



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
23/1/2023	<i>[Signature]</i>
Date	Signature

Case no: A208/19

In the matter between:

PHILEMON RADICHABA MOHLALHLANE

1st Appellant

MANYANA RUBBEN MOHLALOGA

2nd Appellant

DINGA RAMMY NKHWASHU

3rd Appellant

DINGAMAZI KA DINGA (Inc) t/a Masephula Dinga

Commercial Attorneys

4th Appellant

and

THE STATE

Respondent

JUDGMENT

NEUKIRCHER J:

1] In the Regional Division of Gauteng held at Pretoria, 6 accused stood trial on various counts of fraud, theft, forgery, corruption and money laundering in a matter that had its origins in 2007/2008. The State alleges that the accused were all bound together by virtue of the doctrine of common purpose. The accused were all represented at trial and pleaded not guilty to all the charges.

2] The present appellants were the 1st to the 4th accused¹. They were charged specifically as follows:

2.1 Count 1: fraud, alternatively theft, read with the provisions of s103 of the Criminal Procedure Act No 51 of 1977 (CPA), read with s51(2) of the Criminal Law Amendment Act no 105 of 1997;

2.2 Count 2: the contravention of s4(a) and/or (b), read with s1, s4(i), s4(ii) and s8 of the Prevention of Organised Crime Act 121 of 1998 (POCA) (ie money laundering)

Alternatively

The contravention of s6(a), s6(b) or s6(c), read with s1 and s8 of POCA (ie the acquisition, possession or use of the proceeds of unlawful activity).

3] The appellants were all convicted and sentenced as follows:

¹ The 4th appellant being an attorneys firm represented by the sole director, the 3rd appellant

- 3.1 1st appellant was convicted on count 1 only and sentenced to 7 years' imprisonment;
- 3.2 2nd appellant was convicted on counts 1 and 2 and was sentenced to 15 years' imprisonment on count 1 and 15 years' imprisonment on count 2. The court ordered that 10 years of the sentence in respect of count 2 should be served concurrently with that of count 1;
- 3.3 3rd appellant was convicted on counts 1 and 2 and sentenced to 15 years' imprisonment on each count. The court ordered that 6 years of the sentence in respect of count 2 should be served concurrently with that of count 1;
- 3.4 4th appellant was convicted on count 1 and sentenced to a fine of R50 000 conditionally suspended for 5 years.

- 4] The present appeal lies against both conviction and sentence.
- 5] It is trite that the test on appeal against conviction is whether the court misdirected itself² and on sentence whether the court misdirected itself or imposed a sentence that is shocking, startling or disturbingly inappropriate.³

THE CHARGE SHEET

- 6] The purpose of a charge sheet is that it contains the essential allegations which, the State must prove in order to sustain a conviction, and must set out facts upon which the State will rely to prove its case. This affords an accused with an

² R v Dhlumayo 1948 (2) SA 677 (A)

³ S v Van de Venter 2011 (1) SACR 238 (SCA) at par 14

opportunity to formulate his defence which, in turn, accords with his constitutional right to a fair trial.⁴

- 7] However, in my view, it is not necessary to set out each and every fact upon which the State will rely to prove its case – this would be overly formalistic – it is sufficient if the substantial facts upon which the State relies are set out and it is also sufficient if (in an exceptionally detailed charged sheet such as that *in casu*) the State proves the essential facts of the charges⁵.
- 8] Whether the accused's substantive fair trial, including his/her ability to answer the charges, might be impaired would be dependent on a "*vigilant*" examination of the relevant circumstances⁶.
- 9] In the matter before us, the appellants' attack on the fact that the State failed to prove each and every fact stated in the document titled "General Preamble to the Charge Sheet" takes an overly formalistic view of the matter. There can also be no criticism in respect of the formulation of the charges themselves – they are very clear. The State was also at pains to point out that the minimum sentence is applicable upon conviction. The appellants have suffered no prejudice in this respect.
- 10] The point is that the State is bound to prove the elements of the crimes for which the appellants have been charged in the charge sheet. The question is

⁴ S v Livanje 2020 (2) SACR 451 (SCA) at par [23]

⁵ S v Legoa 2003 (1) SACR 13 (SCA)

⁶ S v Legoa at pars [20] and [21]

whether it has done so. The fact that each and every fact set out in the preamble is not proven is, in my view, not relevant – the State is bound to prove its case as formulated in the charge sheet itself, beyond reasonable doubt.

- 11] Therefore, in my view, the challenge put up by the appellants cannot be sustained.

THE EVIDENCE

- 12] The State called many witnesses in its effort to prove its case beyond a reasonable doubt. Amongst them were two s204 witnesses and a qualified forensic accounts, Mr Söhnge.⁷

- 13] Mr Söhnge compiled a report which illustrates the flow of funds originating with the payment by the Land Bank into the 4th appellant's trust account and from there into the various accounts of the other appellants and/or their beneficiaries. His evidence was never seriously disputed by any of the appellants. The crux of it all is that the Land Bank paid an amount of R6 000 000 into the 4th appellant's bank account on 1 February 2008 and by 6 May 2008 (ie 3 months later), there was R22 641-44 left – not a cent had been spent for the purpose for which it had originally been designated by the Land Bank, but had instead been consumed by the appellants – but I will return to this issue in due course.

THE s204 WITNESSES

⁷ Who is employed as an associate at Pricewaterhouse Coopers (PwC)

- 14] As stated, there were two s204⁸ witnesses: Mr PKW Mosoma (Mosoma) and Mr GM Tjia (Tjia). Although the court a quo accepted their evidence as reliable and trustworthy, it did not make any order regarding their indemnity as provided for in s204 – the State asks that this court grant them both immunity. The appellants argue that they were unreliable and untrustworthy witnesses and that indemnity should not be granted. Their evidence and this issue will also be dealt with in due course.

8

S204 states:

'Incriminating evidence by witness for prosecution

(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness—

(i) that he is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him—

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question.

(3) The discharge referred to in subsection (2) shall be of no legal force or effect if it is given at preparatory examination proceedings and the witness concerned does not at any trial arising out of such preparatory examination, answer, in the opinion of the court, frankly and honestly all questions put to him at such trial, whether by the prosecution, the accused or the court.

(4)

(a) Where a witness gives evidence under this section and is not discharged from prosecution in respect of the offence in question, such evidence shall not be admissible in evidence against him at any trial in respect of such offence or any offence in respect of which a verdict of guilty is competent upon a charge relating to such offence.

