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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

CASE NO: 80/2017

In the matter of:

THE STATE

v

NORMAN FREDERICK DELPORT	**ACCUSED 1**
JOHANNA CATHERINA DELPORT	**ACCUSED 2**
MARIUS DELPORT	**ACCUSED 3**
TWO SHIPS TRADING 373 (PTY) LTD	**ACCUSED 4**
MN CHEMICALS DISTRIBUTORS CLOSE CORPORATION	**ACCUSED 5**

HEARD ON: **3, 4, 12, 21 JUNE 2019, 2, 15, 24 JULY 2019**

7, 8 OCTOBER 2019, 2, 3, 9 DECEMBER 2019.

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CORAM: **MURRAY AJ**

SENTENCE ON: **10 December 2019**

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[1] Mr Norman Frederick Delport (Accused 1) a 68-year old male, formerly of […] Street, Woodland Hills, Bloemfontein, and Mr Marius Delport (Accused 3) a 39 year old male, formerly of […] Street, Woodland Hills, Bloemfontein, were charged with 136 counts of FRAUD, of which charges 33 – 136 are to be read with Section 51(2)(a) and Part II of Schedule 2 of Act 105 of 1997. They were charged in the alternative with 74 counts of contravention of the provisions of Section 59(1)(d) of the Value Added Tax Act 89 of 1991 and 62 counts of Contravention of the provisions of Section 235(1)(e) of the Tax Administration Act 28 of 2011.

[2] Both men were also charged with 125 counts of Money Laundering by contravening the provisions the provisions of Section 4(b)(i), read with the provisions of Sections 1 and 8 of the Prevention of Organised Crime Act 121 of 1998 ("POCA").

[3] They both submitted written s 112(2) statements, which the State accepted. All money laundering charges against both of them were withdrawn when Mr Marius Delport in his s 112(2) statement pleaded guilty on the 136 Fraud charges and his father, Mr Norman Delport in his s 112(2) pleaded guilty on the 136 Alternative charges of contravening the VAT Act and the Administration Act.

[4] On 3 June 2019 they were convicted in accordance with their section 112(2) statements. Mr Norman Delport was therefore convicted of 136 charges of the contravention of section 59(1)(d) of the VAT Act 89 of 1991 and section 235(1)(e) of the Administration Act 28 of 2011, and Mr Marius Delport of 136 counts of Fraud of which 104 fall under section 52(2) of the Criminal Law Amendment Act 105 of 1997.

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[5] No previous convictions were proved against Mr Norman Delport and one conviction of a traffic speeding offence was proved against Mr Marius Delport.

[6] The State asked Mr J Higgs, the SARS officer who coordinated the investigation into the Delport Family Trust, the Eden Rock Trust, Two Ships Trading Pty Ltd and W N Chemicals Production CC, to testify in aggravation of the sentences being contemplated for the Delports. The purpose of his evidence was "not to ascertain the mathematically precise quantum of the actual loss or potential losses suffered by SARS, but primarily to assist the trial Court to have a proper perspective of the magnitude of the moral blameworthiness of the deceptive criminal enterprise" in which the Delports were embroiled. He aimed to demonstrate the *modus operandi* with which SARS had been defrauded of an amount of R60 389 151.95.

[5] He explained that the fraud was committed from 2009 until 2015. It went on over a period of 6½ years, with the first of the fraudulent claims submitted in 2009 and the last in 2015 when SARS auditors in Kroonstad requested an audit of all the entities and in 2016 referred the matter to the SARS Criminal Investigating Unit.

[6] Since both Delports pleaded guilty, Mr Higgs confined his evidence to a bundle of documents specially compiled to demonstrate the *modus operandi* and to show how the money was fraudulently claimed as VAT refunds and moved through the accounts of the various entities under false/fictitious inscriptions to hide the origin or end-destination thereof.

[7] He explained that **Two Ships Trading Pty Ltd,** the **Delport Familie** Trust and the **Eden Rock Trust** were registered for VAT. Their VAT returns were then submitted to SARS. VAT 201 forms were then used to misrepresent the Input and Output tax of the various entities. During the SARS investigation the bank statements of those 3 entities as well as that of **MN Chemicals** were investigated/examined.

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[8] He used the **Delport Family Trust** which submitted tax returns on a monthly basis to illustrate an actual transaction for the November 2013 period. The relevant return was submitted on 1 December 2013, alleging paid Output tax of R69 890.21 and claiming Input tax of R628 994.89. SARS then refunded the **Delport Family Trust** with an amount of R559 104.68 for that month alone. Between May 2011 and September 2014 a total Output Tax of R601 835.20 was declared for the said Family Trust, while a total Input Tax of R 15 631 964.62 was claimed and **R15 030 129.38** was refunded to the Family Trust.

[9] He demonstrated that between March 2011 and September 2015 SARS paid a total refund amount of **R21 767 840.51** to the **Eden Rock Trust.** Between August 2008 and January 2012 it refunded **Two Ships Trading (Pty) Ltd** with a total of **R23 591 182.06.** The total refunds paid to all three the entities are **R60 389.95.** All of these refunded totals regarding these three entities were admitted in the two section 112(2) statements.

[10] For each entity Mr Higgs supplied a list of Incorrect/fictitious descriptions. Fictitious debit entries of **R4 174 182** were reflected in Delport Trust Standard Bank Account from which the money was then transferred to MN Chemical, yet was indicated on the Trust's bank statement as, for instance, a transfer to *Karan Beef*. On MN Chemical's bank statement the transfer would be in turn be indicated as one from *Karan Beef*. Mr Higgs then demonstrated how on 4 April 2013 the *R439 187.62* transferred from the Delport Family Trust purportedly *"to Karan Beef March"* was instead received in MN Chemical's Standard Bank account on the same day, described as a *"transfer from Karan Beef March"*

[10] Mr Higg showed how, in the same way incorrect **Credit entries** to a total of **R5 013 522.41** appeared on the **Delport Family Trust Account** while the money was actually received in **MN Chemical's** account. He used, as an example an entry on 25 September 2013 when an amount of R268 760.19 was purportedly 'received' in the Trust's account as an *"IB Payment from Beefmaster"* while on the same day the R268 760.19 was debited to the MN

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Chemicals bank account designated as an *"IB Payment to Delport Familie Trust"*.

