

13/96

Not Reportable.

CASE NO: 392/95
EB

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

M C SONDAY

First Appellant

M A CHAFEKER

Second Appellant

and

THE STATE

Respondent

CORAM: SMALBERGER, HOWIE et SCOTT JJA

HEARD: 5 MARCH 1996

DELIVERED: 18 MARCH 1996

JUDGMENT

SMALBERGER, JA:

The two appellants were convicted in the Regional

Court, Cape Town, of fraud and a contravention of sec 9 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (knowingly making a false statement under oath). They were each sentenced on the fraud count to three years imprisonment conditionally suspended for five years; on the other count a fine of R1200,00 or six months imprisonment was imposed. They noted appeals to the Cape of Good Hope Provincial Division against both their convictions and sentences. The appeals against their convictions were dismissed. They did not pursue the appeals against their sentences at the appeal hearing. However, the court *a quo* had given prior notice of a possible intention to increase their sentences should the appeals against their convictions be dismissed. Having heard argument on appeal it came to the conclusion that the sentences imposed on the fraud count were

disturbingly inappropriate. It accordingly set the sentences aside and referred the matter back to the trial magistrate to "impose heavier sentences in the light of the contents of this judgment, after having obtained and considered a report by a probation officer or correctional official in terms of section 276 A (1) of the Criminal Procedure Act 51 of 1977". The sentences on the other count were confirmed. Leave to appeal was refused by the court *a quo*, but was subsequently granted by this Court on petition in respect of (1) the dismissal of the appeals against the convictions, and (2) the setting aside of the sentences on the fraud count and the referral of the matter back to the trial magistrate.

In relation to the fraud count the gist of the State's case was as follows. The first appellant applied to Trust Bank of Africa Limited ("the Bank") during the latter part of 1989 to open bank accounts for

certain companies and firms engaged in various business enterprises and for them to be granted overdraft facilities. In doing so he purported to be one Farouk Abrahams ("Abrahams") who, at least nominally, was the major shareholder and a director of the companies, and owner of the firms, concerned. The first appellant provided certain details and information required by the Bank, and signed various documents, in the pretence of being Abrahams. He did so without the knowledge and authority of Abrahams. Furthermore, he failed to disclose to the Bank that he was an unrehabilitated insolvent. At all relevant times the second appellant had knowledge of, and connived in, the first appellant's conduct. They acted with intent to defraud the Bank. Their conduct induced the Bank, to its prejudice, to open accounts in the names of the companies and firms concerned, and to grant them overdraft facilities to

the tune of R210 000,00. (It is common cause that use was made of these facilities; that at 23 July 1990 the debit balances in respect of the accounts totalled R122 993,75; but that by the time of the trial the balance had been reduced to somewhere in the region of R30 000,00 to R40 000,00, disregarding interest.) The State called three witnesses, Schultz and Willenberg (both Bank officials) and Abrahams, to substantiate its claims against the appellants.

The appellants both testified. The first appellant admitted signing certain documents as Abrahams. The appellants claimed, however, that Schultz and Willenberg knew that first appellant was not Abrahams, but Sondag, and that in his dealings with the Bank he acted on behalf of Abrahams (having been duly authorised thereto by Abrahams). They further contended that Schultz was aware of the fact that the first

appellant was an unrehabilitated insolvent. Their defence constituted a denial that they had acted with intent to defraud and that the Bank had suffered any prejudice as a consequence of their conduct.

It is not necessary to review and analyse the evidence given at the trial regarding the fraud charge. This has been done with commendable thoroughness in the judgment of Thring J in the court below. With one exception, the arguments advanced on appeal before us were similar to those raised in that court. They have been comprehensively dealt with in its judgment. I am satisfied, for the reasons there given, which do not require repetition in this judgment, that the trial magistrate correctly accepted the evidence of the State witnesses and rejected any contrary evidence of the appellants. It was accordingly established that the appellants had wrongfully and intentionally misrepresented the truth to

the Bank. It was not seriously contended that the appellants' unlawful conduct, particularly their failure to disclose that the first appellant was an unrehabilitated insolvent, was at least potentially prejudicial to the Bank. It is clear from the evidence that the first appellant was the driving force behind the companies and firms to which reference has been made. The effect of Schultz's testimony was that the Bank would not have afforded overdraft facilities to an unrehabilitated insolvent. This makes commercial sense and accords with prudent business practice. By the same token it is unlikely that extensive overdraft facilities would have been granted to companies or firms effectively run by an unrehabilitated insolvent.

The exception to which I have referred relates to the question of the appellants' intent. For the purposes of the present appeal it can be

accepted (without deciding the point) that our law requires for the crime of fraud an intention not only to deceive, but also to cause prejudice (or potential prejudice) - cf S v Huizers 1988 (2) SA 503 (A) at 508 A - B.

