OFFENCES INVOLVING AN ELEMENT OF DISHONESTY: SECTION 27(a)(ii) OF THE ESTATE AGENCY AFFAIRS ACT 112 OF 1976

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SUMMARY

Section 27(a)(ii) of the Estate Agency Affairs Act 112 of 1976 disqualifies a person from being issued with a fidelity fund certificate if such person has at any time "been convicted of an offence involving an element of dishonesty". The Afrikaans text (which was signed by the State President) is worded differently, and refers to "'n misdryf waarvan oneerlikheid 'n element is" ("an offence of which dishonesty is an element"). The current Constitution, unlike its predecessors, contains no provision stating expressly that in the event of a conflict between two versions of an Act the text signed by the President is to be given effect. It is submitted, however, that there is no *conflict* between the two versions of section 27(a)(ii). Having regard to the ordinary rules relating to interpretation of statutes, the conclusion is reached that the section must be interpreted to mean that a person is disqualified from being issued with a fidelity fund certificate only if such person has been convicted of an offence of which dishonesty is an element. The article analyses court cases where the word "dishonesty" was discussed with reference to both common law and statutory offences. Reference is also made to the word "dishonesty" in a criminal law context. It is pointed out that for the purposes of section 27(a)(ii) dishonesty need not be a *requirement* of the offence, but must be an *ingredient* thereof. What must be looked at is the nature of the offence, not the context in which it was committed. The key question is: Can it be said, by applying the standards of reasonable and honest persons, that the nature of the offence, having regard to its description, is such that any person committing the offence would by necessary implication be acting dishonestly? If dishonesty is by necessary inference an ingredient of the offence it is immaterial for the purposes of section 27(a)(ii) that the person convicted of the offence had no intention to deceive. All offences are inherently wrongful, but dishonesty is not necessarily an element of all offences. Cheating or deceiving are key aspects of dishonesty. Offences which are morally repugnant are not dishonest *per se*. From a moral perspective it is arguable that there are degrees of dishonesty, but this is irrelevant for the purposes of section 27(a)(ii).

1 INTRODUCTION

Section 27(a)(ii) of the Estate Agency Affairs Act[1] reads as follows:

> "27. No fidelity fund certificate shall be issued to –
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> (a) any estate agent who or, if such estate agent is a company, any company of which any director …
>
> (i) …
>
> (ii) has at any time been convicted of an offence involving an element of dishonesty."

Section 26 of the Act prohibits any person from acting as an estate agent unless he or she has been issued with a fidelity fund certificate by the Estate Agency Affairs Board. The prohibition contained in section 27(a)(ii) therefore effectively bars any prospective estate agent from obtaining access to the estate agency industry if he or she has at any time in the past been convicted of an offence involving an element of dishonesty. In the case of a practising estate agent (that is, an estate agent already issued with a fidelity fund certificate) the conviction of such an offence triggers the immediate lapse of such estate agent's fidelity fund certificate,[2] with the result that he or she must immediately cease working as an estate agent and return the fidelity fund certificate to the Estate Agency Affairs Board. The estate agent is thereby "expelled" from the estate agency industry. A person disqualified from being issued with a fidelity fund certificate by reason of section 27(a)(ii) can obtain or regain access to the estate agency industry only if the Estate Agency Affairs Board is satisfied, with due regard to all the relevant considerations, that the issue of a certificate to such a person will be in the interest of justice.[3] In other words, such person has no absolute right of access to the industry, as in the case of persons not disqualified in terms of the Act from being issued with fidelity fund certificates.

The aim of this article is to determine what constitutes an "offence involving an element of dishonesty" as contemplated in section 27(a)(ii) of the Act. Guidance is sought from court cases where the meaning of "dishonesty" was considered in the context of both statutory and common law offences. Particular reference is made to judgments concerning section 218(1)(d)(iii) of the Companies Act[4] which disqualifies a person from being appointed or acting as a director of a company, save with authority of the court, if such a person has, amongst others, been convicted of *any offence involving dishonesty* and has been sentenced to imprisonment without the option of a fine, or to a fine exceeding R100.

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1 112 of 1976. References to "the Act" in the article refer to the Estate Agency Affairs Act unless the context indicates otherwise.

2 S 28(5) of the Act. The certificate lapses automatically without any hearing. No statutory discrimination is involved in the procedure: *Estate Agency Affairs Board v McLaggan* 2005 4 SA 531 (SCA).

3 See the proviso to s 27 of the Act.

4 61 of 1973.

The starting point is to examine the purpose of section 27(a)(ii), having regard to the objects of the Estate Agency Affairs Act and the nature of the relationship between estate agents and the persons they do business with, such as buyers and sellers of immovable property.

2 THE OBJECT OF SECTION 27(a)(ii)

The principal purpose of the Estate Agency Affairs Act is to protect consumers in their dealings with estate agents. It provides for the establishment of the Estate Agency Affairs Board[5] whose object[6] is to

(i) maintain and promote the standard of conduct of estate agents; and

(ii) regulate the activities of estate agents,

having due regard to the public interest.

The board is essentially a consumer protection authority. The need to safeguard consumer interests stems from the fact that estate agents play a key role in assisting consumers with buying and selling of immovable property, which for many is the single biggest financial investment they ever make. Estate agents are also active in the rental market and are engaged by sectional title bodies corporate and home owners' associations to collect levies from owners of properties in sectional title and other group housing schemes. In the process considerable amounts of money are entrusted to estate agents. Many consumers lack experience and knowledge in respect of property transactions, so much so that they can easily be exploited by unscrupulous estate agents interested only in securing a deal in order to earn commission. Common law imposes on estate agents certain duties[7] in relation to their clients (*ie* the persons from whom they receive mandates), as well as a duty to exercise professional skill and care,[8] but in practice these duties are paid scant attention by dishonest practitioners. Human nature being what it is, buyers and sellers of immovable property rarely question estate agents' integrity or track record until it is too late. They trust their estate agent, expecting honest and reliable professional service. First-time home buyers and sellers, specifically those at the lower end of the market, are particularly vulnerable. The estate agent involved in the transaction is often their only source of information and they invariably have little choice but to rely on the estate agent and to accept what they are told about a property and the implications of a property transaction.

The consumer protection measures contained in the Act fall into two main categories, namely (a) provisions aimed at *preventing* exploitation of consumers by unscrupulous practitioners and (b) provisions aimed at

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5 S 2 of the Act.

6 S 7 of the Act.

7 The duties are similar to the fiduciary duties arising from the relationship between principal and agent: see *Mallinson v Tanner* 1947 4 SA 681 (T); Delport *SA Property Practice and the Law* 12ed (revised) (1987) 298; Williams "Estate Agents: My Agent or Yours? Aspects of Breach of Fiduciary Duty in Hong Kong" 2001 (31.1) *Hong Kong Law Journal* 90.

