THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 890/12
Reportable

In the matter between:

JEFFERY ISRAEL LEVENSTEIN **Appellant**

and

THE STATE **Respondent**

Neutral citation: *Levenstein v The State* (890/12) [2013] ZASCA 147 (1 October 2013)

Coram: Cachalia, Bosielo, Leach and Willis JJA and Meyer AJA

Heard: 15 August 2013

Delivered: 1 October 2013

Summary: Criminal law – director of company convicted of fraud and contraventions under the Companies Act 61 of 1973 – appeal succeeding on several counts and sentence reduced.
Criminal Procedure – charge sheet and further particulars thereto the exclusive memorial of the charge the accused called on to meet.

O R D E R

On appeal from: South Gauteng High Court, Johannesburg (Pandya AJ and assessors sitting as court of first instance):

1 The appeal in respect of counts 2, 6 and 7 is upheld and the convictions and sentences on those counts are set aside.

2 The appeal against the convictions on counts 1, 3, 4 and 5 is dismissed.

3 The appeal in respect of sentence on counts 1, 3, 4 and 5 succeeds to the extent that the sentences imposed by the trial court are set aside and replaced with the following:

(a) Count 1 ─ 12 months' imprisonment.

(b) Counts 3, 4 and 5 (taken together for purposes of sentence) ─ six years' imprisonment.

(c) The sentences in (a) and (b) above are to be served concurrently.

4 The appeal in respect of count 8 is dismissed and the conviction and sentence on that count are confirmed.

5 The effective sentence is therefore one of eight years' imprisonment.

J U D G M E N T

LEACH JA (CACHALIA JA AND MEYER AJA concurring)

[1] The appellant, a chartered accountant and businessman, was tried in the South Gauteng High Court on six charges of fraud ─ counts 1 to 6 ─ and two charges under the Companies Act 61 of 1973 ─ counts 7 and 8 (the latter Act has since been repealed, but all references to the Companies Act hereinafter are to the 1973 Act and not to the 'new' Companies Act 71 of 2008). The appellant denied his guilt but, after a marathon trial, was convicted on all eight counts. He was sentenced

to eight years' imprisonment on each of the six counts of fraud, to one year's imprisonment or a fine of R500 000 on count 7, and to a further two years' imprisonment on count 8. The court also ordered that seven years of each of the sentences imposed on counts 2 to 6 and one year of the period of imprisonment imposed in respect of count 8, should run concurrently with the sentence of eight years' imprisonment imposed on count 1. Effectively, then, the sentence is 15 years' imprisonment, to be reduced to 14 years' imprisonment on the appellant paying the fine of R500 000 imposed in the alternative on count 7.

[2] With leave of the court a quo, the appellant appeals to this court against all his convictions as well as the sentences imposed, save for that on count 7. Although leave to appeal was granted on 8 October 2009, it has taken almost four years for the record to be prepared and the appeal to be heard by this court. As appeared from an application for condonation granted at the outset of the hearing, this unfortunate delay is in no way attributable to the appellant.

Background

[3] The charges against the appellant relate to events which occurred while he was an executive director of a bank and its holding company that collapsed in 2001. Before dealing with those charges it may be useful to place the facts giving rise to the allegations levied against the appellant in their historical context.

[4] The appellant, who is by training an accountant and auditor, founded an accounting practice known as Levenstein and Partners in about 1980. Later, in about 1988, he established a bank known as Wingate Finance, a public company of which he was the chief executive officer ('CEO') whose core business was banking with specific emphasis on the financial needs of accountants. In 1993, Wingate merged with Mercantile Bank but, although he was given a seat on Mercantile's board, he resigned in mid-1994 as a result of a dispute about shares.

[5] Despite this, the appellant's appetite for banking had been whetted, and a year later he, his brother-in-law, Mr Jack Lurie, and a number of associates Messrs Ronnie Buch, Daryl Krawitz, Zacha Lopes and Keith Diesel, were vendors of a new company, called Rand Treasury Limited, incorporated on 17 July 1995. The appellant was not only a director of this company and its designated deputy chairman, but he described himself as being its '*de facto* CEO'. It is clear from the

evidence that at all times thereafter the appellant was the driving force behind the company and its business.

[6] On 10 September 1996, the Reserve Bank granted Rand Treasury Limited a banking licence. A few days thereafter, on 16 September 1996, the company's name was changed to Regal Treasury Private Bank Limited[1] (for convenience I intend to refer to it simply as 'Regal Bank'). On 30 December 1996 it was registered as a bank.

[7] Regal Banks's history was fraught with tension, conflict and controversy. Its original chairman, Mr Peter Springett, a man with a long history in the banking industry and who had been appointed in August 1995, resigned in January 1998 after having been embroiled in a lengthy dispute with the appellant about the scope of his duties. The appellant thereafter assumed the mantle of chairman, but this brought him into conflict with the Reserve Bank which, in the exercise of its supervisory functions under the Banks Act 94 of 1990, objected to him being both chairman and CEO, contending this was not good corporate governance. It took until 30 September 1999 before the appellant backed down and his brother-in-law Mr Lurie was appointed chairman. Another source of conflict at the bank into which the Reserve Bank was drawn was the high turnover of executives and senior members of the bank's staff who found it difficult to work with the appellant, which led to doubts about Regal Bank's corporate governance. Moreover there was considerable conflict between the company and its auditors to which I shall return in due course.

[8] In any event, in a move both supported and encouraged by the Registrar of Banks, Mr Christo Wiese, whose policy was that banks should not be involved in non-banking business, it was decided to establish a group structure to enable the bank to conduct purely banking business and other companies within the group to perform non-banking business. On 27 November 1998, Regal Treasury Bank Holdings Limited ('Holdings') was incorporated as a public company in order to achieve this end. Thereafter, under a scheme of arrangement under s 311 of the Companies Act, the entire issued share capital of Regal Bank was acquired by Holdings with shareholders in Regal Bank receiving a like number of shares in Holdings. This took effect on 1 February 1999, and was followed by Holdings being listed on the Johannesburg Stock Exchange on 25 February 1999.

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[1] Rand Merchant Bank had objected to its original name.

[9] The fortunes and businesses of Regal Bank and Holdings were thereafter inextricably linked. Indeed, both during the course of the trial and in the heads of argument filed by both sides in this appeal, the identities of the two entities were conflated and reference was made purely to 'Regal'. As a matter of convenience, I intend to do so as well although, when appropriate, I shall refer to each separate entity by name.

[10] During the course of Regal's annual audit for the financial year ending February 2000, a serious conflict arose between the appellant and Regal's auditors, Ernst & Young ('E&Y') in regard to the valuation of certain unlisted investments held by Regal. Referred to in argument as 'the branding dispute', I shall deal with it more fully in discussing the first charge against the appellant. In any event, E&Y referred the matter to the Registrar of Banks which led to various meetings between representatives of the Reserve Bank, E&Y, the appellant and various other members of the Regal boards. It also led to another firm of auditors, KPMG, being appointed to prepare a report under s 7 of the Banks Act. Eventually the appellant and Regal capitulated in regard to the amount to be given to the branding income and reflected in Regal's financial statements, which were thereafter published in controversial circumstances on the Stock Exchange News System ('SENS') and had to be corrected some days later.

[11] Further problems and audit issues arose out of Regal's financial results for the year ending February 2001, that had been published on 30 April 2001. This was followed by various press articles about Regal's business that were by no means complimentary, and at an extraordinary board meeting held on 13 June 2001 the appellant was removed as CEO of Regal Bank. At the time Regal was experiencing liquidity problems which it sought to ease by selling off part of its business. With the view of a possible purchase, Investec conducted a due diligence on Regal, during the course of which certain disclosures were made adverse to the bank and its practices. The proposed sale to Investec fell through.

[12] As Mr Wiese explained, the banking industry was in something of a crisis at the time. The stock market had come to the end of a long bull run and the economy had run out of steam. There were liquidity concerns about banks and the market was nervous, especially about smaller banks, and a run of depositors withdrawing their investments could easily have had a contagious effect and spread to other banks.

The situation was exacerbated by there being a number of new banks and greater competition to attract the funds of investors. According to Mr John Martin, an assistant general manager in the Supervision Division of the Reserve Bank who testified in the court a quo, 'the banking system was overbanked'.

[13] Urgent steps therefore had to be taken. On 24 June 2001, during another extraordinary board meeting, it was decided that 45% of Holding's issued shares that were then being held, directly or indirectly by Regal, should be cancelled; the appellant would retire with immediate effect; and the Reserve Bank would be asked to provide liquidity assistance for a week. The next day, following a meeting between representatives from Regal and the Reserve Bank, a cautionary announcement on Holdings was published. This led to a run on Regal Bank which was unable to pay its depositors their investments. Within a day, Holdings shares were suspended on the Johannesburg Stock Exchange and an application was brought to place Regal in curatorship. Regal never recovered and, on 14 February 2004, was placed into final liquidation.

[14] So much for the sad story of the life and death of Regal. In the aftermath of these unhappy events, the appellant was charged and convicted on the various counts I mentioned at the outset. I now turn to consider whether he was correctly convicted.

Count 1

[15] The first charge arises out of the so-called branding dispute mentioned above. At the outset it is necessary to deal in greater detail with the nature of the dispute and the events that occurred surrounding the publication of what the State alleges amounted to a fraudulent misrepresentation.

[16] Regal Bank had aligned itself with four companies, in particular Kgoro and RMI,[2] with whom it had concluded licensing agreements entitling them to use Regal's brand name or trademark (defined in the agreements as being the name, logos, designs and similar marks owned by Regal and the goodwill attaching thereto). As consideration for this, Regal was to receive a percentage of the total issued shares of the 'branded' company. It was not the acquisition of shareholding in the branded companies but the value to be placed on the asset acquired in the process that caused difficulty.

[2] These are their abbreviated names which suffice for purposes of this judgment.

[17] In preparing its financial statements for the year Regal, at the appellant's behest, adopted a valuation model based on potential rather than real income. This flew in the face of what is commonly known as the Generally Accepted Accounting Standard or 'GAAP', the standard recognised by the Reserve Bank for banks under its supervision. Regal prepared its draft financial results on the basis of a branding value of R55 million, a figure E&Y was unable to approve on audit.

[18] The differences between the two sides were substantial. E&Y, using a capitalization of earnings based approach, valued RMI's business at almost R20.5 million and, as Regal held 25% of RMI's shares, was only prepared to value Regal's share of that business at just over R5.1 million. Regal, on the other hand, reflected RMI's value at R23 million in its balance sheet, and the appellant attempted to persuade E&Y to accept that its value could in fact exceed R32 million. Similarly, although E&Y viewed the Kgoro business opportunity as an exciting and potentially profitable business venture, it felt that it was still unproved and at that stage was only worth a nominal value of R1 million. Accordingly it estimated Regal's share thereof at R250 000. As against that, the appellant argued that Regal's interest in Kgoro could even be valued at more than R44 million, a figure substantially higher than the R15 million reflected in the financial statements it had submitted for audit. There was thus a gulf between the two sides, with Regal pushing for a branding income for the year of R55 million and E&Y not being prepared to go beyond R5.5 million.

[19] In support of the figures he advanced, the appellant relied both on a valuation obtained from two consultants who held themselves out as having business valuation expertise to endorse his method of business valuation. But E&Y were not swayed and, in May 2000, they informed the Reserve Bank that they had reached an impasse with Regal in regard to the issue, that they were not prepared to recognise the model by which the appellant valued Regal's shareholding in the branded companies and that, if Regal would not alter its stance, they would qualify its financial statements.

[20] Auditors qualifying the financial statements of a company could well result in depositors becoming uneasy and starting to withdraw their investments. In a worst case scenario, there could be a 'run' on the bank, upsetting the banking climate and leading to similar runs on other banks, to the jeopardy of the entire industry.

Accordingly, if the financial statements of a bank were qualified the Reserve Bank would either seek the appointment of a curator,[3] or apply to court for the deregistration or winding-up of the bank. In order to attempt to avoid having to do so, the Reserve Bank arranged a meeting with E&Y on 5 May 2000 to discuss the valuation of Regal's investment in RMI and Kgoro. During the course of the meeting Mr Wiese contacted the appellant on a speaker phone and informed him that if Regal issued results which E&Y qualified, a curator would probably be appointed and E&Y might resign as auditors. The appellant responded by stating that his accounting model was ahead of GAAP, but agreed to postpone the release of the financial results.

[21] In order to obtain greater certainty on the issue, Mr Wiese, acting under s 7 of the Banks Act, appointed KPMG, another firm of auditors, to assess the appellant's accounting model and indicate whether or not the appellant's figures were acceptable under GAAP. While awaiting KPMG's report, the appellant wrote to Mr Wiese in an attempt to justify the model of valuation he had adopted, and expressed his belief that Regal had provided irrefutable and persuasive evidence to KPMG that the qualification envisaged by E&Y was 'totally unjustified and indeed irresponsible'.