(b) The provisions of this subsection shall not apply with reference to a witness who is prosecuted for perjury arising from the giving of the evidence in question, or for a contravention of section 319(3) of the Criminal Procedure Act, 1955 (Act 56 of 1955)."

THE FACTS

- 15] This matter has its origins in an empowerment project known as the AgriBEE Fund (the Fund) which was established by the National Department of Agriculture (the Department). The objective of the Fund was mainly to bring previously disadvantaged and emerging farmers – especially woman and the youth – into the commercial farming sphere. The Fund received an initial injection of R100 million from Treasury which was paid in 2 instalments.
- 16] The Fund was managed by the Land Bank on behalf of the Department and it would allocate money, in the form of a grant, to qualifying projects and persons.
- 17] Applications for funding were submitted either directly to Mr Mosoma or to the National Department of Agriculture and were assessed according to the procedures and guidelines set out in the AgriBEE Manual (the Manual). Paragraph 4.5 of the Manual sets out the relevant procedure as follows:

“Applications for grants for farming projects as well as agribusinesses are screened and evaluated at provincial level based on the criteria and forwarded to DoA: Directorate BED to be qualified from the Charter point of view. A technical committee internally consisting of core directorates and led by Dir: BED will conduct this work. From DoA the applications will be forwarded to Land Bank for further screening, appropriate due diligence and assessment.

A National Advisory Panel (NAP) will be appointed by the Director-General of the Department of Agriculture and will include private sector partners. The NAP, inter alia, has the responsibility of ensuring that there is geographical balance to empowerment and other conditions.

The NAP determines the level of the grant based on the number of applications received, the commercial viability of the proposed project etc.”

18] Importantly, paragraph 5.5.1 of the Manual states:

“Politicians, while holding public office, and government employees do not qualify and will not be eligible for the grant.”

19] In 2005 the 1st appellant had worked for the Land Bank. In 2006/2007 he was appointed as Acting CEO of the Land Bank and then as Deputy Director-General of the Department of Agriculture. The 2nd appellant was a Member of Parliament and was appointed as Chairperson of the Portfolio Committee on Agriculture in September 2007. Mr Mosoma was appointed as the Fund Manager in December 2007- applications for funding were submitted either to him or to the Department. Mr Tjia was the CEO of the Limpopo Youth Commission in the Office of the Premier of Limpopo.

20] It is thus very clear that the 1st appellant, 2nd appellant and Mr Mosoma were ineligible for a grant in terms of par 5.5.1 of the Manual.

21] According to the State’s evidence, Tjia knew the 2nd appellant as they had both been members of the ANC Youth League, and were neighbours and friends. They also shared a common interest in farming. The 2nd appellant offered to introduce Tjia to the 1st appellant with the purpose of obtaining funding for a proposed farming project⁹, through the Fund, and 2nd appellant offered to talk

⁹ And in almost all transactions in Tjia was involved, 2nd appellant acted as the go-between between him and the 1st appellant

to 1st appellant on his behalf. Mr Tjia also shared his idea of broad-based youth empowerment with 2nd appellant. The 2nd appellant knew the 3rd appellant as the latter had handled some legal matters on his behalf. He introduced the two.

22] 2nd appellant arranged a meeting at 1st appellant's residence in Polokwane in December 2007. Present were Tjia, 1st, 2nd and 3rd appellants, the latter being there to provide the others with legal advice.

23] At this meeting 1st appellant stated that he had learned that 2nd appellant and Tjia intended to embark on an empowerment project and asked them how much was needed – the response was R500 000. After this meeting – at some unknown date – 2nd appellant informed Tjia and 3rd appellant that 1st appellant had informed him that they could get a R3 million grant from the Fund and they decided then that Tjia and the 2nd appellant would purchase a farm with the money.

24] According to Tjia, at that stage *"it was now clear that it was going to be a profit-making entity for us"* and it ceased to be a broad-based empowerment program *"the minute that we were promised the availability of the grant"*, ie by the 1st appellant.

25] Tjia and 2nd appellant went to inspect a property in Dendron, Limpopo but the purchase price was R4 million – they were therefore R1 million short. 2nd appellant informed 1st and 3rd appellants, and a meeting was convened in January 2008 at the 2nd appellant's home in Polokwane. They discussed the

project and 1st appellant said he could get approval for a R6 million grant: R4 million to buy a farm and R2 million for logistics and equipment.

26] At this meeting it was discussed that 2nd appellant could not make the application as he was the Portfolio Committee Chairperson, and the 1st appellant suggested that Tjia must apply for the grant. They decided to call their enterprise Dingwako Farming Projects (Pty) Ltd and 1st appellant dictated the content of the application to Mr Tjia, who completed it by hand. Although Mr Tjia identified Exhibit R as that application, he denied giving 1st appellant a typed application – he did however identify his signature at the bottom of Exhibit R. Given his admission as regards the content and his signature nothing turns on the fact that Exhibit R is typed.

27] According to the application, (ie Exhibit R) the project was for Youth/workers and local Bochum women in the Bochum area. It would have a feeding lot, slaughter house and butchery and would require the purchase of land, livestock and processing units. It would create approximately 61 jobs.

28] It appears that it was around this time that Tjia received advice from the 3rd appellant to register a Family Trust. The Trust Deed¹⁰ was signed in January 2008 and registered by the 3rd appellant. The Trust would be a director of Dingwako Agriculture Projects (Pty) Ltd (Dingwako) – a company that 3rd appellant would establish for the farming projects.

¹⁰ Of the GM Tjia Family Trust

- 29] It was also common cause that at the time the application for funding was made, none of the documents set out in paragraph 17 supra were in place and none of the checks and balances provided for in par 5.4 of the Manual were followed.
- 30] In February 2008, the 2nd appellant received an sms from the 3rd appellant that the R6 million had been received from the Land Bank, after which a meeting was held¹¹ to discuss the project, at which:
- (a) they decided they needed to pursue the idea of purchasing a farm;
 - (b) Tjia informed the 3rd appellant that he had financial difficulties and asked for a loan from the R6 million¹² and offered to sign an acknowledgment of debt (AoD);
 - (c) 2nd appellant informed him that he had also asked for, and been paid, money from the R6 million;
 - (d) the money emanated from the account of the 4th appellant and was paid over by the 3rd appellant;
 - (e) they decided that the 3rd appellant would become "*an equal partner*";
 - (f) they decided that the farm at Dendron was overpriced and they would look for another farm.
- 31] However, it appears from the evidence that the 3rd appellant - over and above providing legal advice and now becoming an equal partner in this project - was to manage the project. The evidence was that 3rd appellant did not render any invoices for his work, he never accounted for his work, and neither Tjia, nor 1st

¹¹ Between Tjia, 1st, 2nd and 3rd appellants

¹² To pay his bond, amongst other debts

appellant, nor 2nd appellant received any documents from the 3rd appellant to explain how (or why) any of the disbursements were taking place. In fact, it appears that there was a complete and utter lack of any form of accounting from the 3rd appellant as regards the project. Despite his protestations and insistence to the contrary, the 3rd appellant provided no proof to the contrary, which is important in light of the direct evidence of several of the State witnesses and other documentary evidence.

