



Republic of South Africa
IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: A108/2014

In the matter between:

GEORGE AUGUSTUS KOLBE

Appellant

v

THE STATE

Respondent

Court: Justice A Le Grange *et* Justice J Cloete

Heard: 22 May 2015

Delivered: 23 June 2015

JUDGMENT

THE COURT:

Introduction

- [1] The appellant, who had pleaded not guilty, was convicted in the Oudtshoorn regional court on 2 July 2013 on two of the nine counts that he faced, being one of fraud and one of contravening s 11 of the Banks Act 94 of 1990 (*‘the Banks Act’*). On 2 December 2013 he was sentenced on the fraud count to three years imprisonment suspended for five years on the usual conditions, and on the statutory count to a fine of R20 000 or 2 years imprisonment suspended for five years. With the leave of the trial court he appeals against both his convictions and sentences.
- [2] The appellant appeared as accused no 2 in the trial. Accused no 1, his father, passed away before the trial commenced. His remaining two co-accused were discharged in terms of s 174 of Act 51 of 1977 at the close of the state’s case.
- [3] The common cause facts which emerged from the s 115 plea explanation and testimony of the various witnesses in the trial are as follows.
- [4] The appellant held a majority 60% member’s interest in Kontantvloei Regmakers BK trading as Cash Friend (*‘the CC’*) which he acquired on 7 December 1998 when he was 19 years old. His father, the driving force in the business of the CC, namely microlending, was disqualified from holding this member’s interest in terms of s 47 of the Close Corporations Act 69 of 1984 because he was an unrehabilitated

insolvent. The appellant thus effectively held the member's interest on his late father's behalf.

- [5] The CC operated from two branches in Oudtshoorn and three in George, Knysna and Malmesbury respectively. The appellant was employed by the CC as the manager of its branch in High Street, Oudtshoorn. Over the period November 1998 to October 2000 the CC took monies totalling R650 000 from eight unrelated investors, ostensibly to invest in the business, in return for which they were promised interest on their investments at 24% per annum which was to be paid to them in monthly instalments, and which was considerably higher than the rate of interest offered by banks. None of these investors were ever repaid their capital.
- [6] The appellant himself was the manager of one of the branches, and was to all intents and purposes his late father's right hand man. He took instructions from his late father and reported to him.
- [7] Ms Mietjies Sampson (*'Sampson'*) became one of these *'investors'*. At the appellant's instance she paid over R30 000 to him on 23 October 2000. She received the promised interest on her investment in monthly instalments of R600 for two months until December 2000. The CC ceased trading in early 2001 and, apart from a few further payments to her thereafter of R450 each, she was not repaid anything including the capital of R30 000 which she had invested.

[8] These events ultimately led to the appellant and his co-accused being charged on the various counts. He was convicted only on the count of fraud in respect of Sampson, as well as the contravention of the Banks Act. He was acquitted on the seven unrelated counts of fraud pertaining to the remaining investors.

The evidence before the trial court

[9] The state called three witnesses in respect of its case in relation to Sampson. The appellant testified in his own defence and called no other witnesses, save for an expert (an auditor) whose evidence the parties agree is irrelevant for purposes of this appeal.

[10] The first state witness, Ms Sonja Greeff (*'Greeff'*) (previously Willemse), testified that she commenced employment with the CC during 1999 as a collections clerk. The CC also employed, amongst others, a Ms Julies whose function was to actively seek out potential investors and to bring them to the attention of the appellant and/or his late father. During the course of her employment Greeff become familiar with some of the individuals who became clients of the business. By 2000 she had become concerned because she was aware that certain of the clients were not being paid their promised returns, and the appellant was well aware of this, as she had personally referred the clients to him to deal with their complaints.

[11] On one occasion during 2000 Greeff and a colleague Ms Zenobia Visagie were instructed by the appellant's late father to collect Sampson from her home in

Dysselsdorp and to take her to the appellant at the Oudtshoorn High Street branch. Greeff did not attend their subsequent meeting and did not know what they had discussed. However on the appellant's instructions she thereafter took Sampson to a bank to draw money which Sampson handed over to him.

