THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 338/09

In the matter between:

JACOBUS PETRUS CHRISTIAAN MOSTERT SNR **1st APPELLANT**

JACOBUS PETRUS CHRISTIAAN MOSTERT JNR **2nd APPELLANT**

V

THE STATE **RESPONDENT**

Neutral citation: *Mostert v The State* (338/2009) [2009] ZASCA 171 (1 December 2009).

Coram: Navsa, Mthiyane, Heher JJA, Leach et Griesel AJJA

Heard: 4 November 2009

Delivered: 1 December 2009

Summary: Unauthorized abstraction of water from a river – whether state limited to prosecution of statutory offences and common law prosecutions are excluded – effect of s 98 of the National Water Act of 1998.

ORDER

On appeal from: North Gauteng High Court (Basson J and Smith AJ sitting as court of appeal).

The following order is made:

1. The appeal against the appellants' convictions on counts 3 and 4 is dismissed.
2. The appeal against the sentence imposed in respect of counts 3 and 4 is upheld and the sentence altered as set out below.
3. The respondent's cross-appeal in regard to count 1 (fraud) is upheld and the high court's order upholding the appellants' appeal against their conviction on that count is set aside.
4. The respondent's cross-appeal in regard to count 2 (theft) is dismissed.
5. The order of the high court is altered to read as follows:

   '(a) The appeal in respect of the first appellant's conviction on counts 2, 5, 6 and 7 and the second appellant's conviction on counts 2, 5 and 6 is upheld and such convictions and the sentences imposed in respect thereof are set aside.

   (b) The appeal in respect of the appellants' convictions on counts 1, 3 and 4 is dismissed.

   (c) In respect of their conviction on count 1 (fraud) each appellant is sentenced to a fine of R20 000 or 12 months' imprisonment, wholly suspended for four years on condition he is not convicted of fraud committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.

   (d) The appeal against the sentence imposed in respect of counts 3 and 4 is upheld, the sentence is set aside and (both counts being taken together for purposes of sentence) replaced in the case of each appellant with a fine of R5 000 or six months' imprisonment.'

JUDGMENT

LEACH AJA (NAVSA, MTHIYANE, HEHER JJA et GRIESEL AJA concurring)

[1] The two appellants, who are father and son, grow sugarcane in a joint enterprise on the farm 'Dadelvlak'[1] in the district of Barberton. The farm is riparian to the Lomati River from which the appellants abstract water to irrigate their lands. It also falls within the Lomati Irrigation District which was established on 31 October 1969 under the provisions of s 71(1) of the Water Act 54 of 1956 ('the 1956 Act') and in respect of which the Lomati Irrigation Board ('the complainant') was simultaneously created under s 79(1) of that Act.[2]

[2] The functions of the complainant included the exercise of control over the water in the Lomati River within its area of control and the regulation of the amount of water abstracted by farmers within its irrigation district. In order to monitor the quantity of water being abstracted, the complainant required the farmers to register their pump stations and to have them fitted with a water flow monitoring system known as a 'WAMS'.[3] The practice was for each farmer periodically to read the meter on the WAMS and to report the quantity of water consumed to the complainant. These readings were also verified from time to time by the complainant's official, referred to in evidence as the 'waterfiskaal'[4], who made periodic spot-checks on the farms and personally took readings from the WAMS units.

[3] For these purposes the appellants had registered only a single pump-station, known as pump-station 46, in respect of Dadelvlak. However, in July 2004 the complainant learned that the appellants had constructed a second

[1] The full name is 'Dadelvlak 506 JU'.
[2] Proclamation 286, 1969 published in GG2551 of 31 October 1969.
[3] An acronym for 'Water Administration Monitoring System'.
[4] The water bailiff.

pump-station (referred to in evidence as pump-station 46.1) on the farm, which was not registered and had not been fitted with a WAMS. Understandably, the complainant suspected the appellants of using pump-station 46.1 to abstract water from the river which was not being reflected in their water consumption returns. It was later also discovered that the electrical wiring leading to the WAMS fitted to pump-station 46 appeared to have been interfered with in such a way that the pump could be operated without the water abstracted being recorded.

