THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 681/2013

Reportable

In the matter between:

THE STATE **Appellant**

and

JOSEPH ARTHUR WALTER BROWN **Respondent**

Neutral Citation: *S v Brown* (681/2013) [2014] ZASCA 217 (1 December 2014)

Coram: Navsa ADP, Brand, Ponnan, Theron and Zondi JJA

Heard: 5 November 2014

Delivered: 1 December 2014

Summary: **Appropriate sentence in respect of two counts of fraud – on first count, misrepresentations by asset manager to investor that assets were being managed in accordance with mandate – assets in excess of R200 million – on second count**

misrepresentation to shareholders of an entity that administered pension funds and the underlying assets that purchase price would be paid from purchaser's own cash resources – in truth balance of purchase price amounting to tens of millions of rands paid for with funds under administration by seller – non-custodial sentence imposed by high court on basis that plea of guilty on the two counts was limited and was based on *dolus eventualis* and potential rather than actual prejudice – high court reasoned that minimum sentence provisions inapplicable – erred in that regard – discussion of acceptance of plea of guilty *in medias res* – appeal by State upheld – sentences set aside and substituted by a sentence of 15 years' imprisonment – white-collar crimes in question deserving of harsher sentence.

ORDER

On appeal from: The Western Cape High Court, Cape Town (Veldhuizen J sitting as court of first instance).

The following order is made:

1. The appeal in respect of sentence is upheld.
2. The sentences imposed by the court below are set aside and substituted as follows:
   'i. On count 2 the accused is sentenced to 15 years' imprisonment.
   ii. On count 6 the accused is sentenced to 15 years' imprisonment.
   iii. The sentences are ordered to run concurrently.'

JUDGMENT

Navsa ADP (Brand, Ponnan, Theron & Zondi concurring):

[1] This is an appeal by the State, in terms of s 316B of the Criminal Procedure Act 51 of 1977 (the Act), against sentences imposed by the Western Cape High Court (Veldhuizen J) on the respondent, Mr Joseph Arthur Walter Brown (Brown), pursuant to a conviction on two counts of fraud.[1] The trial in the high court, for reasons that will become apparent, attracted a great deal of public and media attention.

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[1] Sections 316B(1) & (2) provide:
'(1) Subject to subsection (2), the attorney-general may appeal to the Appellate Division against a sentence imposed upon an accused in a criminal case in a superior court.
(2) The provisions of section 316 in respect of an application or appeal referred to in that section by an accused, shall apply *mutatis mutandis* with reference to a case in which the attorney-general appeals in terms of subsection (1) of this section.'

The issues

[2] Brown initially pleaded not guilty to a host of charges preferred against him. After several witnesses had testified on behalf of the State he changed his plea to one of guilty on the two counts referred to above and in due course was convicted and sentenced on each count to a fine of R75 000 or a suspended sentence of 18 months' imprisonment. The dispute in this case has its origins in the acceptance by the State, with the approval of the court, of a plea of guilty, *in medias res*. The resolution of the dispute around the appropriate sentence involves, *inter alia*, a consideration of the precise scope of the plea of guilty and the extent to which evidence adduced up until that stage and thereafter during the sentencing phase could be taken into account in the determination of an appropriate sentence. An unsettling aspect I intend devoting a discrete part of the judgement to, is the number and nature of interventions by the court below in favour of Brown. First, however, it is necessary to set out the background in the paragraphs that follow.

The indictment

[3] Brown had been indicted in the Western Cape High Court on four counts of fraud, one count of corruption based on an alleged contravention of s 1(1)(*a*) read with s 3 of the Corruption Act 94 of 1992, a further count of corruption based on s 3(*b*)(ii)(*aa*) and/or 3(*b*)(ii)(*bb*) and/or 3(*b*)(ii)(*cc*) and/or 3(*b*)(iv) read with sections 1, 2, 24, 25, 26(1)(*a*) of the Prevention and Combating of Corrupt Activities Act 12 of 2004, and one count of money laundering - based on an alleged contravention of s 4(*a*) and/or (*b*) read with sections 1 and 4(i), 4(ii) and 8 of the Prevention of Organised Crime Act 121 of 1998 and two counts of theft. There were a number of alternative counts which, for present purposes are irrelevant.

[4] The indictment comprised 84 pages, containing a general preamble and specific preambles in relation to each count. In respect of three of the four counts of fraud, the allegations against Brown, in essence, were that he, through companies effectively controlled by him, procured large amounts of capital from clients for investment by

fraudulently representing that he would safeguard those amounts and obtain favourable returns, when, in fact, the money was thereafter invested recklessly or misappropriated for the benefit of Brown, his associates and/or corporate entities in which he held an interest. In relation to the fourth count of fraud, the core allegations against Brown are as follows: Brown through Fidentia Asset Management (FAM), which he controlled, purchased an entity, namely Mercantile Asset Trust Company (MATCO), that administered pension funds, including the investment portfolios underlying those funds. In purchasing MATCO, Brown fraudulently represented to its shareholders that FAM was able to pay, in cash, the full purchase price of R93 million and that it would only assume management control upon payment of the full purchase price. The indictment went on to allege that Brown knew at the material times that FAM did not have the cash to buy the MATCO shares and that, in fact, before the full purchase price had been paid took control of MATCO's assets and then used R60 million of the funds MATCO was administering, *inter alia*, on behalf of pension fund beneficiaries, to pay the balance of the purchase price. Simply put, Brown used MATCO's money to pay the greater part of the purchase price. Thus, so it was alleged, funds previously under MATCO's control for the benefit of beneficiaries of the investment portfolio were not employed to that end but were used to benefit Brown. The single biggest trust administered by MATCO at the end of 2002 was the Mine Workers Provident Fund (MWPF). The assets which MATCO administered and which Brown through a corporate entity took control of before paying the full purchase price, so it was alleged, was an amount of R70 million held in a current account at Investec bank, as well as a portfolio administered by Old Mutual worth R1.13 billion.

[5] In the present appeal we are concerned only with the two counts of fraud in respect of which Brown pleaded guilty and in relation to which he was sentenced. The first (count two), concerns the investment with FAM by The Transport Education and Training Authority (TETA), established in accordance with the Skills Development Act 97 of 1998. TETA is a statutory entity, the functions of which are, *inter alia*, the development of a Sector Skills Plan for the Transport Sector. In short, it is responsible for skills development within that sector. Its funds are made up, *inter alia*, of employer

levies. The second count of fraud (count six) comprises the MATCO transaction and its consequences referred to in the preceding paragraph.

[6] TETA is obliged, in accordance with Treasury Regulations, to have an investment policy which determines how its assets should be invested and protected. That policy must inform the relationship with any entity with which its funds are invested. Assets of a body such as TETA must be protected and its funds should not be invested with any entity that has an investment profile and status less than that of South Africa's four major banks, namely Standard Bank, Nedbank, First National Bank and ABSA. According to the indictment the funds were procured by FAM pursuant to an improper financial inducement paid to TETA's Chief Executive Officer. TETA's initial investment with FAM initially comprised two promissory notes to the value of R50,3 million and R50 million respectively. When TETA requested the return of R15 million, one of the promissory notes was irregularly sold in order for FAM to meet that request. During April 2004, TETA invested a further R100 million with FAM by way of two cash payments of R50 million. By that stage TETA had invested a total of approximately R206 million with FAM. Over time TETA continued to authorise the reinvestment of the total amount in the belief that it had securely invested with FAM. At the end of 2006 TETA informed FAM that it would not renew its investment. After an investigation was launched into FAM's affairs by the Financial Services Board (FSB),[2] TETA was informed by FAM that the latter intended to exit the asset management business and that it would repay the investment over a six month period. During the period of the investment, monthly statements had been dispatched by FAM to TETA, indicating that the total investment, including the two promissory notes, was safeguarded and yielding a return. The State's case was that Brown, through FAM, fraudulently misrepresented to TETA that the promissory notes to the value of R100,3 million would be secure and that all its investments would be managed as trust property, invested safely, and would yield high returns, whereas in truth no sooner had he got his hands on the promissory notes he cashed them before their maturity date for approximately R6 million less than their value

[2] The Financial Services Board was established in terms of s 2 of the Financial Services Board Act 97 of 1990. That Act provides 'for the establishment of a board to supervise compliance with laws regulating financial institutions and the provision of financial services; and for matters connected therewith'.

and TETA's investment was further diminished by Brown purchasing immovable property at a cost of more than R11 million and four luxury vehicles for a total amount in excess of R3 million, and further utilising TETA's funds for personal and/or corporate gain to the prejudice of TETA.

The trial

Maddock's evidence

[7] Amongst the witnesses to testify in support of the State's case after Brown's initial not guilty plea was Mr Graham Maddock (Maddock), a chartered accountant who, in the indictment, is alleged to have been integral to the commission of the alleged offences through a company which he controlled, namely Maddocks Incorporated. Maddock had earlier been convicted and sentenced on counts similar to some of those faced by Brown. In respect of other charges to which Maddock might have been exposed, he was presented as a witness in terms of s 204 of the the Act.[3]

[8] Maddock testified about the receipt of the TETA investments, namely the promissory notes and the moneys referred to in paragraph 6. It is common cause that the two promissory notes referred to above were not kept secure or replaced by successive ones as part of an investment strategy consonant with the terms of the written mandate by TETA. Maddock testified that the promissory notes were cashed before their maturity date and the proceeds then used to purchase immovable property to the value of R11 million in the names of trusts under the control of Brown and four luxury motor vehicles for FAM, the total value of which was R3 million. The motor vehicles were used by Brown and three others at FAM, including Maddock. It was apparent from Maddock's testimony that the investments were not ring-fenced and that FAM's operating expenses as well as substantial dividends to shareholders were paid from whatever investor funds were available. Payments labelled 'restraint of trade

[3] Section 204 provides that a witness whom the prosecutor informs the court will be presented on behalf of the prosecution and will be required to answer questions that may incriminate him, is a competent witness and, if in the opinion of the court, answers questions frankly and honestly he may be discharged from prosecution of the defence specified by the prosecutor and in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified. Such discharge shall be entered on the record of the proceedings.

payments' were also paid to FAM's employees out of investor funds. The written mandate from TETA required its funds to be invested with an A-rated Bank in an investment account or in any one of their other investment instruments through which an optimum income could be generated. Maddock testified that, contrary to that mandate, TETA's funds were used in the manner referred to above as well as to purchase an information technology company name MGX Software Futures for approximately R20 million and an office block at Century City in an amount of R35 million, as well as the Santè Hotel and Spa. All the while, FAM despatched false statements to TETA to the effect that their funds were secure in one of the big four banks.

[9] Maddock's unchallenged testimony was that at the time of the MATCO purchase, FAM did not have sufficient cash resources to pay the full purchase price as per its undertaking and used investments managed and administered by MATCO, namely the Investec moneys referred to earlier, to pay the balance of the purchase price.

[10] FAM's monthly salary bill was R12 million. Once again, it appears that those were paid from investments that were being managed by FAM. The TETA investments with FAM, according to the indictment, extended from 2003 to 2006. According to Maddock, the dividend payments made to shareholders of FAM at the end of 2005 amounted to R44 million. In respect of the restraint of trade payments, Maddock testified that a number of people each received R4 million and that he, Brown and another director each received R6 million. The rather dubious explanation provided by Maddock for the restraint of trade payments was that it was to ensure that people did not divulge company secrets. It must also be borne in mind, as testified to by Maddock, that FAM charged an initial take-on fee of 1,5 per cent of the value of the investment and an annual administration fee was levied on top of that.

