IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Appeal Case No: AR336/2021

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS, KWAZULU-NATAL **APPELLANT**

and

ALVIN PATHER **RESPONDENT**

ORDER

The following order is made:

1. The appeal of the State against sentence is upheld.

2. The sentences imposed by the magistrates' court on 27 June 2019 in respect of each of the 16 convictions of fraud are set aside.

3. The following sentences are imposed in substitution for those set aside.

   (a) On counts 1 to 9 (taken as one for the purpose of sentence) the accused is sentenced to twelve (12) years imprisonment, four years of which are suspended for a period of five (5) years on condition that the accused is not convicted of fraud committed during the period of suspension.

(b) On counts 16 to 19 (taken as one for the purpose of sentence) the accused is sentenced to twelve (12) years imprisonment, four years of which are suspended for a period of five (5) years on condition that the accused is not convicted of fraud committed during the period of suspension.

(c) On counts 26 to 28 (taken as one for the purpose of sentence) the accused is sentenced to twelve (12) years imprisonment, four years of which are suspended for a period of five (5) years on condition that the accused is not convicted of fraud committed during the period of suspension.

(d) The sentence imposed in respect of counts 16 to 19, and the sentence imposed in respect of counts 26 to 28, shall run concurrently with the sentence imposed on counts 1 to 9. The effect is a composite sentence of twelve (12) years imprisonment, four (4) years of which are suspended on the aforementioned conditions.

J U D G M E N T

OLSEN J (BALTON J concurring)

[1] With leave granted by this court the Director of Public Prosecutions, KwaZulu-Natal, appeals in terms of s 310A(1) of the Criminal Procedure Act, 1977, against the sentence imposed on the respondent by the regional court, sitting as the Specialised Commercial Crime Court, on 16 counts of fraud. The magistrate sentenced the respondent to eight (8) years imprisonment wholly suspended for a period of five (5) years. The structure of the sentence is not perfectly clear. It seems that the sentence was imposed in respect of each count on the basis that all the sentences would run concurrently.

[2] The respondent was originally also charged with nine counts of forgery and nine counts of uttering, all of which were related to or formed part of the events giving rise to the 16 counts of fraud. The State withdrew those charges and the respondent pleaded guilty to the 16 counts of fraud.

[3] The complainants were three banks. Counts 1 to 9 relate to ABSA Bank; counts 16 to 19 to First National Bank; and counts 26 to 28 to Mercantile Bank. The fraud counts involved the submission by the accused on behalf of a company, Biotrace Trading 221 (Pty) Limited ("Biotrace"), of false documents purporting to reflect the financial condition of Biotrace, with a view to securing, on each occasion, more credit for Biotrace from the bank concerned than would have been granted if the true position had been revealed to the banks.

[4] The amounts involved appear in the schedule annexed to the charge sheet. If one adds them up the total amount involved is R109 056 000. Credit was granted by the three banks in that sum during the period March 2011 to December 2013. Mr Howse SC, who appeared for the respondent before us and in the court *a quo*, argued that, in assessing what was involved, in the case of credit granted on overdraft the court should not have regard to the total amount of overdraft granted on the occasion of each fraudulent misrepresentation, but rather to the increase in the overdraft limit generated on each occasion, when measured against the overdraft limit set on the earlier occasion, which was of course also induced by fraud. The argument is only superficially attractive. What was solicited by way of credit on overdraft on each occasion directly as a result of fraudulent misrepresentation was the difference between the overdraft the bank acceded to, and the one which the bank would or might have granted if the true position had been presented to it by the respondent. The respondent chose not to put this information before the trial court. Nevertheless, following counsel's argument in the case of the 10 counts which involved credit extended on overdraft, the sum of the amounts fraudulently secured under the 16 counts is R70 906 000. Given the paucity of information the respondent chose to disclose to the trial court concerning the course of his business, this amount appears to be, from the respondent's perspective, the most favourable estimate that can be made of the potential prejudice caused to the three banks involved as a result of the fraudulent conduct of the respondent.