[4] These discoveries set in train a series of events which in April 2006 culminated in the two appellants being arraigned in the Magistrate's Court at Malelane on seven criminal charges. In addition to various charges under the National Water Act, 36 of 1998 ('the 1998 Act'), they were also charged with the common law crimes of fraud and theft. Despite both appellants denying their guilt, the first appellant was convicted on all counts while the second appellant was convicted on six of the seven counts. They were then both sentenced to either pay substantial fines or to undergo imprisonment.

[5] An appeal to the High Court, Pretoria succeeded to the extent that the appellants' convictions and sentences on all but two counts were set aside, including those of fraud and theft, while the sentence imposed on the remaining two counts, which were taken together for purpose of sentence, was reduced. With leave of the high court, the appellants now appeal to this court against their two remaining convictions and their sentence. On the other hand, the state sought and obtained leave to appeal on points of law against the high court's decision in regard to the charges of fraud and theft.

[6] In the light of this background, the charges levied by the state which have to be considered are the following:
Count 1 – it being alleged that the appellants committed the offence of fraud by knowingly providing the complainant with false readings of the quantities of water they had abstracted from the river at pump-station 46 during the period 1998 to 2005 (in the alternative, it was alleged they were guilty of the theft of

the water that had been abstracted through this pump-station but not reflected in their water consumption returns);
Count 2 – it being alleged that the appellants are guilty of theft in that during the period 1998 to 2005 they stole an unknown quantity of water which they had abstracted through pump-station 46.1;
Count 3 – it being alleged that the appellants contravened s 151(1)(e) of the 1998 Act in that they wrongfully, unlawfully, intentionally or negligently tampered or interfered with the WAMS measuring device fitted to pump-station 46;
Count 4 – it being alleged that the appellants contravened s 151(1)(j) of the 1998 Act by unlawfully, intentionally or negligently committing an act detrimentally affecting a water resource by illegally abstracting water from the Lomati River at both pump-stations 46 and 46.1 during the period 1998 to 2005.

[7] The appellants attacked the validity of all these charges. Not only did they support the court a quo's decision that it had not in law been open to the state to charge them with fraud and theft, but they also contended that the charges under the 1998 Act could not be brought against them as the complainant was continuing to operate under the 1956 Act at the material time, despite the 1998 Act having been brought into operation. In order to consider these contentions, it is useful to give a brief historical overview of certain of the laws relating to the use of water.

[8] Water being a scarce and valuable commodity in a country such as ours which is often wracked by drought, it is hardly surprising that prior to Union in 1910 the Cape, Natal, Transvaal and Orange Free State had each passed legislation which differed in terms of effect but controlled the use of public water for purposes of irrigation. It is unnecessary to detail these differences in this judgment as the legislation in question was repealed by The Irrigation and Conservation of Waters Act 8 of 1912 ('the 1912 Act'). Inter alia, it created irrigation districts,[5] as well as irrigation boards for each such

[5] Section 81.

district,[6] which were imbued with various powers, including the power to construct and maintain reservoirs, channels and other irrigation works. They were also charged with the obligation to obtain and conserve the supply of water and to arrange for an equitable distribution of any water stored or diverted by any such works[7] and, in order to do so, were empowered to make bye-laws and rules prescribing 'the manner of regulating the flow of water and the distribution from and use of water in the board's channels and other works'.[8]

[9] The 1912 Act was repealed by the 1956 Act. Not only did it retain the common law distinction between private and public water which had been recognised in the 1912 Act, but it regulated the use of public water, providing for it to be used for agricultural, urban or industrial purposes. It vested the use of public water for agricultural purposes in the owner of land riparian to the public stream in question.[9] It also provided for the creation of irrigation districts[10] as well as an irrigation board for each irrigation district,[11] which were required, inter alia,[12]

- to protect the sources of the water of any public stream in its irrigation district,
- to prevent the waste of the water in any public stream, to prevent any unlawful abstraction or storage of public water,
- to exercise general supervision over all public streams within the irrigation district,
- to investigate and record the quantity or share of water which every person having any right and respect of such water was entitled to use,
- to supervise and regulate the distribution and use of the water of all or any of the public streams within its irrigation district,
- for that purpose, to erect and maintain such devices for measuring and defining the flow of the water or controlling its diversion, and

[6] Section 83.
[7] Section 89(2).
[8] Section 95(b).
[9] Section 9(1).
[10] Sections 71 to 77.
[11] Section 79.
[12] Section 89.

