her all the money which he had taken from his briefcase and that he had asked her to check that it amounted to R110 000. Secondly, according to Agliotti an amount of R120 000 was handed over to the appellant in the boardroom. Muller is adamant that only R110 000 was handed over to the appellant. Thirdly, Agliotti made no mention of the fact that Muller had told him that she had removed R10 000 from the money that she had counted. On the contrary, according to Agliotti he had wanted to give as much money as he had to the appellant. It was for that reason that he added R20 000. Fourthly, Agliotti testified that the money was paid to the appellant because the latter had informed Agliotti that he had problems. Muller testified that the money was paid over for a holiday for the appellant and his family. Fifthly, Agliotti testified that he had

arrived at Maverick and that shortly thereafter the appellant arrived. Muller testified that the appellant had arrived first and that Agliotti had informed her prior to the arrival of the appellant that the appellant would arrive first and that she should make coffee for him whilst he waited.

[21] The judge concluded that had Muller and Agliotti conspired with each other to give false evidence against the appellant these differences would have been avoided. He concluded that their very presence, meaning differences, whilst creating some possible difficulty in regard to reliability or cogency, gave their evidence credibility. The differences were not so extensive as to render it impossible to make a finding that the payment had been made to the appellant.

[22] It bears mention that the trial judge was best placed to consider and assess the evidence. He had the opportunity and the advantage of observing Muller when she testified and to assess the credibility of the evidence with due regard to her demeanour in the witness box. The learned judge noted that when at the end of Muller's cross-examination, it was put to her that the appellant denied that he ever received payments from Agliotti, she turned her face looked directly at the appellant and said: 'That is not the truth'. The judge further observed that Muller's reaction did not appear to be contrived. It gave her evidence what the judge described as 'the stamp of credibility'. He concluded that despite all the criticism of her evidence the stamp of credibility was justified and her evidence in general was accepted. There is no basis to interfere with that finding.[9] The judge accordingly found that Muller's evidence does serve as corroboration of payment to the appellant. Agliotti testified that the payment was R120 000. Muller testified that the payment was R110

[9] *S v Shaik & others* 2007 (1) SA 240 para 87.

000. The court found that her evidence in respect of R110 000 was convincing and it was accordingly held that her evidence was corroborative of the payment as testified by Agliotti up to that amount. The judge adopted a cautious approach, which has stood the test of time, and therefore he cannot be faulted in accepting the evidence of Agliotti where it was corroborated by independent evidence.[10]

[23] Additional corroboration for the State's case in respect of this payment is to be found in the evidence of Friedman. He testified in regard to the appellant's bizarre spending pattern in the relevant period. In January 2005 the total amount paid out of the appellant's bank account amounted to only R465.35 and in February 2005 to R188.12. No credible explanation for this was provided. The appellant's wife, who was said to be the person in charge of the household finances, was not called as a witness to explain this. The absence of cash cheques or cash withdrawals also referred to in Friedman's report was not explained. On the face of it the appellant must have had some other source of funds and the payments from Agliotti provide a plausible explanation for his altered spending pattern.

[24] The judge also found further corroboration for this payment having been made by Agliotti to the appellant, in the appellant's foreign currency transactions. The appellant had received an advance for a visit to France in the amount of R8 537.17 for his journey on 3 June 2005. Notwithstanding this the appellant utilised the sum of R13 064.15 to purchase euros. However, after the visit the appellant sold 680 euros at a rand value of R5 193.90 on 28 June 2005. The trial court found that the

[10] *S v Bester* 1990 (2) SACR 325 (A) at 328d; *S v Mahlangu & another* 2011 (2) SACR 164 (SCA) para 21.

appellant had excess cash in his possession, which he was unable to explain.

[25] The judge then referred to another foreign currency transaction. Here the appellant received an advance of R8 954.81 for a trip in July 2005. Notwithstanding this the appellant utilised the sum of R21 796.65 to purchase $3 152 on 28 July 2005. After the visit the accused sold $2 237 at a rand value of R14 020.70 on 19 August 2005. It was found that the appellant had spent slightly less than his advance. He was once again unable to furnish an explanation for his conduct. The court considered these transactions to provide corroboration for Agliotti's evidence that the appellant had received payment of the amount of R110 000. Confronted with the State's case as set out above and having regard to the poor quality of the appellant's evidence, the court came to the conclusion that the appellant's denial of receipt of payment of R110 000 was not reasonably possibly true.

(b) *Payment of R30 000*

[26] The next payment in respect of which corroboration was found is the payment of R30 000 which represents the proceeds of a cheque dated 28 September 2005.

[27] This cheque was dated the day after Brett Kebble died. The judge then dealt with how the amount was paid to the appellant. In re-examination Agliotti stated that on the day after Kebble died, he had to go and identify Kebble's body. He did not know where the mortuary was. He went to Nassif's office for assistance. Nassif instructed one of his employees, André Burger, to show Agliotti where the mortuary was. Whilst driving in the car to the mortuary the appellant phoned Agliotti

and asked for money. Although counsel for the appellant initially objected to this evidence the objection was abandoned when cellular phone records were produced which reflected the disputed call. There was a futile attempt to link the R30 000 to an Interpol dinner but this floundered when it turned out that the dinner occurred in September 2004. The payment in dispute here had been made on 28 September 2005. The suggestion by the defence that the R30 000 was in fact not paid to the appellant but used by Agliotti as a clearance payment for a drug transaction that he was involved in, was rejected by the court. The counterfoil of the cheque reflects 'Chief' and the fact that the appellant was the only person who was referred to by Agliotti as Chief, makes nonsense of the latter suggestion. The court accepted that sufficient corroboration had been provided for the payment under this heading.

(c) *Payment of R10 000*

[28] The court was satisfied that the counterfoil linked the payment of this cheque to the appellant. Flint originally linked this payment to another policeman. He however later changed this in his evidence. The court concluded that the counterfoil to the cheque served as corroboration for Agliotti's evidence. The cheque in question is dated 14 June 2004 and has annotated on it the words 'JSGA'. In the context of this case the appellant is the only person who would fit the description of 'JS'. There is a compelling inference that 'GA' refers to Glen Agliotti. I have already referred to the unlikelihood that the retired policeman, Bezuidenhout or John Stratton might be the person to whom these annotations refer. I find the reasoning of the court and the conclusion to which it came in this respect to be beyond reproach.

(d) *An unspecified amount of US Dollars*

[29] Agliotti testified that he paid the appellant $30 000 in three payments. The one payment was made in the first class lounge in the International Departure Hall at O R Tambo International Airport. The appellant denied receipt of this payment. Agliotti was found to have received $100 000 on 22 April 2005 from Mr Muller Conrad Rautenbach.[11] In this regard it was put to the appellant that he went to Cyprus for an Interpol regional conference from 23 May 2005 to 28 May 2005. The appellant received an advance in respect of the expenses of this trip from the SAPS of 700 euros which was acquired at a cost of R5 900.75. On his return to South Africa the appellant's actual expenses were calculated to the sum of R6 223.62 and claimed from the SAPS. This resulted in a nett amount of R322.87 being paid to the appellant. Included in the claim was an amount of 508.99 euros or dollars in respect of accommodation. On his return to South Africa on 28 May 2005 and contrary to his normal practice of allowing Ms Eunice Elizabeth Grové, his personal secretary, to attend to his foreign currency transactions, the appellant sold $2 500 at O R Tambo International Airport. This occurred one month after Agliotti had received the $100 000 from Rautenbach. When the appellant was asked to indicate where the dollars had come from, he could not do so. Instead, he furnished a number of unsatisfactory responses. His first response was that he would have received the foreign currency from the Cyprus trip. It was then pointed out to him that the advance of foreign currency for this trip had been in euros. The appellant then changed his version to say that the advance was from Interpol. To avoid the suggestion that he had been paid for the same expenditure by the SAPS and Interpol, he stated that the SAPS advance was returned to

[11] Rautenbach had a legal issue with SARS and was out of the country in Zimbabwe. He was afraid of returning to the country for fear of being arrested. Agliotti assured him that because of his connection with the appellant he could get Rautenbach's problem to go away. For his services he demanded a fee of 100 000 USD. It is from this amount that the State suggested that Agliotti was able to pay the appellant in US dollars.

the SAPS and the Interpol allowance was used. This was rightly rejected by the court as simply not true. The explanation was simply fanciful.

