Reportable:	**YES**/NO
Circulate to Judges:	**YES**/NO
Circulate to Magistrates:	**YES**/NO
Circulate to Regional Magistrates:	**YES**/NO

IN THE HIGH COURT OF SOUTH AFRICA

[NORTH WEST HIGH COURT, MAHIKENG]

APPEAL CASE NO: CAF7/2012

(*court aquo*) CASE NO: CC8/2008

Date Heard: 12 – 13/08/2013

Date Delivered:

In the matter between:

ANDRIES JOE MASOANGANYE (ACCUSED 1 *court aquo*) 1st APPELLANT

ABDUL KADER AHMED (ACCUSED 2 *court aquo*) 2nd APPELLANT

TLALENG ALINA MHLEKWA (ACCUSED 3 *court aquo*) 3rd APPELLANT

And

THE STATE RESPONDENT

Coram: Kgomo JP; Rampai AJP et Hendricks J

JUDGMENT

Kgomo JP

ORDER

1. **The appeal in respect of all the appellants (Andries J Masoanganye: No1; Abdul K Ahmed: No2; and Tlaleng A**

Mhlekwa: No3) pertaining to all the counts (charges) is dismissed in respect of the conviction and sentence.

2. **The appeal by first appellant (Masoanganye) in respect of the recusal is dismissed.**

3. **The appeal by the second appellant (Ahmed) in respect of the separation of trial is dismissed.**

4. **The second appellant (Abdul K Ahmed) and the third appellant (Tlaleng A Mhlekwa) who have been on bail are to present themselves to Correctional Services in Mahikeng within seven (7) days of this order to serve their sentences.**

THE CHARGES, CONVICTIONS AND PUNISHMENT

1. Mr Andries Joe Masoanganye, the first appellant, was the Master of the High Court, Mahikeng. On 08/09 July 2010 he was convicted and sentenced as follows by Leeuw JP in the North West Division of the High Court (Mahikeng):

   1.1 Count 1: Theft on 12 April 2001 in the amount of R181 858.00 from the Guardian Fund and was sentenced to 8 years imprisonment. Henceforth identified as the Bophuthatswana IGI(BOP IGI) Insolvent Estate offence ;

   1.2 Count 2: Theft on 15 May 2001 in the amount of R122 548.58 from the Guardian Fund and was sentenced to 10 years imprisonment. This offence related to Estate Late Lebopo;

   1.3 Count 3: Theft on 28 August 2001 from the Guardian Fund in the amount of R400 000.00 and was also sentenced to 10 years imprisonment. This count relates to Estate Late Shadi.

1.4 Count 4: Theft on 19 October 2001 from the Guardian Fund in the amount of R113 138.22 and was similarly sentenced to 10 years imprisonment. The money emanated from Estate Late Malatse (not Malatsi) and was due to African Bank or more appropriately to Unique Finance.

1.5 Count 5: Theft on 04 April 2002 in the amount of R400 000.00 (compare Count 3 in para 1.3 above) from the Guardian Fund. A sentence of 10 years imprisonment was repeated. The theft related to Estate Late Sehoone whose beneficiaries were his children from the Titis (not Titus) family.

The court aquo ordered all the sentences to run concurrently. The effective sentence that the Master is serving since July 2010 is 10 years imprisonment.

2. The State alleged that the Master acted in cahoots with Ms Tlaleng Alina Mhlekwa, the third appellant who was his assistant. Also complicit in the scheme was held to be Mr Abdul Kader Ahmed, a one-person legal practitioner who was accused of having laundered some of the ill-begotten gains through his firm's trust account. Mr Ahmed is the second appellant. A fourth accused, Ms Grace Keatlaretse Mooketsi, was convicted only in respect of Count 2 in that it was found that she colluded with the Master and was sentenced to pay a fine of R3000.00 or in default of payment to serve three (3) years imprisonment. She has neither appealed her conviction nor her sentence.

3. Attorney Ahmed, the second appellant, was convicted and sentenced as follows:

3.1 Count 1: Guilty of the theft stated in para 1.1 (above) and sentenced to 8 (eight) years imprisonment, two (2) years of which were conditionally suspended for three years.

3.2 Count 4: Guilty of the theft stated in para 1.4 (above) and sentenced to six (6) years imprisonment.

By virtue of these sentences having been ordered to run concurrently second appellant's effective sentence is six (6) years imprisonment. He is out on bail pending appeal.

4. The Third appellant, the Assistant Master, was convicted and sentenced as follows:

4.1 Count 1: Guilty as set out in para 1.1 (above) and sentenced to eight (8) years imprisonment whereof four (4) years were conditionally suspended for three years. This is the only count on which she has been convicted. She is also out on bail pending appeal.