32] Between February 2008 and September 2008 Tjia received a total of R431 145 of the R6 million earmarked for the project – this included R316 545 paid in respect of an amount outstanding on his Mercedes Benz motor vehicle which he asked the 3rd appellant to settle and which was. Despite the fact that this was a “loan”, the 3rd appellant never drew up an AoD for Tjia to sign and the “loan” was never repaid.

33] Shortly after the decision was made not to purchase the Dendron farm, the appellants began looking for another farm and identified one in the Legwale area just outside Polokwane. Tjia and 2nd appellant went to visit it, and after 2nd appellant had obtained the input of the 1st appellant to proceed with the purchase, it was purchased for R2,3 million¹³ – this being said, the land was never put to the use for which the R6 million intended. Instead, the meetings between the main role-players became more and more infrequent and when the 3rd appellant indicated that he wanted to rent the farm out for livestock grazing, the others tasked him with this. The farm was rented out to a Mr Chaba

¹³

The money repatriated from the 2nd appellant's Trust after the Land Bank initiated its investigation

for R1 000 per month to graze his cattle which was paid into the 3rd appellant's account – the others had no idea where the money went, and the evidence was that they received no benefit from this money.

- 34] Mr Mosoma adds to the link between the 1st appellant and the scheme, and also establishes that the 1st appellant was the catalyst for the R6 million payment and what followed¹⁴. Mr Mosoma was employed at the Land Bank as a fund manager in the AgriBEE project from 2006. He confirmed that the Fund was established to bring previously disadvantaged communities into farming projects by acquiring farms and then they were provided funding in order to establish the farming projects.
- 35] 1st appellant approached him and informed him that the Minister of Agriculture wanted to establish more projects for women and youth (called the YARD project). He was instructed by the 1st appellant to authorise the payment of the R6 million to the 4th appellant – this despite his protestations that proper procedure had not been followed in terms of the Manual – but 1st appellant instructed him to proceed, which he did.
- 36] When the Land Bank conducted the audit, Mosoma was the one who drafted and received all the documents and he also backdated some¹⁵. Mosoma's evidence was that, in actual fact, there was no business plan, no application

¹⁴ He was arrested and charged with fraud and corruption in respect of other projects and he acted as a s204 witness in more than one matter that resulted from the Land Bank investigation

¹⁵ He received the business plan from the 3rd appellant during May 2008 and backdated the letter of engagement he had drafted to reflect the date of 9 October 2007 (the purpose of which was to fool the Land Bank auditors into thinking that the project was already in the pipeline)

and no due diligence and the application never properly served before the NAP. To draft the “application” he obtained the information from the 1st appellant. He also testified that this was not the only project where he was instructed to make payments without the necessary documents and procedures being followed.

- 37] The main purpose of these documents was to be able to provide the auditors with a trail as the funds had been disbursed in January 2008 and as there had been no progress report, Mosoma could not explain to the auditors how the funds had been utilised. Eventually Mosoma had to call a NAP meeting to get all approvals ratified. This he did on 13 May 2008 with the specific assistance of the 1st appellant who sat on that NAP.¹⁶
- 38] He explained that despite the existence of the Manual, it was not always followed – in his words “*(t)he manual was mostly only followed when it suited the situation*”. The technical committees were also never established – this left the Fund wide open for the type of abuse and theft that is so evident from this case.
- 39] As it turns out, the Dingwako Farming Project¹⁷ was one of several brought to him by the 1st appellant¹⁸ with the specific instruction to effect payment – this despite the project having no application or approvals per the Manual, nor approvals by the NAP Committee (or any other Committee for that matter) at that stage. His objections were met with the 1st appellant's response that this

¹⁶ Although the minutes of that particular meeting do not refer to the Dingwako Farming Project, they do refer to the Kgatelopele Co-Op which the evidence linked to this particular transaction

¹⁷ Also known as the Kgatelopele Co-Op

¹⁸ As Acting CEO of the Land Bank

was a Ministerial Project that had to be prioritized and that the approvals would be obtained at a later stage. He also informed Mosoma that the Land Bank's Finance Department did not expect supporting documents and 1st appellant provided him with the 3rd appellant's trust account details to see to the payment, which he did.

- 40] Thus it is clear that whilst Mosoma was not involved in the plan to obtain the funding and the creation of the project, he was involved in the payment itself and the creative paper trail to regularise everything *ex post facto* - all this with the specific assistance of the 1st and 3rd appellants.

THE STATE WITNESSES

- 41] Much of the remaining witnesses evidence focused on putting the remaining pieces of the puzzle together:
- (a) the purchase of the Remaining Extent Portion 1 of the Farm Skuinshoek 948 and Portion 1 Farm Kleinfontein (the Farm) to Dingwako Farming Projects (Pty) Ltd for R2,3 million. The purchase price was paid from the 4th appellant's account and the property was registered on 5 December 2008;
 - (b) Mr Shiluvane, a messenger and driver employed by the 3rd appellant who signed documents on the instruction of the 3rd appellant (and had no idea what he was signing) that appointed him as the director of Dingwako Farming Projects (Pty) Ltd and signed the Offer to Purchase of the Farm;

- (c) Mr Chaba, who testified that the 3rd appellant drafted the lease agreement¹⁹ that gave him the grazing rights on the Farm for R1 000 per month from May 2009. The rental was paid to the office of the 3rd appellant and he paid from 2009 until 2011. He was evicted in 2013 by the State;
- (d) the flow of the money to purchase paintings, 2 x BMW vehicles registered in the name of the Ditshele Family Trust belonging to the 2nd appellant, vacation ownership products, a stationary shop were amongst many other payments and purchases, none of which were related to the project but simply demonstrate that the appellants and Tjia regarded the R6 million as theirs to do with as they wanted.

