THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE

Case no: 446/02

In the matter between

VITO ASSANTE **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: **OLIVIER, CONRADIE JJA and JONES AJA**

Heard: **17 February 2003**

Delivered: **31 March 2003**

Summary: **Fraud - sentence - 24 years' imprisonment confirmed**

JUDGMENT

CONRADIE JA

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[1] At the conclusion of the State case against him, the appellant offered a plea of guilty on each of one hundred and eighty three counts of fraud which together totalled an astonishing three hundred and forty-five million Rand. He was convicted accordingly and sentenced on each of the counts to fifteen years' imprisonment. The sentences on all the counts except count two were ordered to run together. In the case of count two six years of the fifteen year sentence were made to run concurrently with the rest. The effect of this is that the appellant's sentence is one of twenty-four years' imprisonment. The appeal is against this sentence.

[2] In December 1988 the appellant was appointed branch manager of the Kempton Park Branch of the Natal Building Society that later became the NBS Bank. Between 1994 and the end of 1996 he helped to implement a dishonest scheme to obtain money from investors for developers of sectional title and cluster homes. Money that potential investors were, by the appellant's misrepresentations, made to believe was intended for the NBS Bank was instead deposited directly into a type of account called a corporate saver account. Corporate saver accounts were offered to chosen customers, particularly attorneys, accountants and other professionals. Through the creation of sub-accounts, monies could be deposited into and withdrawn from a corporate saver account for the credit or debit of a particular client of the account holder.

[3] The account with which this trial was concerned was conducted in the name of a firm of attorneys, Nel, Oosthuizen & Kruger ('NOK'). Investors' cheques, although made out to the NBS Bank were paid directly into the NOK corporate saver account. From there it was allocated to various sub-accounts and used by those who operated the account.

[4] Investors were encouraged to think that they were lending money to the NBS Bank by the fraudulent issue of guarantees to them signed by the appellant, ostensibly on behalf of the NBS Bank, confirming receipt of their investments by the NBS Bank and undertaking responsibility for their repayment when they matured. No one in the NBS Bank other that the appellant knew of the scheme, the effect of which was that NOK became the principal debtor and the NBS Bank the ostensible surety for repayment.

[5] The sustainability of the scheme was jeopardised by the fact that the activities of the property developers who used the money did not provide enough cash flow

to ensure the repayment of loans as they fell due. This resulted in the development of a pyramid scheme where the loans of existing investors could be repaid only by taking in new investments. At that stage, at the latest, the appellant should have realized that disaster was bound to overtake him. He nevertheless continued through his brokers to solicit investments, exposing to loss those who were taken in by the lure of a higher than customary interest rate as surely as if he had taken their money for himself.

[6] The fact that the appellant had issued over a hundred guarantees for amounts obtained from investors went, one is tempted to say miraculously, unnoticed until early in 1997 when such a guarantee was offered by one of the misled investors to its banker as security for an overdraft. The banker hesitated to accept the guarantee as security and showed it to a senior official of the NBS Bank. The Bank immediately put a stop to the scheme. Almost R128m (excluding interest) remained owing to investors when it came to an end.

[7] In his judgment on sentence Joffe J in the court *a quo* referred to the fraudulent scheme as one of 'breathtaking enormity'. It certainly is that. The successful manipulation of the opportunities which the appellant as bank manager enjoyed went on from August 1994 to December 1996. The fraud was sophisticated and prolonged. It required careful and cunning planning. The result was that investors in the scheme lost more than R127m of their capital.

[8] The size and duration of the fraudulent scheme was only made possible by the trust that the NBS Bank reposed in the appellant as one of its senior managers. The abuse of trust on the scale on which it happened is, it goes without saying, seriously aggravating. It had the potential to destabilize the banking industry in this country. The judge *a quo* evaluated this factor against the backdrop of the alarming increase in white collar crime referred to in *S v Blank* 1995 (1) SACR 62 (A). It has become such a scourge that the business community, more particularly Business against Crime and the Banking Council, are now assisting directors of public prosecutions by making available private sector funding for the prosecution of offenders.

[9] Counsel for the appellant did not submit that, in exercising his discretion to impose a sentence of fifteen years' imprisonment on each of the 108 counts, the judge *a quo* had committed any misdirection. He relied entirely on the submission that the sentence was startlingly inappropriate. This is, of course, a well-known ground for interfering with the exercise of discretion by a lower court on appeal. (*S v Anderson* 1964 (3) SA 494(A) at 495D - E)

[10] The sentence was inappropriate, and startlingly so, he went on to suggest,

because the court *a quo* had not adopted a balanced approach; and while conceding that the deterrent aspect of sentencing was of great importance, he submitted that in the case of the appellant the sentence was 'grossly disproportionate to his just deserts'.

[11] In some eighty of the counts against the appellant, the amounts involved were one million Rand or more, sometimes eight or ten times as much. A conviction on each of them justified a sentence of imprisonment of fifteen years. Taking the overall scale of the scheme into account, a sentence of fifteen years did not take adequate account of the gravity of the offences. The judge *a quo* therefore decided to make the concurrence on one of the counts partial: only six of the fifteen years were to run together with the rest. I do not think that he could have devised a way of dealing with the matter that was any fairer than that.

[12] The Court below did not overlook the truism that the sentence should fit the crime as well as the offender. It carefully considered his personal circumstances. He was at the time a fifty year old divorced father of two daughters with no previous convictions. He had made good progress at the Bank and had not directly benefited from the frauds. The Court also, generously, regarded the appellant's plea of guilty at the end of the State case as an indication of remorse. In my view it left nothing out of account that it should have considered. The sentence is severe, there is no doubt about that. Counsel were unable to find a case where a period of imprisonment as long as this had been imposed for fraud. But then, they were unable to find a case in which the amounts involved were as large.

The appeal is dismissed.

J H CONRADIE
JUDGE OF APPEAL

OLIVIER JA)Concur

JONES AJA)