THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 827/2011

In the matter between:

MARIA JOHANNA PRINSLOO	**FIRST APPELLANT**
HERBERT HENRY PRINSLOO	**SECOND APPELLANT**
MARIA JOHANNA LEMSTRA	**THIRD APPELLANT**
GERRIT LEMSTRA	**FOURTH APPELLANT**
WILLEM JACOBUS PELSER	**FIFTH APPELLANT**
IZABEL ENGELBRECHT	**SIXTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral citation: *Prinsloo & others v State* (827/11) [2015] ZASCA 207 (4 December 2015)

Coram: Brand JA and Fourie and Eksteen AJJA

Heard: 18 November 2015

Delivered: 4 December 2015

Summary: Criminal Law – unlawful multiplication scheme conducted in contravention of various statutory provisions and the common law ─ whether such activities constituted a pattern of racketeering activity in contravention of sections 2(1)*(b)*, 2(1)*(e)*, 2(1)*(f)* and 4 of the Prevention of Organised Crime Act 121 of 1998 (POCA) ─ elements to be proved by the State to secure convictions under relevant provisions of POCA ─ whether *dolus* or *culpa* required ─ proper approach. Sentence ─ whether interference by court of appeal is justified.

ORDER

On appeal from: North Gauteng Division of the High Court, Pretoria (Pretorius J and assessors sitting as court of first instance):

The first accused

(i) Counts 77176-86246

The appeal against the convictions on these counts is upheld to the extent that the order of the trial court is set aside and the following substituted therefor:

'Skuldig aan een klagte van die oortreding van artikel 42 van die Koöperasiewet 91 van 1981.'

(ii) Counts 197708-199747

The appeal is upheld and the convictions and sentence imposed on these counts are set aside.

(iii) Counts 200664-218636

The appeal against the convictions on these counts is upheld to the extent that the order of the trial court is set aside and the following substituted therefor:

'Skuldig aan een klagte van die bedryf van 'n skadelike sakepraktyk.'

(iv) Count 218683

The appeal against the conviction on this count is upheld to the extent that the order of the trial court is set aside and the following substituted therefor:

'Skuldig aan diefstal ten bedrae van R91,1 miljoen.'

(v) Save as aforesaid, the appeal of the first accused against her convictions and the sentences imposed, is dismissed.

The second accused

(i) Counts 77176 to 86246

The appeal against the convictions on these counts is upheld to the extent that the order of the trial court is set aside and the following is substituted therefor:

‘Skuldig aan een klagte van die oortreding van artikel 42 van die Koöperasiewet 91 van 1981’

(ii) Counts 197708 to 199747:

The appeal is upheld and the convictions and sentence imposed on these counts are set aside.

(iii) Counts 200664 to 204797

The appeal is upheld and the convictions and sentence imposed on these counts are set aside.

(iv) Counts 204798 to 218636

The appeal against the convictions on these counts is upheld to the extent that the order of the trial court is set aside and the following is substituted therefor:

‘Skuldig aan een klagte van die bedryf van ’n skadelike sakepraktyk.’

(v) Count 218637

The appeal is upheld and the conviction and sentence imposed on this count are set aside.

(vi) Save as aforesaid the appeal of the second accused against his convictions and sentences imposed is dismissed.

Accused 3

(i) Counts 48 to 949; counts 144337 to 188910; and counts 197708 to 199747

The appeal is upheld and the convictions and sentences imposed on these counts are set aside.

(ii) Counts 200664 to 218636

The appeal against the convictions on these counts is upheld to the extent that the order of the trial court is set aside and the following is substituted therefor:

‘Skuldig aan een klagte van die bedryf van ’n skadelike sakepraktyk.’

(iii) Save as aforesaid the appeal of accused 3 against her convictions and the sentences imposed is dismissed.

Accused 4

(i) Counts 77176 to 86246

The appeal against the convictions on these counts is upheld to the extent that the order of the trial court is set aside and the following is substituted therefor:

'Skuldig aan een klagte van die oortreding van artikel 42 van die Koöperasiewet 91 van 1981'

(ii) Counts 197708 to 199747

The appeal is upheld and the convictions and sentence imposed on these counts are set aside.

(iii) Counts 200664 to 218636

The appeal against the convictions on these counts is upheld to the extent that the order of the trial court is set aside and the following is substituted therefor:

'Skuldig aan een klagte van die bedryf van 'n skadelike sakepraktyk.'

(iv) Count 218637

The appeal is upheld and the conviction and sentence imposed on this count are set aside.

(v) Count 218683

The appellant is sentenced to 10 years' imprisonment on this count and it is ordered that the sentence is to run concurrently with the sentence imposed on counts 2 and 3.

(vi) Save as aforesaid the appeal of accused 4 against his convictions and the sentences imposed is dismissed.

Accused 5

(i) Counts 144337-188910

The appeal is upheld and the convictions and sentences imposed on these counts are set aside.

(ii) Count 218653

The appeal against the conviction is upheld to the extent that the order of the trial court is set aside and the following substituted therefor:

'Skuldig aan die oortreding van artikel 75(1)*(a)* van die Inkomstebelastingwet 58 van 1962.'

(iii) Save as aforesaid, the appeal of accused 5 against his convictions and the sentences imposed, is dismissed.

Accused 6

(i) Counts 144337-188910

The appeal is upheld and the conviction and sentences imposed on these counts are set aside.

(ii) Count 218682

The appeal is upheld and the conviction and sentence imposed on this count are set aside.

(iii) Counts 54534-59033

The typographical error in the summary of the trial court of the counts in respect of which accused 6 was acquitted, is corrected to reflect the acquittal of accused 6 on counts 54534-59033.

(iv) Save as aforesaid, the appeal of accused 6 against her convictions and the sentences imposed, is dismissed.

(v) Count 218657 ─ The State's appeal

The appeal of the State against the sentence imposed on this count is upheld. The sentence is set aside and the following substituted therefor:

'Aanklag 218657 ─ Bedrog ─ 12 jaar gevangenisstraf.'

JUDGMENT

Fourie and Eksteen AJJA:

Introduction

[1] In 1919 Italian immigrant Charles Ponzi of Boston, Massachusetts, United States of America, devised a scheme by which he enticed some 11 000 Bostonians to invest approximately US$20 million with him, promising exceptionally high rates of return within a short period of time by purchasing international reply coupons from other countries and then redeeming them in the US for postage stamps. Initially he was able to pay these exorbitant returns to previous investors by simply drawing from the capital investments received from subsequent investors. However, seeing that the scheme was not based upon any viable underlying economic enterprise, it eventually had to collapse when no more investors could be persuaded to make further investments. Hence, schemes of this nature have, down the years, become known as Ponzi schemes.

[2] This appeal has its origin in a similar scheme which had been conducted during the period 1 March 1998 to 22 May 2002, initially only within the Vaal Triangle area 60 kilometres south of Johannesburg, but was later also countrywide. The scheme was initiated by the first appellant, but subsequently the second to sixth appellants became involved at different times and in different capacities. It is common cause that during the four years of its existence, approximately R1,5 billion was invested in this scheme and upon its demise scores of investors had lost all their money and were left destitute. The State contended that, what the appellants had conducted, was a Ponzi or multiplication scheme, and in view thereof a plethora of criminal charges were preferred against them. In fact, the final indictment contained no less than 218 683 charges.

[3] The appellants, to whom we will conveniently refer as ‘the accused’, were arraigned on these charges in the North Gauteng High Court, Pretoria and their trial commenced before Pretorius J and two assessors on 27 July 2009. The accused pleaded not guilty to all the charges, but after hearing evidence, Pretorius J, on 8 June 2010, found each of them guilty on a large number of the counts preferred against them. We will in due course refer to the specific counts, but should mention that the accused were found not guilty on some 1 000 counts. They were subsequently sentenced to terms of effective imprisonment, ranging from 25 years to 5 years. We will also in due course return to the sentences so imposed.

[4] The accused are appealing, with the leave of the court a quo, against such convictions and sentences. The State, also with the leave of the court a quo, appeals against the sentence imposed on accused six in respect of count 218 657.

Dramatis Personae

[5] The first accused was the main role player in the scheme. She initiated the scheme in 1998, and it is common cause that, at all times, she was at the forefront of this enterprise.

[6] The second accused joined the scheme in the first half of 2001and acted as a public official or an office bearer of two entities utilised to conduct the scheme. He married the first accused in December 2001. They were divorced during the course of the trial.

[7] The third accused is the daughter of the first accused. She joined the scheme in April 1998 and acted as a public official or an office bearer of four of the entities involved in the scheme.

[8] The fourth accused is the husband of the third accused and the son-in-law of the first accused. He joined the scheme in January 1999 and acted as a public official or an office bearer of three of the entities utilised to conduct the scheme.

[9] The fifth accused is the son of the first accused. He joined the scheme in July 1998 and acted as a public official or an office bearer of two of the entities utilised to conduct the scheme.

[10] The sixth accused is the niece of the first accused. She joined the scheme in October 1998 and acted as a public official or an office bearer of two of the entities utilised to conduct the scheme.

Chronology of relevant events

[11] The accused did not (and could not in view of the uncontested objective evidence) seriously contest the notion that the scheme operated by them was in fact a Ponzi scheme. The evidence clearly showed that the underlying cash loan

businesses conducted by the first accused, never generated sufficient income to meet or sustain the interest payments to be made to investors. In the result investors' capital was used to satisfy the interest commitments. The essence of the business of the scheme was the taking of deposits, initially at a return of 20 per cent per month but later mostly at a return of 10 per cent per month. As a matter of course, the scheme was therefore insolvent *ab initio* and constituted a Ponzi scheme.

[12] We do not consider it necessary for purposes of this judgment, to engage in a detailed summary of all the events giving rise to the charges preferred against the accused. This laborious task had been undertaken by the trial judge who produced an exceptionally detailed judgment of 1 159 pages. We will merely refer to the events constituting the factual matrix necessary for the consideration of the appeals brought by the respective accused.

[13] Reverting to the nature and extent of the scheme, it appears that the first accused commenced her cash loan business in March 1998 under the name and style of Finsure Consultants. Investments were procured from the public at an initial return of 20 per cent per month. In October 1998, the business was converted to a close corporation styled MP Finance CC t/a Finsure Consultants. The first accused was the only member, but on 29 December 1998, the members' interest was restructured so that she held 60 per cent and the third and fifth accused, 20 per cent each.

[14] In the period between 1 March 1998 and 28 February 1999 deposits by investors of R1,57 million were received, whilst R1,4 million was owed to the investors in interest. This was not reflected in the financial records of the close corporation for the 1999 tax year. They reflected a gross income of R176 478 only with a nett profit of R10 608 before tax.

[15] On 29 February 2000 deposits were held in an amount of R20,65 million. The interest commitment for the period between 1 March 1999 and 29 February 2000, was R14,9 million. This was yet again not reflected in the financial records of the

close corporation, which reflected a gross income of R1,7 million with a nett profit of R4 530 before tax.

[16] Following an inspection by the Department of Trade and Industry (the DTI) on 10 May 2000, the first accused represented in writing to the DTI that:
(a) all investors were repaid on 11 and 12 May 2000;
(b) the investors were family members and friends who were shareholders and paid dividends based on profits; and that
(c) there were only 33 investors who invested a total amount of R682 750.

[17] However, as it transpired subsequently, members of the public who had invested in the scheme, did not receive payment of their investments and on 13 May 2000 the total value of these investments was approximately R37 million.

[18] During May 2000, a new entity entered the fray, namely, a company by the name of Madikor Twintig (Pty) Ltd (Madikor). On 18 May 2000, documentation was lodged with the registrar of companies, appointing the first, third, fifth and sixth accused as directors of Madikor.

[19] In the period between 10 May 2000 and 17 January 2001, 2 450 deposits to the value of R131 million were received from members of the public by Madikor. While ‘investments certificates’ were issued for deposits received in Finsure Consultants and MP Finance CC, ‘share certificates’ were issued for deposits received by Madikor. However, during the period June 2000 until April 2002, investor statements were issued in the name of ‘MP Financial Services’. These statements listed all investments by and payments to investors, irrespective of the entity used or the fact that an investment in one entity may have been converted to an investment in another.

[20] On 25 October 2000 an enquiry was made by the South African Reserve Bank (the SARB). This resulted in a written response by the attorneys of the first accused on 11 December 2000, in which it was -
(a) acknowledged that deposits were taken in contravention of the Banks Act 94 of 1990 (the Banks Act); and

(b) undertaken that deposits received would be repaid by 15 January 2001, of which proof would be submitted to the SARB in January 2001.
A list of 105 investors of the amount of R2 996 700 was attached to this letter. However, it is common cause that, on 11 December 2000, there were in fact 2 461 active investments with a total value of more than R126 million, while the underlying business of the scheme at no stage realised sufficient profit to service the resulting debt payable to these investors at a rate of R13,4 million per month. Needless to say, investors were not repaid as had been undertaken in the letter addressed to the SARB.

[21] On 19 March 2001 an application for membership dated 30 January 2001, was filed on behalf of MP Finance SACCO with the Savings and Credit Co-operative League (SACCOL). It appears from the application that an inaugural general meeting of MP Finance SACCO was held on 15 January 2001, where it was decided that the first accused would act as its chairperson and the third accused as treasurer. The fourth accused signed the application as 'member'. However, on 26 March 2001, SACCOL refused the application for membership.

[22] Notwithstanding the refusal of the application lodged by MP Finance SACCO, deposits were taken from investors in the name of this unregistered entity. It is common cause that, in 2001, registered savings and credit co-operatives were only allowed to take deposits up to a maximum of R9,9 million. However, during the period between 1 January 2001 and 21 August 2001, 5 483 deposits to the value of R308,5 million by investors were taken by the unregistered entity, MP Finance SACCO.

[23] On 4 June 2001, a shelf company was converted to a public company and renamed Martburt Financial Services Ltd (Martburt), in which 10 000 ordinary shares were issued. Of these 6 000 were allocated to the first accused and 1 000 to each of the second, third, fourth and fifth accused. The latter four accused were also appointed as directors of Martburt. Although the sixth accused was never officially appointed as a director, she was held out to be one in the documentation of Martburt. A draft prospectus made provision for 2 000 shares with a nominal value of

R1 each, linked to debentures of R4 999, to be issued to the public for a total amount of R10 million.

[24] However, during the period between 4 June 2001 and 31 October 2001, approximately 4 500 deposits from investors to the value of R290,9 million were taken by Martburt. In addition, 3 451 debentures to the value of R155,7 million were issued in Martburt's name and 841 investments to the value of R44,3 million were transferred from Madikor and MP Finance SACCO to Martburt.

[25] On 6 June 2001 inspectors appointed in terms of s 11(1) of the South African Reserve Bank Act 90 of 1989, inspected the business of Martburt. A legal representative of Martburt then admitted that deposits were taken in contravention of s 11(1) of the Banks Act. It was represented to the inspectors that between R10 million and R12 million was owed to investors. This was untrue. On 6 June 2001 the actual amount owing in respect of approximately 5 890 investments was in the order of R320 million. The explanation proffered on behalf of Martburt was that the draft prospectus 'legalised' the taking of deposits. This was also untrue since the R10 million to be raised through the issue of debentures would not have covered the R320 million owed to investors. At that meeting of 6 June 2001, an instruction was given by the inspectors that no further deposits may be taken from the public.

[26] The following day the inspectors instructed the first accused to repay deposits under the control of the managers appointed in terms of s 83(1) of the Banks Act. The first accused represented to the inspectors that R10,7 million was owing to investors, while at that stage the amount owing in respect of approximately 6 006 investments, was approximately R325 million. When confronted with the fact that not all investors were reflected on the investors' list dated 7 June 2001, it was represented to the inspectors on 10 July 2001 that R11,6 million was owed to the investors. This was another blatant untruth. As at 10 July 2001, approximately R362 million was owed to investors. On 1 August 2001, the amount owed to investors exceeded R375,1 million.

[27] After the meeting of 6 June 2001, investors' files were removed from the principal place of business at Madikor Building and, over the next year, the files were

again moved, also to the farm of the sixth accused. Various agents were appointed to deal with payments to investors and with new investments.

[28] As from 1 August 2001, deposits were further taken in the name of the entity M & B Co-Operative, with membership certificates being issued to investors. An application for registration of M & B Co-Operative dated 25 September 2001, was lodged with the registrar. According to the application, the second accused would be the chairperson and the fourth accused a director of the co-operative. However, the application was never approved and M & B Co-Operative was never registered. That notwithstanding, 9 071 deposits of the value of R542,7 million were taken in the name of this entity during the period between 1 August 2001 and 1 March 2002. In addition, 92 investments in other entities to the value of R6,1 million were transferred to this non-existent entity.

[29] During late 2001 to the beginning of 2002 a company named Africa's Best 173 (Pty) Ltd was converted to a public company with its name changed to Krion Financial Services Limited (Krion). This was yet another vehicle utilised for the taking of deposits from investors. Moreover, investments made in previous entities were converted to investments in Krion. A registered prospectus was issued for Krion and 100 000 N-Ordinary shares[1] valued at 1c each were offered at a premium of R999.99 from 5 March 2002 to 4 June 2002. Therefore, R100 million could potentially be raised should this offer be fully subscribed. It should be borne in mind, however, that the R100 million which had to be raised in this manner would still have been insufficient to cover the amount of R796,2 million owed by the scheme to investors as at 8 February 2002. As it turned out, Krion received 8 797 applications for 908 600 shares to the value of R58,4 million from new investors and receipts were issued for a further R57 million with no corresponding applications for shares. It followed that a total amount of R115,4 million was received by Krion in respect of new investments of which only R24,3 million found its way to the Krion bank account.

[1] N-Ordinary shares are the same as ordinary shares, except that they give shareholders minimal or no voting rights. They often trade at a discount to Ordinary shares and although they are likely to cost less, they pay out the same dividends as Ordinary shares. See information on the Johannesburg Stock Exchange website in this regard at *www.jse.co.za*, accessed on 27 November 2015.

[30] The total value of investments in Krion (including conversions, new investments and money received without corresponding application for shares) amounted to R965 million. It will be recalled that only 100 000 shares to the value of R100 million were issued in terms of the prospectus, with the result that the offer was over-subscribed by R865 million. Therefore, R865 million ought to have been repaid to potential investors after the closing of the offer on 4 June 2002. But, on that date only R3,7 million was left in the Krion bank account. It would appear that the balance of the investments placed with Krion was used to pay investors in respect of investments made with other entities involved in the scheme.

[31] The inevitable result of the aforegoing was the liquidation of all the entities which formed part of the scheme, during June 2002. The different entities were treated as one for purposes of liquidation and joint liquidators were appointed for the 'MP Finance Groep BK'.

[32] It is convenient at this stage to briefly summarise the purchase and or transfer of assets in the names of various trusts. The individual transactions are relevant to certain charges preferred against the accused, to which we will return. Four trusts were involved and we proceed to summarise the acquisitions made by each of them.

The PT Vennote Familie Trust

[33] The fourth accused was the settler and donor of this trust established on 23 August 1999. He also acted as a co-trustee of the trust.

[34] The following assets, most of which were immovable properties, were purchased in the name of the trust:

(a) 6B Delius Street, SW 5, Vanderbijlpark, purchased on 17 November 1999 for R380 000.

(b) 2B Delius Street, SW 5, Vanderbijlpark, purchased on 1 December 1999 for R1 019 685 million.

(c) Ardenwold Gasthaus and Waenhuis Danssaal, purchased on 19 April 2000 for R330 000.

(d) Remaining Extent of Extent 7 of the farm Van Wyk, no 584, purchased on 19 April 2000 for R400 000.

(e) Extent 13 of the farm Van Wyk, no 584, purchased on 19 April 2000 for R100 000.

(f) Small Holding 52, Ardenwold Agricultural Holdings, purchased on 10 October 2000 for R305 000.

(g) Grootvaal Properties (Pty) Ltd, the shareholding of which was purchased on 10 October 2000 for R1 731 215. The company owned the building utilised as head office by the scheme, later known as the Madikor Building. The first, third, fifth and sixth accused were appointed as directors of the company with effect from 11 November 2000.

(h) Moneyline 399 (Pty) Ltd, the shareholding of which was purchased on 11 October 2000 for R1 546 135. The company owned section no 9 in the sectional development known as Maraldi. The first accused was appointed as a director of the company with effect from 11 October 2000 and third, fifth and sixth accused from 7 November 2000.

(i) Moneyline 385 (Pty) Ltd, the shareholding of which was purchased on 11 October 2000 for R900 000. The company owned section no 11 in the development known as Maraldi. The first accused was appointed as a director of the company with effect from 11 October 2000 whilst third, fifth and sixth accused were thus appointed from 7 November 2000.

(j) Extent 14 of the farm Van Wyk, no 584, which was purchased on 28 March 2001 for R150 000.

(k) Section no 6 Baltimore Mansions, Vanderbijlpark, which was purchased during May 2001 for a purchase price which, with interest, amounted to R915 025.

We should add that the first and fourth accused represented the trust in concluding several of the aforementioned agreements of purchase.

Jakia Trust

[35] This trust was established on 3 July 2001. The sixth and seventh accused, Hendrik Engelbrecht, the latter being the husband of the former – both acted as trustees. The following assets were purchased in the name of the trust:

(a) Extent 8 of farm Parkerton, which was originally purchased on 23 February 1999 in the name of the seventh accused for R874 455. On 19 April 2002, the mortgage

bond registered over the property was cancelled and the property was transferred to the trust.
(b) Extent 1 of the farm Midden, which was originally purchased on 16 August 1999 in the name of the seventh accused for R588 000. On 19 April 2002 the mortgage bond registered over the property was cancelled and the property was transferred to the trust.
(c) Extent 3 of the farm Parkerton , which was originally purchased on 14 August 2000 in the name of the seventh accused for R300 000. On 19 April 2002 the mortgage bond registered over the property was cancelled and the property was transferred to the trust.
(d) Extent 4 of the farm Parkerton, which was originally purchased on 4 December 2000 in the name of the seventh accused for R268 800. On 19 April 2002 the property was transferred to the trust.
(e) Farm Salomina's Rust and farm Morgenzon, purchased on 7 August 2001 for R1,4 million.

[36] For the sake of completeness we should mention that the seventh accused was also found guilty and sentenced on two of the preferred charges against the accused, but has not sought leave to appeal.