[11] Maddock, when asked about the generation of profits by FAM and whether it had the right to dip into investor funds in the manner described above, said the following:

'I don't believe he had the right to use investor funds . . . Because those were investors' funds that had to be invested for the benefit of investors . . . And the company at that time did not have the profitability in order to distribute further dividends or so on from which he could use that money . . . That's why I believe that . . . Correct . . . There weren't – there were never sufficient profits in the company, other than the raising of those funds . . . For the raising fees when we took over . . . But that was capital coming in, I mean, or . . . That was . . . Investors' funds coming in. We've received investors' funds . . . And there was a fee put on our fee, or the company fee, for taking those funds on and administering them . . . And those – that – those fees were substantially higher than what was in the agreement. So other than those fees, we didn't have – there was really no profit being generated that would be able to pay R12 million to Mr Brown as dividend, or something like that.'

[12] It appears that in 2006 Maddock earned a salary of R194 000 per month as FAM's financial manager. He occupied this position at all material times. According to Maddock, a director of FAM, like Mr Koen, earned more than he did.

[13] Maddock also testified about Brown's 2006 *ex post facto* attempts to justify the use in 2003 of TETA funds to purchase immovable property for his benefit. To that end Brown procured a letter from Mr Steven Goodwin (Goodwin), an associate of his, on behalf of an entity called Worthytrade, falsely indicating that the amount utilised for the purchase of the immovable property constituted a reimbursement for amounts which TETA would have had to pay to Worthytrade. The letter was backdated to conceal the fabrication. Maddock also testified about belated attempts involving Maddock, Goodwin and Brown to adjust files and accounts in order to present an acceptable state of affairs to the FSB when it started investigating FAM's affairs.

[14] The following email dated 6 July 2006 from Goodwin to Brown and copied to Maddock is significant:

'Good evening Graham/Arthur.

With reference to my earlier discussion with Graham, and more specifically on my thoughts on the accounting regarding TETA and related issues, please find my ideas below (in no specific order).

I believe that FAM should show TETA as a client (there is too much documentation to indicate that this was not the case – AM have communicated with the auditor general and I think that we run the real risk of tripping over our own feet if we try and side step this – if anyone calls or speaks to TETA then the cats out the bag) – although there may be a belief that we should be in a position to demonstrate that we hold certain assets in TETA's name, I believe that we would pass the test if we could demonstrate that we are able to identify certain assets (held in a custodial account for example) or held for the specific benefit of TETA by FAM. Remember that if the proposal is read, we have been given permission to trade in money market instruments on TETAs behalf. We may need to allocate some of the money market instruments to TETA to solve this problem.

We can play around with the beginning period when we sold the Commerze bank paper because at that stage TETA was not a Fidentia client – they only became a Fidentia client when they moved the ABSA notes to Fidentia (which was some time after they were actually purchased and then for a few months Fidentia only held the ABSA notes) – it was very shortly after this time that Rudi left – but I do have a document signed by Rudi – where he proposes to TETA to sell the ABSA notes and purchase RMB notes and where he explains to TETA the credit rating of RMB versus ABSA Versus FNB (see the documents which I sent Arthur previously).

The returns which are shown to TETA and for which FAM sends a monthly statement, which have been capitalized on an annual basis, should continue to be shown as normal – this will tie up with the mandates and the agreements and the reports to the auditor general etc..

The other monthly profits paid out to Worthytrade including Kukkard and or anything else should be lumped together as trading profits shared and or share of profits on structured deals and or profits resulting from M&A activities (remember that we can play with the difference between the profits shown on the Worthytrade statements and the date that the profits were actually made (eg M&A profit on MATCO made in say June – but only shown on Statement over 12 months beginning in November (this by agreement with Worthytrade – very easy to set up required documentation – or we can say that was a verbal arrangement – which Worthytrade can confirm after the fact I can come up with many different types of profit sharing if required). If we follow this route and do not link payments made to Worthytrade to specific clients and or specific transactions (we may need to conjure up numbers which balance back to the amounts paid stemming from specific events or series of events – which could include activities used in the TETA process (e.g. trading of instruments) – but not to the TETA deal specifically) we will not cause any problem in respect of profits made not distributed to the client or excessive profits

made or be accused of distributing profits out of capital etc. It is important that this be called "profit share" – rather than fees earned – from a VAT perspective – this can be a schedule prepared on a quarterly basis.

I propose that we have a schedule similar to the one which I sent you previously setting out the trading profits/profit yields which is a very different document and not confused with the TETA statements in any way. This will also assist in case there is a look through at how I distribute these returns and how they are accounted for thereafter.

I have already generated the basis of what I propose – which balances back to the actual amounts paid by Fidentia.

Please give this some thought and let me know – I will prepare the next months statements on the basis as set out above.'

The existence, despatch and receipt of the e-mail were uncontested. Nor, ultimately, it would seem, was its content.

[15] It was clear from Maddock's evidence that when FAM was called upon to repay the TETA investment, it was not able to do so.

[16] Maddock testified that at around the time of the FSB investigation, the monthly statements that FAM, in terms of the investment mandate, was required to send to TETA were not punctual and it appears that Brown and his associates had to 'construct' statements.

Naran's evidence

[17] The next material witness in support of the State's case was Mr Dalpat Naran (Naran) who, at all relevant times, was the financial manager of TETA. He testified about Treasury Regulations that dictated the investment policy of TETA. Funds could only be invested in A-rated banks to generate interest. A-rated banks were the likes of South Africa's top four banks referred to earlier. Such funds could, however, be invested in those banks through asset managers such as FAM. According to Naran, Goodwin had contacted him and offered a higher return on investments than what TETA was then receiving. He arranged for a reference check to be done on FAM, and the TETA board decided to invest with FAM. He also referred to the written mandate in terms of

which FAM would invest TETA funds. That mandate was informed by the TETA investment policy referred to above. In terms of the investment agreement, FAM was obliged to supply monthly investment reports to enable proper accounting on the part of TETA. In terms of the agreement, an interest rate was guaranteed with an extra profit sharing return added to it. The mandate was non-discretionary. The capital was guaranteed and the funds would at all times be invested with an A-rated bank. The promissory notes were as good as cash; being an investment instrument that comprised a promise by the bank to make payment on a specific interest rate at a specific point in time, and it was tradable. FAM was not authorised to cash the promissory notes.

[18] Naran explained how the total investment by TETA referred to above came to be made. He came to know, for the first time, that the promissory notes had been sold when the FSB investigation was undertaken. All the statements received in terms of the investment agreement had given TETA comfort in that it assured the latter that its investments were secure and were invested in terms of the mandate. Naran also testified about agreements with FAM to reinvest the TETA funds, again at an agreed minimum return of 8,5 per cent with an additional 2 per cent on a profit participation basis. The mandate remained constant, and all the while FAM sent TETA statements indicating that the funds were secure and accruing interest. All the indications were that, when the TETA investment matured on 27 September 2004, the value would be R206 287 134,34. That amount was scheduled to be reinvested by TETA with FAM. The estimated balance as at 27 November 2005, calculated on the basis of the statements supplied by FAM, was R227 947 283,67. That amount was then reinvested with FAM at an agreed minimum interest rate with an added 2 per cent profit participation. FAM confirmed to the Auditor-General that it was holding TETA's funds securely. As late as 20 November 2006, FAM confirmed to TETA that, as at 31 October 2006, it was holding R245 677 210,76 on the latter's behalf. TETA only became aware of its investment being in jeopardy when the FSB launched its investigation and it was then decided to call up the investment. Subsequently, FAM informed TETA that it had taken a decision to exit the asset management business and undertook to return investments to investors over the following six months. That did not materialise. Naran

left TETA at the end of October 2008, more than a year after the repayment was due, and at that stage not one cent of TETA's funds had been repaid. Nor was anything paid thereafter.

Goodwin's evidence

[19] Like Maddock, Goodwin, another witness to testify in support of the State's case, had also pleaded guilty to charges similar to those faced by Brown. Subsequent to a plea of guilty he was sentenced to ten years' imprisonment, four years and nine months of which were served. He confirmed that he was the sole director of two companies, namely Intabrand (Pty) Ltd and Worthytrade (Pty) Ltd, and testified about how he came to be involved with Brown and FAM. Goodwin explained how promissory notes were used as investment instruments and how they could be used to obtain a credit line which could then be used to optimise income. He accepted that, in terms of the TETA mandate, the promissory note had to remain secure. In addition, he testified about how, on behalf of FAM, he paid substantial financial inducements to the Chief Executive Officer of TETA to move its funds to FAM and to reinvest them.

[20] Goodwin testified about his role in producing the monthly statement that FAM sent to TETA. In that regard he was part of a collaborative effort involving Maddock and Brown. Goodwin was also responsible for providing verifications sought by the Auditor-General in relation to TETA's investment. According to Goodwin the investigation by the FSB required a 'rebalancing of the books'. He described the effect of the FSB investigation as follows:

'[T]he temperature was mounting so to speak. . . .'

[21] The following part of Goodwin's evidence is significant:

'[I]t was certainly put to me in no uncertain terms at that time, that it was not because there was a shortfall in the assets, in other words there were enough assets to cover the liabilities, in fact the documents that I have clearly says that there were more assets than liabilities. However, they were the wrong kind of assets. They were assets in property, or they were assets in whatever, I don't know exactly where all these assets were, but that was the explanation given to me. And so the effort was to move these assets which were in property into bank, Land Bank,

Development Bank, those type of securities for a period of time, whilst these properties and so on could be liquidated and brought back into – to be made liquid again.'
I shall in due course revisit this aspect.

[22] It is clear from Goodwin's evidence that, not only was he aware of the TETA mandate alluded to above, but was instrumental in its formulation. Goodwin confirmed the evidence of Maddock to the effect that he had provided, on behalf of Worthytrade, an *ex post facto* fabricated justification for payment to Brown of the amount utilised to purchase the private property referred to earlier in this judgment. He testified that the letter was formulated at Brown's instance. The substantial amounts paid as an inducement were, for obvious reasons, not disclosed to TETA. According to Goodwin, Brown was aware of the regular inducements being paid in relation to the TETA investment, namely R50 000 per month.

[23] It is necessary to record that after Goodwin had already been testifying for at least a day, Brown was for the first time assisted in his defence by counsel who had not yet placed himself on record but who appeared to be advising 'behind the scenes', and was in court and involved in some of the exchanges with the court. Shortly after engaging in exchanges with Veldhuizen J, counsel took over the conduct of the case from Brown whilst Goodwin was testifying.

[24] In respect of the MATCO investment, Goodwin testified that the Mineworkers Pension Fund (MPF) had complained to the FSB that FAM was investing in unacceptable and unauthorised asset classes.

[25] It appears that in relation to his part in the investments Goodwin was being generously remunerated by way of what he described as a profit sharing arrangement.

[26] An interesting word was used by Goodwin in relation to explanations that were contrived to subvert the FSB investigation, namely 'retrofitting'. He later explained that

he was 'creating stuff and, doing all sorts of things that would not be done in the normal course of events'.

[27] In respect of some of the profit yield due to TETA, there appears to have been some skimming-off to dubious destinations. In this regard, Goodwin said the following:

'How are we going to dealt with the TETA yields paid out every three months? It would be problematic to explain where some of the yields ended up . . .

Well, the yields paid out every three months were the yields obviously via the enhanced yield structure that I have described and they were obviously paid out to one of my companies and the problematic [thing] is that some of those yields, was paid to Piet Bothma and so how was, how were we going to explain that? This is what I am referring to here.'

Brown was intimately involved, according to Goodwin, in the exercise referred to in this and the preceding paragraphs. Goodwin acknowledged that creative bookkeeping was an apt description of what they were engaged in.

[28] Goodwin accepted unreservedly that the disposal of the TETA promissory notes and the expenditure incurred in respect of the purchase of immovable property for the benefit of Brown and luxury motor vehicles and the other expenditure from the capital amounts invested by TETA were contrary to the mandate.

[29] At one stage Goodwin suggested a book entry that would show moneys invested 'under the MATCO umbrella' as being part of the TETA investment in order to appease and assure TETA and/or the FSB that the former's investment was secure.

[30] In respect of the MATCO transaction, Goodwin testified that during discussions about how the purchase was going to be funded, Brown said the following:

'[W]e'll just pay for them with their own money.'

