IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A228/2011

DATE: 2 SEPTEMBER 2011

In the matter between:

PETER FRANCOIS DU PLESSIS Appellant

and

THE STATE Respondent

J U D G M E N T

CLOETE, AJ:

The appellant was charged in the Bellville Commercial Crimes Court with 11 counts of fraud, alternatively theft and 11 counts of contravening section 11(2) as read with sections 1 and 91(4)(a) of the Banks Act 94 of 1990. He was timeously informed of the minimum sentencing provisions contained in section 51(2) of the Criminal Law Amendment Act 105 of 1997.

The appellant initially pleaded not guilty to all of the charges against him. However, on the third day of the trial and after the

state had led the evidence of five witnesses, the appellant made certain admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977, effectively admitting guilt to the 11 counts of fraud. At the time of making these admissions, the appellant had legal representation.

The state thereafter closed its case and the appellant closed his case without testifying or calling any witnesses. The presiding magistrate convicted the appellant on the 11 counts of fraud and acquitted him on the 11 counts of contravening the Banks Act. On 4 November 2010 the magistrate, taking all 11 counts as one for purposes of sentence, imposed 14 years imprisonment of which two years were suspended for five years on condition that the appellant is not again convicted of fraud or theft committed during the period of suspension. The magistrate also alluded to the provisions of section 276(1)(i) of the Criminal Procedure Act when imposing sentence. On 14 December 2010 the magistrate granted the appellant leave to appeal against the sentence imposed. The appellant now appeals against that sentence.

During the period April 2007 to September 2008 the appellant, acting on behalf of an entity called Commtrad which purported to trade in local and international products, solicited and/or accepted investments from members of the public with the

promise of a 10% per month return on their investments. The appellant represented that he would provide bridging finance in respect of containers carrying fish which were to be exported to the Far East. At the time neither the appellant nor Commtrad had the required permit to export (or import) fish in terms of the Marine Living Resources Act 18 of 1998. In the same vein, the appellant also represented that he would provide bridging finance for containers carrying imported items (including laminated flooring and electronic goods) as also for fuel, port charges and warfage for container vessels. Again, there would be a 10% per month return.

At a stage the appellant informed some of the investors that, instead of only providing bridging finance, he would purchase goods on consignment in order to increase profits. He also represented to one complainant that a particular letter of credit was proper security for a loan when in fact to his knowledge it was not.

The appellant did not appropriate the investors' funds as he represented. Instead he utilised funds invested by later investors to pay "profits" to earlier investors, but also for his own personal gain. Unbeknown to the investors, the appellant had previously been sequestrated and his business, Exotic Cars, had been liquidated.

The total amount invested by the complainants in the appellant's scheme was R9 796 000,00 and of that the amount which was lost in respect of capital only (i.e. excluding unpaid profits and the loss of interest on the funds had they been properly invested) was approximately R6.8 million.

It is trite that the circumstances in which a court of appeal may interfere in a sentence which another court has passed are limited. There must be either a material misdirection by the trial court, or the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking, startling or disturbingly inappropriate". See S v Malgas 2001 (1) SACR 469 (SCA) at 478d-g.

The appellant submits that the magistrate misdirected himself by failing to properly balance his personal circumstances, the seriousness of the offence and the interests of society. He contends that although the amount involved was substantial, the complainants were not "pensioners, widows and orphans", but "educated, middle class people". He argues that the complainants should in fact shoulder some of the responsibility for their losses, apparently because "they should have known

with such high returns, it is a high risk venture or even illegal, yet they willingly took part" and that in a "start-up import and export company you do not have any recourse should the venture fail".

The appellant contends that the investors were "relatively well-off, with discretionary funds available" and that they "can again make up these losses...the damage is not permanent as with, for instance, some assaults and murder". He argues that the magistrate did not place sufficient weight on his personal circumstances, which are that at the time of being sentenced he was 53 years old and married with two teenage children. Subsequent to being charged, he had again been sequestrated and his business liquidated. The appellant also "came clean" halfway through the trial and effectively pleaded guilty.

