IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF KWAZULU-NATAL

HELD AT DURBAN IN THE SCCC2 SITTING IN T COURT

CASE NO: 41 / 454 / 2019

IN THE MATTER BETWEEN:

THE STATE

And

CINDY SAUNDERS ACCUSED

SENTENCE-

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[1] In light of some of the evidence led by the State pertaining to the quantum it is perhaps apposite to remind oneself of the effect of a section 112(2) statement admitting guilt that has been accepted by the State. Quite simply where an offender has been convicted on his written plea that has been accepted by the state, the court is inextricably bound to sentence such an offender in accordance with the factual matrix as set out in the written plea. It is a salient principle of our law that where an accused individual has been convicted solely on his plea, his or her moral blameworthiness should be determined, among others, by the role they played. It is well to keep in mind that, in order to do so properly, a trial court is bound by the

facts as set out in the plea,[1] in so far as those facts support the admissions that follow. To approach the imposition of sentence any other way would be an irregularity.

[2] The approach was clarified by the learned Judge of this Division, Olsen J who said in DPP KZN v P

> "Substantial and compelling circumstances, justifying lesser sentences than the prescribed minimums, are to be considered and addressed at the sentencing stage. The fact that in some cases the manner in which the crime was actually committed may contribute to a finding that such circumstances exist, and must accordingly feature in a statement in terms of s 112(2), does not logically support an argument that any and all submissions or facts going to mitigation can be cast in stone by inclusion in the statement.
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> None of the judgments cited by counsel advance the proposition that substantial and compelling circumstances which do not form part of the facts which justify a plea of guilty must appear in a statement in terms of s 112(2).
>
> On the other hand, when the plea is to be advanced upon the basis that the crime falls beyond any minimum sentencing legislation relied upon in the charge, or under a different heading in such legislation, the facts relied upon for that should appear in the statement in terms of s 112(2).
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> Whilst one appreciates the pressures under which prosecutors fulfil their duties, great care should be taken before accepting a statement in support of a plea of guilty which goes beyond what is contemplated by s 112(2) of the Criminal Procedure Act, lest the result is that the enquiry designed to reach a just sentence is compromised."

[1] Gebert v S (A271/2015) [2016] ZAFSHC 114 (30 June 2016) S v Van der Merwe 2011 (2) SACR 509 (FB) S v Thole 2012 (2) SACR 306 (FB) par [8] and [9]

[3] The Accused Cindy Saunders, hereinafter referred to as the Accused has pleaded guilty and been convicted of 45 counts of Fraud between October 2017 and August 2018 totaling R16 860 527-53. The 45 counts are made up as follows: -

> Counts 12-54, in which she pleaded to defrauding her employer, Nicolson Shipping which is owned by Marc Edwards, on 42 occasions she defrauded Nicholson Shipping in the amount of R11 432 527-53.On Counts 38-54, due to the amounts involved these charges need to be considered under the prescripts of the prescribed minimum sentencing legislation contained in Act 105 of 1977.
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> Counts 133-135, in which similarly she pleaded to defrauding S K Boyz a commercial entity whose owner is Manohar Sukdeo on three occasions in the total amount of R5 428 000-00, all three counts due to the sums of money[2] involved attract the prescripts of the same legislation.

[4] It is against these legislative prescripts that the court must consider the imposition of an appropriate sentence, what will determine this sentence will be dependent on whether or not there are factors present as envisaged in Section 51(3). Present. [3]

[5] The sentencing provisions contained in section 51(2) of the Criminal Law Amendment Act, Act 105 of 1997[4] means that the prescribed minimum sentence of 15 years imprisonment has to be imposed on these counts, unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the one prescribed[5]

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[2] Any offence relating to exchange control. corruption. extortion. fraud, forgery. uttering or theft, (u) involving amounts of more than R500 000.00: (b) involving amounts of more than R1 00000.00. if it is proved that the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy: or (c) if it is proved that the offence was committed by any law enforcement officer— (i) involving amounts of more than R10 000.00; or (ii) as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy

[3] Act 105 of 1977, Criminal Law Amendment Act.

[4]Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in- Part II of Schedule 2, in the case of- a first offender, to imprisonment for a period not less than 15 years; a second offender of any such offence, to imprisonment for a period not less than 20 years; and a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

[5](3) *(a)* If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

[6] The issues which concern the court at this stage of the proceedings are therefore the following namely:

(a) In respect of those counts falling under the prescripts of section 51(2), whether to impose the prescribed minimum sentence of 15 years' imprisonment. The accused led comprehensive and detailed evidence seeking to convince the court that there are substantial and compelling circumstances in existence justifying a deviation been made in terms of s 51(3) of the CLAA, if the court agrees with that contention it may impose any appropriate sentence.[6]

(b) Secondly in respect of those counts not falling under section 51(2), the appropriate sentences to be imposed.

[7] It is against these legislative prescripts that the court must consider the imposition of an appropriate sentence, one is mindful that this fetters the courts traditional discretion when it comes to the imposition of sentence. In many respects however sentencing remains the most difficult part of a criminal trial. This is most definitely the case here. I am indebted to senior counsel for both State and the defence for their learned and thorough argument in the matter.

Legal Representation and Evidence Outline

[8] The accused has been represented throughout these proceedings by Advocate C. Van Schalkwyk who has been instructed by Carl Van der Merwe and Associates. Advocate D. Cole has appeared for the State she prosecutes as part of the Specialised Commercial Crimes Unit in Kwazulu- Natal.

[6] There is some debate in this regard as to whether or not a court is required to impose imprisonment notwithstanding a finding that substantial and compelling circumstances are present, see section 51(5) of Act 105 of 1997 and section 297 (4) of Act 51 of 1977 but see S v Hildebrand [2015] ZASCA 17 and S v Dawjee) [2018] ZAWCHC 63; [2018] 3 All SA 816 (WCC) (10 May 2018). In terms of the binding precedent of these decisions 'I am not convinced that Seedat is in conflict with Hildebrand and Malgas. The former concerned a sentence which judges sought to impose where no term of imprisonment was given. In Hildebrand v The State and in S v Malgas the court confirmed that a sentencing court's discretion is not eliminated by the prescribed minimum sentence once it is deviated from

[9] During the course of the sentencing proceedings the following evidence was placed before the court:

1. A pre-sentence report compiled by Sthembile Qwabe a probation officer with the department of Social Development Kwazulu-Natal.[7]
2. The accused gave evidence and handed in a 103 page affidavit pertaining to her life and the circumstances surrounding the commission of the offence.[8]
3. Exhibit B also contains a confirmation letter from Dr. Motloung that the accused was referred and completed counselling session for the treatment of her gambling issues[9].
4. Dr R I Savov, a psychiatrist testified virtually via an audio-visual link, his report and explanatory references is in the defence bundle from page 105-121 with a detailed curriculum vitae qualifying him as an expert handed in subsequently.[10]
5. The accused also called Rakesh Ramandin of the support group Gambler's Anonymous in mitigation of sentence.
6. Further, the wife of the pastor of the church that the accused attends, Cheryl Stone gave evidence of her interaction with the accused in the past few years.
7. The complainant in counts 12-45, Marc Edwards the owner of Nicolson Shipping testified in aggravation of sentence.
8. The state also called the accountant or representative of SK Boyz to testify, the owner being unavailable due to ill health.
9. The defence have handed in detailed Heads of Argument and referred to both local and overseas authority in support of their submissions.
10. The State has responded with written Heads and cited case law in support of their submissions, both local and from abroad.
11. Both the State and senior Counsel has addressed the court in terms of section 274 of the Criminal Procedure Act.