- generally to supervise within the irrigation district the storage, diversion and use of water in public streams.

[10] The 1956 Act was repealed and replaced by the 1998 Act which fundamentally reformed South African water law. The common law distinction between public water and private water was no longer recognised as a basis for entitlement to the use of water. Instead, under s 2 of the 1998 Act, government at national level was granted the overall responsibility for and authority over the country's water resources and their use. Section 3 recognises national government, acting through the minister[13] as the public trustee of the nation's water resources, as having the power to regulate the use, flow and control of all water in the country. Section 4 goes on to prescribe who is entitled to use water, and the use of water otherwise than as permitted under the Act is both prohibited and criminalised.[14]

[11] In addition, the 1998 Act does away with the system of irrigation districts and their associated irrigation boards and replaces them with a system of 'catchment management agencies' and 'water user associations'. The former have as their purpose the delegation of the management of 'water resources' (defined as including 'water courses, surface water, estuaries or aquifers')[15] 'to the regional or catchment level and to involve local communities'.[16] The latter are intended to be 'in effect co-operative associations of individual water users who wish to undertake water-related activities for their mutual benefit'.[17] Section 98(4) provides that within six months of the commencement of the Act an irrigation board established in terms of any law in force immediately before the 1998 Act came into operation, is to submit to the minister a proposal to transform the board into a water user association – which proposal the minister, under s 98(5), may either accept, with or without amendment, or reject. If the proposal is accepted, the minister is to gazette a declaration to that effect.

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[13] Defined as the Minister of Water Affairs and Forestry.
[14] Section 151(1)(a) as read with s 151(2).
[15] Section 1.
[16] See the explanatory note to Chapter 7 of the 1998 Act.
[17] See the explanatory note to Chapter 8 of the 1998 Act.

[12] Section 98(2) of the 1998 Act is a 'sunset clause'. It provides:

'A board continues to exist until it is declared to be a water user association in terms of subsection (6) or until it is disestablished in terms of the law by or under which it was established, which law must, for the purpose of such disestablishment, be regarded as not having been repealed by this Act.'

In addition, s 98(3) provides that:

'(a) the name, area of operation, management, property, rights, liabilities, obligations, powers and duties of a board remain the same as immediately before the commencement of this Act;

(b) this section does not affect the continuity, status, operation or effect of any act or omission of a board, or of any by-law made by a board, before the commencement of this Act;

(c) any person holding office with the board when this Act commences continues in office for the term of that person's appointment; and

(d) if a position becomes vacant prior to the declaration of the board as a water user association, the board may fill the vacancy according to the procedures laid down by or under the law which applied to that board immediately before the commencement of this Act.'

The clear intention of these provisions is that existing water irrigation boards should continue in operation until they are restructured as water user associations. (Although strictly speaking it should not be taken into account in interpreting the Act[18] this is confirmed by the explanatory note to chapter 8 of the Act, into which s 98 falls).

[13] Notwithstanding the six month period prescribed by s 98(4), the complainant was neither disestablished nor transformed into a water user association, and was still continuing to operate by virtue of the provisions of s 98(2) and (3) at the time of the appellants' trial, some eight years after the 1998 Act had come into operation. How this somewhat surprising state of affairs came about is, however, neither here nor there and, for present purposes, it must be accepted that at all times material to the charges brought against the appellants the complainant had continued to exist and to operate with the obligations, powers and duties it had enjoyed under the 1956 Act.

[18] See s 1(4) of the 1998 Act.

[14] In the light of this, the appellants argued that the charges brought against them under the 1998 Act were not competent as, so they submitted, the 1956 Act had continued to be in force in the complainant's irrigation district – and it did not create similar statutory offences. In my view, for the reasons that follow, this cannot be accepted.