It was conceded on behalf of the appellants that on the State's case an intention on their part to deceive had been proved. It was argued, however, that proof of an intention to prejudice was lacking.

To obtain overdraft facilities from the Bank it was necessary for the first appellant to pose as Abrahams and to withhold the fact of his insolvency from the Bank. The evidence reveals Abrahams to have been a poorly educated, humble painter/handyman with little or no business acumen or experience. As such he was hardly likely to inspire sufficient confidence for the Bank to agree to advance substantial overdraft facilities to companies and firms allegedly under his control. The first

appellant was by all accounts a businessman of some experience who created a generally favourable impression. But because he was an unrehabilitated insolvent avenues of finance were largely, if not entirely, closed to him. The appellants must have realised, and by inference did realise, that both Abrahams and the first appellant would inevitably be regarded as bad risks. To overcome the dilemma with which he was confronted it was necessary for the first appellant, with the knowledge and support of the second appellant, to act as he did. Their machinations speak eloquently of their fear that any request for finance would be turned down if the truth were revealed. It was only by making false representations that they had any hope of persuading the Bank to advance the overdraft facilities sought by the first appellant for the businesses under his control.

The appellants clearly intended to achieve their object by deliberately misleading the Bank. It was precluded by their false representations from investigating Abrahams in order to determine whether he was an acceptable business risk, or making enquiries concerning the first appellant's insolvency. Admittedly certain security was furnished by the companies and firms for the overdraft facilities afforded them. But such security would have been lost, or at least been at risk, if investigation revealed that the first appellant was the beneficial owner of the companies and firms concerned and that the assets pledged as security fell into his insolvent estate. The only reasonable inference to be drawn from the appellants' elaborate plan is that they subjectively foresaw the reasonable possibility that the Bank could be prejudiced by their conduct but persisted therein, regardless of the consequences.

They themselves never testified that their intention was only to deceive and not to prejudice. In the circumstances their intent to prejudice has been established.

In the result the appellants' appeals against their convictions on the fraud count cannot succeed. That being so, it is common cause that their appeals on the other count must also fail.

This brings me to the question of sentence. It is trite law that a court of appeal may only interfere with the sentencing discretion of a trial court on limited grounds. It is entitled to increase a sentence which is glaringly inadequate or shockingly inappropriate. The court *a quo* felt that the wholly suspended sentence on the fraud count fell into this category and was "an improper sentence which does not meet the exigencies of the crime".

Fraud is undoubtedly a serious offence, particularly in this day and age. The appellants' fraud was carefully conceived and cunningly executed. They persisted with their deception over a substantial period of time. As the court *a quo* observed, they were perhaps fortunate not to have been charged with forgery and uttering and attempting to defeat the ends of justice. They showed no apparent remorse for their conduct. A substantial sum of money was at stake. The trial magistrate must have been aware of these considerations, yet rejected the notion of correctional supervision and considered a wholly suspended sentence appropriate.

The evidence reveals that for a period of years preceding the fraud Abrahams had, wittingly or unwittingly, been a front for the first appellant to enable him to acquire interests in properties and businesses

which he would otherwise have been precluded from doing by the provisions of the (now repealed) Group Areas Act. This state of affairs had antedated the first appellant's insolvency. The fraud on the Bank was committed in perpetuation of that scheme. The appellants were not shown to have given incorrect financial information to the Bank about the companies and firms concerned. They do not appear to have exaggerated their assets or played down their liabilities. Nor did they utilise, as they might have done, the available overdraft facilities to the limit. There is nothing to suggest that the money that was drawn was used for anything other than the benefit of the various businesses. The loss suffered by the Bank resulted from a failure of the businesses and not because of the personal misappropriation or misuse of monies by either appellant. Although an unrehabilitated insolvent, the first

appellant appears to have been *de facto* solvent. The prejudice factor was therefore not as grave as might otherwise have been the case. And the Bank's loss is in the process of being repaid on a regular basis and has been significantly reduced.

While on a proper perspective of all relevant considerations one might justifiably conclude that the sentence on the fraud count was a lenient one, it was not so excessively lenient as to be regarded as glaringly inadequate or shockingly inappropriate in the circumstances, particularly if regard is had to the appellants' personal circumstances, including the fact that they are first offenders. In the result there was no legal justification for interfering with it. The appropriateness of the sentence on the other count was not an issue in the appeal before us.

The following order is made:

- 1) The appeals of the appellants against their convictions are dismissed.
- 2) Their appeals against the order made by the court *a quo* setting aside their sentences on the fraud count and referring the matter back to the trial magistrate to impose heavier sentences are upheld, and the order in question is set aside.
- 3) The sentences imposed on the appellants by the trial magistrate on the fraud count are restored.
- 4) The sentences imposed on the appellants in respect of the remaining count are confirmed.

J W SMALBERGER
JUDGE OF APPEAL

HOWIE, JA) CONCUR
SCOTT, JA)