

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape Division)

Case no: CA&R 125/05
Date heard: 2008-12-01
Date delivered: 2008-12-12

In the appeal of:

WILLEM LOMBARD

APPELLANT

versus

THE STATE

RESPONDENT

Coram: MAJIEDT J *et* STEYN AJ

JUDGMENT ON APPEAL

MAJIEDT J:

1. The Appellant was convicted in the local Regional Court on two counts of fraud arising from the provisions contained in the Value-added Tax Act, 89 of 1991 (*“the Act”*) as well as his sentence of an effective 4 years imprisonment. The Appellant was granted leave to appeal only against sentence by the Court *a quo*, but on petition to this Court, he was also granted leave to appeal against his aforementioned convictions.
2. The Appellant had adumbrated a number of appeal grounds in his Notice of Appeal and these were further expanded by Mr. Cloete on his behalf during oral argument. In my view the matter can be

decided on a crisp point of law, namely whether the State had proved an intention to defraud on the part of the Appellant **on the basis averred in the charge sheet**. It is consequently not necessary to deal with the evidence in great detail and most of the material facts are in any event either common cause or have not been seriously placed in issue at the trial.

3. The State called a number of witnesses to prove the charges against the Appellant. It is important, however, to commence by setting out *verbatim* the charges contained in the charge sheet. The Appellant was charged as follows:

“Count 1.

The accused is guilty of the offence of fraud.

UPON or during September 1996 at or near Kimberley in the district of Kimberley and in the Regional Division of Northern Cape, the said accused unlawfully, false (sic) and with the intent to defraud, gave out and pretended to the Receiver of Revenue, Kimberley, that he was entitled to claim input tax in the amount of R11 690,00 (eleven thousand six hundred and ninety rand) from the Receiver of Revenue being the value-added tax for capital goods purchased by him at Senwes Limited on the 22 of August 1996 and that he there and then by means of these false pretences caused the said Receiver of Revenue Kimberley to the potential prejudice of the Receiver of Revenue to believe that he is entitled to the said claim and to refund him.

WHEREAS in truth and in fact when the said accused gave out and pretended to the said complainant as mentioned he knew that he was not entitled to claim the above-mentioned amount from the Receiver of Revenue as the transaction for the purchase of the capital goods was never finalised and/or never realized.”

The accused was charged in the alternative to Count 1 with theft, but it is not necessary to set out the details of the alternative

charge, nor is it necessary to set out the details of the second alternative which relates to offences contained in s59(1)(a) and s59(1)(d) of the Act (as alternatives).

Count 2 reads as follows:

“Count 2

That the accused is guilty of the offence of fraud.

UPON or during January 1998 at or near Kimberley in the district of Kimberley and within the Regional Division of the Northern Cape, the said accused unlawfully, false (sic) and with the intent to defraud, gave out and pretended to the Receiver of Revenue Kimberley that he was entitled to claim input tax in the amount of R94 012.80 (ninety four thousand and twelve rand and eighty cents) from the Receiver of Revenue being value-added tax for capital goods purchased by him at Senwes Limited on the 28th of December 1997 and that he there and then by means of these false pretences caused the said Receiver of Revenue Kimberley to the prejudice or potential prejudice of the Receiver of Revenue to believe that he is entitled to the said claim and to refund him.

WHEREAS in truth and in fact when the said accused gave out and pretended to the said complainant as mentioned he knew that he was not entitled to claim the above-mentioned amount from the Receiver of Revenue as the transaction for the purchase of the capital goods was never finalised and/or never realized.

In Count 2 the Appellant was also charged with theft as a first alternative and with a contravention of s59(1)(a) or s59(1)(d) of the Act as a second alternative.

With the charges as background I now turn to discuss briefly the evidence.