[22] The appellant's optimism was shown to be misplaced when the KPMG review report came to hand. It supported E&Y and concluded that it was too soon to reliably measure the branding income. But it agreed that the amounts reflected in the financial results advanced by the appellant did not conform to GAAP.

[23] This report was delivered to the Reserve Bank at a meeting on 15 May 2000. It was the start of a busy day. Regal was due to publish its annual financial statements within two days, and finalisation of the audit was thus a matter of urgency, and the meeting between KPMG and the Reserve Bank was the first of four meetings relating to Regal's financial reports that took place that day. It was followed by a meeting between members of the Reserve Bank and E&Y at which it was mentioned that the appellant had stated that the market was expecting an earnings per share ('EPS') announcement of 79 cents. To this Mr Strydom of E&Y responded by stating that until the branding scheme realised income it could not be taken into account in assessing Regal's profit, and that if Regal persisted with its financial statements reflecting an EPS of 79 cents it would convey the wrong picture. In addition, Mr van

[3] See s 69 of the Banks Act.

Heerden of E&Y stated that E&Y would be prepared to sign off on the financial statements at 43 cents per share.

[24] Flowing from this, another meeting was held at the Reserve Bank later that day attended by representatives of the Reserve Bank's Bank Supervision Department including Mr Wiese and Mr Martin, representatives of KPMG and the appellant representing Regal. The appellant was told that KPMG concurred with the findings of E&Y, and Mr Wiese urged him not to publish the financial statements if they were qualified as the Reserve Bank would then have no alternative but to deregister the bank.

[25] The appellant appeared to be obdurate and so Mr Wiese called a further meeting, this time with Regal's chairman, Mr Lurie, and the chairman of Regal's Audit Committee, Mr Buch, to whom he explained that if Regal was to avoid deregistration it would have to accept the auditor's suggested valuation of the branding income being no more than R5.5 million. Mr Strydom, indicated that E&Y would sign off on the financial statements if Regal used that valuation.

[26] Faced with this ultimatum, the appellant bowed to the inevitable and instructed Mr Jonathan Davis, who was at the time Regal's Chief Financial Officer, to redraft the financial statements by reversing approximately R50 million of the amount reflected in the draft statements in regard of branding income so as to allow only R5.5 million in that respect, and to amend the profit announcement accordingly. Mr Davis, who also testified, stated that the appellant further instructed him to ascertain what level of earnings Regal required in order to avoid making a trading announcement that its EPS was less than the 48 cents of the previous year. Mr Davis did the necessary calculation, and informed the appellant that to do so Regal's profit on the figures that appeared in its statements would have to be increased by R6 million. The appellant instructed him to defer R6 million of the expenditure for the year reflected in the statements (which had the effect of a corresponding increase in profits) and to prepare the final financial reports on that basis. Mr Davis complied. His evidence on these events was not challenged by the appellant in cross-examination and can be accepted, as the trial court did.

[27] According to Mr Davis, on the appellant's instruction the commentary in the draft press announcement was also amended, not only by the inclusion of a statement that branding income had been deferred, but by the additional comment

that expenses of R18 million relating to the branding income had already been written off. However Mr Davis testified that the actual branding expenditure could never have been R18 million but was probably under R1 million (in this he was supported by the auditor, Mr Strydom), that he had no idea how the appellant had arrived at the figure of R18 million and that when he had asked what E&Y's attitude would be to the adjustments, the appellant had replied that he would deal with them. The appellant later instructed Mr Davis to contact Mr van Heerden of E&Y in order to get someone to audit the R6 million adjustment, but he was unsuccessful in doing so. The financial results in their final form were therefore published without the auditors having seen them. This the appellant knew. Not only is this apparent from his own evidence but Mr Davis told him that Mr van Heerden's secretary had said that he was away for the day.

[28] It was in this way that Regal's 2000 financial results came to be published, first on the Johannesburg Stock Exchange News System ('SENS') late on 16 May 2000 (a copy of which was forwarded to the Reserve Bank as required under s 65 of the Banks Act) and, subsequently, in the popular press the following day. Under a sub-heading 'Banking Model', the financials contained the statement that 'Regal' had developed a 'futuristic financial model' and that 'prevailing accounting standards do not have the flexibility to account for the model and this new asset class philosophy in a current year'. Despite this it went on to allege that the model 'has, and will create enormous wealth for shareholders' and that:

'Regal are in disagreement with the Auditors regarding the disclosure and treatment of certain investment securities created by the model. By appointment the complexities and design features of the model are available for inspection and discussion at Regal's Revonia office. . . . The divergence between old and new accounting standards manifests in a so-called valuation difference of R30,5m, after taxation, reducing earnings per share by 30 cents . . .The Board approved the year end results reflecting earnings per share of 79.96 cents. At the request of the Registrar of Banks we have agreed to defer the valuation difference. All expenditure incurred to generate this income has been written off in the current year. We estimate that approximately R18 million of expenditure relating to the new model has been accounted for on this basis. Generally accepted accounting practice allows for the setting off of this expenditure against the income deferral. Regal, as detailed above, has absorbed the full brunt of this expenditure in the current year.'

[29] The publication of the financials in this form brought an immediate and indignant response from E&Y. In a letter the chairman of E&Y, Mr Tom Wixley, addressed to the directors of Holdings on 17 May 2000 (also copied to Mr Wiese at the Reserve Bank), he complained about the SENS announcement and demanded that a correction notice be published immediately stating, inter alia, that the 'reference to earnings per share of 79.96 cents in the announcement should be ignored.' It was as a result of this that on 25 May 2000 Regal published the following announcement:

'The section under banking model in Regal's audited results appears to have caused a level of misunderstanding amongst shareholders and investors:

Regal Directors together with our auditors Ernst & Young wish to place on record that the 50 cents per share referred to in the results was arrived at in accordance with generally accepted accounting practice and that further reference to amounts of 79.96 cents per share were based on alternative valuation and accounting methodologies.'

[30] Subsequently E&Y agreed to sign off on Regal's statements in the form they had been published, but only after having visited the bank when, on the appellant's own version, he for the first time explained to them how he had arrived at the figure of R18 million in respect of branding expenditure, a sum which he contended was not to be married with operating expenditure. However, both Mr Wixley and Mr Strydom of E&Y testified that they had only agreed to accept the published results as the adjustment which had been made without their knowledge fell within the audit materiality of the company — that being an amount by which the figures of the company and its auditors could differ without the auditors having to qualify the financials. In doing so, they were also motivated by there being a banking crisis in the country following the recent demise of two other banks. Mr Strydom explained:

'Our audit materiality was 6-million. We were extremely unhappy with the 6-million (that was deferred). However this was presented to us after the fact and we had to make a decision what would our reaction be. My Lord we were very aware of the consequences of any decision on our behalf. Here was a profit announcement that was put in the paper without our authority. We could very easily (have) put on SENS a statement that the profit announcement as published by Regal was not audited. My Lord at that time we already had the beginnings or a portion of the so-called tier two bank crisis . . . a statement . . . saying we have never given our consent might just have been the end of Regal. My Lord this is not only an audit materiality issue, where we as auditors in the light of the consequences had to justify the 6-million for audit purposes. The real issue is that a set of financials, profit

announcement was published . . . with entries . . . not vetted by the auditor and it was stated that it was vetted by the auditor. The effect of this 6-million is in fact extremely material from the point of investors, because it changed their earnings per share . . .. If the 6-million was not deferred, there would have been a decrease in earnings per share. After the deferral of the 6-million there was a slight increase in the earnings per share. My Lord we as auditors decided for 6-million we were not going to put the future of Regal at risk . . . [T]herefore the reasoning was that whatever the 6-million is, . . . we were in a position and I would say, would still be in a position, to live with the adjustment, although forced on us to accept.'

[31] Although they were ultimately accepted by E&Y in these circumstances, the publication of Regal's financial results in the form they were in on 16 May 2000 formed the basis of the charge against the appellant on count 1, it being the State's contention that the announcement contained misrepresentations of fact fraudulently made to induce persons using the financials to act to their actual or potential prejudice. The charge set out in the charge sheet was lengthy and convoluted. It included both positive allegations of factual misrepresentations actually made as well as negative allegations relating to alleged fraudulent omissions. The State's case in respect of the latter was not upheld by the court a quo and it was not suggested on appeal that it had erred in failing to do so. The debate on this count thus centred upon alleged misrepresentations of fact actually made in the announcement.

[32] Pruned of the allegations relating to the unproved omissions, the charge read as follows:

'IN THAT, on or about 16 May 2000 and in Sandton in the District of Randburg, the accused, in concert with others or otherwise, did unlawfully, falsely and with the intent to defraud, expressly or impliedly represent to Ernest & Young and/or the Reserve Bank and/or Regal Bank's depositors and/or Regal Holdings' shareholders and/or users of its financial statements:

- That the preliminary results for the year ended 29 February 2000 had been "audited" at the time of publication thereof whereas in fact it had not;
- That Regal Holdings' board had approved the year-end results reflecting earnings per share of 79.96 cents whereas in fact it had not;
- That approximately R18 million branding expenditure had been written off during 2000 whereas in fact such expenses had not been identified and written off;

- That all expenditure incurred by Regal Bank to generate branding income had been written off in the 2000 year whereas in fact R6 million branding expenditure had been deferred; . . . .

Causing

- Ernest & Young to express an invalid or defective audit opinion and/or not to qualify its report;
- Shareholders and/or potential shareholders to buy, sell or hold their shares;
- Depositors to deposit, withdraw or hold their deposits;
- Shareholders, depositors and/or users of its financial statements to accept the financial statements as correct;
- The Registrar of Banks to maintain the bank's registration;

To the prejudice or potential prejudice of Ernest & Young and/or the Reserve Bank and or Regal Bank's depositors and/or Regal Holdings' shareholders and/or users of its financial statements;

WHEREAS in truth and in fact the accused, when he so represented or gave out, well knew:

- That the preliminary results for the year ended 29 February 2000 had not been "audited" at the time of publication thereof;
- That Regal Holdings' board had not approved the year-end results reflecting earnings per share of 79.96 cents;
- That approximately R18 million branding expenditure had not been identified and written off during 2000;
- That all expenditure incurred by Regal Bank to generate branding income had not been written off in the 2000 year and in fact R6 million branding expenditure had been deferred.

. . .

NOW THEREFORE the accused is guilty of fraud.'

[33] The State's case in respect of the alleged misrepresentation relating to the 79 cents EPS which it alleged had not been approved by the board is confusing. The evidence establishes that generally a company's financial statements, once audited, are only published upon approval by its board. The State alleged this had not happened after the meetings on 15 May 2000 and that the financials announcing an EPS of 79 cents had not been so approved. However, having regard to the content of the publication, it is clear that what was announced was not an EPS of 79 cents. Instead it indicated that although the board had approved an EPS in that amount, it had been reduced by 30 cents due to the valuation dispute with the auditors. And we

know from the evidence not only that, on the figures put forward by Regal for audit an EPS of 79 cents was justified but also that, on 26 March 2000, the board had approved a dividend policy to pay a 13 cents dividend on an expected EPS of 79 cents should the financial statements be accepted on audit. Essentially then, even if the board did not approve the financials before they were published (an issue of some dispute – the appellant contended that there had been substantial compliance with this requirement), what was set out in the announcement in regard to an EPS of 79 cents was accurate and the State failed to prove any misrepresentation in this respect.

[34] The allegation in the charge that the appellant knew that all expenditure incurred by Regal to generate branding income had not been written off in 2000 as R6 million of such expenditure had been deferred, is equally confusing. The evidence led on behalf of the State was that branding income could not have exceeded R1 million, and thus R6 million branding expenditure was not available to be deferred. The evidence was, in fact, that R6 million of what had been set out as being Regal's branding expenditure was treated as deferred in order to increase its EPS, but that is not the essence of the misrepresentation alleged against the appellant in the charge. This may well have been the product of careless drafting of the charge, but the State is bound by that which it alleges. The appellant cannot be found guilty of fraudulently misrepresenting that all the branding expenditure had been written off knowing that R6 million branding expenditure had been deferred when expenditure in that amount had not been incurred.

[35] Turning to the other elements of the charge, as proof of the allegation that the appellant had misrepresented that the financial statements as published had been audited whereas they had not, the State relied upon the fact that the statements, as adjusted by Mr Davis (reducing the branding income but adjusting the profits by deferring R6 million expenditure to justify an earnings per share of 50 cents) had not been seen by E&Y nor approved by them before being published. Consequently, so it was argued, E&Y had not signed off on their audit, the appellant knew this and therefore knowingly made a false representation in this regard; as he also did in regard to the R18 million branding expenditure.