Anja Boerdery Trust

[37] This trust was founded on 3 July 2001 and sixth and seventh accused acted as its trustees. The following assets were purchased in its name:
(a) Farm Verwachting, purchased on 7 August 2001 for R1 020 331.
(b) Farm Ausker's Dale and farm Erfdeel, purchased on 22 October 2001 for R334 189.

Izarich Trust

[38] The trust was founded on 3 July 2001, and sixth and seventh accused acted as its trustees as well. The following assets were purchased in its name:
(a) Extent 1, 2 and the Remaining Extent of the farm Altyddaar 630, originally purchased on 13 November 2001 in the name of the seventh accused for R1,1 million. On 3 April 2002 the property was transferred to the trust.

(b) The Remaining Extent, and the Remaining Extent of Extent 1, of the farm Klapperrandjie 394, purchased on 15 June 2001 for R940 000.
(c) Portion 10 of Erf 2408 Uvongo, originally purchased on 6 January 2001 in the name of accused 6 for R600 000. On 3 April 2002 the property was transferred to the trust.
(d) Extent 2 of the farm Bulskop 363, purchased on 13 January 2002 for R410 000.
(e) Erf 1244 Shelly Beach, purchased on 1 March 2002 for R650 000.
(f) Remainder of Erf 1241 Shelly Beach, purchased on 1 March 2002 for R1,35 million.
(g) Remainder of the farm Sweet Home 479, purchased on 3 May 2002 for R1,040 million.

[39] The cumulative total of the aforementioned assets acquired by the various trusts had been virtually R18 million. The purchase considerations were paid from the funds deposited by investors of the scheme in the names of the various entities utilised in conducting the scheme. There were no loan agreements concluded between the trusts and those entities.

The convictions and sentences

[40] The accused were not criminally charged for operating the Ponzi scheme, as suggested by counsel for the first accused in her heads of argument. What they were charged with, are offences committed by them in the process of conducting the scheme. These included various statutory and common law offences, as we will in due course show. We proceed to deal separately with the specific counts on which each accused had been convicted and the sentences imposed in respect thereof.

First accused

Counts 1 and 2

[41] It is convenient to consider counts 1 and 2 together, as they encompass offences concerning racketeering activities under s 2 of the Prevention of Organised Crime Act 121 of 1998 (POCA). Such activities are defined under a ‘pattern of racketeering activity’, which means the planned, on-going, continuous or repeated participation or involvement in any offence referred to in Schedule 1 of POCA, and includes at least two offences referred to in Schedule 1 of which one of the offences

occurred after the commencement of POCA and the last offence occurred within ten years after the commission of such prior offence referred to in Schedule 1.

[42] Count 1 is a charge framed under s 2(1)*(f)* of POCA, which provides that:

'Any person who manages the operation or activities of an enterprise and who knows or ought reasonably to have known that any person, whilst employed by or associated with that enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, shall be guilty of an offence.'

[43] The first accused is the only accused charged under s 2(1)*(f)* of POCA and, as Bozalek J held in *S v De Vries & others* 2009 (1) SACR 613 (C) para 380, the State, in order to prove count 1, must prove the following elements:

(a) that an 'enterprise' existed;

(b) that the accused managed the operations or activities of the enterprise;

(c) that a 'pattern of racketeering activity' took place; and

(d) that the accused knew or should reasonably have known that a pattern of racketeering activity took place.

[44] Count 2, which was preferred against all the accused, is framed under s 2(1) *(e)* of POCA, which reads as follows:

'Any person who, whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity, within the Republic or elsewhere, shall be guilty of an offence.'

[45] In *S v Eyssen* 2009 (1) SACR 406 (SCA), Cloete JA explained the essential difference between the offence in ss *(e)* and that created in ss *(f)*, as follows in para 5:

'The essence of the offence in ss *(e)* is that the accused must conduct (or participate in the conduct) of an enterprise's affairs. Actual participation is required (although it may be direct or indirect). In that respect the subsection differs from ss *(f)*, the essence of which is that the accused must know (or ought reasonably to have known) that another person did so. Knowledge, not participation, is required. On the other hand, ss *(e)* is wider than ss *(f)* in that ss *(e)* covers a person who was managing, or employed by, or associated with the

enterprise, whereas ss *(f)* is limited to a person who manages the operations or activities of an enterprise. . . .'

[46] In considering both counts 1 and 2, it has to be borne in mind that 'manage' is not defined in POCA and therefore bears its ordinary meaning, which in this context is: '1 [To] be in charge of; run. [Or] 2 Supervise staff. [Or] 3 [To] be the manager of a (sports team or a performer).' See the *Concise Oxford English Dictionary* 10 ed (2002) sv 'manage'.

[47] The word 'enterprise' is defined in s 1 of POCA as follows:

'. . . includes any individual, partnership, corporation, association, or any other juristic person or legal entity and any union or group of individuals associated in fact, although not a juristic person or legal entity.'

As stated by Cloete JA in *Eyssen* para 6, it is difficult to envisage a wider definition. A single person as well as every other type of connection between persons known to the law or existing in fact are included.

[48] With regard to count 1, it is common cause that the first accused managed the operation or activities of the scheme. It was her brainchild and at all relevant times she was at the forefront of its day to day activities. The court a quo aptly described her as 'die dryfveer en moederbrein van die onderneming'. It was not disputed by her that the activities conducted through the various entities utilised by the scheme, constituted an 'enterprise' as defined in s 1 of POCA. The evidence showed that the accused were all consciously associated for the purpose of conducting the scheme for their common benefit. The first accused also did not seriously dispute the finding of the court a quo that a 'pattern of racketeering activities' as defined in s 1 of POCA, had taken place in conducting the business of the scheme. As will become clear in due course, a multitude of offences referred to in Schedule 1 of POCA had been committed by the accused in conducting the scheme through its various entities, which offences had occurred prior to and after the commencement of POCA and within a ten year period as prescribed by POCA.

[49] The remaining element that the State had to prove for a conviction of the first accused on count 1, is that, whilst managing the operations or activities of the

scheme, she knew or ought reasonably to have known that a pattern of racketeering activity took place. The submission on behalf of the first accused at the trial and on appeal, was that a contravention of s 2(1)*(f)* of POCA requires *mens rea* in the form of intention (*dolus*) and that negligence (*culpa*) is not a sufficient form of *mens rea* for a contravention of the provision.

[50] The court a quo rejected this submission and held that negligence is a sufficient form of *mens rea* for a contravention of s 2(1)*(f)*. However, it appears from para 1222 of the judgment that the court a quo, in fact, held that the first accused 'het sonder twyfel geweet dat hulle (the second to sixth accused) in diens van die onderneming was en dat hulle deelgeneem het aan die onderneming se sake deur hierdie patroon van rampokkery'. This amounts to a finding that the first accused had the necessary *mens rea* in the form of intention. In our view, the evidence overwhelmingly supports a finding that the first accused had the necessary *mens rea* in the form of *dolus*. In managing the affairs of the scheme by leading from the front, she had been fully aware that the affairs of the scheme had been conducted through a pattern of racketeering activity. Apart from common law crimes such as theft and fraud having been committed in the furtherance of the business of the scheme, a multitude of statutory offences were also committed and the excuse of the first accused that she had not been aware of the unlawfulness of such conduct, does not only ring hollow, but was correctly rejected as false beyond any reasonable doubt.

[51] We are further of the view that, in any event, the wording of POCA and in particular s 2(1)*(f)* makes it clear that *culpa* is a sufficient form of *mens rea* for a contravention of this subsection. In *S v Arenstein* 1964 (1) SA 361 (A) at 366C-D, it was reiterated that the degree of blameworthiness required for a culpable violation of a statutory prohibition must in the first place be sought in the language used by the lawgiver. In the absence of any words expressly indicating the particular mental state required, the degree of *mens rea* must depend on that foresight or care which the statute in the circumstances demands.

[52] The offence in terms of s 2(1)*(f)* is committed by a person managing the operation or activities of an enterprise and who knows or ought reasonably to have

known that the enterprise's affairs are conducted through a pattern of racketeering activity. The plain wording of the subsection requires *mens rea* in the form of either *dolus* or *culpa*. As explained by Albert Kruger in *Organised Crime and Proceeds of Crime Law in South Africa* (2008) at 148, the words 'ought reasonably to have known' introduce the element of reasonableness, which must be assessed objectively. No subjective intent or *dolus eventualis* is required. The question is whether the fictional reasonable person, the *diligens paterfamilias*, would have known. See also Jonathan Burchell *Principles of Criminal Law* 4 ed (2014) at 874.

[53] The view that *culpa* would suffice for a contravention of s 2(1)*(f)*, is underscored by s 1(3) of POCA which states:

'For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both–

(a) the general knowledge, skill, training, and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.'

[54] In our view there is also no doubt that, in the present circumstances, the first accused ought reasonably to have known that the scheme's affairs were conducted through a pattern of racketeering activity. Therefore, we find that the first accused in any event had the necessary *mens rea* in the form of *culpa* for a contravention of s 2(1)*(f)* of POCA.

[55] At the hearing of the appeal, counsel for the first accused raised a legal contention which had not been canvassed at the trial. She submitted that s 2(1)*(f)* 'is aimed primarily at punishing persons who control others, whilst knowing they are committing crimes, [but] refrain themselves from engaging in criminal conduct'. Therefore, the submission continued, the first accused could not be convicted of contravening s 2(1)*(f)* as she had personally participated in the activities of the scheme. Put differently, counsel submitted that, where an accused is shown to have personally participated in the conduct of an enterprise through a pattern of racketeering activity, he or she 'does not fulfil the definition of s 2(1)*(f)*'.

[56] In our view, the intention of the legislature, as gathered from the plain wording of POCA, is to hold those involved in organised crime liable for the different roles played by them in the conduct of an enterprise's affairs through a pattern of racketeering activity. These include managing (s 2(1)*(f)*) and personal participation in (s 2(1)*(e)*), the affairs of the enterprise. As commented by Bozalek J in *De Vries* at 397-398, there appears to be no good reason why a person who both manages and participates in the affairs of the enterprise directly, should only be liable for one of the two roles.

[57] We are in agreement with counsel on behalf of the State that, in construing the provisions of POCA, and in particular s 2(1)*(e)* and *(f)*, a liberal or broad construction is to be preferred. This would be in accordance with the broad objectives of POCA set out in the preamble thereto. In *National Director of Public Prosecutions & another v Mohamed NO & others* 2002 (4) SA 843 (CC) paras 14-16 the Constitutional Court, with reference to its preamble, emphasised the importance of POCA to curb the rapid growth of organised crime, money laundering, criminal gang activities and racketeering which threatens the rights of all in the Republic and presents a danger to public order, safety and stability, thereby threatening economic stability. To curtail the ambit of s 2(1)*(e)* and *(f)*, as suggested by counsel for the first accused, would, in our opinion, be contrary to the intention of the legislature.

[58] Further, with regard to the intention of the Legislature, we should emphasise that the South African Legislature was strongly influenced by models of organised crime legislation in the USA (see Burchell op cit at 873 fn 1), in particular the RICO statute (Racketeer Influenced and Corrupt Organisations Statute enacted as Title IX of the Organised Crime Control Act of 1970). In *S v De Vries & others* 2012 (1) SACR 186 (SCA) para 43, this court stressed the 'considerable assistance' to be gained from the jurisprudence of the United States dealing with RICO, in interpreting POCA. In *Sedima, SPRL v Imrex Co* 473 US 479 (1985) at 497-498, the US Supreme Court emphasised that, by reason of RICO's 'expansive language and overall approach', the statute 'is to be read broadly'.

[59] Apart from the above, we, in any event, see no reason why the legislature would have intended to restrict the prosecution of persons under s 2(1)*(f)* of POCA

solely to those managers who have not dirtied their hands by personal acts of participation in the conduct of the affairs of the enterprise. Such a construction would lead to an absurdity, where the manager of a multi-billion rand racketeering enterprise who has had minimal personal active participation, would only be liable for the minimal participation role under s 2(1)*(e)* and not under s 2(1)*(f)* for the extensive managerial role played in a highly successful criminal enterprise.

[60] We therefore conclude that this submission of counsel for the first accused is without merit. It follows, in our view, that the court a quo correctly found the first accused guilty on count 1 and that her appeal in this regard should fail.

[61] This brings us to count 2, ie the contravention of s 2(1)*(e)* of POCA. What the State was required to prove is that, whilst managing an enterprise (the scheme) the first accused directly or indirectly participated in the conduct of the scheme's affairs through a pattern of racketeering activity. As emphasised above, this court in *Eyssen* at 409c-d (para 5) held that the essence of the offence referred to in s 2(1)*(e)* is actual participation (be it direct or indirect) in an enterprise's affairs, as opposed to knowledge, not participation, which is the essence of an offence in terms of s 2(1)*(f)*.

[62] In dealing with count 1 above, we have already found that an enterprise (the scheme through its various entities) existed which was managed and controlled by the first accused while conducting its affairs through a pattern of racketeering activity. What remains, is the element of participation on the part of the first accused, a topic which we have also broached in dealing with count 1. It would suffice to say that the evidence overwhelmingly shows that the first accused actively and directly participated in the scheme's affairs; in fact, she was the heart and soul of the business of the scheme and knowingly participated in contravening various statutory provisions and committing common law crimes, as set out below. As pointed out by counsel for the first accused in her heads of argument, the first accused's name '. . . appears on all certificates as the owner or main shareholder of the organisation. At no stage did the first appellant attempt to avoid participation in the organisation and its activities. She was at the forefront of this enterprise at all times'. It follows, in our view, that the remaining element of participation on the part of the first accused has also been proved beyond reasonable doubt.

[63] We should add that, as in the case of count 1, counsel for the first accused submitted that the State failed to prove that she had the necessary criminal intent in the form of *dolus* to contravene the provisions of s 2(1)*(e)* of POCA. In our view, this submission fails to take proper account of the definitional elements of this statutory contravention, ie participation in the affairs of an enterprise through a pattern of racketeering activity. As emphasised in *Eyssen*, participation in the affairs of the enterprise is the offence. Kruger op cit at 13, observes that an accused 'is guilty by virtue of (a) being involved in an enterprise (being part of the group of racketeers), and (b) being involved in the commission of two or more predicate offences' listed in Schedule I of POCA.

[64] To summarise, it is now well-settled that the essence of the offence in terms of s 2(1)*(e)* of POCA is participation through a pattern of racketeering activity and not knowledge. Once it is proved that the accused has participated in the conduct of an enterprise's affairs through a pattern of racketeering activity, ie by committing two or more predicate offences listed in Schedule I of POCA, he or she is guilty of a contravention of s 2(1)*(e)* of POCA. There is no need for a further inquiry, as suggested on behalf of the first accused, as to an additional *mens rea* requirement over and above the *mens rea* required by the predicate offences.

[65] It is significant to note that the courts of the USA, in considering the offence of participation in RICO, have held that the relevant section of RICO (s 1962 (c)), 'imposes no additional *mens rea* requirement beyond that found in the statutory definitions of the predicate crimes'. See *United States v Biasucci* 786 F.2d 504 (1986) (US Court of Appeals, Second Circuit) para 8; *United States v Boylan* 620 F.2d 359 (1980) (US Court of Appeals, Second Circuit) para 5. In *United States v Scotto* 641 F.2d 47 (1980) (US Court of Appeals, Second Circuit) para 4-6, it was reiterated that '. . . no specific intent to engage in an unlawful pattern of racketeering prohibited by RICO is required.'

[66] In *S v Green & others*, an unreported decision of the Durban and Coast Local Division of the High Court (Case no.the first accused CC 39/02 delivered on 27 March 2002) it was held that, in order to satisfy the element of *mens rea* for the

offence under s 2(1)*(e)* of POCA, 'it must be a prerequisite that the accused had knowledge of the pattern of racketeering activity and, with knowledge of the activity, associated himself and participated in one or more of the offences'. Insofar as *Green* requires proof of knowledge on the part of the accused of the pattern of racketeering activity, in addition to his or her participation in two or more of the predicate offences, it wrongly introduces an additional *mens rea* requirement for the offence created in s 2(1)*(e)* of POCA. In addition, the decision in *Green* does not accord with the principle enunciated by this court in *Eyssen*, that the essence of the offence in terms of s 2(1) *(e)* of POCA is 'actual participation' in an enterprise's affairs, as opposed to 'knowledge not participation' which is the essence of an offence in terms of s 2(1)*(f)* of POCA.

[67] It follows, in our view, that the State has beyond reasonable doubt proved the elements of the offence under s 2(1)*(e)* of POCA and the appeal of the first accused against her conviction on count 2 should fail.

Count 3

[68] This count relates to the offence created in terms of s 2(1)*(b)* of POCA, namely that any person who receives or retains any property, directly or indirectly, on behalf of any enterprise, and knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity, shall be guilty of an offence.

[69] The court a quo found the first accused guilty on this count and although she had been granted leave to appeal in respect thereof, the appeal on this count was not pursued. No more need to be said in this regard, and there is no reason why this conviction should not be confirmed.

Counts 4-13

[70] The immovable properties acquired by the PT Vennote Familie Trust (see para 34 above) form the subject matter of these counts. The counts are framed in terms of s 4 of POCA, which deals with the activity commonly known as money laundering. Each of the counts relates to one of the properties acquired by the trust with the money deposited by investors in the scheme. The essence of each of

counts 4-13 is that the first accused had knowingly concealed the money derived from or through a pattern of racketeering activity by acquiring the properties with that money. It is common cause that the first accused was involved in deciding to acquire the properties in the name of the trust. In fact, she and accused 4 concluded most of these transactions on behalf of the trust. In her evidence the first accused conceded that she was instrumental in acquiring the properties for the trust and that she was aware that all of the properties were purchased with funds deposited in the scheme by investors.

[71] The purchase of the property referred to in count 4 differs from the other nine counts in that the money utilised was the interest earned by accused 3 and 4 on their investment which they had made in the scheme. The proceeds were utilised to purchase the relevant property and it was registered in the name of the trust. This occurred with the full knowledge and consent of the first accused. The result, however, is the same as in the case of the other counts under this rubric, ie the money utilised for the purchase of the property was derived through a pattern of racketeering activity, ie the business of the scheme.

[72] In respect of all these counts it was the money derived from the business of the scheme that was concealed by utilising it to acquire fixed property. This constituted a contravention of s 4 of POCA. Counsel for the first accused, however, approached these counts from a different perspective, namely that the fixed property acquired by the trust in each instance was the ‘property’ for purposes of s 4 of POCA. She submitted that there was no attempt on the part of the first accused to disguise or conceal the nature, source, location, disposition or movement of these properties or the ownership thereof. Therefore, the submission continued, the State failed to prove a contravention of s 4 of POCA.

[73] There is no merit in this submission. These counts pertained to the disguising or concealing of the proceeds of the unlawful activities *in casu*, namely money derived from the scheme through its various entities.

[74] It follows that the appeal against the convictions on counts 4-13 should also fail.

Count 27

[75] The first accused was convicted on this count of the offence of conducting the business of a bank in contravention of the provisions of s 11(1) of the Banks Act 94 of 1990 (the Banks Act). She has not pursued her appeal against this conviction and there is no reason why the conviction should not be confirmed.

Count 28

[76] The first accused was convicted on this count of fraud with regard to wilful misrepresentations made to Dr Dekker and Mr van den Bergh during the period 8 May 2000 - 16 May 2000. The first accused has not pursued her appeal against this conviction and there is no reason why it should not be confirmed.

Counts 29 and 30

[77] These are two counts of fraud. The first relates to a written misrepresentation made by the first accused through her attorney on 11 December 2000, grossly understating the total value of investments made in the scheme. The second similarly pertains to a written misrepresentation made on 14 December 2000 by the first accused through her accountant, once again grossly understating the total value of investments made in the scheme.

[78] The first accused does not dispute that, in respect of both counts, the definitional elements of the crimes in question have been proved. However, on appeal, the first accused belatedly submitted that there was an undue duplication of convictions in respect of these two counts. In our view, there is no merit in this submission. Although the motive underlying the misrepresentations may have been similar, namely to prevent the authorities from investigating the scheme, it cannot be denied that the two instances consist of separate independent acts each with its own separate intention to deceive. They cannot be regarded as one continuing crime. Reference can be made to *Vorster v S* 1976 (2) PH H.202 (AD), in which it was held that a systematic course of conduct which consists of separate independent acts of the same nature (in that case the accepting of bribes) need not be treated as a single offence.

[79] We therefore find that there was no duplication of convictions and that the appeal against these convictions should fail.

Counts 31, 32, 33, 35, 36, 37 and 38

[80] Counts 31, 32, 35 and 37 are fraud charges while counts 33, 36 and 38 are contraventions of s 84(8)*(c)* of the Banks Act (wilfully furnishing a manager appointed in terms of the Banks Act with false information). All of the counts relate to misrepresentations made by the first accused during the period 6 June 2001 to 1 August 2001, to duly appointed inspectors or managers appointed in terms of the Banks Act. The first accused concedes that she wrongfully and unlawfully made these misrepresentations by grossly understating the number and value of the total investments made in the scheme, but contends that her intention throughout was the same, namely to prevent the business of the scheme being closed down.

[81] It was therefore submitted on her behalf that she had acted with a single intent and ought only to have been convicted on one count of fraud and one count of contravening s 84(8)*(c)* of the Banks Act.

[82] This submission, once again, confuses the motive for the offences with the element of intention required for criminal liability. The first accused may have had the motive or purpose in mind to prevent the closure of the business of the scheme, but on four separate occasions during a period of two months and acting in response to four separate requests, she intentionally misled each of the representatives by making separate and independent misrepresentations. Each of these misrepresentations constituted separate independent acts amounting to separate offences of fraud and the contravention of s 84(8)*(c)* of the Banks Act. In the relevant circumstances the independent acts cannot be treated as a single offence.

[83] We are accordingly of the view that the court a quo correctly found the first accused guilty of the separate offences mentioned in these counts. It follows, in our view, that there is no merit in the appeal of the first accused against her convictions on these counts.

Count 34

[84] This count refers to a contravention of s 84(8)*(d)* of the Banks Act, ie the failure of the first accused to comply with a reasonable request made to her by Mr Bredenkamp, a manager duly appointed in terms of the Banks Act. It is common cause that on 7 June 2001 Bredenkamp requested the first accused to bank all cash received in the course of the business of the scheme. This she failed to do and on 10 July 2001 Bredenkamp discovered R3 057 420 in cash kept in three safes by the first accused at her residence. The first accused has not advanced any argument on appeal and her conviction on count 34 ought to be confirmed.

