REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

SOUTHERN CIRCUIT LOCAL DIVISION

CASE NO: CC 65/2011

RAMSGATE

DATE TYPED: 7 AUGUST 2012

In the matter between:

STATE

versus

THANDO KWATSHA

BEFORE

THE HONOURABLE MR JUSTICE NDLOVU

SITTING WITHOUT ASSESSORS

HEARD AT RAMSGATE

JUDGMENT DELIVERED ON 21 JUNE 2012
SENTENCE DELIVERED ON 24 JULY 2012
JUDGMENT ON LEAVE TO APPEAL DELIVERED ON 24 JULY 2012

JUDGMENT (21 JUNE 2012)

NDLOVU J The accused was arraigned on thirty-seven counts of fraud involving the total sum of R5 955 000.00. The details of these charges are set out in the indictment. The charges were read with the provisions of section 51 (2) of the Criminal Law Amendment Act 105 of 1997.

The accused was legally represented by Mr M Chetty.

Upon such arraignment the accused pleaded guilty to all thirty-seven counts of fraud. Mr Chetty confirmed that all these guilty pleas were in accordance with his instructions and thereupon handed up a statement in terms of section 112 (3) of the Criminal Procedure Act 51 of 1977, which set out the plea explanation amplifying the guilty pleas of the accused. He read out into the record the statement, which was duly translated to the accused in the isiXhosa language, being the language in which the accused elected to conduct the proceedings. The accused confirmed the correctness of the contents of the statement and he confirmed that it was indeed his own statement. He also confirmed that the signature appearing on the statement was his own. The Court admitted the statement and marked it Exhibit A.

Ms Jacobs, who appeared for the State, confirmed that the statement of the accused was indeed in accordance with the State's case and that on that basis the State was accepting the accused's plea explanation.

I have considered the statement myself in relation to the pleas that the accused tendered and both the elements of the crime as well as the alleged facts in the indictment. Having done so, I am satisfied that the

accused is admitting all the elements of the crime of fraud as well as the alleged facts contained in the indictment.

Accordingly –

THE ACCUSED IS FOUND GUILTY AS CHARGED ON ALL THIRTY-SEVEN COUNTS OF FRAUD INVOLVING THE SUM OF R5 955 000.00.

SENTENCE (24 JULY 2012)

NDLOVU J On 21 June 2012 the accused was convicted, on his plea of guilty,[1] of 37 counts of fraud involving the total sum of R5 955 000[2], upon the Court being satisfied of his tendered written plea explanation[3] that he was, indeed, guilty as charged. The charge was subject to the provisions of section 51(2) of the Criminal Law Amendment Act[4].

The *modus operandi* whereby the accused misrepresented the true state of facts to the 37 complainants and to the prejudice of both the complainants and Standard Bank (the Bank), in the commission of the crimes concerned, is clearly set out in paragraphs 3 and 4 of the preamble to the Indictment which, for the sake of convenience, I propose to repeat:

'3. Whilst employed as (financial planner) at either the Kokstad, Ixopo and Matatiele branches (of Standard Bank), the accused interacted

1 Section 112(1)(b) of Act 51 of 1977 (the CPA)
2 The detailed particulars of all 37 counts appear in Schedule 'A' to the Indictment. The amount per count ranges between R40 000 and R500 000.
3 Section 112 (3) of the CPA. The written plea statement was admitted and marked as Exhibit 'A'.
4 Act 105 of 1997

with the complainants herein and misrepresented to them that the amounts invested by them will be deployed to approved investment companies within the Standard Bank group.

4. The accused however deployed the money paid in by the complainants herein to Messin Projects CC, which account is operated by an associate of the accused and not one of the approved investment companies within the Standard Bank group.'