8 See, *eg*, *Soobramoney v R Acutt and Sons (Pty) Ltd* 1965 2 SA 899 (D).

assisting persons who have suffered a loss by reason of having misplaced their trust in a particular estate agent. Section 27 falls into the first category. It prohibits the issue of a fidelity fund certificate to certain persons, thereby ensuring that those persons cannot become estate agents or, if they are already estate agents, that they be expelled from the industry. The legislature clearly considered the persons referred to in section 27 to be unfit to assume the responsibilities of an estate agent, having regard to the nature of those responsibilities.

In determining the object of section 27 it is useful to have regard to section 218(1) of the Companies Act which disqualifies certain persons from being appointed or acting as directors of a company. Subsection (1)(d)(iii) reads as follows:

> "(1) Any of the following persons shall be disqualified from being appointed or acting as a director of a company:
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> (a) …
>
> (b) …
>
> (c) …
>
> (d) save under authority of the Court –
>
> (i) …
>
> (ii) …
>
> (iii) any person who has at any time been convicted (whether in the Republic or elsewhere) of theft, fraud, forgery or uttering a forged document, perjury, an offence under the Prevention of Corruption Act, 1958 (Act 6 of 1958), the Corruption Act, 1992 (Act 94 of 1992), Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, or any offence involving dishonesty or in connection with the promotion, formation or management of a company, and has been sentenced therefor to imprisonment without the option of a fine or to a fine exceeding one hundred rand; …"

The predecessor of section 218(1) was section 68 *bis* of the Companies Act 46 of 1926. The object of the latter section was explained as follows in *Ex parte Erleigh*:[9]

> "The object of these two provisions (s 68 *bis* (1) and (2)) is plain; the Act clothes directors, or enables them to be clothed, with very great powers, which in the hands of unscrupulous or dishonest men may enable them to inflict very great injury not only upon shareholders in the companies of which they are directors put also upon innocent members of the public who had dealings with the companies controlled by them. It is, therefore, of great public interest that the management of companies should not be in the hands of disreputable boards of directors; it is not considered safe that men convicted of the crimes mentioned in these two provisions should have these powers in their hands. Therefore, the Act lies down as a general rule that men convicted

[9] 1950 2 PH E14.

> of the crimes mentioned shall not sit as directors of companies; that I think is the plain object of these provisions."

The Estate Agency Affairs Act establishes five categories of estate agents,[10] including (a) principal estate agents (companies, close corporations and sole proprietors), (b) directors of estate agency companies and certain members of close corporations which are estate agents, and (c) employee estate agents. The disqualifications referred to in section 27 of the Act cover *all* estate agents, not only estate agent directors and those having management powers within an estate agency firm. Nevertheless, much of what was said in *Ex parte Erleigh* relating to company directors and the object of section 68 *bis* of the Companies Act 1926 applies equally to section 27 of the Estate Agency Affairs Act. Undoubtedly, it is of great public interest that disreputable persons not be permitted to engage themselves gainfully in negotiating or handling property transactions on behalf of members of the public. It is not safe for the persons referred to in section 27 to earn a living by assisting members of the public with investment decisions relating to immovable property, or that they be allowed to accept monies payable by third parties in respect of property transactions. Unscrupulous or dishonest persons may in so doing inflict great injury on members of the public. This is particularly true of the persons referred to in section 27(a)(ii), namely those convicted of an offence involving an element of dishonesty. Members of the public deserve to be statutorily protected from placing their trust in persons who not only have a track record of dishonest conduct, but have in fact committed an *offence* involving an element of dishonesty.

The main aim of section 27 is therefore to safeguard consumer interests. There is, however, a secondary objective. The section, subsection (a)(ii) in particular, benefits not only consumers but also the estate agency industry in general. The estate agency industry is a multi-billion rand industry, providing work opportunities to thousands of employees and entrepreneurs. However, the exploitation of members of the public by unscrupulous estate agents clouds perceptions about estate agents in general and impacts negatively on the entire industry. This is clearly not in the public interest. Section 27(a)(ii), although aimed primarily at protecting consumers, also seeks to prevent the industry from being brought into disrepute by persons with a proven track record of dishonest conduct. Seen in this context, it would be correct to state that the section is both a consumer protection measure and an industry safeguard.

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[10] See the definition of "estate agent" in s 1 of the Act; and Delport 278.

3 ANALYSIS OF SECTION 27(a) (ii)

3 1 Discrepancy between the English and Afrikaans texts

The Afrikaans text of section 27(a)(ii) reads as follows:

> "27. 'n Getrouheidssertifikaat word nie uitgereik nie aan –
>
> (a) 'n eiendomsagent wat of, indien so 'n eiendomsagent 'n maatskappy is, 'n maatskappy waarvan 'n direkteur … –
>
> (i) …
>
> (ii) te eniger tyd skuldig bevind is weens 'n misdryf waarvan oneerlikheid 'n element is; …"

There is a clear discrepancy between the English and the Afrikaans texts. The English text refers to "an offence involving an element of dishonesty", not "an offence of which dishonesty is an element". The Afrikaans text, on the other hand, reads differently: it refers to "'n misdryf waarvan oneerlikheid 'n element is" (translated: "an offence of which dishonesty is an element"). The Afrikaans translation of "an offence involving an element of dishonesty" is: "'n misdryf waarby 'n element van oneerlikheid betrokke is". An offence "involving an element of dishonesty" is not necessarily the same as an offence "of which dishonesty is an element". The former has a wider meaning than the latter, indicating that the context in which the offence was committed may be considered in determining whether or not the offence involved an element of dishonesty.[11] On the other hand, whether or not dishonesty is an element of an offence depends entirely on the nature of the offence, having regard to its description.[12] For example, rendering services as an estate agent without being in possession of a valid fidelity fund certificate is an offence in terms of the Estate Agency Affairs Act.[13] There is nothing in the description of the offence suggesting that dishonesty is an element of the offence.[14] However, the *manner* in which the offence was planned or committed may have involved an element of dishonesty, for example where the accused had in fact been issued with a fidelity fund certificate but this later turned out to be invalid because material questions in the application form had not been answered honestly.

The Afrikaans text of the Act was signed by the State President. However, it is not clear what weight, if any, must nowadays be given to the signed version of an Act when it comes to interpreting conflicting versions of a provision in the Act. The current Constitution of the Republic of South Africa,

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11 See *Estate Agency Affairs Board v McLaggan* 2005 4 SA 531 (SCA), discussed more fully below.