4. In order to prove these charges, the State led the evidence of the

following witnesses:

- 4.1 Ms EJ van der Walt is a specialist inspector in the section Criminal Investigations within the office of the South African Revenue Services (“SARS”). Her evidence briefly explained the provisions of the Act with regard to input and output tax claims and refunds. She also testified about her investigation into the matter concerning the Appellant’s two claims which forms the basis of the two charges of fraud against him. In the course of her investigations she conducted interviews and took statements from the State witnesses, Messrs Oberholzer, Klopper and Basson.
- 4.2 Mr JA Oberholzer was at all material times herein employed at Senwes (a co-operative) in Bothaville as a Mechanisation Manager. He testified about count 1, *supra* and referred in particular to Exhibits “F” and “G” before the Court. Exhibit “F” is a copy of a document issued by Senwes on 22 August 1996 to the Appellant, while Exhibit “G” is a copy of an original Senwes delivery note dated 28 August 1996, issued to the Rauten Family Trust. Mr. Oberholzer described Exhibit “F” as a faxed copy of an invoice, while Exhibit “G” was a copy of a delivery note. Of some significance concerning these two documents is that they had the same serial number, namely 299718. The witness had with him in the witness box the original invoice book of Senwes Bothaville and he was able to find the original document of serial number 299718 in that book. He explained that every invoice book had three pages, namely a white page, which

was the original, a green page, which was the second copy and a pink page, which was the third copy. He explained further that the white original would always stay in the book, one of the copies, usually the green one, would go to the client and the pink copy would go with the computer generated invoice to be retained on file. There are certain striking disparities between the two documents with the same serial number, namely Exhibits “F” and “G”, *inter alia* the fact that it was made out to different persons: Exhibit “F” was made out to the Appellant and Exhibit “G” to the Rauten Family Trust. Furthermore the amounts thereon differed, Exhibit “F” related to a S55 flexi spray, whereas Exhibit “G” related to a Laverda harvester and the dates thereon also differed. Mr. Oberholzer was unable to explain how these two vastly dissimilar documents containing the same serial number had come into existence.

- 4.3 Mr. PJ Klopper testified that he was at all material times herein a manager at Senwes, Ottosdal. His testimony related to count 2. He confirmed the evidence of Mr. Oberholzer with regard to the method of operation of Senwes regarding its invoice book and the white, green and pink copies therein. He testified further that he had during 1998 been engaged in a transaction with the Appellant, who wanted to purchase new tractors from Senwes and who in turn had certain used equipment and machinery which he wanted to trade in to Senwes. This transaction ultimately did not materialise for reasons which are not germane here. He also testified about Exhibits “AA1”, “AB”, and “AE” before the

trial court. Exhibit “AA1” is a copy of a VAT-invoice made out to the Appellant by Senwes which the Appellant used to claim input tax in the amount of R94 012.80 from SARS. It bears serial number 065782 and relates to certain goods, including tractors and a Volkswagen Chico motor vehicle. It is dated 28 December 1997. Exhibit “AB” in turn is an invoice from Senwes also made out to the Appellant with the same serial number (065782) with the same inscription regarding the tractors and the Volkswagen Chico motor vehicle thereon, but which has a line drawn through it with the words “*kanselleer*” written on top of that line. In addition, this particular document is undated and has a number of handwritten entries on the right hand side thereof with the heading “*inruile*” and which apparently relate to the goods which the Appellant was desirous of trading in to Senwes. Mr. Klopper explained that the document, Exhibit “AB”, was cancelled because the transaction with the Appellant failed to materialise. He was also shown Exhibit “AE” which bears the same serial number as Exhibits “AA1” and “AB”, namely 065782. This document resembles Exhibit AB, except that it has some other entries, namely “*maize master – mieliemeule*”. Mr. Klopper also testified that the date on “AA1”, namely 28 December 1997 was, according to the calendar, a Sunday. He explained that Senwes never does business on a Sunday in the normal course of events. An examination of the invoice book also indicated that this transaction, according to the sequential numbering of the serial numbers, could not have been done in December, but must in fact have taken place during late January 1998.