[5] During sentencing proceedings the State called two witnesses, one from First National Bank and the other from Mercantile Bank. This evidence revealed that after Biotrace had been wound-up and the respondent sequestrated, First National Bank had to write off R16 million and Mercantile Bank R15.2 million. No evidence was placed before the court as to the ultimate loss sustained by ABSA Bank. Judging from the amounts relating to ABSA Bank which featured as counts 1 to 9, it seems unlikely that it suffered an ultimate actual loss significantly different to that suffered by the other two banks, unless ABSA Bank was for some reason favoured by the respondent (or by the liquidators of Biotrace or the trustees of the respondent's insolvent estate).

[6] Each of the counts on its own falls within Part II of Schedule 2 to the Criminal Law Amendment Act 105 of 1997, rendering a sentence of 15 years imprisonment on each count compulsory in the absence of substantial and compelling circumstances.

[7] In support of his plea of guilty to the 16 counts of fraud the respondent submitted what he called a statement in terms of s 112(2) of the Criminal Procedure Act. The document has 18 paragraphs. The first paragraph records that the respondent understands the charges and, being legally represented and acting of his own volition, he pleads guilty to them.

[8] Insofar as the merits of the case are concerned two paragraphs of the statement dealt with the charges relating to each of the complainants (ie six paragraphs in all). Using the two paragraphs relating to ABSA Bank as an example, they read as follows.

'**Counts 1 to 9**

9. The Accused admits that during March 2011 to December 2013 and at Durban he wrongfully and unlawfully misrepresented to ABSA and/or Poovalingam Manikam that the Debtors Book and other securities of Biotrace which he ceded as security when applying for credit was a true reflection of the amounts due and payable to Biotrace. By means of this fraudulent misrepresentation the Accused induced ABSA

Bank and/or Poovalingam Manikam to the potential prejudice of ABSA bank to extend credit to Biotrace in the amounts reflected in Column 2 of Schedule A on the dates reflected in Column 5 of Schedule A.

10. The Accused knew that the Debtors Book and other securities ceded to ABSA bank were not a true reflection of the amounts due and payable to Biotrace and that ABSA Bank would not have extended the credit but for the misrepresentation. The Accused knew at all relevant times what he was doing and that what he was doing was unlawful.'

(It is Column 3 of Schedule A, and not Column 2, which reflects the amounts relating to each of the 16 counts. The error was only noticed during the course of the appeal argument. Nothing turns on it.)

[9] Unfortunately, and because they constitute the *fons et origo* of the error into which the magistrate fell when imposing sentence upon the respondent, the remaining paragraphs of the statement submitted by the respondent in support of his plea must be quoted.

'2. At all relevant times the Accused was the director and person in control of Biotrace Trading 221 (Pty) Ltd (Biotrace) which specialized in the manufacturing of ink for the printing industry. Biotrace was a successful enterprise which generated healthy profits and grew to become a strong business during the 1990s and the early part of the 2000s.

3. The Accused's sister was a qualified medical doctor. During 2002, while employed by the KwaMashu Poly Clinic, she contracted Tuberculosis MDR (Multi Drug Resistant) from the patients she was treating.

4. Tuberculosis MDR is a particularly dangerous strain of Tuberculosis because of its resistance to treatment. The Accused's sister's condition deteriorated to the point where she could no longer work and required full time medical attention.

5. The Department of Health which employed the Accused's sister refused to accept responsibility for her condition and refused to retain her in their employment and to pay for the very expensive treatment required. She was required to spend extensive

periods in hospital and the medical bills reached astronomical amounts. These expenses were all paid by the Accused through Biotrace.

6. During 2011 to 2012 the Accused set up an Intensive Care Unit at his home in order to provide full time care for his sister. This represented a huge expense which was met by Biotrace.

7. Although the business of Biotrace was still profitable, it was necessary for the Accused to extend certain financial facilities with the banks and/or to create new financial facilities in order to maintain and grow Biotrace to accommodate the additional expenses. Against this background the Accused approached the 3 financial institutions referred to in the charge sheet, namely ABSA, FNB and Mercantile Bank for credit facilities. He informed the relevant bank officials of his sister's predicament.