Counts 39 and 40

[85] The count of fraud (count 39) and the contravention of s 84(8)*(c)* of the Banks Act (count 40), respectively, have their origin in a letter addressed to PriceWaterhouseCoopers (PWC) by Mr Cossadianos, a bookkeeper who represented the first accused at the relevant time. The letter, dated 8 February 2002, was prepared and written by Cossadianos pursuant to a meeting between the first accused and representatives of PWC appointed as managers to the business of the scheme in terms of s 84(1) of the Banks Act. The purpose of the letter written by Cossadianos to PWC was to provide a complete and comprehensive list of investors and agents to PWC. Cossadianos, acting on behalf of the first accused, advised PWC in the letter that there were 167 investments made in the scheme to a total value of R11 002 934. It is common cause that, as at 8 February 2002, the actual value of investments in the scheme was more than R796 million. It is further common cause that, had the true state of affairs been conveyed to PWC during February 2002, immediate steps would have been taken to close the scheme down so as to prevent investors from suffering further losses.

[86] The court a quo found that this constituted a material misrepresentation which was false to the knowledge of the first accused and she was thus convicted of fraud and the statutory offence of providing false information to the managers appointed in terms of s 84(1) of the Banks Act.

[87] At the hearing of the appeal a two-pronged attack was launched by counsel for the first accused against the convictions on these counts. First, she submitted

that the State failed to prove that the first accused had made the misrepresentation, particularly in view of the failure of the State to call Cossadianos as a witness. Secondly, she submitted that, as PWC accepted that the information to be provided by Cossadianos would be inaccurate, the letter of Cossadianos did not constitute a misrepresentation.

[88] We believe that the attempt of the first accused to distance herself from the content of the letter written by Cossadianos, is rather disingenuous. She testified that Cossadianos was at her office where she handed all the investor files to him with a request to audit same and to prepare the letter required by PWC. She testified that she and Cossadianos 'het saam gewerk as vennote' and that a 'dag of twee later' she did have sight of the incorrect information sent to PWC by Cossadianos, but she did not set the record straight with PWC as she 'was bang hulle maak my besigheid toe'. It follows that, not only was the first accused the source of the information that Cossadianos supplied to PWC, but she had in any event ratified the blatant misrepresentation contained in the letter. As submitted on behalf of the State, the common thread in the *modus operandi* employed by the first accused, is that she repeatedly grossly understated the size of the business for fear that it would be closed down. In this instance the misrepresentation was that the value of the scheme was a mere 1, 38 per cent of its actual value of more than R796 million.

[89] We fail to appreciate why, in these circumstances, there would have been a duty on the State to call Cossadianos as a witness; on the contrary, if there was any exculpatory explanation for the compilation of this grossly understated list of investors, the first accused ought to have called Cossadianos to provide such explanation. Furthermore, if the first accused did, as she testified, afford Cossadianos access to all the investor files, it is inconceivable that he would have understated the value of the scheme by some 98, 62 per cent.

[90] To this one should add the evidence of Carel Bothma, who testified on behalf of the State, that the first accused had instructed him to create loan documents, which she urgently required, to the value of R10 million or R11 million, apparently for an audit to be conducted by Cossadianos. His evidence was not disputed by the first accused and it appears that the falsely created loan documents made up a

substantial part of the list of investments which accompanied the letter of Cossadianos dated 8 February 2002. It is also common cause that R17 million of the purported loans reflected in the list of investments, did not exist. In view of the aforesaid, we find that, not only did the State prove that the first accused was the source of the false information submitted to PWC, but also that she was aware that the material misrepresentation had been made on her behalf and failed to declare the true state of affairs to PWC.

[91] The second submission on behalf of the first accused in respect of these counts, namely that no misrepresentation had been made, as PWC acknowledged that the investor list would 'not be accepted as accurate or a true reflection in any way', is equally without merit. The letter written by PWC after the meeting of 22 January 2001, records that Cossadianos would provide PWC with a document specifying the extent of the investments obtained, loans and/or investments made and the application in general of funds received as investments by the first accused and her entities. PWC confirmed 'that the above document will not be regarded as the final and true reflection of accounts, but will be used by PWC in the decision making process regarding the course of action, if any, to be followed'.

[92] It is therefore clear that PWC would have relied on the document to decide the future of the businesses of the scheme. The PWC letter certainly did not grant the first accused and Cossadianos carte blanche to mislead PWC to the extent that the value of the investments were reflected as a mere 1, 38 per cent of their actual value. We should also add that this belated defence was not raised at the trial nor was it relied upon by the first accused as a ground of appeal when she applied for leave to appeal.

[93] In view of the aforesaid we conclude that the State had proved the guilt of the first accused beyond reasonable doubt and that her appeal against the conviction on counts 39 and 40 should fail.

Count 41

[94] This count upon which the first accused was convicted, was also one of fraud. The first accused has not pursued her appeal in this regard. The evidence clearly

shows that yet another material misrepresentation was made to the appointed managers by the first accused through her attorney that investments of only R409 000 had been received by M & B Co-Operative, while the true value of the investments received at that date amounted to R541 million.

[95] The court a quo correctly convicted the first accused on this count and the conviction should be confirmed.

Counts 42 and 43

[96] Count 42 is one of fraud, while count 43 is a contravention of s 84(8)*(c)* of the Banks Act, both emanating from misrepresentations made by the first accused through her attorney. The court a quo found the first accused guilty on both counts, but on appeal counsel for the first accused has not advanced any argument in respect of these counts.

[97] We accordingly do not have to dwell on these counts, save to say that they form part of the pattern of grossly understating the magnitude of the scheme by the first accused, and misrepresenting to the authorities that all investors had indeed been paid out, whereas this was not the case.

[98] There is no doubt that the court a quo correctly convicted the first accused on these counts and the convictions should be confirmed.

Counts 45-46

[99] These counts of fraud relate to a range of misrepresentations made in the conduct of the business of the various entities utilised by the scheme. The court a quo found the first accused guilty on both counts. Counsel for the first accused has not presented any argument on appeal in regard to these counts. There is, in our view, no basis for a finding that the court a quo misdirected itself in this regard. Therefore the convictions ought to be confirmed.

Counts 48-949, 950-3385 and 8071-11694

[100] Each of these three groups of counts referred to contraventions of s 135(3)*(a)* of the Insolvency Act 24 of 1936, by the first accused in her capacity as a director or

officer of one or more of the corporate entities through which the scheme conducted its business during the period 1 March 1998 to 31 October 2001. These corporate entities were subsequently liquidated and s 135(3)*(a)* of the Insolvency Act, read with s 425 of the Companies Act 61 of 1973 (1973 Companies Act), provides that an insolvent (or director or officer of an insolvent company) who has contracted debts without an expectation of ability to pay such debts, shall be guilty of an offence.

[101] The court a quo found the first accused guilty on one count of contravening s 135(3)*(a)* of the Insolvency Act in respect of each of the three groups of counts. The evidence shows that debts were incurred by the corporate entities through which the first accused conducted the business of the scheme, in circumstances where there was no expectation at all of an ability to pay same. These convictions have not been attacked on appeal and there is no reason why same should not be confirmed.

Counts 20568-20768, 20769-24392 and 24393-33265

[102] The 12698 counts constitute contraventions of s 84(8)*(d)* of the Banks Act, in respect of which the court a quo found the first accused guilty as charged. What the counts referred to are instances where the first accused failed to comply to the best of her ability with reasonable requests made by the managers appointed to the scheme, that no further deposits were to be accepted from investors in the scheme. The first accused does not dispute that the definitional elements of the offences had been proved by the State, and the only issue raised on appeal is that there was an undue duplication of convictions on these counts.

[103] In this regard counsel submitted that the first accused had taken a decision to disregard the request of the manager not to take further investments. This resulted in 12698 different instances where she or her co-accused or her agents took investments contra the request not to do so. The decision of the first accused was based on her intention to proceed with the scheme as usual in order to prevent it from collapsing. Therefore, the submission continued, there was a duplication of convictions in that the charges were based on ‘the same culpable fact’. However, as submitted on behalf of the State, counsel for the first accused again confuses the motive for the crimes with the element of *mens rea* required for criminal liability.

Although these counts were generic in nature, each count related to a distinct or separate act with different victims or complainants, dates and amounts and was not based on the same culpable fact. There was a different intent or *mens rea* formed in respect of each separate act in disregard of the manager's request not take further investments.

[104] In the result there was no duplication of convictions and the appeal of the first accused in regard to these counts should fail.

Counts 33266-34167, 34168-36617, 39068-44550, 50034-54533, 59034-68104, 188911-197707

[105] These are counts of fraud relating to the investments made by investors in all the entities through which the scheme was conducted. The misrepresentations upon which the State relied were made by the first accused by means of the investment certificates and agreements issued to investors, and included the following:

(a) that the entities could lawfully take investments from the public.

(b) that fixed percentage returns and return amounts were lawfully offered.

(c) that investors legally acquired shares in Madikor, whereas it was common cause that such entity was a private company and could not lawfully issue shares to the general public.

(d) that MP Finance SACCO was a member of or registered with SACCOL, whereas it was never registered as such.

(e) that investors legitimately acquired shares or membership in MP Finance SACCO, whereas the entity never existed.

(f) that investors legitimately acquired shares in Martburt, whereas its prospectus was never registered or distributed. Moreover, the draft prospectus made provision for share certificates to the value of R10 million to be issued, while 4500 certificates to the value of more than R290 million had in fact been issued.

(g) that investors legitimately acquired shares or membership in M & B Co-Operative, whereas the entity was never registered.

[106] Moreover, under cross-examination, the first accused admitted that:

(a) she did not state to investors that the investments were illegal.

(b) she effectively guaranteed a fixed return, irrespective of how her business performed.
(c) she did not state to investors that if her business performed poorly, capital would have to be used to pay interest returns on investments.
(d) she did not state to investors that their investments or deposits were taken in contravention of the Banks Act or the former Usury Act 73 of 1968.
(e) she did not state to investors that a multiplication scheme was being operated in contravention of the Unfair Business Practices Act 71 of 1988.
(f) she never stated to investors that the modus operandi employed by her in conducting the scheme was that investor capital had to be used to pay the interest returns to investors.

[107] These misrepresentations caused investors to invest in the scheme to their financial prejudice. In fact, the first accused admitted that, had the investors known the true state of affairs, they would not have invested in the scheme.

[108] The court a quo found the first accused guilty on all these counts of fraud. On appeal, it was submitted on behalf of the first accused that the State had failed to prove the misrepresentations on which it relied. It was contended that, in attempting to prove the misrepresentations, the State relied on the similar fact evidence of 25 investors, but that this was insufficient to prove the actual misrepresentation in respect of each count. In our view this submission fails to take account of the fact that the misrepresentations upon which the State rely, were made in writing as per the investment certificates and agreements. The presentation of the similar fact evidence of the 25 investors was only for the purpose of showing that investor certificates and agreements containing these misrepresentations were issued to investors. In our view this evidence regarding the misrepresentations, together with the admissions made by the first accused in her evidence, as well as the undisputed evidence of prejudice or potential prejudice caused to investors, proves beyond reasonable doubt that the first accused had defrauded the investors referred to in these counts.

[109] We should mention that, with regard to counts 188911-19707 (relating to Krion) the first accused admitted during cross-examination that the

misrepresentations and facts deliberately withheld from investors, were also made and withheld by her at meetings held with investors and agents at various locations countrywide.

[110] Counsel for the first accused further argued that, in respect of all the counts, there has been an undue duplication of convictions. In particular, she submitted that, where individual investors made re-investments and transfers from one entity to the other, these were made on the investor's own initiative and not as a result of any further false representation made to the investor by the first accused. However, each investment or re-investment was accompanied by its own documentation and accompanying new intention on the part of the first accused, with the result that there was no duplication of convictions.

[111] Finally, in this regard, it was submitted on behalf of the first accused that she believed that she had acted lawfully after seeking advice from her legal advisors. However, the record of the trial shows that the first accused had misrepresented the true state of affairs of the business of the scheme to all the parties that she had approached for legal advice. She could therefore not have had any honest belief in the legal advice obtained in this manner.

[112] It follows, in our view, that the appeal against the conviction of the first accused on these counts should also fail.

Counts 77176-86246

[113] The first accused was charged with 9 071 counts of contravening s 42 of the Co-Operative Act 91 of 1981 (the Co-op Act), in carrying on business under the name of M & B Co-Operative without being registered as a co-operative. Section 42 provides that any person carrying on business under a name in which the word 'co-operative' or the abbreviation 'co-op' is included without being incorporated as a co-operation under the Co-op Act, shall be guilty of an offence. It is common cause that the first accused conducted business under the name and style of M & B Co-Operative Limited without being registered as a co-operative. However, the State charged her separately for every transaction concluded under the name of the co-operation whereby investments were received from investors in the scheme. On

appeal it was submitted on behalf of the first accused that, in charging her with 9071 counts, a duplication of convictions had taken place.

[114] It seems to us that there has been an improper duplication of convictions in this instance. Section 42 of the Co-op Act provides that the 'carrying on of business' in this manner constitutes the offence. This would imply the conduct of a business in which more than one transaction is concluded. It therefore appears to us that, what the legislature intended to criminalise, is the actual carrying on of the business under the name of an unregistered co-operative and not each and every separate transaction concluded in the course of such business.

[115] Counsel for the State has referred us to the heading of s 42 which reads 'improper use of word "co-operative" etc., an offence'. This, counsel submitted, is an indication that each and every improper use of the word 'co-operative' constitutes a separate offence and that the conviction of the first accused in respect of all 9071 counts is accordingly in order. We do not agree. As appears from the body of s 42, it is the carrying on of the business in this manner which is criminalised, which conduct of necessity would include a range of transactions to constitute the carrying on of a business.

[116] We are therefore of the view that, in respect of these counts, the appeal ought to succeed to the extent that the first accused should only be convicted on one count of contravening s 42 of the Co-op Act.

Counts 144337-188910

[117] On these counts the first accused was convicted of contravening the provisions of s 83(3)*(a)* of the Banks Act, in failing to comply with a written direction issued by the Registrar of Banks on 7 June 2001. In terms of this direction she and the entities then forming part of the scheme were directed to repay all monies obtained from investors, including, if possible, any bank interest that may lawfully have accrued on such amount. The repayment of these amounts to investors had to be made under the control of Mr Strydom of PWC.

[118] The 44 573 counts of contravening this section were based on the payments of interest and dividends made to the investors after the date of the direction, without the knowledge or permission of Mr Strydom. These payments amounted to R1 020 billion. It was not disputed by the first accused that such payments were made, but counsel on her behalf submitted that these payments of interest or dividends were not covered by the written direction and therefore could be lawfully made to investors. We do not agree with this submission. As mentioned earlier, the written direction expressly refers to all monies obtained from investors including interest that may lawfully have accrued on such amounts. Therefore such interest, or 'dividends' as it was often referred to, could only be paid to investors subject to the management and control of PWC.

[119] Counsel for the first accused further submitted that PWC never put any procedure in place whereby repayments could be made to investors under the supervision of PWC. However, Mr Bredenkamp of PWC testified that investors could not be paid out at that stage because the solvency of the scheme had to be maintained. The monies could only be repaid to investors once the solvency of the scheme was established. As the first accused had continuously grossly understated the magnitude of the scheme, it was impossible for PWC to ascertain the solvency of the scheme.

[120] Finally, counsel for the first accused submitted that an improper duplication of convictions had taken place and the first accused should only have been convicted of one contravention, in that she had one intention only, namely to proceed with the business of the scheme as usual and therefore to make these payments to investors. As we have previously pointed out, this submission confuses the motive of the first accused with the element of *mens rea* required for criminal liability. Her motive may have been to proceed with business as usual, but in respect of each payment so made, she had a separate intention in respect of a separate beneficiary and in a separate amount. There was accordingly no improper duplication of charges.

[121] It follows that the appeal against the convictions on these counts should fail.

Counts 197708-199747

[122] These counts represent charges brought against the first accused for contravening s 104(1)*(d)* of the Income Tax Act 58 of 1965 (Income Tax Act), by failing to pay secondary tax on companies (STC) to the South African Revenue Service (SARS). The charges relate to STC at the rate of 15 per cent deducted from 'dividends' payable to investors in Krion. However, no Krion shares had been allotted to investors at the time when such 'dividends' were calculated and paid. Therefore no STC was payable to SARS.

[123] The trial court found the first accused guilty on the main count of contravening s 104(1)*(d)* of the Income Tax Act, but the State readily conceded that she ought not to have been so convicted. The State submitted that she ought to have been convicted on the alternative counts of theft of the amounts so deducted and which had not been paid over to SARS. However, during argument counsel for the State conceded that it had failed to prove that the first to fourth accused had the intention to appropriate the amounts so deducted and therefore the alternative charge of theft of the monies deducted had not been proved.

[124] It follows that the appeal of the first accused in this regard should succeed and that she be acquitted on these counts.

Counts 200564-200663 and 200664-218636

[125] The parties are agreed that the judgment of the court a quo contains a typographical error indicating that the first accused was found guilty on counts 200564 to 200663. In fact, the accused were all discharged on these counts in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA). Clearly, what the court a quo intended to do was to convict the first accused on counts 200664 – 218636, committed during the period 9 June 1999 to 1 March 2002.

[126] First accused does not dispute that she satisfied the definitional elements of the offences enumerated in counts 200664 to 218636. These relate to the conducting of a harmful business practice declared in terms of para 2 of GN 1134 of 1999, promulgated in *GG* 20169, 9 June 1999 under s 12(6) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988, namely the offering or promising or

guaranteeing to pay an annual effective interest rate exceeding the repo rate[2] determined by the South African Reserve Bank by more than 20 per cent.

[127] Counsel for the first accused, however, submitted that she should only have been convicted on one count and not on 17972 individual counts. She contended that the intention of the legislature was to proscribe harmful business practices, which implies the practice of the business in its entirety and not each separate transaction. We believe that counsel is correct in her submission, particularly in view of the wording of GN 1134 which declares the harmful business practice to be 'the operation of or participation in a multiplication scheme. . . .' This necessarily implies the existence of a multiplication scheme the operation of which constitutes the harmful business practice. We therefore conclude that what the legislature intended to proscribe is the operation of the multiplication scheme as such and not to criminalise each individual offer made in contravention of the Notice as a separate offence. In fact, counsel for the State fairly conceded that this interpretation is reasonably justified.

[128] It follows that, in respect of the counts under this rubric, the first accused ought to have been convicted on one count only and not on 17972 individual counts.

Counts 199748 to 200563; 218683 and 47

[129] The first group of counts represents 815 unauthorised payments made by the first accused from the Krion bank account to settle amounts due to pre-existing investors in the scheme in respect of interest and or capital repayments and or cash withdrawals. This amounted to R20 million. Each of these counts of theft was in respect of a different amount paid to different investors. It appears that the court a quo correctly convicted the first accused on these counts.

[2]The repo rate is the repurchase rate. This is the interest rate charged by the South African Reserve Bank (SARB) on short-term loan facilities provided to South African banks. The SARB uses the repo rate in its refinancing framework to influence short-term market interest rates, economic aggregates such as spending, economic growth and inflation. See in this regard an information paper by the SARB entitled *The role of the prime rate and the prime-repurchase rate spread in the South African banking system* available on the SARB website at *www.resbank.co.za*, accessed on 30 November 2015.

[130] Count 218683 deals with the theft of the money accompanying all applications for shares in Krion, allegedly amounting to R908,5 million. However, the State concedes that theft in the amount of R908,5 million had not been proved. What does appear from the common cause facts, is that approximately R115,4 million of new investor money was received in respect of applications for shares in Krion, of which R24,29 million was deposited in the Krion bank account. It follows that the quantum of count 218683 should only be R91,1 million. It appears to be common cause that this amount was misappropriated by the first accused and therefore her conviction on the count of theft in respect thereof should stand, but for the lesser amount of R91, 1 million.

[131] Count 47 is one of fraud, in that the first accused induced Mr van Wyk, a director of Krion, to issue three Krion cheques to the value of R1, 7 million, R1 million and R3, 3 million, respectively. The first accused represented to Van Wyk that the cheques were to be used for a legitimate business purpose whilst they were actually used to make interest payments to existing investors in the scheme.

[132] The first accused did not dispute the above, nor that she satisfied the definitional elements of the crimes in question, but pointed to the fact that she had been convicted on counts 199748, 199749 and 199751 of theft of the same amounts represented by the same three cheques which are the subject matter of count 47. She contends that it is not legally permissible to find her guilty on a charge of fraud where she has already been convicted of theft in regard thereto. We do not agree. In these instances both the intention to defraud and the intention to commit theft were proved. In such event it is permissible to convict an accused of both fraud and theft, even if the separate counts ‘depend on the same factual finding’. See *S v Boesak* 2000 (1) SACR 633 (SCA) para 71.

[133] It follows that, subject to what is said above in regard to the quantum of count 218683, the appeal of the first accused against her conviction on the counts under the above rubric, should fail.

Counts 218637, 218638, 218639 and 218682

[134] The first accused was convicted under these counts for knowingly being a party to the reckless carrying on of the business of the corporate entities utilised in the conduct of the scheme. This constituted contraventions of s 64(2) of the Close Corporations Act 69 of 1984 and s 424 of the 1973 Companies Act, respectively, and included the entities MP Finance CC, Madikor, Martburt and Krion.

[135] No argument was presented on behalf of the first accused in regard to these counts, and as the evidence overwhelmingly shows the reckless participation of the first accused in the business of these corporate entities, the convictions ought to be confirmed.

Counts 218660 and 218661

[136] On these counts the first accused was convicted on the alternative charge of contravening s 104(1)*(a)* of the Income Tax Act, in being instrumental in the making of false statements in the income tax returns submitted on behalf of MP Finance CC for the tax years 1999 and 2000.

[137] Counsel for the first accused did not address us on these counts and there is no reason why the convictions should not be confirmed.

Counts 218641 and 218642

[138] These two counts of fraud relate to the misrepresentations made by the first accused in her 1999 and 2000 income tax returns, by grossly understanding her taxable income. The misrepresentations caused substantial prejudice to SARS and the trial court found the first accused guilty on both counts.