[12] Greeff was concerned that Sampson, who had young children, would find herself in the same position as the other disgruntled investors. She had overheard a discussion between the appellant and his father where they decided to distribute the funds of an investor, Mr Plaatjies, of R150 000 across the various branches of the CC. Her evidence was that meetings had been held over this period with some of the "investors" who were told by the appellant's late father that Cash Friend was no longer operating, but that they could obtain shares in another business, Debt Help 4 U, which was to be operated from the same premises. Greeff could recall that the appellant had attended at least one of these meetings, and testified that shortly after Debt Help 4 U commenced trading he left the business.

[13] Greeff was told that the appellant's explanation was that there had been an economic downturn in the microlending industry which caused a number of these businesses to close. This was exacerbated by competition in the form of African Bank and the regulatory authorities tightening controls over the industry, which led to Cash Friend no longer having control over the manner in which returns were paid to investors. These factors, coupled with certain undertakings given by his late father which had not been fulfilled, had caused him to leave the business. The

appellant would confirm that the meeting or meetings with investors had been held, but would maintain that he had not been involved in those meetings in any way. Greeff replied that she knew of at least one meeting at the High Street branch when the appellant was present. She was one of the employees who had driven to collect investors for the purpose of attending.

[14] Sampson testified that her husband had been fatally injured in an accident. She was paid the proceeds of what appears to have been his insurance policy of R50 000 by cheque. She deposited the cheque into her bank account on 16 October 2000, and was told that it would take seven days to clear. At the time she was unemployed with three children and without any source of income. She approached Cash Friend in Oudtshoorn for a small loan to tide her over in the interim. She had a meeting with the appellant and explained her predicament, while at the same time providing him with proof of the amount that she had deposited at the bank.

[15] The appellant immediately enquired if she had children and suggested that she invest R30 000 in the business (R10 000 per child) because it could pay a higher return than the bank and would be just as safe. He loaned her R1000 and she told him that she would consider his proposal. Seven days later two women (Greeff and Visagie) arrived at her home and told her that they had been instructed by the appellant to fetch her. Upon her arrival at his office she was asked if she accepted his earlier proposal. He told her that she would be paid R600 per month interest.

She agreed and was driven by one of the women to the bank to draw the money. Upon her return she was presented with a written agreement by the appellant and told to sign. Its contents were not explained to her. She duly signed the agreement, handed over the cheque to the appellant and left.

[16] Although she had been given a copy of the written agreement before leaving the appellant's office she had not been informed of its contents until they were explained to her months later by a social worker who she had approached for advice. The appellant did not challenge Sampson's evidence other than to claim that all queries regarding non-payment had been referred to his late father on the latter's instructions.

[17] The third state witness was Visagie whose evidence was that she commenced employment at Cash Friend during 1998. The appellant had started working there as manager of the High Street, Oudtshoorn branch shortly prior to July 1999. She and other employees were instructed by the appellant's late father to actively seek out individuals who were due to receive retirement or retrenchment packages to take out loans from the business pending payment thereof and to thereafter invest their '*packages*' in the business. Visagie confirmed that she was one of the two women who had been instructed to fetch Sampson from her home by the appellant's late father. She corroborated Greeff's evidence in relation to Sampson in all material respects. She testified that she too had been concerned at the time, given that other clients were struggling to obtain their monthly returns from the

business. Her impression was that while there were sufficient funds to make loans to clients there was a problem in repaying investors.

[18] During cross-examination Visagie was asked if there was any reason why the appellant should not have trusted his late father. She expressed the opinion that the appellant had trusted his father completely, and that in her view his father had been in complete control of the business. She herself had not collected anyone to be taken to the business on the instructions of the appellant himself.

[19] The appellant testified that he had no training or experience when he initially commenced employment for his father in a previous business just after matriculating in 1997. The little that he subsequently learnt was from his late father and uncle. In mid-1999 he was appointed by his late father as trainee manager, then assistant manager, and within three months of his commencing employment as manager of the High Street, Oudtshoorn branch of Cash Friend.

[20] At the time when he acquired the majority member's interest at the age of 19 years he was still a minor and his late father co-signed the relevant documentation in his capacity as his guardian.

