REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSKEI DIVISION)

CASE NO: 62/2005

In the matter between:
THE STATE

and

NTSIKANE Z. MTSHABE
Date Heard: **5 OCTOBER 2006 – 6 OCTOBER 2006**

Date Delivered: **4 DECEMBER 2006**
Summary: ***Attorney – conviction for fraud – complete absence of remorse - imprisonment***

JUDGMENT

CHETTY, J

[1] The profession of an attorney is an honourable one and the court the zealous guardian of its integrity. Section 15 of the Attorneys Act, 53 of 1979 (the Act) thus provides in ss 1 (a) that ***"unless cause to the contrary to its satisfaction is shown the court shall on application in accordance with this Act admit and enrol any person as an attorney if such person, in the discretion of the court is a fit and proper person to be so admitted and enrolled (ss1 (a))"***. Mr *Ntsikane Z. Mtshabe* sought his admission and enrolment as an attorney during 1995 and, satisfied that he was a fit and proper person to be admitted to the profession, that all the other requirements of the Act had been fulfilled, this court duly admitted

and enrolled him to the ranks of his chosen profession. For the past eleven years he has been engaged in the practice of law as an attorney. The personal attributes and moral standards which the title demand is, *inter alia* an inflexible regard for the truth, a high sense of honour and incorruptible integrity. The evidence adduced sadly established the contrary. The accused now stands before this court as a convicted felon awaiting the imposition of sentence. The crime of which he has been convicted is fraud, which from its early recognition in the Roman law and subsequent evolution, has been characterised by deception.

[2] In my earlier judgment, I referred to the essential elements which constitute the crime of fraud and concluded that the evidence adduced established the guilt of the accused beyond a reasonable doubt. I do not intend to traverse the same ground save to reiterate that I found the statements of account which constituted the gravamen of the charges, were drafted by the accused, were clearly false and amounted to a misrepresentation which caused prejudice to the fiscus and that the accused moreover had the requisite intent to defraud.

[3] In determining an appropriate sentence, it is perhaps apposite to commence by restating the guidelines to sentencing which have consistently been applied and followed in our courts. These

sentencing principles were succinctly articulated by *Holmes*, J.A. in **S v Rabie** 1975 (4) SA 855 (A) at 862G as:-

> "***Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.***"

Fairness and justice demands that when assessing an appropriate sentence a court should avoid insensitivity to one side or an exaggerated sense of the wrong done to society. However whilst fairness includes the element of mercy it also does not exclude a robust approach to sentencing.

[4] The crime is, as I have said one of fraud. It was committed over a period of several months with the connivance and active participation of an equally corrupt fellow attorney, the now deceased Mr *Mnyamana*. The scheme they devised was simple and would have remained undetected were it not for a chance remark at the golf club and the promulgation of a proclamation authorising the SIU to investigate various payments made to legal practitioners briefed to perform legal services on behalf of the *Mthatha* state attorney. The total amount paid to the accused and which formed the subject matter of the charges against him is R458 406.75

constituted by fifteen statements of account of differing value.

[5] The ultimate authority responsible for payment of the accused's account was the registrar of this court who issued the payment vouchers. Each statement of account was accompanied by a certificate signed by Mr *Mnyamana* which verified that the accused in fact performed the services as reflected in the individual statements of account. Further verification was provided by a signature of the head of the *Mthatha* state attorney's office. Upon receipt of the statements of account, the responsible official in the registrar's office would have had no reason to doubt the veracity of averments the statements of account proclaimed.

[6] In actual fact the statements of account were a perversion of the truth. They were to the knowledge of the accused false, duplicated and grossly exorbitant. Payment of the first statement of account fuelled the accused's unslakeable desire for it led to the submission of a further 14 statements of account over a three month period during which he had ample time to reflect on his nefarious conduct. The accused however carried on regardless, his modus operandi can thus properly be categorised as revealing a protracted and contemptuous indifference to integrity.

[7] The accused is currently forty seven years of age, married and

the father of four children. The eldest child manages the accused's guest house in Mthatha and operates a tow truck business. The second son is a fourth year medical student of the University of the Witwatersrand whilst the youngest children are at school in Grahamstown and Mthatha respectively. In addition to practicing as an attorney the accused is a part time lecturer in commercial law at the Walter Sisulu University in Mthatha and a property consultant. He is also a deacon of the Anglican Church.