[7] Court's Sentencing Exhibit A.
[8] Exhibit B- 1-129
[9] Page 104
[10] Pages 122-129.

[10] Senior Counsel, Advocate Van Schalkwyk in amplification of the pleas of guilty read into the record a section 112 statement in which the accused pleaded guilty to all 42 counts of fraud. It is perhaps appropriate at this stage to amplify which counts she be pleaded guilty to, and which counts attract the prescribed minimum sentences contained in section 51 (2).

[11] There are two complaints in this matter, the complainant in counts 12 to 54 is Nicholson shipping and the owner of Nicholson shipping is Marc Edwards. The accused also pleaded guilty to count to 133 to 135 where the complainant is SK Boyz and the complainant is Manahur Sukdeo. Counts 12 to 36 in which Mark Edwards of Nicholson shipping is the complainant, the fraud occurred between the 26th of October 2017 and the 28th day of February 2018. A period of almost exactly 4 months, none of these counts fall within the ambit of section 51 (2) and prescribed minimum sentences do not apply to these counts. The quantum of fraud committed in these initial counts is it is around R840 332-00 .

[12] Counts 37-54 took place between March and the end of May 2018. These 17 counts constitute the vast majority of the quantum of the fraud perpetrated against Nicholson shipping. The loss sustained by the complainant Nicholson shipping during this period is approximately R10,592,195 of the total loss of 11,432 527. These 16 counts all fall within the ambit of section 51 (2) of Act :05 of 1997. All these counts therefore attract the prescribed minimum sentence of 15 years' imprisonment.

[13] The final three counts to which the accused pleaded guilty counts 133 -135, and the complainant on these three counts is SK Boyz, and in three days longer than a month during July to August 2017 the accused on three occasions defrauded SK Boyz of a total of R5,428,000.

[14] The section 112 two statement states the accused was an Export controller at Rencorp cc which traded as Nicholson shipping. At all material times, the accused suffered from a gambling disorder in the form of a compulsive obsessive gambling addiction and had to raise money to pay back gambling debts she had incurred as a

result of such addiction. These debts arose as a result of the debilitating effects of this addiction She decided to commit fraud initially upon Nicholson shipping and later on SK Boyz in order to raise the money to pay off her gambling debts.

[15] She was unable to perpetrate the crime on the own and therefore entered into a common purpose relationship with accuse number two who represents the companies who are listed as accused three and four on the charge-sheet.The co-operation of accuse 2,3 and 4 and in particularly the companies belonging to accuse number two was necessary in order for her to complete the fraud of the complainant, they were necessary in order to facilitate the transfer of money into one of the account of accused two and his entities.

[16] Accused 2-4, were to benefit financially from the fraud committed on the furtherance of this common purpose to defraud the complainant, they received payment as "commission for their efforts in the furtherance of this common purpose."

[17] The accused admits as part of this fraudulent scheme she generated false invoices from Nicolson Shipping for containers allegedly sold to Valley Irrigation. as set in the indictment. The invoices showed a fictitious history of transactions between Nicholson shipping and valley irrigation where the accused later intended to use to secure other fraudulent transactions and payments.

[18] In all the counts the accused misrepresents to Nicholson shopping that accused 3 and four had sold shipping containers and rendered services into Nicholson shipping and that;

1. invoices generated by accused 3 and 4 and issued to Nicholson shipping were valid and work due for services that were actually rendered.
2. That the amount is mentioned in the charges were due and payable to accused three and four by Nicholson shipping.

When the misrepresentations were made I knew that they were unlawfully made, false and that my actions and those of accused 2-to 4 were unlawful. Accused admitted that she knew all along that no monies were due and payable by Nicholson shipping to accused number three or four as no containers were sold or any services rendered by accuse number 3 or 4 to Nicholson shipping.

[19] The accused admitted that she intended these misrepresentations to cause Nicholson shipping to pay these amounts to accuse 2 to 4 and that both herself and the other accused were to benefit financially

[20] This duly happened and Nicholson shipping paid amounts over to accused 2 to 4 in the amounts reflected in the charge sheet. Nicholson shipping suffered actual prejudice in the amount of R11,432,527.53. The accused acknowledged that these monies were not lawfully due and payable to her or anyone else by Nicholson shipping.

[21] The accused stated that she paid over to the accused 2 the amount of R604,000 as commission to him and for his share of the benefits unlawfully obtained

[22] In respect of count is 133 to 135 the accused admits that she misrepresented to SK Boyz that she had concluded the business deal with Valley Irrigation to supply them with shipping containers, that she had sourced these shipping containers from accused number 3 for sale to Valley Irrigation:

[23] The accused needed a business partner to assist with financing the transactions to purchase the containers from accused number three. She misrepresentative SK Boyz that they would share in the profit of each transaction to the extent that they would receive 50% of the profit made when the container that was sourced from accused 3 were sold to Valley Irrigation. The accused

admits that she knew at all times that these misrepresentations were false and that she was aware that her actions were unlawful.

[24] When the misrepresentation was made she intended SK Boyz to act thereupon to their prejudice.When the misrepresentations were made all the accused knew that no containers were sourced from accused 3 for sale to Valley irrigation. No containers were to be delivered to Valley Irrigation. The accused knew that S K Boyz would not be paid back any money. As a direct result of this misrepresentation, SK boys paid over the sum of R5,428,000. SK Boyz suffered prejudice in the sum of R5,428,000 as paid over to accused number three.

[25] The Accused admitted that accused three paid to her an amount of R4,445,000 over to her. She then in turn paid over to accused two, the sum of R145,000 for his facilitating of the receipt of the money through the accounts of accused 3 and his share of the unlawful proceeds of our actions.

SENTENCING PRINCIPLES

[26] The principles applicable in determining a fair, balanced and appropriate sentence have long been laid. "What has to be considered is the triad consisting of the crime, the offender and the interests of society.[11] "These sentencing principles were succinctly articulated by Holmes JA in S v Rabie[12]:

> "Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances." This is not always an easy task.

[27] As the learned judge Steyn said in S v S[13], a matter also dealing with an accused convicted of a white collar crime"

[11] S v Zinn 1969 (4) SA 537 (A)
[12] 1975 (4) SA 855 (A) at 862G
[13]S v S (AR233/05) [2017] ZAKZDHC 13

> "The sentencing phase of a trial is the most difficult for any presiding officer. This case is no different, mainly because the focus now shifts from the merits of the case to factors which are irrelevant to the merits, such as the motive for the crime, the personal circumstances of the accused, the impact of the crime on the victims and society's interest. One of the reasons for this difficulty is that there is no universal formula to apply to each and every case that results in an appropriate sentence.