[36] There is no magic in the concept of an auditor 'signing off' an audit. As explained by Mr Strydom, the process involves no more than a verbal statement from the auditor authorising the company concerned to go ahead and publish the financials in their final form. But there can be no doubt that the financials in their final form had not been signed off as audited. E&Y had approved neither the deferral of R6 million of the expenditure reflected in the draft financial statements so as to result in an EPS of 50 cents per share nor the statement that R18 million of branding expenditure had been written off. By the same token, the R6 million expenditure deferral had not been disclosed nor approved by E&Y; instead the amount of the operating expenses contained in Regal's statements was merely adjusted.

[37] I am therefore satisfied that in those limited respects the appellant knew that the financial statements contained figures that did not bear the auditors' approval. But that does not in itself justify a conviction of fraud. For that to result, he must have knowingly misrepresented the truth with the intention to induce persons embarking on a course of action to their actual or potential prejudice. It is to this issue that I now turn.

[38] I accept that the appellant felt passionately that his method of valuation was ahead of its time, believed that GAAP was inadequate for this purpose and felt that the auditors ought to have placed a far higher value upon Regal's branding income. I also accept that by adopting the appellant's method of valuation, it may well have been possible to show, as he alleged, that at least R18 million branding expenditure had been written off. However the fact remains that he knew that E&Y, as well as the other accountants and the Reserve Bank, firmly disagreed with his methodology. He also knew E&Y had approved neither R18 million being written off in respect of branding expenditure nor R6 million expenditure being deferred in order to achieve an EPS of 50 cents. Moreover he knew that if the branding income E&Y was prepared to allow was used, Regal's EPS would have been substantially less than that of the previous year – and that Regal's results had been manipulated by way of the R6 million deferral in order to avoid that result.

[39] Thus although the audit process had dragged on for many months, and despite many of the figures used to draw the financial statements having been approved on audit, the inescapable reality is that the figures as ultimately published did not bear the auditor's approval. The appellant not only knew that to be so but orchestrated

their misrepresentation in order to make Regal appear more attractive to investors and depositors than would otherwise have been the case. Not only had the R6 million deferral resulted in a higher EPS value but the announcement was misleading in stating that as a result of Regal having 'absorbed the full brunt' of the R18 million branding expenditure that year, it was 'positioned very powerfully for the ensuing year'. The inference is inescapable that the appellant intended to influence investors and depositors by setting out information that he knew had not been approved by the auditors despite the claim that the financials had been audited; and he must have appreciated that they could act to their actual or potential prejudice if they relied on financial statements falsely declared to have been audited. Consequently, on this limited basis the appellant was correctly convicted of fraud on this count.

Count 2

[40] The charge on this count relates to an alleged misrepresentation made by the appellant to E&Y during the course of their annual audit for the financial year ending February 2000. The State relied upon the content of a standard printed form document headed 'Directors' Remuneration Notification' that company directors are required to complete for use in the preparation of their company's annual financial statements and audit. Under the heading 'Emoluments', it contains a list of items such as director's fees, basic salary, bonuses, and expense allowances, with a space provided alongside each to be filled in by the director in respect of the financial year in question. It is common cause that for the year ending 28 February 2000 the appellant completed and signed such a form in which the only amount inserted was his basic salary of R413 000. Although the date of signature was not inserted, it was admitted at the outset of the trial that it had been signed in March 2000 and that it constituted an advice to E&Y that his remuneration for the year was R413 000 (presumably on the basis that it was made available to E&Y during the annual audit).

[41] As I understood the case of the State both on this and several of the other charges of fraud, reliance was placed on what may be termed a primary misrepresentation made to E&Y to induce them to prepare factually inaccurate financial statements which would represent a consequent, secondary misrepresentation to other users of those statements. In any event, it alleged that

the content of this form was false in that the appellant knew that he had failed to disclose certain additional emoluments he had received, namely;

(a) A bonus of R2 million paid to him by Regal Bank on or about 15 February 2000;

(b) Approximately five million Regal Holdings shares that had been allocated to him; and

(c) An additional amount of approximately R220 000 paid to him by Regal Bank during the period March 1999 to February 2000.

[42] Pertinent to the alleged bonus of R2 million and the five million shares is a letter dated 29 December 1999 addressed by the appellant to the chairman of Regal Bank in which he requested that certain matters be taken up with Regal's board at its meeting in January as a matter of urgency as he saw 'the next three weeks as presenting a brief "window of opportunity" to satisfactorily address my requests, which opportunity may not present itself again'. After having stated that he had largely shouldered the pressures and responsibilities of the bank and that more than 50% of the bank's profits had been generated directly from his desk, the appellant went on to say:

'I submit that my efforts for Regal from inception to date justifies a cash bonus of R2m and a structural re-design of my restraint share allocation. The Greenwich deal crystallizes into focus the gross share allocation distortion that currently prevails. When the Greenwich transaction is completed and new Regal shares are issued to Greenwich shareholders, an unacceptable result thereof will be that certain Greenwich executives will then hold substantially more Regal shares than myself. I may not, and cannot function on an equity platform that is subservient to people under my control. I submit that a fair and reasonable change to my existing equity position should embrace the following:

(i) a further restraint allocation of 5 million shares, subject to a sale embargo thereof over a three year period;

(ii) the prevailing structure (regarding the original allocation of shares) to remain contractually unchanged.

Cognizance must be taken that the rationalization of various listed groups onto the Regal equity platform will expand the number of shares in issue. I am told by the market on a regular basis that (K) is not . . ."in my League". I am certainly not in his financial league (equity and income). I . . . have had to carry the group during its entire history. Justice and fairness must now prevail.

In the interest of protecting and safeguarding shareholders and depositors, this issue should arguably have been rectified proactively by the Board in the past. This letter however should

provide the impetus for driving the process. My patently inequitable financial predicament must be rectified expeditiously. The status quo is untenable.'

[43] It is common cause that the foot of this this letter was subsequently endorsed by the chairman with the comment:

'The non-executive directors of REGAL have unreservedly and unconditionally authorised and approved the contents of this letter relating to cash and the shares requested by the Chief executive officer – Mr Jeffrey Levenstein.'

This endorsement was not dated. However, in a letter dated 26 January 2000 addressed to the chairman of the board by Mr PF Nhleko, at the time a non-executive director of Regal, mention is made of a meeting of the non-executive directors held on Tuesday 25 January 2000. Mr Nhleko went on to confirm that in principle he had no qualms with the appellant's remuneration structure being reviewed and Regal's restraint agreement with the appellant being re-assessed, although he suggested that a remuneration committee should be established in accordance with the 'King Code' for corporate governance.' In the light of this, the endorsement was presumably made by the chairman pursuant to the meeting mentioned by Mr Nhleko.

[44] Dealing first with the State's allegation that the appellant failed to disclose a bonus of R2 million, it is common cause that Regal paid him that sum on 15 February 2000. In essence the State's contention is that the appellant asked the board for a R2 million bonus in his letter of 29 December 1999; was thereafter paid R2 million on 15 February 2000; and that must therefore have been the bonus for which he had asked.

[45] Things are not always as simple as they seem. The sum of R2 million was paid the day after the appellant had concluded a written agreement with Holdings and Regal Bank. This agreement records that in 1995 the appellant had signed a restraint of trade agreement in which, as consideration for the restraint obligations to which he had bound himself, he had been issued and allotted shares in Regal Bank which had been exchanged for a like number of ordinary shares in Holdings prior to its listing in February 1999. It went on to record that in recognition of the value of the appellant's 'know how and intellectual capital', the necessity for the Regal group to continue to have that benefit and in order to protect Regal from competitors, agreement had been reached to modify and amplify the terms of the original restraint

– and that as consideration for the additional restraint obligations (the terms of which were spelled out in the agreement but are unnecessary to repeat) Regal agreed to pay the appellant a cash amount of R2 million and to transfer to him five million ordinary shares in Holdings. Clause 4.2 of the agreement reads:

'The [appellant] acknowledges that, if he is not restricted from competing with Regal, Regal will potentially suffer considerable economic prejudice, including loss of custom and goodwill. Accordingly, Regal considers it essential to protect the Regal's interests that the [appellant] agrees to a restraint of trade undertaking in its favour to ensure that [he] will be precluded from carrying on certain activities which would be harmful to the business of the Regal; restraint period being 3 years.'

[46] In the light of this, the appellant testified that the R2 million he received was not in fact a bonus but a payment made in restraint of trade. As mentioned by the court a quo in its judgment, he also pointed out that in his tax return for the year 2000 he had recorded the R2 million payment as being a non-taxable receipt or accrual forthcoming from a restraint of trade.

[47] At the time the R2 million was paid, amounts paid to employees to compensate them for binding themselves to restraint agreements, and thereby sterilising a part of their earning capacity, were indeed regarded as being receipts of a capital nature and not as taxable income,[4] although a change in that regard was imminent. Under the Taxation Laws Amendment Act 30 of 2000, the definition of 'gross income' in the Income Tax Act 58 of 1962 was shortly due to be amended to render taxable any compensation paid for a restraint of trade received or accrued on or after 23 February 2000[5] (this might explain both why the appellant regarded the matter as urgent and his reference to a 'window of opportunity' that might not again present itself, but that issue was not explored during the trial). But as the payment to the appellant was made before 23 February 2000, if it was indeed a restraint payment he was perfectly entitled to regard it as being non-taxable.

[48] The R2 million was reflected in Regal Bank's books of account as being a payment in respect of a restraint of trade and dealt with as such: it was reflected under the title 'Intellectual Capacity' as a fixed asset with the amount being capitalised and the charge to the income statement spread over a period of ten

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[4] See *Macguire v Commissioner, South African Revenue Service* 2009 (4) SA 345 (SCA) and ITC 1338 (1980) 43 SATC 171 (T).

[5] See s 13(1)(*f*) and s 22(2)*(a)* of the Taxation Laws Amendment Act 30 of 2000.

years. This shakes the very foundation of the State's case. If Regal regarded the payment as being one in restraint of trade, and it was accepted as such by the appellant, then it cannot be construed as having been a bonus. In order to succeed on this issue, the State was therefore obliged to show that the restraint agreement of 14 February 2000 was not what it purported to be.

[49] The State did not seek to prove that the agreement was a fraud on the fiscus (to avoid the payment being subjected to tax) nor did it allege that both Regal Bank and Holdings, both of whom signed the restraint, were complicit in such a fraud. In addition, the representatives of Regal who signed the agreement were not called to explain why they had done so. That is a major difficulty for the State. The mere fact the appellant was paid R2 million after he had asked for it as a bonus does not necessarily lead to the conclusion that Regal bowed to his demands and treated it as such. Restraints of trade are commonplace, and it may well be that on agreeing to pay such a large sum to the appellant, Regal felt it would be best to protect itself at the same time by extending the terms of the original restraint. That is of course speculation, but it illustrates that Regal may well have had some good reason to pay the amount as a restraint consideration rather than as the bonus originally requested.

[50] Consequently, the existence of the restraint agreement cannot be ignored on the simple basis that the appellant had initially asked for a bonus. Importantly as appears from Mr Nhleko's letter of 26 January 2000, Regal's non-executive directors had agreed to the appellant's restraint agreement being re-assessed at their meeting the previous day. Not only does this support the appellant, but it provides the explanation for the subsequent restraint amendment. Indeed when Mr Nhleko testified on behalf of the State, he confirmed that the non-executive directors had agreed that an amount of R2 million be paid to the appellant as a restraint and that Regal's board had subsequently approved and ratified that decision at a board meeting. This had led to the restraint agreement being drawn up and signed on 14 February 2000. I have read the judgment of the minority in this matter and in the light of these facts, and with great respect, their conclusion that an inference is to be drawn that the R2 million was paid to the appellant as a bonus disguised as a restraint consideration, is unsustainable. It flies in the face of the existence of a written restraint agreement and Nhleko's testimony in regard thereto.

[51] There is thus no justifiable reason on the evidence to go behind the terms of that agreement. The State therefore failed to prove that the R2 million paid to the appellant after that agreement was concluded was not in fact a restraint payment but a bonus.

[52] The finding of the court a quo in convicting the appellant of fraud on this issue was somewhat equivocal. It concluded that the R2 million had been a bonus 'or at least a material benefit' (seemingly as envisaged by s 297 of the Companies Act to which I shall revert below) which the appellant had been obliged to mention in the director's remuneration notification. This reasoning is fallacious. Not only was the amount not shown to have been a bonus but the appellant was charged with failing to declare a bonus and not with a fraudulent non-disclosure of a 'material benefit' in the form of a restraint payment. In the result, the payment of R2 million was incorrectly taken into account in considering whether the appellant was guilty of the fraud with which he was charged.

[53] The finding of the court a quo that the failure of the appellant to mention the five million shares Regal had agreed to give him also constituted a fraud, can similarly not stand. Despite the appellant's agreement with Regal, those shares were never transferred to him and, quite simply, there was no obligation on him to declare a benefit he had not received. Indeed during argument the State informed the court a quo that it did not seek the appellant's conviction in regard to his failure to mention the shares. Startlingly, the court did not agree and proceeded to convict the appellant of fraud in that respect. Not surprisingly, and quite correctly, the State did not seek to persuade this court to accept the correctness of that decision.