[21] The appellant's evidence was further that his function as manager was only to ensure that monies loaned by the business were repaid on due date in accordance with payment terms contained in the relevant written agreements. His late father

was responsible for ensuring that there were sufficient funds in the business to finance these loans. He was not party to how these loans were funded. All potential investors were referred to his late father at the Knysna branch on the latter's instructions. The appellant had a very basic knowledge of what he personally was required to do and the procedures to be followed, which had been explained to him by his late father and his uncle who was also the auditor of the business, Mr Gert Labuschagne (*'Labuschagne'*), who had passed away on 17 June 2001. His late father and uncle had made the decision in 2000 to fix the return on investments at 24% per annum. He had no involvement in that decision.

- [22] According to the appellant the only knowledge which he had of the microlending industry, apart from what had been conveyed to him by his late father and uncle, was that there were organisations to which the business belonged. A monthly fee had to be paid in return for which newsletters were received informing members about developments in the industry. During the course of his employment as manager he had come to hear of the industry becoming regulated. It was the appellant's testimony that, whereas previously his *modus operandi* had been to retain the identity documents and bank cards of the various debtors of the business so that he could physically draw the repayments out of their bank accounts each month, he was no longer permitted to do so. This resulted in a huge increase in bad or irrecoverable debt.

[23] It was the appellant's evidence that when he became aware that investors were not being repaid timeously, he raised this with both his late father and Labuschagne, who assured him that this was only a temporary situation which had arisen because of loans made to clients in advance of them (and others) paying over their "investments" to the CC. This made sense to the appellant and he accepted it as such. He also accepted that his father was acting in good faith when he himself made attempts to collect the outstanding monies due, even handing over some of the clients to local attorneys for formal collection. The appellant further accepted without question the explanation which his late father had provided to him about the "investment" by individuals in the business which involved purchasing a portion of his member's interest. Such was the appellant's trust in his late father that he even encouraged his own father-in-law to invest. Ultimately his father-in-law lost R200 000. This caused a rift between him and his late father to the extent that they did not have any contact for five years.

[24] The appellant testified that during 2001 his late father broke certain promises made to him. He told him that he could no longer continue in the business and he resigned. It was also his evidence that when disgruntled investors approached him demanding payment of their monthly returns he referred them to his late father in accordance with the latter's specific instruction to this effect. He had only signed the agreements with the various investors because his father had told him that he must do so, given that he was reflected as the majority member in the CC. The first occasion on which the appellant became aware of any irregularities actually

committed was when he was contacted by the investigating officer two years after he resigned, in 2003.

[25] During cross-examination the appellant denied that when Sampson had paid over R30 000 (at which stage he had been the branch manager for about two years) he had been aware that the business would be unable to meet the monthly returns or ultimately to repay her. He repeated that he had previously expressed concern to his late father and Labuschagne and had been assured that the business was only experiencing a temporary cash flow problem. He had trusted both men, having had no reason at that stage not to do so. The appellant could not recall his dealings with Sampson and thus did not dispute her evidence in this regard. He maintained however that any dealings which he had with investors were on his late father's instruction.

[26] The appellant conceded that at a stage it was decided that individuals such as Sampson would purchase a portion of his member's interest in the CC. He explained that he had been told by his father and Labuschagne that the former wanted to sell his "shares" in the CC. His evidence was that:

‘ Wat is aan u verduidelik wat gaan nou plaasvind? --- Daar is verduidelik dat die mense daai vorm moet teken en my pa het met hulle gepraat en ek weet 'n paar van hulle was reeds bestaande beleggers, my pa het met hulle gepraat en hulle het die vorms geteken en ek het dit ook geteken. ’

[27] The appellant was referred to the agreement which he had concluded with Sampson on 23 October 2000, in which she purchased 2% of his member's interest in the CC for R15 000 (1% being valued at R7 500) and simultaneously made an unsecured loan of a further R15 000 to the CC. He was asked how he could have represented to her that her money was secure in circumstances where: (1) he knew that at the very least the CC was experiencing cash flow problems; and (2) a portion of the money "invested" by Sampson was entirely unsecured. He responded that:

'Ek het die vraag gevra en dis aan my verduidelik dat hierdie paragraaf 3 'n norm in die besigheidswêreld is, as dit by leningsrekening ensovoorts kom...

