SEE ORIGINAL JUDGEMENT BADGE

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO: 271/94

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

J D PENNINGTON..... First Appellant

M E SUMMERLEY..... Second Appellant

and

THE STATE..... Respondent

CORAM: SMALBERGER, HOWIE *et* PLEWMAN J J A

HEARD: 24, 25 MARCH 1997 DELIVERED: 16 May 1997

J U D GMENT

/ HOWIE JA ...

HOWIE JA:

I agree in all respects with the reasons set out in the judgment of my Colleague Smalberger, save in regard to Count 1. As he indicates, the crucial issue on that count is whether at the time of the relevant representations and non-disclosures it is reasonably possibly true that a consortium existed or that accused 2 and 3 - primarily accused 3 - ever honestly intended that a consortium would subsequently be formed. In that regard it does not assist the accused, in my opinion, that the formation of a consortium was openly declared, that sundry persons were approached to be members of it or that references to a consortium or its alleged members are to be found in the documentary evidence. One would expect to encounter such evidence whether the consortium was genuine or fraudulently fictitious. And in so far as the comparatively large measure of documentary evidence in this connection might seem to tip the balance in the accused's favour, it must be remembered that once the Registrar learnt of the NELSA share acquisition, made active

enquiries about it and set conditions for compliance to his satisfaction, generation of such documentation was unavoidable. Accordingly I think that the existence and tenor of this evidence are merely neutral considerations.

What is essential, in my view, is to assess the consortium issue in the proved factual context, in other words, against the broad picture. When UAL put forward the offer on 15 February 1982 to buy the NELSA shares, the accused's fraudulent machinations for the procurement of funds for the use and expansion of the Magnum Group were well established. 74 of the crimes laid to their charge had already been committed by the end of 1981. The Group had by then grown extensively but there was an ever-increasing need for more funds not only for its maintenance but, during 1982, also for its survival. It was in this climate that the accused decided to acquire, at roughly the same time, control of two companies with readily available resources of cash and quoted shares. One was NELSA and the other was IL Back. The

quantum of their cash and cashable assets was attractively large without the price being, to any curious observer, manifestly out of reach. In the case of I L Back no formalities beyond the usual were involved. NELSA, however, was an insurer and s 27 bis of the Insurance Act posed complications. In terms of that section (since repealed) any acquisition of a quarter or more of an insurer's shares had to be reported to the Registrar. Accordingly it was not legally possible for a Magnum company to become the sole owner of the shares without notification to the Registrar and the inevitability of his close attention. There would have been no need for a consortium if a Magnum Company could have raised the purchase price and if its financial affairs and standing would have withstood the Registrar's scrutiny. One knows that MAL did indeed raise the price. But quite obviously investigation by the Registrar would have been unwelcome to say the least. In the circumstances it is not surprising that from the outset the existence of a consortium was alleged, of which every member would acquire less than

a quarter of the shares. On that basis it was unnecessary to give the required notification to the Registrar.

True to the accused's established scheme, the Back and NELSA acquisitions had hardly been effected when the cash and cashed assets of those companies were channelled through SABA to Magnum. Even viewed in February, 1982 it is most unlikely that any interested prospective consortium members would have retained their interest had they known of that manoeuvre and the reasons for it. The improbability became steadily stronger as the year wore on, the membership of the consortium remained apparently unresolved and Magnum approached liquidation.

Consistent with the inference that the NELSA acquisition was by Magnum interests and no one else, was the fact of the pledge to RMB on 3 May 1982 by MAL of the existing 500 000 NELSA shares and the cession in security on 19 November 1982 of 1,5 million NELSA shares, also to RMB. (Only 1 million additional shares were issued in

August 1982 so that it is not clear whether the cession involved a miscalculation or a second pledge of the initial shares, but no matter.) Furthermore the pledge clearly purported to be of MAL's own property and in the deed of cession MFH guaranteed that it was the beneficial holder of the ceded shares.

Equally supportive of that inference were the circumstances of payment for the NELSA shares and the salient facts which accused 3 failed to tell the Registrar once communication with the latter became unavoidable. It was a provision of the offer document that ownership of the shares would vest in the alleged consortium on payment of the purchase price. But there is no evidence that such a consortium existed at the time or that it had appointed nominees. Nothing in the offer suggests that all that there was at the time was merely a contemplation that a consortium would in the future be formed. Had that been the case there would clearly have been an obligation to inform the Registrar that, despite the fact that the price had been paid on 15 February (it seems

through accused 3's personal bank account) by MAL, the shares would nonetheless later be transferred to named persons in a distribution which would avoid a contravention of s 27 bis.In fact, however, it was not at that time that any representation was made to the Registrar. He only learnt of the transaction because Cain (of NEG) insisted that he be informed. And it was only as a result of the Registrar raising a query that accused 3 wrote to him. That was on 29 June 1982. Purporting to "report on the financial position" of NELSA, accused 3 made no mention in the letter of the fact that MAL had paid for the shares and then, by journal entry, had debited the purchase price to MFH which, in turn, had debited an account in its books called "Investment in Nelsa". (This, of course, meant that MFH was the owner of the shares.) The letter also failed to disclose that as early as 23 February 1982 and 7 March 1982 accused 2 and 3 had realised all NELSA's securities and proceeded to divert the proceeds to Magnum. Nor did the letter refer to the pledge to RMB. Accused 3 further purported to give the

Registrar details of each "shareholder", specifying different consortium members from those recorded in the offer document. They now included infer alios RMB (a gross improbability seeing that it was a pledgee) and Beckett. Beckett was forced in evidence to concede that he was never allocated shares or even had a definite participation in a consortium.

Also in conflict with the existence of a consortium were further vacillations in its alleged membership and the fact that, for inadequately explained reasons, no finality was ever reached in this. regard. At a NELSA directors' meeting on 12 November 1982 it was announced that the Registrar had consented to NELSA's operating as an insurer thereby, in effect, giving the all-clear at last. Even at that late stage the Magnum spokesperson could reveal nothing more specific about the alleged consortium than that he sought the registration of the entire NELSA share capital in the name of the Summerley Family Trust, as nominees for "the beneficial owners". The latter, however, were not

named. The post-liquidation entries in MFH's records, apparently in acceptance of the existence of a consortium, were unexplained in evidence. They are, moreover, as questionable as the entire consortium version.

Then there are the numerous inconsistencies and irregularities, pointed out by the witness Heckroodt, pertaining to the allotment and recording of the consortium shares and related matters. These are far more likely to have been occasioned by perfunctory and ill-directed efforts to maintain the pretence of a consortium than by almost chronically inefficient attempts to record the truth.

As far as the defence evidence in this connection is concerned, Beckett's testimony reads most unconvincingly. Accepting his honesty, the compelling reason for his vagueness, in my opinion, is that although the concept of a consortium was talked about, and, for reasons already given, talked about with a purpose, it was never proceeded with, or intended to be proceeded with.

The evidence of accused 3 relative to this count was unsatisfactory for all the reasons stated by the trial Judge. His conclusion that such evidence was to be rejected is amply supported by a study of the record.

In my opinion, therefore, the only reasonable inference is that although prospective new shareholders might have been solicited, the alleged consortium never existed and accused 2 and 3 at no time had the honest intention to bring it into being. It is further to be inferred that the story of a consortium was, viewed broadly, part and parcel of the fraudulent scheme to procure funds for Magnum and, viewed narrowly, aimed at facilitating the NELSA takeover by deceiving the Registrar, among others.

Accused 2 and 3 were therefore correctly convicted in respect of the first leg of count 1 and it is unnecessary for the present purposes to consider the second.

As far as sentence is concerned I am not persuaded that the

trial Judge misdirected himself. He drew a fully warranted distinction between the blameworthiness of accused 2 and that of accused 3 and their respective sentences reflect that difference appropriately. They also mirror a balanced assessment of the competing mitigating and aggravating features of the case. The latter clearly predominate. To establish a commercial empire was one thing. To do so illicitly at the expense of SABA was quite another. SABA's elimination from the financial scene was only prevented at a cost to its parent bank of many millions.

The appeal is dismissed in all respects.

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T Howie PLEWMAN JA)

concurs

THE SUPREME COURT OF APPEAL,

CASE NO: 271/94

In the matter between:

J D PENNINGTON — FIRST APPELLANT
M E SUMMERLEY — SECOND APPELLANT

and

THE STATE — RESPONDENT

CORAM: SMALBERGER, HOWIE and PLEWMAN JJA

HEARD: 24, 25 MARCH 1997

DELIVERED: 16 MAY 1997

JUDGMENT

SMALBERGER, JA ...