[54] I turn now to the sum of R220 000 which the State alleged the appellant had fraudulently not disclosed. This issue related to various amounts of the appellant's household expenditure that had been paid on his behalf by Regal. The court a quo correctly found that the State's evidence fell short of establishing what sums were paid but founded its conviction on the appellant's own testimony that Regal had expended an average of about R5 000 per month (a total of approximately R60 000) during the year in question in respect of his domestic expenses such as telephone, lights and water etc, and held that this should have been declared.

[55] The appellant alleged that he had an office at his home where he worked after hours on company business, and that Regal had agreed to pay these amounts, in

effect, to reimburse him for the expenditure he had incurred on its behalf in providing him with a working space. This he said had been the on-going position since 1995, and the State did not dispute this. Nor did it dispute that Regal had agreed to these amounts going through its books. Arrangements of this nature are commonly made in the commercial sector and there is no reason to reject the appellant's evidence on this as false. That being so, the R60 000 paid on the appellant's behalf cannot be construed as remuneration. On the contrary, if Regal had not paid it, the appellant would have had to have recovered the sum from Regal. The payments Regal made merely short-circuited that process, and can in effect be regarded as no more than the reimbursement of expenditure the appellant had incurred on its behalf. It was therefore not remuneration that had to be declared.

[56] In my judgment, then, the State failed to establish that the appellant's directors' remuneration notification was factually incorrect in all three respects alleged in its charge and the appellant's conviction of fraud on this count cannot be sustained.

[57] In the light of this conclusion, it becomes necessary to consider the alternative charge, namely, an alleged contravention of s 249(1) of the Companies Act which reads:

'Any person who in any statement, return, report, certificate, financial statement or other document required by or for the purposes of any provision of this Act, whether in non-electronic or electronic format, makes a statement which is false in any material particular, knowing it to be false, shall be guilty of an offence.'

[58] It was argued by the State that the appellant had failed to disclose all emoluments he had received during the year 2000 in the directors remuneration notification, although it correctly abandoned any reliance on the five million Regal shares on this count for the reasons I have already given. In the light of my conclusion that the payment of R60 000 amount to a reimbursement of expenditure made on Regal's behalf that sum, too, did not have to be mentioned. Consequently the State focussed its argument on the R2 million payment which, so it was submitted, for whatever reason it was paid, was nevertheless an 'emolument' that had to be disclosed under s 297(1)*(a)* of the Companies Act (it required the annual financial statements of a company to contain particulars showing 'the amount of the emoluments received by directors').

[59] Section 297(2A) of the Companies Act went on to provide an extremely wide definition of what was to be construed as 'emoluments', including the monetary value of any 'material benefits'.[6] I accept that it was important for shareholders to know what the company was paying its directors and that s 297 was designed to achieve that end. But whether the appellant had been obliged to declare the R2 million as an emolument, in the directors' remuneration notification he signed, even if he had been paid that sum, is irrelevant and unnecessary to decide, despite the issue having been dealt with at length both in evidence and argument.

[60] In criminal proceedings it is always necessary to bear in mind the details of the offence which the accused is alleged to have committed as set out in the charge sheet, it being the exhaustive memorial of the case against him.[7] On this count, it was alleged that the appellant had contravened s 249(1) of the Companies Act, not by making false statements in the directors' remuneration notification, but by making 'statements in the year 2000 preliminary results . . . which were false in a material particular, knowing them to be false, in the respects as set out in Count 2'. Accordingly the content of the directors' remuneration notification and whether a payment in restraint of trade should have been shown as an emolument is irrelevant to the charge. What has to be considered is whether the preliminary results (ie those presented to E&Y for audit) contained the false particulars alleged in count 2.

[61] It is common cause that the R2 million paid to the appellant was reflected in those results as being payment made in restraint of trade and, as I have already mentioned, it is treated in the books of account as such. E&Y were aware of it, and informed Regal's management that as a restraint payment it should be disclosed. Indeed in due course it was reflected in the audited financial statements as a restraint payment. The State therefore failed to establish that the appellant falsely made statements in the year 2000 preliminary results as it alleged, and he cannot be convicted on the charge which he faced in the alternative on count 2.

Count 3

[62] This charge concerns the immovable property known as 93 Grayston Drive, Sandton ('93 Grayston') which had been purchased by another Holdings subsidiary, Regal Property Investments (Pty) Ltd ('Regal Property'), with the intention of building offices to be leased to generate rental income. This development started during

[6] Section 297(2A)*(e)*.
[7] *S v Hugo* 1976 (4) SA 536 (A).

2000 and it was estimated that the work would be completed towards the end of 2001.

[63] The appellant however devised a scheme to convert 93 Grayston into a financial instrument by selling it for delivery at a future date with the profit derived from the sale being brought into Regal's income statement from the date of contract until transfer eventually took place. To achieve this end, on 17 November 2000 he signed a number of transactions relating to 93 Grayston:

(a) An agreement of sale concluded between Regal Property on the one hand and Mettle Properties International (Pty) Ltd ('MPI') under which 93 Grayston was sold to MPI for R600 million with transfer to be effected as soon as reasonably possible after the 'effective date' (defined as being 1 January 2012). This sale (referred to as the 'forward sale agreement', a convenient title which I intend to use as well) was subject to a resolutive condition that unless Regal Bank granted MPI the funding necessary to pay the purchase price by date of registration of transfer, the agreement would lapse and be of no further force and effect.

(b) A preference share agreement between Regal Bank and MPI.

(c) A put option agreement between Regal Property and MPI under which MPI was entitled to sell 93 Grayston back to Regal Property in 2017.

(d) A call option between Regal Property and MPI in terms of which Regal Property could buy all the issued shares of MPI from Mettle Limited ('Mettle').

[64] It was admitted by the appellant that he had provided E&Y with the forward sale agreement during the 2001 year-end audit. However, due to the resolutive condition just mentioned, E&Y were not happy to treat the agreement as an unconditional sale as MPI was under no obligation to buy unless Regal Bank provided the purchase price. This led to the appellant deleting the resolutive condition, and the agreement, so amended, was signed on 7 March 2001 but backdated with effect to 28 February 2001 to ensure that it fell within that financial year. A copy of the amended agreement was then made available to E&Y.

[65] Unbeknown to E&Y, the same day the amendment to the forward sale agreement was signed, the appellant also concluded an amendment to the preference share agreement with MPI, inserting a term rendering the sale of 93 Grayston conditional upon Regal Bank subscribing for the preference shares as regulated by the preference share agreement and that, if Regal did not do so, the

sale agreement would lapse. The effect of this was to restore the position as it had been before the amendment.

[66] There can be no doubt from this that the appellant intended to mislead E&Y. It is not without significance that. according to Mr Davis, when E&Y first requested a copy of the forward sale agreement (prior to its amendment), the appellant told him not to disclose anything relating to the Mettle deals to the auditors without consulting him. There can of course be no doubt that E&Y were entitled to see the various other documents relating to 93 Grayston, as Mr Davis candidly admitted. Without them, the forward sale agreement did not paint a full and proper picture of what the scheme entailed; but it was given to E&Y as proof of an unconditional sale of the property which in fact it was not. Had all the relevant agreements been disclosed to them, E&Y would not have allowed any income to be recognised in terms of the scheme. Ultimately, however, labouring under the misapprehension that there had been an unconditional sale of 93 Grayston, and after having obtained various valuations in respect of the property, E&Y allowed Regal to recognise income derived from the sale in an amount of R54 million of which R36.5 million was brought into Regal's income statement with the balance of R17.5 million being taken to the statement of audit difference as an under-accrual of income. The R36.5 million reflected as income accounted for approximately 41% of Regal's total income for the year and increased its EPS by some 40 cents.

[67] It is readily apparent from this that the appellant purposefully withheld necessary information relevant to 93 Grayston from E&Y to prevent them from learning the true state of affairs, to cause them to audit the financial results to show that Regal had performed much better than it had in fact, and to make Regal a more attractive investment haven than it was in truth. The obvious intention in doing so was to mislead not only E&Y but also all users of Regal's audited financial statements and to cause them to act to their prejudice by taking financial decisions on the strength of incorrect information. The appellant was correctly convicted of fraud on this count.

Count 4

[68] This count also relates to an alleged misrepresentation of fact affecting the audit of Regal's 2001 financial statements. It is common cause that Pekane Investments (Pty) Ltd ('Pekane'), a wholly owned subsidiary of Worldwide African

Investments Holdings Ltd, had acquired 15% of the shares of Holdings and this had led to Mr Nhleko, already mentioned when dealing with count 1, being appointed to Regal's board. Tension later arose between the appellant and Mr Nhleko, who indicated that Pekane intended to sell its 15% shareholding in Holdings. The appellant attempted to persuade him not to do so but, in December 2000, Pekane offered the Holdings shares it held to Regal Bank at R3.90 per share (less than its earlier offer of R5,50 per share), which amounted to a total consideration of approximately R60.2 million.

[69] Regal Bank purchased these shares. It did so as it feared that if it did not, the shares would be dumped onto the market, possibly causing a collapse in the share price. Mr Van der Walt testified that the appellant had stated that Pekane had them 'over a barrel' while the appellant, in his own evidence, described Pekane's threat to sell as 'pure unadulterated blackmail'. The appellant succumbed to the pressure and on 29 December 2000, Regal Bank issued a cheque, co-signed by the appellant, in the amount of R60.2 million as payment for the shares. In order to raise the funds to pay this sum, Regal had to raise a loan from ABSA bank secured by a preference share investment it had with ABSA. Pekane delivered the share transfer certificates to Regal Bank together with blank transfer forms to enable Regal to transfer the shares to whomever it so chose.

[70] It appears that the decision to buy Pekane's shareholding was influenced by a opinion the appellant had obtained from an attorney, Henry Vorster, who had suggested that under s 38(2)(*c*) of the Banks Act, the shares could be purchased by Regal Bank in order for it to place them with a purchaser within six months. I would prefer not to comment on the validity of this opinion but it gave rise to the appellant developing a 'conduit strategy' in which he relied on s 38 as entitling the bank to hold the shares with the view to subsequently dispose of them.

[71] Having purchased the shares, Regal's executive directors were requested to assist in finding a buyer for them. This led to Mr JC van der Walt of Regal's executive committee approaching a company known as Hanover Re to attempt to persuade it to buy the shares (the approach was unsuccessful). In addition, as appears from the minutes of a Regal Board meeting on 31 January 2001, it was decided that the shares could be distributed to loyal Regal supporters at a discount. Similarly, a Regal Board minute of 30 May 2001 reflects that the dividends received

from the Pekane shares were to be used to pay dividends to members of Regal's staff who were to receive shares in due course. And not only did Mr van der Walt approach Hanover Re to sell the shares but he was also tasked to establish another trust (referred to as the 'Executive Trust') to create a 'backstop' in which to place the shares should Regal be unable to find a buyer. All of this indicates clearly that Regal had unconditionally purchased the shares from Pekane..

[72] Despite this, at the appellant's instruction the R60,2 million Regal paid for these shares was incorrectly reflected in its books as an 'overnight loan' (viz a loan with no agreed terms as to its repayment). It was argued on behalf of the appellant that this was more consistent with what had occurred than with the company purchasing its own shares. That cannot be accepted. Regal did not buy the shares on behalf of another nor did it lend the purchase price to Pekane as was reflected in the books. It bought the shares in an attempt to avoid their price dropping and in the hope that at some stage it might find a buyer to whom it could sell them.

[73] In the light of this there can be no doubt but that the appellant orchestrated Regal Bank purchasing Pekane's shareholding in Holdings for approximately R60.2 million and reflecting the price it paid as an overnight loan to Pekane in order to obscure the truth. This gave rise to the State averring in the charge sheet that he had misrepresented to E&Y or the Reserve Bank or Regal Bank's depositors or Holdings' shareholders or users of its financial statements that Regal had made a loan to Pekane in an amount of approximately R60 million which was secured by shares with a market value of approximately R70 million whereas in truth and in fact no such loan had been made, and it had bought the shares from Pekane.

[74] This charge flows from events that occurred during an audit meeting E&Y held on 9 March 2001 with Regal's management, including both the appellant and Mr Davis. The latter testified that when the issue of the overnight loan to Pekane was raised there was an awkward silence in the room, and that he had just blurted out that the loan was secured by a portfolio of shares valued at R70 million. The appellant did not correct him and, in fact, later congratulated him, saying that his answer had been 'brilliant'. Not only did the appellant endorse by silence what both he and Mr Davis knew was untrue, but the falsehood was subsequently confirmed in writing by Mr Davis in a memorandum which was approved by the appellant and forwarded to E&Y a few days later.

[75] Mr Strydom testified that he had no reason to disbelieve what he had been told and, consequently, a R60.2 million asset was reflected in the financial results as an overnight loan on which income of approximately R500 000 was brought into Regal's income statements as interest. He further testified that if he had been aware of the true nature of the R60 million payment (that it was a purchase price of Regal shares being bought from Pekane) the loan would have been reversed, the share capital in Regal's financial statements would have been reduced and a disclosure made in the financial statements that Pekane had sold its shareholding in Regal.