[15] While it is so that the complainant had continued to exist and exercise the functions it had performed under the 1956 Act, this does not mean that the 1956 Act had not been repealed throughout the country, including within its irrigation district. The complainant's existence and functions were merely preserved as a temporary measure to enable it to continue to operate. Had the legislature intended the 1956 Act not to have been repealed within the areas of operation of irrigation boards established under that Act when the 1998 Act came into operation, it would have been a simple matter for it to have said so. It did not do so, and such an intention is not a necessary inference. Indeed, the provisions of the 1998 Act clearly indicate the contrary. Thus, for example, a person who enjoyed an existing lawful water use before the commencement of the 1998 Act, was permitted under the provisions of s 34 of the latter Act to continue to exercise that use. The explanatory note to part 3 of chapter 4 of the 1998 Act, into which s 34 falls, gives the following relatively simple and accurate summation of the provisions of that part of the chapter:

'This Part permits the continuation under certain conditions of an existing water use derived from a law repealed by this Act. An existing lawful water use, with any conditions attached, is recognised but may continue only to the extent that it is not limited, prohibited or terminated by this Act. No licence is required to continue with an existing lawful water use until a responsible authority requires a person claiming such an entitlement to apply for a licence. If a licence is issued it becomes the source of authority for the water use. If a licence is not granted the use is no longer permissible.'

[16] Thus, although an irrigation board might continue to exist and operate with the various duties and obligations it had under the 1956 Act despite the

coming into operation of the 1998 Act, it does so by reason of the provisions of the latter which clearly apply within the irrigation district of each such an irrigation board and regulates the use of water. Accordingly, anyone who commits an offence envisaged by s 151 of the 1998 Act may be charged under that Act, even if the offence is committed within the irrigation district of an irrigation board established under the 1956 Act which continues to exist and operate by reason of s 98 of the 1998 Act.

[17] It was therefore clearly competent for the state, in counts 3 and 4, to charge the appellants with offences under s 151 of the 1998 Act. Whether the evidence establishes their guilt on these counts is another matter, to which I shall return in due course.

[18] It is convenient at this stage to consider the issue raised in the cross-appeal, namely, whether it was competent to charge the appellants with the common law offences of fraud (count 1) and theft (count 2, and as an alternative on count 1) or whether the state was limited to charging them with no more than the statutory offences created by the 1998 Act. The cross-appeal flows from the court quo's finding that the legislature, by comprehensively regulating the use of water by way of the 1998 Act in which it created numerous statutory offences, necessarily intended to limit the prosecution of persons for offences in relation to water and its use to those it had provided under that Act, and had excluded common law offences the elements of which overlapped with such statutory offences.

[19] In my view, the court a quo misdirected itself in this regard. The mere fact that certain conduct might constitute an element of both a common law offence and a statutory offence is not in itself any reason to find that the legislature intended only the statutory offence to be capable of prosecution. There are numerous instances where certain conduct will be an element of both a common law and statutory offence. An obvious example which springs to mind is the negligent driving of a motor vehicle. This amounts to a statutory offence and an essential element of the common law offence of culpable homicide where it results in a loss of life. But that is no bar to the offender

being charged with culpable homicide and, in the alternative, the statutory offence of negligent driving. Indeed, this court has recognised that in certain cases where conduct which amounts to a statutory offence overlaps with the common law offence, the penalty prescribed for the statutory offence may in certain circumstances be a useful guide in considering an appropriate sentence for a conviction of the common law offence.[19]

[20] I accept that, in principle, the legislature could bar the prosecution of certain common law offences and restrict the prosecuting authority to bringing charges solely in respect of statutory offences. But there is no provision in the 1998 Act which specifically debars common-law offences relating to water or its misuse, nor can such a provision be found by necessary implication, and the court quo erred in finding that the appellants could not be prosecuted for common law offences.

[21] While I thus see no reason why a charge of fraud could not be brought against the appellants, that is not the end of the matter in respect of whether water pumped out of the Lomati River could be the subject of a charge of theft, an issue which needs more detailed examination.