SMALBERGER JA:

The appellants, J D Pennington and M E Summerley, and two others, were arraigned before Gordon AJ in the then Witwatersrand Local Division on 172 counts of fraud. The appellants were accused 2 and 3 respectively. Their co-accused were G M Trail (accused 1) and K J R Summerley (accused 4). For the sake of convenience I shall refer to them all as in the court below. A fifth accused, Mrs L Horftmanshof (formerly Lawrence), who had originally been indicted with the others, left the Republic permanently before the trial and could not be extradited in time. After a protracted hearing lasting almost three years accused 2 and 3 were each convicted on counts 1-150; accused 1 was convicted on counts 2-150. They were acquitted on the remaining counts. Accused 4 was acquitted on all

counts. The convicted accused were sentenced as follows:

Accused 1: Seven years' imprisonment.

Accused 2: Six years' imprisonment on counts 2-150, half of which was conditionally suspended, plus nine months' imprisonment on count 1 to run concurrently with the sentence on the other counts.

Accused 3: Seven years* imprisonment on counts 2-150, plus eighteen months' imprisonment on count 1 to run concurrently with the sentence on the other counts. The three convicted accused sought, and were granted, leave to appeal to this Court against both their convictions and sentences. Subsequently accused 1 abandoned his appeal. Hence the present appeal is confined to accused 2 and 3.

The charges against the accused arose from their alleged involvement in the activities of a group of companies commonly referred to as the Magnum Group of Companies ("Magnum Group" or "Magnum") over the period December 1979 to December 1982. The main company in the Magnum Group was Magnum Financial Holdings (Pty) Ltd ("MFH"), a financial holding company carrying on the business of a financial dealer. Accused 2 and 3 were both directors of MFH. The Summerley Family Trust ("SFT"), a trust with accused 3 as donor and his wife and children as beneficiaries, was the sole shareholder of MFH. Amongst the wholly owned subsidiaries of MFH were Magnum Acceptances Ltd ("MAL") and (initially) Magnum Leasing Ltd ("MLL"). The directors of MAL included accused 2 and the erstwhile accused 4. Its primary business related to money and

capital market transactions, lease financing and other financial activities. MLL was also involved in lease financing and related activities. Its directors included accused 2 and 3. During June 1981 accused 3 acquired the total shareholding of MLL from Magnum. Apart from those already mentioned, MFH had, over the relevant period, a 100% shareholding or controlling interest in a number of other companies with varied interests and activities, including property, engineering, aviation, computers and security. The Magnum Group employed a large number of people and had considerable assets. It also, over the relevant period, had very substantial liabilities.

Accused 3 was the guiding hand and dominant figure in MFH and thus of the Magnum Group as a whole. It was he who was primarily responsible for its growth over a period of years. He was its chief

executive officer and the effective owner of all or most of the shares in the various Magnum companies. In addition to certain directorships, including the position of managing director of MAL, accused 2 was a senior employee of the Magnum Group and the head of its money market division. Accused 1 was at all relevant times the money market manager of the South African Bank of Athens ("SABA") as well as the chief accountant at its head office. Accused 2 had been his predecessor as money market manager at SABA. Mrs Lawrence (as she was at the relevant time) was a senior employee in Magnum operating as its chief treasury officer and money market manager.

The Magnum Group "collapsed" in December 1982 after Volkskas Bank refused to honour certain of its cheques totalling millions of rand (including one to SABA for R4.5 million in respect of which SABA had

issued a contra bank cheque to one Hobbs). Consequent thereon MFH and certain companies in the Group went into liquidation. SABA was left with losses of about R30 million. The upshot of all this was the appointment of a Commission of Enquiry under section 417 of the Companies Act 61 of 1973 to investigate Magnum's affairs. The Commission commenced its hearing on 21 December 1982. The proceedings before it lasted almost two years. In the interim police investigation began. A firm of chartered accountants was engaged in about August 1983 to conduct an in-depth investigation into certain aspects of Magnum's dealings and to report on their findings. The relevant report was compiled by Mr D J Wright. This report eventually provided the foundation for the charges against the accused. Wright's report was completed late in 1984. On the strength of it a police docket

was compiled and referred to the Attorney-General in August 1985. Thereafter followed a delay of nearly four years before the Attorney-General's office finally produced an indictment. It was served in May 1989. Proceedings in court began in August 1989 but due to postponements at the request of the defence the trial only commenced in February 1990.

Accused 1 enjoyed the benefit of legal representation for part of the trial; accused 2 and 3 were unrepresented save on certain occasions to be mentioned presently. From time to time the accused requested, and were granted, further postponements to enable them better to prepare and deal with the State's evidence. A large number of witnesses testified on behalf of the State. At the close of the State's case the accused were granted a postponement in order that they might seek legal

advice with regard to the future conduct of their respective cases. Accused 1 and 2 declined to testify; accused 3 did (as did accused 4). Certain witnesses gave evidence for the defence. Judgment was ultimately delivered in January 1992 and sentence was passed six months after that. The matter now comes on appeal more than fourteen years after the events giving rise to the prosecution, a regrettable state of affairs, to say the least.

The charges of which the accused were ultimately convicted fall into four broad categories. Briefly, the first (count 1) related to the take-over in 1982 of the National Employers Life Assurance Company of South Africa ("NELSA") by an alleged consortium of which SFT was purportedly a member. The second category (counts 2-114) dealt with so-called "conduit transactions", the depositing of money with SABA by

investors procured by the Magnum Group and the almost simultaneous channelling of like amounts by accused 1 to a company in the Magnum Group. The State alleged that the transactions were part and parcel of a fraudulent scheme which enabled Magnum to obtain investments, which would otherwise not have been available to it, as a result of unauthorised conduct by accused 1 at SABA. The third category (counts 115-125) was a variation on the theme of the previous one. It related to obtaining or securing loans to or investments in Magnum against alleged unauthorised written guarantees signed by accused 1, purportedly on behalf of SABA. The fourth category (counts 126-150) was similar to the third. It related to the obtaining of loans and/or investments by Magnum against which unauthorised post-dated cheques, provided by accused 1 and purportedly issued by SABA, were given to investors as

security for the loans and/or investments. It is common cause that the actual transactions underlying counts 2-150 took place. Of the fifteen paragraphs of the general preamble to the indictment containing material factual allegations, all but two were admitted by the accused. In relation to those two it was said by the accused (somewhat obscurely) that they could "neither admit nor deny the allegations". The essence of the State's case in relation to counts 2-150 is that accused 1 did not have authority from SABA to act as he did, and that the schemes underpinning them were the product of a conspiracy or common purpose between accused 1, 2 and 3 and Mrs Lawrence to defraud the investors concerned and/or SABA.

Argument on appeal centred on the following issues: 1) Whether or not the accused had a fair trial.

2) Whether accused 1 was authorised, expressly or tacitly, to conduct the transactions giving rise to counts 2-150 on behalf of SABA. A related matter is whether, if accused 1 lacked the necessary authority, he was aware of that fact.

3) Whether there was a common purpose between accused 1 and Magnum officials to defraud investors and/or SABA.

4) Whether, if accused 1 lacked authority, accused 2 and 3 were at all relevant times aware of that being so, and were party to a common purpose to defraud.

5) The correctness of the conviction on count 1.

As to the first issue, it was contended on behalf of accused 2 and 3 that their trial was unfair by reason of the cumulative effect of a number of factors. In assessing the impact of those factors we were

invited to have regard to what might loosely be referred to as the fairness requirements of the interim Constitution (Act 200 of 1993) and the final Constitution (Act 108 of 1996).

In the majority judgment in S v Mhlungu and Others 1995 (3) SA 867 (CC) para [41] at 888 A - D, it was pointed out that an appeal inherently involves the complaint that the court below erred in terms of the law applicable at the time of the proceedings at first instance. Consequently, if the right sought to be asserted on appeal did not exist at the time of a criminal trial then the appellant can have no legitimate cause for such complaint and the appeal must be decided on the law applicable at the time of the trial.

The trial in this matter was completed well before the interim Constitution came into operation. It is therefore clear that the

constitutional provisions referred to by accused's counsel cannot apply in the present case.

The relevant law at the time of the trial was stated in the judgment in S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A). A fair trial had then to be achieved in accordance with the formalities, rules and principles of procedure which the law required, not in accordance with abstract ideals. Although those formalities, rules and principles were designed to ensure a fair trial, their infringement could not result in a successful appeal unless there had been a procedural irregularity or illegality in the trial and such irregularity or illegality had resulted in a failure of justice. (See, in the above respects, 375 A-D, 377 A-D and 387 A-B.) The question now, therefore, is whether such a failure occurred.