[8] There were a number of witnesses who testified in mitigation of sentence on behalf of the accused. Dr *Beukman*, a forensic criminologist compiled a report which formed the basis of her evidence and provided the foundation for her ultimate conclusion that the most appropriate sentence would be a non custodial one. She commenced her evidence with her curriculum vitae and emphasized that the report's primary focus was on the accused as a person. The interviews she conducted were with the accused, his family and a telephonic interview with the head of the Walter Sisulu Law School, Adv *Matyumza*. These interviews together with her insight into the report by a clinical psychologist, Dr *Greeff,* led her to opine that the most appropriate sentence would be a non custodial one. Dr *Beukman's* evidence is unfortunately based on a false premise. Her report and evidence is permeated by references to what is described as a mistake on the part of the accused.

Throughout her report and that of Dr *Greeff*, where similar nomenclature is used, is the repeated denial that the accused drafted the various statements of account. The mistake that is proffered is his alleged negligence in failing to check these statements. In my judgment I dealt extensively with this evidence and rejected it as palpably false. I *inter alia* found that the accused drafted each statement of account with the intention to defraud.

[9] These findings are significantly absent from her evidence and report despite her protestations that she had read the judgment. When counsel for the state challenged her evidence by referring to the aggravating features of the crime contained in the judgment, she, not surprisingly, given the focus of her report, stoically defended her conclusion. That subjectivity, given her status as an expert, is to be deprecated. Dr *Greeff's* report is similar in vein. Whilst he refrained from being prescriptive as regards the form of sentence the general import of his report extols the virtues of the accused as a person. Advocate *Matyumza* did likewise and whilst I accept that the accused is a committed family man and has all the attributes which his witnesses adorned him with, the evidence adduced by the state during the trial showed the accused to be a cunning individual who, with the connivance of an equally corrupt colleague, managed to fleece the fiscus of several hundred thousand rand. In doing so he was motivated solely by greed.

[10] By his own admission the accused ran not only a successful legal practice but moreover several business ventures hereby enabling him to enjoy the trappings of wealth. His children were fortunate to enjoy the best education and have progressed well. His contribution to his own community and society at large was adverted to by several witnesses. A synopsis of that evidence is to the following effect. He offered his services to the local university at negligible numeration and became an indispensable member of the law faculty. Its head, Adv *Matyumza* heaped praise on the accused describing him as a highly respected and invaluable member of staff whose integrity was above approach. Similar character traits were ascribed to the accused by Reverend *Majaja,* an eminent clergyman. Both witnesses commented on the accused's fall from grace and the devastating consequences the conviction presages. Those consequences could easily have been avoided were it not for the accused's avaricious appetite. I have in the course of this judgment referred to the corrupt relationship between the accused and the late Mr *Mnyamana*. The precise ambit of that relationship has not been divulged but by its very nature would necessarily have involved a *quid pro quo*. Who the initiator was is of no consequence. The accused was a willing participant and his conduct after the full extent of his fraudulent scheme had been unearthed is inconsistent with his portrayal as a man of integrity.

[11] The forensic criminologist Dr *Beukman* made an impassioned plea that a custodial sentence should not be imposed on the accused. Objectivity was, as alluded to hereinbefore, not her forte and as her evidence unfolded, so did her subjectivity become more pronounced. She stated quite categorically that no person who matched the accused's profile should be committed to goal for a crime of fraud. One must assume that prior to her testifying she had read the judgment or at the very least the import thereof had been disclosed to her. If so, the extent of the accused's fraudulent conduct would have been readily apparent to her. All that one can say is that her commitment to the accused is admirable but her evidence of little intrinsic value. Her report and evidence emphasize the personal circumstances of the accused and, as was apparent from her cross-examination, purposefully done because the witness considered it her function to highlight the mitigating circumstances. Her conclusions amount to an opinion which is superfluous and in effect a usurpation of the function of the court.

[12] Reverend *Majaja*, as I have mentioned, faired no better. He too seemed oblivious to the true extent of the accused's fraudulent machinations and whilst I accept his evidence that the accused is a devout congregant and a philanthropist he nonetheless did not later demur from seeking to enrich himself in ways inconsistent with his

public image. As corroboration for this public image the accused, as adumbrated hereinbefore, called Adv *Matyumza* as a character witness. I must confess to a sense of deep disquiet having listened to the evidence of this witness who is after all the Head of the School of law at the local university. The true import of the accused's conviction seems to have escaped the witness entirely for he stated quite unequivocally that notwithstanding the accused's conviction for fraud he would continue to utilise the accused's services as a lecturer. This is an astounding stance. The conviction will inevitably lead to the accused's disbarment from the profession and to permit him the liberty of teaching law to impressionable minds quite irresponsible.