5. Leave to appeal in respect of both their convictions and sentences was granted to the Full Court of the High Court by the court aquo to the three appellants on 10 May 2011. The fourth accused, Ms Mooketsi, accepted her fate.

6. It is difficult to characterise the defence of the Master. It is amorphous and wavers between: He was duped into signing the cheques or approving payment; he signed without checking; someone unknown to him kept a parallel system or a set of records which were presented to him as authentic but later destroyed or disappeared; and even that he has done nothing wrong. Attorney Ahmed blames a now-deceased so-called paralegal, Mr Patrick Mogorosi, for his woes or the surreptitious disappearance of his Powers of Attorney and other

relevant documentation from the Master's office or from his office files. The Assistant Master claims that she had been barely six months in that office, was not familiar with the workings in the Master's office and signed the cheque in Count 1, she was convicted of, in blissful ignorance or in good faith.

THE BACKGROUND INFORMATION

7. Mr Jan Horn is an employee of the Department of Justice and Constitutional Development (DOJ&CD) and attached to the Quality Assurance Section. When the investigation pertaining to these cases were commenced with he had held this position for the past three years. Prior thereto his curriculum vitae reads: He served in various magistrates offices for 20 years from being a clerk to magistrate. This was followed by 12 years in the Office of the Master of the High Court in Pretoria (Tshwane). The period is apportioned thus: Two years as control officer; and about ten years as supervisor in respect of the Guardian Fund.

8. The duties of a Quality Assurance Officer (QAO) entails examining the records of magistrates offices to assess whether the prescripts of the Department were adhered to and ensure that irregularities were eliminated. His training and experience placed him in good stead to testify how a Master's Office functions:

   8.1 A Remittance Register (the R/R) is kept in which is entered all cheques, cash and revenue stamps – in fact all negotiable instruments.

   8.2 The Registry Section in the Master's Office opens the post upon receipt. The staff members in this section are appointed by the Master. They are the ones who enter the remittances. The specific amount in respect of each negotiable instrument is reflected;

8.3 The Registry Clerk provides the register together with the negotiable instruments to a duly assigned officer in the Guardian Fund office. This officer checks whether the particulars in the register correspond in every respect with the instruments and signifies his/her imprimatur for later inspection with a signature and a date;

8.4 Upon the completion of this verification the register and liquid instruments are taken to a cashier who issues a corresponding receipt to every payee. The receipt numbers are entered in the relevant columns of the remittance register for control purposes;

8.5 Next, an account card, colloquially termed a "blue card" due to its colour, is opened for every payment received. This is in fact more of a spread sheet than a card. According to Mr Horn if there are three minor beneficiaries, for example, an account card must be opened for each one of them with the amount due to each one specified on the account card;

8.6 When payment is made an entry to that effect must be reflected on the account card. The purpose of the payment must also be recorded. For example "maintenance". The cheque number and the amount paid out must in addition be entered on this account/blue card.

9. With this uncontested background evidence it is vital to examine how claims are processed. The importance of this exercise reposes in the fact that it enables the Court to determine whether the appellants, within their respective fields of endeavour or responsibility did what was required of them. Regard could be had to the various layered documentation which serve as checks and balances. Mr Horn testified that there are essentially two accounts in the Guardian Fund:

9.1 An interest bearing account for minors and people who lack mental capacity, like mentally ill persons. In such cases interest is paid to the beneficiaries with their claims. For maintenance a form J341 is completed when the parent or guardian requisitions money for an under 21 year old;

9.2 A non-interest bearing account is used for creditors who could not be traced by the liquidator but who subsequently claim a refund from the Guardian Fund. As the account suggests only the capital amount is paid out. When a claim is made in this instance the creditor himself/herself may simply write a letter and dispatch same with a copy of their identity document to the Guardian Fund. An attorney authorised by means of a Power of Attorney may also intercede.

9.3 For inheritance a J251 form is completed. The Master, or in the Master's absence the Assistant Master, determines what premium is to be paid monthly or bi-monthly or half-yearly to a claimant, depending on the need. Inheritance is claimed by a beneficiary who has attained the age of majority.

9.4 When a claim for inheritance is lodged the Assistant Master must peruse the relevant estate file to establish whether the rightful beneficiary has made the requisition. This incumbent checks the contents of the file against the entries on the account/blue card and further collates those with the particulars on the J251 form. These are some of the built-in checks and balances to obviate improper payment.