As a first offender for fraud exceeding R500 000,00, the appellant became liable to imprisonment for a minimum of 15 years in terms of section 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 unless the court *a quo* was satisfied in terms of section 51(3)(a) thereof that substantial and compelling circumstances existed which justified the imposition of a lesser sentence.

The complainants socialised with the appellant and at least

one of them met him through the community based neighbourhood watch in Hout Bay. One complainant was his doctor. Of the 11 complainants, seven lost their entire investments in the scheme.

Mr Eksteen (count 5) lost just over R2 million, including funds which he had invested on behalf of the Burn Foundation, a charity for children suffering from serious burn wounds. He was 70 years old. Mr Hart (count 6) lost just over R1 million. He was 75 years old. Ms Siepen (count 7) lost R500 000,00. She was 62 years old and a widow in ill health. Mr Southwood (count 8) lost R765 000,00. He was 64 years old. No evidence was placed before the court that any of the complainants could make up their losses.

To my mind the appellant's attempt to foist some of the responsibility for his criminal conduct on to the complainants, only serves to reinforce his apparent lack of remorse. The fact that the innocent complainants might have been foolish in trusting a friend and associate who was involved in a community based law enforcement project in no way detracts from his culpability. He preyed on the gullible, exploiting his associations with them. These offences were not isolated. The appellant's conduct was premeditated and persistent over the period of more than a year. He betrayed the trust of those who

believed in him, but still seeks to avoid accepting responsibility for his actions.

The fact that he effectively pleaded guilty halfway through the trial is not necessarily an indication of his remorse. It may well be that the appellant realised that in the face of overwhelming evidence against him, he would have to "come clean".

The appellant did not disclose to any of the complainants that he had been sequestrated. He did not represent to the complainants that his company was a "start-up import and export company" although nothing turns on this as there is no merit in the contention that the complainants are therefore somehow to blame. And not much store can be placed on the appellant's submission that what should also have been taken into account is that he was subsequently again sequestrated and his business liquidated since these events were a direct result of his own criminal conduct.

Although the magistrate took all of the counts of fraud as one for purposes of imposing an appropriate sentence, it cannot be overlooked that of the 11 complainants, four lost amounts substantially in excess of R500 000,00. One lost R500 000,00. Only two lost amounts of R100 000,00 or less.

The magistrate had due regard to the appellant's personal circumstances when considering an appropriate sentence. The appellant's submissions as to how his scheme started, the current financial position of his wife and his stroke during 2005 were not placed before the court *a quo*. The appellant elected not to testify in mitigation of sentence, nor did he call any witnesses to do so on his behalf. These submissions are thus not properly before this court and cannot be taken into account.

The magistrate referred to the case of S v Sadler 2000 (1) SACLR 331 (SCA) at 335g-336a. The sentiments expressed by the Supreme Court of Appeal in that case cannot be overemphasised. The appellant's attempts to draw comparisons between sentences imposed by our courts for violent crime on the one hand, and his crimes on the other, to minimise their seriousness must be rejected. The Supreme Court of Appeal in the Sadler case has placed "white-collar" crime in its proper perspective.

The magistrate carefully weighed up all relevant factors pertaining to the appellant's personal circumstances, the seriousness of the offence and the interests of society. Despite the seriousness of the offences (four were in excess of

R500 000,00 and thus each attracted a minimum sentence of 15 years imprisonment) and the consequences thereof to the complainants, the magistrate nonetheless took the appellant's personal circumstances into account and in the result imposed a sentence less than the minimum prescribed. The magistrate did not materially misdirect himself in imposing the sentence which he did. The sentence imposed by him was not shocking, startling or disturbingly inappropriate. There is thus no basis for this court to interfere.

I would, therefore, propose the following order: **THE APPEAL AGAINST SENTENCE IS DISMISSED**.

CLOETE, AJ

I agree and it is so ordered:

ALLIE, J