The emergence of a case for the defence

[31] At the commencement of cross-examination by counsel now representing Brown, it was put to Goodwin that Brown and other witnesses would testify in support of the defence case. What that case would be was at that stage not yet disclosed. Much of the

first part of the cross-examination of Goodwin appeared to be directed at demonstrating that FAM was a well-run business possessing the requisite licences, staffed by skilled people and following appropriate processes. Much of this was done by what might be described as counsel – rather than the witness – testifying.

[32] During the cross-examination of Goodwin, a defence of sorts was, for the first time, referred to by counsel representing Brown and it appeared to be that FAM in fact had a corporate structure and divisions and a business strategy, and that it was wrong to attribute all the negative consequences that impacted on investments to Brown. As put by counsel, FAM wasn't a 'one-man show'. The business strategy alluded to appeared to be that in order to obtain maximum yield it wasn't always possible to adhere to a mandate. It was described by counsel as 'a different way of doing it'. The suggestion appeared to be that the capital invested was never at risk. One of the examples provided by counsel as an alternative maximum profit yielding investment was the purchase by FAM of the software company referred to in para 8 above.

[33] Counsel, in cross-examining Goodwin, indicated that Brown would testify that he had reputable auditing firm Ernst & Young value FAM's investments on a monthly basis. That appeared to be an indication that evidence would be presented that care was being taken by Brown to ensure that assets exceeded liabilities.

[34] Counsel also appeared to be suggesting that investing in property in 2003, when the property market was booming, was prudent. The suggestion was that Brown would testify to that effect and would explain that immovable property purchased by FAM would ultimately provide cover for any investment. At that stage the defence being constructed seemed to be that FAM had a blend of investments that ultimately secured investor funds, and that since FAM was a discretionary asset manager, this was in order. All of it, however, was premised on Brown and other witnesses testifying to that effect. It also ignores the fact that the mandates in question were non-discretionary.

[35] Judging by the tenor of counsel's questions at one stage during the cross-examination of Goodwin, a further part of the defence appeared to be that FAM was entitled to treat all the moneys it had under management as belonging to one pot of assets to be dealt with at will. There was also some suggestion during the cross-examination of Goodwin that insurance policies put in place by FAM would protect investors.

The plea of guilty

[36] Shortly after Goodwin testified, counsel representing the State informed the court that Brown had made a decision to change his plea to one of guilty on counts 2 and 6. A written plea of guilty, signed by Brown and his counsel, incorporating a series of admissions said to be sufficient to sustain a conviction on those counts was handed in. Brown confirmed that this was indeed the case. As a consequence, so the court was informed, the State had decided not to lead any further evidence and then closed its case. In turn, counsel representing Brown closed the defence case. The State then indicated that the only argument it would put forward was that Brown be convicted on counts 2 and 6, the two fraud counts in question. At that stage, the court understood the position as follows:

'Yes, well we need to go through this and make sure that the evidence is sufficient for a conviction.'

[37] Thereafter, during the early exchanges between counsel for the State and the court concerning the plea of guilty, Veldhuizen J appeared to consider that deviating from an investor mandate coupled with a representation that the mandate was being adhered to did not constitute fraud. The court appeared to suggest that by not adhering to a mandate, a fund manager only rendered himself liable to an action for a breach of contract. When the State insisted that the court was erring in that regard, the court responded as follows:

'Well I don't know then you're practising in a different legal system [than] I am because fraud you must have a misrepresentation.'

The court appeared to be experiencing difficulty with the State's submission that the monthly statements by FAM constituted a misrepresentation to TETA that the

investments were secure. The court also struggled with the concept that FAM had misrepresented to MATCO that it had the cash to finance its purchase of the MATCO shares when it was clearly not possessed of such funds. The court, with reference to the admissions made, took the view in favour of Brown that there were sufficient assets which, if liquidated, could fund the purchase. Counsel for the State was adamant that MATCO envisaged a cash transaction and that FAM misrepresented that it was in a position to pay the cash.

[38] I consider it necessary to set out the following statements by the court:

'Now what I propose to do is I would like to have heads of argument, full heads of argument on these matters and I am going to give you time to prepare those heads because I must make it quite clear at this stage that not only me, I have fully discussed this with my assessors, I have a difficulty on count, not so much count 2, count 2 I think there are admissions which spell out what will amount to a fraud but on count 6 I have serious difficulties. Firstly, regarding the misrepresentation, secondly, regarding causation what moved MATCO to hand over control and I want reference to facts on which a decision can be based. So I'm going to give you time and I want full argument on that because at the moment I must tell you I have serious reservations me and my assessors whether the admissions on count 6 are sufficient to sustain a conviction.'

[39] When proceedings resumed, counsel representing the State suggested that in the light of the difficulties raised by the court, the more prudent route to follow would be for the court to question Brown on the contents of his plea. The court, in response, put it to counsel that section 112(1)(*b*) of the Act did not apply when a plea of guilty is raised beyond the beginning of a trial.[4] Counsel disagreed. At that stage the only certainty was that uncertainty reigned about how the tendered plea of guilty was to be treated. This

[4] Section 112(1)(*b*) of the Act provides:
'(1)Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea –
. . .
(*b*) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette,* or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.'

became all the more evident from the following exchanges between counsel representing the State and the court:

'[COUNSEL]: I'm only looking at his plea and I'm saying that the admissions on his plea is sufficient.

If the Court disagrees with that view of the State, then obviously we have to take a step back and then I'm saying then the Court should raise those concerns that the Court do have regarding the plea with the accused [today]: are you saying by saying XYZ that you're innocent or is it just mitigation of sentence that you've included in this document? If that process is then followed and the Court says: well, I'm now satisfied on the available evidence and on the – not on the evidence, on the plea, just on the plea. I'm satisfied on the plea that you actually intend to plead guilty and that you did plead guilty and therefore I can convict you on those two counts as pleaded.

If the Court says: no, I am not convinced about that, I'm not satisfied, then the State would ask for a reopening of the State's case. So I'm saying we have to unfortunately go back a step or two in this whole process where we are now, in the interests of justice. And there is no other reason for that . . .

COURT: If you're wrong on your interpretation of Section 112, what then? I mean, then I must give a judgment.

[COUNSEL]: If I'm wrong on my interpretation of Section 112, then I would give – ask for reopening of the State's case before judgment. My learned friend agrees with me that if . . .

COURT: *Ja*, but how are you going to know that?

[COUNSEL]: Well, I would like to have an indication from the Court. I mean, we're not playing games here. It's a criminal trial and it's in the interest of justice.

COURT: I understand. I quite understand that we're not playing games. That's exactly why we're in this situation today: because of the concerns I raised. But where's Section 112?

[COUNSEL]: Maybe I can . . . I've got it. I've given the Court heads.'

[40] The uncertainty was compounded by the State not having access to its own library because it was locked, and further it appeared that its access to the relevant authorities online was also limited.

[41] During further exchanges the court once again expressed reservations concerning the misrepresentations allegedly made by FAM. Counsel for Brown said the following in response to the court:

'Dat ek nie meneer Brown se onskuld kan bepleit op hierdie klagtes nie, soos ons mos nou reeds ooreengekom het. En ek moet die hof help. Dit is wat die hof my uitgestuur het hier op die 10de om te doen.'

[42] The court then went on to say the following:

'But that is – I don't think that's the purpose of Section 112 and that is certainly not the purpose of any trial, because I would be extremely unhappy if I found out later that he's made admissions just to plead guilty and those admissions proved to be false. That is the last thing that should happen. That shouldn't happen. So – but what I am concerned with at the moment is that the admissions that are before me do not go far enough to prove his guilt to sustain a guilty verdict on the indictment as [it] stands.

And one must always look at the indictment. That's the starting point of any trial. So – but you see, as I see it, there are two difficulties, two serious difficulties. The first is, he says he made a misrepresentation but just two paragraphs further on he says: well, Fidentia had sufficient assets. Well, then it's not a misrepresentation. Then Fidentia made no misrepresentation. It had sufficient assets. It could pay the purchase price. The fact that they preferred not to do so later because of strategic reasons and because of the interests of Fidentia, well, that is something else.'

[43] At that stage it appeared that the court's continuing concern was whether in terms of the MATCO transaction there had indeed been a misrepresentation. When the court resumed thereafter, a slightly amended plea of guilty was presented which the court then appeared to be satisfied with. That plea, which is central to the present appeal, is set out hereafter:

'1. In addition to the admissions already made I, the accused, freely make the following further admissions.
2. I am represented by Adv B Pretorius and I fully understand my right and the implications of these admissions.
3. I am making these admissions in the spirit of finalizing the proceedings and so that the State would not be required to prove its case on the fraud counts 2 and 6 anymore.

4. The following admissions are hereby made by me;

5. **AD TETA COUNT 2.**

5.1 Over the period 2003 to 2005 the Transport Educational Trading Authority (TETA) advanced two promissory notes and two cash amounts totalling two hundred million and three hundred thousand Rand to the Fidentia Group of companies (FID) as an investment on a non-discretionary mandate, of which R15 million has been returned.

5.2 I have been the CEO of FID during the relevant times.

5.3 These amounts have from time to time been invested in asset classes different to those specified in the non-discretionary mandate between FID and TETA.

5.4 At the time and throughout the period I knew that investing in these alternative asset classes would be more risky and would not be as safe as those described in the TETA mandate and could cause potential prejudice and I have reconciled myself with this fact.

5.5 For the period between May 2003 and September 2006 I knew that the monthly statements to TETA prepared by Steven Goodwin, Rudi Bam and Johan de Jongh and checked by the Financial Director, Graham Maddock were incorrect. I did not conduct further investigations to ensure the correctness thereof. I knew that this could cause potential prejudice and I have reconciled myself with this fact.

5.6 My actions under clauses 3 to 5 constituted a misrepresentation of the true facts and I have thereby caused potential loss to TETA.

5.7 My actions were unlawful and constituted fraud by way of *dolus eventualis.*

6. **AD MATCO COUNT 6**

6.1 Negotiations between FID and the shareholders, directors and trustees of Mercantile Asset Trust Company (Pty) Ltd (MATCO) had commenced in early 2003 and the intention was that MATCO would enter into an investment management agreement with FID. This however did not take place at the time.

6.2 During September 2004 FID was again approached by MATCO and FID decided to invest in Matco and entered into a purchase agreement with the shareholders of MATCO to purchase all the shares in MATCO and also at the time entered into an investment mandate agreement with MATCO.

6.3 The purchase agreement stipulated that the full purchase price had to be paid in the following manner before possession and control of MATCO would be handed over to FID:

The purchaser shall pay the Purchase Price to such bank account as the Seller may reasonably specify in writing by not later than five business days before the closing date, in immediately available funds without offset or deduction.

FID and I misrepresented that FID was able to do so and thereby induced the shareholders of Matco to enter into the agreement and sell their shares to FID.

6.4 The board of FID and I made the strategic decision not to liquidate the instruments held by FID and for FID to charge MATCO the fees receivable by all the various entities in FID in order to make up the full purchase price due and payable before transfer and control.

6.5 On the date of the transaction I knew that FID had enough assets in the form of negotiable instruments to execute the sale of share agreement, but not enough liquid cash and that FID would use funds derived from fees from the investment mandate agreement with Matco to pay the largest portion of the purchase price of the shares.

6.6 FID only had enough cash to pay the minority shareholders and paid them on 19 October 2004.

6.7 On 19 October 2004 FID controlled MATCO due to the transfer of the shares by the sellers before full payment was made to all shareholders contra to the terms of the agreement and FID and I thereafter ordered the transfer of R69 million from the MATCO current account to FID.

6.8 A substantial portion of these funds, to wit R56 million, has been used to pay the majority shareholders for their shares.

6.9 The above actions amounted to a misrepresentation of the true facts in respect of the sale of share agreement and the method and time of payment.