COUNT 3: ESTATE LATE SHADI

10. I find it convenient to deal with the conviction relating to Estate Late Shadi first. It expedites comprehension of the modus operandi devised by the perpetrators of the theft because direct evidence in

this regard was adduced. Surprisingly, only the Master was convicted on this count. Ms Bontle Shadi was called as a witness by the State in terms of s204 of the Criminal Procedure Act, No 51 of 1977 (CPA). It is common cause that an amount of R400 000.00 was paid out to Ms Shadi, the widow of the late Karabo Shadi. A cheque for the stated amount was signed on 28 August 2001 by the Master and accused 5, Mr Theo Mogapi, who was acquitted on all the charges he faced. Mr Mogapi's name features prominently throughout this judgment. He worked in the Master's Office.

11. This is how events unfolded. Karabo Shadi died on 12 December 1996. Ms Shadi was appointed the executor to the estate. Over many months various amounts were paid into and out of the Guardian Fund, for the benefit of the couple's four children who were still minors. A blue card was opened for each child, as the regulations stipulate. The moneys deposited and paid out were all recorded on each one of these cards. Meticulous evidence was proffered on this charge by Ms Shadi, Mr Horn and Mr Frederick Smit, an experienced forensic internal investigator. The court aquo also dealt extensively with this evidence. There is no need to regurgitate same.

12. The fact that in Ms Shadi's initial visit to the Master's office she was accompanied by her attorney, Ms Tlhapi, and later made various trips to that office for withdrawals resulted in an acquaintance between Ms Shadi and the Assistant Master, the third appellant. In the event there was also some familiarity with the Master, the first appellant. On an occasion the Assistant Master allowed her to "jump" the long queue. Crucially, about two weeks before the R400 000.00 cheque was issued Ms Shadi was at the Master's office for the routine

withdrawal for the children. The Assistant Master called her to her office.

13. At the instance of the Assistant Master the two of them went to first appellant's office, the Master himself. It was agreed that she would defer her claims and meet the Assistant Master at her place of residence, Tlotli Flats. It was intimated there that she could claim an exorbitant amount in excess of what was deposited for the children. Upon enquiry Ms Shadi was told to leave that issue to them. That same late afternoon Ms Shadi visited the Assistant Master at Tlotli Flats as arranged between the three of them. The Master joined them there afterwards. Ms Shadi was told to claim R400 000.00, which would be faked on the blue cards for checking purposes. The assistant Master informed her that she pulled a similar stunt in Bloemfontein the proceeds of which she acquired a fixed property and was never caught out.

14. There was a few days' delay before any further developments because Theo, as Ms Shadi knew Mr Mogapi, had been away. The duty of Mr Mogapi in essence was to mechanically write out cheques upon the bidding of his aforesaid appellant superiors. On his return the Assistant Master called in Ms Shadi who was running her own errands elsewhere. Mr Mogapi wrote out the cheque for R400 000.00 which, as it is common cause, was signed by the Master and himself. Ms Shadi went to the Assistant Master's office to report her achievement and showed her the cheque which she later deposited at ABSA Bank, Mahikeng, in the name of Kelelo Trade Store. The bank teller phoned the Master's office for clearance, which was obtained. Ms Shadi instantly withdrew R150 000.00 in cash. There were also subsequent cash withdrawals in smaller amounts.

15. The bank statements evidencing the cash withdrawals (the money trail) served as exhibits. Ms Shadi explains in detail where she met the Master and his assistant separately or jointly, to share the spoils. Always in cash and, predictably, no witnesses present and no written acknowledgment of receipt.

16. On an unspecified date after these fraudulent transactions the Master and his assistant approached Ms Shadi at her business premises in Montshiwa, Mahikeng, and informed her that some officers from Pretoria are carrying out investigations in the Master's office. They assured her that they have taken care of the implicating records described earlier and that nothing untoward would be discovered and, even if that eventuates, nothing would be traced back to her.

17. Not long after this warning, or tip-off, by the Master and his assistant the aforementioned Mr Smit phoned Ms Shadi to meet him at Baffalo Lodge. She met Smit and his colleague there the following day. They enquired after the R400 000.00. She feigned a faded memory and promised to retrieve the bank statements from ABSA in order to respond meaningfully. She nevertheless gave them authority to obtain the bank statements as she would not have to pay for their generation. She reported this turn of events to her collaborators. The Assistant Master informed her that the Master will pay for her attorney, alternatively her (third appellant's) boyfriend's brother in Bloemfontein, who is an attorney, would represent her.

18. With the information supplied by ABSA and Ms Shadi, Mr Smit prepared a statement for Ms Shadi to sign. She refused to do so unaided by an attorney. She was arrested the following day because

the investigators had run out of patience with her. As we know, she eventually turned state witness and was in fact granted amnesty as a credible witness by the Court at the end of the trial.

19. The Master's defence was that the late Patrick Mogorosi, a clerk in second appellant's firm (AK Ahmed Attorneys), provided him with a Power of Attorney and a motivation for the requisition of the R400 000.00 and that Ms Shadi submitted this authorisation to him. According to the Master everything seemed to be in order when he authorised payment. He exceeded the maximum limit of R100 000.00 that a Master was empowered to authorise because Ms Shadi wanted to establish a franchise outlet which would generate substantial returns to the benefit of the children.