THE APPELLANTS' VERSION

The 1st appellant

42] In 2006 the 1st appellant was employed as Deputy Director General in the National Department of Agriculture²⁰. He was DDG for 6-7 months and then went back to the Land Bank in July 2007 to work in the CEO's office to develop new projects for the Minister. The project entailed the development of a banking system that could cater for banking and development of farms as the Land Bank's mandate was driven to support agriculture. The Land Bank received monies allocated to it via Parliament and those were supposed to be used to support agriculture and assist emerging farmers. To this end a policy was developed²¹. At the same time a National Assessment Panel (NAP) was

¹⁹ Between him and Dingwako Farming Projects (Pty) Ltd

²⁰ He'd previously worked in the Land Bank in 2005

²¹ Called MAFIA ie MicroFinance for South African Small Farmers – it was developed in 2005/2006

developed²² that was supposed to assist with BEE and empowering small projects – the members were appointed by the Minister. In 2006 the NAP had been approved by the Departments Executive Committee, but was not yet in operation. A Manual was also developed, which the 1st appellant was involved in preparing in 2006 and which was formally adopted.²³ It was thus clear that he was well aware of its content.

- 43] The AgriBEE Operational Manual was developed by the Department, him and the World Bank staff to put structures in place to successfully run projects – it was never put into place or approved because all the projects moved into the office of the Minister to be run by the PMU. When the new Minister (Xingwana) arrived in early 2006 she was of the view that the systems were too bureaucratic and would stymie her objectives. As a result, she suspended the NAP in 2007 and developed 2 programs. 1st appellant's evidence was that he served on the NAP twice but the NAP was then suspended and a new section called the Project Management Unit (PMU) was tasked with the work of the NAP.
- 44] According to him, the Manual is paired with the NAP and as no NAP was implemented, the Manual was not implemented either. But he fails to adequately explain the fact that the State produced the minutes of 2 NAP meetings, one of which ratified the Dingwaka Project and the R6 million in funding for it.²⁴

²² Its purpose was to deliver empowerment programs for emerging farmers

²³ This being a year prior to the Project, the 1st appellant being instrumental in the procedures to be followed on his own admission, it seems there is little room for his protestations of innocence

²⁴ His response to a question on this issue is a prevarication: "...my question would be, who was in that meeting to ratify the program? Because the NAP was not functional?"

- 45] He was expelled from the Department in 2008.
- 46] He confirmed that Mosoma had been employed at the Land Bank as part of the team assisting with the approval of the AgriBEE projects, but denied that they worked together.
- 47] He and the 2nd appellant know each other from their ANC days together.
- 48] He denies approaching Mosoma in 2007 and discussing the project with him, he denies discussing YARD²⁵ and denies ever being involved in YARD. He denies telling Mosoma he was under pressure to put YARD into place. He denies knowing whether money was allocated to YARD, denies that the NAP authorised projects, denies that he had authority to instruct/request Mosoma to pay the R6 million, denies knowing who authorised payment of the R6 million or how it came to be paid out, and denies knowing about Dingwako – as far as he was concerned “21 or 30” projects were authorised by the PMU. He denies being involved in creating any paper trail to cover anything up and denies having met the 3rd appellant in January 2008.
- 49] As to the R220 000 paid to Mr Mokase (his attorney) - he said he needed the money to pay his legal fees, his house and feed his children and was given the money by the 2nd appellant. Later in his evidence he states that “*some*” money

²⁵

Which he says was not a project – he says the new Minister formed a new approach using communities rather than the Department, one group was called WARD (Women and Agriculture and Rural Development) another was YARD and a third was NARFU (National African Farmers Union)

was paid into his bank account but he doesn't remember how much - Mokase did not tell him who paid him and 1st appellant denied knowing the identity of his benefactor. He says the money was a loan but admitted he had yet to repay it.

50] In fact, the entire explanation amounts to nothing more than an obfuscation:

"COURT: *I do not understand. Are you saying that you asked Accused 2 money and he deposited it into Mr Mokase's account?*

MR MOHLAHLANE: *YES, Your Honour... (intervenes)*

COURT: *Is that what you are saying? The two amounts R200 000 and... (intervenes)*

MR STEENKAMP: *R20 000, Your Worship.*

COURT: *R220 000 and R150 000.*

MR MOHLAHLANE: *Yes, Your Honour.*

COURT: *They went straight to Mokase?*

MR MOHLAHLANE: *Yes, Your Honour.*

COURT: *Okay Mr Steenkamp you may proceed.*

MR STEENKAMP: *I am indebted Your Worship, thank you. At that stage when you received this money did you know what the origin...where this money actually came from at this stage?*

MR MOHLAHLANE: *At that stage I knew it came from Mr Mohlaloga."*

51] Of course, his explanation as to why he's implicated is essentially that he is a scapegoat ("casualties" is the word he uses) and that *"I was not good in management"*.

- 52] It is clear from the evidence of Mr Söhnge that 1st appellant received an amount of R220 000²⁶ from the Ditshele Family Trust. The latter and its account was under the control of the 2nd appellant and payment was authorised and made by the 2nd appellant.
- 53] The 1st appellant's version, in light of Mosoma's evidence and the paper trail followed by Söhnge simply rings untrue. It is, in my view, highly improbable that 2nd appellant would ensure that the 1st appellant receives a "loan" of R220 000 out of the goodness of his heart, and then never ask for repayment. The version is far more probable that 1st appellant was not only the master-mind behind this scheme, but ensured that it was implemented and carried out – he was perfectly positioned to ensure this. The evidence was that it was he who suggested that the others apply for R6 million grant instead of the envisaged R500 000, he who pressured Mosoma into making the unauthorised payment, he was on the NAP that authorised (albeit ex post facto) the project and the payment and he ensured that the cover-up took place despite the incomplete paper trail.
- 54] Whilst 1st appellant denies knowing anything about the project, denies knowing anything about Dingwako and denies creating the paper trail, he admitted attending the 2 NAP meetings and the exhibits clearly reflect his involvement, as does the evidence of Mosoma.

²⁶Made up of a cash component paid to 1st appellant and the rest to Mr Mokase

- 55] I cannot fault the court a quo's reasoning in finding that Mosoma was a credible and reliable witness and in rejecting the 1st appellant's version. On these there is no misdirection.

The 2nd appellant

- 56] The 2nd appellant admitted that the AgriBEE Fund was established by the Department into which monies were paid allocated by the Parliament. The arrangement was that the Fund would be administered (by arrangement between the Department and the Land Bank) by the Land Bank and the purpose of the money was to benefit previously disadvantaged farmers.
- 57] According to Mr Mosoma, the 2nd appellant was the Acting CEO in 2007 – in his evidence, the 2nd appellant suddenly denied this for the first time and he also, for the first time, denied that Mosoma reported to him – the paperwork²⁷ however demonstrates clearly that this is not the truth.
- 58] He admitted that the Manual was drawn to provide for the rules and guidelines regarding the management of the AgriBEE Fund and is dated 18 July 2006. He admitted that the Manual provided for certain committees to be put in place, which was not done, save for the NAP committee which ultimately decided on any application for funding/grants.