8. The Accused was aware that the banks in question would only extend credit up to a particular percentage of the value of Biotrace's Debtor's Book. The Debtor's Book however did not sufficiently underwrite the amounts which the Accused required. In these circumstances the Accused fraudulently misrepresented to the aforementioned banks that the unencumbered debt due to Biotrace in the Debtor's Book was greater than was in fact the case and thereby secured the required finance.

Ad all Counts

15. When the aforementioned credit facilities were extended to Biotrace, the Accused ensured that all repayments to the bank were made as and when they became due. Biotrace continued performing strongly and the aforementioned credit facilities were fully serviced until all 3 banks became aware of the misrepresentation and simultaneously terminated the credit facilities and demanded immediate repayment of the full amounts.

16. Whereas Biotrace was capable of servicing the loans, it did not have the financial capacity to repay the full amounts especially in circumstances where the Accused's sister was requiring expensive treatment. The Accused's sister's illness proved terminal and she ultimately passed away in December 2014.

17. Biotrace was unable to meet its obligations to the bank as a consequence, Biotrace was liquidated. In this process the charges of fraud were laid against the Accused.

18. The Accused admits that his actions were wrongful and unlawful at all material times and he accepts full responsibility for same. The Accused is remorseful and requires understanding that his crimes were committed in circumstances where his sister's terminal illness created the need for additional finance.'

[10] Having considered the record of the arguments delivered in the court *a quo*, and indeed before this court, I entertain no doubt at all that the paragraphs of the statement just quoted were put there with the intention thereby to avoid the respondent taking to the witness stand during sentencing proceedings. In argument before us counsel stated that this was legitimate given that the State accepted the pleas of guilty made in the statement, thereby accepting all of the facts set out in that document, not only those which address the requirement of s 112(2) of the Criminal Procedure Act, that the statement should be one in which "the accused sets out the facts which he admits and on which he has pleaded guilty". I will revert to this issue later.

[11] In my view the effective sentence imposed in this matter was disproportionately low by a very considerable margin. Given the peculiarities of this case it is proper and instructive to traverse some of the particular respects in which the magistrate misdirected herself as these misdirections obviously played a role in generating her decision on sentence.

[12] In her introduction to her judgment on sentence the magistrate undertook to look at the accused's personal circumstances, the crimes of which he had been convicted and the interests of the community. The remainder of the judgment is devoid of any attention to the enormity of the crimes of which the respondent was convicted. Nothing is said about the economic costs to society of crimes of this nature, and of the related community interest in seeing that appropriate sentences are imposed in such cases. The magistrate ignored the statement of Ms Campbell, who gave evidence at the request of the State and on behalf of First National Bank, that the bank felt that there "has to be a consequence for crime and we feel that the maximum goal time for this matter is required". Given that the bank's view of crimes of this nature coincides with the minimum sentencing legislation, the magistrate was

obliged to apply her mind to the victim's views. Instead, the judgment on sentence, fairly assessed, is all about the particular personal circumstances of the respondent.