20. The Master had in mind the provisions of s 90(1) of Administration of Estates Act, No 66 of 1965. It stipulates :

"(1)The Master may, subject to subsection (2) and subject to the terms of any will or written instrument disposing of the money or, in the case of a tutor or curator, by which the tutor or curator has been nominated, pay to the natural guardian or to the tutor or curator, or for and on behalf of the minor or other person concerned, so much of any moneys standing to the credit of the minor or other person in the guardian's fund as may be immediately required for the maintenance, education or other benefit of the minor or other person or any of his dependants, or for any purpose referred to in subparagraph (i), (ii) or (iv) of paragraph (c) of the proviso to section 82, or for any investment in immovable property within the Republic or in any mortgage over such immovable property on behalf of the minor or other person, approved by the Master: ***Provided that, subject to the terms of any such will or instrument, the aggregate of the***

payments made in the case of any minor or other person for purposes of maintenance, education or other benefit shall not, without the sanction of the Court, exceed the amount determined by the Minister from time to time by notice in the Gazette of the capital amount received for account of the minor or other person concerned*".*

The amount determined under Proclamation R123 of 1993; Government Gazette No 15308 of 01 December 1993 was fixed at R100 000.00. The amount determined under Government Notice No R1318 in GG 25456 of 19 September 2003 remains R100 000.00. The R400 000.00 was therefore paid out on 28 August 2001 when the limit was R100 000.00.

21. The Power of Attorney and the motivation letter that the Master alluded to were nowhere to be found. If Ms Shadi is to be believed, in my view she should, the Master and his assistant saw to that. Ms Shadi vehemently denied instructing attorney Ahmed or Mr Mogorosi to act on her and her children's behalf. Nevertheless, in my view, the claim by first and third appellants that they had been furnished with a Power of Attorney is a fabrication. First, the appellant must have known that a paralegal lacks competence to issue a Power of Attorney. Secondly, if the Power of Attorney existed it would redound to the first and third appellants' favour to keep it on file for production when required. Thirdly, even if the Power of Attorney existed it would have been fake because there were insufficient funds in the Guardian Fund for the Shadi children to satisfy a claim of R400 000.00. Fourth, the Master's authority to authorise an enhanced global payment was limited to R100 000.00. An amount above this threshold had to be authorised by a court upon a substantive application. Fifth, the discrepancy would still have been

discovered through the most rudimentary method outlined by Mr Horn and Mr Smit.

22. The third appellant exculpated herself in this manner: It is true that Ms Tlhapi of Tlhapi & Mookeletsi Attorneys introduced Ms Shadi to her in the year 2000, on which occasion she mentioned that she had property in Bloemfontein and that she stayed at Tlotli Flats in Mahikeng (referred to by Ms Shadi). She never saw Ms Shadi afterwards nor did she have any dealings with her. She was attending a course in Pretoria on 20 September 2001, a date on which Ms Shadi intimated to be one of several dates on which money was paid over to the Assistant Master. The court aquo gave the third appellant the benefit of the doubt and discharged her. For what it is worth, I disagree with the court aquo's verdict.

23. The correct approach to be adopted by an appellate tribunal has been enunciated as follows by Marais JA in **S vs Hadebe and Others 1997 (2) SACR 641 (SCA)** at 645e-f:

"*Before considering these submissions it would be as well to recall yet again that there are well-established principles governing the hearing of appeals against findings of fact. In short, in the absence of demonstrable and material misdirection by the trial Court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. The reasons why this deference is shown by appellate Courts to factual findings of the trial court are so well known that restatement is unnecessary*".

See also **R vs Dhlumayo and Another 1948 (2) SA 677 (A)** at 705-706.

24. I am satisfied that the Learned Judge President erred in exonerating the Assistant Master, the third appellant. The evidence against her is overwhelming. We deal with this aspect of the case because the finding unjustifiably casts doubt on Ms Shadi's credibility. The evidence implicating third appellant on this charge has ramifications for the charges that first and third appellants faced. I observe that:

24.1 The Assistant Master, on a conspectus of the evidence, was the initiator of the fraudulent scheme;

24.2 She was the go-between or facilitator of the conspirators;

24.3 Although I find that she **did** benefit from the scheme, it is not a requirement for a thief or fraudster to derive a benefit to be visited with a conviction on a charge of theft. The intention to deprive permanently is all that is required. First, a conspiracy to defraud was established; secondly the conspiracy was executed and culminated in the loss of the R400 000.00 from the Guardian Fund; thirdly, there was no claim or valid claim of a right by the conspirators to appropriate the money or dispose of it in the manner that they did. See: **S vs Cooper and Others 1976 (2) SA 875 (T) at 879 A-H** the Court held:

"*A conspiracy normally involves an agreement, express or implied, to commit an unlawful act. It has three stages, namely, (1) making or formation, (2) performance or implementation and (3) discharge or termination. When the conspiratorial agreement has been made, the offence of conspiracy is complete, it has been committed and the conspirators can be prosecuted even though no performance has taken place. But the fact that the offence of conspiracy is complete at that stage does not mean that the conspiratorial*

agreement is finished with. It is not dead. If it is being performed, it is very much alive. So long as performance continues, it is operating, it is being carried out by the conspirators, and it is governing or at any rate influencing their conduct. The conspiratorial agreement continues in operation and therefore in existence until it is discharged (terminated) by completion of performance or by abandonment or frustration or whatever it may be; per Lord PEARSON in Director of Public Prosecutions v. Doot and Others, (1973) 1 All E.R. 940 (H.L.) at p. 951. While the conspiratorial agreement is in existence it may be joined by others and some may leave it. The person who joins it is equally guilty; R. v. Murphy, (1837) 8 C. & P. 297 at p. 311 (173 E.R. 502 at p. 508). Although the common design is the root of a conspiracy, it is not necessary to prove that the conspirators came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. The agreement may be shown like any other fact by circumstantial evidence. The detached acts of the different persons accused, including their written correspondence, entries made by them, and other documents in their possession, relative to the main design, will sometimes of necessity be admitted as steps to establish the conspiracy itself. It is generally a matter of inference deduced from certain acts of the parties concerned, done in pursuance of a criminal purpose in common between them. R. v. Briscoe and Scott, (1803) 4 East 164 at p. 171 (102 E.R. 792 at p. 795). If the conspirators pursued, by their acts, the same object, often by the same means, some performing one part of the act and others another part of the same act, so as to

complete it with a view to the attainment of the object which they were pursuing, the conclusion may be justified that they have been engaged in a conspiracy to effect that object.".

25. In my view the conduct of Ms Shadi, that of the Master and the Assistant Master fall squarely within the definition of a conspiracy and the doctrine of common purpose enunciated in **S vs Cooper** (above). It is therefore immaterial whether the Assistant Master was attending a course in Pretoria on 20 September 2001 or whether she was on vacation in the Bahamas. The money had already been stolen on 28 August 2001. See **S vs Molimi and Another 2006 (2) SACR 8 (SCA)** para 33 where the Court stated:

"*It has long been accepted that the operation of the common purpose doctrine does not require each participant to know or foresee in detail the exact manner in which the unlawful consequence occurs. Were it otherwise, it would not be possible to secure a conviction simply on the basis that some event had happened during the execution of the common purpose, that all the participants in the common purpose had not more or less planned for. All that is required for the State to secure a conviction on the basis of common purpose is that an accused must foresee the possibility that the acts of the participants may have a particular consequence, such as the death of a person, and reconciles himself to that possibility*".

See also **S vs Thebus and Another 2003 (2) SACR 319 (CC)** para 40.

First appellant was therefore correctly convicted and the third appellant should also have been convicted.

<u>COUNT 1: THE BOPHUTHATSWANA IGI THEFT CHARGE</u>

26. All three appellants were convicted of the theft on this charge which occurred on 12 April 2001 and involved an amount of R181 858.12 from the Guardian Fund. The fraudulent transaction took place four months before the Shadi event in Count 3. In fact, this was the first of the five charges. The auditors Ernst & Young were the liquidators in respect of the Bop IGI insolvent estate. They deposited an amount of R440 489.85 into the Guardian Fund on 23 March 2000. The money redounded to the benefit of creditors who were owed at the time of the final liquidation of the company.

27. The cheque was accompanied by a list of creditors with the amount due to each one reflected in a column against the relevant name. The Bop IGI list consists of 126 creditors or claimants. Although the claimants are listed between the numerals 1 and 551 they do not follow consecutively because others in-between were obviously already paid out by the liquidators. Hence only the 126 listed claimants. What was due to these creditors in terms of the Ernst & Young schedule, which was paginated Exhibit "D3-D5", were "Uncollected dividends in terms of 2nd and 3rd accounts".

    27.1 The most prominent amount by a long stretch was due to Claimant number 466, STANBO FINANCE, in the amount of R98 510.27. It is a notorious fact that the "STAN" prefix in "STANBO" stands for "Standard Bank" and the "BO" suffixed thereto stands for "**BO**phuthatswana".

    27.2 The next highest amount was due to Claimant No 238, Bodiredi Bafokeng, a well-known Non-Government Organisation (NGO) of the Royal Bafokeng (Rustenburg) in the amount of R79 426.25.