[28] In deciding upon an appropriate sentence, it is expected of me to have regard to the purpose of sentencing, which would be deterrent, reformative and retributive. To achieve it, I should have regard to the accused's personal circumstances and needs, the nature of the crime and the interests of society. None of these factors must be over or under emphasised. An appropriate sentence is one which gives a balanced consideration to the offender, the crime and society.

[29] A value judgment has to be made taking into account the aims of punishment and to keep in mind the triad factors as stated in S v Zinn. The court is also mindful that substantial and compelling factors must be found to exist before the court can impose any other sentence other than the prescribed minimum of 15 years In this matter the input from the victim also needs to be properly considered and taken into account.

Substantial and compelling

[30] How serious the Fraud charge is can be seen by the fact that counts 12-36 attracts a minimum sentence of 15 years imprisonment each for a first offender and that this sentence cannot be deviated from by the court because of minor or inconsequential reasons.

[31] In Malgas[14] the Supreme Court of Appeal directed the lower courts:

> "The specified sentences were not to be departed from lightly and for flimsy reasons which could not withstand scrutiny. Speculative hypotheses

[14] S v Malgas 2001(1) SACR 469 SCA per Marais JA [9]

favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations were equally obviously not intended to qualify as substantial and compelling circumstances."

[32] This does not mean however that it is impossible to establish substantial and compelling circumstances:

The Supreme Court of Appeal[15] in Calvin stressed what the enquiry is:

> "This court in S v Malgas set out the approach to be followed when sentencing an accused in terms of s 51 of the Act. It was established that the usual, traditional factors that were taken into consideration when imposing sentence are still to be taken into account in determining whether there are substantial and compelling circumstances present. Furthermore, **if the sentencing court is satisfied that the circumstances of the case are such that the prescribed sentence would be unjust as it would be disproportionate to the crime, the criminal and the needs of society, it is entitled to impose a lesser sentence."**

[33] What the courts are required to consider when deciding if these factors are present was set out in S v Vilakazi,[16] Nugent JA set out this duty as follows:

> " It is clear from the terms in which the test was framed in Malgas and endorsed in *Dodo*[17] that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence. It consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender."

[34] In State v Fatyi, the learned Melunsky AJA said;

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[15] *Calvin v The State* (962/2013) [2014] ZASCA 145 (26 September 2014); Malgas (supra); Vilikazi (supra) Matyithi(supra)
[16] (Supra)
[17] [*S v Dodo* **[2001] ZACC 16**; **2001 (3) SA 382** (CC)]

> "The first is that a court has the duty to consider all the circumstances of the case, including the many factors traditionally taken into account by courts when sentencing offenders (para 9). It follows, too, that for the circumstances to qualify as substantial and compelling they need not be exceptional in the sense of seldom encountered or rare (para 10), nor are they limited to those which diminish the moral guilt of the offender (para 24). Generally, however, the legislature aimed at ensuring a severe, standardised and consistent response from the courts unless there were, and could be seen to be, truly convincing reasons for a different response. In other words the prescribed sentences were to be regarded as generally appropriate for the crimes specified and should not be departed from without weighty justification for doing so (paras 8 and 18). Where the court is convinced, on a consideration of all the circumstances, that an injustice will be done if the minimum sentence is imposed, it is entitled to characterise the circumstances as substantial and compelling."

[35] Further the test is not as is sometimes suggested in this court, a separate or disjunctive test as to whether there are substantial and compelling factors present but a composite test, in essence the court must weigh all the factors into account and on the basis of all the factors decide whether or not substantial and compelling circumstances are present and this includes the important question as to whether the prescribed minimum sentence would be disproportionate or not.

[36] Counsel for the accused provided the court with extensive evidence designed to show that substantial and compelling circumstances were present that justify the imposition of a lesser sentence, much of it was concerned with the accused's gambling addiction, her medical diagnosis as a pathological gambler and the steps she has taken since her arrest to address the addiction and her attempts to rehabilitate herself and her efforts to address and change her life.

THE EVIDENCE LED

[37] The evidence produced in mitigation of sentence by the accused is voluminous, she deposed to a lengthy affidavits containing 350 paragraphs, handed in a forensic report by a specialist psychiatrist Dr R Savov who testified through an audio-visual link. Further the defence let the evidence of Mrs Stone, the wife of

the accused's Pastor and Mr. Ramanand who is a member of Gamblers Anonymous

[38] It is fair to say that the amounts involved in this fraud bearing in mind the relatively short time span and which had occurred is extremely large, 11,432 527 in the case of Nicholson Shipping and 4 528 000 in the case of SK Boyz. This factor looms large over any consideration of an appropriate sentence if there are substantial and compelling circumstances present.

[39] It is impossible to record everything that has been lead in the evidence presented, it is not that I do not take it all into account. I am of necessity required to summarise some of the information and focus on what I consider the most important aspects.

[40] The evidence of the accused indicates that she had a less than ideal childhood, finances and the lack of money was a part of her upbringing. This created stress and tension in the household which was exacerbated by an abusive and intolerant patriarch. Her better experiences growing up seem to have been when her father "won" at the casino, unfortunately the corollary of that was when her father lost money at the casino there was tension and unhappiness in the household. The reality is most lose more than they win at the casino. The family relationship can, with respect be described as toxic, abusive and her father's treatment of her mother can be described characterised by gender based violence, indeed it is almost misogynistic in character.

[41] Tellingly the accused describes her a few recollections of happiness within her parents' marriage was on the occasions when the family were successful at the casino. When the family were unsuccessful at the casino their home life where is immediately problematic and she outlines examples of what can safely be termed as both physical and mental abuse perpetrated on the mother, the accused and indeed anyone who was living under his roof by her father.

[42] The accused's perception of the casino as one of the few places where she was truly happy was normally accompanied by the euphoria of winning. This euphoria of a win and the importance that you associated with the acceptance that

she felt this gave her has unfortunately followed her throughout her life. Unfortunately as they say the odds always favour the house or the casino and long term you were not the exception to the odds.

[43] Despite the financial challenges that prevented her from getting any tertiary education She appeared motivated to succeed in the workplace and she was headhunted by the complainant Mark Edwards of Nicholson shipping on the basis of her reputation in the industry.

[44] The accused quickly became a trusted employee of Nicholson shipping, she earned the respect of Mark Edwards, her employer and quickly advanced in the business. Such was the value that she added to the company and the relationships that she enjoyed with her employer that not only was she promoted, she earned more money but the complainant also accommodated her both in her need for a vehicle or a company car and even at her request employed her mother.

[45] Her relationship with gambling was ultimately her undoing, her gambling was at an uncontrollable level. For purpose of these reasons on sentence I cannot go into the inordinate detail it was presented particularly in her affidavit and I'm once again moved to say I am indebted to counsel for both the State and the accused for their well-reasoned submissions on sentence.