[139] Counsel for the first accused did not address us on these counts and there is no reason why the convictions should not be confirmed.

The first accused ─ Sentence

[140] The relevant sections of POCA contravened by the first accused, respectively triggered the following prescribed maximum sentences:

(a) Sections 2(1)*(f)*, 2(1)*(e)* and 2(1)*(b)* ─ A fine of R1 billion or imprisonment for life.

(b) Section 4 ─ A fine of R100 million or 30 years' imprisonment.

[141] The provisions of s 51(2)*(a)(i)* of the Criminal Law Amendment Act 105 of 1997, read with Part 2 of Schedule 2 thereto, prescribe a minimum sentence of 15 years' imprisonment in respect of a first offender, such as the first accused, with regard to an offence relating to, inter alia, fraud and theft involving more than R500 000. A court is obliged to impose this minimum sentence unless there are substantial and compelling circumstances justifying the imposition of a lesser sentence.

[142] The trial court had due regard to these prescribed sentences in sentencing the first accused. On each of counts 1 to 3, ie the contravention of sections 2(1)*(f)*, 2(1)*(e)* and 2(1)*(b)* of POCA, she was sentenced to 20 years' imprisonment. In respect of the ten counts of contravening s 4 of POCA, the first accused was sentenced to 10 years' imprisonment on each count. On seventeen of the fraud counts and two counts of theft she was also sentenced to 10 years' imprisonment on each count. With regard to the remainder of the convictions she was sentenced to periods of imprisonment ranging from 3 years to six months. The cumulative effect of the various sentences of imprisonment was ameliorated by ordering that several sentences are to be served concurrently, to the extent that the first accused has to serve an effective term of 25 years' imprisonment.

[143] On appeal counsel for the first accused did not argue that the trial judge, in exercising her sentencing jurisdiction, had misdirected herself in any respect. What was submitted, is that the effective sentence of 25 years' imprisonment is shockingly inappropriate to the extent that it merits interference by this court. It is trite that, absent any material misdirection by the trial court, interference by a court of appeal is only justified where there is a striking, startling or disturbing disparity between the trial court's sentence and that which the appellate court would have imposed. See *S v Sadler* 2000 (1) SACR 331 (SCA) para 8. It follows that, even if the court of appeal is of the view that it would have imposed a lesser sentence, interference is only justified if it is convinced that the trial court could not have reasonably passed the sentence which it did.

[144] A reading of the trial court's judgment on sentence shows that the learned judge had due regard to all the personal and other mitigating factors of the first accused, including her clean record; the fact that the matter had dragged on for seven years before the trial commenced; that she has suffered emotionally and is financially ruined, as well as the impact that her incarceration would have on her and her adopted minor child. We should, however, add that the first accused and the other accused were in custody for only four days awaiting trial, whereafter they were released on bail.

[145] The trial judge carefully weighed these factors against the nature, gravity and magnitude of the crimes and the devastating financial and emotional effects the scheme had on some 14 000 investors and concluded that the only suitable sentence was one of effective imprisonment for a considerable period of time. In sentencing the first accused to an effective term of 25 years' imprisonment, the trial judge took into account that she was the driving force of this illegal scheme who showed no remorse or any sympathy for the investors, particularly those who had invested R908 million in Krion which could not be recovered.

[146] In our view, this is a matter in which the element of deterrence plays an important role when considering a suitable sentence. In particular, the sentence should serve as a deterrent to those who may consider launching illegal multiplication schemes of this nature. The common theme of these Ponzi schemes is that the hard-earned financial means of others, often the elderly and financially naïve members of society, are invested in the scheme on the strength of outrageous returns offered which cannot be sustained due to the lack of a viable economic enterprise underpinning the scheme. The devastating effects which this scheme had on investors was graphically illustrated by the evidence of some 25 investors who had been financially ruined and now have to rely on the generosity of family and others to make ends meet. As recorded earlier, the trial court found that the first accused had shown no remorse or sympathy for the plight of these investors.

[147] A further aggravating factor is the cynical approach of the first accused to the directives of the authorities to cease taking investments and to repay investors. She fraudulently misrepresented the extent of the scheme by grossly understating the

number and value of the total investments made in the scheme. These misrepresentations initially persuaded the authorities not to close the scheme down. As a consequence the investors suffered further losses. She blandly testified that she repeatedly understated the size of the business of the scheme for fear that it would be closed down. In one instance the misrepresentation was that the value of the scheme was a mere 1,38 per cent of its actual value of more than R796 million. Apart from these misrepresentations, the first accused had no hesitation, when confronted by the authorities, to merely change the vehicle through which the scheme was conducted in an attempt to deceive the authorities and to prevent them from closing the scheme down.

[148] We should conclude by saying that the damage caused by the conduct of the first accused, both financially and emotionally, can hardly be over-emphasised. Therefore, we share the view of the trial court that a substantial period of direct imprisonment is called for. The sentence of 25 years' effective imprisonment is a heavy sentence, particularly also bearing in mind the fact that, when sentenced, the first accused was 56 years old. Her relatively high age was taken into account by the trial court as well as the fact that she requires medication for high blood pressure and cholesterol. We do not believe that the first accused should necessarily be considered as a person of old age, but, in any event, in *S v Zinn* 1969 (2) SA 537 (A) at 541-542, Rumpff JA held that 'old age when accompanied by loss of mental capacity is a ground for mitigation, but generally speaking old age is not a ground for leniency'.

[149] In our view it cannot be said that the court a quo acted unreasonably in imposing a term of 25 years effective imprisonment. Having regard to all the relevant circumstances, there is no striking, startling or disturbing disparity between the trial court's sentence and that which we would have imposed had we been the court of first instance. On the contrary, we would have been inclined to impose a sentence of the same order. We conclude that the effective sentence of 25 years' imprisonment imposed upon the first accused is not disproportionate to the crime, the personal circumstances of the first accused and the interest of society. In the result the appeal of the first accused against her effective sentence of 25 years' imprisonment should

fail. Finally, we should add that the limited success that the first accused had on appeal, does not impact at all on her effective sentence of 25 years' imprisonment.

The second accused

Count 2 (Contravention of Section 2(1)*(e)* of POCA)

[150] It is common cause that the second accused was both associated with and employed by the scheme. He is a former business banker with 34 years' experience in banking. For approximately 10 years prior to his employment in the scheme he served as a funding manager for ABSA bank sourcing fixed term investments.

[151] He made his first investment in the scheme on 1 February 2001. From March 2001 he introduced a number of new investors to the scheme and received commission on such referrals. He resigned his employment with ABSA bank during July 2001 and took up full time employment in the scheme with effect 1 August 2001. His role in Martburt and M & B Co-Operative has been set out earlier herein. The application form for the registration of M & B Co-Operative was completed and signed by the second accused and he attested to an affidavit verifying the content thereof. It is not in dispute that the application contained false information in respect of the number of members and the extent of the investments.

[152] The second accused was appointed to oversee the activities of the various agents appointed after 6 June 2001 and to verify the correctness of the documentation prepared by them in taking deposits from the public. In this capacity he was therefore exposed to the extent and terms of each investment taken. He knew what the extent was of each interest commitment. He personally signed six investment certificates in Martburt and 337 membership certificates in M & B Co-Operative

[153] In dealing with accused no 1 above we have set out the requirements for a conviction under s 2(1)*(e)*. On behalf of the the second accused it was argued that the State had failed to prove that the second accused knew that his participation in

the scheme amounted to a pattern of racketeering. The argument is essentially the same as that advanced in respect of the first accused. In the case of the second accused he has been convicted of a number of predicate offences listed in Schedule 1 of POCA, some requiring *dolus* and others requiring culpa in order to establish liability. The second accused had the required *mens rea* in each case to commit the various predicate offences as fully set out below. We have already found that no further *mens rea* is required. The offences of which the second accused has been convicted form part of the pattern of racketeering which characterised the activities of the scheme. The second accused was therefore correctly found to have 'participated in the affairs of the scheme through a pattern of racketeering.'

Count 3 (Contravention of section 2(1)*(b)* of POCA)

[154] The second accused was convicted of a contravention of s 2(1)(b) of POCA which provides that:

'Any person who: receives or retains any property, directly or indirectly on behalf of an enterprise; and knows or ought reasonably to have known that such property derived or is derived from or through a pattern of racketeering activity; . . . shall be guilty of an offence.'

[155] Counsel for the second accused submitted that in order to be convicted under s 2(1)(b) of POCA the State is required to prove beyond reasonable doubt that the accused received or retained property directly or indirectly as part of his planned, ongoing, continuous or repeated participation or involvement in offences listed in Schedule 1 to POCA. The submission does not accord with the definitional elements of the offence. The provisions of the section are clear. Once it is established that the accused received or retained property directly or indirectly on behalf of the scheme the only remaining issue is whether he knew, or ought reasonably to have known, that such property derived or is derived from or through a pattern of racketeering activity. His participation in such activity is irrelevant.

[156] It is common cause that the second accused received money on behalf of the scheme. It is not disputed that it derived from a pattern of racketeering activity.

[157] The only question which arises is whether the second accused knew or ought reasonably to have known that such money derived from a pattern of racketeering. The provisions of s 1(3) of POCA are set out earlier herein (para 53). The second accused was a de facto office bearer in the form of a director and or chairperson of entities and purported entities which formed part of the scheme. Under these circumstances the law expects of him to take reasonable steps to acquaint himself with the provisions of the law that govern his responsibilities (*S v Pouroulis* 1993(4) SA 505 (W) at 604C-E; *S v International Computer Broking and Leasing Pty Ltd & another* 1996 (3) SA 582 (W); *S v Longdistance* (*Natal) (Pty) Ltd & others* 1990 (2) SA 277 (A) at 283G.) A director of a company has a duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable him to properly discharge his duties (cf *Halsbury's Laws of England* vol 14 5 ed (2009) para 549. It is well established that a 'Director of a Company . . . has a duty to observe the utmost good faith towards the company, and in doing so, to exercise reasonable skill and diligence' (*Howard v Herrigel & another NNO* 1991 (2) SA 660 (A)). A Director is accordingly required to exercise an independent judgment and to take decisions according to the best interests of the company as his principal. (*Fisheries Development Corporation of SA Ltd v Jorgenson & another* 1980 (4) SA 156 (W) at 163E).

[158] The second accused must for purposes of s 1(3)(a) of POCA be judged according to the general knowledge, skill, training and experience of a director of companies engaging in the business of deposit taking.

[159] The second accused's actual knowledge, skill, training and experience in the banking sector has been recorded earlier. For purposes of s 1(3)(b), he is an experienced banker and he was constrained to concede under cross-examination that he knew that he was contravening the Banks Act in taking a deposit. He has personally been convicted of numerous offences set out in Schedule 1 of POCA. In the circumstances we are satisfied that the trial judge correctly concluded that the second accused ought reasonably to have known when he accepted money on behalf of the enterprise that it derived from a pattern of racketeering activity.

Count 27 (Contravention of section 11(1) of the Banks Act)

[160] The second accused was convicted of contravening the provisions of s 11(1) of the Banks Act in that he, together with his co-accused, conducted the business of a bank in the name of various entities which were not registered as a bank.

[161] Section 11(1) of the Banks Act provides that:

'Subject to the provisions of s 18A no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act.' The provisions of s 18A are not material to the appeal. 'The business of a bank' is defined in the Banks Act to mean:

'(a) the acceptance of deposits from the general public (including persons in the employ of the persons so accepting deposits) as a regular feature of the business in question. . . .'

[162] The material portion of the definition of 'deposit' in the Banks Act provides:

'An amount of money paid by one person to another subject to an agreement in terms of which—

(a) An equal amount or any part thereof will . . . unconditionally be paid, either by the person to whom the money has been so paid or by any other person, with or without a premium, . . . at specified or unspecified dates or in circumstances agreed to by or on behalf of the person making the payment and the person receiving it; and

(b) . . . interest will be payable thereon at specified intervals or otherwise,

notwithstanding that such payment is limited to a fixed amount or that a transferable or non-transferable certificate or other instrument providing for the repayment of such amount mutatis mutandis as contemplated in paragraph *(a)* or for the payment of interest on such amount mutatis mutandis as contemplated in paragraph *(b)* is issued in respect of such amount . . . .'

[163] Counsel for the second accused submits however that the state has proved only four instances where he has received deposits and accordingly that he has not taken deposits from the general public as a regular feature of the business.

[164] The argument is misplaced. The business is the scheme. The scheme has, as a regular feature of its business, taken deposits from the general public without ever being registered as a bank. The business was conducted through various entities from time to time including Martburt and M & B Co-Operative. The second accused personally signed 343 ‘investment certificates’ and agreements to a total value of approximately R20,5million and 971 ‘investment certificates’ and agreements were issued in M & B Co-Operative under the name of the second accused. The ‘investment certificates’ are in the form of agreements in terms of which the capital amounts and the interest would be repaid as envisaged in the definition of a ‘deposit’. By signing these documents the second accused was actively engaged in taking deposits as defined in the Banks Act.

[165] In the result the second accused was correctly convicted of this offence.

Count 45 (Fraud)

[166] The second accused was convicted of fraud arising from misrepresentations made to JT van Wyk and AJ van Wyk (the Van Wyks) in respect of the intended goals of Krion at a meeting held in January 2001.

[167] Mr AJ van Wyk (Van Wyk) was the only witness on behalf of the State who testified in respect of the meeting in January 2002 at which the said representations are alleged to have been made. The evidence of Van Wyk revealed that the second accused, an old acquaintance, approached him during December 2001 and indicated to him that he wanted the Van Wyks to become involved as directors in a company to be formed in which he would have an interest. During January 2002 the first accused, second accused and one Cossadianos travelled to Klerksdorp and met with Van Wyk, a chartered accountant and his brother, an attorney. The second accused introduced Cossadianos as their forensic accountant and business advisor and the first accused confirmed this.

[168] It is not challenged on behalf of the second accused that misrepresentations were made nor that they were prejudicial. Counsel for the second accused raised two arguments. Firstly it is contended that Van Wyk was a single witness, that his evidence should therefore be treated with caution and that an adverse inference should have been drawn against the state by virtue thereof that his brother, who was present at the contentious meeting, did not testify. The second argument is that the misrepresentations were made by Cossadianos and the first accused and that the trial judge erred in finding that the second accused associated himself with the misrepresentations.

[169] Van Wyk was a single witness in respect of these issues. He was also a suspected accomplice and was warned in terms of s 204 of the CPA. His evidence must therefore be treated with caution. It is often stated in respect of single witnesses that their evidence should be clear and satisfactory in every material respect (See *R v Mokoena* 1932 OPD 79 at 80) In *S v Sauls & others* 1981 (3) SA 172 (A) at 180E-G, however, this court held:

‘There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in *S v Webber*). The trial judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [*R v Mokoena* 1932 OPD 79 at 80] may be a guide to the right decision but it does mean “that the appeal must succeed if any criticism, however slender, of the witnesses’ evidence were well-founded” (per Schreiner JA in *R v Nhalapo* (AD 10 November 1952) quoted in *R v Bellingham* 1955 (2) SA 566 (A) at 569.) . . .’

[170] The trial court recognised that his evidence was to be treated with caution. It found that he was an honest and careful witness. It concluded that he gave careful consideration to the questions put to him and made concessions where necessary. It found that he remained consistent throughout cross-examination and did not contradict his version. There is therefore merit in the submission on behalf of the State that Van Wyk was a reliable and credible witness and his evidence was clear and satisfactory in every material respect. Counsel for the second accused

acknowledges that there is no material criticism of the evidence of Van Wyk (nie te veel kritiek teen sy getuienis). It is argued, nevertheless, that the trial judge ought to have drawn an adverse inference against the state because, so the argument goes, he need not have been a single witness.

[171] Counsel for the second accused argues that during the course of cross-examination Van Wyk declared on a number of occasions that he was unable to answer the questions put and that his brother could testify in that regard. It is not, however, suggested that any of these issues in respect of which Van Wyk was unable to testify in cross-examination are material to the State's case. It is not contended that there was any inherent improbability in Van Wyk's evidence which his brother was able to clarify (compare *S v Texeira* 1980 (3) 755 (A) 763H-764C). In the circumstances the State was not obliged to call Van Wyk's brother. A prosecutor is not expected to produce all the evidence which he has at his disposal and he is entitled to decide what he considers to be sufficient to discharge the onus which he is required to discharge. In all the circumstances the argument cannot be sustained.

[172] We turn to the second argument raised on behalf of the second accused. The circumstances leading up to the misrepresentations are set out in paragraph 165 above. Although the second accused did not play an active role in the meeting thereafter he was present throughout. The intentions with Krion were explained by the first accused and Cossadianos. The second accused did not correct the false representations made in the course thereof.

[173] The intentions of Krion set out in the prospectus for the company accorded with the presentation made by the first accused, but were far removed from that which the first accused, to the knowledge of the second accused, truly intended to do. The question which arises is whether the second accused through his conduct made any misrepresentation.

[174] Fraud is constituted by the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another (See C R Snyman *Criminal Law* 5 ed (2013) at 530). Although misrepresentations are, more often than not, made by express verbal statements a misrepresentation could equally be made by silence in circumstances where there is a duty to speak. In *S v Mbokazi* 1998 (1) SACR 438 (N) at 445*f-i* Thirion J explained:
'Misrepresentation may however take a variety of forms. They may be made by entries in books or records (*S v Heyne & others* 1956 (3) SA 604 (A)) or by conduct or even by silence when there is a duty to speak. It would seem to me that the remarks of Lord Halsbury in *Aaron's Reef's Ltd v Twiss* 1896 AC 273 (HL) which are quoted with approval in *S v Ressel* 1968 (4) SA 224 (A) are also apposite in the present case:
"It is said there is no specific allegation of a fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it was conveyed ─ by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing any specific statement is untrue".'

[175] The second accused clearly created the impression in the mind of Van Wyk that he and the first accused were business partners and that Cossadianos was their business adviser and accountant. The second accused was indeed instrumental in obtaining the consent of the Van Wyks to act as directors for the company. In the circumstances, by virtue of the situation created by the second accused the Van Wyks were left under the impression that the presentation was made on behalf of the first and the second accused. For these reasons an obligation arose for the second accused to correct the false representations made.

[176] On behalf of the second accused, however, it is further argued that there is no evidence that she was indeed aware of the true state of affairs. The evidence does not support this argument. The second accused's functions in overseeing the agents is set out in para 152 above.

[177] At the time of the inaugural meeting of M & B Co-Operative he was aware that all the previous investors in Martburt would simply be transferred to M & B Co-Operative because the SARB had not approved of Martburt. By December 2001, when it was evident that M & B Co-Operative had not been registered as a cooperative he was fully aware that the purpose for the creation of Krion was to transfer all the investors who invested money in Martburt and M & B Co-Operative to Krion. They would continue to receive their interest as agreed in their original agreements. The conclusion is inescapable that he did know of the true state of affairs. He chose not to disclose this to the Van Wyks.

[178] For these reasons the submission of counsel for the second accused cannot succeed.

Count 47 (Fraud)

[179] The second accused was convicted of fraud. It was held that he and others, made false representations at a meeting on 16 April 2002, either personally or through Cossadianos to Van Wyk in order to induce him to sign cheques in the amounts of R1million, R1,7million and R3,3million respectively in the name of Krion.

[180] Again the State relies on the evidence of Van Wyk in respect of the events which occurred at the meeting on 16 April 2002. Van Wyk kept contemporaneous notes of the discussions in the meeting which were handed up in evidence and which support his evidence. Again it is argued that the trial court erred in failing to draw an adverse inference against the State by virtue of the failure to call Cossadianos and one Vlok who were present at the meeting and could have confirmed the evidence of Van Wyk. Vlok was the first accused's personal body guard and was later appointed as a director in Krion. The role of Cossadianos is set out earlier. The reasoning set out in paragraph 169 to 170 above finds equal application in this regard.

[181] Cossadianos and Vlok are firmly vested in the camp of the appellants. There is every reason to believe that their evidence may not support that of Van Wyk. It is, however, not the function of a prosecutor to place contradictory evidence before a court and expect the court to find its way through the maze. In *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) para 11 this court stated that:

'[I]t is the obligation of the prosecutor firmly but fairly and dispassionately to construct and present a case from what appears to be credible evidence, and to challenge the evidence of the accused and other defence witnesses with a view to discrediting such evidence, for the very purpose of obtaining a conviction. That is the essence of a prosecutor's function in an adversarial system and it is not peculiar to South Africa. . .' (Footnote omitted.)

[182] It was therefore not the obligation of the prosecutor to call witnesses who are firmly vested in the camp of the accused. In view of the court finding that Van Wyk's evidence was the truth and that it was clear and satisfactory, this argument cannot succeed.

[183] Counsel for the second accused argues further that the trial court erred in its factual findings and that it ought to have been held that she was merely a passive observer at the meeting. The approach to factual findings in an appeal was correctly set out by Jones J in *S v Leve* 2011 (1) SACR 87 (ECG) at 90*g-i* where he explained:

'The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See the well-known cases of *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705 and the passages which follow; *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645; and *S v Francis* 1991 (1) SACR 198 (A) at 204c-f. These principles are no less applicable in cases involving the application of a cautionary rule. If the trial judge does not misdirect himself on the facts or the law in relation to the application of a cautionary rule, but, instead, demonstrably subjects the evidence to careful scrutiny, a court of appeal will not readily depart from his conclusions.'

[184] The events leading up to the meeting on 16 April 2002 serve to place the role of the second accused at the meeting in its context. On 10 April 2002 the second accused forwarded a fax to Van Wyk in which he requested the payment of a cash cheque in the amount of R1,7 million by no later than 12 April 2002. He stated in the communication that agents were waiting for capital to pay out the clients. Van Wyk refused to sign the cash cheque and directed numerous enquiries to Cossadianos in respect of this request. Shortly thereafter the second accused called Van Wyk and intimated that it was no longer necessary to sign the said cheque. On 12 April a further letter followed from accused 4 regarding the signature of cheques. It is against this background that the meeting was held on 16 April 2002 when the misrepresentations were made. Subsequent to the meeting the first accused has acknowledged that she required these cheques in order to pay out interest and capital to investors. This accords with the letter sent by the second accused on 10 April. We are therefore not persuaded that the trial court erred in finding that the second accused knew that Krion money was being used to pay out investors in previous entities.