Die verduideliking aan my is dis onverseker maar jy is wel 'n lid van die BK...

Soos ek gesê het ek het nie enige rede tot kommer gehad op daai stadium met die inligting wat ek tot my beskikking gehad het en die kennis nie. Ja daar was 'n kontantvloei probleem maar die verduideliking was vir my goed genoeg wat ek aanvaar het op daardie stadium en dis die vorms wat vir my gegee was dit is wat sy geteken het...Ek het my opdragte uitgevoer so goed as wat ek kon.'

[28] It was also his evidence that it was only when his father broke promises made to him that the appellant came to suspect that investors were also being misled, and resigned in 2001. The appellant also maintained that he had not been aware of any statutory requirements relating to the management of investor funds. He had never even heard of the Banks Act during his employment at Cash Friend. He had relied completely on his late father and also what Labuschagne had told him.

The trial court's judgment

- [29] The trial court found the state witnesses to be honest and reliable. It accepted that the appellant had not contradicted himself in any material respect during his testimony but found him, without providing details, to be an unimpressive witness, in particular in relation to his dealings with Sampson and one other investor, a Mr Saaimans.
- [30] The trial court found that given the common cause fact that there were problems with repaying investors by October 2000 when Sampson had paid over R30 000, and the suspicions that both Greeff and Visagie had harboured at the time, the appellant, who was more intimately involved in the business, should himself have been even more concerned. The trial court thus found that the state had proven beyond a reasonable doubt that the appellant had subjectively foreseen that when he had persuaded Sampson to invest, there was a reasonable possibility that she would not be paid the promised returns and nonetheless reconciled himself to that possibility. It convicted the appellant on the count of fraud on the basis of *dolus eventualis*.
- [31] After considering various authorities the trial court found that the wording of s 11 of the Banks Act is wide enough for a finding of negligence to result in a conviction for a contravention of the section, and that the appellant's positions as manager and majority member of the CC placed an obligation on him to educate himself on the

relevant statutory requirements, which he had negligently not done. It thus convicted the appellant on the statutory count as well.

Grounds of appeal

- [32] On appeal the appellant advanced three grounds, namely that: (1) the prosecutor had conducted himself in an improper manner during the trial; (2) the trial court erred in finding that the state had proven its case beyond a reasonable doubt; and (3) it misdirected itself in rejecting the evidence of the appellant, contending that it did so on the basis of his demeanour. Neither the first nor third grounds were pursued during argument and the focus correctly centred on the second ground. The appellant's counsel also informed us that, were the convictions to be upheld, it would no longer be contended that the trial court had misdirected itself on sentence.
- [33] The state submitted that in convicting the appellant the trial court correctly evaluated the relevant evidence and properly interpreted s 11 of the Banks Act.

Discussion

- [34] In *S v Humphreys* 2013 (2) SACR (SCA) 1 at paras [12] – [13], [15] and [17] the Supreme Court of Appeal dealt with the requirements for *dolus eventualis* as follows:

[12] ...In accordance with trite principles, the test for *dolus eventualis* is twofold:

- (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and
- (b) did he reconcile himself with that possibility (see eg *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i-j)?

Sometimes the element in (b) is described as “recklessness” as to whether or not the subjectively foreseen possibility ensues (see eg *S v Sigwahla* 1967 (4) SA 566 (A) at 570). I shall return to this alternative terminology, which sometimes gives rise to confusion.

[13] For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population. ...

[15] This brings me to the second element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. The import of this element was explained by Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) at 685A-H in the following way:

“A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility . . . The concept of

conscious (advertent) negligence (luxuria) is well known on the Continent and has in recent times often been discussed by our writers. . . .

Conscious negligence is not to be equated with dolus eventualis. The distinguishing feature of dolus eventualis is the volitional component: the agent (the perpetrator) 'consents' to the consequence foreseen as a possibility, he 'reconciles himself' to it, he 'takes it into the bargain'. . . . Our cases often speak of the agent being 'reckless' of that consequence, but in this context it means consenting, reconciling or taking into the bargain . . . and not the 'recklessness' of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises dolus eventualis and which is absent in luxuria."