The first factor on which counsel for accused 2 and 3 relied was the delay between the relevant events and the commencement of the prosecution. As already indicated, the total period involved was in excess of six years. Several of the reasons for that time lapse have already been mentioned. Having regard to the mass of documentation to be examined, the number of transactions requiring analysis and their complicated nature, it seems to me that but for one exception those reasons are acceptable and that they adequately explain the delay preceding referral of the docket to the Attorney-General. The exception concerns the period while the police docket was in the hands of the Attorney-General's staff. According to the evidence of one of the investigating officers the lack of progress in that time - some three years and nine months till the indictment was served - was occasioned by the

transfer of the first State advocate assigned to the matter and the eventual resignation of his successor. As a result, it was only towards the end of 1988 that prosecuting counsel who appeared at the trial took over the preparation of the case. No attempt was made in evidence to

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determine whether the hold-up was perhaps due to an excessive workload or a shortage of staff but on the face of them these facts reflect a most unsatisfactory state of affairs. It was one potentially prejudicial to the prosecution witnesses, to the accused and their witnesses and to the proper administration of criminal justice in general. The blame for it must unquestionably be laid at the door of the prosecuting authorities.

However that may be, neither the fact of that culpability nor the

passage of over six years served in themselves to create or lead to an

irregularity of the required kind. That is because the crucial question when there has been a lengthy delay in bringing an accused to trial must always focus upon the effect of the delay upon the accused person's ability properly to present a defence.

In the present case it is true that the two accused now on appeal were not legally represented for almost the duration of the trial, but they did have the services of senior and junior counsel when the case was first called on 28 August 1989. On that occasion their counsel presented argument in support of a postponement to enable them to prepare for trial. In doing so he even hinted at the possibility, given the nature of the case, that further adjournments might have to be sought during the trial for what was termed ad hoc preparation. The argument was transcribed and forms part of the appeal record. One would

imagine that had the matter of delay struck those concerned as something so prejudicial that it was inimical to a fair trial, an objection of the present tenor would have been raised there and then. It was not. The postponement application was granted and the proceedings were then adjourned until 30 October. On that date two senior counsel and a junior appeared for accused 2 and 3 and a second postponement was sought, this time until February 1990. The application was opposed. The argument advanced in support of it is also on record. From what was said on that occasion it is beyond question that the accused's counsel were fully alive to the extent of the delay, the complexity of the case and the need for thorough and lengthy preparation. Once again, however, no attempt was made to suggest that to prosecute after the time lapse in question was irregular.

When, in February 1990, the trial was due to begin, the accused were represented by junior counsel, who applied for further particulars to the indictment. This led to a week's postponement in the course of which the matter of particulars was resolved and the trial at last reached the plea stage. Counsel referred to then withdrew because the accused were unable to afford his services any longer. Before withdrawing, however, he assisted them with the compilation of a written statement in explanation of their respective pleas of not guilty on all counts. On neither of these two last-mentioned occasions was the question of prejudicial delay raised. The trial then proceeded and ran its lengthy course.

It is only now, for the first time on appeal, that the complaint has been voiced that delay was, in effect, good ground for branding the

entire trial as unfair. The merits of an objection such as this are hardly, if ever, capable of assessment by reference to extrinsic factors wholly divorced from what an accused says and does at the trial. It was essentially within the knowledge of accused 2 and 3 whether the protracted delay in their being brought to trial prejudiced the proper presentation of their defence to the extent that to try them at all would be unfair. Their silence in this issue up till now is therefore a highly significant consideration.

Obviously the passage of time would have dimmed the memories of all the witnesses. Accused 2 did not give evidence but accused 3 testified and was in the witness box for a long time. He felt free on many occasions to say that he could not recall events in certain instances and indeed explained this with specific reference to the lapse of time

since the liquidation. In his judgment the trial Judge duly considered this aspect and accepted the explanation in so far as it concerned points of detail. On matters which he considered to be of substantial importance, he did not accept it. This, of course, all entailed an assessment by the trial Judge of issues of fact and credibility. The merits of that assessment will be dealt with later. It is its procedural fairness that is relevant at the moment.

A final point to mention as regards the question of delay is that at some stages during the trial reference was made by or on behalf of the accused to the death of one Marais, a senior official of SABA, who would, it was suggested, have been able to furnish material evidence in support of the defence. However, Marais died within two years of the liquidation and would therefore have been unavailable even had the

prosecution been instituted with exemplary expedition.

Having considered the present submission in the light of all the relevant circumstances I am unpersuaded that the factor of delay gave rise to any irregularity, in the sense explained earlier, either in trying the accused at all or in the manner of their trial.

The next factor relied upon by the accused's counsel was their lack of legal representation. As already mentioned, this was not absolute and reference has been made to times when they were indeed represented. A further occasion when they had the services of counsel was at the close of the State case. The record shows that counsel was briefed specifically to advise them of the appropriateness or otherwise of a discharge application at that stage and, with regard to the evidence presented by the prosecution, the advisability of their giving evidence.

The proceedings were in fact postponed to allow the advocate concerned the opportunity to study the record. On resumption of the trial he announced the termination of his mandate but there is nothing on record indicating that he did not or could not give the necessary advice.

The fact that the accused were unrepresented at other times in the trial was due to their inability to afford counsel and to the unavailability of Legal Aid. It is clear from the Rudman decision that the absence of legal representation did not in itself render the instant proceedings irregular. What one has to assess here is whether the trial was conducted in accordance with established rules of practice evolved for the assistance of an undefended accused to reduce the risk of an unfair trial (Rudman, 381 D-E). The presently applicable rules were stated at some length by the court a quo in the Rudman case and cited with

approval by this Court on appeal. The quotation concerned appears at 381 E - 382 C and reads as follows:

> " 'Before the accused is called upon to plead the presiding judicial officer is obliged to examine the charge-sheet, ascertain whether the essential elements of the alleged offence(s) have been averred with reasonable clarity and certainty and then give the accused an adequate and readily intelligible exposition of the charge(s) against him. Unless the charge-sheet contains an appropriate reference to it and the factual basis for bringing it into operation, the accused should be informed by the presiding judicial officer or the prosecutor of the operation of any presumption he may have to rebut and the prosecutor should inform the court and the accused of the content of the evidence he intends to lead. Again, where it is competent for a court to convict an accused of an offence other than the one alleged in the charge-sheet a judicial officer may be obliged to inform an undefended accused of the competent verdict – eg where an undefended accused is charged with theft or with housebreaking with intent to steal and theft the presiding judicial officer should explain to the accused the competent verdicts, viz that he may be convicted of contravening s 36 or s 37 of Act 62 of 1955 or of contravening s 1 of Act 50 of 1956 unless the contravention is an alternative charge or the prosecutor indicates that the State's case is restricted to the offence(s) alleged in the charge-sheet.

At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights – the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of sentence – and in comprehensible language to explain to him the purpose and significance of his rights.

During the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the State witnesses.

Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question – not cross-examine – the witness on the issue so as to reduce the risk of a possible failure of justice.

If, at the close of the State case, an undefended accused is not discharged, the presiding judicial officer is obliged to inform him of his rights and in clear and unequivocal terms explain the courses open to him. The judicial officer is obliged to inform the undefended accused in clear and simple language of any presumption the prosecutor is relying on, the implications thereof and the manner in which it can be rebutted.

The judicial officer should assist an undefended accused

whenever he needs assistance in the presentation of his case and should protect him from being cross-examined unfairly. "

From what I have said already it is clear that the accused were represented or had counsel's assistance when they had to consider the indictment, when they pleaded and at the close of the State case. It remains to examine the role played by the trial judge at other stages in the proceedings.

After accused 2 stated his decision to call evidence but not to testify, the trial Judge explained to the accused their available alternative rights: to remain silent, to call evidence, to testify or to make an unsworn statement. Both accused 2 and 3 indicated their awareness of these rights. On appeal counsel for the accused argued that despite all this the trial Judge ought to have explained the relevant substantive law, more particularly the elements of fraud and the principles of common

purpose.

In my view the trial court was under no obligation to do that in the course of the trial. I am not at all sure it would not have been counter-productive to embark on what would have amounted, in effect, to an abridged lecture at that stage. At the close of the whole case prosecuting counsel presented detailed written argument, so says the trial Judge in his judgment, and this would in itself have alerted the accused to the legal requirements that had to be met by the State and the relevant evidence adduced to meet them. Conceivably the trial Judge might at that juncture have felt it appropriate to draw the accused's attention to some weakness of their evidence in relation to this or that legal element or principle but it is not contended that the argument stage was when the Judge's contribution was irregularly inadequate.

The case against the accused was such that the crucial factual questions were whether accused 1 was dishonestly diverting SABA money for Magnum's use and whether accused 2 and 3 knew it and co-operated to achieve that purpose. The trial Judge assessed accused 2 and 3 as of quite sufficient intellectual capacity both to understand those questions and to deal adequately with them in all phases of the trial. A study of the record supports that assessment entirely. I might add that one cannot but be struck by the articulate and logical way in which accused 3 expressed himself both in cross-examining and in evidence.