[30] The court found that this amounted to corroboration of Agliotti's evidence that he gave the appellant US Dollars albeit not in the amount of $30 000. It held that the State had proved beyond reasonable doubt that Agliotti paid an indeterminate amount in US Dollars to the appellant. I agree.

(e) *Gifts*

[31] The question of gifts does not appear to be covered by the leave granted by the court a quo, which refers only to payments. To the extent that gifts constitute 'gratification' as defined and for the sake of completeness a brief discussion would, in my view, not do any harm to the judgment. On the question of gifts the court found that there was corroboration for Agliotti's evidence that clothing was bought for the appellant's sons. Muller also testified in that regard. When it was put to her at the conclusion of her cross-examination that the appellant denied that Agliotti ever purchased clothes at Fubu for the appellant's children she responded with conviction and whilst looking at the appellant said: 'That is a lie'. The appellant did not seek to place the evidence of his wife or sons before the court in this regard. The court finally concluded that the State succeeded in proving beyond reasonable doubt that the appellant received payments and gifts from Agliotti to the extent indicated in its judgment.

<u>Benefits / Quid pro quo</u>

[32] This aspect of the case falls within the extension of leave granted by this court. The question to be considered here is whether the appellant

provided Agliotti with any quid pro quo for the payments made to him by Agliotti as required by s 4(1)*(a)*(i) of the PCCA Act. The trial court identified four instances that constituted such quid pro quo. The first was a UK report which the appellant showed to Agliotti. Commissioner Martin Hankel, then a Section Head of Intelligence in the SAPS, gave evidence in relation to a number of UK reports. He said that he was requested to identify all the reports that could be found pertaining to Agliotti. There were six such reports in total, according to the SAPS, where there was either content that related to Agliotti or a reference to Agliotti. His evidence was not challenged by the appellant. Neither was the evidence tendered by Agliotti in this regard challenged. He testified that he was shown a document by the appellant. The appellant asked him to read it and he thereafter questioned Agliotti about his knowledge of and relationship with the people mentioned in the report. The appellant then told Agliotti that he (Agliotti) was 'being monitored or [his] movements were'. Agliotti testified that the report that he was shown had a particular appearance. According to him it bore a coat of arms and 'either a HSM or Her Majesty's customs something to that effect'. It cannot be disputed that one of the reports that was placed before the court, has a coat of arms and the words 'HM Customs and Excise' in bold print on it and refers to Agliotti in the context of an investigation into possible criminal conduct on his part. As to the purpose of being shown the document, Agliotti testified that the appellant wanted him to know that the UK authorities were monitoring his movements. I agree with this finding.

[33] In its assessment of the evidence pertaining to this document the court observed that the UK report was not the type of document that the man in the street would have knowledge of. The document was at all

times in the possession of the SAPS. There is no suggestion that Agliotti could have gained knowledge of the existence and the content of the document from any source other than a source connected to the SAPS. Whilst Agliotti could not recall the content of the document completely accurately, his recollection of the content and appearance thereof was considered by the court to be sufficient to establish that the document I have described was the document that was shown to him.

[34] On the evidence the conclusion is unavoidable that the only person who could have shown the document to Agliotti is the appellant. This conclusion was arrived at notwithstanding the comments made in respect of Agliotti's general credibility and the fact that he was a single witness. The court concluded that there was sufficient corroboration for Agliotti's evidence in this regard. The appellant's denial that he permitted Agliotti to read the UK report was therefore considered by the court not to be reasonably possibly true. I cannot find fault with the reasoning of the trial judge.

[35] Counsel for the appellant argued that Agliotti would not have benefitted from being shown the HMS document as he was already referred to in the press as an international drug dealer. While the trial court accepted this to be so, it held that Agliotti could still benefit from being warned that the United Kingdom police were investigating him. To tell someone involved in criminal activities that the police in two countries are interested in his movements, will serve to put him on his guard and potentially cause him to take additional precautions as not to permit his activities to be uncovered. The inference is inevitable that by showing Agliotti the document the appellant warned Agliotti of the interest the United Kingdom authorities had in him and the fact that their

interest was known to the SAPS as well. The trial court found that the appellant had showed the UK document to Agliotti for the benefit of Agliotti. I agree with that conclusion.

[36] The second benefit that Agliotti allegedly received from the appellant related to the National Intelligence Estimate (NIE report). This document indicated that Jurgen Kögl, a businessman, was gathering information on the supposed illegal activities of the appellant. Kögl alleged that the appellant received large sums of money from the Kebbles emanating from questionable business deals concluded on his behalf. The document concerned was described as the 2005 NIE report. In his evidence the appellant admitted that he showed a document to Agliotti that contained a reference to Kögl. He explained that the reason he did so was to show Agliotti the name of Jurgen Kögl. He was concerned that he would not remember the spelling. The court rejected this flimsy explanation. There is no reason why the name could not have been noted on a piece of paper if the only reason for showing Agliotti this was because the appellant could not remember the spelling. The court found that the appellant shared this information with Agliotti to enable Agliotti and the Kebbles to take steps to protect themselves. Accordingly, the portion of the NIE document was shown to Agliotti for the benefit of Agliotti and the Kebbles. The appellant's evidence that he showed a document to Agliotti provides, in itself, corroboration for Agliotti's evidence that the appellant showed him a document and moreover, corroboration that the document had to do with Jurgen Kögl.

[37] The third document found to have been showed to Agliotti by the appellant was an e-mail that contained a statement by one Bill Smith implicating Agliotti in certain drug activities. It also referred to a meeting

of members of the Scorpions at which a Mr Paul O'Sullivan was present. Agliotti stated that the appellant handed him an e-mail which the appellant said provided proof that O'Sullivan was behind the media campaign against him and that Agliotti should hand it to his lawyer so that he could take the necessary legal steps against O'Sullivan. Thereafter, Agliotti benefitted by being placed in possession of this documentation.

[38] The fourth benefit identified, by the court that Agliotti received from the appellant, was his ability to secure the attendance of the appellant at dinners and meetings where his presence was requested. The appellant did not challenge Agliotti's evidence in this respect. It was Agliotti's evidence that he arranged meetings or dinners between the appellant and the Kebbles and their associates; between the appellant and James Tidmarsh, Rautenbach's lawyer; between the appellant and Nassif when the Jumean issue was raised; and between the appellant and Gavin Varejes with whom he had business dealings. This was also not challenged. After the hearing of the application for a discharge of the appellant at the end of the State case the appellant advanced a different case to that which his counsel had put forward until then. Firstly, he said that the he resisted Agliotti's request to eat with the Kebbles for two years. Secondly, he claimed that it was he who called the meeting with Tidmarsh and thirdly, it was Nassif that had arranged the Jumean meeting directly with him. The court rejected all of this and found that the appellant could be and was made available through Agliotti. This was the reason why Rautenbach paid Agliotti $100 000 after originally refusing to do so. As Rautenbach put it, Agliotti had at least managed to raise Rautenbach's issues with the appellant. This was valued at $100 000. Accordingly, this was considered by the court to be a benefit to Agliotti.