[46] The accused's prolific gambling was always a problem and she became involved with people who encouraged and aggravated her gambling problem. Although she seemed to realise that these people were problematic they without doubt influenced her encouraged her and to some extent parasitically fed off her gambling issues. Such was her desire to be accepted by these largely "never do wells" and shady characters that the situation quickly became extremely problematic.

[47] This fast became a downward spiral, she was gambling away her wages and bonuses and was becoming indebted to loan sharks and the situation soon became at least in her mind irretrievable other than by gambling her way out of the problem. The reality the situation was soon at a stage that even if she won big at the casino or online redemption was impossible due to the amounts that she owed.

[48] In order to allow her to continue gambling to continue to seek the great big win she began to steal money from her employer and thereafter the complainant in the last three counts. The amount stolen was astronomical, she had nothing to show for it, the money was gone, and when the game was up, the writing was on the wall so to speak she approached her employer Nicholson shipping and confessed.

[49] Although she claims to have insight into a problems and this is supported to a degree by the opinion of Dr Savov, a clinical psychiatrist who testified on behalf of the accused. Notwithstanding this there is a thread in her detailed and lengthy affidavit of a tendency to blame those that are not actually responsible for her malaise. The fact that the complainant, Mr Edwards was a recreational gambler, does not as she seems to suggest mean that he should have noticed that she was in trouble. Mr Edwards was not responsible, his loyalty to what he thought was an excellent worker should not be used as an excuse. Recreational gambling is not the problem here, if a person gambles money they can afford to lose or put differently gambles responsibly in accordance with their means should not be equated to someone who is stealing massive amounts from her employer.

[50] The accused has detailed the roles of a lot of hangers on, loan sharks and various people who work at the casino. Indeed the role of the gaming industry and much of what she says in this regard is somewhat disturbing. It was fairly obvious to me that loan sharks and the other nefarious practices that she describes should not take place in any organisation committed to responsible gambling.

[51] If this be true and if one accepts that there is some kind of duty of care on an establishment like a casino to practice what they preach so to speak about responsible gambling then they arguably failed the accused. Perhaps even more so the complainants, however the extent to which her affidavit suggest the same and the number of times she returns to this fact indicates that the accused does not fully takes responsibility for what occurred.

[52] Having said that the court is satisfied at the end of her evidence and the evidence lead on this aspect in particular by Dr Savov that the Accused's gambling addiction is as described by Dr Savov, a pathological gambling addiction. Indeed the State has conceded that the Accused's condition is one of a pathological gambler.

[53] Dr Savov a highly qualified clinical psychiatrist examined the accused at the MCare hospital psychiatric unit in wit bank. he confirms that the accused eventually got to the stage where her obsession with gambling and her inability to resist the urge to gamble spiralled completely out of control. He confirms that she was easily influenced by her companions to gamble and it is clear that she ran with people who were influencing her and fed her addiction.

[54] At the time of her observation she presented with all the symptoms of major depression. She was excessively tired, regularly had poor concentration high levels of anxiety, verbalised hopelessness with suicide as an option. He concluded that she was a very at time of consultation a very real risk of suicide, as a consequence of which she was admitted on an urgent basis into the hospital.

[55] She was placed on medication and the psychiatrist final diagnosis that she presented with DSM-IV. (Diagnostic and statistical manual of the the American psychiatric Association) At the risk of being overly simplistic , this diagnosis in the view of the psychiatrist is a full blown mental disorder which is known as pathological gambling.

[56] Pathologic gambling is now recognised as a mental disorder affecting patients by nearly all Psychiatric disciplines. He concludes that the accused suffers from a major depressive disorder and severe pathological gambling addiction.

[57] These conditions deteriorated to a level that the last couple of years that resulted in a complete loss of control over her personal and social life. He concludes that that at the time of the commission of an offence the accused was able to appreciate the wrongfulness of her actions but that the ability to control her actions was diminished due to her mental condition. He concludes that she is a high suicide risk and this is exacerbated by her mental illness and that the accused remains in a mentally depressive state

[58] Dr Savov refers to text books on the subject of pathological gambling which confirm that in instances of person who suffer from this kind of mental illness are

regularly involved in criminal acts such as fraud forgery and embezzlement in order to fund their habits.

[59] The accused remains a risk because of her mental illness however she has insight into her problems and was careful management and proper conditions the prognosis of the accused's recovery is not hopeless. He alludes to the fact that she has already to a degree begun to confront her problems and this is also supported by the evidence of Mrs Stone who is married to the pastor of the church that the accused attends. Mr Ramanand of Gamblers Anonymous also testified as to the role of the accused in the organisation and the progress that she has made.

[60] They confirm that the accused is to an extent living a better life than the one that she was living at the time that she was gambling, that she is in the process of helping others deal with the same issues and has made an attempt to turn her life around. This can also be seen perhaps in the apparent improvement in life at home She really seems to be a very real effort to make things better.

[61] To the extent that it's relevant in this enquiry the state also lead to complaints in the matter or more accurately the complainant Mr Edwards and the bookkeeper of the second complaints. Their losses are massive, it's an enormous amount of money. The complainants' not only lost a large amount of money, they also trusted the accused and in Mr Edwards case assisted the accused, assisted her family, he went far beyond just an employer. The money was never ever recovered, similarly with the complainant SK BOYZ the money was never recovered.

[62] The amount of money stolen from the complainant's over a relatively short period of time is enormous, it ranks amongst the higher amounts that this court has ever come across when it deals with embezzlement and/or fraud from an employer. Many of the counts attract prescribed minimum sentences and it is at this juncture that I will turn to the arguments preferred by the state and the defence in respect of the counts where the prescribed minimum sentences apply.

[63] The impact of pathological gambling is constrained to be decided upon in light of the precedent of Nel although with the advances in Psychiatric Medicine I am of

the view that this precedent might need to be considered in light of the advances in Psychiatric study on the topic. It is apposite to set out the generally accepted DSM-IV diagnosis, noting that mainstream study in the field is including instances of pathological gambling under DSM-5 which can be described as a classification of an addictive disorder.

[64] According to the DSM-IV-TR[18] the essential characteristic of pathological gambling consists of the 'persistent and recurrent maladaptive behaviour that disrupts personal, family, or vocational pursuit'[19]. In such circumstances the individuals are preoccupied with gambling and report that they seek 'action' or 'excitement' more than money. The individual may resort to gambling as a manner of escaping from problems or to relieve feelings of helplessness, anxiety or depression. Pathological gambling is typified by long-term chase rather than gambling for shorter periods.

[65] Individuals suffering from pathological gambling may resort to antisocial behaviours such as forgery, fraud, theft or embezzlement when resources are low. Individuals suffering from pathological gambling often display distorted thoughts and frequently believe that money will be the solution to any problem. In terms of criminal behaviour associated with pathological gambling, Grant[20] opines as follows:

> Many pathological gamblers engage in illegal behaviour, such as stealing, embezzlement, and writing bad checks to fund their gambling or in an attempt to pay off past gambling losses.