[11] Mr Higgs demonstrated how, in similar fashion the **Eden Rock Trust** bank statements between 28 January 2013 and 16 November 2015 reflect, for instance, a payment of R519 812.60 to **MN Chemicals**, disguised as a "*money transfer to Karan Beef January 2013",* while **MN Chemicals**' account on the same date shows a *"transfer from Karan Beef Jan 2013"*" in the same amount. The Eden Rock Trust statements also reflect numerous IB Payments in a total amount of **R2 228 405.56** purportedly to the Delport Familie Trust, but regarding which the correct entity to which the payments were really made, is unknown,

[12] He showed how the **Eden Rock** Trust incorrectly reflects Credit payments in a total amount of **R2 310 857.79** which, while they were actually from MN Chemicals, were described in the statement as, for example, an *"IB payment from KZN Transport"* of R250 145.63 on the very same date that the **MN Chemicals** account shows an *"IB payment to Eden Rock Trust"* of R250 145.63.

[13] Incorrect credit descriptions on the account of **Two Ships Trading (Pty) Ltd** for money actually received from **MN Chemicals** total an amount of **R2 174 174.16**. One such payment of R152 937.87 on 18 December 2012, for instance, was described on the Two Ships Trading bank statement as *"IB Payment from Karan Beef Nov Inv"*, while on the same date appearing in the **MN Chemicals** account as an *"IB Payment to Two Ships Trading" of R152 937.87.*

[14] The **MN Chemicals** account was shown to have had incorrect credit descriptions to a total of **R33 224 897.81** for disguised payments which it had actually received from Two Ships Trading, the Eden Rock Trust and the Delport Family Trust between 20 June 2009 and 16 November 2015. The **MN Chemicals** account was shown to have received payments from the **Delport Family Trust** of **R14 342 043.82**, from the **Eden Rock Trust** **R14 668 936.67**

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and from the **Two Ships Trading Pty Ltd** **R22 625 890.51. In total the 3 entities were found to have paid R51 636 870.10 to MN Chemicals.**

[15] The total refund paid by the SAID to the 3 entities was therefore **R60 389 157.95.**

[16] The role of the Asset Forfeiture Unit is to reclaim what has been wrongfully gained by criminals. It claims the fruit of the crime on behalf of society and in so doing takes the profit out of crime. If there is a victim of the crime, the money goes to that victim. If there is no victim, the money goes into the Criminal Assets Recovery Account and the Cabinet decides what to do with it. In this case SARS should have been the recipient of whatever funds the Unit were able to recover.

[19] However, although the Asset Forfeiture Unit attached the properties belonging to the different entities and to the Accused, the entities had to be liquidated because they were mortgaged to different Banks which had preferential claims. The only proceeds available to SARS are the R 507 638.90 obtained from a sale of movables, and the balance of a property in Kriel with a value of R900 000.00 minus repayment of its mortgage bond of R133 910.21 to ABSA, therefore a mere total realisable amount of R 1 273 728.70.

[20] As Mr Higgs testified, stealing money from SARS is in effect stealing money from the community. He stated that with the R60 million that was stolen in this case, the Government could have paid the salaries of 340 primary school teachers or 440 police officers, or the social grants for 12 581 children or for 2 827 old age pensioners for an entire year.

[21] The extent and seriousness of the offence committed in the present case is clear from Mr Higgs' testimony. He described this particular case as the largest VAT fraud case which the Criminal Investigating Division of SARS has ever investigated and brought to court in the Free State and the Northern Cape. Inevitably, therefore, SARS is asking for sentences that wstould reflect the seriousness of the crime and serve as a deterrent to the community to

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commit similar crimes by showing that perpetrators of so-called ‘white-collar crimes’ will be punished and that no-one can commit fraud for 6 years and expect to simply walk away.

[23] Mr Higgs stated that what the SARS therefore wants for the two Accused, is long-term incarceration. He testified that Mr Marius Delport has since 2016 averred that he was going to repay the R60 million, but that, in such highly improbable event, the repayment should that should merely serve to shorten the duration of the sentence, not to prevent imprisonment altogether.

[24] Regarding Mr Norman Delport Mr Higgs stated that SARS realises that direct imprisonment may not be the most appropriate sentence for him. He pleaded guilty to transgression of the VAT Act and the Administration Act. The sanctions for that offence are the same in both Acts, namely a maximum of 5 years’ imprisonment on each count.

[25] From the evidence led by Mr Higgs, it is therefore clear, as Adv Sampisi later argued, that it was an offence that was carefully planned and executed over a period of at least 6½ years, with the first return submitted on 25 May 2009 and the last on 1 October 2015. That left the perpetrators sufficient time to reconsider and to stop their unlawful activities, but the submission of the fraudulent claims only stopped when SARS detected and acted upon the irregularities.

[26] In his s 112(2) statement, Mr Norman Delport admitted that the 136 Fraud and Alternative Charges against him stemmed from his directorship and membership of Two Ships Trading 373 (Pty) Ltd and MN Chemicals Distributors CC, respectively. He admitted that as Trustee of the Delport Familie Trust (Charges 1 – 16) and the Eden Rock Trust (Charges 17 – 32) and as the sole Director of Two Ships Trading 373 (Pty) Ltd (Charges 33 to 74) he unlawfully and intentionally allowed his son, Marius Delport, to claim on behalf of the entities VAT repayments of R60 389 151.95.

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[27] He admitted, furthermore, that as Trustee of the Trusts and Director of the Company, he should not have allowed the claims for repayment of the input-VAT, and that he acted recklessly by failing to exercise the necessary care that is expected from a company director and a Trustee.

[28] He admitted that he allowed his son to create passwords and secret codes on behalf of the entities which enabled him to submit claims to the South African Revenue Services and to claim repayments thereof. He also failed to ensure that the said claims were not false, which they indeed later proved to be. He averred that he was under the impression that each of the entities was doing well financially and admitted that he should have investigated the origin and/or destination of the funds but failed to do so.