In mitigation of sentence the accused elected to give evidence and he furnished his personal particulars. He is 38 years old currently resident at 9283 NU3 Mdantsane in East London, Eastern Cape, with his mother and younger brother. He has his own property registered both in his name and that of his estranged wife who left him together with their two minor children aged 7 years and 12 months, consequent upon the accused's arrest on this matter. At the moment their Kokstad home is being rented out.

The accused holds a tertiary education qualification – that is, a national diploma in inventory and stores management. He had worked for the Bank as financial planner since 1 October 2001. He was based in Kokstad but also serviced the Bank's branches in Matatiele and Ixopo. His duties mainly involved selling life insurance and investment products, long and short term. In this regard, he gave advice to the Bank's clients who came to him for service. The Bank's approved and associated investment companies were Stanlib and Liberty Life. The accused further told the Court that he did not have a basic salary and that he earned his income from an average monthly net commission of R15 000 which he received from the Bank. He was dismissed from work as a result of this case.

He then sought to explain that he committed these crimes through the influence of his father. He told the Court that in or about April 2008 just before the offence referred to in count 1, his father who was then employed by a sorghum breweries company in Midrand, Gauteng, contacted him and requested an amount of R100 000 which the accused responded, saying he did not have. His father then introduced to him the existence of Messin Projects CC in which he (his father) said he was involved with a certain other lady partner whose name was also given to the accused. The accused said his father then suggested to him that he should get his clients to invest their funds at Messin Projects, instead of the Bank's approved investment companies, saying that the clients would get a more lucrative interest return by investing with Messin Projects. His father supplied him with the banking details of Messin Projects into which the accused would deposit or transfer the clients' investment funds.

His father had also told him that he (his father) was owed in the region of R2 million by Industrial Development Corporation (the IDC) for which his father's business had rendered security services under a tender contract. According to his father, certain officials at IDC who had to process the R2 million payment, were demanding an amount of R100 000 (which appeared to be bribe money) in order for them to expedite the processing of his father's payment. This was the sum of money which his father initially asked for from the accused. His father had promised that the money would be repaid after a week. However, when that did not happen his father told him that the IDC officials were demanding more money and that the accused had to get that from other clients, which the accused then did. He said he

kept on believing that his father would eventually ensure that the clients' investment funds would be paid back.

The accused said he had trusted and respected his father as someone who had never committed a wrong and he had believed in him. As a result, he had then transferred, or caused to be transferred, the clients' investment funds into the account of Messin Projects, as alleged in the Indictment.

He said he started encountering a problem in or about March 2009 when Mrs CN Conana the complainant in count 5, who had invested R200 000, requested a refund of her money. However, the refund was not possible because the accused had transferred the money to Messin Projects account, although he had told Mrs Conana that her money would be invested on an open account with Stanlib. Confronted with this problem, he had then phoned his father and informed him that there was a client who wanted her money back, which was R200 000. His father said he and his business partner would try and get the money paid back soon. However, that did not happen.

In the meantime Mrs Conana kept on coming to the Bank asking for her money from the accused. Out of fear that the issue would probably come to the attention of the Bank authorities, the accused decided to call in another client whom he knew had about R240 000 in her estate account. That was Mrs PZ Langa, the complainant in count 7. He advised her to take her money out of the estate account and invest it with Stanlib, to which the unsuspecting Mrs Langa agreed. Then, on 13 March 2008, instead of doing what he had undertaken to Mrs Langa he would do, the accused transferred

her funds, in the sum of R210 000, into the account of Messin Projects. In other words, even at that stage, notwithstanding Mrs Conana's urgent demands, the R210 000 which the accused obtained from Mrs Langa, was not used to refund Mrs Conana of her R200 000, but was again transferred and paid into Messin Projects account.

The accused admitted that the same *modus operandi* continued, on the dates mentioned in the Indictment, until the fraudulent transaction on 22 January 2010 (count 37) proved to be the final straw. This was after the complainant, Mrs Mahlawe, suspected that something untoward had occurred and she reported the matter to the Bank authorities, which resulted in the arrest of the accused shortly thereafter. He said only three of the 37 clients were paid back their monies by Messin Projects.