- 4.4 Mr. M Basson worked during all material times as a VAT auditor at SARS in Kimberley. He testified that he had performed a VAT audit on a transaction of the Appellant, who was unknown to him. He referred to Exhibit “AA” before the Court which is an audit report on the Appellant for the December 1997 VAT-period. He compiled his audit report on the basis of the information contained in Exhibit “AA1” to which I have already referred. He agreed that there were a number of differences between Exhibits “AA1”, “AB” and “AE”. According to him he would have queried this transaction if Exhibit “AE” had been known to him, because there was no date on it and there were also trade-ins written on that document, whereas “AA1” had no such trade-ins. He conceded that he did not notice that the date on Exhibit “AA1” was in fact a Sunday.
- 4.5 The last State witness was Mr. A van Heerden, a deputy-director at SARS head office dealing with VAT law administration. His office assists VAT offices throughout the country with legal interpretations and rulings and they would issue practice notes in the course of their business. He explained to the trial court the VAT invoice system and the requirements of a valid VAT invoice as defined in s1 of the Act. According to his evidence a faxed tax invoice was not acceptable to claim input tax. He also testified that if VAT input tax had been claimed and there was a refund to the tax payer/claimant, and thereafter the transaction failed to materialise or was cancelled, s21(6) of the Act placed an obligation on the tax payer/claimant to add back the tax

claimed or to account for it through output tax. He was shown Exhibits “F” and “G” on count 1 as well as Exhibits “AA1” and “AE” on Count 2. He agreed that one would be able to claim VAT based on Exhibit “AA1”, because it appeared regular on the face of it. One would not be able to claim VAT input tax on Exhibit “AE” on the other hand, because it contained no date. He testified that one could not claim input tax on Exhibit “F”, because it was a faxed copy and, as far as Exhibit “G” is concerned, he testified that it was only a normal invoice and not a tax invoice. **The crux of this case is to be found in Mr Van Heerden’s evidence in cross-examination where he testified that, as far as a cancelled transaction or a transaction which fails to materialise is concerned, the intention to defraud on the part of the taxpayer is key to a finding whether there is criminal or civil liability on the part of the taxpayer.** In this regard he explained fully the details of the relevant legislative provisions contained in the Act.

5. At the end of the State’s case the Appellant’s attorney brought an application for the Appellant’s discharge in terms of s174 of the Criminal Procedure Act, 51 of 1977. This application was, correctly so, refused by the Court *a quo*. The Appellant thereafter testified and explained how it came about that he had claimed input tax in terms of the provisions of the Act, based on the documents Exhibit “F” (which he had faxed to SARS in Kimberley) and Exhibit “AA1” (which he had handed in to SARS). The Appellant explained that Exhibit “F” was faxed to him by Senwes and he in turn had faxed it to SARS. With regard to Exhibit “AA1”

he testified that Klopper had come out to visit him at his farm to view the secondhand tractors and machinery which the Appellant wanted to trade in on the new tractors and the vehicle to be purchased from Senwes. In the course of their discussions Klopper had noted the trade-ins in the invoice book, the Appellant had signed it and Klopper had thereafter torn out an invoice from this invoice book and handed it to the Appellant. He confirmed that the transaction did not materialise and that he claimed input tax on Exhibit "AA1" which he had later handed in to SARS. He denied that he had the intention to defraud at the time that he had claimed the input tax on the two occasions, however he appeared to concede that he still owed SARS in respect of the VAT refunds that was paid to him.

6. The Magistrate convicted the Appellant and in doing so, found that the State had proved that he had the requisite *mens rea* to defraud SARS at the time that the Appellant had submitted his claims for input tax.
7. The following facts were, in my view, common cause at the trial (both Counsel before us appear to accept that this was so):
 - 7.1 That the Appellant had handed in to SARS the so-called VAT 201 claim forms and the respective invoices referred to in counts 1 and 2 (exhibits "F" and "AA1") in support of his claims.
 - 7.2 That the Appellant was duly registered for VAT in terms of the Act.

7.3 That the Appellant had received the two amounts set out in counts 1 and 2 as VAT refunds based on his aforementioned claims.