[29] Mr Norman Delport admitted, furthermore, that he was a Trustee of the Delport Familie Trust and the Eden Rock Trust which were both registered for VAT, while his son, Marius, was the public representative of the two Trusts. He admitted, as well, that he was the sole Director of Two Ships Trading 373 (Pty) Ltd and the sole member of MN Chemicals Distributors CC. He admitted, also, that due to the false claims submitted by the Trusts and the Company, SARS suffered a real loss of R60 389 151.95.

[30] He averred that the Trusts, the Close Corporation and the Company no longer existed and have been placed under administration after court applications by the Asset Forfeiture Unit of the Director of Public Prosecutions and that he had no knowledge of the value of the proceeds from the sale of his fixed and movable property. He averred, furthermore, that he had been completely wiped out, financially, by the aforesaid liquidation steps. He has also lost all the benefits which he had unknowingly received from the false VAT claims. He stated that he no longer had any assets and he and his wife were dependent on contributions from relatives for their subsistence.

[31] In his s 112(2) statement, Mr Norman Delport then apologised to the Court and asked forgiveness for allowing his son to financially deal with the entities and for his own reckless handling of the trusts, the close corporation and the

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company. He admitted that he understood the high expectations demanded from persons in control of such entities, and that he failed to comply therewith.

[32] In his statement he also asked for the Court's mercy in sentencing because of his ill health and his having had to postpone a knee replacement and foot operation which causes him daily pain, and which he had to postpone because of the trial.

[33] By agreement between the Defence and the State a pre-sentence report by Mr Johannes A van der Merwe, a Correctional Officer in the service of the Department of Correctional Services was handed up regarding the possibility of considering correctional supervision as a sentence for Mr Norman Delport.

[34] The report indicated that the 68-year old Mr Norman Delport worked for the Railway Police which was later incorporated into the South African Police Services from 1970 to 1983. Thereafter he was employed at Orkney Electrical Construction for 3 years, then by Goldfields Security for 11 years and by Securicor for 2 years. After his retrenchment he was employed by his son Marius in MN Chemical Distributors CC, thereafter worked at his son's farm until his son's business was sequestrated.

[35] When his son started doing business through Trusts, he became a Trustee, and through a company, he became a Director. He moved into one of his son's three houses in Woodland Hills Wildlife Estate. He sold his own house, and took all his pension money to assist Marius to start a new business. As a result of this matter, he and his wife lost everything. They now stay in a 1-room flat in the backyard of his daughter's rental house. Their only income is the SASSA grants which they both receive. They do not have a medical aid and both his and his wife's health is very poor.

[36] Mr van der Merwe remarked that Mr Norman Delport pleaded guilty to having been reckless in the handling of and control over trusts, as a Trustee, as well as of a company, as a Director, and other businesses which enabled his son, Marius, to commit 136 Counts of Fraud to the total value of R 60 389 151, 95.

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The crimes were committed over a period of more than 6 years, from May 2009 until October 2015. His son defrauded SARS from the money through false VAT claims in the name of two Trusts, of which he was a Trustee, and of one Company, of which he was the director.

[37] Mr van der Merwe reported that according to Mr Norman Delport he had been unaware that his son was committing these crimes and that he was aiding him through his authorised signature. Also that he would never have approved of any criminal activity since that is absolutely contrary to his belief and to who he is. Although he admits that as a result of the false VAT claims SARS lost an amount of R60.3 million rand, he was never aware of the crimes. According to him some of the money was recovered through the Asset Forfeiture Unit who has sold everything he owned, leaving him without any assets. In that way every benefit that he might unknowingly have derived from the crime, has been lost.

[38] Regarding Mr Norman Delport's physical condition, Mr van der Merwe reported that he was in a lot of pain due to knee problems and ulcers. He also suffers from high blood pressure and struggles with lung problems.

[39] In considering a possibly suitable sentence, Mr van der Merwe took into account the nature and seriousness of the crime, the interests of the community and the personal circumstances of Mr Norman Delport. He correctly stated that the sentence must be in line with the seriousness of the crime, which in this particular case is very serious. It is a very large amount of money that is involved and the crime was well planned and well executed, perpetrated over a period of more than 6 years. Normally that would make a period of direct imprisonment appear to be the only suitable option, but, he stated, in this instance one has to take into account the specific role Mr Norman Delport played in the execution of the crime.

[40] In that regard Mr van der Merwe pointed out that Mr Norman Delport was unaware that he was involved in crime. However, through his reckless and negligent handling of his authority in the businesses and the trusts, he did

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unknowingly allow the crimes to be perpetrated. He trusted his son and signed documents without questioning his son's requests. His contribution to the crime was therefore serious since, through his reckless handling of these matters, he enabled his son to defraud SARS of more than R60 million. Regarding that, however, Mr van der Merwe stated that the court should take into account that Mr Delport never had the intention to commit crime, and that he is ashamed of and feels incredibly sorry for what he has done, that he shows remorse for not acting more responsibly and that he admitted his guilt regarding the very serious crimes that have been committed.

[41] Mr van der Merwe described Mr Norman Delport is an aged man who shows no tendency to commit crime and who does not appear to pose any risk to the community. His crime was one of negligence rather than intent. He has lost everything he has worked for all his life and everything he might unknowingly have received as a benefit from the crime and is not a criminal in the true sense of the word.

[42] At 68 he is a first offender who had no intention to commit a crime, and who is struggling with his own health problems whilst assisting his wife, to whom he has been married for 42 years, and who is in very poor health. He is now just a poor, elderly man with no assets, who is, in a sense, a victim in his own case.

[43] Mr van der Merwe stated that he could not think of any reason why Mr Norman Delport should be removed from society. It would not be in anyone's best interest to send him to prison. He does not appear to pose any risk of committing any further crime and has already suffered a lot as a result of this case.

[44] Mr van der Merwe considered two options regarding sentence: a) a community based one based on a sentence such as correctional supervision, regarding which the community service part of the sentence will have to be revisited due to his old age and health condition, or b) a wholly suspended sentence of direct imprisonment. He concluded that, while it is possible to

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administer as sentence of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act, 51 of 1977, Mr Norman Delport's health would affect the possibility of serving community service. In his opinion, therefore, a sentence of direct imprisonment in terms of section 276(1)(b) of the CPA, suspended in full, would be more appropriate in the light of the circumstances of this case.