[185] In an endeavor to persuade Van Wyk to sign the cheques the first accused represented to Van Wyk that money was needed to be advanced to micro lending franchises. The second accused did nothing to correct this misrepresentation. Cossadianos further represented to Van Wyk that a covering bond over immovable property of the PT Vennote Familie Trust would be registered as security. The second accused assured Van Wyk that the property adjacent to the Ardenwold Guesthouse had been valued at R10million and that the guesthouse was worth at least R5million. This, the second accused denied, however, his participation is borne out by the contemporaneous notes kept by Van Wyk during the meeting. The second accused furthermore presented at the meeting with a banking slip confirming that an amount in excess of R6million was held in the Krion account to meet the payment of the cheques. The trial court concluded that he had associated himself with the misrepresentations made. We find no misdirection on the part of the trial court and accordingly are disinclined to interfere with the finding of the trial court.

[186] Finally counsel for the second accused argues, in any event, that the State has failed to establish beyond reasonable doubt that any representation made by the second accused in fact moved Van Wyk to sign the cheques. Causation, however, is not a requirement for a conviction for fraud. Even if the state has failed to prove that the misrepresentation resulted in actual prejudice a conviction may still follow provided it is established that the representation was potentially prejudicial in that it involved the risk of prejudice. (See Snyman op cit at 535 and *R v Kruse* 1946 AD 524 at 533-534; *S v Judin* 1969 (4) SA 425 (A) 435.) For these reasons the argument cannot succeed.

Counts 77176 – 86246 (9071 counts of unauthorized use of the word 'cooperative'.

[187] These counts relate to the alleged conduct of a cooperative without it having been registered. It is not disputed that the second accused acted as chairperson of M & B Co-Operative and took numerous deposits in the name of the co-operative which was never registered. 9071 Investment certificates were issued in the name of M & B Co-Operative hence the 9071 convictions. Two arguments were raised by counsel for the second accused. First it is argued that although the trial court dealt with these charges in the judgment (and held the second accused liable) it failed to pronounce a verdict at the conclusion of the judgment. Therefore it is contended that the second accused is entitled to be acquitted.

[188] Section 322(1) of the CPA provides:

'In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may–

(a) . . .

(b) give such judgment as ought to have been given at the trial . . .'

[189] Counsel for the State submitted that the court is entitled to give the judgment which the trial court ought to have given. He contended that it is manifestly clear that the trial court intended to convict the second accused as is evidenced by the

reasons and the imposition of sentence. In the circumstances it was submitted that s 322 of the CPA is applicable.

[190] The trial court held that the second accused as a director of M & B Co-Operative ought to have been aware of legislation which applies to co-operatives. It recorded that he acknowledged that he knew that the co-operative was not registered and he proceeded to issue 337 investment certificates in the co-operative.

[191] These factual findings are common cause. A finding that the second accused is entitled to his acquittal by virtue of the failure of the trial judge to formally record his conviction would be contrary to the factual findings made. Such an approach would undermine the administration of justice. In these circumstances we consider that the argument on behalf of the second accused cannot succeed

[192] The second argument raised is, assuming that the first argument fails, that the conviction on 9071 counts constitutes a duplication of convictions. This is dealt with under the first accused and the same considerations find application. In the circumstances the second accused was incorrectly convicted of 9071 charges. He ought to have been convicted on one count only.

Counts 197708 – 199747 (2040 charges of contravening s 104 (1)(3) of the Income Tax Act.

[193] These counts have been fully dealt with earlier (paras 122-123). For the reasons stated the appeal against these counts must succeed.

Counts 199748 ─ 200563 (816 counts of theft)

[194] The subject matter of these charges is set out earlier in respect of the first accused (para 129).

[195] The events surrounding the creation of Krion are discussed earlier (paras 29-30, 167 and 175). Van Wyk was the only director with signing powers on the Krion account. The co-signatory was one Nel, one of the trustees of the Share Family Trust and a long standing friend of the second accused. The Share Family Trust owned the controlling shares in Krion. Nel had not been apprised of any functions which he was required to fulfill on behalf of the trust and there is no evidence of any attendance of any management meetings on behalf of the Trust with regard to Krion.

[196] Nel agreed to act as a co-signatory for Krion on the condition that Van Wyk would sign all cheques prior to being presented to him for signature. Nel accordingly relied on Van Wyk to ensure the propriety of the cheques.

[197] On 16 April 2002 at the meeting referred to earlier herein Van Wyk revealed a reluctance to sign any cheques on behalf of Krion without a full motivation from Cossadianos and provision of appropriate security. At the request of Cossadianos and without any reference to Van Wyk the second accused thereafter arranged with ABSA Bank for accused 4 to obtain authority to affect internet banking transfers. In these circumstances the trial judge concluded that the second accused knew full well that Van Wyk would be unwilling to consent to the authorization given to accused 4 to make payments from the Krion account and that the second accused knew what payments were intended to be made.

[198] Counsel on behalf of the second accused submitted that the trial court committed various misdirections in respect of the evidence. Firstly the second accused testified that he did in fact attempt to consult Van Wyk in this regard. He telephoned Van Wyk to discuss the matter with him. Van Wyk, however, so his evidence goes, was in Port Nolloth. Although the second accused spoke to Van Wyk the telephone connection was of such poor quality that the line was interrupted before he was able to discuss the matter with Van Wyk. In this regard he is contradicted by the first accused who states that they were unable to make contact with Van Wyk. Van Wyk, when he testified, denied that he was ever in Port Nolloth.

This evidence was not challenged by the second accused in cross-examination and the trial court found the second accused to be an unsatisfactory witness. It accepted the evidence of Van Wyk.

[199] On behalf of the second accused it is again contended that Van Wyk is a single witness in this regard and that an adverse inference ought to have been drawn against the State by virtue of the failure to call Van Wyk's wife who was able to confirm whether he was in Port Nolloth or not. There is no merit in the argument and the considerations in respect of single witnesses set out earlier find application here too.

[200] It is further argued that the trial court misdirected itself in respect of the extent of the second accused's involvement in the establishment of Krion. The involvement of the second accused is set out above (paras 167 and 175). Again the trial judge did not misdirect herself in this regard and we find no grounds to interfere with the factual finding of the trial court.

[201] Counsel for the second accused argues further that the court erred in concluding that the second accused knew that Van Wyk would not approve of the authorisation given to accused 4. This must be seen in the light of the events preceding the meeting of 16 April and the events at the meeting which are discussed earlier (para 184-5). The trial court furthermore considered both the inability of the second accused to explain why it was necessary for internet banking services to be approved at all and to provide any logical explanation for why it was so urgent that it could not, on his version, wait for Van Wyk to return from Port Nolloth. We find no misdirection on the part of the trial court.

[202] Finally, it is argued on behalf of the second accused that the 815 counts of theft constitute a duplication of convictions. Reliance is placed on *S v Verwey* 1968 (4) SA 683 (A). Verwey was an attorney charged with one count of theft arising from

a general deficit in his trust account. In the alternative he was charged with nine individual counts of theft in respect of the theft of monies deposited by nine individual clients in his trust account. Verwey was convicted of seven counts of theft on the alternative charges. An appeal to the Supreme Court [now the High Court] failed. In a further appeal this court held the convictions to be irregular. It held that money which was paid into the trust account by individual clients became consumed in the trust account and no longer existed as separate identifiable amounts. Moreover the State had failed to prove seven withdrawals corresponding to the amounts deposited by the complainants. It could not be determined in the circumstances whether any particular withdrawal constituted the theft from any of the individual complainants. Rather, amounts were paid into the trust account from time to time and withdrawn from time to time. The balance dwindled and the accordingly the accused ought to have been convicted of a single count of theft based on the general deficit in the trust account.

[203] The facts in the present matter are markedly different. In this case money was held in the bank account of Krion for and behalf of Krion. Each withdrawal made by accused 4 as a result of the facility arranged by the second accused constituted a separate identifiable appropriation from the Krion account. Each transfer was made to a different pre-existing investor in one of the earlier entities or purported entities used to conduct in the scheme. Each such transfer required a fresh intention to be formed. In the circumstances counsel's argument cannot succeed.

Counts 200664 – 218636 (17973 counts of conducting a harmful business practice being a multiplication scheme)

[204] It is conceded on behalf of the State that the second accused ought not to have been convicted on counts 200664 to 204797. In respect of counts 200664 to 200683 he was discharged at the end of the State's case in terms of s 174 of the Criminal Procedure Act. He could therefore not subsequently be convicted. Counts 200664 to 204797 relate to events prior to 28 May 2001 when the second accused was not involved in the scheme. Counts 204798 to 218636 remain.

[205] On behalf of the second accused two arguments are raised, firstly that the multiple counts constitute a duplication of convictions and secondly, in any event, that it has not been proved beyond reasonable doubt that the second accused knew that he was engaged with a multiplication scheme.

[206] The first argument on behalf of the second accused is considered earlier herein in respect of the first accused. For the reasons set out the second accused was wrongly convicted of multiple counts. He is guilty of a single offence only.

[207] Turning to the second argument advanced it has been recorded earlier that the second accused was a director of Martburt and the chairperson of M & B Co-Operative. The legal implications flowing from the duties of directors has been discussed (para 157). He personally had investment in the scheme and knew of the interest which was paid. The second accused's participation in the scheme, including his referral of investors from March 2001, for which he was paid commission, his function in supervising the agents who collected deposits and his exposure to the extent of the deposits and interest payments made are indicative of knowledge of the nature of the scheme. The trial court's finding in this regard is therefore correct.

[208] In the result the convictions in respect of counts 200664 to 218636 should be set aside and substituted with a single conviction for conducting a harmful business practice.

Counts 218637; 218639 and 218682 relate to reckless trading in MP Finance CC, Martburt and Krion.

[209] The second accused was convicted of reckless trading in MP Finance CC. He was never a member of MP Finance CC and was not involved in the scheme when MP Finance CC was utilised as a vehicle. In the circumstances the State has correctly conceded that the second accused ought not to have been convicted on this count.

[210] I turn to the alleged contravention of s 424 of the Companies Act in respect of Martburt. Section 424(1) of the Companies Act provides:

'When it appears . . . that any business of the company was or is being carried on recklessly or within intent to defraud creditors of the company . . . or for any fraudulent purpose, the court may, . . . declare that any person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be personally responsible . . . for all or any of the debts or other liabilities with the company . . . .'

[211] Section 424(3) provides that any person who was knowingly a party to the carrying on of the business of the company in such manner is guilty of an offence. On behalf of the second accused it is acknowledged that he was indeed a director of Martburt, however, it is argued that the evidence establishes that the second accused did not act in such capacity. The argument need only to be stated to be rejected. The second accused accepted the directorship in Martburt and his acceptance thereof gives rise to certain obligations in law. To the extent that he did not act as the law requires of a director to act it constitutes a dereliction of his duty. His failure to act in the manner in which it was expected of a director can therefore not assist the second accused.

[212] Counsel of behalf of the second accused proceeded to argue that the only involvement of the second accused in Martburt which has been established on the evidence was the acceptance of a single deposit and the signature of six 'investment certificates' which he signed.

[213] Even if this was correct (which it is not) it constitutes participation in the reckless conduct of the business of Martburt. (Compare *Gordon v Standard Merchant Bank Ltd* 1984 (2) SA 519 (C)). He knew that the taking of deposits constituted the business of Martburt and he personally participated in accepting deposits with full knowledge that it constituted a contravention of the Bank's Act. He was aware that Martburt offered 10 per cent per month on any investment and he

referred investors to Martburt on that basis. At no time did the second accused attempt to ascertain that Martburt was able from its income to service such investments. The objective facts are that it could not. The conclusion is inescapable that he was knowingly a party to carrying on the business recklessly.

[214] In the result the appeal on this count should be dismissed.

[215] In respect of Krion the second accused was not a director. It is argued on his behalf that the State has failed to prove beyond reasonable doubt that he had the intention to be party to the reckless conduct of the business of Krion. Again, counsel downplays the involvement of the second accused. It is not in dispute that he was involved in establishing Krion, identifying and appointing directors for Krion, identifying and appointing trustees in the Share Family Trust which held the controlling interest in Krion, arranging for the opening of the Krion bank account, obtaining authorisation for internet banking on the Krion bank account and obtaining the signature of Mr Nel on the documents which were signed to enable the second accused to arrange for accused 4 to perform internet transfers. He was present at the meetings held with investors where it was explained to investors that previous investments were merely to be converted to investments in Krion for no consideration. He knew that payments were carried out on the Krion bank account whereas no business in Krion had been commenced and whereas Krion had not realised any profit by such time and he actively sought to persuade Van Wyk to sign such cheques.

[216] For these reasons the argument of counsel cannot succeed.

Sentence – Second accused

[217] We have held that the convictions and sentence in respect of counts 197708 to 199747; counts 200664 to 204797 and count 218637 are to be set aside.

[218] We have held too that counts 77176 to 86246 constitute a duplication of convictions and that the appellant ought to have been convicted on one count. The trial court took these multiple counts together for purposes of sentence and imposed a globular sentence of one year imprisonment. Similarly, in respect of counts 200664 to 218636 the trial judge took the offences together for purposes of sentence and imposed a sentence of three years imprisonment. Whilst the 971 counts in the former instance and the 17973 counts in the latter have been reduced to one offence in each case it is merely the result of the interpretation of the relevant statutory provisions. The factual findings in respect of the conduct of the second accused which is to be punished in each case remains materially undisturbed. In these circumstances we do not consider that the sentence in these instances merit interference.

[219] In respect of the second accused therefore the appeal against the convictions succeeds to a limited extent only. In respect of sentence, however, this does not assist the second accused as the effective sentence imposed remains undisturbed. This is so as the sentences which are affected and which are set aside were in any event to run concurrently with the sentences imposed in respect of counts 2, 3, 45 and 47.

[220] In argument before us counsel for the second accused did not contend for any misdirection on the part of the trial judge. He has confined his argument to the submission that the effective sentence is so disturbingly severe in the circumstances that this court should interfere with the sentence imposed. Counsel has further confined his argument to the sentences imposed in respect of counts 2 and 3 (contraventions under POCA) and 45 and 47 (fraud). The sentence imposed in respect of these four counts determines the effective sentence as all other sentences imposed in respect of the remaining offences were to run concurrently with these. The second accused was sentenced to an effective term of imprisonment of 12 years.

[221] In respect of count 2 and 3 the second accused was sentenced to 10 years imprisonment in each case of which 3 years were conditionally suspended. The sentences were ordered to run concurrently. The second accused was therefore sentenced to an effective 7 years' imprisonment in respect of these offences. The trial court's analysis of the second accused's involvement and participation in the scheme is essentially correct. It is true that she stated in her judgment on sentence that the second accused was also involved in MP Finance Sacco, however, the error is not material. It is immaterial because she correctly recorded that he only became involved in the scheme in May 2001 and that he actively participated in all the activities of the scheme thereafter. She recorded too that the second accused actively participated in the making of false representations in the application for the registration of MP Finance Sacco. The reference was clearly intended to be a reference to the registration of M & B Co-Operative. Despite the erroneous references to MP Finance Sacco her analysis of his active involvement in the scheme correctly reflects his conduct.

[222] Although these errors are alluded to in heads of argument before us counsel for the second accused, fairly, did not seek during argument to make anything of these errors.

[223] Count 47 was a fraud relating to cheques in the amount of R6million. A discretionary minimum sentence of 15 years imprisonment applies to the offence. The trial court held that substantial and compelling circumstances do exist to deviate from the prescribed sentence and it imposed a lesser sentence. Even where substantial and compelling circumstances are found to exist, however, the standardized sentence set out by the legislature in the Criminal Law Amendment Act must serve as a point of departure in the assessment of sentence.

[224] The trial court gave careful consideration to the personal circumstances of the second accused and the interest of society in the imposition of sentence on these counts. It considered that he was a first offender and of an advanced age at 67 years. It gave consideration to his career in finance and to the extent of his involvement in the scheme. It recognised that he lost his pension in the scheme and that he lost his material possessions in consequence of his arrest. The crimes of which the second accused has been convicted under POCA are, however, serious offences. In our view the trial judge correctly assessed the conduct of the second accused in the affairs of the scheme and weighed same against his personal circumstances and the interests of society. In the circumstances we are not of the view that the sentence imposed on these counts is so severe as to warrant the interference by this court.

Third and fourth accused

It is convenient to consider the appeals of accused 3 and 4 together.

Count 2 (Section 2(1)*(e)* of POCA)

[225] Counsel on behalf of accused 3 and 4 submitted that the State has failed to prove that accused 3 or 4 had knowledge of the unlawfulness of their conduct.

[226] The argument on behalf of accused 3 and 4 is predicated on the assumption that it is necessary for the State to prove that the accused had the intention to participate in the conduct of the scheme through a pattern of racketeering activity. The question of the required mens rea for a contravention of the provisions of s 2(1) *(e)* of POCA has been considered earlier. The foundational submission for the argument on behalf of accused 3 and 4 is therefore incorrect. The issue to be determined is whether accused 3 Scheduleand 4 had the mens rea to commit the predicate offences listed in Schedule 1 to POCA.

[227] Accused 3 was both employed by and associated with the scheme and was an active participant in the conduct of the affairs of the scheme from the inception. Her membership of MP Finance CC and directorships at Madikor Twintig and

Martburt is set out above as is her role in MP Finance Sacco. According to the personnel list of MP Finance seized by the administrators appointed by the SARB she is reflected as the Financial Director with effect from 1 June 1998. She completed the cash book in respect of the micro lending business from 1999 and she personally signed investment certificates as from November 2000.

[228] Initially accused 3's efforts were concentrated in the micro lending division until April 2001. She knew what the income of the micro lending business was. In April 2001 she was transferred to the investment division, initially in training. There she was exposed to all the investment files, the calculating of interest to be paid out monthly and the extent of the deposits made. As from 7 June 2001 she was committed on a full time basis in the investment division. She was aware of the investigation by the DTI while she was a member of MP Finance CC in May 2000. She professes to have been comforted by the first accused's assurance that the matter was all sorted out. She was present in the meeting with the inspectors appointed by the SARB on 6 June 2001. She was accordingly witness to the admission made by the legal representatives on behalf of the first accused that the scheme was contravening the provisions of the Banks Act. She witnessed the representation by the first accused that approximately R10million to R12million was owing to investors. This she must have known to be false as she had personally signed investment certificates in the amount of R17million prior to that date. She was present too when the instruction was given that no further deposits may be taken. Notwithstanding this instruction and her knowledge of the contravention of the Banks Act she actively continued, after a brief interlude, taking deposits on behalf of the scheme. She witnessed the dramatic change in the modus operandi of the scheme which occurred at 6 June 2001 by the appointment of agents to conduct the collection of deposits and the payment of interest She witnessed the removal of the investment files from the offices of the scheme in order to hide them from the inspectors on the same day that the inspectors visited. She has been convicted of a number of predicate offences listed in Schedule 1 of POCA. Her participation through a pattern of racketeering is manifestly established.

[229] Accused 4 joined the scheme in January 1999. His involvement with the establishment of the MP Finance Sacco and M & B Co-Operative and his directorship in Martburt is recorded above. He was employed in the scheme as personnel manager. Over the period November 2000 to February 2002 he signed 11 248 investment certificates in an amount in excess of R632,6million.

[230] He was, as recorded earlier, the founder and a trustee of the PT Vennote Familie Trust. Assets which were purchased in the trust from 17 November 1999 are recorded above. Accused 4 performed the computer functions in the scheme and was personally involved in all the amendments and variations to the investors certificates and related documentation on each occasion that the scheme shifted from one entity to the next. He was accordingly employed and associated with the enterprise and participated in the conduct of its affairs from 1999. The submission to the contrary on behalf of accused 4 can therefore not be sustained.

[231] Accused 4 bore knowledge of the draft prospectus of Martburt. The prospectus provided for the issuing of debentures to the sum of R10million. Accused 4 personally issued ‘debentures’ to the value of R92million in Martburt. He issued ‘investments certificates’ in MP Finance Sacco without ever taking any steps to determine whether the Sacco had in fact been registered. He knew of the instruction given by the inspectors appointed by the SARB that no further deposits from the public should be taken. In the face hereof he issued 659 further ‘investment certificates’ in the name of Martburt to the total value of R40,7million after 6 June 2001. He issued 8317 investment certificates in the name of M & B Co-Operative to the value of R488,6million without ever ascertaining whether M & B Co-Operative had been registered. He too has been convicted of a number of predicate offence listed in Schedule 1 of POCA.

[232] In the circumstances his participation through a pattern of racketeering is established.

Count 3 (Section 2(1)*(b)* of POCA)

[233] Counsel for accused 3 and 4 does not dispute that accused 3 and 4 received or retained property directly and indirectly on behalf of the enterprise. The sole argument advanced is that the trial court erred in finding that these appellants knew, or reasonably ought to have known that such property derived or is derived from or through a pattern of racketeering activity.

[234] The role of accused 3 is set out in paras 227 and 228 above. She conducted the bookkeeping of the cash loan business from February 1999 for Finsure Consultants. During cross-examination she was confronted with an extract from the cash books as at 31 March 1999 which revealed:

- The total amount received from investors was R987 531.63.
- The total amount of money lent out was R87 614;
- The gross income from repayment of loans was R101 344.02.

[235] All investors received 20 per cent per month on their investments at that stage. From the aforesaid figures it follows that the gross profit from the cash loan business amounted to R13 730.02. It is therefore apparent from the cash books in 1999 that the enterprise was not able to sustain the payment of interest to investors.

[236] Accused 3, as a director of Madikor Twintig and Martburt, had a duty to acquaint herself with the legal provisions governing the affairs in the area in which the companies conducted business and to make the necessary enquiries in order to determine that the company's business is conducted within the perameters permitted. The trial court found that accused 3 conveniently failed to make further enquiries from legal representatives or from the inspectors appointed from the SARB when enquiries were clearly called for. In these circumstances it is not open to her to shield behind her alleged ignorance of the pattern of racketeering. (See *Stannic v SAMIB Seven Underwriting Managers Pty Ltd* 2003 [3] All SA 257 (SCA) at paras [16]-[17]. See also *S v Kasie* 1963 (4) SA 742 (W) at 748H-749A)

[237] The provisions of s 1(3) of POCA finds application in determining whether accused 3 ought reasonably to have known that the property was derived from a pattern of racketeering. For purposes of s 1(3)(a) she is to be judged as a director of companies engaging in deposit taking.