The court found that the meetings between the appellant and the Kebbles were arranged by Agliotti. It found that it was inconceivable that the appellant would have been willing to be in the company of the Kebbles and their associates, let alone have dinner with them. The appellant knew the Kebbles were subjected to police monitoring. The court found that the meetings were arranged by Agliotti and attended by the appellant. They were not attended out of friendship but because the appellant was obligated to go to them by reason of the payments made to him by Agliotti. The court held that the State accordingly proved the benefits to Agliotti and that such benefits were provided by the appellant. In my view the reasoning and the conclusion reached by the trial court is compelling and I find it acceptable.

Intention / mens rea

[39] I turn to consider the question whether the State succeeded in proving beyond reasonable doubt that the payments were received from Agliotti and any quid pro quo was afforded with the requisite mens rea. I have already alluded to the fact that s 4(1)*(a)*(i) of the PCCA Act does not specifically refer to intention but rather uses the words 'in order to act, personally or by influencing another person so to act . . .'. According to Burchell these words at least import some 'intention' element. Besides, there is a presumption in our law that mens rea is required for a contravention of a statutory provision.[12] In the case of a contravention of s 4 of the PCCA Act the legislature has made it easier for the State to prove the presence of 'intention'. Section 24 of the PCCA Act provides that once the prosecution has proved that gratification (payment) was accepted or agreed and the State can show that despite having taken reasonable steps, it was not able with reasonable certainty to link the

[12] J Burchell *Principles of Criminal Law* 3ed (2005) at 893.

acceptance of the gratification to a lawful authority or excuse on the part of the person charged, and in the absence of evidence to the contrary which raises reasonable doubt, it is sufficient evidence that the person charged accepted such gratification of that person 'in order to act' in a manner envisaged in s 4 of the PCCA Act. The provisions relate to a rebuttable presumption of mens rea, including knowledge of unlawfulness, which is rebuttable by the person charged.

[40] In the present matter there is no need to invoke the presumption contained in s 24 of the PCCA Act given the abundance of evidence from which a corrupt intention can be inferred. On his own evidence the appellant knew as early as August 2003 that Agliotti was using his name to get money from the Kebbles. He knew that Brett Kebble had a problem with the South African Revenue Service. He also knew that Agliotti was the kind of person that would use this relationship to benefit himself financially and yet he continued to go to Agliotti and to associate with him.

[41] There is also the question of the appellant's assertion in evidence that he knew that if a 'hustler' like Agliotti gave him anything he would immediately know that it was for an illegal purpose. He added that if Agliotti made any payment to him he would know that he intended to induce him to afford him some favours in one way or another. This concession is illustrated in the following passage during cross-examination:

'. . . What I am saying is, if it happened that Mr Agliotti gave you R50 000 and you took it, that would have been wrong? --- That would have been wrong to me.

Why? --- Because it is an inappropriate thing to do.

Especially if you are the Head of the police? --- Yes.

And you would know that if a man, and I can take you through the record, you said, but if it is necessary, if a man like Agliotti, a hustler would offer you money you would thin[k] there is something behind this, am I right? --- I would think so.
He is trying to buy my favour or do something if he offered me a large amount of money, am I right, that would have been your story? --- Yes.'

[42] Clearly in these circumstances there can be no question that once it was proved that the appellant received payments from Agliotti, the inference was irresistible that it was for an illegal purpose and with knowledge of that illegal purpose. It follows therefore that the court having accepted that payments took place, found that the State had succeeded in establishing beyond reasonable doubt that the payments were accepted by the appellant with the requisite corrupt intention.

[43] It is also clear from the way the appellant dealt with Agliotti that he would not have believed that he was acting lawfully. The visits to Maverick to collect payments took place during office hours. Whenever the appellant visited there he was not accompanied by any of his colleagues from the police. Secondly, the UK reports that were shown to Agliotti were done without Hankel's knowledge or consent. The appellant offered no explanation why a National Commissioner had to exhibit documents to a person of questionable repute. Thirdly, in none of the meetings with the Kebbles, Agliotti and their associates were any of the appellant's colleagues present. Fourthly, one of the documents, namely the e-mail, was shown to Agliotti at a parking lot outside Makro in Woodmead. If there was nothing wrong with the transaction it is not clear why Agliotti was not called to the appellant's office and shown the document there. All of the above are in my view further indicators that

the appellant knew that what he was doing was wrong and provide sufficient proof of his guilty state of mind.

Conclusion

[44] There can therefore be no question that the State succeeded in proving the guilt of the appellant beyond reasonable doubt and the court a quo was justified in convicting the appellant of corruption in contravention of s 4(1)*(a)* of the PCCA Act.

[45] In the result the following order is made:
The appeal is dismissed.

_____
K K MTHIYANE
DEPUTY PRESIDENT

SNYDERS JA (LEACH JA concurring)

[46] I have had the benefit of reading the judgment of Mthiyane DP. I agree with the conclusion that he arrives at, however, I have taken a specific view of this matter that needs to be stated separately.

[47] At the outset it is necessary to supply a short sketch to explain the context of different personalities mentioned in relation to the instances of corruption that the appellant were convicted of in the court below. The point of commencement is the appellant. He was the National Commissioner of Police in South Africa for the period during which the charges arose and also, since October 2004, the President of Interpol.

During this entire period he had a close relationship with one Agliotti, an individual who had no particular occupation, but described himself as a businessman who busied himself at times with a form of import and export and the clearing of containers. He was also, from his own mouth, a drug dealer, having pleaded guilty to such a charge during 2006. The true nature of their relationship is something I return to later in this judgment. Agliotti also had a close relationship with Brett Kebble, a businessman who, with his father Roger Kebble (the Kebbles), was the director of several mining companies, including Johannesburg Consolidated Investments Ltd (JCI). John Stratton was one of the directors of JCI and, according to Agliotti, a close confidant of Brett Kebble. The Kebbles bought a company from Martin Flint called Spring Lights Co (Pty) Ltd (Spring Lights) and used its bank account to make money available to Agliotti to perform a variety of tasks for them. Flint was kept on as the financial director of Spring Lights. He is the father of Diane Muller, Agliotti's fiancé during the relevant period. Muller conducted her own very successful events organising business, initially known as Monster Marketing CC, from offices that were shared by both Agliotti and Flint. Flint was the accounting officer for Monster Marketing CC. Clinton Nassif was closely connected to Agliotti and the Kebbles. He conducted private investigations and provided security services, varying in nature, for the Kebbles. Billy Rautenbach was a businessman in South Africa who was under investigation by the since disbanded Directorate of Special Operations (DSO), known as the Scorpions, for a variety of alleged commercial crimes, who left South Africa when a warrant for his arrest was issued. Tidmarsh is a Swiss attorney who acted for Rautenbach. Bulelani Ngcuka was the former National Director of Public Prosecutions during the time of the investigation of the case against Rautenbach. Ngcuka was succeeded by Vusi Pikoli who filled that

position during the time that the case against the appellant was investigated until shortly before the appellant was arrested.

[48] The appellant was charged with a broad range of alleged instances of corruption committed during his term as National Commissioner of Police, consisting of the receipt of money, gifts and favours from Agliotti in return for protection, favours and information. He was convicted of four instances of receiving money and one of receiving clothing for his two sons. The trial court found that the appellant gave quid pro quo for what he received from Agliotti, in the form of imparting information to Agliotti by showing him three different documents and by attending dinners and meetings at Agliotti's request.