[13] The magistrate considered it appropriate to mention a fact stated in the statement in terms of s 112(2) of the Criminal Procedure Act, that the respondent ensured that all instalments due to the banks were made as and when they became due, that Biotrace continued to perform strongly, and that the credit facilities were fully serviced until all three banks became aware of the misrepresentations and terminated their respective credit facilities. One suspects that this was regarded as important by the magistrate because of a submission made by counsel for the respondent in his argument on sentence. He contended that it was overwhelmingly probable, and in accordance with his instructions, that if the respondent's frauds had not been discovered, Biotrace would have continued to service the debt because the business was "very healthy", and there would not ultimately have been any actual prejudice. Counsel hastened to add that his submissions should not be misunderstood as casting blame on the banks, a disavowal which was repeated more than once during the sentencing proceedings. The issue not addressed by counsel for the respondent, and not dealt with by the magistrate in her judgment, was whether and to what extent the ability of Biotrace to pay the required instalments was a product of robbing Peter to pay Paul (that figure of speech being less metaphorical in the present context than it is in ordinary use). When asked to address this question in argument before us, counsel suggested that where there is doubt about an issue such as this, the sentencing court is obliged to adopt the position most favourable to the accused. There are contexts where that principle should inform a sentencing courts approach to one or other issue arising, but that is not a universally applicable principle. There is no *lis* between the State and the accused at the sentencing stage. The presumption of innocence has been displaced. The courts duty is to impose a just sentence. The duty of the State and the accused is to place the material before the court which each of those parties regards as appropriate for consideration in the course of the formulation of a sentence. (See generally, *Olivier v State* [2010] JOL 25319 (SCA) at paras [6] to [11].) In my view the proposition that it matters that Biotrace managed to service its loans until the respondent's frauds were discovered is, given the facts of this case, of no consequence unless it can be established that, as improbable as it seems, none

of the proceeds of the frauds perpetrated upon any of the three banks facilitated servicing of any of the loans which were the product of the fraudulent misrepresentations. No effort was made to establish that. Much more by way of factual information, as opposed to speculation or opinion, was required in order to enable the court to reach its own conclusion on the subject. A remarkable thing about the statement in terms of s 112(2) of the Criminal Procedure Act is that it nowhere mentions any particular amount of money, save for the quantum of potential prejudice as set out in the admitted schedule to the charge sheet.

[14] Digressing briefly from the magistrate's judgment, but remaining with the subject of the contention advanced by counsel for the respondent that the significance of instalments having been met up to the time when the frauds were uncovered lies in the fact that it renders it probable that there would have been no actual loss but for the decisions the banks made to "foreclose", the magistrate ought to have taken due notice of the response given by Ms Campbell when that proposition was put to her in cross-examination. Ms Campbell's response is worth quoting.

'I don't believe that once we had done the source payment testing on the debtor finance facility and established that the debtor payments weren't in fact from the real debtors, that the client would have been able to have continued servicing the loan on a long terms basis. Potentially for a couple of months maybe but from a long terms perspective, no. … Well, our system allows us to do what we did, which was the source payment testing and established that, you know, it was coming from Mr Pather's personal account and not from the real debtors. So then we had to go back to see what were the real debtors and the debtors book, upon doing what we call "debt confirmations", we could barely validate the book. So, that then brought into question what the real turnover of this business was and we couldn't quantify that. But we knew that it couldn't be what it was purported to have been.'

[15] On the same subject, in her address on sentence, counsel for the State made the submission that the borrowings were based on inflated figures, and that accordingly, in the end, Biotrace would never be able to afford to repay everything. In reply counsel for the respondent said that "unfortunately, she is not allowed to say that because she has accepted different facts in the plea …" He then proceeded to

read from paragraphs 15 and 16 of the statement in terms of s 112(2) (see above). Paragraph 15 took counsel's argument nowhere. Paragraph 16 of the statement is at best ambiguous. Where it asserts that Biotrace was "capable of servicing the loans" was it talking about the servicing that had already taken place, or the servicing which would have to take place in the future? There is certainly no clear assertion in the statement in terms of s 112(2) that, but for foreclosure which resulted from the fact that the banks came to learn of the respondent's misrepresentations, Biotrace would inevitably have been able to pay off all the loans in instalments as and when those instalments fell due; let alone

(a) any assertion that this could be achieved without the financial benefit, enjoyed throughout the material time, of additional credit extended by reason of fraudulent misrepresentations;

(b) any statement of the "financial facts" which would support a claim that Biotrace could have done so.

Exaggerated and ultimately misleading arguments of this type served not to advance but to obstruct the determination of an appropriate sentence in this case.