7.4 That the transactions on which the VAT refunds were based, failed to materialise.

7.5 That the Appellant is liable in law to repay the said refunds to SARS.

8.1 Fraud has been defined as follows:

“The unlawful and intentional making of a representation which causes actual prejudice or which is potentially prejudicial to another.” See: **Snyman Criminal Law 4th Ed at 520.**

“Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.” See: **Burchell & Hunt: South African Criminal Law and Procedure Vol 2, by JRL Milton at 702.**

Compare also: **S v Van den Berg 1991 (1) SACR 104 (T) at 106;**

S v Campbell 1991 (1) SACR 503 (Nm) at 505 b-c.

8.2 It is plain therefore that the State has to prove the following elements of the offence beyond reasonable doubt:

- a) Misrepresentation
- b) Unlawfulness

- c) Intention
- d) Prejudice/potential prejudice.

8.3 It is trite that misrepresentation may consist of an act or of an omission in circumstances where there is a legal duty to disclose.

Compare: **S v Heller and another (2) 1964 (1) SA 524 (W) at 536 F;**

S v Harper and another 1982 (2) SA 638 (DCLD) at 655 D-E.

8.4 It has been held in a number of cases that, in order to establish criminal liability for fraud based on non-disclosure, the State must prove an intention to mislead where an accused person fails to disclose while under a legal obligation to do so.

See, *inter alia*:

S v Western Areas Ltd and others 2004 (4) SA 591 (W) at pars [7.1], [7.2]. [25] and [26].

S v Yengeni 2006 (1) SACR 405 (T) at par [31].

S v Burstein 1978 (4) SA 602 (T) at 604 H – 605 B.

S v Rosenthal 1980 (1) SA 65 (A) at 85 B-C.

9. Mr. Cloete on behalf of the Appellant has, quite understandably, laid much emphasis during his argument on the fact that the State had worded the charge sheet in the manner set out herein. Consequently the State had to prove beyond reasonable doubt that when the Appellant had submitted his claims for input tax as per Exhibits “F” and “AA1”, he knew that the claims were false or that he had no belief in its truth. Put differently, the State had to prove beyond reasonable doubt that the Appellant had no reasonable belief at the time of the submission of the aforesaid

claims that the respective transactions would materialise or would not be cancelled. Ms Kersten, for the State, has valiantly attempted to persuade us that the Magistrate was correct in finding that the State had in fact discharged this onus of proof. I cannot uphold her contention. Even on the State's case it was clear on the evidence of Klopper that he and the Appellant were in continued negotiations up until April 1998 regarding the transaction relating to count 2. There was also no issue between Klopper and the Appellant concerning the reason why the transaction had failed, namely due to the fact that the Appellant's cash flow did not permit him to write a cheque for the full amount for the goods which he wanted to purchase from Senwes. The evidence of the Appellant is unchallenged that he could not wait for a cheque from Senwes to be paid to him in respect of the secondhand goods which he wanted to trade in. The Appellant explained in his evidence (and this was not challenged at all) that what he had in mind was in fact a set-off between Senwes and himself regarding the amounts for goods to be purchased and for goods to be traded in. With regard to the first transaction, relating to count 1, the Appellant's evidence that he was continuously in contact with Senwes to ascertain when the flexi spray would arrive from the USA, from which it had to be imported, was undisputed and not challenged at all in cross-examination.

10. In the light of the foregoing, it is plain that the State failed to prove beyond reasonable doubt that the Appellant had the intention to defraud at the time that he submitted his claims. Furthermore, the Magistrate in my view erred in making the following findings:

- a) *“Accused made the representation to the South African Revenue Services that he is entitled to claim whereas it was not the correct position. He never declared output tax which omission accounted (sic) to a misrepresentation of the correct position on his part to the effect that the transaction succeeded and he was entitled to such monies claimed to as it was not the case.”*