[49] Agliotti was the main witness against the appellant. The general gist of his evidence was that he had made several payments to the appellant, which the latter received. The trial court found his evidence to have been unreliable. The appellant testified in his own defense and his testimony was found to have been substantially dishonest. One witness, Muller, stood out during the trial as honest and reliable. The trial court convicted the appellant on the basis of objective corroboration for Agliotti's evidence. In this court the credibility findings by the trial court are not attacked except in respect of Muller. Therefore the issues in this appeal are: first, did the trial court err in finding Muller a credible witness, and second, did the trial court err in concluding that there was sufficient corroboration for Agliotti's version to have established the appellant's guilt beyond a reasonable doubt.

[50] Muller's evidence was attacked on three bases: first, that she had contradicted herself; second, that she had a vested interest to support

Agliotti's evidence; and third, that she and Agliotti conspired to falsely incriminate the appellant. It is evident from the judgment of the trial court and the heads of argument on behalf of the appellant in this appeal, that the criticisms by the appellant of Muller's evidence is no different in this court than it was in the trial court. The judgment by the trial court convincingly answers each and every one of those criticisms and the appellant failed, in this court, either in the heads of argument or during argument, to indicate any errors made by the trial court in that regard. It is therefore hardly necessary to go into any particular depth on this issue. Such an exercise would amount to mere repetition of what has been thoroughly canvassed.

[51] It is trite that this court will not lightly interfere with a credibility finding of a trial court.[13] There is nothing in the record that suggests that the trial court was wrong in its conclusion. The alleged contradiction in her evidence, the only one pointed to, is not real. A careful reading of the record illustrates that she only testified about one specific incident that sustains the inference that the appellant received a specific direct payment from Agliotti. She never tried to suggest she saw other such instances and never suggested that she saw the appellant leave Agliotti's office with an envelope that could possibly have contained money. The submission that she contradicted herself is unfounded.

[52] Her alleged vested interest in Agliotti which the appellant suggests motivated her to have lied, is based on the following facts: she was also the recipient of money from the Spring Lights account; she is his former girlfriend; she remained friendly with Agliotti even after they terminated their relationship; and continued to travel together. Although this criticism is based on fact, the submission that the facts motivated an

[13] *R v Dhlumayo* 1948 (2) SA 677(A).

inclination to lie was at no stage apparent during the trial. On the contrary, during her evidence she dispelled any possible basis for such an inference. She was running a highly successful and profitable business and was not in any way dependant on Agliotti for income, and the amounts she did receive from Spring Lights were not gratuitous payments but the fulfillment of promises made by Agliotti arising out of their relationship. She said she had no reason to become his enemy after they split up and their continued travels suited them both. The submission on behalf of the appellant is opportunistic and contrary to the essence of her evidence.

[53] A conspiracy between Agliotti and Muller finds no support in the facts. The trial court correctly pointed to the fallacy of such an argument: that there was no opportunity for such conspiracy (this will become apparent later in this judgment), that the many discrepancies between them is destructive of any conclusion that they conspired, and that neither of them at any stage illustrated an inclination to incriminate the appellant. On the contrary, Agliotti adamantly insisted, to the very end, that he never ‘bribed’ the appellant.

[54] There exists no basis on which this Court is entitled to interfere with the credibility finding by the trial court in relation to Muller’s evidence.

[55] During November 2006 Agliotti was arrested as a suspect in the murder of Brett Kebble. Once in jail he was anxious to be released on bail. One route open to him was to provide the investigating and prosecuting authorities with useful information as a bargaining tool to obtain his release. For this purpose he started compiling notes in point

and word form about payments made to the appellant and the quid pro quo received from the appellant. When he made these notes he had no access to any documentation that he could draw information from or use to stimulate his memory. He also had no contact whatsoever with Muller. Significantly there was no investigation of the appellant at this stage. Objective evidence at the trial corroborated some of the contents of these notes and illustrate why the trial court was justified in its conclusion that there was not only no opportunity for a conspiracy between Agliotti and Muller, but no actual conspiracy.

[56] Agliotti testified about the nature of the relationship that he had with the appellant. According to him they were close friends. He described himself as a generous person who spontaneously gave gifts to people that he encountered a fact that was confirmed by the appellant. As the appellant was a close friend of Agliotti, he also benefitted from that same generosity. However, in that relationship the generosity took on a whole new dimension. In the appellant's own words, Agliotti was a person constantly in need of recognition, and he therefore flaunted his close relationship with the appellant. This close relationship with the appellant enabled Agliotti to secure a fee of R12 million from the Kebbles with the assurance to them that the appellant was 'on board'. This evidence was unchallenged and clearly reveals that the co-operation of the appellant came with a substantial price tag. Clearly the Kebbles indulged in activities that required the co-operation of the appellant outside his normal duties as chief of police and for that they were prepared to pay substantial money. Agliotti was able to offer the co-operation of the appellant, whether real or illusory, because of the close relationship that he enjoyed with him. Against this background Agliotti testified to numerous payments of various amounts that he made to the

appellant. This occurred over a period of years and, by the very nature of such payments, no record of them was kept. Understandably, he was vague about the details.

[57] Muller corroborated Agliotti about the nature of the relationship between him and the appellant. She was not a witness to most of the details regarding payments to the appellant, but heard about them from Agliotti. She did, however, testify to numerous instances that she was asked by Agliotti to prepare envelopes containing amounts of money. On many of the envelopes she was instructed to write the initials JS. She assumed, but did not know, that it referred to the appellant. However, the appellant always called at their offices or sent his driver soon after such envelopes were prepared. Although she never saw the appellant receive such an envelope, she was convinced the money was for him.

[58] The use of the initials JS became a point of intense debate. The suggestion on behalf of the appellant, based on the evidence by Flint, was that it could also have referred to John Stratton. Flint testified that, not having known whose initials J S were, he assumed it was John Stratton as they had frequent dealings with Stratton at that stage as Muller and Flint, on behalf of Monster Marketing CC, were busy negotiating a black economic empowerment (BEE) deal with the Kebbles and Stratton on behalf of JCI. He also said that Stratton, wanted to buy a new car but required bridging finance. He asked that the deposit on the car and some of the initial monthly payments be made from the Spring Lights account. They obliged as it was the intention that Monster Marketing would become a JCI entity after the BEE deal had been concluded. The deal then fell through. An investigation by a firm of chartered accountants revealed three cheques that accorded with this evidence. They were dated

3 August 2004, 12 October 2004 and 1 December 2004 respectively. Not one of them is part of the payments that the appellant has been charged with. The first cheque is made out to Monster Marketing in an amount of R182 274.30. Its stub refers to JSMB and Nedbank. This information is clearly reconcilable with a payment of a deposit on a Mercedes Benz motor vehicle for John Stratton. The second and third cheques are for the same amount, R18 607.44, made out in favour of Monster Marketing, and the stubs of both refer to 'JS Car'. This information is clearly reconcilable with the payment of two installments on John Stratton's car.

[59] The contrast between these cheques and those the trial court accepted as corroboration for payments made to the appellant will become evident as the evidence is discussed. Suffice it to say at this stage that all of the cheques that the trial court accepted as corroborating evidence were made out to cash, in round figures and were not made out at regular intervals.

[60] The trial court, faced with the absence of reliable, detailed evidence from Agliotti, exercised what can only be described as extreme caution and only convicted the appellant on the basis of a few payments for which clear corroboration existed.

[61] Agliotti's prison notes refer to payment of R300 000 to the appellant. It was unchallenged that when he consulted with his counsel about these notes, the latter, as a result of the content of the consultation, made his own notes on the same paper. Above the amount of R300 000 counsel wrote 'split trace cheques – Martin' (the reference to Martin clearly being to Flint). The cheques were subsequently traced and two cash cheques were found that was made out during December 2004, one

for R100 000 and one for R200 000. Agliotti testified that the proceeds of the R100 000 cheque, which he instructed Flint to draw, were paid to the appellant. He added R20 000 to it and asked Muller to pack it into an envelope, which he handed to the appellant in the boardroom of Muller's business premises. The trial court concluded that the money from the R100 000 cheque was paid to the appellant. Before looking at the details of the cheque, Muller's evidence provides an important focus.