Precedent on pathological gambling

[18] 20. DSM-IV-TR (n 7) 671. See also A Frances, Essentials of Psychiatric Diagnosis: Responding to the Challenge of DSM-5 (Guilford Press, New York 2013) 138–39. The diagnostic criteria for pathological gambling is set forth in the DSM-IV-TR and provides as follows:

[19] The Role of Impulse Control Disorders in Assessing Criminal Responsibility: Medico-Legal Perspectives from South Africa Geert Philip Stevens*Department of Public Law, University of Pretoria

[20] Grant (n 2) 3.

[66] The only impulse control disorder that has featured in South African criminal case law is pathological gambling. The latter was, in addition, only addressed in two decisions. It is notable that in neither of the two decisions the accused relied on the defence of pathological criminal incapacity as a defence. Reliance was only placed on the particular impulse control disorder in support of mitigation of sentence. In Sv Wasserman[21], the facts were that the appellant was charged with 64 counts of theft involving over one million rand. She was consequently convicted on all counts and was sentenced to 15 years imprisonment in terms of s 51(2) of the Criminal Law Amendment Act 105 of 1997.

[67] On appeal the question which had to be assessed was whether the sentence imposed in the trial court had been fair in light of the fact that the appellant had been diagnosed as suffering from pathological gambling disorder. A related question which had to be answered was whether pathological gambling qualified as a substantial and compelling circumstance in order to depart from the minimum sentence provided for in the Act.

[68] In assessing whether pathological gambling qualified as a mitigating factor, evidence was heard from Professor Schaffer, the director of the Division on Addictions at the Harvard Medical School who testified that gambling affects the central nervous system. Schaffer further stated the following[22]:

> "But let me just say that there is neurotransmitter activity that accompanies gambling and it is much like taking a psycho-stimulant and by psycho-stimulant I mean nicotine, caffeine, cocaine so that it is similar to those quick hitting, rapid, stimulating drugs ... The acting out are the stimulants, the gambling, risk taking behaviours. These can all hold addictive potential."

[69] It was held by Patel J that pathological gambling constituted a progressive disease which could be effectively treated. In terms of assessing whether

[21] 57. Wasserman v S (2005) JOL 13301 (T). See also M Carnelley, 'S v Wasserman – Is dobbelverslawing 'n wesenlike en dwingende omstandigheid in terme van die Strafregwysigingswet wat 'n geringer vonnis regverdig' *Is gambling addiction a substantial and compelling circumstance justifying a lesser sentence] (2005) 30 (1) Journal of Juridical Science 153–61; SV Carnelley Mand Hoctor, 'Pathological Gambling as a Defence in Criminal Law' (2001) 22 (2) Obiter 379–88.
[22] Wassermann supra at [6].

pathological gambling constituted a mitigating factor it was held by Patel J that addiction to gambling constituted a mitigating factor which could impact on sentencing. It was accordingly held by Patel J that the imposition of the prescribed minimum sentence was shockingly inappropriate.

[70] Accordingly, after regard was taken of the appellant's personal circumstances, the offence and the broader interests of the community, the sentence imposed by the trial court was set aside and replaced with a sentence of five years correctional supervision in terms of which half of the sentence was suspended for three years provided that the accused was not convicted of any crimes of attempted theft, theft, attempted fraud, fraud, attempted forgery, forgery, uttering or making false representation. It was further ordered that the appellant be referred for counselling and rehabilitation programmes for her pathological gambling disorder.

[71] The decision in Wasserman was the first judgement in which pathological gambling was recognised as a disorder and that it could constitute a substantial and compelling circumstance justifying a lesser sentence than the prescribed sentence provided for in the Act. Obviously in terms of sentencing, pathological gambling will be assessed in conjunction with all the relevant circumstances of the case in order to determine the presence or not of substantial and compelling circumstances[23].

[72] In Nel[24] the appellant was convicted in the trial court of robbery with aggravating circumstances and was sentenced in terms of the Act to 15 years imprisonment. The salient facts were that on the morning of 19 February 1999, the appellant, armed with an unloaded firearm, went to the Lorraine Entertainment Centre in Port Elizabeth, held up the staff and then locked them in the ladies' toilet and robbed them of R32,595. He was consequently arrested and pleaded guilty.The appellant testified in mitigation of sentence that he had been suffering from a gambling addiction which had started as early as 1994 and which he failed to curb

[23] See Carnelley, S v Wasserman (n 57) See Carnelley, S v Wasserman (n 57) 160.
[24] 67. Nel v S (2007) 4 All SA 709 (SCA).

despite having stopped at some stage. According to his testimony, gambling had consumed him to such a degree that he was known as a regular and a 'most valued guest' at some gambling houses.

[73] The appellant testified that despite having generated a generous income, he became more and more indebted as a result of his gambling. In mitigation of sentence the appellant relied on the expert evidence of a clinical psychologist, who testified that the appellant presented as immature and compulsive and had low self-esteem which drove him to live in a fantasy world, which in turn enabled him to compensate for those feelings and which affected his ability to make rational decisions. He further testified that the appellant suffered from a personality defect manifesting in a pathological gambling problem and that the appellant had reached the third and last phase of gambling which was a disorganised phase where gambling had completely taken over his life, and that he remained a danger to society if he did not receive adequate treatment.

[74] Mr Breedt, the psychologist, testified that the appellant needed long- term psychological treatment to deal with his gambling addiction and accordingly that long- term imprisonment and the appellant's removal from gambling facilities without the required psychological treatment would have no effect on him. The trial court reasoned that as robbery with aggravating circumstances was a serious offence, it had to impose the prescribed 15 years imprisonment and accordingly that there had been no substantial and compelling circumstances present which had justified the imposition of a lesser sentence.

[75] On appeal it was argued on behalf of the appellant that his pathological gambling had made drastic inroads into his ability to make rational decisions and should have been viewed on its own as a mitigating factor and as such constituted a substantial and compelling circumstance which justified the imposition of a lesser sentence than the prescribed minimum sentence. Reliance was further placed on behalf of the appellant on the decision in Wasserman supra. On appeal Mlambo JA, however, criticised the approach followed in Wasserman and held as follows[25]:

> "In my view the reasoning in Wasserman supra was unnecessarily overbroad, and it is not surprising that the Court was unable to find support

[25] At [15].

> for its views in the South African jurisprudence. In my view the Court's approach was too broadly expressed as to amount to an undue relegation of the retributive and deterrent elements in sentencing in favour of the rehabilitative and reformative elements. Indeed it could open the door to undue reliance by gambling addicts on their addiction to escape an appropriate sentence in the form of direct imprisonment."

[76] Mlambo JA further held that gambling addiction can never operate as an excuse for the commission of an offence. In respect of pathological gambling, Mlambo JA reasoned as follows:[26]

> "Whilst gambling addiction may be found to cause the commission of an offence, even if it is pathological (as in this case) it cannot on its own immunise an offender from direct imprisonment. Nor indeed can it on its own be a mitigating factor, let alone a substantial and compelling circumstance justifying a departure from the prescribed sentence.