The accused's spiritual adviser, Pastor Cecil Hemero, was called by the defence to testify. He confirmed that the accused and his wife were members of his church, The Power of Love Church based in Kokstad and that they regularly attended the church services. He told the Court that the accused came and confided to him that he was having a problem at work which the accused described, referring to this incident. The pastor said he had also impressed on the accused that the matter was serious indeed. The accused had further told him that one of the clients had sought to cancel her investment with the Bank and wanted her money back, which was unfortunately not available. (This client was apparently Mrs Conana.) The pastor told the Court that he had then advised the accused to come clean to the authorities with respect to what he had done.

The State called the Bank's forensic investigator, Clifford Michael

Uppink. He had been in the employ of the Standard Bank for some 23 years, of which 14 years as a forensic investigator. He told the Court that after the Bank received the complaint from Mrs Mahlawe, he was mandated to investigate the matter. During the course of his investigation he interviewed the accused who admitted to him that he had indeed transferred the clients' funds to Messin Projects without the knowledge and authority of the clients. The accused had then signed an acknowledgment of debt with the Bank whereby he undertook to repay the money. However, no such repayment was forthcoming. It would appear, however, that the accused was arrested shortly thereafter.

Mr Uppink further testified that the Bank staff at all three branches (that is, Kokstad, Matatiele and Ixopo) were extremely shocked on learning the news of the accused's arrest, given the fact that he was highly respected by his colleagues, due to his position in the Bank. He was regarded in a more senior level than the average Bank's front staff.

The witness had also interviewed most of the 37 complainants. He said it appeared that most of the invested funds consisted of pension monies either of the clients' deceased spouses or the clients' own pensions. Most of the complainants were elderly people, about 90% of whom were unsophisticated and from rural areas. The Bank's analysis showed that the deposits were their life savings which were invested to secure their future.

Mr Uppink further stated that the Bank had, in the meantime and on a goodwill gesture basis, taken a decision to refund all the clients who came forward and submitted their claims for refund. However, they were only refunded their initial investments without interest. The Bank would consider

the issue of interest after the finalisation of this case. Thus far the Bank had written off some R5,1 million which was used to pay the clients.

The witness further pointed out that fraud and theft were very prevalent in the banking industry, in that the current statistics revealed that during the last financial year the banks, generally, lost an estimated R2.5 billion through fraud and theft, which included cybercrime and card theft. Recovery of stolen money through these crimes was usually very difficult.

He further told the Court that, as a result of this incident, the Bank's reputation was certainly impacted negatively in the Kokstad, Matatiele and Ixopo areas. The Standard Bank brand in those areas was severely damaged in that the confidence which the people had of Standard Bank had been severely tarnished. In fact, the witness was not even sure whether any of the 37 complainants had reinvested their monies with Standard Bank after their reimbursement, which was effected only after a year since the matter was investigated.

Under cross-examination, Mr Uppink confirmed that during his investigation he examined the accused's personal account with the Bank and noticed that there was insignificant credit balance therein, although he could not remember how much it was. The witness also conceded that this particular type of bank fraud (i.e. committed with this typical *modus operandi*) was not a regular occurrence.

Mr Chetty, in his address in mitigation, asked me to find that there are substantial and compelling circumstances to justify the Court's departure from the imposition of the prescribed minimum term of imprisonment. He

submitted that the mitigating factors included the following:

- The accused is a first offender.
    - He was influenced by his father to commit the crimes. In this regard he referred me to the decisions in *S v Flannagan*[5] and *DeSousa v The State*[6].
    - The *modus operandi* in the commission of the crimes was unique.
- The accused pleaded guilty and thus showed remorse.
- He did not acquire any personal gain from the crimes.
- He agreed to assist the police with their further investigations.