[238] In respect of s (1)(3)(b) she in fact had knowledge of the cash book of the micro lending business in 1999, the financial statements of MP Finance CC for 1999 and 2000 and the extent of interest which was offered to investors and which she and accused 4 derived from the scheme. Whilst she had no tertiary education accused 3 had matriculated with commercial law, business economics and accounting as subjects. In all the circumstances we find that the trial court correctly held that accused 3 knew or ought to have known that the property received derived from a pattern of racketeering.

[239] Accused 4 too was a director of Martburt. As the founder of the PT Vennote Familie Trust he acted as trustee from its inception. The properties which were purchased in the name of the trust are recorded above. He signed the contracts on each occasion. On each occasion the money, in cash, was derived from the scheme and on each occasion no agreement was concluded between the trust and any of the entities. None of the loans were ever repaid.

[240] His role in the conduct of the scheme is set out in paras 229 to 230 above.

[241] Accused 4 acknowledges that prior to 6 June 2001 he became aware of a letter addressed to the first accused by the SARB dated 25 October 2000 in which the SARB stated that it had reason to believe that the first accused was conducting the business of a bank without being registered as such. He took no steps to determine the lawfulness of the business.

[242] For purposes of s 1(3) of POCA he too is to be judged as having the general knowledge, skill, training and experience of a director of companies engaging in the business of deposit taking and, in respect of funds received in the trust, of a trustee managing the affairs of others.

[243] In these circumstances the evidence is overwhelming that accused 4 knew or ought reasonably to have known that the monies received by him as trustee derived from a pattern of racketeering. In his case too the argument of lack of knowledge cannot succeed.

Counts 4, 5, 6, 7 and 8, 12 and 13 (Fourth accused – Money Laundering)

[244] The subject matter of these convictions has been discussed earlier in respect of the first accused. The transactions in issue occurred between 17 December 1999 and May 2001.

[245] Two arguments are advanced on behalf of accused 4. Firstly it is contended that the trial court erred in concluding that accused 4 knew or ought reasonably to have known that the 'property' was derived from unlawful activity and secondly that the court erred in concluding that the transactions had or were likely to have the effect of concealing or disguising the nature, source or movement of the said property or the ownership thereof.

[246] Accused 4 took up employment with MP Finance CC at a salary of R3000 pm which he received in cash without any deduction. He had resigned his previous employment and invested an amount of R90 000.00 which derived from his pension payout in 1999. Within the first year his investment grew to R436 000.00. He was a branch manager in one of the micro lending outlets and was aware that the micro lending business was not generating profits. In August 1999 he again invested a further R1000.00 in the scheme. According to the investment documents the

investment would grow to R9000.00 within a year. He therefore knew of the extravagant benefits which he derived from the scheme and that the scheme offered returns on investments which were not sustainable.

[247] In the circumstances by August 1999 he knew that the micro lending business generated little or no profits. He knew too that the scheme offered unsustainable returns on investments.

[248] Section 9 of the Trust Property Control Act 57 of 1988 requires of the trustee in the performance of his duties and the exercise of his powers to act with the care, diligence and skill which can reasonably be expected from a person who manages the affairs of another. It is recorded earlier herein that it is not in dispute that the monies utilised for the purchases of the immovable property in question was derived from the scheme.

[249] For purposes of s 1(3)(a) of POCA accused 4 should be judged as a trustee managing the affairs of another with the knowledge and exposure which accused 4 had had to the operation of the scheme prior to the relevant dates and the manner in which the transactions occurred.

[250] The trial court correctly held that accused 4 knew or ought reasonably to have known that the money derived from unlawful activity.

[251] The second leg of the argument advanced is predicated upon the same misguided assumption which underlies the argument on behalf of the first accused, namely, that the property in issue is the immovable property purchased. The assumption is erroneous. The property in issue, as set out in the charge sheet, is the money deriving from the scheme which was utilised for the purposes of purchasing the properties. The manner in which the money was advanced and transactions

were concluded reveal overwhelmingly that they had, or were likely to have the effect of concealing or disguising the nature, source or movement of the money used to effect the purchase.

[252] The appeal against the convictions on these counts can therefore not succeed.

Count 27 (Third and fourth accused – Contravention of s 11(1) of Banks Act)

[253] The relevant provisions of the Banks Act are set out earlier. The sole argument advanced on behalf of accused 3 and 4 is that they did not act with the necessary *mens rea* and ought therefore not to have been convicted.

[254] The argument is founded on the simplistic submission that the evidence reveals that they believed at all times that the first accused would sort out the problems relating to the Banks Act.

[255] There are two difficulties with this argument. Firstly, accused 3 was aware in May 2000 when the Department of Trade and Industry visited the first accused that the Banks Act posed difficulties to the continued conduct of the scheme. Accused 3 and 4 were present at the meeting on 6 June 2001 when the inspectors appointed by the SARB met with the first accused. They were aware that legal representatives for the first accused acknowledged that the scheme was contravening the provisions of the Banks Act and they witnessed the instruction given that no further deposits were to be taken. Accused 3 and accused 4 continued to take deposits after 6 June 2001 with full knowledge of the confession made at the meeting on 6 June. Both proceeded to take deposits without attempting to ascertain from the inspectors appointed by the SARB whether their difficulties had been addressed. With knowledge of the difficulties being presented by the Banks Act they participated in M & B Co-Operative and took deposits in the name of M & B Co-Operative without M & B ever being registered as a co-operative. In the circumstances, even accepting their

confidence in the ability of the first accused to overcome the difficulties posed by the Banks Act in due course, they proceeded to conduct the business of a bank in the interim without ever ascertaining the nature of the problem posed by the Banks Act nor enquiring whether the first accused had succeeded in her endeavours to overcome these difficulties.

[256] The second difficulty with the argument is to be found in their directorships of Madikor Twintig (accused 3) and Martburt (accused 3 and 4) respectively. The legal duties of directors are fully canvassed earlier and in these circumstances it cannot avail accused 3 and 4 to seek cover in the confidence which they had in the first accused.

Count 31 (Fraud)

[257] The conviction relates to the meeting which occurred on 6 June 2001 with the inspectors appointed by the SARB. During the meeting and in the presence of accused 3 and 4 the first accused represented to the inspectors that she held in total an amount of approximately R10million to R12million in investments and that the said amount was committed in her micro lending business. The trial court held that accused 3 and 4 associated themselves with this representation and failed to reveal the true extent of the scheme nor that the micro lending business had never generated sufficient income to pay the interest commitment which the scheme had in fact made to investors.

[258] In truth, at the time, the scheme had taken approximately R320million in investments, very little of which was invested in the micro lending business and indeed the micro lending business did not generate an income remotely sufficient to service the interest commitment made to investors. The monthly interest commitment of the scheme as at 6 June 2001 amounted to R38,4million.

[259] Accused 3 acknowledged that she was present at the meeting. It is not in dispute that she failed to correct the misrepresentations. Counsel for accused 3

argues that the trial court erred in holding that accused 3 was aware that the representations were false.

[260] The functions of accused 3 in the investment division of the scheme and the extent of investment certificates which she had personally signed prior to 6 June 2001 are not in dispute. Her obligations as a director of Madikor Twintig and Martburt have been fully discussed.

[261] In the circumstances we find no misdirection on the part of the trial court and are disinclined to interfere with its finding that accused 3 did know that the investments held by the scheme as at 6 June 2001 were substantially in excess of R10million to R12million.

[262] She knew too that the micro lending division did not generate income remotely sufficient to service the interest commitment. In this regard her exposure to the financial records has been recorded earlier.

[263] In these circumstances the argument on behalf of accused 3 cannot succeed.

[264] The only argument advanced on appeal on behalf of accused 4 is that he did not know of the representations nor that they were false as it is argued that he was not present in the meeting at the time when the misrepresentations were made. It is common cause that he was not present throughout the duration of the meeting and that he arrived after the meeting had commenced together with Bredenkamp, who was present in the meeting when the representations were made. Accordingly it occurred after he and accused 4 had arrived in the meeting. The trial court accepted the evidence of Bredenkamp in this regard. We accordingly find no basis to interfere with the factual finding of the trial court.

[265] In the result the appeal against the convictions on this count cannot be sustained.

Count 47 (Fraud – Fourth accused)

[266] The circumstances material to this charge are set out earlier herein in respect of the second accused. It relates to the representations made to Van Wyk in the meeting on 16 April 2002, which were directed at persuading Van Wyk to sign certain cash cheques in the name of Krion. Accused 4 does not dispute that he was present at the meeting on 16 April 2002, nor that the misrepresentations relied upon by the State were made. The argument advanced on behalf of accused 4 is that he did not really pay attention to the discussions at the meeting and that he did not participate in the discussions and accordingly that he did not associate himself with the representations and therefore he did not have the mens rea to commit fraud.

[267] The events leading up to the meeting on 16 April 2002 are again material for the consideration of the argument raised. Reference has been made earlier to the letter addressed to Van Wyk by the second accused on 10 April 2002. On 12 April 2002 accused 4 directed a letter to Van Wyk recording that Trade Stuff 2064 CC (the close corporation managing the guesthouse) had applied for a loan in the amount of R2million, that R300 000 was to be paid in cash and a cheque was requested from Van Wyk in the amount of R1.7million. The letter was written on a Krion letterhead and signed by accused 4 on behalf of the loans department. It was as a direct consequence of this letter that Van Wyk requested the meeting on 16 April.

[268] Prior to the meeting and on 16 April accused 4 addressed a further letter to Van Wyk now under the heading ‘Diverse Loans’. In this letter accused 4 requested Van Wyk to sign three additional cheques, one in the amount of R10 000 for alleged accounting fees and two further cheques in the amount of R1million and R3,3million respectively allegedly for ‘Corporate Loans’. Again the letter was written on a Krion letterhead and signed by accused 4 on behalf of the loans department. Accused 4

was reflected in the Krion prospectus as the ‘loans manager’. He accordingly held a de facto management position in Krion. He therefore owed a duty to Krion. The purpose of the meeting was to discuss these two letters and to persuade Van Wyk to sign the requested cheques. The representations in the letters as to the purpose of the cheques were false.

[269] The trial judge correctly found that the argument advanced on behalf of accused 4 cannot be sustained. We find no reason to interfere with the finding of the trial court.

Counts 48 to 949 (contravention of s 135(3)*(a)* of the Insolvency Act – Third accused); counts 950 to 3385 (contravention of s 135(3)*(a)* of the Insolvency Act – Third accused); and counts 8071 to 11694 (contravention of s 135(3)*(a)* of the Insolvency Act – Third and fourth accused)

[270] These three groupings of charges relates to contraventions of s 135(3)*(a)* of the Insolvency Act in MP Finance CC, Madikor and Martburt respectively. The factual background to these charges is set out earlier in respect of the first accused (para 100).

[271] Section 135(3)*(a)* of the Insolvency Act prescribes that an insolvent shall be guilty of an offence if, prior to the sequestration of his/her estates, he/she contracted any debt of R15 000 or more or debts to the aggregate of R50 000 or more without any reasonable expectation of being able to discharge such debt or debts.

[272] The section is to be read together with s 425 of the Companies Act. The relevant portion of the section provides:

‘If any person who is or was a director or officer of a company in respect of which a winding-up order has been granted . . . and which is unable to pay its debts, has committed any act or made any omission in relation to any assets . . . of such company, which act or omission, if such act had been committed or such omission had been made by a person whose estate was sequestrated on the date upon which the winding-up of such company commenced, . . .

would have constituted an offence under the law relating to insolvency such past or present director or officer shall be guilty of such offence . . .'
(Section 64 of the Close Corporation Act stipulates for these provisions of the Companies Act to apply to Close Corporations, with necessary adaptation)

[273] The only argument advanced in respect of accused 3 in respect of counts 48 to 949 is that she could not have lacked the reasonable expectation that MP Finance CC would be able to pay its debts as all the investments were made with 'Marietjie' (the first accused) and not with MP Finance CC. MP Finance CC, therefore, did not incur any liability. The argument cannot be sustained. The objective evidence reveals that 902 separate agreements were concluded between investors and MP Finance CC as represented by the first accused to the total value of approximately R40.7million.

[274] Section 135(3)*(a)*), however provides for it to be an offence where an insolvent (or then, in terms of s 425 of the Companies Act, a director or officer of a company) has prior to sequestration (or liquidation in the case of a company) contracted a debt without any reasonable expectation of being able to discharge the debt. Accepting that accused 3 was an officer or director (in the context of a close corporation, a member) the evidence shows that she did not sign any investment certificate prior to November 2000. The charges relate to the period March 1998 to 17 May 2000. In these circumstances counsel for the State conceded that it has not been shown that accused 3 contracted any debt in the name of the close corporation. Her conviction on this count must therefore be set aside.

[275] Counts 950 to 3385 are formulated under the same legal provisions in respect of investments made in Madikor. Again the argument raised on behalf of accused 3 is limited to the single issue raised in respect of counts 66 to 949. Again the argument cannot be sustained. The objective evidence shows that 2 450 separate agreements were concluded between individual investors and Madikor, as represented by the first accused, to the total value of R131million. These

investments were made in the period 10 May 2000 to 17 January 2001. The interest obligation of the scheme as at 14 December 2000, in the name of Madikor, amounted to R13,5 million per month whilst the income generated from the micro loan industry amounted to just R2 472 415 for the year. It is not in dispute that third accused signed a number of these investment certificates and thereby contracted debts in the name of Madikor.

[276] The knowledge of accused 3 of the cashbook of MP Finance CC in March 1999 and the financial statements for the year 1999 and 2000 is set out earlier. She does not dispute, nor could she, that she knew that there could be no reasonable expectation that Madikor would be in a position to pay the debts which she incurred. She was accordingly correctly convicted of one offence relating to these charges.

[277] Counts 8071 to 11694 are formulated in terms of the same legal provisions but in respect of Martburt. In this instance both accused 3 and 4 were convicted of one offence. On behalf of accused 3 and 4 the same argument is advanced as was advanced on behalf of accused 3 in respect of the earlier charges under this section.

[278] In this instance four thousand five hundred separate agreements between investors and Martburt were concluded during the period 8 June 2001 to 31 October 2001 to the total value of R290,9million. Both accused 3 and 4 were directors of Martburt at the time and both signed investment certificates thereby contracting debts. They could not have had any expectation that Martburt would be in a position to pay these debts. They were therefore correctly convicted of one offence in respect of these charges.

Counts 20568 – 33265

[279] Accused 3 and 4 do not appeal against the findings under these counts.

Count 33266 – 36617; 50034 – 54533; and 59034 to 68104

[280] Accused 3 and 4 were acquitted on all of these charges. Notwithstanding their acquittal the trial court held in the course of the judgment that accused 3 and 4 were fully involved in the commission of these offences. In these circumstances it is argued on behalf of accused 3 and 4 that their appeal against this finding should be sustained.

[281] The argument is misguided. Leave to appeal has not been granted in respect of individual findings in the course of the reasoning of the trial judge and generally such an appeal is incompetent. An appeal in a criminal case is only against the conviction of an accused or against the sentence imposed. There is therefore no merit in this argument.

Counts 77176 – 86246 (contravention of s 42 of the Cooperative Act – Fourth accused)

[282] Accused 4 was convicted of conducting the business under the name and style of a co-operative and using the word co-operative in contravention of s 42 of the Act. Although the argument is not raised on behalf of accused 4 that these convictions constitute a duplication of convictions, we have held earlier that the accused ought to have been convicted of only one count. This redounds to the benefit of accused 4 too.

[283] The sole argument advanced on behalf of accused 4 is once again, that accused 4 did not culpably conduct business under the name of M & B Co-Operative Ltd and in fact investments were made under the name of ‘Marietjie’ (the first accused). Again the argument is misguided. The enterprise entered into 9 071 agreements in the name of ‘M & B Kooperasie Bpk’ and/or M & B Co-Operative Ltd' to the total value of approximately R541,7m. Accused 4 signed 8 285 of these documents clearly in the name of M & B Co-Operative Ltd. The appeal on these counts accordingly succeeds only to the extent that accused 4 is convicted of one offence only.

Counts 144337 – 188910 (contravention of s 83(3)*(a)* of the Banks Act – Third accused)

[284] Accused 3 was convicted of the contravention of s 83(3)(a) of the Banks Act. The merits of the charges are not addressed by accused 3 in the appeal. Yet it is submitted on behalf of accused 3 that the State, in its heads of argument at the trial, conceded that accused 3 should be discharged on these counts. In these circumstances counsel for accused 3 in argument requested her acquittal by the trial court. The court nevertheless convicted accused 3. In these circumstances counsel for accused 3 contends that the court failed to afford the defence an opportunity to address the court on these charges and that this constitutes a gross irregularity which entitles accused 3 to be acquitted on the charge. The State conceded that the conviction should be set aside.

[285] We are in agreement. While the trial court is not bound by the concession made by the State in its argument, an accused's right to a fair trial demands that the trial court must at least indicate to the defense that it may not be inclined to accede to the view of the prosecution. In the absence of such an indication defence counsel may rightly conclude that court accepts the concession made by the prosecution. In the result these convictions must be set aside.

Counts 197708 – 199747 (contravention of s 104(1) of the Income Tax Act – Third and fourth accused)

[286] The position in respect of the convictions on these counts is identical to that of the second accused which is set out earlier herein. In the circumstances the convictions should be set aside.

Counts 199748 – 200563 (Theft – Third and fourth accused)

[287] These convictions relate to the cash withdrawals and monies transferred from the Krion bank account by internet transfer effected by accused 4 pursuant to the authority obtained through the assistance of the second accused which is set out earlier herein. An amount of R20 090 001,78 was withdrawn from the Krion account, predominantly in favour of various pre-existing investors in entities or purported

entities operated by the scheme. It is not in dispute that the money was so withdrawn nor that it was unauthorised. On behalf of accused 3 and 4 it is argued that they did not have the mens rea to commit theft. Counsel argues that they worked for the first accused, and it was her business and she took the decisions. Reliant on their own evidence it is submitted on their behalf that they obeyed and believed that the first accused would sort out the legal difficulties.

[288] Accused 3 and 4 knew that the money deposited into Krion bank account originated from new investors to acquire shares in Krion. Accused 3 was actively involved in the calculation of monthly interest payments to be made to investors. She calculated the amounts to be paid from the Krion account. Accused 4 carried out the internet transactions. They accordingly both knew that the payments were in respect of interest due to pre-existing investors. Both accused had known since 6 June 2001 that the scheme had been prohibited from taking new investments. Both actively participated in the continued collection of new deposits. They were aware of the dramatic changes in modus operandi of the scheme which occurred on 6 June as set out earlier herein. The evidence of the witness Els, which was not challenged in cross-examination, was to the effect that accused 3 instructed the agents appointed to pay interest due to investors from subsequent deposits received.

[289] Accused 4 had sought to persuade Van Wyk to sign a number of cash cheques, as set out earlier herein and he was present at the meeting on 16 April 2001 where Van Wyk was persuaded to sign such cheques. In these circumstances the conclusion is inescapable that accused 3 and 4 knew that they were acting unlawfully. That being so it is not open to the accused to rely on instructions given by the first accused. (See *S v Shepherd & others* 1967 (4) SA 170 (W) at 177H-178B; *S v Sixishe* 1992 (1) SACR 624 (CkA) at 626b-c; *Snyman supra* at page 139). In the circumstances the appeal cannot succeed.

Counts 200664 – 218636 (Commission of harmful business practise – Third and fourth accused)

[290] In this instance too the simplistic argument is raised on behalf of accused 3 and 4 that they did not have the mens rea to commit the offence in question. Accused 3 and 4 were both directors in Martburt and accused 3 was also a director in Madikor Twintig. Accused 3 was furthermore a member in MP Finance CC. The obligations of directors to the companies concerned has been dealt with earlier herein and finds equal application under these charges. For those reasons the argument cannot succeed. For the reasons set out earlier herein, however, the convictions fall to be set aside and to be substituted by a single conviction.

Count 218637 (Reckless or fraudulent carrying-on of business of corporation – Third and fourth accused)

[291] Accused 3 and 4 were convicted of contravening s 64(2) of the Close Corporations Act. The material portion of s 64(1) provides:

'If it at any time appears that any business of a corporation was . . . carried-on recklessly, with gross negligence or with intent to defraud any person or for a fraudulent purpose, a court may . . . declare that any person who was knowingly a party to the carrying-on of the business in any such manner, shall be personally liable for all or any such debts or liabilities . . .'

[292] Section 64(2) renders it an offence for any person to knowingly be a party to the carrying-on of the business of the corporation in such a manner.

[293] Again the sole argument advanced on behalf of accused 3 and 4 is that they were not knowingly party to the conduct of the business of MP Finance CC in a reckless, gross negligent or fraudulent manner in that the investments were not made in the close corporation, but in the name of 'Marietjie'. For the reasons set out in paragraph 273 above the argument cannot succeed.

[294] Accused 3 was a member of the close corporation. She had an investment in the scheme and was aware of the interest rates paid at the time. She referred other investors to the scheme. She signed the financial statements of the close

corporation and kept the cash books of the corporation. She was therefore aware of the financial position of the close corporation. In the circumstances we consider that it was correctly held that she was knowingly a party to the conduct of the business of the close corporation. It is not in dispute (nor can it be) that the business was carried on for fraudulent purpose. In the circumstances we consider that accused 3 was correctly convicted.

[295] Accused 4, however, was not a member of the close corporation. He took up employment with the close corporation in January 1999. After 3 months training he became the manager of one of the micro lending outlets. He later became aware that his branch of the the micro lending business generated little or no income. He did have an investment in the scheme and knew of the interest generated by his investment. That constitutes the material evidence against him. Counsel for the State was constrained to concede during argument that there was insufficient evidence to have justified the conclusion that he was knowingly a party to the carrying on of the business of the close corporation in a reckless or fraudulent manner.

[296] The trial court approached this charge on the basis that the second accused, 3, 4, 5 and 6 were fully involved in the business of the first accused which was comprised of the unlawful taking of deposits from the public. This conduct she found was fraudulent and their participation therein persisted at a time when they knew they were acting fraudulently.

[297] This charge, however, relates only to the business of the close corporation. The business was conducted through the vehicle of the close corporation until May 2000. The participation upon which the trial court appears to have relied is participation in the scheme which, in the case of accused 4, occurred much later. The State’s concession made during argument is therefore fair and the conviction of accused 4 on this count must be set aside.