[17] ...The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of dolus eventualis would not have been established.'

[35] The central issue for consideration on count 6 (the fraud count) is whether the evidence established beyond a reasonable doubt that the appellant intentionally made a misrepresentation that caused real or potential prejudice to the complainant. In respect of count 9 the question is essentially whether s 11 of the Banks Act requires criminal liability (*mens rea*) in the form of negligence (*culpa*) or intent (*dolus*) to be proven.

[36] On the one hand it can be argued that the evidence showed that the appellant was a young and naïve individual who had trusted his father completely and was easily controlled and manipulated by him. The appellant had no direct role in seeking out

investors and to the extent that he interacted with them he did so on his late father's instructions. He played no part in the structuring of the business and took no management decisions. He referred to the investor agreements as '*forms*'. His primary and simple function was to collect payments from debtors.

[37] It is correct that the appellant at a relatively youthful age (19 years old) held the majority member's interest in the CC. It is not in dispute that his late father was an unrehabilitated insolvent. The appellant as a result effectively held the member's interest on his late father's behalf and by all accounts, the late father was the driving force in the business.

[38] However the evidence of Sampson on count 6 was not seriously challenged during cross-examination. Its stands largely uncontroverted and in our view should be preferred above that of the appellant. On her version of events the appellant can hardly be described as a young and naïve individual whose primary and simple function was to collect payments from debtors. In fact her evidence paints a rather different picture of the appellant.

[39] At the time the appellant was doing business with Sampson he was 21 years of age. He had by that time been involved for more than two years with his late father in the business. He was the branch manager in Oudtshoorn and at the time had an intimate knowledge of the business. Sampson's evidence clearly demonstrates that it was indeed the appellant who persuaded her in October 2000 to withdraw her

monies from the bank and to invest it with him for a better return. On Sampson's uncontroverted evidence it was the appellant who made the sales talk. According to her, after she showed the appellant her bank deposit slip he immediately enquired about her children. He suggested she invest R10 000 per child with him. The appellant then represented that he would pay her a better rate of interest on her investment than the bank and that her monies would be as safe as in a bank. Sampson was also adamant that the appellant never explained to her the details and content of the document at the time she signed it. She only found out about the true nature and contents thereof when they were pointed out to her by a social worker months after the event.

[40] Both Greeff and Visagie testified about the disgruntled investors who, before Sampson invested her monies, regularly came to the office to complain about their monthly interest payments that they did not receive. In fact Greeff in particular expressed the view that she was concerned about Sampson investing her monies in the CC as a result of the many complaints they received from other investors. She also testified about the discussion between the appellant and his late father concerning the investment of Mr Plaatjies (*'Plaatjies'*).

[41] On the appellant's own version, before receiving the monies from Sampson, he was aware of a number of complaints by disgruntled "investors", including Plaatjies. The complaint of these "investors" was in fact about their promised monthly returns on their investments that were not paid regularly or at all by the CC. During cross-

examination the appellant conceded that at the time he recruited Sampson to invest her monies he knew there were insufficient monies in the business to cover its monthly obligations and that the more deposits people made the more obligations arose for the CC.

[42] According to the appellant he discussed these problems with his father and was given the assurance that it was a short-term cash-flow problem and that it is part of business. At some stage he had also a discussion with Labuschagne, his late uncle and accountant of the CC who explained to him that all the capital funds had been invested and it would just be a matter of time before the CC would be liquid again. On the available evidence the timeline as to when these discussions took place is unclear. We will accept in favour of the appellant that they must have taken place when the investors started to complain about the non-payment of their promised monthly returns. The appellant in cross-examination conceded that he knew what an unsecured loan was. Furthermore, he conceded that the unsecured loans made by the investors to the CC were not as safe as a deposit in a normal bank.