12 See *Ex Parte Bennett* 1978 2 SA 380 (W) 384C-D discussed below.

13 S 34.

14 Hundreds, if not thousands, of practising estate agents technically commit the offence each year because the Estate Agency Affairs Board is late in renewing their fidelity fund certificates. There is no dishonesty involved on the part of the offenders: they are simply compelled to commit the offence or go out of business.

1996,[15] unlike the 1961 Constitution, the 1983 Constitution and the (interim) 1993 Constitution, contains no provision stating explicitly that in the event of conflicting versions of an Act the version signed by the President must prevail. Section 82 of the (current) Constitution states merely that the signed copy of an Act "is conclusive evidence of the provisions of (an) Act …" What is meant by "conclusive evidence" is an open question.[16] However, the issue need not be resolved for present purposes. Previous constitutions made it clear that affording preference to the signed text arose only in the event of a *conflict*[17] between two versions of a statute. Thus, if by applying the normal canons of interpretation *no conflict* existed, there was no need to give the signed text any preference.[18] In *Jaffer v Parow Village Management Board*[19] one of the rules of interpretation was formulated as follows:

> "Where one of the two official versions of a statute is capable of two constructions but the other version is capable of only one of those constructions the Court will apply the construction of the latter version".

The same rule of construction was formulated as follows by Van den Heever JA in *New Union Goldfield Ltd v Commissioner for Inland Revenue*:[20]

> "(W)hen a Legislature speaks in two languages in the same breath, it seems to me that which is common to both versions must be regarded as Parliament's true intention. The surplus on one side must be regarded as due to incautious expression."

The rule as formulated by Van den Heever JA, labelled as the "highest common factor of the two texts",[21] has, despite its shortcomings,[22] been applied in an number of subsequent High Court judgments[23] and by the

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15 Hereinafter "the Constitution".

16 Constitutional law experts are divided on the issue: see Du Plessis *Statute Law and Interpretation* 25(1) *LAWSA* 342 who expresses the view that s 82 "simply states that one version of an Act (out of a possible 11), namely the one signed by the president, will be conclusive evidence of the provisions of the Act". He maintains that the absence of a provision in the Constitution dealing specifically with conflicting versions is "an implicit recognition of the intrinsic concurrence of the different versions of legislative texts", opening the door to "the fullest possible development of the principles of the case law as it stands". Du Plessis refers to two other views on the matter, one being that only the signed version of an Act is to be regarded as authoritative, and the other that in the case of a conflict between various versions of an Act the version that best reflects the spirit, purport and objects of the bill of rights is to be preferred.

17 S 65 of the 1961 Constitution; s 35 of the 1983 Constitution and s 65(2) of the 1993 Constitution.

18 *Cronje NO v Paul Els Investments (Pty) Ltd* 1982 2 SA 179 (T) citing what was said in *Handel v R* 1933 SWA 37 40: "It is only when they (the English and Afrikaans texts) are not capable of reconciliation, when they are mutually destructive, that a conflict arises."

19 1920 CPD 267. The judgment was followed and approved in many later cases: see *Whitla v Standerton Town Council* 1952 3 SA 567 (T) 571H and cases mentioned there.

20 1950 3 SA 392 (A) 406.

21 *R v Silinga* 1957 3 SA 354 (A) 358H.

22 See the remarks by Schreiner JA in *R v Silinga supra* 358-359.

23 See, *eg*, *R v Singu* 1954 3 SA 555 (C); *Ex parte Kommissaris van Kindersorg: In re Steyn Kinders* 1970 2 SA 27 (NC); and *Cronje NO v Paul Els Investments (Pty) Ltd supra*.

Appellate Division (as it was then known).[24] The rule still applies today, not having been jettisoned from the law relating to interpretation of statutes by any Act or judgment of the Supreme Court of Appeal or the Constitutional Court.

As stated earlier, the English version of section 27(a)(ii) has a wider meaning than the words contained in the corresponding Afrikaans text. The expression "an offence involving an element of dishonesty" in the English text obviously covers an offence of which dishonesty is an element (referred to in the Afrikaans text). The highest common factor, therefore, is the words "an offence of which dishonesty is an element". The result is that section 27(a)(ii) must be read to mean that a person is disqualified from being issued with a fidelity fund certificate only if such person has been convicted of an offence of which dishonesty is an element. For the purposes of section 27(a)(ii) the question is therefore simply whether dishonesty is an element of the offence in question; the question is not whether there was an element of dishonesty involved in committing the offence. In other words, the disqualification contemplated in section 27(a)(ii) does not come into play if a person has been convicted of an offence and dishonesty is not an element of the offence itself. This would be so even where the context in which the offence was committed reveals dishonest conduct on the accused's part.

This conclusion differs from the following observation made by Lewis JA in *Estate Agency Affairs Board v McLaggan*:[25]

> "In my view it is conceivable that, in the relation to section 27(a)(ii) of the Estate Agency Act *(sic),* the context in which an offence is committed might also render conduct dishonest even where dishonesty is not an ingredient of the offence itself."

The judgment is referred to more fully below.[26] Suffice to state for present purposes that the remark was *obiter* since the court found it unnecessary to decide the point in view of its finding that the offences of which the respondent had been found guilty were inherently dishonest. More importantly, however, is the fact that the discrepancy between the English and Afrikaans texts of section 27(a)(ii) was not considered by the court at all. The remark by Lewis JA was made on the basis that the section refers to an offence "involving an element of dishonesty". It is respectfully submitted that Lewis JA cannot be faulted if that is how the section has to be understood. However, the correctness of the *dictum* can be questioned in view of the conclusion reached above, namely that section 27(a)(ii) must be read to refer to an offence "of which dishonesty is an element".

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[24] *Santam Versekeringsmaatskappy Bpk v Kemp* 1971 3 SA 305 (A) 320H.
[25] 2005 4 SA 531 (SCA) par [25] 541D.
[26] See par 4.1.

3 2 Grammatical meaning of "dishonesty" and "element"

The dictionary meaning of the word "dishonest" is:

> "[B]ent, cheating, corrupt, crafty, crooked, deceitful, deceiving, deceptive, designing, disreputable, double-dealing, false, fraudulent, guileful, immoral, knavish, lying, mendacious, perfidious, shady, snide, swindling, treacherous, unethical, unfair, unprincipled, unscrupulous, untrustworthy, untruthful, wrongful".[27]

To this one can add the words "underhanded" and "dishonourable".[28] The word "oneerlik" in Afrikaans is defined to mean

> "nie eerlik, opreg nie; skelm, bedrieglik … kul"[29]

Of course, all offences are dishonest if by dishonesty is meant wrongful conduct. On this approach, even traffic offences are dishonest. It is submitted, however, that for the purposes of section 27(a)(ii) the essential characteristics of "dishonesty" are cheating, corruption, deceit or fraud. The type of dishonesty the legislature had in mind was dishonesty that would disqualify a person from becoming an estate agent, having regard to the duties and responsibilities of estate agents. The legislature intended to bar from the industry persons with a track record of cheating, corruption, deceitful conduct or fraudulent dealings. It was not the intention to close the industry to persons who had been found guilty of offences involving immorality, unfair conduct, unprincipled activities or unethical behaviour. For the purposes of section 27(a)(ii) those offences, repugnant as they may be from a moral point of view, are not offences of which dishonesty is an element. Pollution of the environment, for example, can be labelled unethical or unprincipled behaviour, but this does not mean that statutory offences relating to pollution involve the type of dishonesty contemplated in section 27(a)(ii).