Count 218638, 218639 and 218682 (Accused 3 and 4 – contravention of s 424(3) of the Companies Act – reckless trading in Madikor Twintig, Martburt and Krion respectively.)

[298] The provisions of s 424 are set out earlier herein in respect of the second accused. In respect of these convictions too the refrain by counsel on behalf of accused 3 and 4 persists that the evidence establishes that the business was not conducted in the name of Madikor Twintig, Martburt or Krion but in the name of 'Marietjie'. For reasons fully set out earlier herein the argument in respect of Madikor Twintig and Martburt is misplaced. Accused 3 was a director of Madikor Twintig and both accused 3 and 4 were directors of Martburt. Both accused 3 and 4 signed investment certificates in respect of Madikor Twintig and in Martburt. They were therefore both actively engaged in the business of Madikor Twintig and Martburt. Neither Madikor Twintig nor Martburt generated any meaningful income from which the interest on the deposits taken by accused 3 and 4 could be serviced. Accused 3 was convicted in respect of counts 218638 and 218639 whilst accused 4 was convicted of the latter count. We are accordingly of the view that accused 3 and 4 were correctly convicted.

[299] Neither accused 3 nor accused 4 were directors in Krion. Accused 4 was, however, the manager of the loans department in Krion. Their participation in the reckless or fraudulent conduct of the affairs of Krion is set out in paras 288 to 289 above. For these reasons their appeal on count 218682 cannot succeed.

Count 218648 (Contravention of the provisions of s 75(1)*(a)* of the Income Tax Act – Third accused)

[300] Accused 3 was convicted of the contravention of the provisions of this section. She does not appeal against this conviction.

Count 218683 (Fourth accused – theft)

[301] Accused 4, together with the first accused, was convicted of theft in the amount R908,5 million. The State conceded that the amount of R908,5 million had not been proved. The figures are discussed earlier herein in respect of the first accused where it was concluded that the first accused ought to have been convicted of theft in the amount of R91,1 million. On behalf of the State it is argued that the conviction of accused 4 in such an amount should also be confirmed.

[302] The only argument raised by counsel on behalf of accused 4 is yet again that accused 4 was merely employed by the first accused, did not take decisions, merely carried out instructions and always believed that the first accused would sort out the difficulties. This argument we have already rejected. In the result the appeal in respect of this count must be dismissed.

Count 218660 and 218661 (Contravention of Section 104(1)*(a)* of the Income Tax Act – Third accused)

[303] In argument before us counsel for accused 3 indicated that he had omitted in his heads of argument to deal with counts 218660 and 218661. These were counts of fraud arising from her signature to the financial statements of MP Finance CC for the tax years 1999 and 2000 respectively. It is not in dispute that the financial statements grossly misrepresented the financial position of the close corporation nor that accused 3, as member of the close corporation, signed off the statements. Accused 3 contended, however, that she did not verify the contents of the statements before signature and merely signed same, without reading the documents because the first accused asked her to sign. The trial court held that she failed to take reasonable steps to verify the content of the statements before signing. At the same time the trial judge concluded that the State had failed to 'prove all the elements' against accused 3. In the context of the judgment 'all the elements' clearly relates to elements of the crime of fraud.

[304] On behalf of accused 3, it is argued that by finding that the State had failed to prove all the elements the trial judge intended that she be acquitted. In proclaiming the verdict however, the court convicted accused 3 on the alternative count, which

was formulated under s 104(1)(a) of the Income Tax Act 58 of 1962, (which was in force at the time).

[305] The alternative charge alleged that the accused had inter alia, with intent to assist another to evade tax, signed a tax return submitted to SARS without having reasonable grounds to believe that the return was true. The express finding of the trial court that accused 3 had failed to take reasonable steps to verify the content of the financial statements, which were submitted to SARS, seem to us to have justified the conviction on the alternative count. The belated argument on behalf of accused 3 is therefore without merit.

Sentence – Third accused

[306] Accused 3 too has enjoyed limited success in the appeal against her convictions. In her case too the success enjoyed on the merits has no impact on the effective sentence imposed. Accused 3 was sentenced to 15 years' imprisonment in respect of each of counts 2 and 3 and in each case 3 years of the 15 was conditionally suspended. She was accordingly sentenced to an effective term of imprisonment of 12 years on each count and it was ordered that the sentences should run concurrently. All the remaining sentences imposed were ordered to run concurrently with the sentences imposed in counts 2 and 3, thus resulting in an effective term of imprisonment of 12 years.

[307] Counsel for accused 3 does not contend for any misdirection on the part of the trial judge. Rather, it is argued that the sentence imposed is shockingly inappropriate in all the circumstances.

[308] Again the trial court has given careful consideration to the personal circumstances of accused 3 and to the interest of society having regard to the nature and severity of the offences in issue. No purpose could be served by repeating same herein. The maximum sentences prescribed by the legislature in respect of the convictions under POCA has been recorded earlier. These offences are very serious offences and the predicate offences of which she has been convicted include 816

counts of theft, reckless or fraudulent conduct of Madikor Twintig, Martburt and Krion, contraventions of the Banks Act and the Unfair Business Practices Act.

[309] In matters of serious commercial crimes such as those involved in the present instance the personal circumstances of the accused must necessarily yield to the interest of society. Under these circumstances we do not consider the sentence imposed to be so severe as to justify the intervention by this court.

Sentence – Fourth accused

[310] Accused 4 has similarly enjoyed limited success in the appeal against his convictions. In his case too the convictions and sentences which are to be set aside does not affect the effective sentence imposed upon him. The second accused was sentenced to 15 years imprisonment each on the counts 2 and 3. The terms of imprisonment in respect of counts 2 and 3 were ordered to run concurrently and all the sentences imposed on the remaining counts of which he was convicted were ordered to run concurrently with the sentences imposed on count 2 and 3. He was accordingly sentenced to an effective 15 years' imprisonment.

[311] Accused 4 was convicted of theft of R91,1million (count 218683), however, no sentence was imposed. Generally it is undesirable for a court of appeal to impose sentence without reference to the trial court. In the present instance, however, thirteen years have already lapsed from the time of the initial arrest of the appellants. A reference back to the trial court would result in a further delay which, on the facts of the matter would not serve the interest of justice and cannot be justified.

[312] The offence carries with it a discretionary minimum sentence of 15 years imprisonment. The trial judge considered the facts of the case and concluded that substantial and compelling circumstances do exist which justify a deviation from the prescribed sentences. Hence the sentence of 10 years imprisonment imposed in respect of count 47. We accept her finding in this regard. The trial court further

convicted the first accused of the same offence (theft) and imposed a sentence of 10 years imprisonment.

[313] Although the trial court convicted the first accused and 4 of theft of R908million we have held that they ought to have been convicted of R91,1 million. The sentence imposed in respect of the first accused remains unaltered however. In this matter parity of sentence dictates that accused 4 too should be sentenced to 10 years' imprisonment which it is ordered will run concurrently with the sentence imposed in respect of counts 1 and 2.

[314] On behalf of fourth accused too it is not submitted that the trial court has committed a misdirection. It is argued that the effective term of imprisonment, 15 years, is so severe as to induce a sense of shock.

[315] The offences of which he has been convicted are numerous and serious. The predicate offences of which he was convicted and which give rise to his conviction on counts 2 and 3 include offences of money laundering (s 4 of POCA) to the value of approximately R8 million, two counts of fraud and eight hundred and seventeen counts of theft in an amount which exceeds R100 million.

[316] The trial court has given recognition to the severity of the offences and has carefully weighed this against his personal circumstances. Again, no purpose would be served by repeating same herein. Again the nature of the offences demands that personal circumstances yield to the interest of society. In the result we do not consider that there is a striking, startling or disturbing disparity between the sentence imposed by the trial court and that which we would have imposed. The appeal against sentence must therefore fail.

Fifth accused

Count 3

[317] This is a contravention of s 2(1)*(b)* of POCA, ie receiving or retaining property on behalf of an enterprise, while accused 5 knew or ought reasonably to have known, that such property is derived from a pattern of racketeering. According to accused 5 he was aware that the first accused conducted a business in which she accepted investments and paid interest thereon and was involved in a micro lending business, but he had no further knowledge of the nature thereof, nor was he involved in its day to day affairs. The evidence, however, paints a different picture. He had a 20 per cent interest in MP Finance and in due course acquired a 20 per cent member's interest in MP Finance CC. He was also a director of Madikor from 9 May 2000 and referred to as the 'sales director' of Marburt in its draft prospectus. He executed documentation on behalf of those entities and signed investment certificates to the value of R9 837 million. He assisted in the conduct of the business of the scheme as is shown by his presence at Madikor building, the main place of business of the scheme. He was also involved in removing investors' files from Madikor Building. In addition, he introduced potential investors to the first accused, thereby earning commission.

[318] The receipt and retention of money from investors on behalf of the scheme, as we have found earlier, was derived through a pattern of racketeering activity by virtue of the contravention of s 11(1) of the Banks Act; s 135(3)*(a)* of the Insolvency Act and para 2 of Notice 1135 of 1999 promulgated in terms of s 12(6) of the Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

[319] Having regard to the nature and extent of the involvement of accused 5, detailed above, we cannot fault the conclusion of the court a quo that accused 5 knew or ought reasonably to have known that the investments so received or retained were derived from or through a pattern of racketeering activity, in contravention of s 2(1)*(b)* of POCA.

[320] Therefore the appeal of accused 5 against his conviction on count 3 should fail.

Count 27

[321] Section 11(1) of the Banks Act is clear; no person may conduct the business of a bank unless such person is a public company and is registered as a bank. The business of a bank is defined as, inter alia, the acceptance of deposits from the general public. Accused 5, as shown earlier, was not only actively involved in securing investments from the public, but was aware at all times that this was the very nature of the business of the scheme conducted through its different entities. He was a member of MP Finance CC and a director of Madikor Twintig, and therefore duty bound to take all reasonable care to establish whether or not the business of the scheme was permitted by law. See *S v De Blom* 1977 (3) SA 513 (A) at 532G. This he woefully failed to do and, in our view, the court a quo correctly found him guilty on count 27. Therefore the appeal of accused 5 against his conviction on count 27 has to fail.

Counts 144337 – 188910

[322] At the trial the State, during argument, conceded that accused 5 ought to be acquitted on these counts. However, the trial judge, without affording accused 5 an opportunity to address her on any doubt that she may have had in acquitting accused 5, found him guilty and proceeded to impose sentence on these counts. The State submitted, correctly, that the appeal of accused 5 against his conviction and sentence on these counts should succeed, as this failure of the court a quo constituted a serious infringement of his constitutional right to a fair trial.

Counts 200664 – 218636

[323] Accused 5 submits that he merely worked for the first accused in her business, believing that she had sorted out any problems related to the lawfulness thereof, and therefore did not have the necessary *mens rea* to commit the offence of conducting a multiplication scheme which paid interest at an annual rate of more than 20 per cent in excess of the REPO rate. We have already found that accused 5 indeed played an active role in the conduct of the business of the scheme and are in agreement with the finding of the court a quo that, in the circumstances, it is clear that accused 5 had full knowledge of the fact that this exorbitant rate of interest by far exceeded that paid by commercial banks on deposits made by them. In addition, even if accused 5 was not aware of the unlawfulness of this conduct (which we find

difficult to believe, seeing that the average rate of interest paid to investors at that stage was 10 per cent per month ─ as opposed to a maximum REPO rate of 14,91 per cent per annum), he dismally failed to take any steps to determine whether or not this was permitted by law. (Cf *S v De Blom*, supra).

[324] It follows that the appeal of accused 5 against his conviction on these counts should fail.

Count 218637

[325] Section 64(2) of the Close Corporation Act 69 of 1984 declares the reckless, grossly negligent or fraudulent carrying-on of the business of a close corporation, to be an offence. It is common cause that, at the relevant time, accused 5 was a member of MP Finance CC and involved in its business, which entailed the conduct of an unlawful multiplication scheme. We have already dealt with the manner in which the business had been conducted, and have to agree with the court a quo that it was 'om die minste te sê roekeloos'.

[326] Counsel for accused 5 submitted that it was the first accused, and not him, who had conducted the business of this corporation, but we have already held that there is no merit in this line of argument.

[327] Therefore, the appeal of accused 5 against his conviction on this count should fail.

Counts 218638; 218639 and 218682

[328] Section 424(3) of the Companies Act 61 of 1973 declared the reckless or fraudulent conduct of the business of a company to be an offence. It is common cause that, at the relevant time, accused 5 was a director of Madikor Twintig and the 'sales director' of Martburt. He was also involved in the administration of the business of Krion. The business of these companies was, as in the case of the other entities of the scheme, the unlawful conduct of a multiplication scheme in which accused 5 participated. There is no doubt, as held by the court a quo, that accused 5 was aware of the unlawfulness of the business of the scheme or, at least, that such

business was conducted in a reckless manner, with accused 5 being an active participant.

[329] The submission on behalf of accused 5, that he was not involved in the conduct of those corporate entities, is clearly devoid of any merit.

[330] Therefore, the appeal of accused 5 against his convictions on these counts should fail.

Count 218653

[331] The State concedes that the evidence does not support the conviction of accused 5 on the main count of contravening s 104(1)*(d)* of the Income Tax Act. However, it was submitted on behalf of the State that the alternative charge to the main count, namely that of failing to submit a tax return for the 2001 year of assessment, in contravention of s 75(1)*(a)* of the Income Tax Act, was proved by the evidence of Mr Pierre Moolman of SARS, which showed that no tax return was submitted by accused 5 for the 2001 tax year. Counsel for accused 5 has not addressed us in regard to this count and there is, in our view, no basis for a finding that the trial judge misdirected herself in convicting accused 5 on this count. The appeal should according fail.

Counts 218660 and 218661

[332] On these two counts accused 5 was convicted on the alternative charge of contravening s 104(1)*(a)* of the Income Tax Act, in being instrumental in the making of false statements in the income tax returns submitted on behalf of MP Finance CC for the tax years 1999 and 2000. In this regard counsel for the fifth accused, who also appeared for the third accused, repeated the argument on his behalf that we have considered in paras 303 to 305 above. For these reasons there is no basis why the appeal against these convictions should not be dismissed.

Sentence – Fifth accused

[333] This accused was found guilty of only one contravention of POCA, namely s 2(1)*(b)* thereof. As mentioned previously, a maximum sentence of a fine of R1 billion or imprisonment for life is prescribed. The trial court sentenced accused 5 to

ten years' imprisonment for the contravention of s 2(1)*(b)* of POCA of which five years were suspended for a period of five years. In respect of the remainder of the convictions accused 5 was sentenced to various terms of imprisonment ranging from one year to 3 months. The court a quo ordered that all the sentences are to be served concurrently with the sentence imposed for the contravention of s 2(1)*(b)* of POCA. In the result accused 5 was sentenced to an effective term of five years' imprisonment.

[334] Counsel for accused 5 submitted that this effective sentence is shockingly inappropriate entitling this court to interfere. Counsel suggested that consideration should be given to an alternative sentence of imprisonment under s 276(1)*(i)* of the Criminal Procedure Act. It was also suggested that the lesser role played by accused 5 in the conduct of the scheme and the overbearing influence of his mother, the first accused, are factors to be taken into account, as well as the fact that he suffers from dyslexia.

[335] The trial judge took full account of all the mitigating factors in favour of accused 5, including those mentioned above. This moved her to impose an effective sentence of 5 years' imprisonment. In our view there is no room for a finding that the trial judge acted unreasonably in arriving at the sentence. She had to weigh these mitigating factors against the active, although limited role played by accused 5 in the conduct of the business of the scheme. In this regard it should be borne in mind that he personally signed investment certificates to the value of nearly R10 million. He was also instrumental in removing the investors' files from Madikor building when the authorities stepped in and directed that the activities of the scheme should cease. In our opinion it cannot, having regard to all the relevant circumstances, be said that the sentence imposed by the trial court induces a sense of shock. On the contrary, had we been the court of first instance, we would have been inclined to impose an effective sentence of imprisonment of at least five years.

[336] We bear in mind that, as indicated above, the conviction and sentence of accused 5 on counts 144337-188910 are to be set aside. However, the sentence imposed in respect thereof is only three months' imprisonment which had to be served concurrently with the effective sentence of 5 years' imprisonment imposed

under s 2(1)*(b)* of POCA. Therefore the setting aside of this sentence has no impact upon the effective sentence imposed upon accused 5.

[337] In the result the appeal of accused 5 against his effective sentence of five years' imprisonment should fail.

Sixth accused

Count 2

[338] Counsel for accused 6 submitted that she ought to have been acquitted on the charge of contravening s 2(1)*(e)* of POCA. He argued that, although accused 6 may have been associated with the first accused, she was not associated with the scheme or enterprise conducted by the first accused, nor did she participate in the operation or management of the enterprise itself. In the latter regard counsel submitted that s 2(1)*(e)* of POCA requires involvement in the 'rigtinggewende optrede of werksaamhede van die onderneming'. For this submission reliance was placed on *Reves v Ernst & Young* 507 US 170 (1992) where it was held that to conduct or participate in the conduct, directly or indirectly, of an enterprise's affairs (as required by s 1962*(c)* of RICO, the counterpart of s 2(1)*(e)* of POCA), participation ' in the operation or management of the enterprise itself' is required which entails that 'some part in directing the enterprise's affairs is required'.

[339] However, as emphasised by counsel on behalf of the State, it should be borne in mind that *Reves* concerned the civil RICO liability of an independent accounting firm which rendered accounting services in terms of a contractual relationship with an alleged corrupt co-operative. The accountants were not involved in the decision-making process of the co-operative, but allegedly failed to perform their accounting obligation with the necessary care and skill. It was held that RICO civil liability did not attach to the accountants as they were not part of the decision making process through which the co-operative's affairs were conducted. It should be immediately apparent that the facts in *Reves* differ markedly from those in the instant matter where all the accused, including accused 6, were part and parcel of the corrupt enterprise and themselves engaged in criminal activities, thereby furthering the objectives of the enterprise.

[340] We should add that, post-*Reves*, the United States courts have consistently made it clear that an accused need not be part of the enterprise's management or control group to be criminally liable under s 1962*(c)* of RICO. In *United States v Oreto* 37 F.3d 739 (1994) (US Court of Appeals, First Circuit) para 64, eg it was cautioned that:

'*Reves* is a case about the liability of outsiders who may assist in the enterprise's affairs. Special care is required in translating *Reves*' concern with "horizontal" connections ─ focusing on the liability of an outsider adviser ─ into the "vertical" question of how far RICO liability may extend within the enterprise but down the organizational ladder.'

Further, in para 66 the following was said:

'We think Congress intended to reach all who participate in the conduct of that enterprise, whether they are generals or foot soldiers. . . . The Statute requires neither that a defendant share in the enterprise's profits nor participate for an extended period of time, so long as the predicate act requirement is met.'

[341] As we have emphasised above, a contravention of s 2(1)*(e)* of POCA is proved where it is shown that the accused has participated in the conduct of an enterprise's affairs through a pattern of racketeering activity, ie by committing two or more predicate offences listed in Schedule I of POCA. There is no requirement that, for a contravention of s 2(1)*(e)* of POCA, one must participate in the operation or management of the enterprise itself. There is accordingly no justification for the submission that s 2(1)*(e)* of POCA requires involvement in the 'rigtinggewende optrede of werksaamhede van die onderneming'.

[342] The further submission that the scheme and its business was that of the first accused and that accused 6 did not participate in its affairs, but merely concerned herself with her own affairs, is similarly without justification. It is common cause that accused 6 was actively involved in the conduct of the affairs of the scheme. She appears to have been the favourite of the first accused at least until the second accused appeared on the scene. Accused 6 was one of the first investors in the scheme and subsequently canvassed investors in her capacity as a highly successful agent. In May 2000 she was appointed as a director of Madikor. In the temporary absence of the first accused, she acted as manager of the business of the

scheme, with signing powers on the cheque account and was from early on allowed to sign investment certificates. She became so heavily involved in the administration of the scheme that she had to employ additional staff members to assist her. The first accused promised her that she would be appointed as a director of Martburt and although that did not happen, she was identified as one of the directors on Martburt's letterhead.

[343] The evidence shows that the first accused kept accused 6 abreast of developments, including the problems experienced with the authorities regarding the nature of the business of the scheme. Her standing in the hierarchy as second in charge of the business of the scheme, is confirmed by the fact that, when it was decided to hide investors' files from PWC, she was instrumental in hiding same, also at the farm of her and accused 7. There she continued to operate the business of the scheme. It is common cause that, during her tenure, she personally signed 521 investment certificates to the value of more than R28,1 million. During the period February 2000 to October 2000 she was the only person, apart from the first accused, who personally signed investment certificates. She also assisted with the administration of payments to be made to investors. To this one should add the evidence of the first accused, that she appointed the second accused to 6 as directors of the 'oorkoepelende onderneming' to assist her in operating the scheme.

[344] In this manner accused 6 actively participated in the scheme's affairs and thereby furthered the objectives of the scheme. It is clear to us that she shared a common business objective with the first accused and the other accused, who at different stages played different roles in conducting the business of the scheme. In so doing, accused 6 personally committed the predicate offences which make up the pattern of racketeering activity. These crimes are dealt with more fully hereunder and include contraventions of the Banks Act, Insolvency Act, Unfair Business Practices Act, Close Corporations Act, Companies Act and common law crimes.

[345] In our opinion the above clearly shows the association of accused 6 with the scheme by directly participating in its conduct through a pattern of racketeering activity. However, counsel for accused 6 further submitted that accused 6 ought to have been acquitted by virtue of the failure of the State to prove that she had the

necessary intention in the form of *dolus* to contravene s 2(1)*(e)* of POCA. There is no merit in this submission, as it seeks to unjustifiably introduce an additional *mens rea* requirement for a contravention of s 2(1)*(e)* of POCA. We reiterate what has been said before, that, once it is proved that an accused has participated in the conduct of an enterprise's affairs through a pattern of racketeering activity, ie by committing two or more predicate offences listed in Schedule 1 of POCA, he or she is guilty of a contravention of s 2(1)*(e)* of POCA. This the State has proved in regard to accused 6 and there is no need for a further inquiry as to an additional *mens rea* requirement over and above the *mens rea* required by the predicate offences committed by her.