[16] In her judgment the magistrate stated that it was clear that the respondent's crimes were committed "in circumstances where his sister's terminal illness warranted a need for that additional finance from the accused". It seems clear that the "additional finance" the magistrate had in mind was the amount from time to time which could not be obtained otherwise than through the making of fraudulent misrepresentations. The implication is that what was derived by fraud was used for the maintenance and treatment of the respondent's sister. That proposition was a theme underlying the submissions made by counsel for the respondent when arguing the matter before the magistrate. At one point the contention was made expressly.

'My instructions are, and this has been accepted in the plea, that this was done for the sole reason of providing the funding necessary to keep her alive".

Of course the statement in terms of s 112(2) does not say that at all. The most that can be said on this score is that the statement asserts, and the State seems to accept, that the condition of the respondent's sister required more money than was

available, and that fraud was employed in order to get that money. The statement was carefully crafted to avoid any estimate of the actual costs incurred by the respondent (or by Biotrace) in taking care of the respondent's sister. All the statement employs are phrases like "very expensive treatment"; "astronomical amounts"; "huge expense". Contributing even more to the obscureness of the plea is the statement that the respondent had to "set up an intensive care unit at his home". What does that entail? What did it cost? As already observed earlier in this judgment, the plea is entirely devoid of any reference to rands and cents. The actual costs of these medical expenses was for the respondent to disclose. His failure to do so ought inevitably to have led to acceptance of the proposition that it was highly improbable that the medical expenses consumed anything like the amount of money the respondent secured for Biotrace by making the fraudulent misrepresentations. Perhaps the closest one gets to the truth of the matter is in paragraph 7 of the statement, where it is said that it was necessary for the accused to do what he did "to create new financial facilities in order to maintain and grow Biotrace to accommodate the additional expenses." What that conveys is that the proceeds of fraud were to be utilised to the advantage of Biotrace. It would grow. The fact that, for so long as the respondent's sister was alive, Biotrace would meet her medical expenses does not change that primary picture.

[17] The learned magistrate made certain further elementary errors which presumably contributed to her ultimate decision.

(a) She held that the two bank witnesses conceded that they were aware that the respondent's sister was terminally ill and that the respondent was funding her medical expenses. The evidence of those witnesses was that they did not know that until it came out in the court proceedings.

(b) The magistrate classified the respondent as "a primary caregiver to his children" However counsel for the respondent, in opening his address on sentence, said that the respondent was back in business on a small scale selling ink products and really only "making ends meet". He also disclosed that respondent's wife is a doctor employed by the State as a pathologist, and that they reside with the respondent's parents.

(c) The magistrate said that the respondent managed to pay off one of the banks in full whilst Biotrace was still in operation. There is no evidence to that effect. What counsel for the respondent did say (although it is not certain that the State accepted it) is that two vehicle finance loans made by ABSA were paid off. He said nothing about the overdraft, the final limit of which was set at R15 million in December 2013.

(d) The magistrate asserted that "insurance had paid the complainants". There is no such evidence. On the contrary Ms Campbell's evidence was that the bank had insurance for fraud committed internally, but not for "external fraud"; ie a client committing fraud against the bank.

(e) Near the end of her judgment the magistrate said this.

> 'Most of all, the accused lost his sister who was an asset to the community of South Africa due to the accused's failure to maintain her after sequestration."

Again there is no evidence to this effect. Respondent's counsel recorded in argument that the respondent's sister had died in December 2014, about a year after the foreclosure. His submission was perhaps more carefully crafted than others he had made.

> 'The accused is not saying that it was because of the foreclosure, but obviously his ability to care for her was affected and she then passed on.'

[18] In her judgment the magistrate mentioned that one of the bank witnesses (it was in fact Ms Campbell) had said that this was a "sophisticated matter". The magistrate thought that it might show that the accused was not acting alone. But she overlooked the answer Ms Campbell gave when she was asked to explain her use of the word "sophisticated".