[76] It was clearly to avoid this occurring that the appellant endorsed the false representation of the facts made by Mr Davis. Any doubt about this is removed by the fact that after the sale of the shares Pekane continued to be reflected in Regal's records as a shareholder, which provides the clearest evidence of an intention to obscure the sale of the shares. It was only on 23 June 2001, during the course of the Investec due diligence that Mr van der Walt informed Mr Strydom of the true state of affairs and that Pekane had in fact sold their shares to Regal for R60.2 million.

[77] It is readily apparent from this that the appellant made himself guilty of a misrepresentation of the facts to the auditors. Whether he believed in the 'conduit strategy', which he said 'shaped his mind' and which he said was supported by the opinion of attorney Vorster, is irrelevant. He purposefully misled the auditors, once more with the intention to ensure that certain vital financial information was not reflected in the audited results of Regal. He was clearly correctly convicted on this charge.

Count 5

[78] This charge also relates to the preparation of Regal's 2001 financial statements. It arises out of representations made in regard to a trust Regal had established on 15 March 1996, was referred to by its shortened name of the 'Shareholders Trust'. The State alleged that during the period November 2000 to June 2001, during the course of E&Y's annual audit, the appellant fraudulently represented to them that the Shareholders Trust had sold eight million Holdings shares to a company known as Mettle Ltd ('Mettle') or one of its subsidiaries at R5,50 a share, (a total consideration of R44 million), that the transaction was part of the normal operations of the trust, that the sale was an unconditional, out and out sale, and that the price was an indication of the market value of the shares whereas

he knew that the shares had not been sold as part of the normal operations of the trust and that the transaction relating to the shares had formed part of a structured financial deal with Mettle, was not a true indication of market value and was not an unconditional arm's length sale.

[79] In August 2000, Deloittes had been appointed by the Registrar of Banks to conduct a review of corporate governance at Regal. In its report, Deloittes drew attention to the fact that as at 31 August 2000 the Shareholders Trust held some five million Holdings shares while the Incentive Trust (another Regal trust) held in excess of 9.5 million such shares, and that the two trusts had acquired more than 10 million Holdings shares in the previous six months. The minutes of trustees meetings recorded that this had been done 'to take advantage of the lower levels of the share price'. Importantly, these acquisitions had been funded by substantial advances Regal Bank made to the trusts that were secured only by the shares themselves. The loans were not being repaid and, including interest, the bank had an exposure of R87.4 million. Much of this was unsecured; at the then prevailing price of Holdings shares, the value of the Shareholders Trust shareholding was only R17.6 million as opposed to its debt to Regal Bank of some R36 million while the Incentive Trust's debt of in excess of R51 million was secured solely by its shareholding in Holdings of some R33.3 million.

[80] It is common cause that when Deloitte's presented their findings to the Registrar of Banks at a meeting attended by the appellant on 23 October 2000, the appellant explained that the aim of the trusts was not to support the share price but to 'remove shares from weak shareholders and to sell them to strong holders'. He also claimed that eight million of these shares were to be sold at R5.50 per share within the course of the following week. Subsequently, during November 2000 the appellant informed the Reserve Bank in writing that eight million shares had indeed been sold to Mettle at a price of R5.50 which was 'in excess of the average price' at which shares had been purchased in the first instance. These are the shares which the State alleges were not in fact sold to Mettle.

[81] On 1 December 2000, the Financial Mail reported that Mr Hein Prinsloo of Mettle had stated in an interview that Mettle was not holding a stake in Regal and that the sale of eight million Regal shares had merely been the back leg of a structured finance deal. This, understandably, generated some concern on the part

of the Reserve Bank, and it requested E&Y to investigate the issue of the sale of the shares as part of its annual audit of Regal. It should immediately be recorded that in Regal's draft financial statements for the 2001 financial year, a company in the Mettle group, Mettle Securities, had been reflected as being a major shareholder with eight million Holdings shares.

[82] Mr Strydom of E&Y testified that the sale of these shares was raised at various audit committee meetings attended by the appellant and that the appellant had told the committee that Mettle had erroneously denied any connection with Regal in order to avoid bad publicity when talking to the press. He specifically stated that the shares were unconditionally registered in Mettle's name. Mr Strydom's evidence on this is supported by the minutes of the audit committee meetings. And in a letter addressed to E&Y on 26 April 2001, the appellant again recorded that the sale of the shares to Mettle 'was unconditional and that the shares are registered in Mettle's or its nominees' name'.

[83] Despite the appellant's assurances to the contrary, in fullness of time it was revealed that there had not been an out and out sale of the shares and that, instead, the appellant had been the architect of a complicated structure of agreements of which the purported sale of the shares had been but one. It is not necessary for present purposes to consider the various transactions in any detail (they comprised a preference share agreement, a subordinate loan agreement, a portfolio management agreement and put and call option agreements). It suffices for present purposes to mention the following important features:

(a) Regal subscribed to preference shares to a value of R125.5m in a Mettle subsidiary known a Hollowprops.

(b) Within the Mettle group, the R125.5 million preference shares subscription price was used to acquire the eight million shares from the Shareholders Trust for R44 million, which was used to settle the trust's liability to the bank.

(c) The eight million shares were thereafter held in a portfolio created for the benefit of Regal and managed by Mettle Securities but vested in a company in the Mettle group known as Metshelf Trading 1.

(d) R80 million of the R125.5 million subscription price was placed by Mettle on deposit with Regal Bank and vested in the aforementioned portfolio for the benefit of Regal.

(e) As appears from this, Regal purportedly paid Mettle R125.5 million of which R124 million was used to buy shares from the Shareholders Trust for R44 million and R80 million was placed on deposit with Regal (the difference of R1.5 million seems to have been a fee earned by Mettle for doing this). However, as the R44 million was in fact used by Regal to extinguish the debt owed by the trust to Regal Bank, there was merely a 'round tripping' of money (as so aptly described in the evidence).

(f) In terms of a put option, Regal was extended the option to sell its preference shares in Hollowprops to Metshelf Trading 1 while, in terms of a call option, Mettle granted the Shareholders Trust the option of purchasing the entire share capital of Metshelf Trading 1. This would include the Metshelf 1 portfolio which consisted of the eight million Holdings shares and the R80 million invested with Regal Bank.

(g) Apart from the R1.5 million fee Mettle earned, the only beneficiary of the Metshelf 1 portfolio was Regal itself, and all the risks and rewards of the scheme rested with it.

[84] From this it appears that Regal was in effect 'sitting on both sides' in respect of the deal and 'transacting with itself with Mettle interposed as a party to create the impression that it was an arm's length deal' as alleged by the respondent. Oblivious to this, E&Y audited the various transactions as being separate, there having been nothing in the books of account to suggest the existence of a link between them. The sale of the eight million shares was thus treated as unconditional, and the financial statements audited on that basis. Mr Strydom, who had been responsible for the audit, testified that it was only much later, at the time of the Investec due diligence when he was alerted by Mr van der Walt to the truth, that he realised that Regal had in effect bought its own shares from the Shareholders Trust and housed them in a portfolio of which it was the sole beneficiary and in respect of which it bore all the risks and rewards.

[85] It is clear from this that Regal's 2001 financial statements as audited reflected incorrect information as a result of the appellant's misrepresentations and that he had lied, both to the audit committee and in his letter to E&Y dated 26 April 2001, by stating that the sale of the shares to the Mettle subsidiary was an unconditional sale and not part of a structured financial arrangement. Thus, knowing that E&Y wished to investigate the issue, he failed to disclose the full suite of transactions that made up the arrangement with Mettle and intentionally gave them false information with

the clear intention to deceive. He achieved that goal. The evidence of E&Y was that had the true nature of the transaction been known, the sale would not have been recognised and the eight million shares would have been cancelled against Regal's share capital. The failure to do so led to Regal's assets and liabilities being incorrectly increased by R80 million, its profits being inflated by R3 million and its shareholders' equity being over-valued by R44 million.

[86] The appellant clearly wished to make Regal appear to be in a better financial position than it was. And he pursued this objective by withholding crucial information from the auditors knowing that the financial statements would be used by interested parties to make investment decisions. The prejudice, actual or potential, this caused is obvious. I have no reservation in confirming the appellant's conviction of fraud on this count.

Count 6

[87] The charge on this count flows from dealings Regal had with Sempres Ltd ('Sempres'), a company that held certain intellectual property relating to telecommunications in which Regal was interested. Regal, in turn, had a banking licence and held intellectual property relating to financial services. Each side attached a value to its respective intellectual property, and an agreement was negotiated for each to acquire the right to use the intellectual property of the other for their mutual benefit. This scheme was to be funded by means of a share swop arrangement, with a proposed smaller component involving the purchase of each other's shares. The effect of both the share swops and the share purchases would be cash neutral. However, a proposed third component was for Regal Bank to advance Sempres R5 million as a loan to enable it to fund certain operations.

[88] According to Mr van der Walt, Regal Bank's executive committee was uncomfortable with combining the loan application with the other components of the scheme, being of the view that a loan should 'stand on its own feet and should be viewed independent from the share swop'. It thus resolved that the Sempres transaction would only be considered if Sempres did not also insist on a loan as a condition of entering into the agreement.

[89] The appellant's attitude was that although the executive committee could disapprove having a loan built into the Sempres transaction as a condition, it was not

responsible for the approval of loans made by Regal Bank, that being a function that fell within his operational mandate. He therefore removed the condition from the draft agreement and, at a subsequent meeting held on 21 February 2001, he informed the executive committee that the lending condition had fallen away. As a result of this, the Sempres agreement, from which the loan condition had been removed, was signed on 7 March 2001 and was thereafter approved by Regal's board on 16 March 2001.

[90] On 26 April 2001, some six weeks after the Sempres agreement was concluded, Regal advanced a loan of R5 million to Sempres. Once more this was not done in the form of a simple loan but was the product of a complicated structure of transactions involving a number of parties in which Regal Bank purchased five million Sempres shares for R5 million from a third party; but which also involved put and call options (again, the details of these transactions need not be discussed).

[91] What the appellant had not informed the executive committee was that Sempres' application for a R5 million loan was going to be considered by the credit committee of the bank. But, although he may have acted in an underhand manner by not disclosing this to the executive committee, that is not the subject of the fraud levied against him. The charge is solely that he fraudulently represented to the boards of Regal Bank or Holdings that the Sempres agreement would be cash neutral whereas 'Regal Bank intended to or made a loan of R5 million in terms of the transaction'.

[92] The appellant's defence to this charge was of course that the loan to Sempres was a separate transaction to the Sempres transaction which had indeed been cash neutral. The State sought to rebut this defence by relying upon the evidence of Mr van der Walt and of Mr Diesel to the effect that the executive committee had made clear to the appellant that no loan at all should be extended to Sempres.

[93] Under cross-examination Mr van der Walt stated that the executive committee had said it would not entertain the Sempres transaction 'in any way, shape or form whether by means of a separate application or not if there was a request for funding'. However his testimony was that when the original Sempres proposal had been debated it had been decided 'that we would not entertain the lending part, the R5 million loan part, as part of that transaction'. When pressed on this in cross-

examination and asked whether the transaction relating to the purchase and swopping of shares was interlinked with the loan or whether they were distinct and severable, Van der Walt replied:

'Initially they were presented as one and at the insistence of the executive committee they became separate.'

This comment, taken with Mr Van der Walt's comment mentioned above that the loan 'should stand on its own feet and be viewed independent from the share swop' is consistent with the appellant's case that the issue of a loan became a separate issue.

[94] The evidence of Mr Diesel failed to throw any clearer light upon the matter. He stated at the outset that his understanding of the Sempres transactions 'was somewhat limited'. When it was put to him that the transaction with Sempres was concluded without any precondition relating to the loaning fund and that the loan was thereafter separately considered and granted but not as part of the transaction, his reply was that this 'did happen'.

[95] In these circumstances the State's evidence fell short of establishing that the executive committee had prescribed that no loan should be granted to Sempres if the share–swop agreement was concluded. Indeed much of the State's evidence was to the effect that the loan application should be considered not as part of the Sempres transaction but as a separate issue, which supports the appellant's version. After all Regal Bank was in the business of lending money, and there could have been no reason why it should not have advanced Sempres a loan, subject of course to it being approved like any other.