[77] It was accordingly emphasised by Mlambo JA that in order to find substantial and compelling circumstances, a broader and more holistic approach had to be followed. Having regard to the appellant's financial predicament he had placed himself in, caused by the gambling addiction in conjunction with other factors such as remorse, the use of an empty firearm and the lack of any physical injuries to the victims were all weighty considerations in the assessment of the presence or not of substantial and compelling circumstances. Having regard to all the factors mentioned above, Mlambo JA held that there were substantial and compelling circumstances present and accordingly reduced the sentence of 15 years imprisonment to 10 years imprisonment.

[78] Whereas I may have some sympathy with the suggestion that Nel is dismissive perhaps unfairly of the treatment pf pathological gambling addiction it is binding on this court. However as suggested by Counsel for the accused and as stated by Mlambo JA in Nel, in terms of sentencing courts will take a holistic view of all the circumstances in order to assess as to the presence or absence of substantial and compelling circumstances. In Nel the court in any event applied a holistic approach as it did not solely view the pathological gambling as a

[26] At [16].

substantial and compelling circumstance, but still had regard to other factors as well. It is, however, true that it was held that pathological gambling could constitute a substantial and compelling circumstance, and having regard to the fact that the Nel decision constitutes appellate authority, it is doubtful whether on its own it would amount to a substantial and compelling circumstance. As Carnelley[27] correctly submits, gambling addiction is but one of many factors to be considered during the sentencing phase.

[79] Whereas the prevailing medical position and evidence led in this matter shows that pathological gambling is an addictive disease, this was not considered by the Appeal Court at all in Nel whereas it was addressed in Wassermann and that issue will hopefully be considered by our highest courts in due course. There is a general acceptance in American and Canadian law that although offenders should not be excused their abhorrent behaviour and criminal acts but there is also an acceptance that pathological gambling is an addictive disease that moral blameworthiness maty be affected and that should amount to a degree of mitigating circumstances. A downward trend in sentences imposed is prevalent in American and Canadian cases dealing with this issue.

[80] What is required of this court at this time, is as dictated to by the dicta of Mlambo JA in Nel, is to consider the issue of substantial and compelling circumstances in a inclusive holistic manner. It is on a consideration of all the factors considered conjunctively or as a composite test and not disjunctively as ably argued by Counsel that the answer is positive for the accused.

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[27] See M Carnelley, 'The Role of Pathological Gambling in the Sentencing of a Person Convicted of Armed Robbery: A Comparative Discussion of the South African, Canadian and Australian Jurisdictions'(2008) 3 South African Journal of Criminal Justice 296, where the author notes that the court in Wasserman discussed the issue of pathological gambling referring to both the medical and psychological research on the topic whilst specifically stating that pathological gambling constituted a disease. The latter was indeed a positive aspect of the Wasserman decision as opposed to the Nel decision where the court failed to address this issue. Carnelley correctly submits that the court in Wasserman considered all the mitigating and aggravating circumstances in ultimately reaching the finding that the prescribed minimum sentence was shockingly inappropriate. It could accordingly be argued that the criticism by the Appellate division of the Wasserman judgement was in some respects harsh. As Carnelley argues, the court could have provided a more detailed analysis of foreign jurisprudence. Carnelley, 'The Role of Pathological Gambling' (n 83) 304.

I believe that on a totality of the factors presented to the court by the accused establish substantial and compelling circumstances and that the imposition of the prescribed minimum sentences on counts 37-54 in the circumstances would result in a disproportionate sentence.

[81] I find that the Accused's pathological gambling addiction that is classified in medical Psychiatry as a mental disability, her severe depression along with the fact that she has endeavoured to remedy her life path and by all accounts the uncontradicted evidence of the social worker and the evidence led on her behalf suggests a serious attempt by the accused to lead a better life.

[82] Since her life imploded due to the uncovering of her criminal behaviour she has made efforts of her own volition to address her addiction and personal travails. She is 37 years of age, a first offender, gainfully employed and supports her two children. They will suffer immensely, if their mother is imprisoned in terms of the Minimum sentencing legislation applicable, they will effectively grow up in the complete absence of their mother. Counsel for the accused has from the outset correctly in my view conceded that a term of imprisonment is inevitable.

[83] She consciously has tried to reform her life, indeed she helps assist others in dealing with addictive disorders through her involvement with Gamblers Anonymous. There is no violence involved in the offences although I am mindful that this a serious crime and it is a myth that those who commit white collar crime are not truly criminals, that is an obvious heresy[i28]

[84] She pleaded guilty and to a degree this court will accept along with her evidence in this regard that this to a degree is a sign of remorse, it without doubt shortened the trial and I am in agreement with the judgments in our law that suggest some benefit should accrue to the accused in these circumstances. Although this is of her own making the accused has been publicly vilified for her conduct, both in mainstream media and also on the various social media platforms that exist. One cannot lose sight of the fact that there are very real victims in the matter, the owners of the two companies defrauded, Edwards of Nicholson shipping and Sukdeo of SK Boyz who have every right to be saddened and angered by the accused's treatment of them and her deceit, with the amounts been involved

[28] S v sadler [supra]

been so large any sentence that is imposed also needs to reflect their loss and society's indignation at her conduct. I am mindful of the fact that the indignation of society should not be conflated to the interests of society which is a different concept.

[85] I find that the accused has shown that the threshold in section 51(3) has been reached and that substantial and compelling circumstances are present that warrant the imposition of a lesser sentence.

[86] With the finding of substantial and compelling circumstances the court has to decide what in the circumstances is an appropriate sentence. Following Hildebrand this court is free to impose any sentence it deems fit after a proper application of the principles set down in respect of sentencing. I however cannot lose sight of the fact that counts 37-54 met the threshold of attracting prescribed minimum sentences and that impacts upon how this court exercises its judicial discretion.

[87] A reminder is necessary at this point; Cameron JA as he then was said in S v Abrahams[29]'said;

> "Even when substantial and compelling circumstances are found to exist, the fact that the Legislature has set a high prescribed sentence as "ordinarily appropriate" is a consideration that the courts are "to respect and not merely pay lip service to". When sentence is ultimately imposed due regard must therefore be paid to what the Legislature has set as the bench mark.'

[88] As Ms Cole the prosecutrix ably argued, This needs to be factored into any enquiry as to what is an appropriate sentence in the circumstances, whereas I have thus far focused upon the enquiry in terms of section 51(3) I now focus on the onerous responsibility of imposing a sentence that is not only fair to the accused but also factors in the seriousness of the offence and the interests of society.

[29] **2002 (1) SACR 116** (SCA), Cameron JA at 126

[89] The personal circumstances of the accused have been dealt fully in the examination whether or not their substantial and compelling circumstances existed and the finding that there was. I am mindful when assessing an appropriate sentence that the legislature felt that an offence on these facts was included in those offences attracting a prescribed minimum sentence. As was apparent in Abrahams[30] even if there are substantial and compelling circumstances the court must have regard to what the benchmark.