6.10 Although I was not directly involved in each and every detail of this transaction I did not prevent the format of the transaction and the manner of payment. I foresaw that this could cause potential prejudice to the shareholders of Matco and reconciled myself therewith.

6.11 My actions were unlawful and constituted fraud by way of *dolus eventualis*.'

Paragraph 6.3 was an amendment made to the plea subsequent to the concerns raised by Veldhuizen J. In un-amended form it read as follows:

'The purchase agreement stipulated that the full purchase price had to be paid before possession and control of MATCO would be handed over to FID and FID misrepresented that it was able to do so.'

The convictions

[44] The court, on the strength of the plea, produced the following judgment:

'The accused is indicted before this Court on four counts of fraud, two counts of theft, one count of contravening section 1(1)(a) of the Corruption Act No. 94 of 1992, one count of contravening section 3(b)(ii)(aa) and/or (bb) and/or (cc) and/or 3(b)(iv) of the Prevention of Combating of Corruption Activities Act, No. 12 of 2004, and lastly, a contravention of section 4(a) or 4(b) of the Prevention of Organised Crime Act, No. 121 of 1998.

Some evidence was presented to us on certain counts especially counts 1, 2 and 3. The accused then made certain admissions, Exhibit E and then changed his plea to one of guilty on counts 2 and 6. The State closed its case and the accused followed suit. We were not satisfied that the facts admitted by the accused were sufficient to found convictions on counts 2 and 6. An amended statement of admissions were thereupon handed in by the accused, these are contained in Exhibit E1.

Adv Van Vuuren for the prosecution conceded that the evidence regarding count 1 does not prove that the accused had the necessary intention to defraud and as regards counts 3, 4, 5, 7, 8 and 9 is not sufficient to sustain convictions on these counts. In our view this concession is amply justified.

THE ACCUSED IS ACCORDINLGY ENTITLED TO BE ACQUITTED ON THESE COUNTS AND HE IS FOUND NOT GUILTY ON COUNTS 1, 3, 4, 5, 7, 8 AND 9.

We are satisfied that the admitted facts contained in exhibit E1 are sufficient to found a conviction on counts 2 and 6 of the indictment. We do not find it necessary at this stage to elaborate on the exact basis for this.

THE ACCUSED IS THEREFORE AND IN ACCORDANCE WITH HIS PLEA FOUND GUILTY ON COUNTS 2 AND 6 OF THE INDICTMENT.'

Sentencing proceedings

[45] Sentencing proceedings followed. First, Brown testified in mitigation of sentence. At the outset, it appeared that Brown would be repentant and forthcoming, indicated by the following statement:

'Your Lordship the purpose of the evidence that I'm going to lead in mitigation is not to blame or apportion blame on other people or anything such as that it is so that the Court could come to a just verdict in the circumstances. This trial and this matter has been very emotive and obviously carries massive media interest and to date in six years I've not been allowed to tell my side of the story so we intend to lead some evidence but the evidence is not to lay apportion [or] blame

at other people or anything to that effect it's me taking responsibility but also being afforded the opportunity for the sake of the Fidentia staff, for the sake of my family and everybody that has suffered as a result of this so that the truth is out.'

However, almost immediately thereafter his principal concern appeared to be the effect on his family and FAM's employees.

[46] The breakdown of Brown's family life and his separation from his wife and children who are in Australia, and the 22 days he spent in jail subsequent to his arrest loomed large in Brown's testimony in mitigation. Being restricted to the Western Cape in the years following his arrest rankled with him.

[47] Brown initially testified that he had a Bachelor of Commerce degree, but seemed to be experiencing difficulty obtaining documentary proof of that fact from the university at which he had studied. Brown's evidence at the end of his examination in chief, when he was asked whether he had anything he would like to put before the court, contained the following about his degree:

'I testified yesterday that I have a B.Comm. degree. Now this is something I need to explain. I had studied at UPE for two years, started my business, got married, we had a child and for all intents and purposes abandoned those studies. Now because I was commuting between Port Elizabeth and the Eastern Cape and various of the other ex-homelands. So I then proceeded to do the other subjects at my father's university, then applied . . . At Unitra . . . Then applied to UPE for special exemption because I had exceeded the timeframe and all of that. They issued me with the exemption. I had completed all the subjects and qualified. When this Fidentia thing happened – and in fact the certificate was submitted to the Financial Services Board, I actually have proof of that – all my documents were at Fidentia so I don't have those original documents. After my release Mr Kahn did approach the university for a copy but the university's answer at the point in time that they had been merged with these various other institutions and they are unable at this point in time to locate their record.'

Under cross-examination, when he was asked whether he had a degree from the University of Port Elizabeth, he stated:

'That is correct in respect of my explanation, Advocate van Vuuren.'

When the court asked him whether he had a degree, he replied:

'I believe so, Your Lordship, yes.'

Later he conceded that he hadn't passed all of his first and second year subjects. He also explained that he had only completed three years of a five year period of study at the University of Port Elizabeth. His explanation was that he had 'applied for exemption'. It can fairly be said that his evidence in this regard was an illustration of obfuscation and evasion and in the ultimate analysis just plain dishonest.

[48] Very early in his career, Brown developed a penchant for structuring financial services solutions and consulted to banks, locally and internationally. Brown testified that at one stage in his career, he started trading in financial instruments for his own account. He had built up a very good rapport and credibility with banks. According to Brown he had at that stage sold a fairly successful business comprising pharmacies in doctors' practices. In 2001 he and Mr Louis Koen and Maddock discussed setting up their own business:

'I had through . . . consulting . . . seen there was a big gap in the market that all the big financial institutions and so on had been missing. One of the things was services to what is known as the bottom of the pyramid market, that . . . was being wholly ignored at the time. Private equity investment in development projects . . . was being ignored at that time so we set about building a company.'

[49] FAM was the business that Brown started in 2003. It appears that by that time Brown had accumulated R25 million of his own money. The following part of his testimony provides some insight into how he viewed his conduct that led to his two convictions:

'[T]he sad thing about this . . . is the four clients in [FAM] which is what this whole issue is about, it's a drop in the ocean in respect of all the deals that we did and all the investors that we did have and all the transactions that we did conclude if one looks at the size of what we started with . . . .'

[50] Ironically, Brown chose the word Fidentia for his company because it 'appealed to my sense of history and my sense of what right is and what is wrong and also it appealed to what we wanted to achieve'.

[51] Over the first six months of FAM's existence, in furtherance of his business plan, Brown had built up a team of highly skilled people. He was, he testified, intent on setting up checks and balances. Brown appeared at an early stage in his testimony to be shifting some of the blame onto Maddock. It will be recalled that FAM's transactions were processed through the trust account of Maddocks Incorporated. He had this to say about Maddock:

'I never had insight into that account I trusted him implicitly as he testified that the accounting records and so on were being prepared by himself and his staff whilst we were setting up our operations.'

[52] A further example of Brown's view of his own conduct that led to his convictions is the manner in which he described his business methods as similar to that of Warren Buffet, one the world's wealthiest individuals:

'Mr Buffet uses the exact same structure where if he uses other people's funds to acquire a private equity as in fact he did . . . when he bought the New York Times. The exact same structure that we implemented was the most robust structure in order to protect interests being the investors' interests but give you the flexibility to properly manage these assets to their maximum value.'

[53] Brown also presented as an excuse that FAM's business had grown exponentially and too fast and that it had fallen behind in 'the administration of the contracts'. He repeatedly complained of being hounded and unfairly treated by the media and the FSB. He appeared to be especially pained by the public image that he felt was wrongly constructed:

'Fidentia was presented as this entity that willy-nilly went and spent investors' money and we bought cars and we did all of this stuff and bought sports teams but it was a business plan.'

[54] According to Brown the curators who had taken over the business subsequent to the FSB investigation were responsible for the dwindling value of FAM's assets which might have contributed to FAM not being able to meet investor claims. He said the following:

'Now if they sell a company for less than half of the purchase price not even value, for sure there's going to be damage, for sure there's going to be losses and these are the losses . . . that I am in the public domain being blamed for and everybody associated with Fidentia . . . .'

[55] Brown insisted that FAM had sufficient assets to cover its liabilities but conceded that this was disputed by the curators.

[56] Brown claimed that the FSB report was completely false. He testified that according to the TETA mandate TETA could not withdraw its investment all at once, without notice; there was a 90 day notice period. According to Brown the only potential prejudice that he foresaw as a result of not complying with the TETA mandate and investing in the wrong asset classes was that TETA might have to wait a little longer than the 90 day notice period before its investment was returned:
'[T]he only risk that there was that we would pay the balance of the purchase price late.'

[57] In respect of the MATCO transaction it is important to note how Brown sought to minimise his blameworthiness for having taken control of that entity before the full purchase price had been paid:
'I think it's a question of our over zealousness to get involved and do the transaction and their desperateness to do the transaction that resulted in that situation.'

[58] Brown complained about being attacked in a police van and in prison. It appears to have been by fellow prisoners. After his arrest Brown's estate was sequestrated.

[59] Brown testified that he has been offered gainful employment. The purpose of that statement was probably directed at avoiding a custodial sentence. Insofar as his private life was concerned, it is clear that Brown's stepfather was an important and nurturing influence in his life. In addition, Brown maintained a close relationship with his own father. Brown has three younger brothers, one of whom suffers from epilepsy. Brown is not yet divorced but has a girlfriend. He considers himself to be someone who is liable to be taken advantage of.

[60] During his time at Pollsmoor Prison Brown wrote to obtain ministerial intervention to improve the lot of prisoners who were in need of better conditions. He also testified about the social development programmes FAM had initiated. Brown had started a choir and assisted children with their schooling. In an exchange with the court after he was asked how he viewed the prospect of future incarceration Brown said the following:

'The only way I can answer this is to say that, as I said at the outset of this, this has been a very long six years and I am quite tired of looking over my shoulder, I am quite tired of all the adverse media, I am quite tired of all the litigation and I want finality and if that means that I need to spend some time in prison to get finality then I will and I will try and make something positive out of it. I will because my nature is to try and help people. So I am quite sure if the Court deems it reasonable to give me a prison term that there will be some or other project that I could make a positive contribution towards, use my skills and the things that I have also learnt in this process, to try and assist other people.'

[61] Under cross-examination, Brown stated that:

'[W]hen this portfolio was out of balance from time to time it was due to our failings in respect of administration. It wasn't that we set out to breach mandates and defraud people and so on.'

[62] According to Brown he deviated from the mandates in question because of bad cash-flow planning. He conceded, however, that at the time the first promissory note was sold, FAM was not experiencing a cash-flow problem. From his evidence, it is clear that during 2010, at the time that he was testifying, TETA had not yet received any part of its investment back and it was unclear whether it would recoup its entire investment.

[63] Brown conceded that, when the first promissory note was cashed, he took R11 million for himself. That money was used to acquire a beach-side residential property and another one slightly away from the beach. At first, he stated that he considered it a good investment and then went on to say that the properties were for the benefit of his family. He almost immediately thereafter appeared to justify taking the R11 million from the proceeds of the sale of the first promissory note by stating that he was entitled to fees for assisting with TETA's prior investment problems. It will be recalled that the letter provided by Goodwin on behalf of Worthytrade provided a

justification that Goodwin accepted to have been a fabrication. Brown also admitted to the purchase of the luxury motor vehicles referred to earlier.

[64] A short while later during his testimony, Brown reverted to justifying the purchase of the property and the motor vehicles as part of FAM's overall portfolio planning. Almost immediately thereafter, Brown sought to justify the purchase of the motor vehicles as an entitlement flowing from the fees that FAM had earned.

[65] Brown conceded that TETA funds were used to purchase the software company referred to earlier. He admitted that the company did not generate profits in the first year of its purchase. Brown insisted, however, that the company was a valuable investment. According to Brown FAM's cash-flow problems became evident in 2006. The TETA investment commenced in 2003. Brown explained the deviation from the TETA mandate on the basis that he wanted to optimise income. Brown testified that the software company had been purchased for R21 million with TETA funds. Asked how quickly these assets could be liquidated to meet a recall of the investment by TETA, Brown testified as follows:

'[T]hat would obviously depend on the market conditions at the time. It would also depend on what the offer was. We received various offers over the period of time for Santè. But I would have to speculate, maybe six months . . . Well they would be able to get it but they wouldn't get it immediately, no.'