[96] While I accept that Regal in fact paid R14.1 million to Sempres for its right to use the latter's technology, and to that extent the transaction was not 'cash neutral' as found by the trial court, this does not mean that the appellant was guilty of the fraudulent misrepresentation with which he was charged. The R14.1 million was paid to Sempres in terms of clause 7.1 of the Sempres transaction to which Regal had knowingly bound itself, and formed no part of the loan Regal subsequently made to Sempres. It is thus irrelevant to the State's charge that the appellant fraudulently misrepresented to Regal that the transaction was 'cash neutral' as it intended to make a loan of R5 million in terms of the transaction. It was the loan, and not the payment of R14.1 million that formed the subject of the charge. The court a quo thus

convicted the appellant on the basis of facts irrelevant to the charge. Not only can the conviction not stand for that reason alone, but the State failed to establish that the R5 million advanced to Sempres was part of the Sempres transaction rather than as a separate transaction concluded by Regal in the course of its normal banking activities. The appellant was wrongly convicted on this count.

Count 7

[97] On this count the appellant was charged with having contravened s 38(1) of the Companies Act which prohibited a company giving financial assistance for the purpose of a purchase of any of its shares or shares of its holding company. Section 38(3)*(a)* further provided that upon breach of the section, every director or officer of such a company was guilty of an offence unless it was shown that he or she had not been a party to the contravention. The object of s 38 was to avoid a company's capital being diluted by it supplying funds for the purchase of its own shares to the detriment of its creditors who were entitled to look to the company's paid-up capital to discharge their debts.[8]

[98] It is trite that a charge should be framed in language that does not leave an accused to speculate as to the true nature of the charge and the allegations he or she has to meet.[9] Section 35(3)*(a)* of the Constitution prescribes that the right of an accused to a fair trial includes the right to be informed of the charge with sufficient detail to answer it. Furthermore s 84(1) of the Criminal Procedure Act 51 of 1977 lays down that 'a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge'. And in that regard the comment of Wessels CJ in *R v Alexander & others* 1936 AD 445 at 457, albeit made many year ago, remain apposite. He said:

'What is the object of an indictment? Its real purpose is to inform the accused in clear and unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him.'

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[8] See *Lewis v Oneanate (Pty) Ltd & another* 1992 (4) SA 811 (A).

[9] Eg *S v Hugo* 1976 (4) SA 536 (A) at 540E-G.

[99] The State was consequently obliged to clearly allege when, to whom and in what amounts it contended that Regal had advanced financial assistance for the purchase of its shares. But, once again, the charge of the State is vague and confusing. It reads as follows:

'. . . [D]uring or about the period October 2000 to April 2001 and in Sandton in the District of Randburg, the accused, in concert with others or otherwise, unlawfully and intentionally, by means of loans, guarantees, the provision of securities or otherwise, directly or indirectly, gave financial assistance to the amount of approximately R125m, to Mettle SPVs and/or JL Associates and/or Levenstein Data and/or other persons or entities, for the purpose of or in connection with the purchase of shares of Regal Bank's holding company, Regal Holdings, which financial assistance did not constitute the lending of money in the ordinary course of the business of Regal Bank.'

[100] Rather than clarifying the details of what the State's case might be, the request for particulars to the charge and the State's reply served rather to aggravate the uncertainty; although in an answer that bore no relation to an irrelevant question as to what the 'entrenched ordinary course of business of Regal Bank' may have been, the State stated:

'As at date of curatorship, the records of Regal Bank reflected that the bank had lent money to related parties to buy Regal Holdings' shares to the amount of approximately 45-50% of its shares (at the value of approximately R190 million), with the sole security being the pledge of Holdings shares to the bank.'

[101] It should be mentioned that after the Metshelf 1 structured scheme (detailed in count 5) had been concluded, Regal entered into two further similar schemes with Mettle (referred to as Metshelf 2 and Metshelf 3), each of which involved a preference share investment to the amount of R10 million (apart from the amounts involved the schemes were identical to Metself 1). In the State's heads of argument it was suggested that the reference in the charge to 'Mettle SPVs and/or . . . other persons or entities' included the three Metshelf schemes and various Regal trusts. But although it may well have been the intention to embrace all the Metshelf transactions, it is almost inconceivable that there was not specific mention of the trusts if it had been intended to include them.

[102] More importantly, whatever the intention of the framer of the charge may have been, without the trusts being mentioned the appellant was not to know that this

charge related to advances Regal had made to them. Certainly the vague reference to ‘other persons or entities’ in the charge can hardly be seen as being an adequate identification of the trusts. The net could hardly have been thrown wider or more vaguely. It would not be fair to the appellant, and would constitute a breach of his rights to a fair trial under s 35(3)*(a)* of the Constitution, for the charge to be regarded as embracing allegations of loans to the trusts.

[103] Despite this, the court a quo accepted that the Shareholders Trust and the Incentive Trust were ‘other entities’ as envisaged in the charge and found the appellant guilty on this count by reason of the fact that they were entities to whom advances had been made for them to purchase Regal’s shares. In the light of what I have set out above, the advances to the trusts should not have been taken into account in assessing the appellant’s guilt on this charge, and the appellant was incorrectly convicted by the court a quo doing so.

[104] I turn to consider whether there are other transactions that are adequately covered by the charge in the manner in which it is framed. The key to unravelling the confusion lies, in my view, in the reference to ‘Mettle SPVs’ and the sum of R125 million. The inference is irresistible that the framer of the charge intended to refer to the Metshelf 1 scheme (to which I have referred in count 5), albeit without appreciating that only R44 million of the R125.5 million purportedly paid to Mettle was for Regal shares. Indeed I understood counsel for the respondent to concede this to have been the case and, ultimately, to limit the State’s argument to Metshelf 1 and to contend that the purchase of Regal’s shares from the Shareholders Trust under that scheme had been financed by Regal.

[105] At first blush the State’s argument is plausible as, ex facie the document of sale in Metshelf 1, Regal advanced Mettle R 125,5 million of which R 44 million was used to pay for eight million shares sold by the Shareholders Trust. But once more, things are not that simple. It must be remembered that a sale embraces the concept of the object of the sale, often referred to as the *res vendita*, being transferred from one person to another, and the general rule is that an owner who sells, on receipt of payment, is obliged to transfer ownership to the purchaser.[10] On the State’s own case this is not what happened. In count 5 it alleged that there had been no sale of the eight million shares to Mettle; that such purported sale had been part of a

[10] See eg *De Wet v Santam Bpk* 1996 (2) SA 629 (A) at 638D-639I.

scheme designed for Regal to continue as the beneficiary of the shares in respect of which it bore the risks and rewards; that Mettle had not been advanced the funds used to pay the alleged purchase price but the trust's debt to Regal had merely been cancelled and the funds round tripped back to it; and that had the true nature of the scheme been known the sale would not have been recognised by the auditors and the sale of the shares cancelled against Regal's share capital.

[106] For the reason's already given, there can be no reasonable doubt that the State's allegations in regard to the falsity of the representation can be accepted and that the so-called 'sale' to Mettle was not a sale at all. Consequently not only was there no dilution of Regal's capital (which s 38 of the Companies Act was designed to penalise) but Regal did not give financial assistance to Mettle to purchase the shares (the amount it paid was 'round-tripped' back to itself.) Therefore, to use a colloquial expression,[11] the State cannot have both 'the money and the box': it cannot be heard to say in respect of count 5 that the eight million shares had not been sold to Mettle but to contend on this count that such a sale had taken place and that Regal had financed it. As there was no sale, there was no contravention of s 38 and the appellant's conviction on this count must be set aside.

Count 8

[107] I turn to the final charge against the appellant, brought under 424 of the Companies Act, the material provisions of which were as follows:

'(1) When it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court may, on the application of the Master, the liquidator, the judicial manager, any creditor or member or contributory of the company, declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court may direct.

. . . .

(3) Without prejudice to any other criminal liability incurred, where any business of a company is carried on recklessly or with such intent or for such purpose as is mentioned in

[11] Derived from a popular game show.

subsection (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be guilty of an offence.'

[108] In order to succeed on a prosecution under this section, the State must prove that the accused was knowingly a party to the carrying on of the company's business recklessly, or with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose. In the present instance the matter can be decided on whether the appellant was knowingly a party to the carrying on of Regal's business in a reckless manner.

[109] Of course the test for recklessness is objective. In *Philotex (Pty) Ltd and others v Snyman and others* 1998 (2) SA (SCA) at 143G Howie JA stressed that to be the case and held that the actions of a person concerned are subjective only 'insofar as one has to postulate [the reasonable person] as being to the same group or class as [the accused], moving in the same spheres and having the same knowledge or means to knowledge', and that a consciousness of risk is not an essential component of recklessness. He concluded:[12]

'In its ordinary meaning, therefore, "recklessly" does not connote mere negligence but the very least gross negligence and nothing in s 424 warrants the word being given anything other than its ordinary meaning.

In the application of the recklessness test to the evidence before it a Court should have regard, *inter alia*, to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery.'

[110] In *Tsung v Industrial Development Corporation of South Africa* 2013 (3) SA at 468 (SCA) this court reaffirmed the principles set out in *Philotex* and went on to hold[13] that conduct on the part of a director which deliberately diminished the company's ability to repay its debts fell within the ambit of s 424. It also approved the comment of Cameron JA in *Ebrahim*[14] where he stated that s 424 becomes applicable 'when the level of mismanagement of the corporation's affairs exceeds the merely inept or incompetent and become heedlessly gross or dishonest' and that 'those running the corporation may not use its formal identity to incur obligations recklessly, grossly negligently or fraudulently.'

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[12] At 144A.
[13] Para 51.
[14] *Ebrahim v Airport Cold Storage (Pty) Ltd* 2008 (6) SA 585 (SCA) para 15

[111] These are the principles that have to be borne in mind when considering the State's charge on this count in which it alleged that the appellant had contravened s 424 by having recklessly carried on the business of Regal by:

- 'Dominating, prescribing to, disregarding and/or overruling the boards and/or directors and/or committees and/or management and/or staff of Regal Bank and/or Regal Holdings;

- Ridding the bank and/or Regal Holdings of directors who did not agree with his plans, schemes and/or methods;
- Remaining as both CEO and Chairman despite the Reserve Bank's disapproval;
- Taking whatever measures necessary to enhance and/or maintain the share price of Regal Holdings;
- Entering into and disguising the true nature of structured financial agreements in which Regal held the sole risk and reward with the motive of enhancing or maintaining the share price of Regal Holdings and falsely increasing the assets and liabilities of Regal;
- Allowing the sole security for financing share purchases of Regal Holdings' shares be those shares;
- Not exercising proper corporate governance within Regal Bank and Regal Holdings;
- Allowing the bank's money to be utilised for the purchase of Regal Holdings shares by non-legal entities and the Trusts;
- Buying back the shares of its major shareholder, Pekane;
- Committing the offences contained in counts 1 to 7.'

[112] I must immediately record my surprise at the last bullet point which included specific references to the other offences with which the appellant had been charged. To find the appellant guilty of the various criminal actions with which he was charged in the previous counts, and then to have regard to those actions once again in considering whether he had contravened s 424, would clearly amount to an impermissible duplication of convictions. Unfortunately this is indeed what the court a quo did. Having found the appellant guilty on counts 1 to 7, it proceeded to also find that he had carried on Regal's business recklessly by committing the offences set out in those counts. It was wrong to do so, and the conviction on count 8 in relation to those issues cannot stand.

[113] The court a quo also found that it had not been shown that the appellant acted recklessly by serving both as Regal's CEO and its chairman, but went on to

hold that in the manner in which he had dominated Regal employees and ridded Regal of directors who did not agree with his plans and schemes, amounted to his carrying on Regal's business recklessly. Certainly the appellant was a dominating character who fell out not only with Regal's initial chairman Mr Springett but also with various other members of Regal's board and employees. But whether his domination, forcefulness, impatience with others and suchlike resulted in the business of Regal being carried on recklessly is another matter (and indeed I did not understand the State to persist in arguing that to have been the case). In the light of what is set out below, it is not necessary to decide that issue nor, indeed, many of the other issues that were raised as allegedly relevant to the reckless conduct of Regal's business.

[114] I have already mentioned how the Shareholders Trust, Incentive Trust and Executive Trust were established and received advances from Regal Bank used to fund the purchase of Regal shares. The only security held by these trusts was, of course, the shares themselves. But the shareholding vested in the trusts was substantial, as were those of Holdings' shares in the Metshelf 1, 2 and 3 portfolios held on Regal's behalf but financed by Regal Bank.

[115] In February 2001 the Executive Trust, which until then had been inactive, bought Holdings shares at a price in excess of R3.3 million. And despite the appellant having agreed that the Shareholders Trust would be wound down and Regal having advised both its auditors and the Reserve Bank that this would be done, in the period from 23 May 2001 until Regal was placed into curatorship, a further 4.6 million Holding shares were bought by the Incentive Trust and the Shareholders Trust at a cost of approximately R20 million advanced to them by Regal Bank. These purchases were done at a time when Regal Bank was facing a liquidity crisis as is evidenced by it just having been obliged to borrow R60 million from ABSA to pay for the Pekane shares.