[90] I note and align myself with the comments of Hughes AJA[31] when last year after approving of the dicta in Sadler she stated in S v Kwenda:

> **"The scourge of white collar crime, especially fraud, is currently the order of the day in our country. Fraud is a cancer that is crippling our country from the core"**

[91] There seems to be a tendency of non- lawyers and on occasion even legally trained people to trivialise the seriousness of white-collar crime, its seriousness is regularly understated and the consequences possible pursuant to a conviction underestimated. One only has to listen to the evidence of the complainants or their representative to realise the anger they felt at being misled by the accused and that does not even include the amount of money that was lost by him to the fraud of the accused upon him. It is a large amount of money.

[92] Serious cases need to be treated with an appropriate degree of judicial scrutiny, too often the courts have been criticised for a lax and soft approach to so-called white-collar crime. It is unfortunate to note that a recent study of the sentences imposed since 2010 indicate some disturbingly soft sentences being imposed flying in the face of judicial precedent within the region that this court sits. Indeed, there were times when one got the impression that the Specialised commercial crime courts were debt collection vessels; this being so despite what Marais JA said 24 years ago in Sadler's matter:

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[30] Supra per Cameron JA as he then was.

[31] **S v Sadler (57/99) [2000] ZASCA 13; [2000] 2 All SA 121 (A) @ [11] ;[12] and [13]**
Victor Kwenda v The State (682/2018) [2019] ZASCA 113 delivered on (17 September 2019)

> "I regret to have to say, [white collar crime has] often been visited in South African courts with penalties which are calculated to make the game seem worth the candle[32]"

[93] The myth that those persons involved in serious large-scale theft or fraud and corruption are not really prison material or criminals needs to be dispelled. As Marais JA[33] pointed out this is a heresy and needs to be removed. These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it. [13] It is unnecessary to repeat yet again what this court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration. [My Emphasis]

[94] It is in this context that I consider sentences imposed by our courts, especially the Supreme Court of Appeal in comparable cases. What follows is a synopsis of reasons sentences imposed by our superior courts for similar offences often involving misappropriation of funds from Employer, mindful of the fact that all cases have their own particular facts and require individualisation. Noting that the accused was an employee who was in a position of trust, she was entrusted with the book-keeping function of the complainant, a firm of attorneys.

[95] In S v Prinsloo[24], Leveson J expressed strong views when dealing with sentencing an accused convicted of misappropriation of funds from employers. The head-note of the case reads as follows:

> "....I(n) the world of commerce employers were compelled to place trust in their employees. It was not possible for the employers to conduct the business of their concerns themselves. No alternative remained to them but to repose confidence in their employees, and when an employee breached that trust his conduct had to be heavily penalised. The employer was entitled to expect unswerving honesty from the employee in return for the wages he

[32] S v Sadler (57/99) [2000] ZASCA 13; [2000] 2 All SA 121 (A)

paid and the benefits he gave him. Nothing but implicit acceptance of that obligation by the employee would keep the wheels of commerce turning smoothly. It was the duty of the courts, whenever this sort of misdemeanour was detected, to send out the message that such conduct would be severely punished'.

[96] In this particular matter the complainant had these expectations, instead the accused embarked on a deceitful scheme to steal from the complainant. This, with respect is extremely aggravating in this matter.

[97] It is in that context that I consider sentences imposed by our courts, especially the Supreme Court of Appeal in comparable cases. What follows is a synopsis of reasons and sentences imposed by our Appeal courts for similar offences involving misappropriation of funds from Employer. In all of these matters the courts endeavoured to apply the principles behind the dicta of Marais JA pertaining to white collar crime.

[98] In S v Lister[34] , a 34 year old bookkeeper's sentence of 4 years' imprisonment was confirmed by the SCA, after she had been convicted of theft of R95 700 from her employer, which she stole over a period of 11 months.

[99] In Howells[35], the appellant had been convicted in the regional court of having defrauded her employer of R100 000 over a period of two years. She had been sentenced by the regional court to 4 years' imprisonment in terms of s 276(1)(i) of the CPA. The appellant was divorced and had three dependent children. On appeal, the High Court considered the interests of her minor children but held that there was no misdirection by the regional court in sentencing the appellant to direct imprisonment.

[34] **1993 (2) SACR 228** (A)
[35] S v Howells [2000] JOL 6577 (SCA)

[100] In De Sousa v The State[36] the appellant had pleaded guilty to 13 counts of fraud. She had been part of a fraudulent scheme involving a total amount of R1 000 228.94. She had benefitted only R90 0000 for her participation in the scheme. She was 32 years old and a first offender. She had pleaded guilty and shown genuine remorse and contrition. She had also signed an acknowledgement of indebtedness in favour of the complainant in the sum of R90 000, being the extent of her benefit from the fraudulent scheme, and thereafter paid the debt in full. She had utilized some of the money to assist her mother, who was in financial difficulty, and her sister (whose husband was in rehabilitation) to pay school fees. All counts having been taken as one for the purposes of sentence in the Regional Court she was sentenced to *7.5* years' imprisonment, which was confirmed by the High Court.

[101] She appealed further to the SCA, Ponnan JA, acknowledged her genuine remorse and expresses sympathy for her stated[37] the gravity of the offence only a custodial sentence would be appropriate as sympathy cannot deter a court from imposing the kind of sentence dictated by justice and the interests of society, the learned judge of Appeal set aside the 7.5 years originally imposed and imposed 4 years' imprisonment.

[102] Both counsel for the State and the defence agree that the only appropriate sentence is imprisonment but seek vastly different terms. To this end I am mindful of the evidence of Dr Savov of the likelihood of less-than-optimal treatment of the accused's illness within prison especially considering her suicidal inclinations which manifest as a result of the pathological gambling addiction afflicting her. I am mindful that the department of Correctional Services is an organ of state and a constitutional duty bearer with an obligation to provide appropriate medical care to all inmates. Courts have pronounced upon this regularly in the context of bail applications, but with respect I believe the principle remains the same.

The law in my view remains that all detainees in prison, either awaiting trial prisoners or convicted have rights enshrined in the constitution to adequate medical treatment, these rights are contained in section 35 of the constitution. The Western

[36] **[2008] ZASCA 93** (12 September 2008)
[37] (Supra) at [13] de Sousa

Cape High Court affirmed this in S v Peterson, in this case the court was dealing with a detainee with a mental illness; Whitehead AJ affirmed,

> "the treatment and care for patients with mental illnesses will be less than satisfactory and not nearly at the same level as the care any patient would get at any recognised mental institution. People with mental illnesses belong in an institution that cater for that and not in a prison. A prison is primarily an institution where people are detained in order to protect the public. They however have rights in terms of Section 35(e) and (f) of the Constitution to adequate medical care and access to a chosen medical practitioner. The Constitution demands no more of the prison authorities. If they should fail in their duty to give this care any detainee will have recourse to ensure that these rights are provided.