[43] While some of the evidence indicates that the appellant's late father was a dominant figure in the business and the appellant may have acted on some of his instructions, in the case of Sampson, the undisputed evidence shows that the appellant was the first person who interacted with her regarding a loan. He thereafter solely convinced her to invest R30 000 with him. The crucial question now is whether the appellant intentionally expressed a distortion of the truth at the

time he entered into the agreement with Sampson; knowing full well that there was never an intention to sell any membership interest to the complainant, properly invest her monies, repay any loans that she would make to the CC and that she would not benefit from any profit-sharing, which resulted in her suffering a financial loss.

[44] In our view, on the undisputed and accepted facts the question must be answered in the affirmative for the following reasons. The evidence shows beyond a reasonable doubt that at the time Sampson invested her monies and signed the agreement “Memorandum Van Koorooreenkoms (*sic*)” she relied entirely on the information the appellant provided to her. The appellant by then had over two years’ experience in the business and had intimate knowledge of the CC workings to the extent that he at one stage had a discussion with his late father how to distribute the monies of Plaatjies. He operated in Oudtshoorn as the branch manager and was in charge of the daily running of the business. His father was doing business from Knysna. On more than one occasion, before the event with Sampson, investors came to the appellant to complain bitterly about their guaranteed monthly returns they did not receive. He knew about the investors’ frustration and that they wanted their monies. In the appellant’s favour it is accepted that he had a discussion with his late father and uncle, but whatever information they gave him, he was at least nonetheless aware that there was a serious cashflow problem in the business to the extent that from June 2000 investors were not being paid their guaranteed monthly returns and profit-sharing advances or when paid, it was done erratically.

[45] The appellant was also fully aware that the member's interest in the CC rarely, if ever, was actually transferred to the investors as promised. He was further fully acquainted with the fact that an unsecured loan to the CC could hardly be regarded as proper security in the same manner as a deposit in a normal bank, having conceded as much.

[46] Moreover, the appellant conceded in cross-examination that at the time he recruited Sampson to invest her monies he knew full well there was a serious liquidity problem in the CC to cover its monthly obligations. In fact the appellant admitted that the more deposits received the more obligations there were for the CC. Viewed cumulatively, the inescapable conclusion is that the appellant subjectively foresaw the possibility that Sampson would not be paid the monthly guaranteed returns and advances on the profit-sharing as stipulated in the contract but nevertheless reconciled himself to that possibility. He deliberately misrepresented and distorted the true facts and proceeded to conclude the contract in his own name with the resultant prejudice that was actually caused to Sampson.

[47] The appellant's testimony leads us to form the firm view that he continuously downplayed and minimized his moral and legal blameworthiness and desperately tried to shift all blame to his late father. However on the proven facts, it cannot be reasonably possibly true that the appellant was entirely ignorant of his late father's modus operandi and slavishly followed instructions when he contracted with Sampson. The fact that the appellant later resigned from the CC is not necessarily

only indicative of his naïvety. It is more probably a case of realising that he could be caught out about the true state of affairs in the CC and its fraudulent activities.

- [48] The remarks of Lord Halsbury in *Aaron's Reefs Ltd v Twiss* 1896 AC 273 (HL) which are quoted with approval in *S v Ressel* 1968 (4) SA 224 (A) and in *S v Mbokazi* 1998(1) SACR 438 NPD at 445 g-h seem to be apposite in the present case:

'It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed – by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue.'

- [49] Turning now to the conviction on count 9. S 11 of the Banks Act provides that:

11. Registration a pre-requisite for conducting business of bank.---(1) Subject to the provisions of section 18A, no person shall conduct the business of a bank unless such person is a public company and is registered as a bank in terms of this Act.

(2) Any person who contravenes a provision of subsection (1) shall be guilty of an offence.'

[s 18A deals with branches of foreign institutions and is not relevant for present purposes].

[50] S 1 of the Banks Act contains a comprehensive definition of the '*business of a bank*'. For present purposes, it includes the acceptance of deposits from the general public (including persons in the employ of the person so accepting deposits) as a regular feature of the business in question; the soliciting of or advertising for deposits; and the utilisation of money accepted by way of deposit for the granting of loans to other persons.

[51] There can be little doubt that the business of the CC fell squarely into this definition. The question which arises is whether the appellant himself was guilty of contravening s 11. The trial court found that he had been negligent and that negligence suffices for purposes of a contravention.