[62] Muller testified to a cash payment of R110 000 by Agliotti to the appellant at her offices during December 2004. Shortly stated, the details of her evidence is that, towards the end of 2004 Agliotti handed her a large amount of cash and told her to pack R110 000 of it into a bank bag. On counting the money she found it amounted to R120 000. She therefore removed R10 000 and packed the rest as he asked her to do. She then took the packed money into the board room where the appellant was sitting with Agliotti and handed the bag to Agliotti, who pushed it across the table towards the appellant. Points of difference between Agliotti and Muller relate to surrounding events that easily arise and, as the trial judge remarked, are indicative of the absence of a conspiracy to falsely incriminate the appellant.

[63] The differences between them pale further into insignificance when the next bit of corroboration is considered. Unrelated to the investigation against the appellant, the shareholders of JCI instructed the firm of chartered accountants, KPMG, to conduct a forensic investigation into the Kebble's management of JCI. During this investigation the Spring Lights account came under the spotlight as it was the channel through which the Kebbles allegedly channeled vast amounts of money to sometimes undisclosed and often unauthorized recipients. The DSO and prosecuting

authorities ultimately benefited from this investigation in that it identified several cash cheques, the stubs of which drew attention because they could be tied to payments made to the appellant. All of these stubs contain an inscription that could be a reference to the appellant, being 'JS', the initials of the appellant, 'Chief', being a shortened reference to the appellant as chief of the police, and 'COP', being an abbreviation for the appellant as the chief of police.

[64] Amongst these cheques was one, dated 20 December 2004, in respect of which the stub read 'CASH CoP'. On behalf of the appellant there was a desperate attempt to illustrate that 'CoP' could have referred to another or other policeman. There was no suggestion that it could have referred to anything unrelated to a member of the police force. Evidence was elicited during cross-examination of a generous and kind hearted Agliotti that financially assisted a policeman with the surname Bezuidenhout who had a car accident during which he wrecked his car. Agliotti's own version was that he assisted Bezuidenhout 'in a small way because [he] felt sorry for them'. R100 000 is hardly a small amount and it was never suggested that it was.

[65] Flint, who wrote out most of the cheques drawn on the Spring Lights account, made a statement that the money from at least two of the cheques was intended for Bezuidenhout. During evidence he changed this evidence and explained that he had since remembered that the money that was paid to Bezuidenhout was fetched by the latter at premises occupied by Muller, Flint and Agliotti prior to June 2004 and that the cheques under discussion were dated after June 2004. He thus concluded that the cheques could not have been for Bezuidenhout.

[66] In isolation the evidence about money paid to Bezuidenhout and Flint's contradiction about at least two of the cheques having been for Bezuidenhout, could have had a significant effect in favour of the appellant's defence. However, in the context of all the other evidence, it does not. The amount of the cheque goes way beyond generosity and kind heartedness. Taken with the evidence of Agliotti and Muller and the further corroboration to be discussed, it is not reasonably possible that the moneys went to Bezuidenhout.

[67] Before mentioning further corroboration in relation to this payment of R110 000, it is convenient at this stage to dwell on the meaning of the words written on the cheque stubs. Much was made on behalf of the appellant of the fact that Flint was the author of most of the cheques and cheque stubs, and he testified that he never suspected that the money was meant for the appellant. Counsel for the appellant argued that as the author of the stubs were unable to say that the money was meant for the appellant it cannot be concluded that the words on the cheque stubs referred to the appellant. This argument is fallacious. Flint testified that he wrote out cheques on Agliotti's instructions. He had no independent knowledge of what the money was intended for. What he wrote on the stubs was based on information from Agliotti and was meant to be a cryptic reminder of what the money was for. Flint was therefore not the author of the stubs in the usual sense of the word. Although it was by his hand that the writing was made on the stubs, it was based on information from Agliotti. This is true in relation to all the relevant stubs.

[68] Mr Dean Friedman from KPMG was instructed, pursuant to his forensic investigation for JCI, to do a forensic analysis of the appellant's finances. Amongst other things, he found a significant change of trend in

the appellant's bank account during the period January 2005 until March 2005. During January and February 2005 no cheque payments were made form the appellant's bank account, unlike the months before and after that time, when cheque payments were, on average, well in excess of R10 000 per month. For the period January until March 2005 no cash withdrawals were made and credit card expenditure from January until April 2005 dropped, on average, by several thousand Rand. The appellant offered no explanation for this drop in the spending patterns from his bank account. It is hardly conceivable that the appellant, faced with the dilemma just illustrated, was unable to tender an explanation if one, other than the incriminating one proffered by the respondent, existed. I state this whilst not losing sight of the fact that the appellant testified that his wife ran the household finances. Nothing was suggested that barred her from testifying.

[69] An attempt was made on behalf of the appellant to illustrate that Agliotti and Muller were talking about different incidents in relation to the December 2004 payment, as Muller was confused about the date of the event to which she testified. Her recollection was not crystal clear, but she remembered that the incident occurred towards the end of a year that Agliotti went to Mauritius. Whilst giving evidence she recalled that the incident occurred before the death of Kebble, who was murdered on 27 September 2005. There is no merit in the contention that Agliotti and Muller were not testifying about the exact same payment.

[70] The trial court correctly concluded that sufficient corroboration existed to substantiate the conclusion that the appellant, beyond a reasonable doubt, was the recipient of R110 000 from Agliotti of which R100 000 was drawn with cheque 0266 from the Spring Lights account.

The further findings by the trial court followed the same pattern. Against the backdrop of numerous payments having occurred, supported by a particular cash cheque, the stub of which contained some reference to the appellant and the general corroboration referred to above and detailed with care in the judgment by the trial court, the appellant was convicted of receiving three further payments. The first two are evidenced by cheques; the first being cheque 0127, the stub of which reflected the inscription 'CASH JSGA' made out on 14 June 2004 for an amount of R10 000; the second being cheque 0355 dated 28 September 2005 made out in the amount of R30 000, the cheque stub reflecting 'CASH Chief'. Agliotti interpreted the 'JSGA' to refer to 'Jackie Selebi Glen Agliotti'.

[71] Insofar as the general corroboration relied on by the trial court is concerned, I am of the view that the trial court, in applying the rules of caution and seeking corroboration, was benevolent to the appellant and preferred to refrain from convicting the appellant in relation to a specific payment when the faintest doubt was raised. Thus the appellant was not convicted in relation to four more cheques that reflected inscriptions that could be interpreted as references to the appellant.

[72] In relation to cheque 0355 particularly strong corroboration was found which also serves to strengthen the general corroboration. Agliotti testified that the day after Brett Kebble was murdered, 28 September 2005, whilst on his way to the mortuary to identify Kebble's remains, he received a telephone call from the appellant, who asked him for money. He specifically remembered the telephone call because of the unusual circumstances he found himself in when he received the call. During cross-examination it was denied that the appellant made this call. Objective evidence of telephone records was thereafter found and

introduced that indicated that the appellant did indeed make a phone call to Agliotti on that day. The cheque is dated the same day. Its stub contains the words 'CASH Chief'. Agliotti testified that he used to refer to the appellant, and nobody else, as 'Chief'.