Apart from what I have said thus far, the record is replete with instances in which the trial Judge afforded the accused postponements in order to prepare for cross-examination, to consider documentary evidence or for other associated purposes, and when he assisted them to

conduct cross-examination, to clarify evidence or to indicate issues that required attention. All in all I am satisfied that the rules enunciated in the above quotation were complied with.

It remains to mention that the accused had the additional benefit that accused 1 was represented by senior counsel when the major State witnesses testified, which evidence was subjected to close and lengthy cross-examination before accused 2 and 3 themselves cross-examined.

Accordingly I find no irregularity in the proceedings in so far as the lack of legal representation is concerned.

The third factor which was said to render the trial unfair was the admission in evidence, and the use against accused 2 and 3, of a confession made by accused 1. It was contended that this statement had been obtained by way of undue pressure from senior SABA personnel

and that its very content had been influenced by what Mrs Lawrence had earlier told Magnum's auditors.

Assuming in favour of accused 2 and 3, purely for the sake of argument, that the confession was wrongly admitted, I cannot find anything in the trial judgment which, by express or implied findings, indicates that the trial Judge used it against them. Where the confession is discussed it is in relation to the case against accused 1. Moreover the abundance of evidence, to be referred to presently, which supports the State case against accused 2 and 3, militates completely against the inference that the court employed the contents of the confession in order to convict them.

The fourth factor on which the unfairness argument was based, concerned the frequency with which Wright referred in his report and

in his testimony to evidence given at the Commission of Enquiry and to other hearsay matter. It was to be inferred, so it was argued, that Wright actually relied on this tainted material in making his findings which, in turn, were wrongly accepted by the trial Judge.

It seems clear enough that Wright was called to give background evidence, to describe the various transactions involved and to trace the manner in which money was moved by way of such transactions. It emerged during the course of his evidence, however, that the transactions and the manner of their execution were in fact common cause. And where his evidence was in any important respect hearsay, the necessary witnesses were called to back it up. Moreover, it is nowhere apparent from the trial judgment that the court a quo simply adopted Wright's factual findings as its own. The conclusions reached

by the court were manifestly based on the trial Judge's assessment of the oral and documentary evidence and his own inferences. Consequently, no irregularity attached to the admission of Wright's evidence or the court's reliance on any of it.

The penultimate point raised with regard to the present issue was that the record of the Enquiry was wrongly admitted and wrongly used as a basis for cross-examination by prosecuting counsel. There is no substance in this argument. As the law stood at the time of the trial, the evidence given at the Enquiry by each accused was admissible against him. It was therefore permissible to prove at the trial what an accused said at the Enquiry and to cross-examine him on it. It was also permissible for the trial court to infer adversely to accused 3 where an important part of his trial evidence did not appear in his Enquiry

evidence. Finally, in so far as accused 3 was cross-examined on what another accused said at the Enquiry, the latter's evidence was not, in my view, admissible as the statement of a co-conspirator because by then any conspiracy was a thing of the past and the co-accused's statement nothing better than an admission inadmissible against accused 3. However, examination of the record reveals that accused 3 was not pressed on any subject thus raised. The matter in question was left there and the course and quality of his evidence cannot be said to have been adversely affected by any irregularity which might have been inherent in such cross-examination.

To sum up on this issue, no irregularity or illegality occurred in, or in relation to, the trial save, possibly, in regard to the aspect most recently discussed. As to that, no failure of justice resulted.

In order to deal satisfactorily with the second, third and fourth issues it is necessary to enlarge upon the factual background to counts 2-150. SABA was a registered commercial bank. It was relatively small in respect of both its capital and assets. Its managing director at the relevant time was Mr A P Philippides ("Philippides"), he having assumed duty as such in March 1979. Mr F J Landsberg ("Landsberg") was the bank's chief inspector and head of its internal audit department. Both men were widely experienced in banking. Apart from its normal commercial banking activities SABA conducted a small money market business. Accused 1 was in fact SABA's only money market official. According to the evidence, a bank's money market transactions would normally involve either the buying and selling of securities or the short-term (largely overnight) investment of surplus funds with other banking

or financial institutions. Funds invested overnight with such institutions constituted loans for which no underlying security was given. The market in this regard operated on the basis of trust. While such dealings were mainly confined to banks and financial institutions there were also relationships between them, or some of them, and certain large corporations or so-called "blue chip" companies. (They were apparently known as "grey market operators".) It is common cause that Magnum was not a "blue chip" company. Any dealings of this kind with a non "blue chip" company would almost invariably require the furnishing of security. Apart from banks and financial institutions there were also concerns such as the company, Central Money Market ("CMM"), which was part of the Magnum Group, which operated on the periphery of the money market in the securities field, but which was apparently not

active during the period of the indictment. There was evidence by accused 3 and the defence witness Heiberg that there had, over a period of years, been extensive money market dealings in respect of securities, involving considerable sums of money, between CMM and SABA. They also testified to the existence of a "bank cheque facility" with SABA. When trading in securities, the seller of such securities would normally require a bank cheque before parting with them. In terms of the bank cheque facility CMM would issue a Magnum cheque in favour of SABA and would in turn receive a SABA cheque in favour of the seller. This facility, it was claimed, was in existence when accused 1 took up employment with SABA in October 1978 and was subsequently continued by him. According to Heiberg, the bank cheque facility involved no real risk to SABA because the transactions to which it

related provided sufficient underlying security.

The transactions relating to counts 2-114 may be summarised as follows. (I borrow extensively from the judgment of the court a quo.) The Magnum Group, in the search for finance to fund or expand its investments, approached prospective investors with the request to invest their surplus funds with SABA. Some of these investors were initially requested to make their investments directly with Magnum but were not prepared to do so on an unsecured basis, or were only willing to do so with a recognised financial institution. For example, Mercabank (counts 62-81) refused Mrs Lawrence's request for a loan of money to Magnum because it was not on the approved list of institutions that Mercabank could lend money to on the overnight money market without security. It was, however, prepared to place its money with SABA. A similar

request was turned down by the SABC (counts 21-52) because Magnum was not a registered bank or approved financial institution. It too was prepared to invest in SABA. In all instances where investors refused to invest in Magnum, SABA became the suggested alternative institution for investment. As a registered commercial bank it was considered to pose no risk for investors. The invitation to invest with SABA was made attractive by offering higher rates of interest than were generally obtainable elsewhere. The investors issued cheques in favour of SABA or, through the Reserve Bank, credited the account of SABA. On the same day as the funds were received by SABA, accused 1 issued a SABA cheque for the identical amount in favour of either MLL or MAL, or credited the amount to the account of MLL at SABA. (Of the Magnum Group, only MLL had an account at SABA.) The SABA

cheques were drawn on its head office cheque account. When repayment of investors was required, a Magnum company would issue a cheque for the amount involved to SABA, and the investor would be paid with a SABA cheque issued by accused 1. In respect of interest, a Magnum company would supply SABA with a cheque for the interest plus an additional 1% as commission or remuneration for SABA. In turn a SABA cheque would be issued by accused 1 to the investor concerned for the exact amount of interest due to it. Certain investors received letters from SABA confirming the investments made by them. Some 40 of these were typed at the Magnum offices (which were situated in the same building) on SABA letterheads. They were signed by accused 1 purporting to act on behalf of SABA. No security was received by SABA for amounts on-lent by it to Magnum. Counts 2-114

relate to the period from December 1979 to December 1982 and involve an amount of just less than R112 million. The vast majority of the transactions occurred in 1981 and 1982 - forty one in 1981 and sixty one in 1982.

Counts 115-125 relate to letters of guarantee issued by accused 1 ostensibly on behalf of SABA. On four occasions during 1982 (counts 115-118) money was invested by Putco directly with Magnum. On each occasion Putco was not satisfied with the negotiable instruments offered by Magnum as security. As a result letters of guarantee purporting to be from SABA signed by accused 1 were obtained. These were acceptable to Putco. In the letters SABA ostensibly undertook to re-purchase the instruments concerned from Putco in the event of Magnum failing to do so by a certain date. When Putco sought to recall certain

of its funds from Magnum in December 1982 it was informed that Magnum was not in a position to refund them. When called upon to honour the undertakings in terms of the letters of guarantee, SABA denied all knowledge of the transactions. Ultimately Putco suffered a loss in excess of R4 million. Similar letters of guarantee were given as additional security in respect of loans made to Magnum by other investors (counts 119-125) over the period December 1981 to October 1982. In the case of Rand Merchant Bank (counts 121-124) the letters concerned were signed by accused 1 and another signatory. Two of the companies concerned each suffered a loss of approximately R400 000,00. All other investors had the amounts invested by them repaid. The total amount involved in these counts was R19 million.