Support for this view is to be found in the following passage in *Ex Parte Bennett*:[30]

> "What is an 'offence involving dishonesty'? In its ordinary meaning dishonesty in this context denotes:
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> 'Lack of probity: disposition to deceive, defraud or steal. Also, a dishonest act.'
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> (See Shorter Oxford English Dictionary, sv "dishonesty" 4.) In *Brown v R* 1908 TS 211 Solomon J said at 212 that in its ordinary sense "dishonest" involves an element of fraud. (*Cf R v White* 1968 3 SA 556 (RAD)). In *Words and Phrases Legally Defined* (2nd ed by JB Saunders; 1976 Supplement at 57) there is a quotation from a judgment of the Canadian Supreme Court:

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27 See Chambers *Paperback Thesaurus sv* "Dishonest".
28 Reader's Digest *Oxford Complete Wordfinder sv* "Dishonest".
29 See Odendaal *et al HAT. Verklarende Handwoordeboek van Afrikaanse Taal sv* "Oneerlik".
30 *Supra* 383H.

> '"Dishonest" is a word of such common use that I should not have thought that it could give rise to any serious difficulty, but in construing even plain words regard must be had to the context and circumstances in which they are used: *Canadian Indemnity Co v Andrews & George Co Ltd* (1953) 1 SCR 19 at 24. However, to try to put a gloss on an old and familiar English word which is in everyday use is often likely to complicate rather than to clarify. 'Dishonest' is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning. It is such a familiar word that there should be no difficulty in understanding it. *Lynch & Co v United States Fidelity & Guaranty Co* (1971) 1 OR 28 per Fraser J at 37, 38.'
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> In this context the word 'involve' means to contain or include as a part, so that the expression 'offence involving dishonesty' means an offence of which dishonesty is an element or ingredient – in the case of a common law offence in terms of its definition, and in the case of a statutory offence in terms of the statute which created it."

These remarks were made with reference to section 218(1) of the Companies Act[31] which, amongst others, disqualifies a person from being appointed a director of a company without a court order if such person has been found guilty of "an offence involving dishonesty" and a certain sentence has been imposed.[32] Much the same applies to an offence of which dishonesty is an element as contemplated in section 27(a)(ii) of the Estate Agency Affairs Act. However, it is respectfully submitted that the last paragraph of the *dictum* must not be read to mean that for the purposes of section 27(a)(ii) dishonesty would be an element of an offence only if dishonesty is specifically mentioned as an element or ingredient in the definition or description of the offence. Neither the Afrikaans nor the English text of section 27(a)(ii) refers to an offence of which dishonesty is a *requirement*. The word "element" means "component or part".[33] Dishonesty is therefore an element of an offence if dishonesty is a component or part of the offence. Section 27(a)(ii) does not require the dishonesty to be the *only* element (or even a major part) of the offence, only that dishonesty must be *an* element. What is required is more than just a *trace* of dishonesty, but dishonesty need not be one of the *essentialia* of the offence. The distinction is important, because there are no common law offences in our law which require proof of dishonesty *per se*. Theft, for example, is generally regarded

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31 61 of 1973.

32 The section is quoted in par 2.

33 The *Oxford Dictionary* ascribes six meanings to the word "element". Only the first, namely *component* or *part*, is applicable for present purposes. Odendaal et al *HAT Verklarende Handwoordeboek van die Afrikaanse Taal* define the Afrikaans word "element"as follows:

> "Element, (-e). 1. Samestellende, eenvoudige deel, beginsel van iets: Selle is elemente van lewende wesens. Daar is 'n Fascistiese element in hierdie beweging. Ongewenste elemente in ons buurt. 2. (hist) Eenvoudige stowwe waaruit die fisiese heelal saamgestel sou wees – lug, water, vuur, aarde – die 4 elemente: stryd van die elemente, storm. 3. Omgewing, omstandigheid waarin 'n mens of dier hom besonder tuis voel, die beste aard: In jou element wees by die kus, in die Karoo. In jou element wees as daar gevaar is. In hierdie vak was hy in sy element. 4. (chemie) Stof wat deur chemiese bewerking nie verder in eenvoudiger stowwe opgebreek kan word nie: 'n Element is 'n stof wat uit een soort atome bestaan. 5. (elektr.) Weerstandsdraad en omhulsel van 'n verwarmer; verwarmingselement: Die element van 'n strykyster. 6. Onderdeel, bv. 'n deel van 'n wiskundige versameling, van 'n konfigurasie in die meetkunde, een van die gegewens of waardes waarop berekenings of gevolgtrekkings gebaseer is."

as a "dishonesty" offence.[34] However, dishonesty is not mentioned specifically in the legal description of the offence[35] and a person can be convicted of theft without proof of dishonesty on his or her part. The dishonesty is inferred from the fact that the accused had unlawfully appropriated someone else's property or money for himself with an intent to steal. Even the description of fraud as a common law offence makes no mention of an element of dishonesty. It is nevertheless safe to say that dishonesty lies at the root of fraudulent conduct.[36]

The same can be said about a *bribery*, a point clearly made in *Ex parte Tayob*.[37] The applicants had applied in terms of section 218(1)(d)(iii) of the Companies Act for authority to act as directors of companies, having been found guilty of bribery. The application was dismissed, the court expressing itself as follows in respect of bribery and corruption:[38]

> "Bribery and corruption are offences which attack the framework underpinning an orderly society. It is more odious and more of a threat against an honest, open community than other dishonest conduct because other dishonest conduct in general is not an attack against the framework supporting society which may cause it to rot and collapse but in general only threatens individual members or isolated aspects of society."

In view of the aforegoing it is submitted that dishonesty is an element of an offence for the purposes of section 27(a)(ii) if the nature of the offence, having regard to its description, is such that the inference can readily be drawn that any person committing the offence must be inherently dishonest.