[73] The only version, other than a denial by the appellant, that was argued in answer, was that the R30 000, represented by this cheque, was used by Agliotti to make a customs payment for the release of a container that later turned out to have contained narcotics. The argument is not supported by the facts and is rather opportunistic. It confuses Agliotti's evidence of the payment for the container and ignores the inscription on the cheque stub and the objective evidence of the telephone conversation. In fact, it constitutes a random connection of two amounts of R30 000 that could not be connected on the evidence.

[74] Shortly after this payment, on 16 October 2005, the appellant took the unusual step of personally calling at a clothing store, Gray's, in Sandton City, where he and Agliotti regularly shopped together, and made a cash payment of R25 000 on this account which at that stage stood at R56 430. An amount of R25 000 was not withdrawn from his account for this purpose. The appellant having been in possession of such a large, otherwise unaccounted sum of cash, provides a measure of corroboration for the respondent's version that Agliotti had paid him R30 000 in cash.

[75] The third additional payment the court a quo found had been made was an amount of $30 000 Agliotti said he had made to the appellant on 23 May 2005 at the O R Tambo airport shortly before the appellant departed on a trip to Cyprus. The reason for this payment further paints

the picture of the nature of the relationship between the appellant and Agliotti and adds to the general corroboration.

[76] Rautenbach desired to return to South Africa, but due to the warrant that had been issued for his arrest he did not feel free to do so. He serendipitously met with Agliotti in Zimbabwe and learnt about the relationship between Agliotti and the appellant. He requested Agliotti to attempt to persuade the appellant to pay attention to his case with the ultimate view of facilitating his return to South Africa without running the risk of being arrested. Agliotti was keen to assist and charge a fee for his efforts. On Agliotti's insistence the appellant met Tidmarsh, Rautenbach's attorney, in his hotel room in Sandton on 19 April 2005. They discussed Rautenbach's dilemma. The appellant testified that by doing so he gave Tidmarsh the opportunity they sought, namely to have Rautenbach's case listened to by 'higher authority'. During this meeting the appellant, on his own version, gave Tidmarsh information that assisted him to respond to a letter to Rautenbach from Ngcuka. This information included that Ngcuka was suspected of 'abusing his office' and was being used by British Intelligence for their purposes.

[77] Not long after this meeting, on 22 April 2005, Agliotti flew to Lumbumbashi in the Democratic Republic of Congo, met Rautenbach at the airport who handed him $100 000 for arranging the meeting with the appellant. Rautenbach's evidence in this regard was not challenged. He was accepted by the trial court as a reliable witness and that finding is also not challenged in this court. During this time, somewhere during May or June 2005, the appellant had occasion to share a flight with Pikoli to the Eastern Cape on official duties. According to Pikoli, when they disembarked, the appellant asked him why his department does not drop

the charges against Rautenbach. He responded by asking why they would do that and the appellant replied that he was in possession of a letter that could embarrass Ngcuka, a previous National Director of Public Prosecutions (NDPP), and Pikoli's office. According to Pikoli he dismissed this communication as he believed it was not a matter the appellant should have been involved in. Pikoli's evidence was accepted by the trial court and that finding is not attacked in this court.

[78] I need to interrupt myself at this stage to state that both the appellant and Agliotti testified, on the strength of a letter written by Ngcuka, who was then the NDPP, to Rautenbach, that Ngcuka had tried to bribe Rautenbach. Rautenbach was not of that view. The letter does not illustrate that intention either and when the appellant was driven to concede that fact during cross-examination, he said that Agliotti informed him that Rautenbach disclosed to him that Ngcuka had tried to bribe him.

[79] Agliotti testified that on 23 May 2005, shortly after he had received $100 000 from Rautenbach, he met the appellant at the O R Tambo airport and handed him an amount of US Dollars. The appellant denied this. On that day the appellant left the country to attend an Interpol meeting in Cyprus. He was advanced €700 by the South African Police Service (SAPS) for the trip. Upon his return, he exchanged $2 500 into Rand at the airport. He tried to explain the inconsistency by stating that his trip was funded by Interpol, therefore he had additional foreign currency. This was conclusively illustrated during his evidence not to have been the case. His counsel ventured another explanation. That from his many travels abroad the appellant accumulated some foreign currency. Even though there is some support in the appellant's evidence that he held some foreign currency in his safe at home, the

insurmountable difficulty with this submission is that it was not the explanation offered by the appellant.

[80] In addition to payments, the trial court also found that Agliotti bought several items of Fubu clothing for the appellant's two sons. This finding was based on the evidence of Muller that corroborated Agliotti's version. She testified of an occasion in Sandton City shopping centre when the appellant, his wife and sons, met with Agliotti and Muller at the clothing store that sells the Fubu brand of clothing and Agliotti took the appellant's sons and treated them to several choices of items of clothing. It is hardly imaginable that Muller would have dreamt up this incident in the detail that she recounted it. As Muller was correctly found to have been a reliable witness, her evidence was sufficient to sustain the conviction in this regard.

[81] The trial court made no error in reaching the conclusion that it did about benefits in the form of payments to the appellant and clothing for his sons. If anything, the trial court was benevolent towards the appellant in its approach of the evidence.

[82] The trial court found that the respondent proved, beyond a reasonable doubt, that quid pro quo of four kinds were given by the appellant for gratification received from Agliotti. Three were in the nature of information shared and the fourth in the nature of his attendance at various dinners and meetings at Agility's insistence.

[83] Agliotti gave evidence that during approximately July or August 2006 the appellant telephoned him and asked to see him urgently. When they met he showed Agliotti a document consisting of two pages, it

displayed the United Kingdom (UK) coat of arms, it referred to 'Her Majesty's Customs' and it correctly recorded some of Agliotti's travels to the UK and with whom he met whilst there. The real value of disclosing this document to Agliotti is that it conveyed that the UK were monitoring his movements as they suspected him of drug trafficking. Agliotti referred to this document in his prison notes as 'Report . . . . H.M.S. customs'.

[84] Standing alone, this evidence by Agliotti is not indicative of much and as the trial court found him to be an unreliable witness, would have been meaningless if not corroborated. The nature of corroboration that was proved by the respondent, however, was devastating for the appellant's case. What is certain is, if such a document existed, it was definitely shown to Agliotti, because there was no other way that he could have had the specific knowledge of its content that he had testified about.

[85] Such a document was introduced into evidence. It was referred to during the trial as the 'UK Report'. It is a letter, addressed to Mark Hankel (Hankel), Director of Crime Intelligence of the SAPS from the British High Commission on a letterhead bearing the following inscription under the UK coat of arms: 'HM Customs and Excise' and underneath that: 'Law Enforcement'. It was dated 3 August 2004. Hankel testified on behalf of the respondent. He received this document from the UK Customs authorities. At the time, his department was conducting an investigation into drug related activities of several people, Agliotti having been one of them. They called this investigation 'Operation Chaser'. This letter was kept in the file pertaining to Operation Chaser. When he was approached by the prosecuting authority about the existence of such a

letter, he discovered that the file had been booked out by a Captain Thema (Thema) of the SAPS on 21 April 2006 and was never returned.

[86] During his evidence the appellant conceded that subsequent to Hankel's evidence, he consulted with Thema, whilst knowing that the latter was a state witness and he was not entitled to consult with him. Despite the evidence and the appellant's consultation with Thema, he was never called as a witness in the appellant's case. There was no answer to this evidence, and the appellant had none. The trial court made no mistake in its finding against the appellant in this regard.

[87] In his prison notes Agliotti referred to a 'NIA' report that was shown to him by the appellant. He testified that the appellant had a thick document which he opened and showed two pages of to Agliotti. Two lines of the writing in it were underlined and that related to an allegation by one Jurgen Kögl (Kögl) that the Kebbles were paying the appellant. The appellant asked Agliotti to find out about Kögl and told him that the relevant document was an intelligence report destined for the President of South Africa.