Counts 126-150 relate to instances where, as security for

investments made with Magnum, post-dated SABA cheques were furnished to investors. In most cases the cheques were for the capital amounts plus agreed interest. The cheques were post-dated to the date of repayment. In some cases repayment dates were extended and fresh cheques issued. In the case of Didier SA (Pty) Ltd (counts 133-141, 143, 146-150) interest was paid separately by means of Magnum cheques. The arrangements for the post-dated cheques were made in each case by Mrs Lawrence. The cheques were issued by accused 1. Five of the counts related to post-dated cheques issued in 1980, fifteen to cheques issued in 1981 and five to cheques issued in 1982. The total amount involved was in the order of R17 million. None of the investors suffered any financial loss.

As I have previously mentioned, it is common cause that the

transactions underlying counts 2-150 took place. Wright was able to trace these transactions through the books of Magnum. Even though all the entries were not completely straightforward, Wright did not suggest that there was a deliberate attempt to disguise anything in Magnum's accounting records. As will appear more fully in due course, there was a dearth of records at SABA. Each of the transactions resulted in credit becoming directly available to one or other of the companies in the Magnum Group, irrespective of the course followed. In each case the participation of SABA's money market division, and more particularly accused 1, was established. His signature appears on the relevant documentation in respect of all but two of the counts. In respect of those two counts the unchallenged evidence was to the effect that accused 1 had made suitable arrangements with other employees to

provide the necessary signature during his temporary absence. Accused 1 was therefore directly involved in each count.

The evidence of Philippides is dealt with at length in the judgment of the court a quo. There is no need for me to set it out in detail. I shall concentrate on its essential features. Philippides was described by the trial Judge as "an honest and honourable witness who never exaggerated the position". He accordingly had "no hesitation in accepting his evidence". While Philippides's evidence may be open to some degree of criticism, I have no reason to doubt the general correctness of the trial Judge's assessment of him. According to Philippides, SABA's general policy, on account of the limited size of its operations, was not to allow facilities of more than R500 000,00 to any customer. There were, however, certain exceptions. In addition, SABA

generally declined deposits in excess of R250 000,00 unless they were split, in order to limit the amounts it could be called upon to re-pay at any one time. Money market dealings to cover shortages or invest surplus funds were only permitted with banking or financial institutions. Accused 1 was fully aware of SABA's policy in those respects and had no authority to act to the contrary. Nor was he authorised to make loans or give advances to any customer. Philippides recalled an occasion on which accused 1 advised him that he had received money from Magnum to cover a shortage at the month's end. His response was that the money should be returned as soon as possible as he did not like having dealings with Magnum.

Philippides further testified that it was not the policy of SABA to give letters of guarantee such as those to which counts 115-125 relate.

It was also against SABA's policy to give post-dated cheques. If SABA undertook a future obligation to a third party, it did so by issuing an ordinary bank guarantee in proper form. Accused 1 had no authority to give either letters of guarantee or post-dated cheques on behalf of SABA since he had no authority to offer credit facilities to customers. To the extent that a bank cheque facility existed, it clearly did not apply to post-dated cheques; in the latter case there was no exchange of cheques and the underlying security was lacking. While it appears from the evidence that SABA's policies may have been transgressed on isolated occasions, this does not in my view detract from the acceptability of Philippides's testimony.

It is clear from the evidence of Philippides that accused 1 did not have authority from SABA to enter into the transactions which are the

subject of counts 2-150. Any suggestion that SABA's management, including Philippides, knew, or must have known, of accused l's irregular activities, and condoned them, is without foundation. According to Philippides, he only became aware of these irregularities after the Magnum cheques were dishonoured in December 1982 and, as it was put in evidence, "the bubble burst". Although accused 1 reported to him monthly, the relevant transactions were never brought to his attention by accused 1, either verbally or in any documents. Nor was it possible to have had knowledge of the transactions from the bank records.

Leaving aside the question of authorization, Philippides was adamant that proper records had to be kept for all money market transactions. Apart from source documents such as cheque requisition

slips and cheques, proper ledger cards in the name of each investor had to be opened and maintained. These should have reflected, inter alia, the amounts invested, the period of the investment and the applicable rate of interest. These cards would have served as SABA's records of the transactions. An example of such a ledger card is exhibit Y1. It is a copy of the ledger account for SABC and records deposits and withdrawals. It reflects, inter alia,deposits of R500 000,00 on 17 and 31 January 1980 and one of Rl 000 000,00 on 29 October 1980. There was therefore a ledger card for SABC investments in the money market. Yet over the period 8 January 1980 to 28 November 1980 there were ten instances of amounts invested by SABC with SABA on the money market (all of which were on-lent to Magnum and gave rise to counts 22-31) not reflected on the ledger card. Nor were a further twenty-one

instances during 1981 and 1982 (counts 32-52) reflected therein. The inference is irresistible that the SABC transactions to which counts 22-52 relate were deliberately not recorded in SABA's records.

Philippides further testified that letters should have been sent to all customers (investors) confirming details of their investments. Examples of these are to be found in the exhibits in the record. Copies of such letters would normally be filed with the general records, the customer's file and, if another department was involved, that department. All letters would have had reference and serial numbers and would have been filed accordingly. There should have been similar records for amounts lent by SABA.

According to Philippides and Landsberg no such records for the transactions relating to counts 2-114, or equivalent records in respect of

the other counts, were to be found at SABA. This was confirmed by Wright to whom such records as were available were handed by Landsberg. (While there was evidence that records are not necessarily kept of overnight money market transactions, the transactions which are the subject matter of the charges against the accused clearly do not fall into that category.) Landsberg was the person primarily responsible for the search for relevant records at SABA. He too was found by the trial Judge to be an honest witness whose integrity was beyond question. That he was a man of integrity was repeatedly endorsed by accused 3 when cross-examining Landsberg.

When giving evidence accused 3 claimed that there must have been records of the relevant transactions at SABA. His attitude is understandable, for without such records the clear inference would be

that such transactions were unauthorised. When confronted with the evidence of Philippides and Landsberg, which he was in no position personally to refute, he resorted to "speculation" that the records must have been destroyed by, amongst others, Philippides and Landsberg. This had never been suggested to either of them under cross-examination, and smacks of an afterthought on the part of accused 3 when he realised the significance of the absence of relevant documents. Apart from this "speculation" running counter to acceptable evidence, it is unlikely that Philippides and Landsberg would have jeopardized their careers by acting in this manner or have undertaken so enormous a task. Furthermore, it would have made no sense for them to have destroyed SABA's records. The only purpose in doing so would have been to avoid claims against SABA. And that would have been an

exercise in futility, as any claimants would have been in possession of authentic documentation to establish their claims.

A number of SABA employees or ex-employees who testified stated that it was widely rumoured at SABA that there were extensive dealings with Magnum. Philippides and Landsberg claim not to have been aware of such dealings, nor to have had reasonable grounds for believing that there were any such dealings. While this may be somewhat surprising in view of the volume of the transactions that actually took place between SABA and Magnum within the context of a relatively small bank, there is not sufficient reason to cast doubt on their evidence in this regard. It is apparent from the record that Philippides was never well disposed towards Magnum and he could have been expected to take steps to stop any unauthorised dealing involving

Magnum which would have put SABA at risk. Quite clearly large sums of money passed through SABA's head office bank cheque account en route to and from Magnum. This account was not one that normally invited, or required, the attention of management. On perusal it would have reflected balances rather than details, and it is unlikely to have alerted Philippides or Landsberg to accused l's intrigues. The cheque requisition slips and spent cheques would have been assigned to the waste department where they would not have come to the attention of Philippides and Landsberg. There were also deliberate attempts by accused 1 to hide transactions with Magnum. Thus in the account reflecting the 1% interest or commission received by SABA from Magnum accused 1 simply referred to the amounts involved as "accruals" (in contrast to his earlier practice, before the period of the

charges, where the source was disclosed as CMM). Where additional signatures were required, accused 1 succeeded in obtaining them without full disclosure of the transactions concerned. In the absence of records such as ledger cards, letters of confirmation, written reports and the like it is perhaps not surprising that the unauthorised transactions involving SABA did not came to the knowledge of Philippides or Landsberg or someone occupying a senior position like Marais or that they remained undiscovered by the regular internal and external audits that were conducted. While SABA's overall controls may have been, and probably were, somewhat lax, there is nothing to suggest that accused l's irregular conduct was known to, and condoned by, management and consequently enjoyed tacit approval.