[45] On 2 December 2019 Mr Norman Delport took the stand to testify in mitigation of his sentence. He was very emotional, to such an extent that he had difficulty speaking. His remorse was obviously sincere. He confirmed that he had pleaded guilty to the alternative charges as set out in his section 112(2) statement and stated that he had been ignorant and reckless and that it is only now that he comprehends the huge losses suffered by SARS, the Banks and his family. He stated that he never realised what his negligence would cause. He never realised, either, what the purpose of his presence on the farm was or what the consequences of his signature on the documents would be.

[46] He stated that he had trusted his son. He believed that his son knew what he was doing and was neither aware of, nor believed that there would be any irregularities. He then apologised to the Court and to everyone who had suffered through his actions and stated that he wished he had an opportunity to make amends. He stated that he had never before been involved in any unlawful actions and gave the assurance that he will never be involved in any again.

[47] Mr Reyneke, in mitigation on behalf of Mr Norman Delport, submitted that his involvement was of a lesser degree than that of his son and that his conduct was reckless and constituted *dolus eventualis* rather than *dolus directus.* He had indicated right from the outset that he wanted to plead guilty, as is evident from the reply to the section 212B notice and his section 112(2) statement. He admitted that he had enabled his son to commit fraud to the extent of R60 million. And despite all the postponements to allow his son to repay the said R60 million, it appeared that that was not going to happen.

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[48] He submitted, furthermore, that Mr Norman Delport lost his entire material existence. He is aware of the damage caused and takes responsibility therefore, which is an indication that he can be rehabilitated. He submitted that Mr Norman Delport was good human material who apologised to SARS and even to his own family. His involvement enabled his son to commit the fraud. His remorse is real – it complied with Ponnan JA's description in **S v Matyityi**[1] of remorse as "a gnawing pain of an offender's conscience for the plight of another."

[49] Mr Reyneke argued that it is evident from Mr van der Merwe's pre-sentence report how Mr Norman Delport got involved in the matter and how, due to his generosity, he put all his funds into his son's business, only to lose everything. He also consented to the confiscation of his only remaining asset, which is a sign of his generosity and his remorse. He and his wife worked for their money long before these fraudulent events commenced.

[50] Mr Reyneke pointed out, furthermore, that the health of both Mr Norman Delport and his wife is very poor. According to him, they will serve 'sentences' for the rest of their lives: if their daughter does not provide accommodation for them, they will be out on the street. Much worse than the sentence itself, is the fact that they now have to live on charity and depend on the generosity of others.

[51] He pointed out that although Mr Norman Delport had pleaded intent, it is clear that he had been caught up in the scheme and swept along while he was under the impression that everything was in order and the businesses were doing well. He emphasised that Mr van der Merwe stated that Mr Norman Delport had learnt his lesson and was unlikely to commit another crime. Also that, although he said that correctional supervision could be considered, the circumstances of the case militated against that and concluded that fully suspended imprisonment would be more appropriate. He pointed out that Mr

[1] 2011(1) SACR 40 (SCA) at par [13]

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Higgs of SARS also stated that unsuspended direct imprisonment would not be suitable for Mr Delport Snr.

[52] Adv Sampisi argued in aggravation that it was not SARS that lost the money, but the country's fiscus. He referred to what Mr Higgs had testified about all that the Government could have done with the money and stated that the time has come for courts to put a stop to such crimes. He emphasised that the crimes were committed over a period of 6 years and that there had been sufficient time to reconsider and stop the crimes. He also referred to what Mr Higgs had said about direct imprisonment for Mr Norman Delport.

[53] The State then requested that Mr Norman Delport be sentenced to 5 years' imprisonment in terms of section 276(1)(b) on each of the 136 counts of contravening the VAT Act and the Tax Administration Act, and that all the sentences be served simultaneously for an effective sentence of 5 years, to be wholly suspended for 5 years.

[54] Defrauding SARS of R60 million in Value Added Tax is obviously a very serious crime. Mr Norman Delport admitted his role in allowing the fraud to be perpetrated through his own reckless conduct as a Trustee of the two Trusts, and as the sole director of the company and sole member of the Close corporation through which the fraudulent refunds were obtained and channelled. In sentencing the court needs to take into account the seriousness of the crime and mete out punishment that fits the criminal as well as the crime, is fair to society and is blended with a measure of mercy according to the circumstances of the case.

[55] As was held in **S v Grundling 2015 JDR 2055 (SCA)**, the fact that an accused is a suitable candidate for correctional supervision does not mean that a non-custodial sentence has to be imposed. In that respect I refer to **S v Lister** in which Nienaber JA held that

> "to focus on the well-being of the accused at the expense of the other aims of sentencing and the interests of the community was to distort the process and to produce, in all likelihood, a warped sentence."

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[56] I consider apposite in the circumstances of this accused the principle expressed by the Court in **S v Grundling at par [18]** regarding a 65 year old first offender who pleaded guilty to and was convicted of 30 counts of contravening the VAT Act, that

> "the imposition of an appropriate sentence should be approached with a 'humane and compassionate understanding for human frailties and the pressure' that contributed to the commission of the crimes."

[57] In doing so I accept that Mr Delport snr's age and poor health as well as his sincere remorse, his acceptance of the blame for his role in the case, his clean record, and all the mitigating factors set out in Mr van der Merwe's report lessen his moral blameworthiness. Considering his lesser role in the commission of the offences and the circumstances in which he was involved, I am of the view that he should not be physically imprisoned.

[58] Although Mr Delport is not a threat to society according to Mr van der Merwe's report, and although long term direct imprisonment due to his age and poor health is not justifiable, the sentence should, in view of the seriousness of the crime, still reflect an appropriate measure of rebuke for his reckless conduct and should serve to deter others from getting involved in similar crimes.