[103] Mbenenge AJ in **S v MPOFANA** [34]the Transkei High Court held that:

> "Upon a proper construction of s 35 (2) (2) and (f) of the said Constitution, one whose detention has been pronounced lawful and in the interests of justice cannot simply resort to a further bail application merely because he has been detained under inhumane and degrading conditions or on the ground that his right to consult with a doctor of his own choice has been infringed. It is, however available to such person firstly to apply to the prison authorities concerned and call upon them to remedy whatever complaints he/she has with regard to the conditions of his/her detention. Should the prison authorities fail to remedy such complaints, it is available to the detainee concerned either to challenge the detention before a court of law as being unconstitutional or obtain a court interdict to force the prison authorities to comply with the law."

PRIMARY CARE GIVER

[104] The accused is a primary care-giver to her children but the father is an involved parent as are the immediate family. It is apparent that steps have been put in place to ensure that the jarring removal of a parent from the home is being planned

for. I am sensitive to the challenges and the effect of removal of the accused but on a consideration of the Triad in Zinn as required by Sachs J in 'M[38]' and the related principles as set out in the case law I believe that the only appropriate sentence is clearly a custodial sentence, the real issue is the length thereof, a non-custodial sentence would in my view, be by a considerable margin inappropriate.

[105] The court after applying its mind to whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated has made an ancillary orders in order to try to ensure that the needs of the children are addressed and that the plans made to try to minimize the effect and that they are not placed at risk.

[106] In the circumstances I am satisfied that the offences are of such a serious nature that the personal circumstances of the accused should yield to the other purposes of punishment, in particular deterrence and retribution. As the learned judge Steyn said in S v S[39]:

> "If I was solely guided by the accused's individual circumstances then correctional supervision in terms of **s 276(1)(h)** of the **Criminal Procedure Act 51 of 1977** would have suited his needs. The aforesaid section however provides for a sentence not exceeding 3 years' imprisonment. It is expected of me not to find a sentence that fits the needs of the accused. The sentence should also be in the interests of society and serve as a deterrent to prevent others from doing the same"

[107] The imposition of sentence as sagely set out by Advocate Van Schalkwyk SC is extremely difficult, I cannot pretend to be unaware of the public's reaction to the accused's criminal conduct, no sentence would appease those other than an imposition of a lengthy term of imprisonment that would effectively crush the accused. The court is mindful notwithstanding that one feels for the complainants and the effect on them, the interests of society as a whole demand the imposition of a sentence that will truly serve the interests of justice and not the satisfaction of vengeance.

[108] In State v Ishwarlall the learned judge Moodley said:

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[38] S v M (Supra)

[39] Supra at [23]

> "Although society has an indisputable interest that a fair sentence be imposed, the purpose of sentencing is not to satisfy public opinion but to serve and promote the public interest. A court has the duty to impose a fearlessly appropriate and fair sentence, even if such a sentence would not satisfy public opinion. In *S v Gardener & another* **2011 (1) SACR 570** (SCA) para 68 Heher JA explained as follows:
>
> 'True justice can only be meted out by one who is properly informed and objective. Members of the community, no matter how closely involved with the crime, the victim or the criminal, will never possess either sufficient comprehension of or insight into what is relevant, or the objectivity to analyse and reconcile them, as fair sentencing requires. That is why public or private indignation can be no more than one factor in the equation which adds up to a proper sentence, and why a court, *in loco parentis* for society, is responsible for working out the answer.'

[109] It is against this back-drop that I must impose an appropriate sentence but before doing so I wish very briefly to deal with a recurring theme in the evidence of the accused and the affidavit she deposed to that is a raw and emotional depiction of her conduct and emotions during this exercise. She regularly deals with the conduct of the gaming industry, the presence of loan sharks at the casino, the conduct of the staff at these venues and the repeated invitations to the accused to continue gambling by offering free stays in accordance with the loyalty programmes. I am of the view that imprisonment is inevitable and indeed a lengthy one but it should be applied with a measure of mercy.

[110] I am mindful that an enquiry is ongoing or at least the results are not yet known to the accused and that I have not heard the response of those in the gaming industry who are involved. Having said that in a country where its constitutional values include respect, responsibility and accountability with the known dangers of gambling, that gambling can be addictive and dangerous what has occurred here, if true, is the antitheses of the promotion of responsible gambling.

[111] With the release of the Ontario Court of Appeal's decision in *Paton Estate*[40], the possibility was left open for a casino to be found to owe a duty of care to patrons who gamble excessively. Specifically, where the gambler is a member of a casino's customer loyalty program, thereby imputing knowledge of extreme gambling behaviour on the casino, and where the casino has no reason to believe the patron's losses are sustainable, a duty of care should be imposed. Liability should follow in cases where the casino knowingly contributed to or deliberately ignored these losses. Indeed this might even be an avenue of legal recourse for those who lost enormous amounts of money in this matter.

[112] This reasons for sentence is to forwarded to the South African Responsible Gambling Foundation for their information and for them to decide if they believe any further investigation is necessary

Sentence :

[113] I have decided to take counts 12-36 as one for purposes of sentence, all these counts do not attract prescribed minimum sentencing legislation and are in comparison lower amounts that cumulatively total, R840 332-00, the complainant in this matter is Marc Edwards of Nicholsen shipping:

1. Six years Imprisonment.

On counts 36 – 54, which I take as one for purposes of sentence, wherein the complainant is also Marc Edwards, the cumulative total of the fraud is R10 592195 accused is sentenced as follows:

2. Twelve years imprisonment of which three years imprisonment is suspended for five years on condition accused is not convicted of fraud or theft, or any attempt thereto, committed during the period of suspension for which imprisonment is imposed without the option of a fine.

On counts 133-135 which I take as one for purposes of sentence, where the complainant is the entity SK BOYZ represented by Mr Sukdeo , and the cumulative amount of the fraud is R5 428 000 the accused is sentenced as follows:

3. Eight years Imprisonment

[40] Alberta Law Review Paton Estate v Ontario Lottery and Gaming Corporation 2016 349 OAC (CA)

The sentence imposed in paragraphs one and three are to run concurrently with the sentences imposed in paragraph 2, namely counts 36-54.

The effective term of imprisonment is nine years imprisonment.

[114] No Order is made in terms of section 103(1) of the Firearms Control Act.

[115] The Clerk of this court is ordered to immediately direct the Department of Social Development to do the following:

(a) The Department must appoint a designated social worker as contemplated by the Children's Act 38 of 2005 to investigate in terms of **ss 47(1)** and **155**(2) of the Act, whether the accused's children are minor children in need of care. The Department must do this without delay and take all steps necessary to ensure that:

(i) they are properly cared for in all respects;

(ii) they remains in contact with the accused during the period of imprisonment, and has contact with her insofar as it is permitted by the Department of Correctional Services.

[116] This reasons for sentence is to forwarded to the South African Responsible Gambling Foundation for their information and for them to decide if they believe any further investigation is necessary

Delivered, dated and signed this 14th day of February 2023.

Garth Davis Regional Magistrate

[i] S v Sadler (supra)