4 RELEVANT COURT CASES

4 1 Statutory offences involving dishonesty

The question of dishonesty in relation to statutory offences has arisen on a number of occasions.[39] The following can be mentioned for present purposes:

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34 *Le Grange v Boksburgse Stadsraad* 1991 3 SA 222 (W) 227H.

35 Skeen *Criminal Law* (6) *LAWSA* par 294 defines theft as "the unlawful and intentional appropriation of another's movable corporeal property, or of such property belonging to the thief in respect of which somebody else has a right of possession or a special interest".

36 As was remarked in *Le Grange v Boksburgse Stadsraad supra*: "Self die verbode handeling by bedrog ontbeer 'n element van oneerlikheid; dit kan aangevul of bygelees word eerder as wat dit per definisie 'n eksplisiete vereiste is. Selfs dan is dit nie 'n vierde element naas onregmatigheid, skuld, en handeling nie maar 'n kwaliteit van laasgenoemde."

37 1989 2 SA 282 (T).

38 288D.

39 In certain instances the matter was common cause, as in *Marpro Trawling (Pty) Ltd v Cencelli* 1992 1 SA 407 (C) where the issue of dishonesty was relevant for the purposes of section 47(1)(b)(iii) of the Close Corporations Act 69 of 1984. The section disqualifies a person from taking part in the management of the business of a corporation, save under authority of a court order, if such a person has at any time been convicted of an offence involving dishonesty and been sentenced to imprisonment for at least six months without the option of a fine. The defendant had been convicted of bilking in contravention of s 32 of the Hotels Act 70 of 1965, which provides that any person leaving a hotel without paying his account commits an offence. The parties were in agreement that the offence involved

4 1 1 Contravention of resale price maintenance regulations

In *Ex parte Bennett*[40] the applicant had been found guilty on a number of charges relating to contraventions of the resale price maintenance regulations promulgated in terms of the Regulation of Monopolistic Conditions Act.[41] The applicant had been the national sales manager of SA Philips (Pty) Ltd, a manufacturer and supplier, *inter alia*, of television sets. The company itself, together with its managing director and five other company officials, were also found guilty. The applicant was given a fine of R2 000. In his reasons for sentence Van Zijl JP described resale price maintenance as constituting "dishonest competition in relation to other manufacturers of television sets", a "fraud on the public" and as being conduct which "tends to break down the commercial morality of the country".

After his conviction the applicant applied for an order declaring that he was not disqualified in terms of section 218(1)(d)(iii) of the Companies Act from being appointed a director of a company. The application succeeded on the grounds that the applicant had not been convicted of an offence involving dishonesty. Having regard to the nature of the offence the court expressed itself as follows:[42]

> "The offences created by Regulation Notice 1038 are not in my view offences involving dishonesty. The honesty or dishonesty of the persons participating in the prohibited agreement, understanding, business practice or method of trading is irrelevant to the commission of the offence."

Referring to the opinion of Van Zijl JP that the conduct of the accused had been "dishonest competition" and "fraud on the public" the court remarked that the judge had used those words not in their ordinary meaning, but with the meaning of "conscienceless", "unconscionable", or "unscrupulous" in order to condemn a practice which had resulted in members of the public being obliged to pay a higher price for television sets than they would have paid if free competition had been allowed to operate. According to the court it was an open question whether the conduct of the accused had been dishonest, even in a wide sense. It described the conduct prohibited by the regulations as *malum prohibitum* not *malum in se*. In this respect the following observation was made:

> "Until the publication of that *Notice*, resale price maintenance did not even constitute an offence, nor was it regarded by the Courts even as being necessarily contrite to the public interest. Thus it was held in *Witwatersrand Trustees (Pty) Ltd v Rand Steel Products (Pty) Ltd* 1946 WLD 140 that the mere fact that the purpose of an agreement is to reduce competition and

dishonesty. (In *Nusca v Da Ponte* 1994 3 SA 251 (BGD) 259C-D Friedman AJP was of the opinion that this was in fact the court's decision. With respect, the court in the *Marpro* case did not decide the point at all: it was part of the agreed facts in terms of Rule 33(1) and (2) of the Rules of Court.)

40 *Supra*.

41 24 of 1955.

42 384D.

> increase prices does not necessarily make such an agreement injurious to the public. And, it should be pointed out, the *Notice* itself provides that the minister's declaration and prohibition shall not apply to certain commodities, namely petrol, tyres, tubes and magazines (including newspapers)."

With respect, the fact that resale price maintenance did not constitute an offence prior to the publication of the regulations in question cannot be the overriding factor in determining whether or not the offence constituted dishonesty. Most statutory offences were not offences at all prior to the publication of the Act or regulations creating the offence. In deciding whether or not a statutory offence involves dishonesty the *reasons* for creating the offence could be of paramount importance, but not the fact that the conduct in question did not constitute an offence prior to the creation of the offence by statute.

4 1 2 Illicit diamond dealing

In *Nusca v Da Ponte*[43] the issue for decision was whether or not an offence of illicit diamond buying (a statutory offence in terms of the Precious Stones Act 73 of 1964) constituted an offence involving dishonesty, thereby disqualifying a person from acting as a director of a company. The court had no difficulty in arriving at the conclusion that the offence did involve dishonesty. Friedman AJP summarised the position as follows:[44]

> "This seriousness of illicit diamond transactions has been commented on by the Courts in many cases, and they have emphasised the loss suffered by the *fiscus* and other considerations, like the offence being akin to receiving stolen property. …
>
> In my view, therefore, and having regard to the definitions of 'involve' and 'dishonesty' … I have come to the conclusion that dealing in illicit diamonds involves elements of fraudulent, deceitful and swindling conduct, more particularly in regard to the effects and consequences of this offence. Furthermore, a person who is found guilty of the offence of illicit diamond dealing embroils and implicates himself/herself in dishonest conduct, although dishonesty *per se* is not a requirement for the offence. As I have indicated, by committing the said offence, a person involved commits dishonest acts."

4 1 3 Voting irregularities

In *Le Grange v Boksburgse Stadsraad*[45] the third respondent, a member of the Boksburg Municipality, had been convicted of an offence in terms of section 2(3)(a) and (b) of the Prior Votes for Election of Members of Local Government Bodies Act[46] which reads as follows:

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43 *Supra*.
44 261B.
45 *Supra*.
46 94 of 1988.

"2. Prior votes
(1) …
(2) …
(3) No person may, in respect of a general election of members of local government bodies or an election of all the members of any local government body
(a) make application for a prior vote; or
(b) record a prior vote,
more than the number of times to which he is entitled."