[59] But, although heavy sentences are asked for to serve as deterrent to others,[2] a judge in dealing with so-called 'white-collar crime' still has to ensure that the sentence it imposes is proportional to the crime.

[60] In considering all the factors mentioned above, I am of the view that the imposition of a sentence such as correctional supervision, besides being inappropriate in view of Mr Delport Snr's advanced age and poor health, would dilute the seriousness of the offence and disregard the impact of the actual loss of R60,3 million to the fiscus. Therefore a stricter sentence which would reflect the seriousness of the crime, yet still take into account the mitigating factors, is called for.

[2] Hancke, former AJP of the Free State High Court in Organised Crime and Proceeds of Crime Law in South Africa, at p. ix

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[61] In my view a sentence in terms of s 276(1)(b) of 5 years' imprisonment on each of the 136 counts, all to be served simultaneously, and with the effective sentence of 5 years wholly suspended, as recommended by the State, would be both appropriate and proportionate.

[62] Mr **Marius Delport** also submitted a Plea explanation in terms of S112(2) of the CPA on the first trial date of 3 June 2019. He pleaded guilty on the 136 charges of fraud, of which 104 are to be read with Section 51(2) and Part II of Schedule 2 of Act 105 of 1997. He admitted that his legal representative explained to him the applicability and implications of the provisions of that section with reference to the prescribed minimum sentences. In the statement he also confirmed that he made it freely, voluntarily and without any undue influence. Upon the Court's questions he also confirmed verbally the contents of the statement, that the contents were in accordance with the instructions that he gave to his legal representative and that it was his signature appended to the statement.

[63] He denied having formed a common purpose with his father and his mother (Accuseds 1 and 2) to commit the crimes as alleged. He averred that neither of his parents knows how to work on computers and stated that he handled the financial management of the Delport Family Trust, the Eden Rock Trust, the Two Ships Company and the MN Chemicals Distribution Close Corporation and that he submitted the claims to SARS on their behalf.

[64] He admitted that he registered all four of the said entities with SARS and that in that way he had access to the passwords and secret codes pertaining to each entity which he then used to claim repayment of the input-VAT from SARS on behalf of all four of the entities. the Delport Family Trust, the Eden Rock Trust, the Two Ships company and the MN Chemicals Close Corporatio.

[65] He then admitted that he submitted the Input-VAT claims and that his parents, did not have direct knowledge thereof. He averred that, although the claims

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were deposited into the bank accounts of the different entities, his father as sole director of the company and sole member of the CC, and as Trustee of the two Trusts, was under the impression that the entities were doing well financially.

[66] According to him, the monies received from the input-VAT refunds were used to finance their farming activities and impact studies for a bio-gas plant, but admitted that some of the money was also used for himself and his father. He averred, furthermore, as Mr Higgs also testified, that some of the claims were for real expenses, but stated that, because he no longer had the invoices, he did not dispute the State's allegations. He then averred that the Court would be apprised at a later stage, during argument regarding sentencing, of his proposal for the repayment of the amount owed.

[67] In the statement he thanked the State for withdrawing the money laundering charges (137 to 200) against him after negotiations. He stated that he wished to plead guilty to the charges because he had unlawfully and intentionally claimed and received the amount of R60 389 151.95 from SARS. He admitted to being the Trust beneficiary and the public representative of both Trusts. He also confirmed that, although his father, Norman Delport, was the sole director of the company and the sole member of the close corporation, he himself handled the finances of both. He admitted, furthermore, that the false claims submitted on behalf of the Trusts and the close corporation caused SARS to suffer a real loss of R60 389 151.95.

[68] Like his father, Mr Marius Delport also averred that none of the four entities still existed and stated that all of them had been placed under administration after applications by the Asset Forfeiture Unit of the Director of Public Prosecutions. He also averred that he had no knowledge of the proceeds of the sale in execution of his fixed and movable properties, and that he was financially completely wiped out by the said liquidation steps. Like his father, he also claimed to have lost all benefits which he had received from the false VAT claims and averred that he owned no fixed assets.

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[69] He also alleged that ever since his arrest he has made it clear that he intended to repay the money to the State. According to him he still intended to do so, since he has developed **and sold** a patent. He averred, furthermore, that on 5 November 2018 the Court gave him the opportunity to sell the patent in order to repay the moneys to SARS. According to him, the sales amount would be sufficient to pay back the R60+ million mentioned in the indictment. He stated that his legal representative would deal with the repayment during argument before sentence. Like Mr Delport Snr, he also admitted the various total amounts refunded to the various entities as set out in Mr Higgs' testimony.

[61] In the statement he also apologised to the Court for his deeds and averred that, although he committed the deeds because of the easy access to such claims, he offered to assist SARS to notice and prevent such claims more easily.

[62] He alleged, furthermore, that he had changed his life for the better and that he wished to continue to care for his wife and his minor children. He also asked for mercy in sentencing.

[63] On 3 June 2019 Mr Marius Delport was then convicted in accordance with his s 112(2) statement of 136 counts of fraud, regarding which the minimum sentences regime in terms of Section 51(2) read with Part II of Schedule 2 of Act 105 of 1997 is applicable to Counts 33 to 136. The relevant prescribed minimum of 15 years' imprisonment per count is the applicable sentence in terms of that provision.

[64] His bail was not reinstated. He then instructed his legal representative to argue that he could not be incarcerated because it would be too difficult for the Correctional Services officer, Mr van der Merwe, to travel to Grootvlei Prison, just outside Bloemfontein, to conduct an interview with him in order to compile a pre-sentence report.

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[65] The next day, on 4 June, he then instructed his legal representative to inform the Court that he could not be incarcerated because he needed to travel to Johannesburg to sell a patent he had developed. With that money he intended to repay SARS. But, he averred, no-one else than him could go. He could neither give his legal representative a power of attorney to go and do the deal on his behalf, nor have the SAPS or Correctional Services take him there, because if "they" saw anyone else, the "deal would be off". The "they" was never identified, neither was any detail about the patent, the place where the purported transaction was to take place, or the purported buyers of the alleged patent ever provided. His request was refused.