The Magistrate is wrong in the aforementioned findings in two respects, firstly the Appellant’s evidence that he *bona fide* believed that he was entitled to claim when he handed in his VAT claim forms in both instances was not challenged at all. Furthermore, it became common cause between the State and Defence at the trial that the source documents on which the Appellant’s claims are based, namely Exhibits “F” and “AA1”, were valid for purposes of his claims (save insofar as Van Heerden at a very late stage in his evidence stated that a faxed copy was not acceptable, but this was clearly not strictly applied at the Kimberley office). Moreover and importantly, the State’s case itself through the evidence Van der Walt, was that a taxpayer was not obliged to hand in source documents to substantiate his claim, but that a claim form itself was sufficient. SARS could then request the substantiating source documents afterwards, should it wish to do so. Secondly the Magistrate is wrong in the second sentence quoted above. The State never charged the Appellant, nor was it its case, that the Appellant had committed fraud through an omission. The State’s case always was (and this was accepted by both parties at the trial and on appeal before us) that the Appellant was guilty of fraud through positive conduct (commission).

- b) The Magistrate also found:

“He continued to enter into further business transactions to the exclusion of ones on count 1 and 2 which transaction on count 1 and 2 he conceded he later knew they were not successful and did not materialise. And it is the evidence before Court that for a period of plus-minus four to six years until Mrs Van der Walt knocked on his door, he never declared output tax or refunded Receiver.”

The same misdirection in law occurs in these findings as the ones in the preceding paragraph. While it is so that the Appellant may have incurred civil liability to SARS for repayment of the amounts refunded to him, this does not prove fraud on the basis as charged and as averred by the State in the charge sheet.

- c) The next finding which I discuss is the following:

“There was not supply as required and expected as envisaged in the Value-added Tax (Act), no payment of goods hoped to be bought, not even orders placed, no deliveries made to accused. Proposed transactions between accused and Senwes Bothaville and Ottosdal did not materialise. The accused knew of that and did nothing to remedy the position On circumstances that the Court had indicated the Court believes that accused when he submitted this claims and submitted this supporting invoices had no intention of the said proposed transactions to materialise.”

I am of the view that the Magistrate has erred in material respects in the aforementioned findings:

- i) It was conceded on behalf of the State by both Van der Walt and Basson, that the documents in question,

namely Exhibits “F” and “AA1” qualified as tax invoices in terms of s20(1) read with s20(4) of the Act. The claims were regarded as valid on the face of it as conceded by both these witnesses and even by Van Heerden who was called as a *quasi* expert witness by the State. Of course it will be recalled, that Van Heerden only had problems with Exhibit “F” insofar as it was a faxed copy which he said was not acceptable in terms of SARS directives. It became clear, however, during the course of the trial that the Kimberley office did not apply this particular directive very strictly.

- ii) Van Heerden made an important concession under cross-examination to the effect that if the Appellant had the intention to actually buy the goods (in both instances set out in the two charges) and if he had submitted these invoices he would have allowed him to claim input tax. He did qualify this concession in respect of “F” which was an unacceptable fax copy. There was no evidence to gainsay the Appellant’s contention in his testimony that he had the *bona fide* belief that these transactions would materialise. It is common cause that the transactions did not materialise for reasons which, objectively speaking, were really out of the Appellant’s control. It will be recalled that on the first count the reason for the transaction not materialising was that the flexi spray could not be acquired timeously from the USA and in

the second instance in count 2, the Appellant had a problem with the method with which Senwes wanted to do the deal with regard to payment by and repayment to the Appellant. Quite significantly, the Appellant testified that he had asked Klopper what he should do about the VAT which he had already claimed in respect of the transaction in the second count. According to him Klopper's reply was that he should not worry and that he (Klopper) would sort it out. This aspect was pertinently put to Klopper by the Appellant's attorney in cross-examination, but Klopper could neither recall, nor could he directly deny it.

- iii) The Magistrate's finding above that there was no supply as envisaged in the Act and no payment of the goods or orders placed or deliveries made, completely loses sight of the fact that the Appellant on count 1 was awaiting delivery of the flexi spray from the USA where it was manufactured and in the second instance, was awaiting Senwes' decision on how to structure the payment deal for the goods to be purchased by the Appellant and those to be traded in by him. In the structure of the Act, a transaction includes an agreement whereby the goods are to be delivered in future. In s1 of the Act "*sale*" is defined as "*an agreement of purchase and sale and includes any transaction or act whereby or in consequence of which ownership of goods passes **or is to pass** from one person to another*".