The absence of proper records not only supports a finding that

accused 1 was not authorised,to conduct the transactions to which the charges relate, but also provide evidence of an awareness on his part of lack of authorization. If the transactions were authorised he would undoubtedly Have kept proper records, for there would have been no need for him not to. His failure to keep such records strongly suggests that he had something to hide. Significantly, accused 1, who had intimate knowledge of all the transactions, never sought to refute the evidence of Philippides or Landsberg, nor did he ever claim to be unaware of any lack of authority to act as he did.

On an overall conspectus of all the relevant evidence, direct and circumstantial, pertaining to this issue I am satisfied that it was established beyond all reasonable doubt that accused 1, to his knowledge, did not have authority to enter into the transactions to which

counts 2-150 relate and that SABA's responsible management was neither aware of, nor tacitly approved or condoned, his actions.

The unauthorised schemes conducted by accused 1 at SABA enured for the benefit of Magnum. They assisted Magnum to raise funds (counts 2-114) or facilitated the acquisition of funds (counts 115-150), mainly at a time when Magnum's financial position was steadily worsening and it was trading in insolvent or near insolvent circumstances. The schemes must inevitably have been carried out with the knowledge and collaboration of a person or persons associated with Magnum. That this is so is evident, inter alia, from the fact that records of the transactions were kept at Magnum (in lieu of appropriate records at SABA); letters to investors and auditors seeking confirmation of investments were typed at Magnum by accused 3's personal secretary

on SABA letterheads; the letters in question did not contain the customary reference or serial numbers to link them to SABA's records; on two occasions investor cheques in favour of SABA were paid directly into MLL's account; certain interest payments were made directly to investors with Magnum cheques; and prospective investors were specifically referred to accused 1 by Magnum employees. The person from Magnum most closely associated with accused 1 was Mrs Lawrence. That she must have been fully aware of the schemes in operation is beyond doubt. When Fontaine, then a partner in Richardson, Reid and Partners, Magnum's auditors, approached her in mid-November 1982 to obtain a certificate from SABA in respect of MLL's liability to SABA, she responded by saying, according to Fontaine's notes, that "the situation was delicate and that washing and

laundering of money had taken place." She gave Fontaine the impression that management at SABA was not aware of what was going on. She referred Fontaine to the former accused 4 who in turn referred her to accused 2. Both expressed a lack of knowledge of transactions with SABA. Eventually Fontaine took the matter up with accused 3 who professed that nothing was amiss. On 28 November 1982 he again spoke to Mrs Lawrence. She basically repeated what she had told him earlier and added, inter alia, that investors funds were being channelled to Magnum by SABA, that Magnum did not acknowledge the loan of such funds in writing and that the transactions were not reflected in SABA's books. From what she told Fontaine it is apparent that she acted in concert with accused 1 to implement the schemes in question. Her statements to him amounted to executive statements made in

furtherance of a common purpose which was still in execution. As such it was admissible against the other accused as proof of the existence of a common purpose (R v Mayef 1957(1) SA 492 (A) at 494). For reasons to follow, the object of the common purpose was to defraud investors and/or SABA. What remains to be considered is whether accused 2 and 3 were at all relevant times aware of accused l*s lack of authority and were party to the common purpose.

I shall deal first with the position of accused 3. He was the founder and effective owner of the Magnum Group. He was its chief executive officer and the person in overall charge of its activities. In his own words he was "running the show". According to his evidence his "major efforts during the period 1981-1982 were directed at expanding the Group's investment base". Money was clearly needed for that

purpose. He would have looked to his money market department to raise the necessary funds. Magnum did not have overdraft facilities with banks and to all intents and purposes used the money market as a bank. Accused 3 had an intimate knowledge of the workings of the money market. It may well be, as he claimed, that he did not over the relevant ! period concern himself with Magnum's day to day dealings on that market. But one would have expected him to take a close personal interest in whether or not his financial needs for investment/expansion were being met, particularly having regard to Magnum's deteriorating financial position of which he must have been aware. Accused 2 in fact constantly kept him abreast of developments on the money market. On his own admission the vaguely defined "loan facility" which he claims Magnum had with SABA was "unquestionably of assistance within the

total funding programme of Magnum". It is apparent from his evidence that he was aware from December 1979 that SABA's money market was. placing funds with Magnum, although he claimed not to have known who initiated the dealings. When asked under cross-examination about the transactions giving rise to counts 2-114 he replied:

> "I would say that I definitely had knowledge that those transactions were taking place. As to their nature, their extent and to what they were, I did not have an intimate knowledge."

It appears, therefore, that while he may not have been involved personally in all the details, he had a general picture of what was happening.

Accused 3 was personally responsible for ensuring that large sums of money were deposited at SABA. He was instrumental in converting NELSA's assets into cash and causing the proceeds to be invested with

SABA. Likewise he was the prime mover behind the investment of I L Back's substantial cash assets with SABA. He played an active role in persuading Mr Joubert of the Southern Trident Building Society to place surplus funds with SABA. When Fontaine in November 1982 sought an explanation from him regarding certain transactions, he informed Fontaine that he had been instrumental in raising monies to be lent to SABA by a number of investors. These funds were in turn lent to Magnum by SABA. Accused 3 therefore knew full well that in respect of monies procured for investment with SABA, corresponding amounts would be lent to Magnum. Hence his efforts to secure investments with SABA. Those amounts would not have constituted overnight loans on the money market. They would have been unsecured term loans of substantial magnitude. Accused 3 was aware that such loans were not

usual. It is further apparent from the evidence that he must have known that many investors were not prepared to invest directly in Magnum, hence their referral to SABA. Others were only prepared to invest in Magnum provided they were furnished with adequate security. From his dealings with the witness Roth he knew that unsecured post-dated SABA cheques were being issued as security for investments with Magnum. In the circumstances accused 3 could not possibly have believed that SABA, a relatively small bank with limited capital and assets, would be prepared to expose itself to the extent it did (at least in the instances in which he was personally involved) without security. As a corollary he could not have believed that accused 1, who was dealing with these matters at SABA, could have been authorized to do what he did. This is all the more so in view of the fact that, to the knowledge of accused

3, a request by Magnum to SABA for loan facilities had previously been turned down.

There are a number of other factors that bear on accused 3's knowledge of what was taking place. He was proved to have signed or initialled numerous cheques and documents relating to counts 2-150 which reflected incorrect information. He was admittedly a busy man and may not always have paid attention to what he was signing or initialling. But at the same time he was quite clearly a meticulous person and it is unlikely that all the inaccuracies would have escaped his attention. The fact that he did nothing about them suggests that he knew what was taking place.

In June 1981 accused 3 acquired the entire shareholding in MLL. It was thereafter no longer part of the Magnum Group. It had already

ceased trading and did not trade again. There was no reason for it to have been taken out of the Group at the time other than for the dishonest purpose of using it as a means for transferring funds and circulating cheques to and from various Magnum companies along devious routes. There is no explanation for the seemingly irrational bookkeeping procedures that were followed in this respect. One can only infer that the intention was to make it difficult for the auditors to trace the origin and destination of certain funds and to conceal in the Magnum Group's financial statements the full impact of what was occurring. While accused 3 was no doubt not personally responsible for these bookkeeping entries it is extremely unlikely that he had no inkling of what was on the go. Finally, although he testified that he did not know about the letters typed at Magnum and the records kept there, accused 3 claimed he

would not have been concerned had those facts been known to him. ' This is hardly the response one would expect from a reasonably responsible person in his position ignorant of what was happening.

The only reasonable inference to be drawn from all the facts is that accused 3 knew that accused 1 did not have authority to act as he did; that accused 3 was aware of, associated himself with and participated in the fraudulent schemes underlying counts 2-150 and acted in concert with accused 1 and others in their implementation. In coming to this conclusion I am mindful of the fact that the trial Judge found accused 3 to be an untruthful witness in certain respects. There is no reason to differ from his credibility findings in this regard. I suspect that he may have been the person who initiated such schemes because he conceived the money market to be a loophole for the requisition of

funds, but there is no proof to that effect.

The case against accused 2 is as strong, if not stronger, than that against accused 3. He was, as I have mentioned before, the managing

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director of MAL, the company directly involved in money market transactions. As such he was the head of Magnum's money market department and thus the person primarily responsible for ensuring that Magnum received the funding it required. He was more intimately involved in the day to day dealings on the market than accused 3. Mrs Lawrence reported directly to him, and he in turn reported to accused 3. He was accused 1's immediate predecessor at SABA. He would therefore have been fully acquainted with SABA's policies and the limits of accused 1's authority. He must have realised that SABA's dealings

with Magnum were far in excess of what would have been usual for a

bank of its size. He could have had no illusions about accused 1 exceeding his authority. Like accused 3, he was actively involved in the procurement of investments in SABA well knowing that the money invested would be on-lent to Magnum, without corresponding security. When approached by Fontaine to obtain a certificate from SABA reflecting its exposure to Magnum he, despite being the obvious person to make the necessary arrangements, was unwilling or unable to assist, a situation indicative of knowledge on his part of accused 1's irregularities and the fact that SABA would be unable to furnish the required information. It is not necessary to canvass any further indications of his involvement and guilt. Suffice it to say that he chose to leave a strong State case against him unanswered. There can be no doubt about his participation in the fraudulent schemes and his resultant

guilt.