[116] But these were not Regal's only acquisitions of its shares. Based on an analysis of the records of the Johannesburg Stock Exchange, Mr Strydom testified that during the period 1 January 2000 to 26 June 2001 approximately 51 million Holdings shares were traded, almost 32 million of which were acquired either by Regal and its trusts or by Mettle. This would include the eight million shares which in effect were moved from the Shareholders Trust to the Metshelf 1 portfolio when R44

million purportedly paid for those shares was used to reduce the trust's loan liability to Regal Bank. In addition, during the last month before curatorship almost every share that became available on the market was acquired by the Shareholders Trust. These acquisitions were done on the specific instructions of the appellant. Mr Faber, who was employed within the Regal group as an equities trader, and who was responsible for the acquisition of these shares on the appellant's instructions, testified that in most instances he was the only person who was really bidding for shares. Tellingly, he stated that it became a joke amongst his stock market colleagues that Regal had become 'the buyer of last resort' of Holdings shares. As a result of all of this, having regard to the direct and indirect shareholding held by Regal in its trusts and portfolios, by June 2001 Regal held approximately 47% of its own shares.

[117] Of course it was extremely risky for Regal to buy shares in this fashion, but it appears to have found itself in the position of a hamster on a treadmill. It had already bought so many of its own shares with its own money that its share price would decline if it stopped buying, and the only way to prevent suffering a loss was to buy more shares to shore up the value. The inference is irresistible, as Mr Strydom confirmed that had it not been for Regal purchasing its own shares its share price would probably have collapsed at a much earlier stage. But in buying its shares as it did, Regal was obviously reducing its liquidity at a time when it was facing a liquidity crisis.

[118] As I have already mentioned, in June 2001, a few days prior to curatorship and once E&Y had eventually established that Regal was holding a vast number of Holdings shares, it was decided to cancel 45% of Regal's shares which were then, correctly, written off against Regal's share capital. An announcement in that regard was made on 25 June 2001, curatorship was imposed the following day and the share price collapsed. This, in turn, resulted in an instant loss of approximately R200 million, being the amount Regal had used to acquire all its shares either directly or indirectly. Regal's acquisition of such a vast holding of its own shares at a time it was in a liquidity crisis can only be regarded as reckless. It was also a state of affairs brought about directly as a result of the appellant's actions.

[119] In these circumstances, I have no hesitation in concluding that the appellant was a person who was knowingly a party to the carrying on of Regal's business in a

reckless manner and that he was therefore guilty of a contravention of s 424(3) of the Companies Act. Even without considering the various other aspects in respect of which it was alleged Regal's business had been carried on recklessly, the conviction on this count must stand.

Sentence

[120] As appears from what I have set out above, the convictions on counts 2, 6 and 7 cannot stand and the sentences imposed on those counts must of course be set aside. What then has to be considered is the appropriateness of the sentences imposed on counts 1, 3, 4, 5 and 8.

[121] It should be remembered that the 'cause' of criminal punishment is the 'offence', consisting of 'all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender' and that consequently 'the length of punishment must be proportionate to the offence'.[15]

[122] Turning to the appellant's personal circumstances, he is a first offender, married with two children and was 58 years of age when sentenced (he is now 62 years old). He is now of an age where the impact of imprisonment is more dramatic than it will be upon a younger man. He is clearly an extremely intelligent person who was rendered destitute by the collapse of Regal and in the eight years between its collapse and sentence being imposed, he had unsuccessfully failed in various attempts to obtain employment, including in the second-hand car business. The court a quo took into account that the appellant had been subjected to anxiety in regard to the outcome of the matter over a long period of time, stressing that the trial itself had taken almost two years to complete. That anxiety must have been heightened after he was sentenced to a lengthy period of imprisonment and had to face uncertainty as to his future during the four years it has taken for his appeal to reach this court ─ a delay which, as I mentioned at the outset of this judgment, can in no way be attributed to him. Whilst ordinarily only the facts known to a court at the time of sentence should be taken into account on appeal, that is not an inflexible rule, particularly when there has been a lengthy delay before the appeal is heard,[16] and in *S v Roberts* this court observed that it would be 'callous to leave out of

[15] Per Ackerman J in *S v Dodo* 2001 (3) SA 382 (CC).
[16] See eg *S v Jaftha* 2010 (1) SACR 136 (SCA).

account the mental anguish which respondent must have endured'[17] during a period of two years pending his appeal. The same approach was followed by this court in *S v Michele*[18] where there had been a six year delay. Accordingly the anguish and stress experienced by the appellant and his family for the period it has taken to hear and dispose of this appeal is a significant factor to which regard must be had in the assessment of sentence.

[123] The extent to which the bail conditions imposed on the appellant pending this appeal have impacted upon his personal freedom must also be considered. He has not been able to leave the province of Gauteng nor has he been permitted to be within a kilometre of an airport or a railway station; he has been obliged to contact the investigating officer daily to confirm that he is at his residence; and most importantly, he has not been entitled to leave his residence between 18h00 and 06h00 ─ effectively house arrest for 12 hours a day from six in the evening. The State argued that these restrictions are neutral and 'cannot possibly be regarded as a mitigating factor', but even though their effect has been less intrusive than actual incarceration, it would be callous and unjust to ignore them. Of course this was not taken into account by the trial court but it cannot be ignored when this court is called on to consider the issue of sentence.

[124] On the other hand, and a matter of great concern, is that a mere reading of the record shows the appellant to be an arrogant individual who at no stage during the lengthy trial displayed any insight into the wrongfulness of his actions. Instead he systematically insulted, belittled and defamed the various witnesses who were called to testify against him, including accusations of corruption and perjury. He showed no sign of remorse, and it needs to be forcefully brought home to him that his actions were unacceptable.

[125] All save one of the convictions upheld by this court are for fraud, which by its very nature is 'always a grave and ugly offence'.[19] It was argued on behalf of the appellant that his criminal actions were motivated not by personal greed but by his undoubted passion for the company he had founded and a misplaced desire to attempt to support it in times of financial woe. To an extent that may be so, but his fortunes and those of Regal were intertwined and his criminal actions to attempt to attract investment in Regal and to keep it going cannot be divorced from the

[17] *S v Roberts* 2000 (2) SACR 522 (SCA) para 22.
[18] *S v Michele & another* 2010 (1) SACR 131 (SCA) para 13.
[19] *S v Rabie* 1975 (4) SA 855 (A) at 862H.

undoubted benefits he would have received had Regal not collapsed. That notwithstanding, I accept that the appellant's prime motivation was not personal enrichment.

[126] It is also necessary to record that it has not been shown that any of the fraudulent misrepresentations made by the appellant were the direct cause of Regal's demise. But that does not mean that the frauds were inconsequential. Those responsible for the financial statements of public companies are under an onerous obligation to ensure that their financial results placed in the public domain are accurate so that shareholders, both actual and potential, are not misled about the financial health of the company. This is all the more so where, as here, the company carries on business as a bank which seeks to attract custom and deposits from the general public at large. It is intolerable that a CEO of a bank can play fast and loose with the truth in regard to the bank's financial state, as the appellant purposefully did. Any sentence imposed in these circumstances must embrace an element of deterrence to bring home to those holding responsible positions in public companies, and banks in particular, that behaviour of this nature cannot be countenanced. The only way in which the investing public can be protected is by imposing salutary sentences upon persons who fraudulently misrepresent the financial state of their companies. Such offences deserve much more than a slap on the wrist. The notion that so-called 'white collar crime' is not serious was emphatically dispelled by this court in *S v Sadler.*[20]

[127] On the other hand, an offender is not to be sacrificed on the altar of deterrence. In imposing sentences in even the most severe crimes it is necessary to remind oneself that striving after severity is amongst the most harmful faults of judges[21] and that:

'A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality.'[22]

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[20] *S v Sadler* 2000 (1) SACR 331 (SCA) paras 11 and 12.
[21] Per Corbett JA in *S v Rabie.*
[22] *S v Rabie* supra at 866A-C.

[128] Turning to the sentences imposed, of course a court of appeal cannot interfere with a sentence unless there was a material misdirection by the trial court or unless there is such a disparity between that appealed against and the sentence it would have imposed that the sentence can be regarded as strikingly inappropriate. It is similarly trite that there can be no standard sentence and that each case must be considered in the light of its own particular facts and circumstances which need to be discretely weighed in the scales to determine an appropriate punishment. As Nugent JA stressed in *S v Vilakazi*[23] 'each detail can be vitally important', the imposition of sentence is cause for 'considerable reflection' and sentences of imprisonment 'are not merely numbers'.

[129] In respect of each fraud count, the court a quo imposed a sentence of eight years' imprisonment. But while fraud is always an odious crime, some frauds are more severe than others, and those committed by the appellant differed in severity and effect. Despite this, what might be termed a 'flat rate' of imprisonment was imposed on each count. This speaks of a failure to appreciate the necessity to reflect on the differences that there indeed were between the various frauds, and constitutes a misdirection which in itself entitles this court to interfere with the sentences imposed.

[130] In the light of these remarks I turn to consider these individual sentences, commencing with that imposed on count 1. The fraud committed by the appellant on this count is far more limited and less severe than those in counts 3, 4 and 5. The appellant was responsible for the publication of Regal's allegedly audited financial statements for the year 2000, well knowing that the auditors had not given their final approval to them in that form. Nevertheless he had attempted to get the approval before their publication, albeit without success. But whilst his actions were cavalier, the figures reflected in the statements showed an EPS of merely five cents or so more than what would have been the case had the expenditure deferral of R6 million not been taken into account. Moreover the amount of R6 million fell within the range of Regal's audit materiality and, after the appellant had published a correction as insisted on by the auditors, audit approval of the statements was given, albeit somewhat under duress. In all these circumstances, including the anxiety in the restriction upon his freedom that the appellant has already suffered, I am of the view that 12 months' imprisonment is an adequate sentence on this count. The appeal on

[23] *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 21.

this count must succeed to the extent that the sentence is reduced to imprisonment for that period.

[131] As a general rule, it is desirable for a court sentencing an offender to impose a sentence in respect of each offence rather than a globular sentence for a number of convictions. But this rule is not immutable, particularly where there are a number of closely connected offences. In the present case, the frauds in counts 3, 4 and 5 all relate to misrepresentations made in regard to the audit of Regal's 2001 financial statements. Not only do they have that in common but they could easily, and more conveniently, have been consolidated as a single offence. That being so, this is a case in which departure from the general rule is justified and I intend to take these three counts together for purposes of sentence.

[132] The misrepresentations on these counts led to Regal's financial position being distorted to a large degree in the financial statements:

(a) The alleged sale of 93 Grayston led to R36.5 million being incorrectly brought into the income statement. This made up 41% of Regal's total annual income and increased its EPS by 40 cents.
(b) The R60.2 million purchase price Regal paid to purchase its shares from Pekane was incorrectly reflected in its books as a loan with the shareholding still vested in Pekane. Not only should the loan have been reversed but there ought to have been an equivalent reduction of Regal's share capital. Moreover, and most importantly, had the true state of affairs been known, the fact that a 15% shareholder had sold its shareholding in Regal would have been disclosed by way of a note in the financial statements.
(c) The alleged sale of shares in the Metshelf 1 scheme incorrectly led to Regal's assets and liabilities being increased by R18 million, its profits being inflated by R3 million and its equity being over-valued by R44 million. That this constituted a serious distortion of Regal's financial health is self-evident.

[133] The consequences of these frauds were therefore extremely serious. Shareholders and investors are entitled to know the true state of the finances of public companies in which they invest and make deposits. Not only was crucial information disguised and hidden from them, but the financial picture that emerged itself from the audited financial statements was distorted and wholly unreliable. This

was all done in order to make Regal a more attractive investment proposition than it really was.

[134] In the light of these and the other factors that I have mentioned, a lengthy period of incarceration must be imposed. However the effective term of ten years' imprisonment imposed by the court a quo on these three counts is too severe and, in the light of the misdirection in regard to the fraud sentences mentioned above, interference by this court is justified. In my opinion an appropriate sentence is one of six years' imprisonment. The appeal against sentence on counts 3, 4 and 5 must succeed to that extent.

[135] Turning to count 8, the sentence of two years' imprisonment for contravening s 424 of the Companies Act was the maximum sentence of imprisonment that could have been imposed upon the appellant.[24] It is unnecessary to detail once more the appellant's actions which established his guilt on this count. He conducted himself without regard to the interests of the shareholders of a public company. The purchase by Regal of its own shares on a vast scale obviously affected its liquidity and contributed towards its inability to pay depositors when there was a run on the bank. I did not understand counsel for the appellant to seriously contend that there had been any misdirection by the trial court in regard to the sentence on this count and, certainly, the period of imprisonment imposed is in no way disproportionate to the crime. Indeed it was richly deserved. The appeal against sentence on this count must fail.

[136] Having regard to all the factors I have mentioned, an effective sentence of eight years' imprisonment is appropriate. That can be achieved by ordering the sentence imposed on count 1 to run concurrently with the sentence of six years' imprisonment imposed in respect of counts 3, 4 and 5. This will be reflected in the order set out below.