27.3 The third highest is Claimant 551, Bop Prof Soccer League, (Bophuthatswana Professional Soccer League) in the amount of R27 846.71.

27.4 The fourth highest is Claimant 75, Standard Bank, in the amount of R26 527.12.

27.5 The fifth is Claimant 546, Standard Bank Bop, in the amount of R 23 895.90

27.6 Lastly, for illustration purposes: The sixth highest amount is Claimant 502, Commercial Union, which stood to benefit R20 846.63.

Total: R277 052.88

28. The amounts in para 27.1 - 27.6 add up to R277 052.88. If same is subtracted from the total amount of R440 489.85 it leaves the sum of R163 436.97. It is common cause that the amount of R181 858.12 was paid into the Trust Account of attorney Ahmed, the second appellant. As no payment was made to the beneficiaries identified in paras 27.1 – 27.6 and add that amount (R277 052.88) to R181 858.12 that was paid out to AK Ahmed Attorneys the total stands at R458 911.00. This amount thus already exceeds the BOP IG1 deposit of R440 489.85 by R18 421.15. This therefore would leave nothing to the 118 remaining claimants because only two claimants were paid. See para 29 below.

29. Exhibit "D6" is the IGI Bop Blue Card. It reflects that on 30 June 2000, three months after the global amount from Ernst & Young in the amount of R440 489.85 was remitted, Mecca Panel Beaters (Claimant 232) was paid an amount of R10 690.55 after a deduction of R662.66; and on 31 August 2000 JP Koi-Koi was paid R1264.64 after a deduction of R66.55. The small amounts withheld may have

been for administrative purposes. Nothing untoward turns on the deduction of these pittances. What is of consequence is that the deficit just becomes worse.

30. What catches the eye immediately in Exhibit "D6" (the blue card) is that in respect of the R181 858.12 paid to attorney Ahmed, first; no claimant is specified by name or by claimant number; second, no beneficiary stood to be paid that amount having regard to Exh "D3–D5". The Master testified that he was unaware as at 12 April 2001 that 5% may be deducted for administrative purposes so no deductions were made. Certainly, as illustrated in paras 27.1 – 27.6 (above) Exh "D3- D5" does not closely throw up this astronomical amount paid into second appellant's Trust Account.

31. The payment of R181 858.12 to "A K Ahmed Trust" was authorised and signed by first appellant and countersigned by third appellant on 12 April 2001. In this regard Mr Horn testified that in the process of inspecting the Mmabatho Master's office he observed that the Bop IGI blue card was not checked in accordance with para 6 of "Code: Organisation and Control" which was issued by the Department (DOJ&CD) and had been in use, with the necessary upgrades, since 1991. He has personal knowledge that the Code was available in the Mmabatho Master's office when he conducted training there in 1995. He and/or Mr Masyn variously noted that:

    31.1 The Blue Card and the remittance register were not checked, dated and signed;

    31.2 The name of the creditor/claimant in whose favour the AK Ahmed Trust cheque (R181 858.12) was made out was not reflected on Exh "D6";

31.3 There was no Power of Attorney or any motivation which authorised second appellant (attorney Ahmed) to claim the money on behalf of a client or clients;

31.4 AK Ahmed was not a creditor or claimant. In other words his name does not appear on Exh "D3 - D5".

31.5 Mr Masyn, who worked as a team with Mr Smit, testified that an authorised search of attorney Ahmed's office revealed no file or record for this claim.

32. The Master and the Assistant Master stood or fell together on this Bop IGI charge. They testified that it is true that the Master approved and signed the cheque in question. It is also true that the Assistant Master countersigned it. They were in each other's presence when this was done. The Master had all the correct documentation (files, registers, AK Ahmed's Power of Attorney, etc.) with him which he checked before he acted as aforesaid. Importantly, they claim that the Master allocated the relevant payments on the original Blue Card **and updated it**. The Assistant Master faithfully vouched for the veracity of her Master's evidence because she witnessed the methodology he employed; that moved her to countersign.

33. Not only was the entry on Exh "D6" deceitful but the incontrovertible evidence is that the original Exh "D3-D5" was discovered in the Master's office in 2003, more than two years after the payment into AK Ahmed's Trust Account on 12 April 2001. Exh "D6" was certainly **not updated**. On the contrary it was unchecked. Shifting ground, these not-so-masterful functionaries suggested that there must have been a "second slate" which has disappeared. They were sabotaged internally, they lamented. They have not named names of culprits or

suspects. As the various strands are pulled together the answer crystallizes.