[52] In *S v De Blom* 1977 (3) SA 513 (A) the court considered what the state was required to prove on a count of contravening s 9(5)(a) of the Currency and Exchanges Act 9 of 1933 and held at 532E-H that:

'In 'n saak soos die onderhawige moet aanvaar word dat wanneer die Staat getuienis voorgelê het dat die verbode handeling begaan is, 'n afleiding gedoen kan word, na gelang van omstandighede, dat die beskuldigde willens en wetens (d.w.s. ook met onregmatigheidsbewussyn) die handeling begaan het. Indien die beskuldigde op 'n verweer wil steun, soos in die onderhawige geval, dat sy nie geweet het dat daar handeling onregmatig was nie, kan haar verweer slaag indien

van die getuienis as geheel afgelei kan word dat daar 'n redelike moontlikheid bestaan dat sy nie geweet het dat haar handeling onregmatig was nie; en verder, wanneer slegs culpa en nie dolus alleen as mens rea vereis word nie, daar ook 'n redelike moontlikheid bestaan dat sy nie juridies geblameer kan word nie, d.w.s. dat, wat al die omstandighede betref, dit redelik moontlik is dat sy met die nodige omsigtigheid te werk gegaan het om haar op hoogte te stel van wat van haar verwag word in verband met die vraag of toestemming om geld uit te neem nodig is of nie. Sou daar op die getuienis as geheel, d.w.s. insluitende die getuienis dat die handeling gepleeg is, 'n redelike twyfel bestaan of daar wel mens rea, in die sin soos hierbo beskryf, by die beskuldigde bestaan het, sou die Staat sy saak nie sonder redelike twyfel bewys het nie.'

[emphasis supplied]

- [53] On appeal before us the state argued that in *De Blom* the court did not specify which form of culpability was required, i.e. intention or negligence, and submitted therefore that either can suffice.
- [54] However in *De Blom* the court was dealing in general with the issue of culpability in relation to statutory offences when it made the findings which we have quoted. In essence what it found is that, even in instances where negligence suffices for a conviction on a statutory contravention, the accused can avoid liability if there is a reasonable possibility that he acted with the necessary circumspection in order to inform himself of what was required of him. It made no specific finding that, in all instances of statutory contraventions, negligence suffices, nor of course did it make any such finding in respect of a contravention of s 11 of the Banks Act.

[55] Presently in our law there appears to be no general rule as to which form of criminal liability or fault (*mens rea*) be it negligence (*culpa*) or intention (*dolus*) is required to be proven in statutory offences. See Burchell, *The South African Law Criminal and Procedure* Vol 3 Statutory offences at RS 9, 1997, chapter 2 at p5; *Criminal Law* CR Snyman Fourth Edition p244 para [5]. There may also be instances where a statute explicitly excludes culpability as a requirement, but in the present matter that issue does not arise and is not necessary to consider.

[56] It is well accepted in our law that where a statute is silent as to what form of *mens rea* is required in respect of a particular offence, the answer is to be sought in the interpretation of the relevant statute itself. In *S v Arenstein* 1964 (1) SA 361 (A) at 366 the Appeal Court held the following:

‘There is no general rule in regard to the degree of mens rea required for the violation of a statutory prohibition or injunction, and it is clear that

“negligence may constitute sufficient proof of mens rea even in cases where negligence is not the gist of the offence charged, if there was a duty on the part of the person charged to be circumspect...” – per CENTLIVRES, J.A., in R. v. H., supra, at p. 130. The degree of blameworthiness required for a culpable violation of a statutory prohibition or injunction must in the first place be sought in the language used by the lawgiver. The requirement of intentional wrongdoing is usually indicated by such words as “willfully”, “intentionally” or “maliciously”, and in the absence of any words expressly indicating the particular mental state required, the degree of mens rea must depend on that foresight or care which the statute in the circumstances demands.” ’

[57] This approach was also followed in *Amalgamated Beverage Industries Natal v City Council of Durban* 1994 (1) SACR 373 (A) at 378 h. The correct approach in

matters of this nature thus appears to be, having regard to the decided case law and legal commentators, that where a high degree of care or circumspection is required, then the legislation clearly contemplates *culpa* as the *mens rea* of the offence. The less onerous the duty to take care and exercise circumspection, the less likely it is that negligence was intended as the form of *mens rea*. In this regard see Burchell in *The South African Law Criminal and Procedure – Vol 3 – Statutory Offences* at RS 9, 1997 ch2 – p35.