²⁷ A Memorandum of Understanding between the Land Bank and the Department dated 22 October 2007 clearly states that the Land Bank is represented by 2nd appellant *"in his capacity as the acting chief executive officer..."*. The MoU is an agreement between the Department and the Land Bank dealing with how the money will be managed by the Land Bank

59] Importantly, the 2nd appellant admitted that monies were paid to him from the Landbank grant. On his version, these payments were “loans”, some of which were repaid and some not and according to him, the loans were not repaid in full as

“Probably two reasons. The first is I was getting concerned that Mr Chia was beginning to be not responsible in terms of the project. Because as I said he was going to be the main person that drives the business plan in terms of implementation, given his location in Polokwane. So that was the discomfort.

The second would have been that over time my cash flow was different. So I could not be able to payback.”

60] In my view, that is the end of 2nd appellant’s defence. What appears very clearly from the exhibits is that:

(a) 2nd appellant created the Ditshela Family Trust as the vehicle through which funds allocated by the Land Bank for the project would be received and/or disbursed;

(b) on 13 March 2008, R866 150 was paid by the 3rd appellant from the Land Bank funds with which the 2nd appellant then purchased 2 luxury BMW motor vehicles. Even after 2nd appellant sold one of these vehicles, he did not repay a portion of the “loan” – he used it to benefit his stationary business²⁸ called Tshela Stationers and Office Supplies, in Polokwane and which was also purchased with monies from the Land Bank;

(c) It appears that R2,8 million was paid from the Land Bank funds into the Ditshela Family Trust between 10 and 12 April 2008;

²⁸

Which still operated at the time of the trial

(d) when the Land Bank began its audit, the 2nd appellant then, via the Ditshela Family Trust, paid an amount of R2 290 000 into the account of the 4th appellant which was used to purchase the farm;

(e) the balance of the funds remains unpaid and unaccounted for.

61] 2nd appellant confirmed that:

(a) he transferred money to Mr Mokase for the benefit of the 1st appellant. He testified that Mr Mokase called him and informed him that the 1st appellant was his client and the latter *"has instructed him to call me regarding his debit owing on his legal fees."* His evidence was that the money that his Trust paid to Mokase was part of the Land Bank funds and was never repaid;

(b) 3rd appellant rendered no invoices, nor was a fee structure agreed to or discussed. The 3rd appellant simply debited his fees from the Land Bank money.

62] I can find no fault in the court's rejection of 2nd applicant's version that his hand in the scheme was innocent.

The 3rd appellant

63] The 3rd appellant was admitted as an attorney in 2002 and a sole practitioner of the 4th respondent. He has had his own law firm in Polokwane and a property investment company for 14 years. According to him, he never met the 1st appellant prior to the court case, he has never been his client nor did he have any meetings or consultations with him.

- 64] He knows the 2nd appellant through the days that they were members of the Communist Party and the ANC Youth League and also through their mutual association with Mr Tjia when Tjia and the 2nd appellant became his clients in approximately 2007/2008. He assisted them with the creation of two legal entities the first being Rugo Logistics and Business Solutions CC and the second being Dingwako Farming Projects (Pty) Ltd. The latter was set up after Tjia approached him to “*set up something*” and had him set up a meeting with Mr de Klerk (a lawyer in Polokwane) to discuss the purchase of a farm in Bogom. He also registered the Tjia Family Trust on instructions of Mr Tjia. The purpose of this Trust was estate planning and he wanted “his” shares in Dingwako to be held by the Trust.
- 65] Dingwako was set up as follows: 3rd appellant owns several registered shelf companies. He used one of these, converted the shareholding and directorships to the name of Tjia and the 2nd appellant. He advised the appellants on the company and his office was responsible for renewing the company's registration by filing annual returns. At a stage land was purchased and was transferred into the name of Dingwako and he continued to give advice to Tjia and the other appellants after this.
- 66] He was adamant that his “*interaction with the company and accused 2 and Mr Chia has always been on a professional basis.*” His evidence was that he was “*eventually*” paid for his professional advice and that

"I had an agreement with Mr Chia and accused 2, at the time that they raised money that I was going to be paid. So I was going to deduct my fees the(n) the resources that I had and that is what I did."

This, however, was not corroborated either in any other evidence or via any documentation.

- 67] According to 3rd appellant, the Ditshela Family Trust was also registered by him on the instructions of the 2nd appellant in 2007 for the same reasons that he registered Mr Tjia's Trust.
- 68] He admitted receiving the R6 million in his firm's bank account²⁹ in early 2008 – he was expecting the money as, according to him, the 2nd appellant and Tjia had told him they were *"trying to get into agriculture"* and were applying for funding for their project. He also testified that he understood (from his meetings with Tjia and the 2nd appellant) that the money was for *"the project"* ie it was to purchase a farm for the *"agricultural project that was going to include youth and other community structures"*.
- 69] From his evidence it appears that monies were paid out from his trust account for one of two reasons: either on the instructions of Mr Tjia or the 2nd appellant, or to debit fees he felt were owing to him for alleged work he did. In the event of the former, the money was paid out either to a beneficiary designated by Tjia or the 2nd appellant, or to their respective Trusts or to *"service providers"*³⁰

²⁹ In the Masepula Dinga Attorneys trust account

³⁰ For example the person sourced by him *"on instructions"* to compile the belated business plan and do

70] The payments disbursed are, inter alia, the following:

- (a) on 1 February 2008 R6 million was deposited into the 4th appellant's trust account by the Land Bank with the reference "*Cams Pay Fnb Cams Pay 00191 Land Bank*" – the balance of the 4th respondent's trust account prior to this payment was R500;
- (b) on 4 February 2008 R80 000 was transferred to the ABSA Bank account of the 2nd appellant;
- (c) on 4 February 2008 R40 000 was transferred to the ABSA Bank account of Mr Tjia;
- (d) on 13 March 2008 R866 150 was transferred to Leo Haese, Pretoria for the purchase of a BMW 118i 5 door³¹ and a BMW X5 3.0d SAV³²;
- (e) on 10 April 2008 R800 000 was transferred to the 2nd appellant's Ditshela Family Trust and another R1 million on 11 April 2008;
- (f) on 12 April 2008 another R1 million was transferred to the Ditshela Family Trust;
- (g) on 19 April 2008 R1 million was transferred to the 4th appellant's FNB call account;
- (h) on 21 April 2008 R1 million was transferred to the 4th appellant's FNB call account;

market research (a Mr Jooned). This business plan is dated 9 October 2008 ie well after the money was paid. It was paid to purchase paintings, BMW motor vehicles, pay Mr Mokase, and other service providers

³¹ The OTP was signed on 15 February 2008

³² The OTP was signed on 25 February 2008

(i) during 1 February 2008 until 29 April 2008 an amount of R76 469 was transferred, in 9 separate transactions, from the Trust account into a FNB call account with the name of "Masepula Dinga Attorneys" ie the 2nd call account.