[66] After Mr Higgs' testimony, the trial was postponed to 12 June 2019 to obtain a pre-sentence report regarding Mr Marius Delport's suitability for a sentence such as correctional supervision. On the 12th, however, his Legal Aid representative informed the Court that Mr Marius Delport now alleged that he had never intended to plead guilty and had terminated his mandate, and that a certain Mr Jacques van Niekerk, a private attorney of Somerset West, would henceforth represent him. The trial was then remanded to 21 June 2019 for the said Mr van Niekerk to bring an application for a change of plea.

[64] On 21 June 2019 Mr van Niekerk did not appear and the Court was informed that he had indicated by e-mail that due to lack of funds or instructions, he was not going to represent Mr Marius Delport. It was then placed on record that Mr Marius Delport wished to reapply for Legal Aid and that, because an alleged attorney was going to visit him in Grootvlei in the next week, he would inform his former Legal Aid attorney by the 25th whether he was indeed going to re-apply for Legal Aid. The matter was then rolled to 2 July for him to apply.

[65] On the Friday, he indicated that he wanted Legal Aid. The Court was informed that the alleged patent transaction would be finalised by 10 and 11 July, and a postponement until 15 July was requested. The State reluctantly agreed, stating that the matter had already been on the roll for a year since it was first set down on the Regional Court roll in November 2016 already, thereafter on the pre-trial roll for 8 June 2018, then set down for trial on 5

November 2018 when another judge granted a postponement upon being informed that the patent transaction would be finalised in four months. After another pre-trial on 2 February 2019, trial dates for 3 to 12 June 2019 were allocated.

[66] On 15 July 2019 the Court was informed that no legal representation had been arranged for that date, but that the transaction for the transfer of the patent had been finalised and that the sales amount exceeded the R60 million which was owed to SARS. It was indicated that Mr Van Niekerk had to be placed in funds, and would then arrange with Adv Johan Nel, alternatively Adv Nel of Kimberley, to appear on 24 July 2019 to assist with an application for a change of plea and possibly for a separation of trials. Adv Sampisi confirmed that the State was ready with certain proposals and would be in a better position to negotiate if Mr Marius Delport had legal representation. He submitted that, therefore, it would be in the interests of justice to grant another postponement to 24 July 2019. The matter was then remanded accordingly.

[67] On 24 July 2019 Mr Delport confirmed that the patent transaction had been finalised and the patent had been reregistered. He averred that funds had been transferred to Van Niekerk's account on Friday 19 July 2019. An e-mail was received from Van Niekerk, however, stating that he had not been placed in funds, therefore neither he nor counsel would be appearing. The matter stood down until 14:00 to see if the purported fees transfer showed on his account. By 14:00 there was nothing.

[68] Further trial dates were then arranged by agreement for 7 to 11 October 2019, 2 to 6 December 2019 and 9 to 13 December 2019. The Court granted a final postponement to 7 October 2019 and put on record that the trial would proceed on 7 October with or without a legal representative for Mr Marius Delport. He was advised that any legal consultation had to take place before then, and that, if legal representation indeed materialised before then, the Court could be approached for the intended applications to be brought earlier. He was strongly urged to appoint legal representatives due to the complexity of the matter.

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[69] On 7 October, however, no legal representative had been instructed and Mr Delport indicated that he wanted to appear in person. He then proceeded with an oral application for a change of plea. He averred that his religious belief would not allow him to plead guilty to 'something he had not done', that he wanted to plead not guilty regarding all invoices issued by Two Ships Trading to the Delport Family Trust and the Eden Rock Trust, although he admitted that he submitted the 'invoices' to SARS and moved the money between the different accounts on one Mark Veitz's instructions. He then alleged that he had pleaded guilty under duress and out of fear because he had been threatened by Veitz with retaliation against his parents. He provided no details regarding who or what this Mark Veitz was, what his alleged connection with the Delports was, or when or why he had allegedly threatened him.

[70] He also alleged that his erstwhile attorney had refused to put a paragraph about Mark Veitz and Two Ships Trading in his s 112(2) statement and failed to show him the statement until they were in court on 3 June 2019. Mr Reyneke refuted his allegations and placed on record that he discussed the paragraph with Mr Delport and told him that if it was included, he could not plead guilty to the charges relating to Two Ships Trading, and that Mr Delport then specifically instructed him to leave out the paragraph and proceed with the guilty plea to the Two Ships Trading charges for which he would take responsibility.

[71] Mr Reyneke also placed on record that he then showed to and discussed the s 112(2) statement without the relevant paragraph with the State on 24 May 2019 and that he also provided it to and discussed it with Mr Marius Delport. That was a week before the trial started. Once again one needs to see Mr Delport's averments in the light of his assurances to the Court on 3 June 2019 that the s 112(2) statement and the contents thereof were in accordance with his instructions to his attorney. In reply Mr Delport then conceded that Mr Reyneke's version was correct. He then stated that since Mark Veitz was no longer in the picture, he could now 'throw him under the bus'.

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[72] Mr Reyneke also placed on record that Mr Marius Delport's reply to the s 212B notice on 15 February 2019 already addressed the Two Ships Trading issue and that even in that document Mr Marius Delport stated that he was responsible for all three of the entities.

[73] The State opposed Mr Delport's application and Adv Sampisi submitted that the latter had been granted numerous postponements for Legal Representation. Throughout he had maintained that once the patent transaction had been finalised he would pay back the R60 million. He stated that since 2016 SARS had engaged Mr Marius Delport directly and in vain requested him to submit the said or any invoices. Even after he was charged with fraud and money laundering, he still failed to provide any. It was only after his conviction on 3 June that he averred that someone else was responsible. He stated, furthermore, that Mr Delport himself in the paragraph that he alleged should have been included, stated the money received from SARS had been paid into their entities and that he himself transferred the money to other accounts.

[74] Due to the paucity of information and the complete lack of detail about any of the averments provided by Mr Marius Delport, and in view of the State's opposition, the Court could not find that his application complied with any of the criteria on which a change of plea could be allowed. In the Court's view Mr Delport had indeed failed to provide a reasonable explanation as required. The application was then dismissed. So was his request to be granted bail.