[66] At this stage the court took exception to the State's attempts to show that TETA had suffered actual loss. The court reminded the State that the plea that had been accepted was limited to a concession that there had only been potential prejudice. A debate ensued between counsel for the State and Veldhuizen J concerning the extent to which evidence adduced up until the acceptance of the plea of guilty could be considered. That debate appeared to embrace the question whether the State, in adducing controverting evidence, could go beyond the *dolus eventualis* that had been admitted towards proving *dolus directus*. It was the first of many exchanges between the court and counsel for the State concerning these two issues.

[67] Brown continued to testify about alternative investments that deviated from the TETA mandate. He explained that FAM had used TETA funds to purchase the Santè Spa and Hotel, which had not been fully built at that time. FAM had paid R89 million to purchase the hotel. FAM appears to have used TETA funds to complete the building. Asked about whether that was not a risky investment, Brown replied as follows:

'That is only very risky in respect of the call up of the money if you don't have insurance number one and number two if you don't have other instruments or cash to be able to repay the investors.'

Asked about whether the insurance would cover fraud, Brown replied:

'Yes, you can in fact. I don't know if that applies in this instance though.'

A debate then ensued between the court and counsel for the State about the propriety of that line of questioning. As stated earlier, I shall later in this judgment deal with material interventions by the court.

[68] Brown took the view that it counted in his favour that he would have been able to borrow money against these assets in order to meet investor claims. Brown was unable to say whether any of the TETA funds were used to purchase MATCO. Brown's justification for purchasing MATCO despite not being possessed of the cash and for investing TETA's moneys in alternative investments in the following terms is significant:

'[D]id you have the money sufficient in assets which you could liquidate . . . Yes. . . . to repay them. . .

Did you have it? In what form? . . . In various assets.

Like what? . . . Dep instruments, money market instruments, cash in the bank, private equity investments and properties, as I have just testified.'

[69] In respect of the MATCO transaction, R1,13 billion of moneys from that entity invested with Old Mutual was called up immediately by FAM after already having taken R70 million from MATCO's Investec investment. Brown admitted that, after the MATCO takeover, he had become a trustee, with MATCO structured as a trust administration business. It appeared to operate as a trust, registered with the Master of the High Court, administering sub-trusts for the benefit of beneficiaries. Trustees consider and process

applications from beneficiaries for payment and assistance, etc. Whilst Brown contested the media description of the beneficiaries as widows and orphans in relation to pension funds, he acknowledged that that description had been coined.

[70] From the Old Mutual funds, a number of immovable properties were acquired, including an office block at Century City. With MATCO money, Brown had also purchased farms and beach-side property in the Eastern Cape. The latter property did not generate any income. One of the properties was bought in the name of a trust, with Brown and his wife included as trustees.

[71] Brown denied being reckless with investor funds and was adamant that the curators had made massive profits on the sale of immovable property owned by FAM and/or related trusts. He refused to acknowledge that registering property in trusts controlled by him had placed investments at risk.

[72] Brown conceded under cross-examination that he had denied to the FSB that TETA was FAM's client. He attempted to explain this away by stating that TETA had previously been Worthytrade or Goodwin's client. He was confronted by the fact that the TETA mandate had been concluded with FAM.

[73] According to Brown, he experienced remorse. Asked to expand on the statement, he said the following:

'I did testify in my evidence in chief that staff members have lost their work. There's issues in respect of recoveries from the investors. I did include all of that. I didn't say that I had remorse for myself.'

He later went on to say:

'I assisted the investors that approached me. I went to the Living Hand's trustees when they requested, the trustees at the time, they have since changed. Given them all the financial records and the information that I did have and, you know, there were a myriad of things. I even went as far as assisting the Antheru Trust with applications as far as it was within my means.'

[74] From Mr Brown's evidence it appeared that there had been extensive litigation between him and the FSB. He also conceded that he had launched two applications to stay his prosecution.

[75] Mr Zacharias Venter (Venter), Mr Brown's maternal uncle, was the next witness to testify in mitigation of sentence. He testified that both of Brown's parents were selfless people. Brown's father had died in an attempt to save someone else's life. Brown's stepfather, equally, was someone who cared about people. Brown was raised in a God-conscious environment. Insofar as Brown's plea of guilty on two counts of fraud was concerned, Venter took the view that he expected nothing less of the man because he was someone who took responsibility for his actions. Venter experienced Brown as someone who had matured quickly and who took responsibility for his actions. In his view, Brown's trial and accompanying tribulations saw a growth in him for the better.

Evidence in aggravation of sentence

[76] The State then proceeded to adduce evidence in aggravation of sentence. The first person to testify in that regard was Mr Dawood Seedat (Seedat), a chartered accountant in the employ of the FSB since April 2006, with 22 years of experience in financial management. He was part of the inspection team that investigated the affairs of FAM and associated companies. He explained that the FSB's primary function was to oversee the activities of financial institutions other than banks. It was the FSB's task to ensure compliance with statutory prescripts. The FSB is the body tasked with the licencing of bodies or persons who provide financial services. The statutory regulatory regime was to create a responsible and safe environment for investors. The Financial Advisory and Intermediary Services Act 37 of 2002 (the FAIS Act) contains provisions relating to the requirements for persons and entities who engage in this business. The FSB has promulgated a code of conduct for businesses which engage in the financial services industry.

[77] Seedat explained that FAM was licenced to provide advice and to render intermediary services in relation to a wide category of financial products, including discretionary financial services relating to management of financial products, confined to money market instruments, warrants, certificates and the like. Seedat also referred to the Financial Institutions (Protection of Funds) Act 28 of 2001 and its provisions which dictate that a director, member, partner, official, employee or agent of a financial institution, or of a nominee company who invests, hold, keeps in safe custody, controls, administer or alienate any funds of the financial institution, or any trust property, must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence. Insofar as trust property is concerned, the instruments or agreement by which the trust or agency in question has been created observe the utmost good faith and exercise the care and diligence required of a trustee in the exercise or discharge of his or her powers and duties.

[78] Seedat was adamant that FAM was constrained to comply with the terms of any investment mandate and to report to clients on investments placed with it. There were stringent accounting and audit requirements that apply to financial service providers who have a discretionary FSB licence. He noted that s 19 of the FAIS Act stipulates that the monies received from clients for investment purposes have to bear the character of trust funds in the hands of the FSB.

[79] Seedat testified that there were material breaches by FAM of accounting and auditing requirements. In respect of the TETA transaction, there was no room for a deviation from the mandate. The FSB had launched an investigation into FAM's affairs as a result of complaints received from Mr Bam, a former director of FAM. Seedat recalled an interview with Brown during November 2006 where Brown denied that TETA had been a FAM client. When Seedat showed him documents to the contrary, he could not explain them.

[80] Seedat questioned Brown about his assertion that FAM held assets that balanced portfolios and that there was no need for concern about there being

insufficient assets to meet investor claims. Seedat specifically asked about a promissory note of R150 million, allegedly held by FAM. Brown assured him that he was in possession of that note and would produce it. The note did not exist and Brown could not produce it.

[81] According to Seedat, written statements from FAM's own auditors indicate that it owed more to clients than the value of its assets. FAM's auditors did not appear to be able to do a proper reconciliation of investor accounts and were unable to verify that a proper allocation of investments had been made. Furthermore, FAM's auditors noted that in respect of the MATCO transaction, FAM's directors had accepted that they had overcharged on fees and had agreed to correct it. FAM's auditors disagreed with FAM's valuation of the software company and considered the valuation to be excessive. The auditors recorded that they had requested a list of non-monetary assets held by FAM. The list that was provided did not indicate who the owners of the assets were. This added to the auditors' concern as to the general requirements set out in the regulatory statutes and the FSB's code of conduct requiring clients' funds to be separately identifiable from that of the Financial Services Provider. The FSB's own investigation revealed that the issues identified by FAM's auditors as troubling were justified.

[82] Seedat testified that, based on the FSB's last calculations, giving FAM the benefit of the doubt in respect of certain investments, the FSB found that R406 million could not be accounted for. This discrepancy was the difference between the amount of money received from clients, as against FAM's investments on their behalf. Seedat testified that from the FSB's analysis it concluded that FAM would not be able to honour its monthly obligations to clients without liquidating existing portfolios or property investments. It was clear to the FSB, Seedat testified, that FAM treated all the investments it received as a common cash pool from which they could draw to settle whatever present claims were made. Later, Seedat testified that funds had been transferred to offshore bank accounts by FAM and that those accounts have not yet been investigated. It is not beyond the realm of possibility that there might be some recovery from that source.

[83] When Seedat testified about how FAM had misappropriated TETA funds and how Brown had contravened statutory injunctions, Veldhuizen J intervened and the debate continued about how far the State could go in adducing and controverting evidence beyond its acceptance of Brown's plea of guilty. At one stage, the court accused the State of mismanaging the case, particularly in relation to its acceptance of Brown's plea of guilty.

[84] Seedat testified that the FSB concluded that FAM and key individuals within that corporate structure did not act with honesty and integrity as required by the FSB's general code of conduct. However, under cross-examination, Seedat conceded that the FSB could not say that every cent of investor funds was misappropriated.

[85] The last witness to testify for the State was Mrs Ivanka Atcheson (Atcheson), a MATCO trustee at the time that it was sold to FAM. She described MATCO'S business as follows:

'The business was basically involved in administrating funds for beneficiaries, for pension funds and provident funds, in order to pay school fees and all the necessary – until the beneficiary became of age 21, whatever limit was set on the trust, so as to assist the beneficiary in mainly getting an education, providing for school fees and uniform. That was the main objective of the business.'

[86] After all the evidence was adduced the State and defence presented their submissions concerning the effect of Brown's plea of guilty and the evidence that might rightly be taken into account in arriving at an appropriate sentence.

Judgment on sentence

[87] Veldhuizen J then proceeded to sentence Brown and to that end produced a seven page judgment. In the first few paragraphs Velhuizen J recorded Brown's personal circumstances. He took into account in favour of the appellant that he had been pained because his two children and his wife had moved to Australia and he had not seen them for the last five years. He also appeared to consider favourably the fact

that Brown had been scorned by his friends and the public at large and even by his church. He considered the 'trauma and personal suffering' that Brown had endured due to his prosecution.

[88] Considering the nine charges that appeared in the indictment, Veldhuizen J stated that, on the face of it, they were extremely serious charges which carry heavy penalties. That notwithstanding, the court went on to say the following:

'Considering the publicity which your case has received in the media, I think it appropriate to make it clear what you have not been convicted of. You have not been convicted of having stolen money from investors or pensioners, or that you defrauded them. You have not been convicted of having stolen money from Fidentia or its subsidiaries. Your conduct underlying your convictions, can in no way be described as a Pyramid scheme. I cannot overemphasize that the two counts of fraud that you have been convicted of, are an extremely diluted version of the fraud that the indictment alleges. The second count of fraud relates only to fraud against the shareholders of MATCO, not against widows & orphans. These two counts of fraud pale when compared to the charges in the indictment. But it [has] been accepted by the prosecution that you never had the intention to cause actual prejudice or damage. You have only admitted and been found to have intended potential prejudice and your moral blameworthiness must accordingly be judged in the light thereof.'

[89] Dealing with Seedat's evidence of the shortfall of R406 million, the court below said the following:

'If his findings are factually correct, then I find it astounding that you have been brought to court on only the nine counts listed in the indictment. I find it even more astounding that the State saw fit to accept your pleas of guilty on the facts set out in the admissions you made in terms of section 220 of the Criminal Procedure Act 51 of 1977. If the facts related by this witness are correct, then something is sorely wrong and I can only think the prosecution case has been poorly handled.'