71] Between 7 August 2008 and 13 October 2008 the 2nd appellant payed a total amount of R 2 290 000 from the Ditshele Family Trust into the account of the 4th appellant. This coincides with the payment of R2 290 000 paid from that trust account in the same period to Henstock Van den Heever Attorneys for the purchase of the farm Skuinshoek and its transfer into the name of Dingwako Farming Projects – this is the only amount that was spent on the project. But the land ended up being rented out to Mr Chaba for grazing.

72] According to the 3rd appellant there was nothing illegal about the transaction
"There was an intention to purchase the farm. There was an intention to farm. But also that I mean there was work done to reach that point...For example the business Plan. I saw service providers. I saw partners for the project That everybody was on the same mind. Everybody understood it to be a legitimate farming project. That is why I am sending them the business plans..."

And the reason he was instructed to find someone to occupy the farm temporarily was because *"there was a delay in the operationalisation of the project."* He rented the farm to Mr Chaba for approximately 3 years until the farm was seized. The rental money was paid to his firm.

- 73] It is nowhere denied by the 3rd appellant that a total amount of R2 million was transferred by him to his FNB call account. Interestingly enough he could produce no instructions authorising him to do so, nor could he produce any invoices supporting his version that debits made in his favour were for work done. In fact, the following exchange demonstrates his stance:

“MR KWASU: *Each document that I drafted, I should have issued an invoice, I did not personally issue the invoices.*

PROSECUTOR: *Mr Chia said he never received any invoice and fees were never negotiated.*

Mr KWASU: *Mr Chia is a liar.*

PROSECUTOR: *But show us your invoices?*

MR KWASU: *Excuse me?*

PROSECUTOR: *Show us your invoices for this matter.*

MR KWASU: *If you wanted the invoices, you should have subpoenaed them. Then I would have brought them.”*

- 74] And when he is pushed further, his excuse is that he gave invoices to his clients; that the invoices are in the files but he does not know where the files are as he has moved offices several times and some were destroyed “*because we are supposed to destroy these things. They take up all the space in the office.*”

- 75] The excuse is simply so weak and so transparently made in an attempt to evade the difficult position he has put himself in, that his version cannot be accepted and was rightly rejected by the court a quo. The same must hold true for the transfer of the R2 million into his FNB call account: there his evidence is that

he “assumes” it was for his fees, and that the R2 million “*was...waiting for the investment in the Section 72A, so there is nothing criminal about that.*” But there were never any instructions to do so and the Section 72A account was never opened. Also, none of the other appellants or witnesses ever testified to the Section 72A account. Tellingly he stated that the fact that R2 million was transferred into the FNB call account awaiting the S72A instructions “*does not mean it was off limits.*”

- 76] Insofar as certain of the payments is concerned, such as the BMW's, his evidence was that it “*has got nothing to do with me*”.
- 77] In any event, Exhibit RRR shows that monies from the call account went to the 3rd appellant's personal accounts: for example, an amount of R367 050 was transferred between 21 April 2008 and 23 February 2009; an amount of R15 500 was transferred into the Jackson Dinga Property Investments account between 2 September 2008 and 10 February 2009 and R58 000 was transferred into the 3rd appellant's home loan.

THE COURT A QUO

- 78] The court a quo correctly approached the evidence of the two s204 witnesses, Mr Mosoma and Mr Tjia, with caution as s204 witnesses. He found that both Mosoma and Tjia gave their evidence in a clear and direct manner but that despite a lengthy cross-examination, their evidence remained intact. He found that their demeanour and credibility “*could not be faulted or doubted*” and that they had made a favourable impression on the court.

- 79] Unfortunately, even though it is clear that the court made these findings, it did not make an order regarding their immunity and the State asks that this court does so now.

Mr Tjia

- 80] Mr Tjia was originally charged as accused no 4 in the court a quo but, with the assistance of an attorney, negotiated his agreement with the State some 6 years after being arrested. Whilst his evidence is certainly not perfect in every minute aspect, and there are very few if any witnesses whose evidence is, it certainly finds support in the evidence of Mr Mosoma, the other State witnesses and the documentary evidence presented. Importantly, Mr Tjia conceded that the funds were not used for their intended purpose.
- 81] The appellants argue that Tjia's inability to answer direct questions, his inability to provide proper explanations especially on the factual issues, demonstrate he is an unreliable witness – for example:
- (a) that 3rd appellant was present to provide legal advice and paid out monies on instructions of the other appellants;
 - (b) that funds paid to him were in respect of a loan and this was not untoward;
 - (c) that there was nothing untoward in the payment of the R6 million from the Land Bank;
 - (d) that the money was used to purchase a property – although not the original one envisaged.

- 82] But these arguments lose sight of the fact that Mr Tjia is a layperson and not equipped to draw legal conclusions on the issues set out in pars (b) and (c) in particular - the court must determine whether there was wrongdoing and by whom; his evidence was to the effect that even if the appellants may have had noble ideas when the initial grant of R500 000 was discussed, by the time they actually applied for the funds that had changed and by the time they actually received the R6 million, all nobility of purpose was eschewed.
- 83] I agree with the court a quo that his evidence was satisfactory.
- 84] I also agree that Mr Mosoma's evidence was satisfactory – he never received any benefit from the R6 million and there was no reason not to accept his evidence.
- 85] In **S v Mnyamana and Another**³³ the court stated that a discharge may be granted if the court is of the opinion that the witness has answered frankly and honestly all questions that have been put to him. This involves an assessment of the witness's evidence and a decision by the court that he/she has been frank and honest. A witness may, of course, be honest but mistaken. The finding is made at the end of the case after all the evidence has been presented.