The charge sheet recorded that the third respondent had encouraged and/or incited one R to apply for a second prior vote and to record a second prior vote in contravention of section 2(3)(a) and (b). Although the third respondent had not personally applied for and/or recorded a second prior vote, his incitement of R had the result that he could be found guilty of the same offence that R had committed. The question then arose whether the third respondent's conviction meant that he had automatically vacated his office by reason of section 30(1)(*f*A) of the Municipal Elections Ordinance 16 of 1970 (T) which stipulated that a local authority councillor vacated his office if he had been convicted of "an offence of which dishonesty is an element". The third respondent argued that in determining whether or not an offence involves dishonesty regard should be had only to the description of the offence and not to the charge sheet as well. On this basis he argued that dishonesty was not an inherent element of the offence as described in section 2(3)(a) and (b) of the Prior Votes for Election of Members of Local Government Bodies Act.

The court rejected the argument and held, having regard to the charge sheet, that the third respondent had acted dishonestly in that he had incited R to defraud or mislead the relevant election official by intentionally misrepresenting to him that she had only voted once. In arriving at this decision the court made the following observation:

"Derdens neem die benadering dat art 30 net 'n misdryf omvat wat per handboekomskrywing noodwendig (en dus altyd) van 'n element van oneerlikheid afhanklik is, nie kennis van die wisselbaarheid van inhoud van sekere misdrywe nie. Ek verwys na huisbraak as voorbeeld. Daar is natuurlik geen so 'n misdryf as huisbraak nie. Wanneer huisbraak gepleeg word met die opset om 'n misdryf te begaan, neem die strafreg wel daarvan kennis. As huisbraak plaasvind met die opset om te steel, sal ek aanvaar dat daar 'n element van oneerlikheid in die bedrywighede van die beskuldigde is. Dit is gewis aanwesig wanneer daar 'n enkele skuldigbevinding aan twee misdrywe uitgebring word soos in die praktyk gebeur, naamlik enersyds diefstal en andersyds huisbraak wat gepleeg is met die opset om diefstal te pleeg. Maar as die huisbraak gepleeg word met die opset om verkragting te pleeg of met die opset om 'n misdryf te pleeg wat aan die aanklaer onbekend is, kan nie gesê word dat die misdryf oneerlikheid as 'element' inhou nie. Ek vind dit onaanvaarbaar dat 'n raadslid wat huisbraak pleeg met die opset om te steel of met die opset om bedrog te pleeg nie gediskwalifiseer word nie net omdat huisbraak volgens die teksboeke gepleeg kan word met 'n ander opset of motief as 'n oneerlike een.

> 'n Soortgelyke situasie geld by uitlokking omdat uitlokking net 'n misdryf is as dit 'n uitlokking is tot die pleeg van 'n misdryf. Uitlokking tot moord of tot aanranding is (behalwe miskien as die metode van uitlokking in sigself oneerlikheid inhou), nie 'n misdryf waarvan oneerlikheid 'n element is nie. Indien die klagstaat egter beweer dat daar uitlokking was tot die pleeg van bedrog, is die handeling (wat 'n element van die misdryf is) wat die Staat moet probeer bewys dat die beskuldigde iemand anders vorentoe gestoot het om 'n kriminele oneerlikheid te begaan. (Ek gebruik die woord 'kriminele' om aan te dui dat daar êrens 'n punt is waar 'oneerlikheid' perke vind. Vergelyk die handhawing van prysstrukture soos vermeld in *Ex parte Bennett* 1978 2 SA 380 (W).)
>
> Blykens die klagstaat is die handeling wat die misdryf daargestel het die uitlokking van (R) om oor te gaan tot gedrag wat volgens die gemelde advokaatsopinie die volgende as inhoud het:
>
> > 'Die element van bedrog of misleiding is teenwoordig omdat sy die betrokke kiesbeamptes opsetlik onder die valse indruk bring dat sy nog net eenmaal gestem het. Dieselfde geld dan ook vir 'n persoon wat medepligtig is.'
>
> Dit is by daardie uitlokkingshandeling wat 'n element was van die misdryf waaraan *derde respondent* skuldig bevind is wat oneerlikheid so verknog was dat oneerlikheid 'n element van derde respondent se misdryf was."

Is it respectfully submitted that the court could have arrived at the same decision by simply having regard to the description of the offence in question. It is dishonest to bring out a second prior vote; simple as that. The *dictum* quoted above simply conveys that in deciding whether or not an offence involves dishonesty the *nature* of the offence, as described in the charge sheet, must be examined.

4 1 4 Non-compliance with tax legislation

Estate Agency Affairs Board v McLaggan[47] is the only reported judgment dealing specifically with section 27(a)(ii) of the Estate Agency Affairs Act. The respondent (M) had been found guilty of two tax-related offences. The first was the offence contained in paragraph 30(1)(b) of the Fourth Schedule to the Income Tax Act 58 of 1962 which makes it an offence for any person to use or apply tax deducted from employee's salaries "for purposes other than the payment of such amount to the Commissioner". M had on 37 occasions over the period 7 December 1997 to 7 January 2002 deducted employee's tax totalling R234 024,59 but had failed to pay this over to the Commissioner for Inland Revenue as required by the Fourth Schedule to the Income Tax Act. The second offence related to a contravention of section 58(d) of the Value-Added Tax Act 89 of 1991 which makes it an offence not to pay to the Commissioner all VAT payments collected on sales.

M was a practising estate agent at the time and had been issued with a fidelity fund certificate by the Estate Agency Affairs Board. Following the conviction the Board took the stance that M's fidelity fund certificate had lapsed in terms of section 28(5) of the Estate Agency Affairs Act, which states that a fidelity fund certificate issued to an estate agent lapses if,

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[47] *Supra*.

amongst others, the estate agent is found guilty of an offence involving an element of dishonesty. It demanded that M cease doing business as an estate agent. M refused, contending that he had not been convicted of any offence involving an element of dishonesty; accordingly, his certificate had not lapsed. M pointed out that he had continued to submit monthly tax returns to SARS reflecting the deduction of the employees' tax and the VAT collections. Based on this he argued that no dishonesty had been involved: SARS had not been deceived, since he did not hide from SARS the indebtedness resulting from his failure to pay the tax amounts owed.

The facts revealed that M had entered into an agreement with SARS to pay the amount outstanding. However, he failed to meet his commitments in terms of the agreement and later wrote to SARS explaining why payments had not been made. He stated that a close corporation of which he was the sole member had bought a property, having been granted a 100% bond by a bank. The reasons for the acquisition, he said, were firstly that the property would accommodate his estate agency company, thereby achieving cost savings; secondly, that his estate agency would benefit from an expropriation adjacent to the new property. M undertook in writing to pay SARS such monies as were received from the expropriation exercise within 24 hours of receipt thereof.