However, Mr Chetty conceded that the crime was very serious and that a term of imprisonment was the only suitable sentence. However, in the light of the mitigating factors he submitted that the Court should still find the presence of substantial and compelling circumstances.

Ms Jacobs submitted that the only mitigating factor in favour of the accused was that he was a first offender and that this factor was far outweighed by the aggravating circumstances of the case. She asked the Court to find that there were no substantial and compelling circumstances present.

As Mr Chetty correctly conceded, the crime of fraud is very serious, more so that it involved such a large sum of money. Considering the nature and magnitude of the crimes I am not persuaded to accept that the mitigating factors alluded to by Mr Chetty justify the extent of the leniency that Mr

5 1995 (1) SACR 13 (A)
6 [2008] JOL 22428 (SCA)

Chetty has implored me to show in terms of sentence.

Whilst traditionally a first offender should be kept out of prison, it is not necessarily so with respect to serious crimes. In *S v Krieling and Another,*[7] the Appellate Division (per Smalberger JA) stated:

> 'While it is a salutary principle of sentencing that a first offender should, as far as possible, be kept out of prison, it is well recognised that in appropriate cases first offenders may, and indeed should, be incarcerated. Whether or not imprisonment is indicated depends essentially upon the facts of each particular case. It is true that imprisonment will cause the appellants great hardship. It will effectively terminate their careers, they will probably lose their homes, their families will unfortunately suffer and they will be exposed to all the negative influences of prison … One is not unmindful of these considerations. No court would deliberately seek to harm a convicted person or cause him undue hardship – no enlightened system of justice would tolerate that. But harm or hardship may be the unavoidable consequence of an otherwise fair and proper sentence. A balanced approach to sentencing requires that not only the appellants' personal circumstances and the potential hardship to them be given due weight, but also the nature of their crime and the interests of the community.'

In *S v Holder*[8] the Appellate Division (now the Supreme Court of Appeal) emphasised that the approach that imprisonment is only justified in certain cases cannot be accepted and is a limitation which does not exist in the meting out of punishment. Any serious offence, irrespective of the

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7 1993 (2) SACR 495 (A)at 497A. See also: *S v Kulati* 1975 (1) SA 557 (EC) at 559A-560H; *S v Sakabula* 1975 (3) SA 784 (C) at 786H-787H; *S v Makkahela* 1975 (3) SA 788 (C) at 789F - G; *S v Ceylon* 1998 (1) SACR 122 (C) at 123j-124b.
8 1979 (2) SA 70 (A)

nature thereof, can lead to imprisonment and imprisonment is sometimes the only appropriate sentence which ought to be imposed.[9] In the application of the principle that imprisonment ought to be avoided, the punitive element of punishment must, in serious offences, of whatever nature, come to the fore and be properly considered, if punishment is to have any meaning in the criminal law.[10]

In the present case the accused committed 37 counts of fraud involving approximately six million rand against mostly elderly and unsophisticated rural people who had placed their trust and confidence in him. Mr Chetty has conceded that custodial punishment was the only suitable sentence. In my view, it is indeed so. On this basis, the consideration of correctional supervision or a suspended sentence as an option simply falls away.

I am certainly not convinced that the accused's conduct in committing all 37 counts of fraud was as a result of direct influence by his father, which he could not resist. The facts in the present case are, in my view, clearly distinguishable from *Flannagan* and *De Sousa,* relied on by Mr Chetty. In *Flannagan* the appellant, a female bank clerk, was convicted of one count of fraud involving R8,5 million which she fraudulently transferred from one account to another. It was established that she had been forced by her husband to commit the fraud. She was 31 years old and a mother of three children. She was sentenced to seven and a half years' imprisonment, of which two years was conditionally suspended. On appeal, the sentence was reduced to 4 years' imprisonment in terms of section 276(1)(i) of the

9 *S v Holder*, above, at 77H-78A . See also *S v Silimela* 1999 (2) SACR (C)
10 *S v Holder*, above, at 74H-75A

CPA.