[22] Roman law recognised certain things as being *res extra patrimonium* which were incapable of being owned, including those things classified as *res communes* being 'things of common enjoyment, available to all living persons by virtue of their existence'.[20] Public water, running in a river or a stream, was recognised as being *res communes* and therefore incapable of being owned.[21] These Roman law principles were adopted by Roman–Dutch law and subsequently recognised in South Africa.[22] Indeed, s 6(1) of the 1956 Act specifically provided that 'there shall be no right of property in public water and the control and use thereof shall be regulated as provided in this Act.'

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[19] Eg *R v Sacks* 1943 AD 413 at 428 and *R v Mzwakala* 1957 (4) SA 273 (A) at 279B-C.
[20] See eg J A C Thomas *Textbook of Roman Law* (1976) at 129.
[21] Justinian *Institutes* 2.1.1 and Lawsa (1st re-issue) vol 30 par 358.
[22] Lawsa *op cit.*

[23] As water in a public stream was therefore incapable of being owned, it was also incapable of being stolen[23] and I did not understand the state to contend otherwise. However, it submitted that the fundamental changes brought about by the 1998 Act resulted in this no longer being an accurate reflection of our law. Its argument in this regard was based on the Act having specifically placed water resources under the trusteeship of national government as I have already mentioned in para 10 above. But I do not see how the fact that government now exercises administration and control over water flowing in a river means it must now be regarded as capable of being owned and thus capable of being stolen. Effectively the 1998 Act does no more than place all water within the aegis of state control, which control the state had in any event exercised over public water before it came into operation. The legislature created various statutory offences under the 1998 Act and, if it had wished to create the offence of theft of water, it could easily have done so. It did not. Instead, in s 151(1)(a) it made the use of water other than as prescribed by the Act an offence.

[24] Accordingly, my prima facie view is that water flowing in a stream or river (a water resource as envisaged by the 1998 Act) is not capable of being stolen, so that a riparian owner who abstracts more water from such a water resource than that to which he or she is legally entitled may commit a statutory offence under s 151 of the 1998 Act but does not commit the offence of theft. However, it is not necessary to reach a final decision on this issue as, even if it had been competent for the state to charge the appellants with theft, that charge could only have been sustained if the appellants had taken more water than what they had been entitled to abstract. On appeal, the court a quo concluded that the evidence in the trial court had failed to establish that to have been the case, and for that reason the appellants' conviction for theft could not stand. The ratio of the decision of the court a quo was based on this factual finding, not on the point of law that a charge of theft could not be brought. Its observation to the effect that a charge of theft of water was inappropriate was no more than a passing comment and was not the underlining reason why the conviction of theft was set aside. That being so,

[23] J Burchell *Principles of Criminal Law* 3 ed (2005) at 167.

the court a quo erred in granting leave to appeal on a point of law in respect of the theft charge which could not determine the appellants' guilt or otherwise on that charge. And in any event, I agree that the state failed to establish that the appellants had abstracted more water from the river than that to which they had been entitled, even if the circumstances were such that their actions gave rise to a very real suspicion that they had done so. In these circumstances the cross-appeal in relation to the charge of theft cannot succeed.

[25] I turn to consider whether the evidence established the appellants' guilt on the three remaining counts. It was argued on behalf of the appellants that the evidence of a state witness, David Maduna, an employee of the appellants, should be disregarded as he had not been properly sworn in by the magistrate. The point is debateable but, for purposes of this appeal, I intend to accept that no account should be had of his evidence. The remaining witnesses were found by the magistrate to be reliable and the attack upon their honesty and credibility contained in the appellants' heads of argument was not only unjustified and groundless but was, in the main, based on speculation and matters not raised in evidence. The appellants did not testify and, in these circumstances, there is no reason not to accept those factual findings of the trial magistrate, which were also accepted by the court a quo.