11. To summarise: the State failed to prove the charges as it is framed in the charge sheet, i.e. that the Appellant is guilty of fraud committed as a positive act (*commissio*) with the intent to defraud at the stage when he submitted his VAT claim forms and supporting documents on counts 1 and 2. The manner in which the State has chosen to formulate the charges is of great importance in this regard. I am of the view that the State has failed to prove beyond reasonable doubt any intention to defraud on the charges as they stand.
12. I deem it necessary to say something about charge sheets and the manner in which they are framed. The Criminal Procedure Act, 51 of 1977, contains detailed prescripts regarding charge sheets and the charges contained therein, see *inter alia* sections 84, 85, 86, 88 and 144 thereof. The State is, in terms of s35(3)(a) of the Constitution of 1996, obliged to set out in the charge sheet sufficient detail so as fairly to inform an accused person about the charge/s which he/she faces.

See: National Director of Public Prosecutions v Rautenbach and others 2005 (1) SACR 530 (SCA) at 539 b.

See also: **S v Hugo 1976 (4) SA 536 (A) at 540 E-F** where Miller JA puts it thus:

“An accused person is entitled to require that he be informed by the charge with precision, or at least with reasonable degree of clarity, what the case is that he has to meet and that is especially true of an indictment in which fraud by misrepresentation is alleged.”

The learned Appeal Judge refers *inter alia* to **R v Alexander and others 1936 AD 445** where Wessels CJ at 457 says the following:

“What is the object of an indictment? Its real purpose is to inform the accused in clear unmistakable language what the charge is or what the charges are which he has to meet. It must not be framed in such a way that an accused person has to guess or puzzle out by piecing sections of the indictment or portions of sections together what the real charge is which the Crown intends to lay against him.”

In **Ex parte Minister of Justice: In re Rex v Masow and another 1940 AD 75** at 90-91 Centlivres JA sets forth the essentials that are to be contained in a charge sheet:

“It will be noticed that the two essentials that must be set forth are firstly the offence and secondly the particulars as to time, place, person and property and that both these essentials must be set forth in such manner ‘as may be reasonably sufficient to inform the accused of the nature of the charge’. In other words the accused must be informed of the offence of which he is charged and with particulars as to time, place, person and property To put it in another way, everything which is an essential element in the offence must be set forth in the charge.”

13. In **S v Hugo**, *supra*, the Appellant had been charged and convicted in a Provincial Division of *inter alia* fraud. In further particulars to the indictment the State specified two misrepresentations to the complainant which the Appellant was alleged to have made. At the trial the State led the evidence of another misrepresentation not alleged in the indictment or the further particulars supplied thereto. In the Court *a quo* the Trial Judge had overruled an objection to the admissibility of such evidence. On appeal it was held that the potentiality of serious prejudice to the Appellant if evidence were to be considered in

respect of allegations not made in the charge sheet, was in the circumstances of the particular case manifest and the conviction and sentence were consequently set aside. At 540 F-G Miller JA states that:

“It is of vital importance to such an accused to know what he is alleged fraudulently to have said or done and he ought not to be left to speculate as to the true nature of the misrepresentations laid to his charge, nor to spell out of the charge possible misrepresentations upon which the State might have intended to rely but which it did not reasonable clearly describe. And when the State clearly specifies the misrepresentations upon which it relies the accused is entitled to regard them as exhaustive and to prepare his defence in respect of those representations and no other.”

Miller JA also refers to **S v Heller and another**, *supra* at 535 H where Trollip J held as follows:

“What I have to decide is whether, in regard to the fraud charges, the State has at this stage of the trial adduced prima facie proof not merely that the accused have committed fraud but has committed it in the manner alleged in the indictment, because precision in pleading and charging fraud is generally, a fortiori in a case of this complexity and magnitude, essential.”

