IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: **AR525/11**

In the matter between:

SATHASIVAN NAIDOO	**FIRST APPLICANT**
PRANITHA NAIDOO	**SECOND APPLICANT**

and

K. DE FREITAS	**FIRST RESPONDENT**
DIRECTOR OF PUBLIC PROSECUTIONS, KZN	**SECOND RESPONDENT**
SUNIL SINGH	**THIRD RESPONDENT**

JUDGMENT

Delivered on: 9/10/12

KRUGER J:

[1] The Appellants, by way of Notice of Motion, supported by affidavits, seek an order reviewing and setting aside the convictions and sentences imposed by the Commercial Crime Court in Durban.

[2] The Applicants were, on the 15th March 2010, convicted of 182 counts of fraud; 23 counts of theft; a contravention of the Banks Act 94 of 1990; and a contravention of the Financial Advisory and Intermediary Act 37 of 2002. The Applicants were each sentenced to an effective term of twenty two years imprisonment on the 17th December 2010. The First Respondent presided over the trial.

[3] The Appellants were arrested on the 2nd August 2005 on charges of fraud. They engaged the services of the Third Respondent to

represent them. After many adjournments, the Applicants, on the 15th March 2010, pleaded guilty to all counts. A written statement, in terms of Section 112(2) of the Criminal Procedure Act, 51 of 1977, was read into the record and handed in as an exhibit in amplification of their plea. The Applicants thereafter confirmed the statement and the accuracy thereof and further confirmed their signatures on the documents. The First Respondent was satisfied that the Applicants had admitted all the elements of the offences and duly convicted them.

[4] After obtaining pre-sentencing reports from the Department of Social Development as well as a report in terms of Section 276 A(1)(a) of the Criminal Procedure Act – re: Consideration of Correctional Supervision as a sentence – and after numerous adjournments, the Applicants were duly sentenced as aforesaid.

[5] The application for review is based on two grounds:

a) That the Applicants "pleaded guilty because of misrepresentations made to us by our attorney at the time (the Third Respondent) that he had concluded a plea agreement with the State on our behalf to the effect that if we pleaded guilty, we would not receive a custodial sentence".

b) That "during the sentence proceedings, evidence was introduced which clearly indicated that we did not admit guilt and the First Respondent was accordingly under an obligation in terms of Section 113 of the Criminal Procedure Act to change the plea to one of "not guilty"."

[6] I propose to consider and deal with the second ground first. Section 113(1) of the Criminal Procedure Act 51 of 1977 (as amended) provides:

> "If the court at any stage of the proceedings under section 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not gu8ilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accu7sed up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.
>
> [Sub-s(1) amended by s 5 of Act 86 of 1996]"

[7] In terms of the aforesaid section a plea of "guilty" can be changed to one of "not guilty" at any time after a conviction but before sentence is passed. In **S v Nixon 2000(2) SACR 79 (WLD) at 87 (i)** Wunsh J observed as follows:

> "Corrective action can be taken at any time before sentence is passed, that is even after a conviction (**Attorney-General, Transvaal v Botha 1993(2) SACR 587(A) at 591 f**).
>
> At the trial the Appellant did not seek to withdraw any admission made by him or change his plea. However, the obligation to substitute a plea of guilty in terms of Section 113(1) of the Act exists even without any action on the part of an accused, as long as the Court is in doubt whether the accused is guilty. This applies also to the retraction of an admission".

[8] In **Mokonoto and Others v Reynolds NO and Another 2009(1) SACR 311 (TPD)**, Southwood J noted that the amendment

to Section 113 resulted in the requirement, that a Court should be "satisfied" of certain circumstances before recording a plea of not guilty, is no longer applicable. "The threshold for the Section to come into operation is now less than a reasonable doubt. It merely requires an allegation". (at 320 g). Accordingly, if there is an "allegation that the accused does not admit an allegation in the charge sheet or an allegation that the accused has incorrectly admitted any such allegation or an allegation that the accused has a valid defence to the charge", then the provisions of Section 113(1) are to be invoked and the plea amended to one of "not guilty". (at 320 e).

[9] In *casu*, both the Social Worker as well as the Correctional Services official testified that the Applicants did not intend to defraud or deceive the complainants but that the loss was due to the collapse of the Johannesburg Stock Exchange following the events of 11 September 2001, commonly referred to as 9/11.

[10] The First Respondent was alive to this allegation and questioned both the Social Worker and the Correctional Services official and sought clarification on this aspect. The relevant portions of the record are as follows:

> "COURT But is that true? Did our stock market ever collapse? ---911.
> Our stock market never collapsed. --- Collapse of the stock market 911 and they even stated – Mr Naidoo stated to me as well that they had no intention of robbing or stealing any individual and in their minds they do not think they have done anything wrong, but it was this situation with the stock marked that created the problem or the situation that they face today. Mr Naidoo also stated that they want to take responsible – they feel partly responsible because they can … [inaudible] they solicited the finances from the complainants.

> Have you had sight of their plea? --- Yes, I have had sight of their plea. Your Workship, and … [intervention]
>
> How does it compare to your report? --- Contrary to the version that they had given me and I have made that clear as well in my report."
>
> COURT I am just glancing at page 4, paragraph 2 of accused 2's report that you drafted. It says that "there are … [inaudible] the accused set out with malicious crafty [?] intention to deprive these investors of their finances and yet stated to the correctional officer that he did not rob or steal from any of these individuals as he made them aware of the risk clause." What on earth is that all about? --- I did question him on that aspect and I stated to him that, you know, for example, when he solicited the finances from these individuals did he make it clear to them that he was going to invest the money on the stock market and what are the risks involved. He stated to me that yes, they did sign a risk clause, but the SAP investigation unit had taken these documents and they did not return it to him. That is why he couldn't present it to me."

[11] The aforesaid extracts clearly show that the First Respondent was aware that the Applicants' allegations were at variance to their plea. It has been held that if evidence is given by or on behalf of an accused for purposes of sentencing which is in conflict with an admission made during the Section 112 proceedings, there is an implied withdrawal of the admission concerned – **S v Nixon (supra) at 87 (j).**

[12] Having ascertained that the Applicants were now denying that they had the necessary intention, the First Respondent did nothing further. He did not seek clarification from the Applicants or their counsel (Mr Mossop) nor did he, *mero muto*, amend or alter the plea to one of "not guilty". Despite the allegations contained in the

affidavits and annexures to the contrary, the record does not reflect that this issue was canvassed with the Applicants or their legal representatives.

[13] It also appears from the record, during the judgment on sentence, that the First Applicant attempted to interrupt the proceedings, possibly to explain the lack of intent as outlined above. The First Respondent however, refused to allow the First Applicant the opportunity to address the Court at that stage of the proceedings.

[14] Given the "lighter test" in terms of the amended Section 113(1), I am of the opinion that the First Respondent ought to have altered the Applicants' plea to that of "not guilty" and requested the State to lead the necessary evidence.

[15] Having reached this conclusion, I do not find it necessary to consider the first ground upon which this application has been based.

[16] In the result, I grant the following order:

1. The Applicants' convictions and sentences are set aside;
2. The matter is referred back to the Commercial Crime Court to record a plea of not guilty in respect of each Applicant and to proceed with the trial.

I agree

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VAN ZYL J

DATE OF CAV: 3 OCTOBER 2012

DATE OF JUDGMENT: 9 OCTOBER 2012

FOR THE APPELLANTS: M PITMAN
INSTRUCTED BY: ASHIKA MAHARAJ & ASSOCIATES

FOR THE RESPONDENTS: A LUDICK AND A TRUTER