The Board's case was that M had deducted employee's tax from employees of the company and had levied and received VAT payments that were then used for purposes different from that for which they were intended. This in itself was dishonest according to the Board. The Board furthermore contended that dishonesty could be found in the context in which the offences were committed, and need not necessarily be an intrinsic element of the offence.

The Board sought an interdict restraining M from continuing his activities as an estate agent. The trial court refused the application on the grounds that the offences in question did not involve any element of dishonesty; accordingly, M's fidelity fund certificate had not lapsed.

The Board's appeal to the Supreme Court of Appeal succeeded. The SCA observed that the clear implication of M's letter to SARS was that his company would not be paying the employee's tax deducted, nor the VAT collections; instead it would be paying interest on a 100% bond obtained to finance a property venture. M had therefore undertaken a new liability rather than paying what was owed to SARS. No indication had been given in the letter of the source of funding for the bond. It was reasonable to infer that the tax deductions made from employees' salaries, and VAT levied and received, were used for this purpose. However, the court found it unnecessary to decide whether dishonesty could be found in the context in which the offences were committed, since it had reached the conclusion that the offences of which M had been convicted were inherently dishonest. Lewis JA summarised the court's views as follows:[48]

[48] Par [24] 540H.

> "Were the offences under the Income Tax Act and the VAT Act intrinsically dishonest? In my view they were. It is true that SARS was aware that the company was not paying the amounts due to it and that the company rendered correct and full tax returns. But at the same time McLaggan, as director of the company, knew it was obliged to pay the taxes it collected from employees to SARS. The company deducted tax from salaries for the purpose of paying the fiscus. It used the money for entirely different purposes. That entails deception of employees, although they would not necessarily be prejudiced since the employer is the agent of SARS for the purpose of paying their tax to it, and once the tax had been deducted they would not be rendered liable again. And it is dishonest insofar as the fiscus is concerned. If an employer deducts tax from employees, and uses it for any purpose other than paying the fiscus, that is dishonest. It is a deliberate misuse of funds. It is conduct that would be regarded by the public in general as lacking in probity. Equally, the levying and receipt of VAT for any purpose other than paying it to the fiscus in accordance with the statute is inherently dishonest. I consider therefore that dishonesty is also an element of the offences in respect of which McLaggan was convicted under the VAT Act."

The matter was therefore decided purely with reference to the nature of the offences, having regard to their description. With respect, the approach cannot be faulted.

4 2 "Dishonesty" in a criminal law context

The meaning of "dishonesty" has been considered on a number of occasions by the English Courts in the context of the Theft Act 1968, which makes provision for a number of offences, all incorporating the element of dishonesty. In terms of section 1(1) a person is guilty of theft "if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it …" The Act does not contain a definition of "dishonest", except for stating that a person's appropriation of property belonging to another is not to be regarded as dishonest in certain instances.[49] Much confusion existed in earlier years as to whether dishonesty in the Act intended to characterise a course of conduct or a state of mind. The matter was laid to rest in *R v Ghosh*[50] where the court of Appeal held that dishonesty is an element of *mens rea,* "something in the mind of the accused". The court nevertheless stressed that an accused cannot escape conviction by simply maintaining that he did not regard his conduct to be dishonest:

> "It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did."

R v Ghosh did not concern the question whether a convicted person's state of mind at the time when he committed the offence has any relevancy for the purposes of determining whether or not dishonesty is an element of the offence in question. It is submitted that the issue of whether or not

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49 S 1(2).

50 [1982] 2 All ER 689.

dishonesty is an element of an offence is a matter to be decided by the court. It is immaterial that the person convicted of the offence may have held the belief at the time of committing the offence that he had not acted dishonestly. An accused's subjective beliefs may play a role in determining whether or not he is guilty of the offence with which he is charged, and may in appropriate instances also be taken into account for the purposes of sentencing. However, once a person is convicted of an offence it is the nature of the offence, and not the subjective belief of the convicted person, which determines whether or not dishonesty is an element of the offence. Accordingly, it makes no difference whether the offence was committed in the open or surreptitiously. Theft is an offence involving dishonesty, and a thief cannot be described as an honest person simply because the theft had been committed openly for all to see.

South African criminal courts often suspend the operation of a sentence on condition that the accused not be found guilty of an offence involving dishonesty within a stated period.[51] However, a number of courts have considered a suspension worded in these terms to be too vague because the convicted person may have difficulty understanding the ambit of the condition.[52] The difficulty experienced by the courts with the expression "an offence involving dishonesty" in respect of suspended sentences was aptly set out by Erasmus J in *S v Manqina*; *S v Madinda*:[53]

> "Uit die aard van die saak moet die beskuldigde met sekerheid weet welke misdrywe die gevaar van inwerkingstelling inhou. Die vraag is dus of 'n leek wat die reg betref sal begryp wat bedoel word met 'n 'misdryf waarvan oneerlikheid 'n element is'.
>
> Soos mnr *Hattingh* tereg aandui, het 'oneerlikheid' 'n morele eerder as 'n regtelike waarde. Die woord het in die eerste plek 'n wye betekenis (*HAT*): 'nie eerlik; opreg nie'; (*The Shorter OED*: 'Dishonour, discredit, shame'). Oneerlikheid in dié sin van die woord omvat menige wette- en gemeenregtelike misdrywe. Die woord het egter ook 'n meer beperkte konnotasie (*HAT*): 'met oneerlike bedoelinge; iemand oneerlik behandel, hom kul'; (*The Shorter OED*: 'Lack of probity; disposition to deceive, defraud, or steal'), welke begrip in strafregtelike verband aanwendings vind in die sin van bedrieëry of misleiding. In *Brown v Rex* 1908 TS 211 byvoorbeeld moes die hof ondermeer beslis of die Kroon bewys het dat die beskuldigde skuldig was aan 'obtaining a livelihood by dishonest means'. Solomon R (soos hy destyds was) verklaar:[54]
>
> > 'Moreover the word "dishonest" must be construed in its ordinary sense; that is to say, there must be an element of fraud, to say the least, in the manner in which the accused obtains his livelihood.'
>
> In dié sin behels oneerlikheid klaarblyklik misdrywe soos bedrog, vervalsing, diefstal deur middel van valse voorwendsels, ensomeer. Maar indien die begrip streng tot misleiding beperk word, sal dit nie betrekking hê op byvoorbeeld roof, afpersing, of selfs gewone diefstal nie. Aan die ander kant,

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51 See *eg S v Collett* 1990 1 SACR 465 (A); *S v October* 1991 1 SACR 384 (C); and *S v Nathan* 1992 1 SACR 467 (N).