[88] Such a document was introduced into evidence. It is called a National Intelligence Estimate (NIE report), an annual document prepared by the National Intelligence Coordinating Committee (NICOC) for the purpose of providing the South African Government with an assessment of the key issues of security concerns to the country on a national and international level. The NIE report indeed contains the information that Agliotti testified about. The appellant's response to this evidence was most unusual. He denied that he showed the particular NIE report to Agliotti but conceded that he showed him some document

concerning ‘information pedlars’ which might have contained a reference to Kögl. During the course of his evidence the appellant produced a document which he said was similar to the one that he showed to Agliotti. The document was never put to Agliotti during the latter’s evidence. On the face of it, it was a classified document, which would lead to the same conclusion than the one drawn by the trial court in relation to the NIE report. The appellant then testified that he had the actual document that he had shown to Agliotti at home. That document, he said, he declassified to enable him to legitimately show it to Agliotti. When he brought the document to court, it was apparent that it had not been declassified, and during further cross-examination it was convincingly illustrated that the document had been fabricated after Agliotti had given his evidence.

[89] The trial court dealt extensively in its judgment with this evidence as the fourth of the appellant’s ‘big lies’ and correctly concluded that the appellant did show the ‘NIE report’ to Agliotti.

[90] The last of the documents that the trial court found the appellant showed to Agliotti, is an eight page document consisting of a statement attached to an e-mail. According to Agliotti the appellant telephoned him and arranged to meet him urgently in the parking area of Makro in Woodmead. There he handed the document to Agliottti with the communication that the document could be used to discredit the DSO. The details of the document and why it may have provided ground to discredit the DSO is irrelevant for current purposes. Agliotti handed the document to his attorney. The document included information about an investigation in which Agliotti was implicated.

[91] The composition of this document was not challenged on behalf of the appellant during Agliotti's evidence. During his own evidence, however, he vacillated between whether he had ever seen the entire eight page-document or only part of it, which part he had seen and handed over to Agliotti and the reason why he gave it to Agliotti. The trial court correctly found that the respondent had proven that the appellant handed the full document to Agliotti and that the appellant was dishonest in relation thereto. This was dealt with by the trial court as the sixth of the appellant's 'big lies'.

[92] Not much need to be said about the trial court's findings about the meetings and dinners that the appellant attended with Agliotti, other than that the finding is not to be faulted. I do make reference to some of the meetings and dinners in a discussion that follows on the nature of the relationship between the appellant and Agliotti. Before I proceed to that discussion it is important to state that the mendacity of the appellant went directly to the essence of vital aspects of the case against him and greatly reduced the risk of accepting the evidence against him.[14] The palpable dishonesty apparent from the appellant's testimony leaves one aghast. It reveals, without any doubt, a guilty state of mind.

[93] The trial court made the following finding in relation to the requirements of s 4 of the Prevention and Combating of Corrupt Activities Act 12 of 2004 (PCCA Act):

'Whilst the act criminalises the conduct of both the corruptor and the corruptee, it clearly and expressly, does not require the existence of an agreement between them.'

[14] *Corfield v Hodgson* [1966] 2 All ER 205; *S v Hlapezula & others* 1965 (4) SA 439 (A) at 440F-G; *De Vries & others v S* (130/11) [2011] ZASCA 162 (28 September 2011).

Towards the end of the judgment the trial court concluded as follows on the evidence:

'As indicated above there is no evidence of an agreement between the accused and Agliotti for benefits to be given to Agliotti in return for payments. On the evidence it is clear that such an agreement or understanding must have existed. It did not have to be expressly concluded. At the very least it came into existence over a period of time. The accused must have known the adage that there is no such thing as a free dinner.'

[94] These findings were attacked by the appellant in this Court. In the heads of argument delivered on behalf of the appellant the following submission is made:

'We submit that there can be no doubt that PCCA requires as a very basic requirement that any gratification accepted or agreed to be accepted by an accused person must specifically relate to some understanding between the person giving the gratification and the person receiving the gratification that he will act or omit to act in a specific agreed manner and/or influence another person to so act.'

[95] It is further submitted on behalf of the appellant that although the trial court was correct in finding that there was no evidence of an agreement between the appellant and Agliotti, the trial court erred in inferring that 'it was clear that such an agreement or understanding must have existed'. It was further contended that the finding 'is of course directly contrary to the allegations in the charge sheet . . . and also contrary to the evidence given by the State witnesses'.

[96] The factual findings and conviction by the trial court on the basis set out above, consist of an acceptance of a gratification on the one hand and the giving of a quid pro quo by the appellant on the other hand, on the basis of an inferred agreement. As such the findings fulfils the requirements of s 4(1)*(a)*(i)*(bb)*:

‘Any public officer who . . . accepts . . . any gratification from any other person . . . in order to act, . . . in a manner that amounts to the . . . misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation; . . . is guilty of the offence of corrupt activities relating to public officers.’

[97] Section 4, in my view, does not require an agreement between the corruptor and the corruptee, nor does it require a quid pro quo from the corruptee. It must be plainly understood that the conviction in this case on the evidence that established an agreement and the giving of a quid pro quo, is not the low water mark of the section.

[98] On the view that I take of s 4, the trial court would have been justified to convict the appellant even without a finding that he had provided a quid pro quo.

Section 4 (1)(*a*)(ii) reads:

‘Any public officer who . . . accepts . . . any gratification from any other person . . . in order to act, . . . in a manner that amounts to –

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

(*bb*) a breach of trust; or

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

is guilty of the offence of corrupt activities relating to public officers.’

[99] Section 25 of the PCCA Act supports the wide interpretation of s 4. It provides:

‘Whenever an accused person is charged with an offence under Part 1, 2, 3 or 4, or section 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2, it is not a valid defence for that accused person to contend that he or she–

(*a*) did not have the power, right or opportunity to perform or not to perform the act in relation to which the gratification was given, accepted or offered;

(b) accepted or agreed or offered to accept, or gave or agreed or offered to give the gratification without intending to perform or not to perform the act in relation to which the gratification was given, accepted or offered; or
(c) failed to perform or not to perform the act in relation to which the gratification was given, accepted or offered.'

[100] In the charge sheet the respondent relied on an allegation that the appellant and Agliotti had conducted a 'generally corrupt relationship'. An investigation of the nature of their relationship serves to illustrate that the requirements of s 4 were satisfied on a narrower basis as well.

[101] I turn first to an investigation of the appellant's behaviour in relation to Agliotti on either common cause or uncontested facts. The appellant's office was situated in Pretoria and that of Agliotti in Midrand. The appellate went to Agliotti's office regularly, approximately twice a month, during office hours and often in full uniform. They regularly met in shopping centres, during office hours, to have coffee and to shop together for exclusive clothing, for which they both had a passion. They communicated regularly via telephone. The evidence showed that during the period 1 July 2004 until 20 August 2004, a mere seven weeks, there were 57 instances of telephonic contact between them, 41 of which were initiated by Agliotti and 16 thereof were made by the appellant. Despite their closeness the appellant and Agliotti never visited each other's homes and included their families in their interaction only on rare and isolated occasions.

[102] The appellant met with Tidmarsh. There was a stark contrast between the reasons for the meeting put to state witnesses and testified to by the appellant. During his evidence he insisted that the meeting took place on his insistence and was about official police business. He went to

listen to a complaint from Tidmarsh about the manner in which the office of the NDPP was treating Rautenbach and to verify Agliotti's revelation to him that Ngcuka attempted to bribe Rautenbach. Curiously though, they met at Tidmarsh's hotel rather than at the appellant's office and he took Agliotti with him. The evidence ultimately revealed that neither Rautenbach nor Tidmarsh was of the view that Ngcuka tried to extract a bribe from Rautenbach.