[75] On 8 October 2019 the Asset Forfeiture Unit successfully applied for an Interim Confiscation Order in terms of s 18 of POCA regarding the last property on Mr Norman Delport's name, a house in Reitz. Mr Norman Delport did not oppose the application and Mr Marius Delport asked for a complete inventory of all the assets that have been and are still to be sold. The Order was granted. On 2 December 2019 the Order was made final by agreement between all the parties.

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[76] The Court was then requested to stand down until 2 December 2019 to enable Mr van der Merwe of Correctional Services to prepare pre-sentence reports for both Mr Norman Delport and Mr Marius Delport (at his own request).

[77] When the trial resumed on 2 December 2019, Mr Marius Delport once again attempted to move an oral application for a change of Plea, on substantially the same grounds as the previous one, once again in person. For the same reasons it was dismissed. Regarding his averment that he wanted to apply for leave to appeal, he was informed that that should wait until after he had been sentenced.

[78] He then averred that he now had three advocates available. Without providing any details about them, he averred that they would be ready to consult with him on 11 December and to appear on 12, 13, and 14 December 2019 (which is a Saturday) 'to take his case further'. I put it on record that up to today no communication has been received at the Court, nor have any attempts been made to make arrangements for their appearance from any of the alleged advocates or from any instructing attorney.

[79] On 3 December 2019 Mr Marius Delport was granted an opportunity to testify or submit arguments in mitigation of sentence. He then averred that Mark Veitz was the real perpetrator who stole the SARS money and that he would not rest until Veitz was made to pay for his deeds.

[80] He stated that he was not asking for leniency or for mitigation because he was not pleading guilty. Regarding his personal circumstances, he stated that he is 38 years old, that he has known his wife since 2008, that they got married in 2011 and that they have two daughters of 7 and 10, respectively, that his wife only recently found employment and that his daughters attend Oranje Meisieskool but that their continued attendance was in jeopardy because his wife cannot afford the school fees. According to him he became a born again Christian in 2011 when he got married, and he now reads the Bible to his co-inmates.

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[81] He then apologised to his parents for his having been naïve enough to believe Mark Veitz and to believe that he could improve all of their circumstances. He stated that his parents had lost everything, from the Danielskuil farm, his father's entire pension to their Bronkhorstspruit house. He then averred that all items that that had been attached, from the houses to the cars, had not been paid for in cash and that all the properties had been mortgaged.

[82] He then maintained that he was not guilty on all the charges, especially not those relating to Two Ships Trading and again averred that Veitz had issued invoices regarding the Delport Family Trust and the Eden Rock Trusts. He then averred that he did not know that the Two Ships Trading Invoices were unlawful and that he never saw a Two Ships Trading VAT return. He maintained that he was guilty because he had allowed Veitz to manipulate him and that Veitz had lied by promising to buy his patent, but now his name does not even appear as a director of the company who did buy it. He averred that he was told if he threw Veitz under the bus, the latter would withdraw the patent-right. He again <u>confirmed that the patent had indeed been sold</u>, but averred that he has no access to the proceeds.

[83] He predicted that SARS was going to lose even more money and that, if he were to be given an opportunity to do so, he would be willing to give SARS his full co-operation and would provide the names of the persons and the four other businesses that are benefiting from this matter so that the persons really responsible for it, can be brought to justice.

[84] Adv Sampisi then argued in aggravation of sentence regarding Mr Marius Delport. He pointed out that originally he pleaded guilty to 136 counts of Fraud of which 104 resorted under s 51(2)(a) read with Part II of Schedule 2 of Act 105 of 1997, then brought applications to change his plea to one of 'not guilty'. He pointed out that the first fraudulent return was submitted in May 2009 already and the last one in October 2015, and that each such fraudulent submission constituted one offence.

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[85] He argued that the fraud was well-planned and well-orchestrated and committed over a period of 6 years during which Mr Marius Delport had all the time in the world to rethink his actions and to stop them. He did not do so until SARS stepped in after an audit of the payment of the refunds. That it was a well-planned scheme, is evident from the fact that it was not only false returns that were submitted, (and which his s 112(2) statement stated it was solely Mr Marius Delport who submitted those), but that there were also false inscriptions made on the bank statements to hide the origin or destination of the money.

[86] He referred to the huge amount of R60 million and to Mr Higg's statement that it is the biggest tax fraud case to have been brought to court in the FS, which emphasises the seriousness of the offence. He also pointed out the community's direct interest in the matter in that SARS provides the money for social needs such as those mentioned by Mr Higgs, including the SASSA grants from which Mr Delport's parents benefit. He referred to the Government's being criticised for failed service delivery and stated that it was people like Mr Marius Delport who contribute to that by robbing the fiscus.

[87] Adv Sampisi then averred that Mr Delport does not show remorse for his offences. He does not accept blame for his deeds. He had 6 years in which to come clean. SARS engaged him in negotiations during which he told them that Mark Veitz was a very good friend who wanted to save him by buying his trade mark so SARS can be repaid. He argued that Mr Marius Delport was been given numerous opportunities to obtain legal representation while he did everything he could to delay the matter, even as recently as yesterday.

[88] Adv Sampisi, in emphasising the seriousness of the matter, referred to **Thankwane v S** 682/2018 ZASCA (17 September 2019) in which a person who defrauded the Department of Education of R4.9 million and who was prepared to pay back the money and even had the money ready to do so, was sentenced to 20 years' direct imprisonment, the Court holding that repayment was not enough – direct imprisonment was also necessary.

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[89] He also referred to **Nxele v S**, an unreported appeal judgment of the Johannesburg High Court, A76/2017 (12 September 2017) where the accused pleaded guilty to fraud in the amount of R8.9 million committed over a period of 4 years and 9 months, and was sentenced on appeal to 15 years' imprisonment.

[87] Mr Sampisi stated that it was clear that SARS would not recover the R60 million in this matter and that the Asset Forfeiture Unit has only succeeded in recovering R1,2 million compared to the R60 million owed to SARS. He submitted that in view of all of the above, the only appropriate sentence would be 20 years' direct imprisonment.