- 14.1 The above *dictum* of Trollip J in **S v Heller and another**, is particularly apposite to the facts of this case. There was in my view a duty on the State to set forth with clarity and precision the basis on which it alleged that the accused had made misrepresentations. More particularly, the State was obliged to set forth whether it relied on a commission or omission on the part of the Appellant. Having taken the route of formulating charges based on a commission, the State could then not thereafter seek to rely on an omission on the part of the Appellant. Moreover and

in any event, the evidence adduced before the Magistrate at most, in my view, merely established a case for civil liability on the part of the Appellant based on his omission to rectify the erroneous refunds. That this constituted at most civil liability on the part of the Appellant was correctly conceded by Van der Walt in her evidence when she was re-examined by the prosecutor.

14.2 In **S v Burstein**, *supra*, at 604 H, Coetzee J expounds a very useful distinction between civil and criminal liability for fraud as follows:

*“The question whether non-disclosure is criminally fraudulent is not an easy one. As pointed out by Hunt in SA Criminal Law and Procedure vol 2 at 716, silence may well constitute civil fraud without constituting criminal fraud. **The distinguishing feature lies mainly in the presence or absence of the necessary intention to defraud.** There are very few cases of criminal non-disclosure. The most comprehensive judgment on this topic is that of TROLLIP J (as he then was) in S v Heller and Another (2) 1964 (1) SA 524 (W) at 536 - 538, which I adopt, with respect, as an authoritative statement of the law. For the purpose of dealing with the facts of the present case more conveniently, I would summarize the requisites of this type of fraud, as discussed by the learned Judge, as follows:*

- (a) *a duty to disclose the particular fact;*
- (b) *a wilful breach of this duty under such circumstances as to equate the non-disclosure with a representation of the non-existence of that fact;*
- (c) *an intention to defraud which involves*
 - (i) *knowledge of the particular fact;*
 - (ii) *awareness and appreciation of the existence of the*

duty to disclose;

(iii) deliberate refraining from disclosure in order to deceive and B induce the representee to act to its prejudice or potential prejudice;

(d) actual or potential prejudice of the representee.”
(emphasis added)

15. In the circumstances therefore and for the reasons set out hereinabove, the appeal against conviction must succeed. It is therefore unnecessary to deal with the sentence imposed. In passing I might add that it strikes me as shockingly severe.
16. I deem it necessary to say something in conclusion about the highly unacceptable state that the record was in. We received the trial exhibits only on the Friday preceding the Monday on which the appeal was heard. This only came about after I had addressed a memorandum to the Appellant's attorneys to point out this omission from the record. It is obvious that the Exhibits, being documentary proof, were highly relevant and was an essential requisite to a sensible reading of the voluminous record. The omission of this vital part of the record is completely unacceptable. Secondly the record did not contain the proceedings on petition to this Court where the Appellant was granted leave to appeal against the conviction. This is another serious oversight. We pointed these omissions out to Appellant's Counsel at the commencement of the hearing and indicated to him that we were however keen to have the matter finalised given the *prima facie* view which we had taken regarding the merits of the appeal. I must make it very clear that under ordinary circumstances, the

appeal would have summarily been struck from the roll as is provided for in the Rules of Court. Our indulgence granted to the Appellant on this occasion must not be interpreted as a waiver or relaxation of the Rules with regard to the preparation of the records for appeals in this Court. In the present matter the record was particularly voluminous and made for difficult reading, given the relative complexity of the case and such difficulty was greatly exacerbated by the initial absence of the trial exhibits.

17. The following order is issued:

**THE APPEAL SUCCEEDS. THE APPELLANT'S CONVICTIONS
AND SENTENCE ARE SET ASIDE.**

**SAMAJIEDT
JUDGE**

I CONCUR:

EJ STEYN
ACTING JUDGE

FOR THE APPELLANT	:	ADV D CLOETE
INSTRUCTED BY	:	JL STEYN ATTORNEYS
FOR THE RESPONDENT	:	ADV C KERSTEN
INSTRUCTED BY	:	THE DPP