'Well, I think the sheer time it would have taken to manipulate information, providing us with information that was untrue, creating fictitious debtors books, creditors' age analyses to the financial information, management accounts, you know we require this information as part of our ongoing monitoring of an account on a fairly frequent basis. And to have sat down and to have done that on such a frequent basis, not just with FNB but I think with other banks as well - I am assuming their credit processes aren't the same but reasonably similar I would imagine – must have taken a lot of time and the money that must have been flowing inter - bank to basically settle one loan here and then get another loan there and then on lend that so that it seemed like everything was running quite normal, was sophisticated.'

The sixteen occasions upon which the respondent's misrepresentation generated the grant of credit by a bank took place over a period of 33 months. There was enough time for the respondent to reflect on what he was doing and to consider desisting from it, and 16 occasions when that issue ought to have been to the fore of his mind. The magistrate failed to take into account not just the extent of the frauds perpetrated, but also the fact that on each occasion the criminal intent had to have been the product of careful deliberation, and sophisticated manipulation of financial data.

[19] The magistrate found that the respondent had shown remorse. She found that issue "pivotal". She was satisfied that the accused had displayed remorse by virtue of his plea of guilty and "full disclosure". As to the latter, in my view the magistrate failed to appreciate the true nature of the information put before the court in the statement in terms of s 112(2). I regard all the information contained in the statement which goes to the motive for committing the crimes, and which goes to the manner in which the proceeds of the crimes were expended, as an exercise in obfuscation. On that obscure foundation counsel for the respondent made a number of remarkable submissions not actually borne out by the facts set out in the statement in terms of s 112(2). For example he argued that although the respondent made the misrepresentations, the respondent did not "steal the money". Instead he serviced the loans. And then, after conceding that the amounts involved were "quite high", one sees this submission.

'But it is my submission that the amounts are not really of such massive consequence because the bank made the election to foreclose, knowing the risks that were involved in

that decision and again it just boils back to the point that if it had been a little more patient, there would not have been that actual prejudice.'

That attitude is hardly consistent with true remorse, and contradicts counsel's earlier submissions on behalf of the respondent to the effect that the respondent casts no blame on the banks for the losses they suffered.

[20] In her judgment the magistrate quoted the well-known passage in the judgment of *S v Matyityi* 2011 (1) SACR 40 at para 13 on the subject of remorse.

'In order for the remorse to be a valid consideration the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, *inter alia*, what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

The respondent approached the court at the sentencing stage with the proposition that whilst fraud of the type and on the scale which he perpetrated would ordinarily call for a substantial sentence of imprisonment, he should be entitled entirely to evade that outcome, ultimately on the basis that the end in fact justified the means; and that what he did was done for a cognisable good cause. That approach contradicts entirely the proposition that the respondent has undergone a change of heart and has a true appreciation of the consequences of his crimes. As the prosecutor put it in her address on sentence in the court *a quo* "…there is absolutely no remorse; he still justifies why he did what he did." The prosecutor's argument on the subject of remorse was one of three which counsel for the respondent classified as impermissible, and therefore to be ignored. Counsel's introduction to his arguments on those three points went as follows.

'And then the other three points – unfortunately my learned friend has fallen into the trap now of arguing against the plea which she accepted.'

It strikes me that there is more truth in these words than was perhaps intended. Traps are not accidental phenomena. Traps are set, usually for the unwary. Putting that aside for the moment, counsel's argument is that the State accepted the condition of remorse by agreeing to paragraph 18 of the statement in terms of s 112(2). There the statement was made that the "accused is remorseful". In other contexts it may legitimately be argued on behalf of the defence that the remorse proclaimed must be taken to be that which is a valid consideration in determining sentence. But where, as is the case here, the remainder of the statement is inconsistent with valid or true remorse, that argument cannot be sustained.