In *De Sousa* the appellant was convicted of 13 counts of fraud involving the sum of R1.228 million. The trial Court found that there were substantial and compelling circumstances present and sentenced her to seven and a half years' imprisonment. She was 32 years old and a first offender. The facts established that she had committed the crimes '*at the instance of her boyfriend who preyed on her vulnerabilities'*[11] and that she *'had assisted her boyfriend to implement a fraudulent plan.'*[12] She only benefitted R90 000 from the crime and she had repaid that amount. She co-operated fully with the police and had shown genuine remorse. There was also little likelihood that she would commit the crime again. On appeal, her sentence was reduced to four years' imprisonment.

It seems to me there is simply no comparison between the two decisions and the present instance. In fact, I do not even appreciate on what basis Mr Chetty, with respect, referred to *Flannagan* because the question of influence, in the context relied on, clearly did not arise there. In that case the accused was not just influenced, but forced by her husband to commit the crime. Further, there was only one count of fraud involved, as opposed to 37 counts in this case. Similarly, in *De Sousa* the Court found that the accused's boyfriend had preyed on her *'*vulnerabilities*'* and further that she had at least repaid the amount of R90 000 which she had benefitted from the crime. Such facts or considerations are not present here.

In any event, any influence which a husband may have over his wife or a boyfriend over his girlfriend, on the one hand, cannot be equated or

11 Par [9]
12 See head note

compared with the so-called influence by a father living in Gauteng over his 36 year old, married, sufficiently qualified and independent son living with his own family in the KZN south coast town of Kokstad. The accused was a sophisticated and intelligent adult person. It was highly unlikely that he could so easily, without more ado, submit to any influence, from whomsoever, to commit a serious crime such as this one. The accused's version in this regard was so highly improbable that, on questioning by me, he conceded that if he were to be placed in the position of a listener to his story he would himself not have believed the veracity thereof. In short, the accused's feeble explanation about his father influencing him in this regard is so simplistic and ludicrous that it falls to be rejected outright as a clear fabrication. It can only exist as a figment of his imagination. I do not need to have any opposing evidence to controvert it.

The fact that the accused committed these crimes using a *modus operandi* that may be described as unique is, to my mind, simply immaterial. The upshot of the matter is that this is bank fraud and a white collar crime, which is quite serious and prevalent in the country. In *De Sousa* the Court remarked that *'white-collar crime had reached alarming proportions and its corrosive impact upon society was all too obvious.'*[13]

Whilst it is noted that the accused was convicted on his guilty plea, which is usually regarded as a sign of remorse, this is not necessarily always the case. The accused did not, once the matter appeared before court, indicate his intention to confess to the crimes. Instead, the contrary was shown when he chopped and changed his legal representatives and caused

13 par [11]

the trial not to proceed on its first set down but instead postponed more than once at his own instance. A number of witnesses were arranged and secured by the State to come to Court and testify and this was obviously done on the assumption that the accused was not admitting his guilt. Had he indicated otherwise at the outset, all those arrangements would not have been made.

The accused took some two and a half years to make up his mind to plead guilty. In this situation I am inclined to conclude that his tendering of a guilty plea was more to do with his realisation of the overwhelming and watertight case against him than his showing of genuine remorse.

It is not uncommon that in some, if not many, cases the disposal or whereabouts of the proceeds of crime involving monetary assets permanently remains the secret of the perpetrator, who would rather choose to go prison and serve whatever sentence than to reveal the secret. In any event, it seems to me that in such situation where the stolen money is never recovered by the owner, this factor should only serve as an aggravating feature.