34. The late Patrick Mogorosi must be turning in his grave. His former attorney-boss is imputing blame on him for everything that went wrong in his firm. Mr Ahmed says Mr Mogorosi dealt with all matters involving estates and the Guardian Fund. The Bop IGI matter is no exception, he stated. He has no recollection that his firm dealt with a matter emanating from Bop IGI or from the liquidator Ernst & Young. There must have been a Power of Attorney issued by his firm. There must have been a file in Mr Mogorosi's office; which he hardly ever entered (and by implication never checked). When the problems pertaining to these cases arose his files were removed by the Law Society of the Northern Provinces. He never saw those files again. The relevant documentation could be in there. Neither the police nor the inspectors ever asked him for an explanation. The first time that he had an inkling of what he was being accused of happened in 2004 when the indictment was served on him. Now, therefore, he has no knowledge of what happened to the R181 858.12. Mogorosi would have known. He (Ahmed) did not benefit. He is innocent. Laughable. Pathetic.

35. From this doom and gloom in the office of the Master rises someone of integrity. He lands the *coup de grâce* against the appellants, particularly the Master. He is Mr Tebogo (not Thebogo) Matsose. He has been employed in the Mmabatho Master's office since 1984. He started off as a typist and progressed to become an Estate Controller. In 1985 he was posted to the Guardian Fund. From 04 May 2000 he was switched to the Examinations Section. In his own words this is how it happened. First, in-chief:

35.1 *"If you look at that blue card, can you tell the Court after you had opened the blue card and entered the amount that was received from Ernst & Young, whether you had any other dealings with that card?=== No, after opening it, I never had anything [to do] with it anymore.*

You mentioned at some point that in May 2000 you no longer worked with the Guardian Fund.=== That is correct.

How did that come about? Were you transferred to another section?===Yes, I was taken out of the Guardian Fund and I was transferred to the Examination Section.

And was there any reason in particular why you were moved from the Guardian Fund?=== Up to now I do not understand the reason until I went to the Master in connection with this.

When you say the Master, who are you referring to?=== Master Masoanganye in connection with the files. There were applications which he approved in writing. He was supposed also to approve them in the computer. After he has approved on documents, he was not approving them in the computer at the same time. So these files were supposed to come back to us so that we should issue cheques. After issuing the cheques according to his approval in the application, we take them back to him again so that he should approve them in the computer. Such files or those files were many in his office. My doubt was if it happened that the paper on which we have approved them, say, went out of the file or it comes out of the file, our records would be correct [sic: incorrect] if that person comes and does the next application because the balance on the computer will [not] be the same as the first balance because we have not yet updated it in the computer.

And then you went to Mr Masoanganye with your concern. What happened then?=== His answer to me was I am not cooperative and he is going to remove me from the Guardian Fund and on the very same day I received a letter which informs me that I am no more in the Guardian Fund. There was no reason in that letter.

Now whilst you were working at the Guardian Fund, did you have powers or the authority to co-sign cheques?=== That is correct. I was countersigning. I had those powers.

Now after you were removed, do you know who replaced you with the Guardian Fund?===Yes, I know.

Who replaced you?===Mr Mogapi is one of them and Mrs Mooketsi".

Mr Mogapi was accused 5 who was acquitted on all charges and Mrs Mooketsi was accused 4 who was convicted in respect of Count 2.

35.2 In cross-examination it was put to Mr Matsose that the first appellant (the Master) will *"testify that the reason why he moved you was when he got to the Master's office there was no proper division of tasks" but "he specifically moved you because there were problems in that other department and he wanted that sorted out".*

Mr Matsose responded with: *"I did not get any problem in that section. Mr Mogapi was working in that section."*

36. Having regard to the dates relating to the five charges (12 April 2001, 15 May 2001, 28 August 2001, 19 October 2001, and 04 April 2002) it has become plain that, metaphorically speaking, "the State of Denmark started to rot" after Mr Matsose's departure. Looking at the

evidence as a whole, some of which will still be dealt with, it is safe to infer that Mr Matsose's relocation was engineered for nefarious motives. He was an obstacle. He knew too much. He questioned too much.

I am satisfied that the court *a quo* did not misdirect itself in convicting all three appellants. They were evidently in cahoots. Their conviction cannot be disturbed.

COUNT 2: THEFT RELATING TO ESTATE LATE LEBOPO.

37. The conviction follows a finding of theft from the Guardian Fund on 15 May 2001 in the amount of R122 548.58. First appellant (the Master) and Accused 4 were convicted and sentenced on this charge, Count 2. Accused 4 neither appealed her conviction nor her sentence. The theft in Count 1 was perpetrated on 12 April 2001. Therefore the theft in this count, Count 2, was the second and followed a mere one month later.