33

1990 (1) SACR 137 (A)

86] In **S v Kuyler**³⁴ Opperman AJ set out the guidelines by which a court assesses whether the witness answered all the questions frankly and honestly as

- “(a) *The enquiry is sui generis and to be regarded as separate from the main trial on the merits of the charges.*
- (b) *The enquiry is to be held after the main trial, that is, at the earliest after judgment on the merits of the criminal charges, to comply with the fair-trial principle in both the main trial and 204-enquiry.*
- (c) *The court must establish on a balance of probabilities whether the witness has complied with the requirements to answer frankly and honestly all questions.*
- (d) *The test is subjective: did the witness testify to the best of his ability in the prevailing circumstances, to comply with the aforementioned requirement to answer frankly and honestly all questions?*
- (e) *The witness must be allowed to advance reasons and/or present evidence to justify his discharge from prosecution.*
- (f) *The court shall apply its mind to the evidence and give judgment.*
- (g) *The ‘opinion’ or judicial decision will direct the outcome: if the court finds that the witness did not testify frankly and honestly, it records that discharge from prosecution on the specified charges, as well as competent verdicts thereto, is refused. If the court finds that the witness did answer all the questions frankly and honestly, it must (shall) grant the discharge on the specified charges and the competent verdicts thereto; and must (shall) record the complete order on the record of proceedings in question.”*

³⁴

2016 (2) SACR 563 (FB) at par 53

87] In my view, the court correctly assessed Tija and Mosoma's evidence and correctly accepted that they had frankly and honestly answered the questions put to them.

88] In **S v Brown**³⁵ it came to the notice of the SCA that the trial court had overlooked the fact that it had been requested to consider the indemnity or otherwise of the s204 witness. The solution of Navsa ADP was to leave the matter to the prosecution and witness concerned "*to take such further steps as they might be advised thereto*". I agree with this approach and thus nothing more need be said on this issue.

89] I can also not fault the court a quo's impressions of the appellants and his rejection of their version:

1st appellant

(a) It stands uncontested that the 1st appellant could not participate in the project because of his position. It is clear that he knew this, but the evidence clearly shows that he used his position and influence to come up with the scheme (it was his idea to apply for R6 million instead of the original R500 000) and then directly benefitted from the two payments made via the 2nd appellant to pay him and his legal fees – these monies were never repaid;

³⁵ 2015 (1) SACR 211 (SCA) at par 146

- (b) his protestations that these were “loans” and he did not know where the funds came from are no more than prevarication and obduration. His version was correctly rejected by the court a quo.

2nd appellant

- (c) The paper trail clearly shows that the 2nd appellant’s involvement in this scheme. He knew exactly why the Land Bank paid over the R6 million and he benefitted directly from this money. The fact that R2 290 000 was repatriated from his Trust does not avail him as the payment was made in a clear attempt to cover up the initial intent and legitimize the purpose of the R6 million application and extricate himself (and the others) from the net that was busy closing around them.

3rd and 4th appellants

- (d) Similarly the 3rd appellant’s version and protestations of innocence and ignorance were rejected. The fact is that the 3rd appellant was at the meetings when the intention behind the R6 million was discussed – the fact that his version is that he did not more than provide legal advice stands to be rejected. Firstly, the court a quo correctly summarized his demeanour as “argumentative” and stated that he was not a credible witness. A simple reading of the exchanges set out in paragraphs 72-74 supra demonstrate the unreliability of his evidence. A further conundrum he has is that R2 million was transferred into his FNB call account but there is no supporting documentation to demonstrate the purpose of this or that it was on instructions of either Tjia or the other appellants, or that its intended destination was a s72A investment account. It is noteworthy that the amount

of R2 million coincides with Tjia's version that 3rd appellant would be a one third partner in the scheme.

(e) A last issue is that the R1 000 per month paid by Mr Chaba was received by 3rd appellant and remains unaccounted for.

90] I therefore cannot find that the court a quo misdirected itself with any of its findings.

THE CONVICTION

91] The court found:

On count 1 – all the appellants “*guilty as charged*”; and

On count 2 – 2nd and 3rd appellant “*guilty as charged*”

It is the words “*guilty as charged*” that cause some consternation.

92] As a general proposition there is nothing inherently wrong with convicting an accused “as charged” – however, practically speaking, that is based on the assumption that the charge is singular in its import. Here the charges are framed in the alternative and therefor a conviction “as charged” creates uncertainty. It is however very clear from the judgment that the court intended to convict the appellants on the main charges and not the alternatives. This finds support not just in the wording used by the court a quo, but also in the fact that the minimum sentences are applicable to the main charge, and were also enforced. To avoid any doubt, however, this will be rectified in the order that will follow.

- 93] In my view the question then is whether the State proved common purposes for Count 1. In my view, all the appellants were present at the meetings where the project was discussed. They all knew that the 2nd appellant could not make the application as he was a MEC and they all commandeered Mr Tjia to make the application. The 1st appellant could also not apply because of his position in the Land Bank and Department of Agriculture - thus the application was not bona fide from inception as they all knew the rules and requirements of the AgriBEE Fund, and they deliberately used Tjia to circumvent those rules. They had agreed to participate and share in the proceeds of the application; the 1st appellant dictated the content of the application to Tjia in the presence of the other appellants, misrepresented the nature of the application to Mr Mosoma and instructed him to pay the R6 million and then influenced the NEC to rubber stamp the project and payment ex post facto. The 2nd appellant was a willing participant in all of this. The 3rd appellant was also not a mere spectator – he was a willing and active participant at all times. There is no evidence that he attempted to intervene in this scheme at any stage or protest that the money was not being used for the purpose for which it was intended by the Land Bank – if fact, if anything, the contrary is true and once the money was paid, the 3rd appellant became an “equal partner”. Lastly, all the appellants assisted Mosoma’s attempts to create a paper trail when the audit was being conducted. Thus, common purpose was clearly established.
- 94] On count 2, the question is whether the State proved that the appellants committed acts in order to

- (a) conceal or disguise the nature, source, disposition or movement of the money or the ownership thereof or any interest which anyone may have in respect, and/or
- (b) enable or assist one or some or all of the other accused who had committed or were committing the offence of fraud to
 - (aa) avoid prosecution and/or
 - (bb) remove or diminish the property acquired directly, or of the said offence.