In arriving at the conclusion that accused 2 and 3 both participated in the fraudulent schemes, I am mindful of the fact that in June 1981 a letter was written to accused 1 by accused 2 offering him a position with Magnum. There is no reason to doubt the genuineness of the offer. Prima facie this letter would appear to militate against the existence of a common purpose, for the continued presence of accused 1 at SABA was essential to the successful implementation of any fraudulent scheme. Why then, if accused 2 (and 3) were involved, would they be prepared to lose the mainstay of such schemes? The evidence does not, however, reveal in what circumstances the letter was written, and any suggestion of innocence that it conjures up is negated by the sheer weight of those factors pointing to guilt.

With regard to the question of fraud, it was not seriously contended that if accused 2 and 3 acted in concert with accused 1, knowing that he lacked authority, they were rightly convicted of fraud

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on counts 2-150. "Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another". (South African Criminal Law and Procedure:Vol II: 3rd Ed (Milton) at 702.) A misrepresentation is a distortion of the truth. The elements of fraud have all been established in respect of counts 2-150. It was falsely represented to investors and prospective investors, by accused 2 and 3 and others with whom they acted in concert (including accused 1), that accused 1 was authorised by SABA to act as he did in accepting investments and issuing letters of guarantee and post-dated cheques from which it would follow that

accused 1 would deal with the investments in the normal way and enter them in the appropriate records of SABA, so protecting the investors' . interests. Alternatively, the failed to disclose to them that accused 1 lacked the authority to do so and would not make appropriate entries in SABA's records. There was actual or potential prejudice to investors in that the misrepresentations caused them to suffer loss or placed their investments at risk. Furthermore, accused 1, being under a duty to do so, failed to disclosed to SABA that he was acting in an unauthorised manner, thereby causing SABA actual or potential prejudice. As the non-disclosure formed part of a common purpose involving accused 2 and 3, they are in law equally responsible for it. The non-disclosures referred to were deliberate. Likewise the representations made were, to the knowledge of those who made them, false. Both the non-disclosures

and misrepresentations were calculated to deceive and cause prejudice.

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The requisites for fraud were clearly established.

It follows that the appeals of accused 2 and 3 against their convictions on counts 2-150 cannot succeed.

I turn, lastly, to consider the conviction on count 1. Prior to the events giving rise to that count NELSA was a subsidiary of National Employers General ("NEG"). Its main business was that of life insurance. The preamble to count 1 recites, inter alia, that:

> "2. On the 15th of February 1982 MFH and/or MAL, under the pretence of being a consortium, purchased all the shares in NELSA from NEG.
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> 7. At the request of The Registrar of Financial Institutions ("The Registrar"), as a prerequisite for the transfer of NELSA to the consortium or purported consortium, the share capital of NELSA had to be increased by two million rand (R2 000 000,00).

8. The two million rand (R2 000 000,00) was paid to NELSA by MFH."

The gravamen of the charge on count 1 was, first, that the accused made a false and fraudulent representation to the Registrar and/or NELSA and/or MEG and/or their respective employees that the shares of NELSA were to be bought and/or were bought by a consortium consisting of certain persons (natural and legal) of whom none would hold more than 24% of the shareholding of NELSA; whereas they knew that the shares were not to be acquired by a consortium, were to be paid for by MFH and/or MAL and that either MFH or MAL were to hold all or more than 24% of the shares in NELSA; and thereby, inter alia induced NEG to sell the shares, and the Registrar to give his permission for the sale of the shares. The second main allegation, brought about by an amendment to the indictment during the course of the trial, was that the accused, knowing that no

real/actual increase in the share capital of NELSA had been effected, as prescribed by the Registrar, failed to inform the Registrar and/or NELSA and/or NEG to that effect.

The existence or contemplation of a consortium to acquire the NELSA shares is central to the first leg of count 1. Mr Fourie, for the State, fairly conceded that if there had always been a consortium, or a bona fide intention to establish one, there would not have been a misrepresentation or the intention to mislead necessary for proof of fraud, nor any resultant prejudice. The onus of course rested upon the State to prove beyond reasonable doubt that no such consortium existed or was ever genuinely contemplated.

On 15 February 1982 Union Acceptances Limited ("UAL") made a written offer on behalf of "A J Struthers, A J D Hobbs, Summerley

Family Trust, Fairhead's Trust and/or their nominees ('The Struthers Consortium')" to purchase the entire issued share capital of NELSA comprising 500 000 ordinary shares from NEG at 660 cents per share. The offer records, in clause 17, that:

> "17.1 the members of the Struthers Consortium will agree between them the number of shares in NELSA purchased by each of them; and
>
> 17.2 the members of the Struthers Consortium will each acquire less than 25% of the shares in NELSA."

Clause 17.2 was inserted to obviate the need for the Registrar's approval of the acquisition of the shares in terms of the then section 27 bis of the Insurance Act 27 of 1943. A consortium of more than four members must ultimately have been contemplated, for if there were only four it was mathematically impossible for all four of them each to have held less than one-quarter of NELSA's shareholding. It appears from the

evidence that in the negotiations preceding the offer accused 3 was the principal representative of the consortium.

The offer was accepted by NEG on the same day. The purchase price of R3 million was paid to NEG by accused 3. The amount had previously been paid into accused 3's account by MAL. It in turn had debited MFH with that amount. The money for the purchase price therefore came from MAL or MFH. On the assumption that there was a consortium, and that the final composition of the consortium and the number of shares of each member had not yet been agreed upon, so that their respective contributions could not be determined, it is not unreasonable to assume that payment may have been made on behalf of the consortium members.

On 23 February 1982 accused 3 took control of the bulk of

NELSA's assets in the form of securities. The balance was effectively taken into accused 2's custody on 7 March 1982. The securities were in due course converted into cash, and the proceeds were paid into a NELSA account with SABA. The amount involved was in excess of R5 million.

The acquisition of NELSA's shares came to the attention of the Registrar in March 1982. He was apparently of the view that he should have been consulted in advance. On 5 April 1982 a meeting was held between the Registrar and Mr Cain of NEG. In a subsequent written report on the meeting Cain mentioned the following points that had arisen:

> "1. That the Registrar considered the acquisition of the shares as a 'backdoor' registration and, as such, was unacceptable.
> 2. That, in his opinion, the shareholders must produce minimum capital of between R5M and R10M to justify the

continuation of the licence.

3. That pending the finalisation of the matter with the new shareholders, no new life policies are to be underwritten.

4. That pending finalisation of the matter with the shareholders, NEG should continue to manage the company and that all investment funds must be controlled by NEG.

5. He would expect the new shareholders to report to him with the financial information which he requires by the latest 16th April, 1982.

6. Unless he is satisfied with the status of the new shareholders, he will consider applying to the Court for the appointment of a Curator to manage the life funds."

(According to accused 3, the intervention of the Registrar put the whole acquisition, including the finalisation of the consortium arrangements, "on ice" until the Registrar's concerns had been dealt with and his requirements met.)

On 3 May 1982 accused 3, acting on behalf of MAL, pledged all the NELSA shares to Rand Merchant Bank ("RMB") as part security for a loan of R2 million. On 6 May 1982 a further meeting was arranged

with the Registrar. Messrs Beckett and van der Merwe (Magnum's attorney) represented or purported to represent the consortium. On the previous day Magnum's accountants (Richardson, Reid and Partners) had written to the Registrar in the following terms:

> "We have been asked by the members of the Struthers Consortium who have recently purchased the shares in the above company, to report on the financial position. The following are the details of the members of the Consortium:
>
> Member
>
> A.J. Struthers
>
> A.J.D. Hobbs
>
> Fairheads Trust Limited
>
> A.T. Beckett
>
> The Magnum Group of Companies
>
> The Summerley Family Trust
>
> H.R. van der Merwe."

Details were furnished of the members and an estimate given of their combined assets.

At the meeting with the Registrar on 6 May 1982 an undertaking

was given to him that the consortium would enter into an interim agreement with NEG which would leave NEG in charge of NELSA until the Registrar had approved the change of control. The Registrar requested information about the members of the consortium. He also insisted that additional funds in an amount of R2 million be provided, which sum was to remain untouched in NELSA. The Registrar was not informed that a consortium had not yet been finally constituted; that NELSA's assets had been delivered to accused 2 and 3 and were being sold; and that the NELSA shares had been pledged against a loan of R2 million.