[21] During the course of argument in this appeal the court raised with counsel for the respondent the issue as to whether any of the material relating to the illness of the respondent's sister, expenditures on her medical expenses, and so on, had any place in a statement in terms of s 112(2) of the Criminal Procedure Act. Plainly that material does not address the requirements of the section that the statement should set out the facts which the accused admits and on which he has pleaded guilty. The proposition counsel was asked to answer was whether the material in question is relevant only for the purposes of establishing substantial and compelling circumstances and in mitigation, and should therefore be placed before the court only at the sentencing stage. It was suggested to counsel that the sole purpose of putting such information in the statement, and securing the prosecution's acceptance of the statement, is illegitimately to confine the sentencing discretion of the court by limiting the scope for examination of facts relevant to sentence. Counsel's answer was that what was done here was legitimate and that indeed

(a) it met the requirements of the law that statements in terms of s 112(2) of the Criminal Procedure Act should not be a "mere regurgitation of the elements of the offence and should state the factual basis upon which the acceptance of guilt is founded"; and

(b) the authorities are to the effect that if the accused seeks to rely on substantial and compelling circumstances in relation to the circumstances in which the offence was committed, these should be included in the statement.

[22] I have no difficulty with either of these propositions as long as one understands that the "circumstances in which the offence was committed" means the facts which constitute the *actus reus*; likewise with the requirement that the statement should record the basis upon which guilt is accepted, although *mens rea* must also be canvassed. The motive for the commission of the crime, assuming that it constitutes a mitigatory feature of the case, does not in my view fall within the purview of s 112(2) unless the way in which the charge is framed calls for an admission of motive, or unless it is so closely related to the commission of the crime that an account of what happened cannot be given without mentioning it. At the end of oral argument counsel undertook to let us have a list of the cases he relies upon for his view of the matter.

[23] The cases to which counsel has referred us are *S v B* 1991 (1) SACR 405 (N) at 406; *S v Van Der Merwe and Others* 2011 (2) SACR 509 (FB); *S v Kekana* 2019 (1) SACR 1 (SCA); *S v Moya* 2004 (2) SACR 259 (W); *S v Khumalo* 2013 (1) SACR 96 (KZP); and *S v Mnisi* 2009 (2) SACR 227 (SCA).

[24] I do not propose to analyse these judgments. As will be realised from what has already been said, in my view the statement in terms of s 112(2) in this case does not achieve the respondent's desired end of confining the enquiry into sentence, and consequently the court's sentencing discretion, to the extent that a just sentence cannot be rendered. However I make these observations.

(a) 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.

(b) 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).

(c) 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).

(d) 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.

[25] By reason of the fundamental misdirections characterising the magistrate's reasoning when reaching the sentence she did, and by reason of the fact that the briefest examination of sentencing precedents in fraud cases reveals that the sentence in this case is disproportionately low, this court is at large to impose a just sentence.

[26] The personal circumstances of the respondent, as placed on record by his counsel in the court *a quo* were, at the time of the trial, as follows. He is 39 years of age. He is married and has two children aged five years and three years respectively. The accused's wife is a doctor employed by the State as a pathologist. The family lives with the respondent's parents. One should add that it does not seem to be disputed that the respondent ran a successful business for some years before the crimes were committed, and that he would thereby have made a contribution to the economy, and provided employment. The respondent had no previous convictions.

[27] In his carefully crafted heads of argument on appeal counsel for the State advanced the proposition that in this case there are actually no substantial and compelling circumstances justifying a departure from the prescribed minimum sentences on each of the counts (15 years imprisonment). However, in argument counsel for the State took a different view, and proposed a lower sentence than the prescribed minimum. I am inclined to the view that he was correct to do so. My

reasons are largely connected to the illness which befell the respondent's sister and his attempts (whatever they were) to save her through expenditures of money. I adopt this view not because I in any way endorse the proposition that a court should allow what might be called a "Robin Hood defence". Illness and death are incidents of human life. The vast majority of people cannot afford medical care in excess of that provided by the State in order to ward off the worst outcomes of severe illness. Those who have the wherewithal are free to choose to spend their money to save a loved one. But it is another thing altogether for a court to sanction fraud, robbery or theft as a means of acquiring the funds necessary to meet such expenses.