[26] As I have mentioned, the appellants' farm lies within the irrigation district of the complainant. The appellants registered a single pump-station with the complainant which was fitted with a WAMS to measure the amount of water they abstracted from the Lomati River. In terms of an undertaking they had given, the appellants periodically passed on the readings to the complainant. Those readings were verified from time to time by the waterfiskaal. Despite the complainant having been entitled to make bye-laws, the scheme appears to have been administered by consent rather than by the passing of bye-laws or regulations.

[27] In July 2004 the waterfiskaal, Mr du Toit, discovered that the appellants had built pump station 46.1 on the their farm to which there was no WAMS or similar system fitted, and were using it to pump water from the Lomati River to a nearby storage dam on the farm – from which water was led to irrigate certain lands. This was reported to the complainant whose committee took the matter up with the appellants and informed them that the pump-station was illegal and that they were to fit it with a WAMS. They agreed to do so at their own cost, but it was subsequently ascertained that the flow-meter was mounted inside the pump-house which was locked, and thus did not comply with the complainant's specifications as it was not accessible to the waterfiskaal.

[28] As a result of certain information received, the complainant also suspected that the WAMS unit at pump-station 46 had been de-activated so that the appellants could pump water from the river which would not be recorded. This led to the complainant obtaining a warrant to carry out an inspection on the appellants' farm. Consequently, on 3 March 2005 a qualified electrical contractor, Mr WJ de Beer, inspected pump-station 46 in the company of the second appellant. When the second appellant unlocked the pump-house, De Beer noticed that the pump was running but that the WAMS was not registering the water flow. The cause of this was found to be that the electrical wiring leading to the WAMS had been bridged. It is unnecessary to deal with the technical evidence save to state that it was quite clear that the electrical circuits had been altered so that the pump could run without the WAMS system reading the quantity of water being abstracted.

[29] This evidence, unchallenged as it was by the appellants, establishes that the appellants pumped an unknown quantity of water out of the river at pump station 46 which was not registered on the WAMS system affixed to that pump. As the figures recorded by the WAMS were forwarded to the complainant as being the appellant's water consumption from the river, the appellants therefore intentionally brought the complainant under the impression that they had abstracted less water than they had actually done. It also prevented the waterfiskaal from verifying the accuracy of the figures that

appellants had submitted. In a nutshell, the appellants deceived the complainant in regard to the quantity of water they had abstracted from pump station 46.

[30] The court a quo appears to have found that the misrepresentation made by the appellants could not be regarded as being unlawful as there was no statutory obligation on their part to provide correct information. But that misses the true issue, namely, that the appellants intended to and did in fact deceive the complainant by forwarding water consumption figures which they knew were incorrect. The complainant was required to protect the sources of the water in the river, to prevent any unlawful abstraction of such water, to exercise general supervision over the river and to recall, supervise and regulate the use of the water in the river.[24] The complainant was thus clearly prejudiced by the appellants' misrepresentations as it relied on the accuracy of the information it received as to the water abstracted from the river in order to discharge its functions. The essence of fraud is the deception of the victim by way of misrepresentation causing prejudice or intentional prejudice, and it matters not that the appellants were not under a statutory obligation to provide accurate figures. Misrepresentations were clearly made by both appellants, either in concert or by making common cause with the actions of each other, and caused either direct or potential prejudice to the complainant. Consequently, while the appellants cannot be found guilty of theft of the unknown quantity of water which they abstracted but did not account for to the complainant, there is no reason why they cannot be found guilty of fraud. I have no difficulty in concluding that the state established the guilt of both appellants on count 1.

[31] In relation to count 3, it is alleged by the state that the appellants contravened s 151(1)(e) of the 1998 Act by having wrongfully and intentionally tampered or interfered with the WAMS device fitted to pump station 46. That the device was interfered with by way of a carefully crafted bridging device being fitted to its electrical system leading is clear. This was done within the pump-station which was locked and to which only the appellants had access.

[24] See para 9 above.

The irresistible inference is that the appellants were directly responsible for the installation of the bridging device to enable them to run the pump without the WAMS recording the amount of water being abstracted. The only real defence to the charge offered by the appellants in the appeal was that they could not be charged under s 151 of the 1998 Act. But, for the reasons already given, there is no merit in that defence. Again, I have no difficulty in concluding that the appellants were correctly convicted on this charge.