[90] The court went on to deal with the submission on behalf of the State that the minimum sentence prescribed in terms of s 51(2)(*a*) of the Criminal Law Amendment Act 105 of 1997 applied and that Brown should be sentenced to imprisonment for a period of not less than 15 years.

[91] Having regard to the plea of guilty in respect of the TETA and MATCO transactions, the court held that, since Brown had pleaded guilty on the basis that there had been no actual prejudice and all that he had foreseen was potential prejudice, the offences in question did not fall within the category of crimes of fraud involving amounts of more than R500 000 which was the jurisdictional fact required for the minimum sentence provisions to be applicable. Thus, Veldhuizen J held that the minimum sentence legislation did not apply and that he was at large to pass a sentence which was just and fair. He went on to state the following:

'It is clear that these crimes, when compared to the crimes with which you were originally charged, do not carry the same high degree of moral blameworthiness. I do not think that a sentence emphasising the rehabilitative purpose of sentencing is required. I must emphasise that the business world, like the rest of society, must be scrupulously honest and fair in their business dealings, and this sentence must serve to deter other likeminded persons, and also serve as punishment for you. At the end of the day, society demands that a sentence be imposed which is fair and just, keeping in mind your crimes and your personal circumstances.'

The sentence itself

[92] Veldhuizen J went on to impose the following sentences:

'1. On count 2, you are **SENTENCED TO PAY A FINE OF R75 000,00 (SEVENTY FIVE THOUSAND RAND) OR SERVE 18 (EIGHTEEN) MONTHS IMPRISONMENT**. A further **18 (EIGHTEEN) MONTHS IMPRISONMENT** is imposed, but **SUSPENDED FOR A PERIOD OF FOUR (4) YEARS** on condition that you are not again convicted of the crime of fraud committed during the period of suspension.

2. On count 6, you are also **SENTENCED TO PAY A FINE OF R75 000,00 (SEVENTY FIVE THOUSAND RAND) OR SERVE 18 (EIGHTEEN) MONTHS IMPRISONMENT.** A further **18 (EIGHTEEN) MONTHS IMPRISONMENT** is imposed, but **SUSPENDED FOR A PERIOD OF FOUR (4) YEARS**, on condition that you are not again convicted of the crime of fraud committed during the period of suspension.'

[93] The State, aggrieved at the sentences which they considered to be disproportionate to the enormity of the fraud perpetrated by Brown, launched the present appeal.

Conclusions

Change of plea during a trial

[94] More than 25 years ago, in *S v Mokhobo* 1989 (1) SA 939 (A), this court had occasion to consider s 112 of the Act, in relation to it being applied both at the commencement of proceedings as well as after the State has led evidence and an accused has then elected to change his plea from not guilty to guilty. At 943D-E the following appears:

'Artikel 112 vind normaalweg toepassing wanneer 'n beskuldigde by die aanvang van 'n verhoor skuldig pleit. Daar is egter niks in die artikel wat spreek teen 'n aanwending van die bepalings daarvan indien 'n beskuldigde wat aanvanklik onskuldig gepleit het sy pleit wens te verander nadat die Staat getuienis begin lei het nie – mits, natuurlik, die anklaer bereid is om op daardie stadium 'n pleit van skuldig te aanvaar. Dit mag dan egter nie nodig wees om die beskuldigde te ondervra, of vir hom om in sy verklaring erkennings te maak, aangaande elemente van die misdaad wat reeds deur getuienis bewys is nie.'

[95] In *Mokhobo* the court was concerned principally with whether the death sentence could be imposed in the absence of evidence proving the guilt of the accused. Put differently, the death sentence could not be imposed if guilt was based solely on a statement constituting a plea of guilty or if a conviction followed upon questioning in terms of s 112 after a plea of not-guilty had been changed to one of guilty.[5]

[96] In *S v Abrahams en andere* 1980 (4) SA 665 (C) at 668A-B, Vivier J recognised that s 112 did not apply only to a plea of guilty before a trial commenced, but that it also applied when there was a change of plea from not guilty to guilty during the course of the trial.

[97] In *S v Sethoga & others* 1990 (1) SA 270 (A) this court dealt with the effect of a change of plea from not guilty to guilty after evidence had been led by the State. In that case, statements were tendered in terms of s 112(2) of the Act admitting all the material elements of the offences to which the accused pleaded guilty. It is necessary to record

[5] *Mokhobo* at 942G-H.

that they pleaded guilty to only some of the charges that had been preferred against them. The pleas were accepted by counsel for the State. Counsel representing the accused and the State were informed by the presiding Judge in Chambers that he considered there to be sufficient evidence to justify the conviction of all the appellants on *all counts*. Counsel indicated that they were prepared to leave the matter in the hands of the court. On resumption the State closed its case whereupon the appellants did likewise. The trial court convicted the accused on all the counts.

[98] In *Sethoga* this court reaffirmed the correctness of the position adopted in *Makhobo* and *Abrahams*. It went further and noted that once an accused pleaded not guilty, a court is seized with the duty of determining the issues between the State and the accused raised by the latter's original plea of not guilty. It held (at 275C-E):

'The prosecutor cannot interfere with the exercise of that duty and compel the Court to enter a verdict of guilty on a lesser charge by seeking to limit the *lis* between the State and the accused. Any acceptance by the prosecutor of a plea of guilty to a lesser offence can accordingly only take place with the Court's consent. This was first laid down in *R v Komo* 1947 (2) SA 508 (N) at 511, and has been consequently followed since then. (See *R v Seboko* 1956 (4) SA 618 (O); *S v Cordozo* 1975 (1) SA 635 (T); *S v Mlangeni* 1976 (1) SA 528 (T).) In my view it represents the true position, which *a fortiori* applies to a case such as the present where there are several counts and the appellants, having initially entered pleas of not guilty to all counts, seek – after evidence has been led – to change their pleas to guilty on certain of the charges. Nothing in the provisions of s 112 detracts from the correctness of this conclusion.'

[99] In *S v Olivier* 2007 (2) SACR 596 (C) Moosa J had regard to the decisions in *Abrahams*, *Sethoga* and *Mokhobo*. At para 10 he said the following:

'In my view the evidence tendered by the State forms part of the record of these proceedings. (In *S v Mokhobo* 1989 (1) SA 939 (A) at 943, the accused initially pleaded not guilty to two charges of murder, but after medical evidence of the cause of death of the two deceased was led, the accused altered his plea on both counts to one of guilty. This was accompanied by a written statement in terms of s 112(2). The State accepted the plea of guilty and closed its case. The Court, on the strength of the admissions contained in the accused's s 112(2) statement and the medical evidence, convicted the accused. Implicit in that finding, the Court, in convicting the accused, relied not only on the admissions contained in the s 112(2) statement, but also on the

evidence presented in the trial prior to the change of plea.) I therefore rule that the evidence tendered by the State prior to the change of plea, constitutes evidence in these proceedings.'

[100] In A Kruger *Hiemstra's Criminal Procedure* (2013) at 17-12, the acceptance of a plea of guilty is discussed in the following terms:

'(i) At the beginning of the case, when the accused is asked to plead. The case is then still in the hands of the prosecutor and the court cannot prevent the prosecutor from accepting a plea of guilty on the charge as [it] stands, or on an alternative or permitted other charge (*S v Cordozo* 1975 (1) SA 635 (T); *S v Mlangeni* 1976 (1) SA 528 (T); *S v Sethoga and Others* 1990 (1) SA 270 (A) at 274I-275G). If the prosecutor accepts a plea of guilty to an alternative or other charge, the main charge falls away and the accused cannot be convicted of it (*S v Ngubane* 1985 (3) SA 677 (A) at 683). The court at 683E described such acceptance as a *sui generis* act by which the prosecutor limits the ambit of the *lis* between the state and the accused in accordance with the accused's plea.

(ii) In the course of the case, and after the accused, by a plea of not guilty, has joined issue with the state. It often happens that the accused in the course of the trial changes the plea to one of guilty to a lesser offence which is then a competent verdict on the charge in question, which the prosecutor may accept. In the *Sethoga* case *supra* at 274I-275G the Appellate Division explained the fundamental distinction between acceptance of a plea by the prosecutor before and after the beginning of the trial. Before the trial commences, i.e. at the plea stage, the prosecutor is *dominus litis* and as such entitled, by means of acceptance of a plea of guilty to another offence, to limit the *lis* between the state and the accused in accordance with the plea. However, as soon as the trial has commenced, the duty rests on the court to adjudicate the case as defined by the charge and the plea. The prosecutor cannot interfere with the exercise of this duty; he or she cannot at this stage by the acceptance of a plea limit the court's functions of adjudication. Such limitation requires the consent of the court.'

[101] The plea tendered by Brown was accepted by both the court and the prosecution without each understanding its true tenor or appreciating their respective roles. It will be recalled that at the time that the plea was tendered and accepted, Veldhuizen J took the view that s 112 did not find application when a plea of guilty was tendered *in medias res*. He considered it to only apply when a plea was tendered at the commencement of

a trial. A slight amendment was effected to the plea initially tendered because of the court's concern about whether, in respect of the MATCO transaction, the facts stated in the plea were sufficient to found a conviction. Thereafter Veldhuizen J, without more, proceeded to convict the accused on the strength of the plea of guilty. It will be recalled that in terms of the plea, Brown accepted his guilt on the two counts on the basis of *dolus eventualis*.

[102] Having regard to the authorities referred to above, Veldhuizen J was obliged, when the plea was tendered, to consider whether the plea ought to be accepted, with particular regard being paid to the effect of the evidence led up until that stage. So, for example, he could have put to counsel that the evidence summarised above was such that it could confidently be concluded that the appellant was guilty of the charges on the basis of *dolus directus*. Because he ostensibly misunderstood his adjudicatory role, he abdicated that responsibility. That notwithstanding, the plea was accepted by the court and also by the prosecution. The State, relieved at not having to continue to deal with the mass of documentation and the complexities of the investment industry, was probably too eager to accept the plea without thinking through the consequences. Before us, counsel representing the State rightly conceded that in this regard the State could have done better.

Evaluating evidence consistent with the plea

[103] In deciding on an appropriate sentence, the court below ought not to have restricted itself to the bare facts contained in the plea. The tendered plea does not provide context nor does it present enough of a picture for the court to properly fulfil its sentencing function. I will, however, accept in favour of Brown that, in considering the evidence adduced up until the acceptance of the plea and presented in mitigation and aggravation of sentence, no regard can be paid to evidence inconsistent with the plea. More particularly, evidence tending toward *dolus directus* and actual loss on the part of investors has to be discounted. It is also necessary to remind ourselves that Brown pleaded guilty on the basis that he foresaw potential rather than actual prejudice.

[104] It is necessary, whilst engaging in the exercise referred to in the preceding paragraph, namely an evaluation of the evidence consistent with Brown's plea, to remind ourselves of the definition of *dolus eventualis*. In CR Snyman *Criminal Law* 5ed (2008) at 184 it is defined as follows:

'A person acts with intention in the form of dolus eventualis if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but:

(*a*) he subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and

(*b*) he reconciles himself to this possibility.'

The learned author goes on to say the following:

'Another way of describing component (b) is to say that X was reckless as to whether the act may be committed or the result may ensue. However, it does not matter whether component (b) is described in terms of "reconciliation with the possibility" or in terms of "recklessness".'

Snyman gives an example of where a person might be held to have *dolus eventualis* at 185:

'If X has *dolus eventualis,* it is possible that he may in the eyes of the law have the intention to bring about a result even though he does not wish the result to follow. In fact, *dolus eventualis* may be present even though X hopes that the prohibited result will *not* follow. In this form of intention the voluntative element consists in the fact that X directs his will towards event A, and decides to bring it about even though he realises that a secondary result (event B) may flow from his act.'