52 See *eg S v Goeieman* 1992 1 SACR 296 (N).

53 1996 1 SACR 258 (E)

54 212.

op toepassing van die beslissing in *R v Burke* 1967 RLR 105, goedgekeur in *R v White* 1968 3 SA 556 (RA), kan meineed nie tuisgebring word onder die begrip 'an offence involving dishonesty' nie – ofskoon dié misdryf by uitstek misleiding behels."

Except for referring to the narrower and wider meaning ascribed to the word "dishonesty", the judge did not address the question whether the wider or narrower meaning should be ascribed to the word in the context of "an offence involving dishonesty". It is submitted that there is no ground for confining "dishonesty" to "deception" for the purposes of section 27(a)(ii) of the Estate Agency Affairs Act. If the legislature had intended to restrict the disqualification to offences involving *deception* it would have done so in clear terms.

4 3 Common law offences

Theft,[55] fraud[56] and bribery[57] are generally regarded as offences involving dishonesty. Whether the same can be said in respect of *perjury* was raised *obiter* by Erasmus J in *S v Manqina*; *S v Madinda*[58] where he remarked, with reference to *R v White*,[59] that perjury is not an offence involving dishonesty even though deception is a key feature of the offence. With respect, the correctness of this view is seriously open to doubt. *R v White* requires closer examination. W had been found guilty of an offence and sentenced to imprisonment suspended for three years on condition that he did not, within that period, commit "any offence involving dishonesty". He was later found guilty of a contravention of section 11 of the Miscellaneous Offences Act 1964 in that he had made a false statement to two police officers that a crime had been or might have been committed. The question arose whether the conviction on the latter offence triggered the operation of the suspended sentence. It appeared that after giving the police the information the accused had asked one of the officers for money, which was refused. The prosecutor argued that although the offence under the Miscellaneous Offences Act did not incorporate fraud as an essential element of the offence, the motive for the offence, namely obtaining money from the police, sufficiently disclosed the element of fraud and potential prejudice to constitute W's offence as one involving dishonesty. The court found that there was some substance in this submission, but nevertheless held that the offence was not an offence involving dishonesty. The first offence was one of theft and the accused was at the time of his conviction brought under the impression that the suspension would come into operation if he were to be convicted of theft again. The court in *R v White* found it unlikely that in suspending a sentence for theft on condition that the accused not be convicted of "any offence involving dishonesty" the magistrate had in mind an offence involving a false statement as contemplated in the Miscellaneous Offences Act.

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55 *Le Grange v Boksburgse Stadsraad supra* 227.
56 *Ibid*.
57 *Ex parte Tayob supra*.
58 *Supra*. See the *dictum* quoted in the text above.
59 1968 3 SA 556 (RA).

R v White is no authority for the view that perjury is not an offence involving dishonesty. As was made clear in *Le Grange v Boksburgse Stadsraad*[60] the *effects* and *consequences* of an offence are important factors to be taken into account in deciding whether or not dishonesty is an element of the offence. If the effect of the offence is that someone was misled, cheated or deceived it would be difficult to argue that dishonesty is not an element of the offence. Deception lies at the root of perjury (a point made by Erasmus J himself in *S v Manquina*; *S v Madinda*) and it is difficult to see how it could even be questioned that dishonesty is an element of the offence. Thus, in *Fairbrass v Estate Agents Board*[61] the court had no difficulty in finding that perjury *is* an offence involving an element of dishonesty as contemplated in section 30(1)(h) of the Estate Agents Act, which states that an estate agent is guilty of improper conduct if he commits an offence involving an element of dishonesty. With respect, the judgment in *Fairbrass* is clearly correct.

5 CONCLUSION

Section 27(a)(ii) of the Estate Agency Affairs Act disqualifies a person from being issued with a fidelity fund certificate if such person has at any time been convicted of "an offence involving an element of dishonesty". The Afrikaans text is worded more narrowly, referring to an offence "waarvan oneerlikheid 'n element is". An offence of which dishonesty is an element is by necessary implication also an offence involving an element of dishonesty. However, the converse is not necessarily true. The Afrikaans text of the Act was signed by the State President, but this is (apparently) not nowadays the cardinal factor to take into account when dealing with conflicting versions of an Act. It is submitted that the narrower meaning should be adopted for the purposes of section 27(a)(ii), with the result that a person would only be disqualified in terms of the section if he or she has committed an offence of which dishonesty is an element. Dishonesty need not be a *requirement* of the offence, but it must be an *ingredient*. What must be looked at is the nature of the offence, not the context in which it was committed. The key question is: can it be said, by applying the standards of reasonable and honest persons, that the nature of the offence, having regard to its description, is such that any person committing the offence would by necessary implication be acting dishonestly? If dishonesty is not an ingredient of the offence in this sense, then *cadit quaestio*: it would be immaterial that traces of dishonesty could be seen in the manner in which the offence had been committed. On the other hand, if dishonesty is by necessary inference an ingredient of the offence it would be immaterial for the purposes of section 27(a)(ii) that the person convicted of the offence had no intention to deceive. It would also be immaterial that the offence had been committed in the open and that no attempt was made to disguise, conceal or hide the conduct in question.

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60 *Supra*.

61 1999 4 SA 1052 (W).

Committing *any* offence is inherently wrongful. However, dishonesty is not necessarily an element of all offences. The key feature of dishonesty is an intent to cheat or deceive. Certain common law offences are readily classifiable as offences of which dishonesty is an element, such as theft, fraud, bribery and perjury. Statutory offences involving the misuse or misappropriation of moneys collected from members of the public in terms of a statutory duty can also be labelled as dishonest. Illegal transactions involving money, such as money laundering offences in terms of the Financial Intelligence Centre Act 38 of 2001 are also dishonest. On the other hand, offences which are morally repugnant, such as child pornography, are not dishonest *per se* regardless of the public's adversion to such offences. For the same reason it would be difficult to describe offences such as murder, rape and assault as offences of which dishonesty is an element.

From a moral perspective it is arguable that there are *degrees* of dishonesty. A person convicted of shoplifting for having stolen a toothbrush in an unguarded moment is perhaps morally not as dishonest as an attorney who has stolen huge amounts of trust moneys over a long period. However, degrees of dishonesty play no role for the purposes of section 27(a)(ii). The object of the section is to protect consumers in their dealings with unscrupulous persons and to prevent the industry from falling into disrepute as a result of actions by dishonest persons. That purpose is served by disqualifying a person from being issued with a fidelity fund certificate if such person has been convicted of an offence of which dishonesty is an element. The degree of dishonesty is irrelevant for the purposes of the disqualification; it would, however, be a factor to be taken into account by the Estate Agency Affairs Board in the exercise of its discretion whether or not to issue a fidelity fund certificate to the disqualified person in terms of the proviso to section 27(a)(ii).