[58] If one has regard to the words used in section 11, and its setting in the Banks Act itself, there is no clear indication as to the form of *mens rea* required in respect of this offence. Upon closer scrutiny, however, there is in our view little doubt that the legislature contemplated negligence (*culpa*) rather than intent (which would require proof of subjective knowledge of the law), to be proven as the *mens rea* requirement in respect of the offence in s 11.

[59] The very regulatory character of the statute, and the clear overriding concern of the protection of the interests of the public, necessarily demand a high level of circumspection and care from those who enter the banking industry. It could not have been the intention of the legislature that practitioners could escape liability purely on the grounds of lack of knowledge of the law, even where such lack of knowledge was unreasonable. The statute in our view must be read in the light of the complexity of the field of banking, and the potential of harm to the public should practitioners act without a high degree of care and skill.

[60] A further clear indication that the legislature contemplated negligence as the *mens rea* of the offences in the Banks Act is to be found in respect of the contravention of s 38 where s 40 provides as follows:

'40. Absence of wrongful intent

If a bank or a controlling company or any director, officer, employee or agent of a bank or controlling company in good faith and on the strength of information reasonably obtained acts or fails to act and thereby unknowingly contravenes the provisions of section 38, such act or failure to act shall not constitute an offence.'

[61] The fact that the legislature has deemed it fit to indicate with regard to a specific offence (s 38) that the form of *mens rea* required to be proven, is negligence, suggests that it contemplated with regard to the other offences, that either strict liability applies i.e. no requirement of *mens rea*, or *mens rea* in the form of *culpa* must be proven. In the light of what we have stated above, it is our view that negligence is the applicable fault standard.

[62] Returning to the facts of this case. The conduct of the appellant in the present instance clearly falls short of what a reasonable person in his circumstances would have foreseen or done. He held a position of authority in a particular field of activity, which any reasonable person would realise, in light of the complexity of the industry and the inherent risk involved, was subject to many laws and regulations. His failure to acquaint himself with such laws in the circumstances was and is negligent.

[63] In contending that *mens rea* in the form of *dolus* is required, the appellant's counsel relied on *S v Clifford*, an unreported judgment of Kroon J in the Eastern Cape Division (case no CC 62/04). The court in that matter was also dealing with the Banks Act, and at para [1054] held that:

'Adv Stander het die skuldigbevinding van beskuldigdes 1, 2 en 6 aan 'n oortreding van die Bankwet bepleit. Aanvaar kan word dat elk van hulle daarvan bewus was dat Usapho nie 'n publieke maatskappye was nie, nóg dat hy as 'n bank geregistreer is. Die werklike vraag wat beantwoord moet word is of hulle van die bepalings van die Bankwet bewus was, alternatiewelik of, by onstentenis van bewys daarvan, die vereiste mens rea tog hulle toegereken moet word.'

[64] We are not convinced that on a proper reading of the *Clifford* case it can be regarded as conclusive authority for the proposition that offences under the Banks Act require proof of fault in the form of intent (subjective foresight). It appears that Kroon J tested the conduct of the accused against the fault standard of *culpa*. The court in fact appeared to find that the accused, while mistaken as to the application of the law, acted reasonably in the circumstances given that its representatives acted upon advice from its attorney and a manager of a major bank retailer (ABSA) that its business did not fall foul of the Banks Act and was legitimate.

Conclusion

[65] It is for these reasons that we do not intend interfering with the appellant's convictions. Furthermore, in any event in respect of sentence, we cannot find any misdirection on the part of the trial court, nor are the sentences imposed shocking, startling or disturbingly inappropriate.

[66] In the result the following order is made:

- '1. *The appeal is dismissed.***
- 2. *The appellant's convictions and sentences are confirmed.'***

A LE GRANGE

J I CLOETE