[28] What does come through indisputably from the statement in terms of s 112(2) accepted by the State is that the respondent's sister suffered a severe and long illness, and that the respondent was considerably affected by it. I think that the court may take judicial notice of the fact that circumstances like these place a tremendous amount of pressure on the family members of the sick, and generate a distressed state of mind which is likely adversely to affect one's judgment. Whilst I reject the argument of counsel for the respondent that it is established that these frauds were committed only for the purpose of accessing funds exclusively for use in treating the respondent's sister's illness, I accept that it is established that he must have suffered a declining state of mind by reason of his anxiety generated by the condition of his sister. Substantial and compelling circumstances were present primarily for that reason.

[29] Nevertheless we are dealing with fraudulent conduct perpetrated repeatedly over a period of nearly three years, and involving very large sums of money indeed. The actual loss suffered by two of the three complainants amounted to R31 million. It is unfortunate that a witness from ABSA Bank was not called by the State. It is significant that the respondent did not claim that ABSA Bank had been repaid in full. The overdraft with ABSA Bank had been elevated to R15 million in December 2013, which would have been just before the fraud was uncovered. Clearly a substantial sentence of imprisonment is required. The perception that banks can withstand such losses because of their resources must be discounted. It is enough, given that credit is described as the life-blood of an economy, that the cost of credit must inevitably

be elevated because of losses sustained by banks when honestly run businesses fail.

[30] The respondent was not imprisoned whilst he awaited trial. There is no need, therefore, to ante-date the sentence to be imposed. It is regrettable that sentence is to be imposed so long after the event. However, as counsel for the respondent revealed in argument, the trial was delayed for some five years after the respondent was charged because of representations made on the respondent's behalf concerning the potential evidence of a witness who was referred to in the proceedings as the "whistle blower". (Extensive requests for further particulars were also made.) The delay may have been a factor if the guilty plea had been tendered at the outset, and rejected by the State. As counsel informed the magistrate, the plea was only tendered when the state insisted on proceeding notwithstanding the respondent's representations. (This delay in accepting guilt is also somewhat inconsistent with the claim of genuine remorse.)

[31] The amounts involved in each of the counts differ quite widely. Given that the amounts involved in fraud cases are of some significance when determining sentence, it might appear inappropriate to impose the same sentence on each of the 16 counts. However something approaching equilibrium is achieved if, for the purposes of sentence, the counts relating to each complainant are grouped together and taken as one.

THE FOLLOWING ORDER IS MADE.

1. The appeal of the State against sentence is upheld.

2. The sentences imposed by the magistrates' court on 27 June 2019 in respect of each of the 16 convictions of fraud are set aside.

3. The following sentences are imposed in substitution for those set aside.

(a) On counts 1 to 9 (taken as one for the purpose of sentence) the accused is sentenced to twelve (12) years imprisonment, four years of which are suspended for a period of five (5) years on condition that the accused is not convicted of fraud committed during the period of suspension.

(b) On counts 16 to 19 (taken as one for the purpose of sentence) the accused is sentenced to twelve (12) years imprisonment, four years of which are suspended for a period of five (5) years on condition that the accused is not convicted of fraud committed during the period of suspension.

(c) On counts 26 to 28 (taken as one for the purpose of sentence) the accused is sentenced to twelve (12) years imprisonment, four years of which are suspended for a period of five (5) years on condition that the accused is not convicted of fraud committed during the period of suspension.

(d) The sentence imposed in respect of counts 16 to 19, and the sentence imposed in respect of counts 26 to 28, shall run concurrently with the sentence imposed on counts 1 to 9. The effect is a composite sentence of twelve (12) years imprisonment, four (4) years of which are suspended on the aforementioned conditions.

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OLSEN J

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BALTON J

Date of Hearing:	Friday, 14 OCTOBER 2022
Date of Judgment:	Friday, 25 NOVEMBER 2022
For Appellant:	Mr TA Letsholo
Instructed by:	Deputy Director of Public Prosecutions Specialised Commercial Crime Unit: Durban Appellant's Attorneys Durban (Ref: ???) (Tel: 031 – 335 6600 / 6631 (Mobile: 084 874 0779 Email: tletsholo@npa.gov.za
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