[137] The following order is made:

1 The appeal in respect of counts 2, 6 and 7 is upheld and the convictions and sentences on those counts are set aside.

2 The appeal against the convictions on counts 1, 3, 4 and 5 is dismissed.

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[24] Compare s 44(1)(*d*) of the Companies Act.

3 The appeal in respect of sentence on counts 1, 3, 4 and 5 succeeds to the extent that the sentences imposed by the trial court are set aside and replaced with the following:

(a) Count 1 ─ 12 months' imprisonment.

(b) Counts 3, 4 and 5 (taken together for purposes of sentence) ─ six years' imprisonment.

(c) The sentences in (a) and (b) above are to be served concurrently.

4 The appeal in respect of count 8 is dismissed and the conviction and sentence on that count are confirmed.

5 The effective sentence is therefore one of eight years' imprisonment.

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L E Leach

Judge of Appeal

WILLIS JA (BOSIELO JA concurring)

[138] I commend my brother Leach for his industry and analysis of the facts with which, for the most part, I agree. In summary, Leach JA has confirmed the correctness of the convictions made in the court below in respect of counts 1, 3, 4, 5 and 8 but disagrees with that court's verdict on counts 2, 6 and 7. In my opinion, the court below correctly convicted the appellant on all counts.

[139] My differences with Leach JA relate not to the facts but to the inferences which may be drawn from the facts. It is necessary to understand the person with whom one is dealing in this case in order to understand why I have drawn the inferences which I have. I present the picture of the man, as I do, not out of any facile belief that simply because a person is found to be a liar, it is permissible to draw inferences as to his guilt. I also do not intend any gratuitous assassination of his character.

[140] The aggregate of the factors of his position with Regal, his opportunities, his power, his personality and his untruthfulness, together with certain incontrovertible facts justify, in my opinion, the conclusion that he was guilty on the counts that are in contention between Leach JA and myself.

[141] The appellant was, at the time of these offences, a mature man, a chartered accountant with many years of experience in the business of banking. The record reveals him to have been domineering, arrogant, bullying, deceitful and manipulative. He performed appallingly under cross-examination. For example, he said that the bank had no liquidity problems when all the evidence indicates that this is patent nonsense. He was evasive; he blamed his own attorney for unsatisfactory aspects of his evidence, including the failure to put his version of events properly to State witnesses; he disagreed that it was the duty of management to provide the auditors with all relevant information relating to the business of the bank; he failed to put it to witnesses that he disagreed with their evidence; he disagreed with the proposition that all major decisions of a bank should be made by the board; he made propositions which are not supported by the evidence; he repeatedly used the expression 'substance over form' in an attempt to justify his conduct; he contradicted

himself; he said that witnesses could be called to confirm his version when they were not.

[142] The appellant said that the auditors lacked ‘appropriate expertise to deal with issues of sophistication’ and were ‘totally incorrect’. He said that Ernst and Young were guilty of ‘outright fraud and deception of the worst nature’ and he disagreed with the self-evidently correct proposition that Regal was not immune from the small bank crisis of 1999 and thereafter. In essence he regarded himself as the alter ego of Regal.

[143] For convenience I shall focus upon the three counts in respect of which I disagree with Leach JA: counts 2, 6 and 7.

[144] Count 2 relates essentially to earnings of R2 million paid to the appellant as consideration for the ‘restraint of trade agreement’. I agree with Leach JA that the consideration of fraud in regard to the agreement that the appellant be given five million shares in Regal falls away. The reason is that the appellant did not receive the shares. The issue of the payment of the appellant’s personal expenses by Regal in an amount of some R60 000 is too small an issue, in relation to the broader picture, to warrant attention in this dissenting judgment.

[145] The appellant addressed a letter to Mr Jack Lurie on 29 December 1999 requesting that Regal pay him a cash bonus of R2 million. The appellant was paid R2 million on 15 February 2000. The evidence permits no other reasonable conclusion than that this payment derives from the appellant’s request in this letter. The payment was not disclosed in the Directors’ Remuneration Notice. The reason the appellant has advanced for this was that the payment did not constitute remuneration.

[146] I disagree with Leach JA’s assessment that the State’s case depends on ‘the mere fact [that] the appellant was paid R2 million after he had asked for a bonus’. I also disagree with Leach JA when he says that there is a ‘major difficulty for the State’ in the fact that those who signed the restraint of trade agreement on behalf of Regal were not called as witnesses. The fact that the agreement was signed is, in my opinion, irrelevant.

[147] I accept, as Leach JA seems to do, that agreements 'in restraint of trade' were, at the time, a vogue item for the avoidance of the payment of tax. As Leach JA has observed, we are not, however, dealing with a fraud allegedly perpetrated against the fiscus. We are not concerned here with whether or not the appellant could reasonably have believed that the agreement 'in restraint of trade' was a 'clever tax dodge' or not.

[148] My principal disagreement with Leach JA is where he says that, as the sum of R2 million was reflected in Regal Bank's books of account as being a payment in respect of a restraint of trade and dealt with as such, it being reflected under the title 'Intellectual Capacity' as a fixed asset with the amount being capitalized and the charge to the income statement spread over a period of ten years, this shakes the very foundation of the State's case against the appellant in regard to the bonus issue.

[149] It is correct, as Leach JA has observed, that the appellant was charged with fraudulently having failed to disclose that he had received a bonus of R2 million on 15 February 2000, not that he had failed to disclose having received the payment of R2 million arising from an agreement in restraint of trade. I am irresistibly compelled to draw an inference which is different from that of Leach JA on this issue. My conclusion is that this 'restraint of trade agreement' was the bonus the appellant had requested, disguised as a restraint of trade agreement. Whether the other parties to the restraint knew or believed that it was a disguise is beside the point. If one reads the evidence as a whole and, more particularly, his own performance under cross-examination, the appellant knew that he was receiving a bonus, disguised as a 'restraint of trade agreement' as a matter of convenience intended purely for his own benefit. Most importantly, he knew that it was a disguise. The appellant was correctly convicted on count 2.

[150] Count 6 relates to the so-called 'Sempres transaction' effected between April 2001 and June 2001. During April 2001 the executive committee of Regal had in clear, unequivocal and unmistakable terms refused to grant a loan of R5 million to Sempres. Subsequently the appellant reported to the executive committee that the loan condition had fallen away. The evidence of the State, especially that of Mr Johannes van der Walt, an executive director at Regal, and Mr Keith Diesel, the

chief financial officer of Regal at the time, was that the appellant had thereafter gone ahead and granted the loan. This is deception. Mr van der Walt was adamant: 'We said we would not entertain the Sempres transaction in any way shape or form if, whether by means of a separate application or not there was a request for funding'.

[151] The fact that there was indeed a share swap in terms of which Regal acquired shares in Sempres and Sempres in Regal does not alter the fact that Regal, as a result of the appellant's instructions, lent money to Sempres. The appellant instructed Mr Diesel to open a loan account for Sempres. The appellant went ahead with the loan after the executive committee, at a meeting at which he was present, had decided that the investment committee could reappraise the application for a loan. As Leach JA said, having removed the condition relating to the loan and having informed the executive committee that the lending condition had fallen away, the appellant sought to justify his subsequent granting of the loan by saying that, although the executive committee could disapprove a loan as part of the Sempres transaction, it was not responsible for the approval of loans made by Regal. That, so the appellant contended, was a function that fell within his operational mandate. This justification is absurd. A loan of this magnitude may well have fallen within the appellant's ordinary authority but, once the executive committee had made a decision not to approve the transaction with the loan, the appellant had no authority to override it and deceitfully to proceed with the transaction – in effect as he had originally intended it should. It is also an inadequate answer to the inference of deceit that the appellant knew that the loan would appear in Regal's books. The disguise consisted in the breaking up of the transaction into digestible portions.

[152] The court below correctly analysed the passing of three million Regal shares to Sempres as having taken place through a route by which Regal advanced R14.1 million in cash to the Rand Shareholders Treasury Trust (of which the appellant was himself a trustee) to purchase Regal shares on the Johannesburg Securities Exchange. The Trust then purchased the Regal shares and then passed on those shares to Sempres as a 'quid pro quo' for Regal being allowed access to Sempres' technology. The Trust then made over the technology to Regal in exchange for shares to the value of R14.1 million which the Trust used to settle its indebtedness to Regal. Through this merry-go-round money was directed by Regal to Sempres to

enable Sempres to purchase Regal shares. The merry-go-round gathered its momentum solely as a result of the appellant's orchestrated deceit.

[153] The appellant performed woefully when cross-examined on this issue. The appellant held out that this series of transactions was 'cash neutral' for Regal. As the court below correctly observed, the net effect of this series of transactions was that Regal parted with R14.1 million in cash in exchange for access to Sempres' technology. That is not a 'cash neutral' transaction. If I understood the appellant's counsel, Mr Roux, correctly, he accepted that the transaction could not sensibly be described as 'cash neutral'.

[154] I disagree with Leach JA when he concludes that the State failed to show that the Sempres transaction was not cash neutral and that the State failed to show that the sum of R5 million lent to Sempres had not been concluded by Regal in the course of its normal business activities. I consider that the conviction on this count was correctly made.

[155] Count 7 relates to the alleged contravention of section 38(1) read with sections 38(3) and 441 of the Companies Act, by way of the giving of financial assistance for the purchase of shares in Regal Holdings.

[156] The allegation in the indictment is that during the period from October 2000 to April 2001, the appellant conspired in the giving of financial assistance in an amount of approximately R125 million to Mettle SPVs and/or JL Associates and/or Levenstein Data and/or other persons or entities for the purchase of shares in Regal Holdings.

[157] The appellant admits that on or about 25 October 2000 he negotiated and signed all agreements held by Rand Treasury Shareholders Trust at R5.50 per share to Mettle Securities for a purchase consideration of R44 million. He also admits that on 9 March 2001 he negotiated and signed all agreements pertaining to the sale of three million Regal shares held by Rand Treasury Shareholders Trust to International Holdings Ltd and Unitrade 50 for a purchase consideration of R14.1 million.

[158] It is also common cause, as noted by the trial court, that it was resolved by the trustees of Rand Treasury Shareholders Trust on 1 March 2001 that the trust would buy shares in Regal Treasury Holdings Limited and that the trust would enter into loan agreements with Regal Treasury Bank Limited to purchase those shares. The trust also resolved that the appellant would be authorized to act for the trust in its dealings with a view to implementing these resolutions.

[159] It is not disputed that the appellant was a shareholder in company in which a 'related party transaction' occurred. It is true, as Mr Roux has submitted, that these transactions took place before February 2000 (ie outside of the time period mentioned in the indictment insofar as count seven is concerned). Others did, in fact, take place during the period alleged.

[160] Prima facie there was, therefore, a transgression of s 38(1) of the Companies Act. There is an exemption provided for by ss 38(2)*(a)* of the Act:

'the lending of money in the ordinary course of its business by a company whose main business is the lending of money.'

For Regal, as a bank, its main business was the lending of money. The key issue was therefore whether the transaction in question could, as a matter of law, be found to be 'in the ordinary course of business' thereof.

[161] Mr Davis testified that he had raised concerns that certain share transactions had not been arms-length transactions and had involved money being lent by Regal to purchase shares in the holding company.

[162] Mr Petrus Johannes Strydom, a chartered accountant who had been partner at Ernst and Young, the firm which undertook the audit of Regal Bank at the relevant period, testified as to other affected transactions which took place within the period alleged in the indictment. He confirmed the facts which amounted to a transgression of section 38.

[163] The appellant placed reliance on various opinions given by counsel but most especially upon that given by Mr André Gautschi SC. It is dated 28 November 2000. Mr Gautschi said that it was clear that Regal Bank fell foul of s 38(1) of the old

Companies Act and that the question was whether Regal could bring itself within the exemption provided for in s 38(2)*(a)* thereof.

[164] Mr Gautschi was careful to qualify his opinion with the fact that his instructions were that the shares had merely been bought for the asking price. He said that whether a transaction escaped the taint of criminality would depend on 'the facts in respect of each and every transaction.' Similar observations as to the qualifications with which the opinion was hedged may be made with regard to the opinions of Advocate Oelofse and Mr Henry Vorster.

[165] With regard to the transactions in question, the buyers were no ordinary customers. They were legal entities in respect of which the appellant was the dominating and controlling influence. The trial court correctly found that the loans were given in order artificially to drive up the price of the public shares of the holding company. The unsatisfactory answers of the appellant under cross-examination permit no other conclusion. The verdict on count 7 was correct.

[166] Insofar as sentence is concerned, the fact that Leach JA correctly found that the appellant was guilty on count one on a more limited basis than was found by the court a quo would, if this count was considered in isolation, justify a lesser sentence in regard thereto. Nevertheless, the court a quo considered the cumulative effect of the sentences on each count and arrived at a term of imprisonment of 15 years. I have no difficulty with that.

[167] I should have dismissed the appeal against conviction and sentence in respect of all counts.

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NP Willis

Judge of Appeal

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