[13] Viewed holistically, the evidence tendered in mitigation is merely a plea for clemency that the accused be spared the ignominy of a custodial sentence given his privileged status within society.

[14] I have been urged to consider the imposition of a non-custodial sentence in the form of either correctional supervision, a suspended sentence or the imposition of a fine. Correctional supervision as a sentencing option is governed by s 276 A of the **Criminal Procedure Act 51 of 1977**. In terms of ss 1 the maximum permissible period is three years whilst ss 2 prescribes a maximum

period of 5 years. The sentencing option introduced by s 276 A is an innovative one with particular advantages to both the offender and the community at large. A suspended sentence or the imposition of a fine is likewise viable sentencing options. All these ensure that an offender is not subjected to the known disadvantages of imprisonment, particularly where, as in the present case, one is dealing with a first offender. I have given anxious consideration to the question whether either is an appropriate sentence but am, in all circumstances, ineluctably driven to conclude that it is not.

[15] Throughout this trial the accused has vehemently protested his innocence. The culprit and progenitor of the situation he finds himself in is his erstwhile candidate attorney, Ms *Majokweni*. Having initially extolled her virtues, by the time his evidence was concluded, Ms *Majokweni* had been reduced to an incompetent, disreputable individual.

[16] The accused's persistent disavowal of draftsmanship of the statements of account coupled to his apportioning the blame therefor on the hapless Ms *Majokweni* is a clear indication of a complete absence of remorse. This is amply demonstrated by his refusal to concede that the statements of account were inflated and duplicated even when confronted with indisputable proof to that

effect by Ms *Pretorius*. His persistence in seeking taxation of the statements of account with the full knowledge that (upon his version) Ms *Majokweni* had improperly drafted them is perplexing to say the least. Even more disturbing is his evidence that had the taxing master allowed the duplicated fees he would readily have accepted it. This demonstrates a peculiar lack of insight into the enormity of his conduct and reflects adversely on his integrity.

[17] The approach of our courts to cases of fraud committed in circumstances such as the present was articulated by *Marais*, J.A. in **S v Sadler** (2000) 2 ALL SA 121 at 125d-h where the learned judge of appeal stated:-

> "***[11] . . . So called "white-collar crime" has, I regret to have to say, often been visited in South African courts with penalties which are calculated to make the game seem worth the candle. Justifications often advanced for such inadequate penalties are the classification of "white-collar" crime as non-violent crime and its perpetrators (where they are first offenders) as not truly being "criminals" or "prison material" by reason of their often ostensibly respectable histories and backgrounds. Empty generalisations of that kind are of no help in assessing appropriate sentences for "white-collar" crime. Their premise is that prison is only a place for those who commit crimes of violence and that***

it is not a place for people from "respectable" backgrounds even if their dishonesty has caused substantial loss, was resorted to for no other reason than self-enrichment, and entailed gross breaches of trust.

[12] These are heresies. Nothing will be gained by lending credence to them. Quite the contrary. The impression that crime of that kind is not regarded by the courts as seriously beyond the pale and will probably not be visited with rigorous punishment will be fostered and more will be tempted to indulge in it.
[13] It is unnecessary to repeat yet again what this Court has had to say in the past about crimes like corruption, forgery and uttering, and fraud. It is sufficient to say that they are serious crimes the corrosive impact of which upon society is too obvious to require elaboration . . ."

[18] The aggravating feature in this case is the fact that the accused as an attorney should have known better. In his day to day professional life he would perforce not only have admonished clients and witnesses to be truthful but moreover have realised that integrity was the core value of his profession. On his own admission he ran a thriving practice, money virtually flowing into his office. Therefore the fraudulent scheme hatched by him did not arise out of necessity but was actuated solely by greed. In these circumstances the only appropriate sentence must be a custodial one and the only remaining question, its term.

[19] The accused is, as I have said, a first offender. Through his conduct he has brought dishonour not only to himself and his family but to his profession as well. He has expressed no contrition for his conduct but has maintained an obstinate façade of innocence in the

face of overwhelming evidence to the contrary. The amount involved was substantial and although a portion thereof was repaid, this certainly does not enure to the benefit of the accused.

[20] The accused is sentenced to imprisonment for eight years.

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D. CHETTY
JUDGE OF THE HIGH COURT

Obo the State: **Adv Cilliers**

Obo the Defence: **Adv Quinn / Adv Zilwa**