The learned author points out that there are two requirements for the existence of *dolus eventualis*:[6]

'The first is that X should *foresee* the possibility of the result, and the second is that he should *reconcile* himself to this possibility. The first may be described as the cognitive part of the test and the second as the conative (or volitional) part of the test.'

Consideration of the relevant evidence

[105] I now turn to a consideration of the relevant evidence. Accepting in Brown's favour that he might have had, as a primary object, optimising investment returns by investing in a range of asset classes contrary to the mandate, it is nevertheless

[6] At 185.

strikingly clear that he and his cohorts were at the very least ‘gung-ho’ about how they dealt with investor funds. They ignored the most basic regulatory rules directed at ensuring that the funds were safeguarded and treated as trust funds.

[106] Brown was equally unthinking when spending moneys drawn from what he considered to be a common pool of investments to be dealt with at whim. He sought comfort in the fact that the business had grown exponentially and that there were, at some stage, sufficient assets to meet immediate investor claims.

[107] It is relevant that the investments in businesses such as MGX Software Futures held significant risks. All the while, the investor concerned was being assured that the mandate was being adhered to.

[108] After the investigation by the FSB was launched, Brown, instead of owning up to his misdeeds, resorted to subterfuge and deceit. The unchallenged evidence of Maddock and Goodwin, concerning the reconstruction of accounts and statements described as ‘retrofitting’, and the resort to measures such as the engineered letter from Goodwin on behalf of Worthytrade are all consistent with that pattern of deceit. This must surely count against Brown.

[109] The TETA and MATCO transactions involved hundreds of millions of rands. Thus the amounts at risk were substantial.

[110] In respect of the MATCO transaction, a material consideration is that a substantial number of beneficiaries of the portfolios which had been plundered by FAM belonged to a vulnerable class. In respect of the TETA funds, it is important to note that the investment emanated from a statutorily compelled body whose purpose was skills development.

[111] Venter’s testimony that Brown was a person who took responsibility for his deeds is belied by the years it took before he pleaded guilty. The admissions that Brown made

during his trial up until the plea of guilty was tendered were presented in a piece-meal fashion and were mostly formal in nature. He declined at the outset to provide an explanation in support of his plea. Whilst it is his right it is not consistent with someone of whom it is claimed was owning up to his deeds. He also engaged in extensive litigation that had the effect of delaying the commencement and completion of his trial.

[112] The promise at the beginning of Brown's testimony, that he was going to be forthcoming and repentant was almost immediately rudely dashed. His primary concern appeared to be his own interests and comfort. He railed against the FSB which, after all, was only fulfilling its statutory mandate. He criticised the police, the media, the Reserve Bank, the curators and the public. His asserted remorse was more apparent than real. A substantial part of his evidence thereafter was devoted to criticism of regulatory authorities, the media, the police and the prosecution. Brown's statements of sympathy concerning investors appeared contrived and reeked of insincerity. His apology to investors is qualified and his evidence as a whole reeks of self-pity.

[113] Brown's testimony concerning the Bachelor of Commerce degree was, as described earlier, simply false, as was his explanation about utilising R11 million of TETA's funds to purchase property in the name of the trust controlled by him. His tendency to dishonesty is reinforced by Seedat's evidence that he had denied that TETA had been a client of FAM's.

[114] It is apparent from Brown's testimony that he continuously downplayed and minimised his moral and legal blameworthiness.

[115] It must be relevant that by the time of the trial and, indeed, even at the time of the hearing before us, there was no indication that the TETA funds had yet been repaid. This is not a consideration of actual loss or an exclusion of the possibility that investors might, ultimately, be repaid at least some part or all of their investment, but is an exercise in weighing Brown's explanation that the negative impact of the manner in which the funds were treated by FAM was limited to investors having to wait a short

while before they were repaid. Brown's reliance on insurance cover as adequate protection of investor funds is cynical and obviously misplaced as it is trite that fraud unravels all.

[116] The conclusion by the court below that the two counts of fraud on which Brown had been convicted were not that serious and that his moral blameworthiness was limited, is entirely unjustified.

Applicability of minimum sentence provisions

[117] The court below erred primarily by holding that s 51(2)(*a*) of Act 105 of 1997 was inapplicable. Veldhuizen J, in arriving at that conclusion, had regard to the TETA and MATCO transactions. In respect of the first, he considered that Brown had only admitted to making representations contained in the monthly statements to TETA which had the potential to cause prejudice. In respect of the MATCO transaction, he took into consideration that the minority shareholders were paid and that, through the handing over of control of MATCO, funds became available to pay the balance of the purchase price to the majority shareholder. Veldhuizen J said the following:

'Those, in essence, are the facts which constitute the two crimes of which you have been convicted. These two crimes, as you admitted, involved potential prejudice and not actual prejudice and certainly do not "involve amounts of more than R500 000,00". After you made the admissions which I mentioned, and changed your plea, the State simply closed its case. The State, with regard to both counts, accepted that your conduct entailed potential prejudice and not actual prejudice.

After we convicted you, the State led evidence which, if it be accepted, constitute crimes which are far more serious.

I cannot sentence you for crimes of which you have not been convicted, that would be wrong. I can only sentence you for that of which you have been convicted. It is, accordingly, my judgment that section 51 of Act 105 of 1997 does not apply.'

[118] Fraud is defined by Snyman as follows:

'Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.'[7]

The unlawful and intentional making of a misrepresentation does not have to cause actual loss for it to constitute fraud. That fact eluded the court below. In respect of each of the transactions in question Brown committed fraud involving tens of millions of rands, way beyond the R500 000 threshold, which is the jurisdictional fact that triggers the minimum sentence provisions. Those assets were at risk and the potential prejudice has to be viewed from that perspective. Thus, in concluding that the minimum sentence legislation did not apply, the court below erred. I may add that even if the court below was correct in its conclusion that the minimum sentence did not find application, it ought to have considered whether, given the objective gravity of the offences, a custodial sentence was nonetheless called for. That it did not do. I shall now turn to consider whether there are substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of 15 years' imprisonment.

An appropriate sentence

[119] In answering that question, the oft cited decision of this court in *S v Malgas* 2001 (1) SACR 469 (SCA) is instructive. Marais JA (para 8) said the following:

'In what respects was it no longer to be business as usual? First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the legislature had ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored. The residual discretion to decline to pass the sentence which the commission of such an offence would ordinarily attract plainly was given to the courts in recognition of the easily foreseeable injustices which could result from obliging them to pass the specified sentences come what may.'

[7] Snyman at 531.

[120] Brown's personal circumstances alluded to above are not such that, by themselves, they compel a departure from the prescribed minimum sentence. I have taken into account, in Brown's favour, that he initiated social responsibility programmes such as starting a choir and assisting school children. He was also a first offender. However, it is quite clear that the message by the legislature is that white collar criminals who commit offences of a certain magnitude must not be permitted a soft landing. I have at some length, contrary to the approach of the high court, considered the seriousness of the offence. Such trauma as was visited upon Brown because of his misdeeds was entirely of his own making. Brown, in testifying, showed a remarkable lack of insight into the gravity of his conduct. There was scant, if any, trace of real remorse. It is clear that Brown is a man of enormous energy with heightened business acumen and was the driving force behind FAM. Would that he had used those skills with a better moral compass. His continuing dishonesty demonstrated during his testimony redounds to his discredit. Lastly, the question of whether *dolus eventualis* on its own constitutes a substantial and compelling circumstance justifying a lesser sentence is required to be addressed. Although the absence of *dolus directus* may well count in his favour it is but one of the totality of factors to be taken into account. Having regard to all the aggravating factors referred to earlier, I am unable to conclude that there are substantial and compelling circumstances present that would justify a departure from the prescribed minimum sentence.

[121] In my view, the sentence imposed by the court below tends toward bringing the administration of justice into disrepute. Less privileged people who were convicted of theft of items of minimal value have had custodial sentences imposed.[8] We must guard against creating the impression that there are two streams of justice; one for the rich and one for the poor.

[122] In *S v Blank* 1995 (1) SACR 62 (A) at 73B-D this court, in dealing with fraudulent conduct of a stockbroker, said the following:

[8] See *S v Nkambule* 1999 (1) SACR 225 (T) and *S v Mahlo* 2006 JDR 0145 (T).

'In view of all these facts, I feel fully justified in imposing a sentence which will deter not only the accused and other stockbrokers from committing crimes similar to those of which the accused has been convicted, but also others involved in business who may be tempted to indulge in larger-scale crimes of dishonesty. The time has already arrived when the severity of punishments imposed for this sort of crime while of course taking the personal circumstances of a particular accused into account, should proclaim that society has had enough and that the courts, who are the mouthpiece of society, will not tolerate such crimes and will severely punish offenders: cf *S v Zinn* 1969 (2) SA 837 (A) at 542D-E.'

At 75i-76a the court, with apparent approval, quoted the following part of the judgment of the trial court:

'In matters which come up on review and on appeal, these courts daily confirm sentences of a fine plus several years' imprisonment, conditionally suspended, for shoplifting, where items worth a few rand are involved; and also sentences of unsuspended imprisonment, frequently of four or five years, where a motor vehicle has been stolen.'

[123] In *Blank* the appellant, a stockbroker, had participated in schemes with senior employees of a life-insurance company to purchase shares and sell those shares to the company at a profit and receive part of the proceeds. The scheme involved 48 fraudulent transactions spanning a period of 17 months. The total profits exceeded R9,75 million of which the appellant received nearly R1,5 million. In considering an appropriate sentence this court confirmed the view of the trial court that there is a need for absolute honesty by stockbrokers. It took the view that, if a broker fell short of the standard required of him, he had to expect the full rigour of a severe sentence being imposed on him, both as punishment, and to deter others. This court dismissed an appeal against the sentence of 8 years' imprisonment. What this court said about stockbrokers applies equally to asset managers who are in a fiduciary position in relation to investor assets.

[124] In *S v Assante* 2003 (2) SACR 117 (SCA) the appellant, a 50-year old father of two with no previous convictions, was convicted of 108 counts of fraud, perpetrated against a bank of which he was a branch manager, which together totalled an amount of R345 million. He was sentenced on each of the counts to 15 years' imprisonment. The

sentences on all the counts, except one, were ordered to run concurrently. The effective sentence was 24 years' imprisonment. It is noteworthy that the judgment records that the appellant had not directly benefitted from the frauds. Investors were encouraged to think that they were lending money to the bank whereas, in truth, the moneys were employed for the development of sectional title and cluster homes. Problems arose when the activities of the property developers did not provide enough cash-flow to ensure the repayment of loans when they became due. This court dismissed an appeal against sentence.

[125] For the reasons set out above, I would incline towards setting aside the sentences imposed by the court below and substituting them with the prescribed minimum sentence of 15 years' imprisonment on each count of fraud, and ordering the two sentences to run concurrently.

Repeated unwarranted judicial interventions

[126] Regrettably and finally, it is necessary to deal with the nature and frequency of judicial interventions during proceedings in the court below. At an early stage in Maddock's testimony, which was to the effect that investor funds were being used to benefit Brown, FAM and its directors, counsel for the State asked Maddock whether Brown had the right to use funds in this manner, Veldhuizen J intervened and asked how Maddock could know whether that was so. The reply was obvious:

'Because those were investors' funds that had to be invested for the benefit of investors.'

A short while later, after Maddock informed the court that he was FAM's financial manager and that he was responsible for keeping books of account, Veldhuizen J suggested to him that FAM was keeping proper books 'and things like that'. The judge went on to enquire of Maddock whether the software used by FAM allowed for the integration of all the related companies, to which the answer was in the affirmative. The judge went on to say the following:

'[COURT]: I see. I see. You were always happy with that, I mean that as far as the accounting in these companies were concerned, that you . . .

[WITNESS]: I was happy with the accounting. I think some of the – you know maybe like loans in one company to the other company became a bit intricate.

[COURT]: Yes. . .
[WITNESS]: But I was happy that all the transactions were accounted for.'