[346] We therefore conclude that the State has, beyond reasonable doubt, proved the elements under s 2(1)*(e)* of POCA and the appeal of accused 6 against her conviction on count 2, should fail.

Count 3

[347] The crux of the argument on behalf of accused 6 on this count of contravening s 2(1)*(b)* of POCA, is that she ought to have been acquitted as the State had failed to prove *dolus* and actual knowledge on her part that the money received from investors were derived from or through a pattern of racketeering activity. This submission overlooks the express wording of s 2(1)*(b)(ii)*, that the offence is committed where an accused knows or *ought reasonably to have known* (own emphasis) that the property received or retained on behalf of an enterprise was derived from or through a pattern of racketeering activity.

[348] As mentioned earlier, the receipt and retention of money from investors on behalf of the scheme was derived from or through a pattern of racketeering activity, including the contravention of various statutory provisions and the commission of the common law crimes of theft and fraud. Accused 6 personally committed some of these offences, and we agree with the conclusion of the court a quo that, having regard to the evidence as a whole, the State has proved beyond reasonable doubt that accused 6 knew or ought reasonably to have known that the investments so received or retained, were derived from or through a pattern of racketeering activity.

Counts 15 and 17-26

[349] Accused 6 is the only accused convicted of these contraventions of s 4 of POCA (money laundering). It is common cause that the proceeds derived by accused 6 from her participation in the activities of the scheme, namely commission on investments procured by her and interest or 'dividends' earned on her own investments, amounted to some R27 million during the period 15 June 2001 to 3 May 2002. This enabled her to purchase immovable properties in the name of three trusts, ie the Anja, Izarich and Jakia trusts. This income of accused 6 was derived from the unlawful activities of the scheme which conducted its affairs through a pattern of racketeering activity.

[350] Having regard to the pivotal position occupied by accused 6 in the management of the business of the scheme, we have no doubt that the court a quo correctly held that she knew, or at least ought reasonably to have known, that the money so received by her formed part of the proceeds of the unlawful activities of the scheme, and that she therefore knew, or ought reasonably to have known, that the acquisition of these properties through the trusts, would have the likely effect of disguising the unlawful source of the money. As pointed out by the court a quo, there was no documentation, such as loan agreements, disclosing the source of the funds utilised to purchase the properties. Therefore, the only reasonable inference is that the purchase of the properties in the name of the trusts was designed to conceal the illegal source of the funds. This conclusion is underscored by the fact that accused 6, in her affidavit filed in her sequestration proceedings, falsely stated that her income of approximately R2 million together with her husband's farming income had been utilised to pay the total purchase prices, whilst failing to disclose that her income received through the unlawful activities of the scheme during that year exceeded R27 million, which was used to purchase these properties. In the result the appeal of accused 6 against her convictions on these counts should fail.

Count 27

[351] Counsel for accused 6 conceded that the constituent elements of this count, ie conducting the business of a bank without being registered as such, had been proved. It is common cause that accused 6 was actively involved in conducting the

business of a bank by taking deposits from members of the public. It is also clear from the evidence that accused 6 failed to take any steps, or at least any adequate steps, to establish whether or not this business of the scheme was permitted by law. See *S v De Blom* 1977 (3) SA 513 (A) at 532G.

[352] Counsel for accused 6, however, submitted that her conviction on count 27 constituted an undue duplication of convictions, having regard to her conviction on charges of the contravention of the Unfair Business Practices Act 71 of 1988, ie counts 200664 – 218636, referred to hereunder. In our view this submission has no merit. As pointed out by counsel for the State, the elements of conducting the business of a bank without being registered as such, in contravention of s 11(1) of the Banks Act, differ from the operation of, or participation in, a multiplication scheme in contravention of paragraph 2 of Notice 1135 promulgated in terms of the Unfair Business Practices Act. Also, as reiterated in *S v Whitehead and Others* 2008(1) 431 (SCA), 'a single act may have numerous criminally relevant consequences and may give rise to numerous offences'. Therefore, the appeal of accused 6 against her conviction on count 27 should fail.

Counts 950-3385

[353] Accused 6 was found guilty on one count of contravening s 135(3)*(a)* of the Insolvency Act, read with s 425 of the 1973 Companies Act, by contracting debts on behalf of Madikor Twintig prior to its liquidation without there being a reasonable expectation of discharging such debts.

[354] It will be recalled that accused 6 was a director of Madikor Twintig. The undisputed evidence of Mr Strydom of PWC shows that, during the period 10 May 2000 to 17 January 2001, Madikor Twintig incurred debts by accepting investments to the value of R131 million, while its liability for interest to be paid to investors, as at 14 December 2000, amounted to R13,5 million per month. Nobody, and in particular not the directors of Madikor Twintig, could reasonably have believed that the company would have been able to discharge the debts owed to its investors.

[355] Accused 6 personally signed 104 investment certificates issued by Madikor Twintig to the value of more than R7,4 million. The certificates confirmed that the

investments were loans to Madikor and were, therefore, debts contracted by accused 6 on behalf of Madikor. It follows that the submission on behalf of accused 6, that she was not aware that debts were contracted by receiving these investments, is devoid of any merit.

[356] The further submission that accused 6 did not have any knowledge of the financial position of this entity, similarly has no merit, particularly in view of the central role played by accused 6 in her capacity as a director, in the conduct of the affairs of Madikor Twintig.

[357] We are further of the view that the reasons already furnished in dealing with count 27 above, apply, *mutatis mutandis*, to the belated defence of an undue duplication of convictions raised by accused 6 in respect of these counts.

[358] We therefore conclude that the appeal of accused 6 against this conviction should also fail.

Counts 8071-11694

[359] Accused 6 was found guilty on one count of contravening s 135(3)*(a)* of the Insolvency Act, read with s 425 of the 1973 Companies Act, by contracting debts on behalf of Martburt prior to its liquidation, without there being a reasonable expectation of Martburt discharging these debts. Accused 6 does not deny that she was actively involved in the conduct of the business of the scheme, which included the entity Martburt. As mentioned earlier, she not only canvassed investments, but effectively partook in the management of the day to day business of the scheme, and to facilitate this role she had signing powers on the cheque account. She also does not dispute that Martburt incurred debts prior to its liquidation in circumstances where there was no reasonable expectation of discharging same.

[360] However, what was submitted on behalf of accused 6, is that she was, at the relevant time of the contracting of these debts on behalf of Martburt, not a director of Martburt; therefore the State has failed to prove that she falls within the ambit of s 425 of the 1973 Companies Act. It will be recalled that, although the first accused

undertook to have accused 6 appointed as a director of Martburt, no formal appointment was made.

[361] It has to be borne in mind that s 425 of the 1973 Companies Act did not only include a director of a company, but 'any person who is or was a director or officer of a company . . .'. The indictment in respect of these counts refers to accused 6 as a director and/or officer ('direkteur en/of beampte') of Martburt. In s1*(c)* of the 1973 Companies Act, an 'officer' of a company was defined as including 'any managing director, manager or secretary thereof'. It is so that accused 6 was not formally appointed as a director or manager of Martburt, nor did she receive a salary for services rendered to this company, but for all intents and purposes she was a *de facto* manager of Martburt. This is convincingly shown by the evidence, including accused 6's own evidence.

[362] Jennifer A Kunst, Professor Piet Delport and Professor Quintus Vorster (eds) *Henochsberg on the Companies Act 61 of 1973* (Service Issue 33, 2011), vol 1 at 921, states, with reference to *R v Kaloo* 1941 AD 17 at 19-21, that in the context of s 425 'officer' includes one who was appointed as an officer and one who was an officer *de facto*. In *Kaloo* the *de facto* manager of a company was also prosecuted for a contravention of s 135(3)*(a)* of the Insolvency Act and this court held, with regard to s 185 of the Companies Act 46 of 1926 (worded similarly to s 425 of the 1973 Companies Act), that a defence based on the fact that he had not been formally appointed as a manager, had no merit. The court held that s 185 (now s 425) applies both to persons who were appointed as managers or officers and to persons who were managers or officers *de facto*.

[363] We therefore conclude that the appeal against the conviction of accused 6 on this count, should fail.

Counts 54534-54542 and 59034-59303

[364] Some confusion has arisen as to whether the court a quo had found accused 6 guilty on these counts, but, as pointed out by counsel on behalf of the State, the court a quo did actually acquit accused 6 on these charges and no sentence was

imposed in respect thereof. A typographical error in listing the counts on which accused 6 had been acquitted has given rise to the confusion, but no more need to be said in this regard.

Counts 144337-188910

[365] The State has correctly conceded that, as in the case of accused 5, the appeal of accused 6 against her conviction and sentence on these counts (contraventions of s 83(3)*(a)* of the Banks Act) should succeed, by virtue of the infringement of her constitutional right to a fair trial.

Counts 200664-218636

[366] Counsel for accused 6 submitted that these counts of contravening para 2 of Notice 1135 of 1999, promulgated under Act 71 of 1988 ought to have constituted one single count and not 17972 separate counts.

[367] We have, in dealing with the appeal of the first accused (see paras 127-128 above), furnished our reasons why an accused ought to be convicted of only one offence of contravening the provisions of Notice 1135 of 1999, when operating a multiplication scheme offering an effective annual interest of 20 per cent and more above the REPO rate to a number of investors on different dates.

[368] In the result we find that, in respect of the counts under this rubric, the first accused ought to have been convicted on one count only and not on 17972 individual counts.

Count 218637

[369] Accused 6 was convicted in her capacity as a party who knowingly carried on the business of MP Finance CC in a reckless, grossly negligent or fraudulent manner, in contravention of s 64(2) of the Close Corporations Act 69 of 1984. It is common cause that accused 6 contracted debts in the name of MP Finance CC at an effective interest rate ranging from 60 per cent to 791 per cent per annum. There is no doubt that these returns could never be sustained. By 13 May 2000, the close corporation had contracted debts to the total value of approximately R37 million with an interest commitment of more than R4 million per month. We have earlier

described the active involvement of accused 6 in the affairs of the entities through which the scheme was conducted, and there is no doubt that such affairs, including that of MP Finance CC, had been conducted in a grossly reckless manner. As pointed out by counsel on behalf of the State, the business of MP Finance CC was carried on recklessly in contravention of s 11(1) of the Banks Act, s 135(3)*(a)* of the Insolvency Act and para 2 of Notice 1135 promulgated under Act 71 of 1988.

[370] There is, in our view, no merit in the appeal of accused 6 against her conviction on this count.

Counts 218638 and 218639

[371] These convictions of contravening s424(3) of the 1973 Companies Act (reckless or fraudulent conduct of the business of a company) related to Madikor and Martburt.

[372] It is common cause that accused 6 was a director of Madikor and, as we have repeatedly emphasised, she was actively involved in the conduct of the business of this company and Martburt. She was, according to the evidence, knowingly a party to the carrying on of the business of these companies in a reckless manner, within the context of this statutory provision.

[373] Counsel for accused 6 submitted that she was only in name a director of Madikor. However, in our view, the evidence as already dealt with hereinbefore, shows that her contribution to the business of this company was substantial. This is underscored by the fact that she had personally signed 104 investment certificates in Madikor to the total value of more than R7,4 million. She was similarly heavily involved in the conduct of the business of Martburt; in fact she was reflected as being a director on the company's letterhead. This involvement is borne out by the fact that she had signed 27 investment certificates in the name of Martburt to the value of some R1,2 million.

[374] We further conclude that, as in the case of MP Finance CC, the business of the two companies here concerned was carried on in a grossly reckless manner.

[375] Therefore the appeal of accused 6 against her conviction on these counts should fail.

Count 218682

[376] The State conceded that there is insufficient evidence to sustain the conviction of accused 6 on this count, ie the reckless conduct of the business of Krion. In our view this concession was correctly made, as the evidence does not show that she had actively participated in the business of Krion.

[377] The appeal against this conviction should accordingly succeed.

Count 218656

[378] Accused 6 was convicted on this count of a contravention of s 104(1)*(d)* of the Income Tax Act, by failing to register as a taxpayer for the 2000 tax year, in order to evade the paying of income tax.

[379] It is not in dispute that, when she became liable to register as a taxpayer in 2000, accused 6 had failed to do so. It is also common cause that the income of accused 6 for the 2000 tax year exceeded R1,358 million. This income was never declared to the SARS, not even after she had registered as a taxpayer in 2001. SARS was therefore precluded from raising an assessment on this income and accused 6 never paid income tax on it.

[380] Accused 6 submitted that her taxable income at the relevant time was insufficient to require her to register as a taxpayer. This is plainly not true. The income level which required registration as a taxpayer at the relevant time, was R40 000. Her taxable income by far exceeded this amount. Her counsel conceded that there is no merit in the explanation for her failure to register as a taxpayer for the 2000 tax year, but submitted that the State had failed to prove that she intended thereby to evade the paying of income tax. This submission is similarly without merit. As submitted on behalf of the State the only reasonable inference to be drawn from her failure to register is that she intended thereby to evade the payment of income tax.

[381] In our view the appeal against her conviction on this count should accordingly fail.

Count 218657

[382] Accused 6 was found guilty of tax fraud on this count, by wilfully and intentionally under-declaring her taxable income for the 2001 tax year to have been R300 000 while it is common cause that her taxable income for that tax year was in excess of R3,7 million.

[383] The evidence shows that accused 6 and 7 and their bookkeeper, Mr Theuns van der Merwe, had colluded to defraud SARS in an attempt to alleviate their income tax problems. In his written heads of argument counsel for accused 6 rather euphemistically stated that this conduct 'laat veels te wense oor'. In fact, it was nothing less than a planned fraud, and the explanation of accused 6 at the trial, that she had requested Van der Merwe not to submit the 2001 tax return, rings hollow. Van der Merwe could not recall receiving such a request and this version is, in any event, gainsaid by accused 6's own affidavit in her sequestration proceedings in which she declared 'Uit Aanhangsel "F" hiertoe blyk dit ook met respek dat ek my inkomste gedurende die tersaaklike belastingjaar (2001) verklaar het, en dat daar inkomstebelasting daarop betaal is.' No attempt was made by her in the affidavit to disclose that her taxable income had been grossly under-declared.

[384] We therefore conclude that the court a quo correctly found accused 6 guilty on this count and that her appeal in this regard should fail.

Sentence – Sixth accused

[385] This accused was sentenced to 15 years' imprisonment of which three years were suspended for a period of five years, on each of the convictions under s 2(1)*(e)* and s2(1)*(b)* of POCA. It was ordered that these sentences be served concurrently. In addition, accused 6 was sentenced to ten years' imprisonment on each of counts 15 and 17-26, ie the contravention of s 4 of POCA, which sentences were to be served concurrently. On the remainder of her convictions she was sentenced to periods of imprisonment ranging from two years' imprisonment to three months' imprisonment. It was ordered that all these sentences were to be served

concurrently with the sentences imposed in respect of counts 2 and 3. This resulted in an effective term of imprisonment of 12 years.

[386] On appeal counsel for accused 6, as in the case of the other accused, did not submit that the trial judge had misdirected herself in exercising her sentencing jurisdiction. He confined himself to the submission that the effective sentence of 12 years' imprisonment is shockingly inappropriate to the extent that it merits interference by this court.

[387] The trial judge had due regard to all the personal and other mitigating factors of accused 6, but in weighing same against the nature, gravity and magnitude of the crimes and the disastrous financial and other effects the scheme had on its investors, concluded that the only suitable sentence was one of effective imprisonment for a considerable period of time. In our view, having regard to the role played by accused 6 in the conduct of the business of the scheme as recorded above, it cannot be said that the trial judge acted unreasonably in imposing this sentence. In this regard it should be borne in mind that accused 6 often acted as the manager of the business of the scheme with signing powers on the cheque account and was from early on allowed to sign investment certificates. During the period of her involvement, she personally signed 521 investment certificates to the value of more than R28 million. When it was decided to hide investors' files from PWC, she was instrumental in hiding same, also at the farm of her and accused 7. There she continued to operate the business of the scheme.

[388] In our view the evidence as a whole regarding the participation of accused 6, certainly justifies a sentence of this order. Further, had we been the court of first instance, we would have imposed an effective sentence of similar duration. We should add that the limited success enjoyed by accused 6 on appeal has no impact at all on her effective sentence of 12 years' imprisonment.

[389] It follows that the appeal of accused 6, against her effective sentence of 12 years' imprisonment, should be dismissed.

[390] We now turn to the appeal of the State against the sentence of two years' imprisonment imposed upon accused 6 in respect of count 218657. As recorded earlier, accused 6 was found guilty of tax fraud on this count by under-declaring her taxable income for the 2001 tax year to have been R300 000, while her taxable income for that year was in excess of R3,7 million.

[391] Counsel for the State submitted that the sentence of two years' imprisonment imposed on accused 6 on this charge induces a sense of shock. It was further submitted that the trial court materially misdirected itself in not giving due weight to the nature and seriousness of the offence and the financial prejudice of more than R3,7 million caused thereby.

[392] It should be borne in mind that a minimum sentence of 15 years' imprisonment is prescribed for this offence in terms of the Criminal Law Amendment Act 105 of 1997. It appears that the trial court regarded the length of time it took to bring the case to finality, as well as the clean record of accused 6 as substantial and compelling circumstances justifying a lesser sentence than 15 years' imprisonment in respect of this count. The State submitted that these factors pale into insignificance when weighed against the aggravating circumstances, particularly having regard to the nature and extent, as well as the financial implications, of the crime.

[393] Upon reflection, we are in agreement with the submission on behalf of the State. The imposition of a sentence of merely two years' imprisonment, having regard to the aforementioned aggravating circumstances and in the light of the prescribed minimum sentence of 15 years' imprisonment, certainly induces a sense of shock. In our view there is a striking disparity between the sentence of two years' imprisonment imposed by the trial court and that which we, had we been the court of first instance, would have imposed. It seems to us that a sentence of two years' imprisonment for a tax fraud of R3,7 million, sends out the wrong message that, notwithstanding a minimum prescribed sentence of 15 years' imprisonment, defrauding SARS in such a substantial amount does not warrant a heavy sentence. In our opinion the appeal of the State ought to succeed and the sentence of two years' imprisonment is to be substituted by one of 12 years' imprisonment. As was

the case with the sentence imposed by the trial court, it should be served concurrently with the sentence imposed in respect of counts 2 and 3, the effective term of imprisonment thereby remaining one of 12 years.

Orders

[394] As a result the orders as set out above will issue.

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P B FOURIE
ACTING JUDGE OF APPEAL

_____
J W EKSTEEN
ACTING JUDGE OF APPEAL

Brand JA

[395] I have had the advantage of reading the joint judgment by my brothers Fourie and Eksteen AJJA (the majority). Save for one exception I agree with their reasoning and their conclusions. The exception relates to the conviction of the first accused on both counts 1 and 2 under sections 2(1)*(e)* and 2(1)*(f)* of POCA. I do not believe that she should be convicted under both these sections on the same facts. To do so would constitute a duplication of convictions.

[396] Since this is a minority judgment which would in any event have no material impact on the outcome of these proceedings, I propose to motivate my point of view without unnecessary elaboration. As explained by Cloete JA in *S v Van Eyssen supra* para 5, which is quoted *in extenso* by the majority in para 45 above, the essence of the offence in *(e)* is participation in the affairs of the enterprise. The crux of *(f),* on the other hand, is knowledge, not participation. Or, as Cloete JA formulated it, the essence of *(f)* is that ‘the accused must know (or ought reasonably to have known) <u>that another person did so</u>’ (my emphasis).

[397] In *S v Whitehead* 2008 (1) SACR 431 (SCA) para 39 Navsa and Van Heerden JJA proposed the following approach in this regard:

'In contesting multiple convictions it is often submitted that they are premised on the same set of facts. This is, in fact, the so-called "evidence test" sometimes applied by the courts in determining whether or not there is a duplication of convictions. This test enquires whether the evidence necessary to establish the commission of one offence involves proving the commission of another offence. In this regard, Bristowe J, in the case of *R v Van der Merwe* 1921 TPD 1 at 5 pointed out that ". . . if the evidence necessary to prove one criminal act *necessarily* involves evidence of another criminal act, those two are to be considered as one transaction. *But if the evidence necessary to establish one criminal act is complete without the other criminal act being brought in at all then the two are separate crimes*."'

(Emphasis added.)

[398] Logic dictates that, participation in racketeering activities will always include knowledge of those activities. While one can have knowledge without participation, the converse is not possible. Of necessity, the conviction of a manager under *(e)* must involve a criminal act in terms of *(f)*. In order to participate in racketeering activities for purposes of *(e)*, the wrongdoer must have knowledge, proof of which in itself will amount to proof of the offence under *(f)*. It is true that the elements of the two offences are in certain respects different, but that in itself, is no answer to an objection of duplication where, as in this case, the greater necessarily includes the lesser. An accused convicted of murder on the basis of *dolus eventualis* will almost inevitably also be guilty of culpable homicide because the wider concept of negligence will of necessity embrace the narrower concept of legal intent. Yet, no-one will think of convicting the accused of both. In so far as *S v De Vries and others* 2009 (1) SACR 613 (C) para 397-398 goes the other way, it was in my view wrongly decided.

[399] The scenario contemplated by the majority in para 59 seems to envisage a manager who participated in some of the activities of the enterprise but not in others of which he or she had knowledge only. In these circumstances I can find no

objection to a conviction of *(e)* on the basis of the former and of *(f)* on the basis of the latter. The point is that in those circumstances, the two convictions will not be premised on the same set of facts. The problem arises where, as in this case, the knowledge proved for purposes of *(f)* derives from the very participation which founded the conviction in *(e).* In these circumstances a conviction of both, in my view, offends against the duplication of convictions rule. The fact that the provisions of POCA must in principle be afforded a liberal or broad construction does not, in my view, detract from this rule which is a salutary one based on fairness to an accused person which is a tenet of our Constitution.

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F D J BRAND
JUDGE OF APPEAL

APPEARANCES:

For First Appellant:	L Augustyn Instructed by: Justice Centre, Pretoria Justice Centre, Bloemfontein
For Second Appellant:	H F Klein Instructed by: Justice Centre, Pretoria Justice Centre, Bloemfontein
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For Respondent:	G C Nel (with him A V Rossouw and D W M Broughton) Instructed by: Director of Public Prosecutions, Pretoria Director of Public Prosecutions, Bloemfontein