[32] The charge against the appellants in to count 4 was that they had contravened s 151(1)(j) of the 1998 Act by unlawfully abstracting water from the Lomati River at both pump-stations 46 and 46.1. The essence of an offence under s 151(1)(g) is an act 'which detrimentally affects or is likely to affect a water resource'. It is clear that the appellants pumped quantities of water from the Lomati River, which is a 'water resource' as defined, at both those pump stations for which they did not account to the complainant. This would have occurred whenever water was abstracted from pump station 46.1 (which was not fitted with a WAMS) and when the water abstracted from pump-station 46 was not recorded by its WAMS due to the meter having been cut out of the electrical system by the unauthorised bridge.

[33] As the complainant was charged with the administration of the water in the river and obliged to supervise and regulate its use, the appellants' actions would clearly either have detrimentally affected the river or have been likely to have done so. I therefore have no difficulty in finding that the appellants were correctly convicted on count 4 as well.

[34] I turn now to the question of sentence. At the outset, I shall deal with count 1 ie the count of fraud. For purposes of sentence, the trial court took this conviction together with the conviction of theft on count 2 and imposed a fine of R30 000 or 18 months' imprisonment wholly suspended for five years on certain conditions. Of course, the appellants are now to be sentenced merely for the single count of fraud. Nevertheless, the offence is a severe one, relating as it does to a scarce natural resource. In these circumstances I am of the view that it would be appropriate to sentence each appellant to a

fine of R20 000 or 12 months' imprisonment but to suspend the sentence in its entirety for five years on condition that he is not convicted of fraud committed during this period of suspension for which he is sentenced to imprisonment without the option of a fine.

[35] The court a quo took both counts 3 and 4 together for the purposes of sentence, and sentenced each appellant to a fine of R5 000 to be paid to the complainant within 30 days or six months' imprisonment. Although the appellants appealed against both the amount they were ordered to pay as well as the length of the period of imprisonment imposed as an alternative, they were, if anything, leniently treated and I see no reason to interfere. However, the condition that the amount of R5 000 be paid to the complainant is inappropriate. Not only does the complainant possibly not still exist, but effectively the court imposed a compensatory order in respect of which the procedures, required by s 152 of the 1998 Act and s 300 of the Criminal Procedure Act 51 of 1977, were not followed. The parties therefore agreed that this court should alter the sentence to reflect the amount as a fine payable to the state.

[36] In the result, I order as follows:

1. The appeal against the appellants' convictions on counts 3 and 4 is dismissed.
2. The appeal against the sentence imposed in respect counts 3 and 4 is upheld and the sentence altered as set out below.
3. The respondent's cross-appeal in regard to count 1 (fraud) is upheld and the high court's order upholding the appellants' appeal against their conviction on that count is set aside.
4. The respondent's cross-appeal in regard to count 2 (theft) is dismissed.
5. The order of the high court is altered to read as follows:

   '(a) The appeal in respect of the first appellant's conviction on counts 2, 5, 6 and 7 and the second appellant's conviction on counts 2, 5 and 6 is upheld and such convictions and the sentences imposed in respect thereof are set aside.

(b) The appeal in respect of the appellants' convictions on counts 1, 3 and 4 is dismissed.

(c) In respect of their conviction on count 1 (fraud) each appellant is sentenced to a fine of R20 000 or 12 months' imprisonment, wholly suspended for four years on condition he is not convicted of fraud committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.

(d) The appeal against the sentence imposed in respect of counts 3 and 4 is upheld, the sentence is set aside and (both counts being taken together for purposes of sentence) replaced in the case of each appellant with a fine of R5 000 or six months' imprisonment.'

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L E LEACH

ACTING JUDGE OF APPEAL

APPEARANCES:

COUNSEL FOR APPELLANTS:	J Nel
INSTRUCTED BY:	Coert Jordaan Attorneys, Nelspruit
CORRESPONDENT:	Giorgi en Gerber Attorneys, Bloemfontein

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