On 29 June 1982 accused 3 wrote to the Registrar with regard to his requirements. In his letter he stated, inter alia:

"The shareholding of NELSA has been arranged as follows:

Name	Percentage

The Summerley Family Trust	24%
Rand Merchant Bank Limited	24%
AT Beckett	996
A J D Hobbs	996
A J Struthers	15%
H R van der Merwe	9%
Fairheads Trust Limited (as trustees for employees)	10%

He further stated that the shareholders were about to enter into a management agreement with NEG, and submitted a copy of the "semi-final" draft of such agreement. He also noted in the letter that "the shareholders of NELSA have been approached by the Inkatha-movement to obtain, through its operating Khulani Holdings Limited, an interest in NELSA. This approach resulted from the Registrar's advice to the Inkatha-movement, when they requested permission to incorporate their own insurance company, to buy into an existing life company."

To comply with the Registrar's demand that additional funds be

provided MFH issued NELSA with a cheque for R2 million on 2 September 1982. On 21 October 1982 Cain wrote to the Registrar on behalf of NEG advising him that "the capital of the Life Company was increased by R2 000 000,00 and the payment of this amount was made on 2nd September 1982."

On 10 November 1982 SFT requested NEG to transfer all the NELSA shares to the trust as nominee "for the various members of the consortium." The share certificates were requested in denominations equal to 24% of the shareholding (two), 12% (one) and 10% (four). On 17 November 1982 the Registrar formally authorized the acquisition of the NELSA shares.

On 19 November 1982, in terms of a written agreement, MFH ceded to RMB all the NELSA shares as security for its debts. By then

NELSA had changed its name to Magnum National Life Assurance Company Limited, and the number of shares had increased to 1 500 000. In terms of clause 1.3 of the agreement MFH guaranteed to RMB that it was the beneficial holder of the shares.

According to Wright, MFH's books reflected the NELSA shares as an investment. In terms of a MFH journal entry dated 18 December 1982 the investment was credited and debited against loans to the following:

Summerley Family Trust	24%	Rl 272 000
Khulani Holdings (Proprietary) Limited	24%	1 272 000
A T Beckett	10%	530 000
A Hobbs	10%	530 000
A J Struthers	12%	636 000
Staff Trust	10%	530 000
H van der Merwe	10%	530 000
		R5 300 000

These entries were apparently made on the instructions of the liquidators of MFH. The entries are otherwise unexplained. Subsequently the entry relating to van der Merwe was reversed.

The loan acquired by MAL from RMB was never repaid. The former NELSA shares were ultimately purchased by RMB from the liquidators for R250 000,00.

Through the whole saga of the acquisition of the NELSA shares the consortium figures from first (the offer to purchase) to last (the journal entry). It also features prominently in the discussions and the events that took place in between. It is true that, contrary to what might have been expected, the consortium does not seem to have been finalised before liquidation and that its suggested composition changed from time to time. This is not necessarily inconsistent with a bona fide intention

to form a consortium and for such consortium to acquire the NELSA shares. Matters were complicated by the intervention of the Registrar and the need to satisfy his requirements. His approval was only given shortly before liquidation. Finalization may have been delayed pending the Registrar's approval, and time and other events may have precluded it thereafter.

With regard to the composition of the consortium it must be borne in mind that the concept of nominees was ever present. SFT, Struthers, Hobbs and Fairheads Trust (later the Staff Trust) figured throughout as members of the consortium. Subsequently Beckett and van der Merwe were included and their names appeared consistently until the end. The Magnum Group was mentioned at one time but was then replaced by RMB which in turn was replaced by Khulani Holdings, who had had

discussions with the Registrar. On balance there appears to have been a greater deal of continuity in the consortium participants than the trial Judge was prepared to credit.

It was probably not beyond accused 3 to have devised the whole scheme as a sham. And there are indications to suggest that the consortium was just that. But none of them is conclusive on the point. Entries in Magnum's books indicate the purchaser of NELSA's shares as MAL or MFH. Not too much can be made of the uncertainty concerning the involvement of MAL or MFH as clear distinctions were not always drawn between companies in the Magnum Group when it came to financial matters. More significant is the fact that there was no entry in the Magnum books to show that the money paid for the shares and increase in capital was paid on behalf of a consortium. Both

transactions are simply reflected as "Investment in NELSA". The NELSA shares were originally pledged by MAL and later ceded to MFH. The pledge was clearly unauthorised and irregular, but MAL had expended money to pay for the shares and would have needed to raise funds to compensate for its outlay pending payment by members of the consortium for their shares. The pledge is not therefore wholly destructive of the notion of a consortium. Nor is the cession. Accused 3 maintained that despite the claim in the cession that MFH was the beneficial owner of the shares involved, RMB was at all times aware that there was a consortium that owned them. This was in effect confirmed by the witness Sinclair who was employed by RMB. He testified that the shares were registered in the name of SFT, but RMB had the shares re-issued in the names of what were believed to be the

members of the consortium, and they in turn each signed blank transfer forms in respect of their shareholding.

The only one of the named members of the consortium to testify was Beckett. He was a defence witness. Although his evidence was very vague he clearly always believed that there was to be a consortium of which he was to be a member. He was also involved with discussions with the Registrar on behalf of the consortium. Cain, who was intimately involved in all the dealings, also believed at the time that there was a consortium, until events at the trial caused him to have doubts. UAL also accepted there was a consortium.

At best for the State there is doubt as to whether a consortium was contemplated. There was no evidence explaining the journal entries which the liquidators caused to be made. It is not known whether

claims were made against the persons concerned in respect of monies advanced by MAL to acquire the NELSA shares on their behalf. Struthers, Hobbs and van der Merwe appeared on the State's list of witnesses and were presumably available to testify, yet they were not called. (Struthers apparently died during the course of the trial which may account for his not being called.) There was no obligation on the accused to call them. The onus to prove its case rested upon the State and it ran the risk of not discharging that onus by not calling them. In my view, on a conspectus of all the relevant evidence, the State has failed to prove the absence of a bona fide intention that NELSA's shares were to be acquired by a consortium. The State therefore failed to establish its case on this leg of count 1.

This brings me to the second leg of count 1 which rests on the

alleged failure on the part of accused 2 and 3 to inform the Registrar that no real or actual increase in the share capital of NELSA had been effected. What the Registrar wished to ensure was that NELSA's policyholders would be sufficiently protected. It was for this reason that he required that NELSA's capital base should be increased. As mentioned previously, in compliance with the Registrar's requirements MFH issued NELSA with a cheque for R2 million on 2 September 1982 for the increase of NELSA's share capital. The cheque was paid into NELSA's Barclays Bank account on the same day. Thereafter NEG, at the request of MAL, placed the R2 million on call with SABA on behalf of NELSA. SABA in turn lent the money to MLL. (This transaction formed the basis of count 17.) MLL issued accused 3 with a cheque for R2 million. He in turn provided MFH with a cheque for a similar

amount which MFH then banked in its Barclays Bank account. All these events took place on the same day. The increase of NELSA's capital base was therefore brought about by the exchange of cheques within the Magnum Group and the involvement of SABA. MFH, according to the evidence, did not have sufficient funds for this purpose at its disposal in its Barclays Bank account. Be that as it may, and irrespective of the circuitous and devious route by which the funding took place, at the end of the day NELSA had some R7 195 354,00 on call with SABA instead of its previous R5 195 354,00. Its assets were accordingly increased by the R2 million paid to it by MFH. Rand Merchant Bank, after acquiring the NELSA shares, succeeded in recovering the full amount from SABA. That there was a "genuine increase" appears from the following passage in Wright's evidence in

chief:

> "In other words, was there a genuine increase of R2-million? — From the books of Nelsa it would appear as if there was a genuine increase of R2-million. I did not see the books of Nelsa . but I would imagine so, because they actually received R2-million

It follows that even though strictly speaking there may not have been an increase in NELSA's share capital, its capital or asset base was increased. This constituted substantial compliance with the Registrar's requirements. In the result there was no culpable non-disclosure by accused 2 and 3 and the State cannot succeed on this leg of count 1 either.

I would accordingly have set aside the convictions of accused 2 and 3 on count 1. As a consequence interference with their sentences would have been justified and I would have been inclined to ameliorate

their sentences somewhat. As the majority, however, are of the view that the appeal in respect of count 1 cannot succeed, the matter is academic. I agree that otherwise no basis exists for interfering with the sentences imposed.

J W SMALBERGER JUDGE OF APPEAL