[103] The appellant allowed and accommodated behaviour from Agliotti that strikes as peculiar from the National Commissioner of Police. Agliotti telephoned him when he was stopped at the door of an aircraft at O R Tambo Airport and questioned by members of the SAPS. Again, when Agliotti was searched at Heathrow Airport he telephoned the appellant with the news. Agliotti also telephoned the appellant from the scene of a housebreaking and after speaking to the appellant handed the telephone to the police officer on the scene who was busy performing his duties. The appellant then instructed him to do his job well as the appellant was his friend.

[104] The appellant met with the Kebbles despite the fact that he knew, since August 2003, that Agliotti received an amount of more than R12 million from the Kebbles for having the appellant 'on board'. During this dinner the appellant discussed with Brett Kebble the details of his father's arrest at the O R Tambo Airport by members of the SAPS and did so in the presence of Agliotti. The appellant blatantly lied about the motivation for and content of the dinner conversation with the Kebbles in that he tendered several versions in this regard. One of those versions was that the dinners with the Kebbles only contained convivial conversation.

[105] The appellant also met with Nassif on Agliotti's request, an arrangement for the purpose of considering using Nassif's security company to address certain criminal acts. Similarly he met with one Jumean to listen to a complaint about a police reservist, Brad Wood. Several other such meetings were arranged by Agliotti and attended by the appellant. At best for the appellant, it shows a willingness to be involved in issues that had nothing to do with essential SAPS business, but only with minor issues related thereto, not deserving of the concern or attention of the National Commissioner of Police.

[106] These facts paint a picture neither purely of friendship nor of a professional relationship, but of an undesirable confusion of the two. What stands out is that the appellant indulged Agliotti in many ways. These indulgences should be seen against the backdrop of the appellant's own knowledge about Agliotti.

[107] He was fully aware that Agliotti flaunted his association with the appellant. The appellant testified that Agliotti had a lot of information about crime (he described him as an 'encyclopaedia' of criminal events) that he shared with him. It is an inevitable inference that one has to be close to crime to have information about it, but nevertheless, the appellant continued his association with Agliotti. During 2003 the South African Revenue Service (SARS) informed the appellant that it was investigating Agliotti in relation to contraban, but the appellant continued to closely associate with Agliotti. The appellant tried to justify his continued involvement with Agliotti by denying that he ever had any concrete evidence about Agliotti's involvement in crime. However, he chose to never question or investigate the rumours about Agliotti or why he was such a rich source of information about crime.

[108] The appellant could contact Agliotti without any difficulty when one of the senior forensic investigators of the Special Investigation Unit of SAPS, Roeland, was unable to do so. After Brett Kebble was murdered, Roeland's investigations revealed that several mobile telephones registered to Agliotti had been active, the day prior to the murder, on the scene of the murder. When she and her staff tried to make contact with Agliotti on these numbers after the murder, they were unsuccessful because the numbers were inactive. However, when they briefed the appellant about this in an official meeting, the appellant dialled a number in their presence and spoke to Agliotti. When he was requested, after the conversation, to divulge the number that he had dialled, he ignored the request. Initially, during the trial, he denied that this incident had happened although he subsequently conceded that it had. He then tried to brush the incident off by saying that the members of the SAPS had all the relevant means to trace and make contact with Agliotti. This evidence ties in with that of Agliotti when he indicated that after the start of the so-called media campaign against him and the appellant, during 2006, he (Agliotti) changed his telephone to a so-called 'pay-as-you-go' to escape detection and media attention.

[109] I now turn to set out the appellant's knowledge in relation to Agliotti. Since August 2003 he had clear evidence that Agliotti abused their relationship and received a vast amount of money from the Kebbles to retain his closeness to the appellant. Also during 2003 he learned of Operation Chaser, a criminal investigation into international drug related crime by the Special Operations Intelligence Centre of the SAPS in which Agliotti, albeit not the main suspect, also featured. The appellant, during the course of 2003, asked Agliotti whether he was involved in crime. He

explained that he '[w]anted to make sure he is not involved in any crime if he is associated with me'. The appellant clearly harboured justified suspicions that Agliotti was involved in criminal activity, a perfectly reasonable suspicion considering his knowledge about Agliotti, and also asked senior police officials about him. According to the appellant he never received an answer to his request, but he also never followed up his request. The appellant called Agliotti a 'hustler' and said that if a hustler like Agliotti offered him money, he would think there is something behind it, that he is trying to buy his (the appellant's) favour.

[110] The above summary shows that the nature of the relationship between the appellant and Agliotti, based on common cause facts, was no ordinary relationship. One does not expect the National Commissioner of Police to take his friend along on police business; to take his friend and informer along to the very meeting where the verification of the informer's information is to take place; to meet his friend to shop together during office hours; to favour his friend by attending to minor complaints for which structures exist to be dealt with; and to divulge information regarding police operations to his friend's friends. If the relationship was so close to have made these occurrences ordinary, one would have expected it to spill over to the families of the appellant and Agliotti, which did not happen.

[111] How did the appellant explain this unusual relationship? It was repeatedly put to state witnesses on his behalf that he had an innocent friendship with Agliotti. I have already illustrated that to have been highly improbable, to the point of being unbelievable. During his own evidence, however, the appellant dramatically changed this version and described the relationship as one between informer and handler. This

explanation is equally inherently improbable. Their relationship was a public one. Agliotti was previously, from the beginning of 2002 for a period of one year, registered as a police informer and had an official handler, not the appellant. He lost that status within a year and was deregistered as an informer. The appellant's mendacity in this regard, dealt with extensively by the trial court, is yet another indication that the relationship between them was extraordinary, not one of friendship, nor one between informer and handler.

[112] The only reasonable inference to be drawn from the nature of their relationship is that the appellant felt beholden to Agliotii. Agliotti's generosity did not stop at the appellant's door, he used the R12 million that he received from the Kebbles for the purpose that it was given. The focus in *S v Shaik & others* 2007 (1) SA 240 (SCA) was on the other side of the coin to the present, but, bearing the obvious factual differences in mind, the following passage from the trial court's judgment highlights the obvious inferences to be drawn:[15]

'If Zuma could not repay money, how else could he do so than by providing the help of his name and political office as and when it was asked, particularly in the field of government contracted work, which is what Shaik was hoping to benefit from. And Shaik must have foreseen and, by inference, did foresee that if he made these payments, Zuma would respond in that way. . . .

he also realised the possible advantages to his business interests of providing the means to retain Zuma's goodwill by helping him to support a lifestyle beyond what he could afford on his Minister's remuneration.'

In my view, the appellant must have realised that Agliotti's generosity and the payments he received from him created a dynamic, whereby he, in his post as head of the nation's police service, would be indebted to him and would have to remain willing to do him favours.

[15] At 260A-D.

[113] This leads to the conclusion that the appellant, on his own version, abused his position of authority and breached the trust placed in the position that he held in contravention of s 4(1)*(a)*(ii). Strictly speaking, this finding obviates the need to investigate whether the appellant gave any quid pro quo for the payments that he received. But, as I have already pointed out, he did.

[114] For these reasons I agree that the appeal should be dismissed.

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S SNYDERS

Judge of Appeal

APPEARANCES

For Appellant:	JG Cilliers SC (with him SJ Coetzee & J Motepe) Instructed by: Geyser & Coetzee Attorneys, c/o Aucamp & Cronje Attorneys, Johannesburg Hill, McHardy & Herbst Inc, Bloemfontein
For Respondent:	GC Nel (with him A Johnson) Instructed by: The National Director for Public Prosecutions, Johannesburg The National Director for Public Prosecutions, Bloemfontein