It is necessary to set out the full exchange between the judge and Maddock that followed:

'[COURT]: Yes, and I mean you conveyed this much to the accused, that the accounting, you are on top of it and there is – you would have said listen I have got a problem here, I have got a problem there but I mean you were paid a very handsome salary.
[WITNESS]: Correct.
[COURT]: So he was – did you tell him that listen it is under control?
[WITNESS]: We were – we did a lot of work on getting all the accounts right and – from when we moved from the one system to the other – it took quite a time for us to put the Great Planes system in and that was correct and we did used to produce monthly management accounts in a pack and a report on each various company.
[COURT]: And this was given to the accused?
[WITNESS]: Yes, it was.
[COURT]: I see. So from all appearances, as far as he would have been concerned, the accounting and so on was in order. It was . . .
[WITNESS]: I believe so.'

[127] It will be recalled that, when the first glimpses of a possible defence emerged by way of the cross-examination of Goodwin, it was to the effect that Brown had relied on the expertise of others and on the processes that had been put in place.

[128] During Maddock's evidence, when he was being asked in-chief whether, at the time certain statements were sent to TETA, the first promissory note had been sold, he replied in the affirmative. The court then interrupted and asked the following:

'I'd like to know, Mr Maddock, do you know this from your own knowledge or is this or are you presuming?'

The ensuing answers were incrementally emphatic that Maddock knew this from first-hand experience.

[129] Some time later, when the court had concerns about counsel for the State putting leading questions to Maddock, he asked the latter whether he knew how the money was

spent after the first promissory note was cashed. He repeated that R11 million of that money was used to purchase immovable property and that R3 million was used to purchase the motor vehicles. Veldhuizen J then asked whether Maddock was aware whether any of the money was used to purchase a replacement promissory note. The answer by Maddock was that he was not aware that that had happened.

[130] When Maddock testified in relation to the TETA investment about how efforts were being made to reconstruct accounts and statements so that the FSB would not be any the wiser and stated that those efforts would not be a true reflection of what had happened to the TETA money, the court intervened. It is necessary, once again, to set out the full exchange between Veldhuizen J and Maddock:

'COURT: Well then you better tell us why you believe that . . . Because I mean just expressing an opinion that you don't believe that it's a true reflection, that's not good enough, then you'd better tell us why do you say that.

[WITNESS]: I'm not aware of the property developments that are reflected on here or the returns of those at all. . .

[COURT]: Ja, you're not aware of it, but you knew that money went there, to property development. . .

[WITNESS]: There were certain funds that – out of all the funds in Fidentia, that were used for purchase of property in Horizon Bay and the hotel and so on.

[COURT]: We know about that, Mr Maddock. You see it's one thing for you to say that this is not a true reflection . . . but there's another answer and this is you may not know whether it's a true reflection. Now what is it exactly, because I mean you know money went to property development, you may not know how much or where exactly it came from, or do you?

[WITNESS]: Well I know how much went into various property if I had access to the accounts . . .

[COURT]: If you had access. Did you have access?

[WITNESS]: No, I'm saying if I had access now, I could show you what was spent on various properties through the financial records.

[COURT]: Oh, right, but then in what respect is this not a true reflection?

[WITNESS]: Because I believe that a lot of the funds had been spent and not necessarily on investments for Teta, they'd been used for the payment of salaries or the payment of, as I mentioned, the property or the cars.

[COURT]: But then what did you do, because the accused asked you in the e-mail:

"Graham, does this support the financials on our side?"

So he wanted to know is this supported, I mean that's a silly thing to do if you know that you're not putting up a true reflection of what's going on, then to ask your accountant is this supported by the financials, the accountant is going to reply, don't be silly, you know man it's not a true reflection. That's my difficult[y], do you understand, Mr Maddock?

[WITNESS]: Ja, I do understand.'

[131] Whilst Maddock was testifying about an exchange of correspondence from which it appeared that explanations were being constructed to deal with the FSB and with cash flows, the court intervened and said the following:

'You see I must tell you that I may be wrong, but I have an idea that Mr Brown will not really contest the flow of money. It's there and I think we may find that we're spending a lot of time indicating that money went here, money went there and all that, and we may find at the end of the day that the accused will probably say yes, no that's true, that's all that's admitted, I've no problem with that. There may be a difficulty with the source of the money and things like that, that's fine, you see.'

[132] At one stage, when counsel representing Brown was cross-examining Goodwin, the court said the following:

'And I know the State has narrowed this to one, Fidentia Asset Management, and you have ably indicated that what we're dealing with is not Fidentia Asset Management, we're dealing with a group of companies, far, far wider than just the one company, and that there was substance in the companies in the sense that it had a structured management system.'

[133] When counsel put it to Goodwin that Brown had caused Ernst & Young to value FAM's investments on a quarterly basis, the court intervened and an exchange with the witness followed:

'COURT: Let's put it this way. Ernst & Young is a very big firm.

[WITNESS]: Yes.

COURT: Let's call them a firm. Well respected, not so?

[WITNESS]: Yes. Yes, they are.

COURT: And, I mean, they have branches all over.

[WITNESS]: Yes.
COURT: So you're dealing with a recognised, highly respected, regarded firm of auditors.
[WITNESS]: Yes.'

[134] As referred to earlier, when dealing with the exchange between counsel for the State and the court on the plea of guilty, the court took the view that not adhering to an investor's mandate while representing that you were, was not fraud. The court likened it to a breach of contract.

[135] When counsel for the State was explaining to the court that FAM had paid the purchase price for MATCO's shares with MATCO's own money, the court responded by asking: 'But why did MATCO hand over transfer control?' There was a further exchange about whether there had been testimony that the full purchase price had been paid in cash. The court persisted in asking whether anybody knew why MATCO had handed over full control. Veldhuizen J had regard to the statement in the tendered plea that FAM had made a strategic decision not to liquidate negotiable instruments held by it, and then said the following:

'So here you sit with a purchaser he says he enters into an agreement because he knows he's got enough assets in the form of negotiable instruments so at that stage if he prefers to liquidate those negotiable instruments he would be in a [position] to pay. So now there at that stage there can be no misrepresentation, now at a later date for strategic reasons he decides I'm not going to liquidate this I'm going to pay in another way.'

[136] The State continued to struggle to persuade the court that there was a fraudulent misrepresentation that the purchase price for MATCO had been wholly met from FAM's funds and it was on that basis that it took control. It bothered the court that Brown's plea recorded that he knew that FAM had enough underlying assets that would ultimately cover the purchase price. In the continuing exchange with counsel for the State, the court said the following about the MATCO shareholders:

'I mean, if they want to be stupid enough to hand over control without receiving payment, well, that's their problem.'

[137] The court, at one stage addressing counsel representing Brown, appeared to be indicating that he shouldn't plead guilty on the MATCO transaction. The court appeared to discount the evidence that had already been led, which I summarised in some detail above.

[138] After convicting Brown, during sentencing proceedings when counsel representing him led his evidence and asked about how well-structured FAM was and informed the court that the object was to show that Brown was not running a scam and that FAM was a professional concern, the court responded as follows:

'No, but no, no if that's the purpose of this I don't think that's necessary because there's no evidence before me and the State can't now present evidence that he was running a scam because he hasn't been convicted of that and I regard that as irrelevant. There's no evidence before me that he's stolen any money from Fidentia. There's no [evidence] before me that he has stolen money from investors. There's no evidence before me that he has run a pyramid scheme. There's no evidence that actual prejudice, actual damage has been caused. The defence and the State is bound by the agreement that they entered into and that's it.'

A short while thereafter, the court said the following:

'Look isn't it a question here, I mean this company grew in a short space of time tremendously and you have to have your control structures in place to do that and at one stage you had assets allocated in the wrong place didn't you, your asset base for the Financial Services Board wasn't properly structured?'

[139] During an exchange between the court and counsel representing Brown about whether the latter should attempt to lead evidence to show that Brown never had the intention to do anything criminal, the court stated that the State will not be allowed to show that Brown always had criminal intent. When counsel pointed out that Brown had pleaded guilty to certain counts, the court said the following:

'Two counts, two counts *on very limited* representations.' (My emphasis.)

[140] When Brown was testifying in mitigation of sentence about the potential prejudice he foresaw, namely that investors would have to wait a little bit longer for their money, the court responded as follows:

'Well the point it this if they knew that you didn't invest it in terms of the agreement well they could cancel the agreement, they could say it's a breach of contract, they would be able to cancel the agreement and reclaim the money, immediate payment of the money so that they were entitled to do then isn't that correct?'

The reply by Brown, predictably, was in the affirmative.

[141] When Brown was being cross-examined about cashing the first TETA promissory note, against the background of how the continued existence of a promissory note, or of one that had replaced, provided security, the court intervened, chastised counsel for the State and asked the following question of him:

'Mr Van Vuuren, don't interrupt me when I am asking a question. The money comes in, now what were they supposed to do with the cheque then, the promissory note. Should it just lie there?'

When that was answered in the affirmative, the court responded as follows:

'I mean surely you must be able to do something with it . . . .'

[142] Shortly thereafter, the court, ignoring the concept that funds invested with an asset management company, particularly in the form of secure instruments, should be treated as trust funds and safeguarded, said the following:

'Yes. But I mean if I invest money in a bank it doesn't remain my money. . . It becomes my bank's money. If I invest money with the bank with a condition that you invest it this way, right, and the bank takes money and invests some of it in that portfolio, so it is still not my money.'

[143] It will be recalled that during the initial and extended exchanges concerning the applicability of s 112 at the time that the plea was tendered, the court and counsel representing the State appeared not to appreciate their proper roles in relation thereto. During Brown's testimony, the court said the following, which indicated clarity on the issue:

'I must tell you that was my initial reaction, is once evidence is led then it is in the Court's discretion whether there can be a plea of guilty – well a plea of guilty can always be there – whether that can be accepted. You see, so that was as simple as that.'

[144] During Seedat's testimony, the court once again displayed its view of Brown's conduct on which the conviction was based:

'But now tell me, Mr Van Vuuren, when someone says, these amounts have from time to time been invested in asset classes different to those specified.'

'That's not an appropriation.'

[145] The passages reflecting the court's interventions and exchanges with witnesses and counsel reflect an on-going consistent attitude that Brown's conduct was not that reprehensible. A judicial officer faced with continuing evidence that trust moneys were being used in the manner described above ought to have been concerned about the propriety of such action rather than repeatedly seeking to excuse it. On occasion, accused persons complain that they have been prejudiced by judicial officers entering the arena. In the present case the State has cause for complaint. I have taken into account that for a substantial part of the proceedings Brown was unrepresented and would have been entitled to protection by the court in its role of ensuring a fair trial. The interventions set out above went beyond a court's obligation in that regard. The judge, very early on, was antagonistic to the State's case and repeatedly intervened to the benefit of Brown. I agree with counsel for the State that the judge's behaviour reflected in these passages is deserving of censure. Counsel representing Brown was constrained to agree.

Maddock's potential indemnity

[146] A final observation concerns the indemnity that Maddock might have been entitled to in terms of s 204(2)(*b*) of the Act. That subsection provides that, in the event of a witness testifying frankly and honestly in answering questions which might incriminate him, he would be entitled to be discharged from prosecution. The court failed to conduct an enquiry in terms of s 204 despite being requested to do so. It was clearly an oversight. It is for the prosecution and Maddock to take such further steps as they might be advised in regard thereto.

[147] For all the reasons set out above, the following order is made:

1. The appeal in respect of sentence is upheld.

2. The sentences imposed by the court below are set aside and substituted as follows:

‘i. On count 2 the accused is sentenced to 15 years’ imprisonment.

ii. On count 6 the accused is sentenced to 15 years’ imprisonment.

iii. The sentences are ordered to run concurrently.’

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MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANT:	Adv. W J Downer SC (with him T du Toit-Smith) Instructed by: The Director of Public Prosecutions, Cape Town The Director of Public Prosecutions, Bloemfontein
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