95] Whilst I agree with the appellants that there was very little attempt made to conceal either the source of the funds or the movement of funds into their respective accounts or payments made, I cannot agree that this is true in respect of all payments made, or demonstrative of their alleged noble intentions. All that this demonstrates is that their view was (as several of them testified) that the money was theirs to do with as they pleased:

- (a) I agree with the State that the payment made into the 3rd appellant's Trust account gave it an air of legitimacy and provided the 3rd appellant with the thinly veiled guise of being able to say that he acted "on instructions" when he paid money out to the appellants or their beneficiaries;
- (b) the payment to BMW for the two vehicles disguises the fact that the payment ultimately benefitted the 2nd appellant;
- (c) the Ditshela Family Trust was created, and its bank account opened, at almost the same time as the offences were committed and as the vehicle with which the 2nd appellant would directly benefit from the scheme –

there was no evidence at all that it held any other assets or funds at any stage other than that received from the Land Bank money; - this was clearly an attempt to create the guise of an “at arm’s length” transaction and disguise that the true recipient of the money was 2nd appellant;

- (d) the movement of the R2 million into 3rd appellant’s FNB call account must suffer the same fate – there was no reason for this extraordinary amount of money to be transferred and none was provided that had any ring of truth to it or was supported by documentary evidence.

- 96] Thus the convictions must stand. Where the court a quo misdirected itself was in the failure to specify of the specific charge on which the conviction was made. This court is at liberty to interfere with this in order to provide proper clarity.

SENTENCE

- 97] The conviction on Counts 1 and 2 carry with them a prescribed minimum sentence of 15 years each. In assessing whether or not to impose this sentence, the court considered that the objectives of punishment are to deter, to prevent, to reform and retribution.
- 98] As to the imposition of the minimum sentence, it was stated in **S v Radebe and Another**³⁶ that *“particular factors, whether aggravating or mitigation, should not be taken individually and in isolation as substantial or compelling circumstances.”* And in **S v Vilakazi**³⁷ the court stated:

³⁶ 2013 (2) SACR 165 (SCA) at par 15

³⁷ 2012 (6) SA 353 (SCA) at para 15

“...it is clear from the terms in which the test was framed in Malgas and endorsed in Dodo that it is incumbent upon a court in every case, before it imposes a prescribed sentence, to assess, upon a consideration of all the circumstances of the particular case, whether the prescribed sentence is indeed proportionate to that particular offence.”

- 99] Here the pre-sentencing reports of all the appellants, as well as their personal circumstances were taken into account, as was the gravity of the crime³⁸ and the fact that this was a white collar crime³⁹.

1st appellant

- 100] The court took into account that he was “the king maker” – his role was essential in the process. He initiated this process, he was able to exert his influence and ignore proper procedures and without this, 2nd and 3rd appellants would not have been able to benefit.
- 101] However, the fact that he was 62 years old, had no prior convictions, has three children and contributes to their maintenance and is on medication for diabetes, hypertension and tuberculosis was a mitigating factor. As a result, the court imposed a sentence of 13 year’s imprisonment on him.

2nd appellant

³⁸ S v Haasbroek 1969 (1) SA 356 (A)

³⁹ S v Settler 2000 (1) SACR 331 (SCA) at par 11

102] He is a highly educated man with a Master's Degree from the University of London. Over and above several other positions he held in the Limpopo Provincial Government, he served as Chairperson of the Portfolio Committee for Agriculture and Land Affairs. He has 5 children of which 3 are still minors. He has no previous convictions. He squandered a grant meant to uplift his community on BMW's and other self-benefitting assets without a second thought.

103] In imposing the minimum sentence, the court a quo took into account all these factors.

3rd appellant

104] 3rd appellant showed no remorse for his actions at all – he is an attorney and as such in a position of trust. He disbursed money from his trust account, well knowing its original intended use, without thought or question. He was 40 years old, no previous convictions with 3 children and is sole breadwinner and looks after his extended family as well – he is also involved in community projects.

105] Whilst the latter is certainly a mitigating factor, the fact that he is an attorney and therefore holds a particular position of trust, is not. His combative demeanour and abdication of responsibility of his hand in the theft of the money cannot find favour with a court.

CONCLUSION RE SENTENCE

106] The point here is that all three appellants abused their respective positions and abused the system. Monies that were earmarked specifically for the upliftment of their communities and provide employment were instead spent liberally on their own gratification and the purchase of (for the most part) frivolities with the sole aim of their enjoyment and their lifestyles. Such conduct cannot be countenanced. There is no redeeming quality to be found in their actions or conduct. The fact that a farm was eventually purchased with part of the Land Bank funds also does not assist them – it was done as a “last gasp” to divert attention from their conduct and the land was never really intended to benefit the community.

107] In my view, the sentences imposed must stand – they are neither harsh nor startlingly inappropriate given the particular facts of this case.

ORDER

108] The order that is made is the following:

1. The orders of conviction are set aside and replaced with the following:
 - a. The 1st appellant is found guilty on Count 1 of fraud read with the provisions of s103 of the Criminal Procedure Act no 51 of 1977, read with s51(2) of the Criminal Law Amendment Act no 105 of 1977.
 - b. The 2nd appellant
 - (i) on Count 1 is found guilty of fraud read with the provisions of s103 of the Criminal Procedure Act no 51 of 1977, read with s51(2) of the Criminal Law Amendment Act no 105 of 1977;

- (ii) on Count 2 is found guilty of the contravention of s4(a) and 4(b), read with s4(i), s4(ii) and s8 of the Prevention of Organised Crime Act 21 of 1998.

c. The 3rd appellant:

- (i) on Count 1 is found guilty of fraud read with the provisions of s103 of the Criminal Procedure Act no 51 of 1977, read with s51(2) of the Criminal Law Amendment Act no 105 of 1977;
- (ii) on Count 2 is found guilty of the contravention of s4(a) and 4(b), read with s4(i), s4(ii) and s8 of the Prevention of Organised Crime Act 21 of 1998.

- d. The 4th appellant is found guilty on Count 1 of fraud read with the provisions of s103 of the Criminal Procedure Act no 51 of 1977, read with s51(2) of the Criminal Law Amendment Act no 105 of 1977.

2. The appeal against sentence is dismissed.



B NEUKIRCHER

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I agree



C SARDIWALLA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines.

The date for hand-down is deemed to be 23 January 2023

Appearances:

For the 1 st Appellant	: Mr Steenkamp
Instructed by	: Andre Steenkamp Attorney
For the 2 nd Appellant	: Adv N Makhubela
Instructed by	: BDK Attorneys
For the 3 rd and 4 th Appellants	: Adv E Sithole
Instructed by	: Dingwa Rammy Nkhwashu
For Respondent	: Adv AG Janse van Rensburg
Instructed by	: NDPP
Date of hearing	: 16 September 2022