If the accused is genuinely willing to assist the police in their further investigation of this matter it is strange why the police are apparently still not in possession of evidential material enabling them to effect further arrests or, at least, to recover something from the stolen loot. As stated, this matter has now taken some two and a half years already without the accused's professed assistance being seen to bear fruit. Instead, he decided to flee Kokstad and went to stay with his mother in East London against the knowledge and approval of the investigating officer as it was required in

terms of his bail conditions. In any event, from what he told the Court about this case, it is inconceivable what other information, he would want the Court to believe, he could assist the police with.

In my view, this is a typical case where the consideration of rehabilitation was to give way to that of retribution and deterrence. In this regard, I am reminded of the remarks by Nugent JA in *S v Swart*[14] where the learned Judge of Appeal stated the following:

> "… [I]n our law retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Each of the elements of punishment is not required to be accorded equal weight, but instead proper weight must be accorded to each according to the circumstances. Serious crimes will usually require retribution and deterrence should come to the fore and that the rehabilitation of the offender would consequently play a relatively smaller role."

I agree with Ms Jacobs's submission that the only mitigating factor may be that the accused has a clean criminal record. However, I do find that the following constitute aggravating features in this case:

36.1 This fraud involves a large sum of money in aggregate, namely, approximately R6 million.

36.2 The crimes were not committed on the spur of the moment, but over a period of about two years and on 37 different occasions and against 37 different complainants, during that period.

36.3 The crimes were committed against unsuspecting Bank

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14 2004 (2) SACR 370 (SCA) at para 12. See also: *Director of Public Prosecutions, KwaZulu Natal v Ngcobi and others* 2009 (2) SACR 361 (SCA) at para 22; *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi and others* 2012 (1) SACR 423 (SCA).

customers who were mostly rural and unsophisticated elderly people who had placed their trust and confidence in the accused, which the accused so mercilessly abused.

36.4 The accused also breached and abused the position of trust and confidence which the Bank, as his employer, had placed in him.

36.5 His conduct had damaged and tarnished the Bank's image and reputation not only with the 37 victims but generally in the Kokstad, Matatiele and Ixopo areas.

36.6 The stolen money was never recovered.

36.7 The fact that the stolen money could not be traced at the accused's door is not, in my view, necessarily proof that the accused acquired no personal gain from the proceeds of these crimes.

36.8 Despite Mrs Conana having confronted the accused for her refund, the accused did not thereafter stop perpetuating his crimes. It is likely therefore that had he not been arrested he would have continued doing so indefinitely.

36.9 Finally, this kind of crime does not only affect the banking industry, but it has a huge negative impact on the economy of the country.

In my finding, the aggravating circumstances far outweigh the mitigating factors. Accordingly, substantial and compelling circumstances as envisaged in section 51(3) of the Criminal Law Amendment Act 105 of 1997 do not exist in this case.

In the result, the accused is sentenced to undergo 15 (fifteen) years imprisonment. All counts are taken as one for the purpose of sentence.

JUDGMENT (24 JULY 2012)

APPLICATION FOR LEAVE TO APPEAL

NDLOVU J An application has been made on behalf of the accused for leave to appeal against the sentence imposed by this Court and an application for bail pending the appeal.

Mr Chetty has submitted that the Court ought to have found that substantial and compelling circumstances do exist on the basis of the mitigating factors that the Court alluded to, if those were to be taken cumulatively. The State opposes the application.

The test in an application of this nature is whether there are reasonable prospects of success on appeal - in other words, whether another court may come to a different conclusion then the one reached by the Court.

I have considered the matter. In my view, there are no reasonable prospects of success on appeal in this matter.

Accordingly –

THE APPLICATION FOR LEAVE TO APPEAL AGAINST THE SENTENCE IS REFUSED.

THAT BEING THE CASE, THE APPLICATION FOR BAIL PENDING APPEAL NATURALLY FALLS AWAY.

APPEARANCES

FOR THE STATE ADVOCATE (MS) S JACOBS

ON BEHALF OF ACCUSED MR M CHETTY

INSTRUCTED BY THE LEGAL AID BOARD

INTERPRETER MR MADLEBE