[88] I agree with Mr Sampisi's submissions that the offences committed are very serious and that Mr Marius Delport had plenty of time to reconsider his involvement, but failed to do so until SARS detected the fraudulent scheme. He now avers that he was not aware of the unlawfulness of certain returns and implied that he was not to be blamed for that since the SARS officers are better qualified than he was, yet took 6 years to detect the irregularities. He cannot rely on being ignorant, however, since on his own version, he partially completed a B.Com degree.

[89] It is obvious that he has not disclosed to the Court his full involvement in this matter. His averments are vague and bare in the extreme. Until today, for example, this Court is none the wiser as to who the averred Mark Veitz is that plays such a prominent role in his explanations, or as to when or where and why he entered or exited the picture, since the Two Ships Trading returns apparently stopped in 2012 already, according to the records submitted by Mr Higgs, or as to when he allegedly threatened Mr Marius Delport.

[90] I agree also that his remorse is not genuine, as described by Rumpff J in **S v Seegers**[3]

> "Remorse as an indication that the offence will not be committed again, is obviously an important consideration, in suitable cases, when the deterrent effect of a sentence

[3] 1970 (2) SA 506 (A) at 511 G - H

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> on the accused is adjudicated, but in order to be a valid consideration, the penitence must be sincere and the accused must take the court fully into its confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined."

[91] If one has regard to the sequence of events in this matter, starting from 2016 when it was first set down in the Regional Court, it is obvious that Mr Marius Delport has gone out of his way to delay the conclusion thereof. His numerous undertakings that time and again came to nothing has had a serious negative impact on his credibility.

[92] In terms of s 51(2) read with Part II of Schedule 2 of Act 105 of 1997 the prescribed minimum sentence pertaining to each of the 104 counts of fraud that involved more than R500 000.00, is 15 years' imprisonment for a first offender, such as Mr Marius Delport. It is trite that a court may only depart from such a minimum sentence if there are substantial and compelling circumstances which would justify a lesser sentence.

[93] In **S v Kruger**[4] the SCA confirmed that punishment of a convicted person should not be likened to revenge. It must have all the elements of and purposes of punishment, prevention, retribution, individual and general deterrence and rehabilitation. The retributive element has as its aim the expression of public revulsion to the commission of the offences.

[94] In **DPP, Gauteng v Pistorius**[5] the SCA held that retribution and deterrence are proper purposes of punishment and that they must be accorded due weight in any sentence. Serious crimes will usually require that retribution and deterrence should be primary considerations and rehabilitation will play a smaller role. The personal circumstances of the accused cannot be the dominant factor at the expense of the well-established aims or purposes of sentencing.

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[4] 2012 (1) SACR 369 (SCA)
[5] 2018 (1) SACR 115 (SCA) at paras [23] and [22]

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[95] I have considered as potentially mitigating that Mr Marius Delport at 38 is still relatively young. His age, however, can only be a neutral factor since there is no evidence that his relative youthfulness has in any way affected his judgment.

[96] I did accept as mitigating that he has a wife who now needs to work to support their two daughters. I have also taken into account that he has no previous criminal record except for the speeding fine, and that he and his family has now lost everything they had and are largely dependent on others to subsist.

[97] I have considered the fact that he has offered to assist SARS to locate the other people and businesses who are benefiting from this scheme, but cannot take that as a real mitigating factor since he has had numerous opportunities to do so since 2016 and has failed to do so until he now finds himself in a corner. The same applies to his numerous 'offers' to pay back the R60 million, which likewise have come to nothing.

[97] Factors that I cannot regard as mitigating is Mr Marius Delport's absence of any true remorse. He did apologise to his parents for involving them in this matter, but in my view did not exhibit the sincerity and true pain and shame for what he has caused others that are required in **S v Matyityi** and in **S v Seergers** and he has time and again failed to take the Court into his confidence. Instead of accepting blame for his own deeds he kept blaming others, from Veitz to his own attorney to SARS which he blamed for not detecting the irregularities earlier. In the absence of recognising and accepting responsibility for one's conduct, there can be nor remorse and the possibility of rehabilitation is minimal.

[98] The seriousness of the offence, the lack of remorse, the numerous undertakings that came to nothing, the continuous attempts to delay the trial which caused his own father serious prejudice by preventing the finalisation of this matter, the failure to take the court into his confidence, are all aggravating circumstances which in my view cumulatively far outweigh the mitigating circumstances in this case. I am therefore unable to find that there are

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substantial and compelling circumstances which would justify a lesser sentence than the prescribed one of 15 years' imprisonment for each of the counts involving more than R500 000.

Wherefore I sentence you as follows:

1. Mr NORMAN FREDERICK DELPORT:

You are SENTENCED

1. To **5 (FIVE) years'** imprisonment on each of Counts 1 – 74

2. To **5 (FIVE) years'** imprisonment on each of Counts 75 - 136

3. All 136 sentences are to be served simultaneously so as to constitute an effective sentence of **5 (FIVE) years'** imprisonment which is wholly suspended for a period of **5 (FIVE) years** on condition that the Accused is not again convicted of the crime of contravention of the Value Added Tax Act or the Tax Administration Act committed during the period of suspension.

4. The Accused is NOT declared unfit to possess a firearm in terms of the Firearms and Ammunition Act, 60/2000.

2. Mr MARIUS DELPORT:

You are SENTENCED:

1. To **10 (TEN) years'** imprisonment on each of Counts 1 – 32

2. To **15 (FIFTEEN)** years' imprisonment on each of Counts 33 – 136

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3. All 136 sentences are to be served simultaneously so as to constitute an effective sentence of **15 (FIFTEEN) years'** imprisonment.

4. No order is made in terms of Section 103 of the Firearms and Ammunitions Control Act, 60 of 2000.

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MURRAY, AJ

On behalf of the State:	Adv W Sampisi Offices of the Director of Public Prosecutions Waterfall Centre Aliwal Street BLOEMFONTEIN
On behalf of Accused 1:	Mr D Reyneke Bloemfontein Justice Centre Legal Aid South Africa BLOEMFONTEIN
On behalf of Accused 2:	Mr Marius Delport in person Grootvlei Correctional Institue BLOEMFONTEIN

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