38. The sequence of events are as follows. Victoria Lerato Lebopo was the beneficiary in this account. She inherited money from her mother who died on 24 July 1994. She was born on 14 December 1979. She was therefore 15 years old at that stage. On 23 March 1998 an amount of R86 979.22 was paid into the Guardian Fund to her credit. This was followed on 05 August 1998 by an amount of R30 174.51. On 10 January 2001 she was credited with an amount of R27 205.60 in respect of the compounded interest. This comes to a total of R144 361.33. Between 22 April 1998 and 01 April 1999 she made five drawings. On 10 January 2001, accompanied by her guardian, Letlama James Lebopo, Victoria Lebopo withdrew the balance which

amounted to R95 097.94. The file was closed. She was then almost 21 years old.

39. The information in para 38 above is gleaned from Exhibit "D23" and the evidence given by Victoria Lebopo. Exh "D17" is an "Application for Monies from the Guardian's Fund: J251". Victoria Lebopo completed this form in her own hand and signed it on 10 January 2001 when she was paid the aforesaid balance of R95 097.94, when the file was also closed. For purposes of this judgment nothing revolves on the fact that the form was not undersigned by the "Executor/Commissioner of Oath/Justice of Peace". There is no complaint of any irregularity up to this stage. One could say: "So far so good".

40. On 15 May 2001 someone stole the identity of Victoria Lebopo and claimed R122 884.58 from same Lebopo Estate. This amount was paid out to the impostor notwithstanding that the records showed a nil-balance and that the file was closed only four months before. This over-payment cheque was approved and signed by the appellant Master and accused 4 countersigned it. Accused 4, it will be remembered, did not appeal her conviction and sentence.

41. Audrey Rakoi testified that she was due to knock-off duty on the late afternoon of 15 May 2001. Accused 4 ordered her to give her (accused 4) the file and blue card relating to Estate Late Lebopo. She remonstrated with accused 4 due to lateness of the hour. Accused 4 was persistent. Ms Rakoi did what she was told and went home. That was the total sum of her dealing with the matter. She was an intern or temporary employee. She worked for the Department for only seven months and resigned because it emerged that the Master

employed her irregularly. She therefore had problems receiving her monthly salary.

42. During the seven months Ms Rakoi worked closely with the Master, the Assistant Master as well as accused 4 and 5 (Mr Mogapi). When she assumed duties accused 5 impressed upon her never-ever to try and do calculations for the payment of claimants. She took the admonition to heart. Ms Rakoi says in any event she did not know how to do the computations. She also satisfied the court *aquo* that the notes and calculations on the file were not hers. It was evidently not her handwriting. Ms Rakoi testified that the Master and his deputy (third appellant) accused her falsely of being culpable for engineering the fraudulent transactions of 15 May 2001. They intimidated her that unless she came out with "the truth" she was going to prison, but she stood firm.

43. The Master's defence is that when he approved the irregular payment on 15 May 2001 and signed the cheque what was presented to him was not Exh "D23" but a fake document. The departmental inspectors/investigators (Horn, Smit and Masyn) testified that when the irregularities in the Master's Office in Mmabatho were discovered they removed clusters of files to the Pretoria Master's office to capture the data on computer. One of these files was the Lebopo file. Exh "D23" is genuine and so is Exh "D17", that was completed and signed by Victoria Lebopo. These documents were transferred to Pretoria long after the fraudulent transactions. That the transactions were fraudulent is not in question. The only question is who the perpetrators were.

44. The first telltail of a fraudulent payment came about in this manner. Ms Amanda Le Masson was a Consultant Risk Manager with ABSA Bank and was based in the Administration Centre in Eloff Street, Johannesburg. A Mr Hlatswayo was charged with various fraudulent transactions. The bank investigated all his transactions. She discovered that on 05 July 2001 an amount of R20 000.00 was transferred from the account of a "Victoria Lebopo" into Mr Hlatswayo's account. In light of this development she had to scrutinise the account of Ms Lebopo after obtaining the required authority.

45. Ms Le Masson established that a cheque in the amount of R122 534.58 dated 15 May 2001 was deposited into the account of a "Victoria Lebopo" by the Department of Justice. Her first suspicion was aroused because it was exceptional for a government cheque in such a large amount to be handwritten. Secondly, the cheque bore a date-stamp of 05 June 2001 of their Cheque Processing Centre, Johannesburg, and that a teller in the Centre processed it. However, the Centre does not have tellers because it is an administration building.

46. On 06 July 2001 Ms Le Masson transmitted per facsimile a copy of the fraudulent cheque (Exh "D19") to Mr Gijben (Pretoria) per cover sheet (Exh"D20") an enquiry to "please confirm cheque". On the same day (06/07/2001) Mr Gijben forwarded the enquiry to "Mr Andries Masoanganye" (first appellant, at "Fax: 018 384 5901" to "confirm cheque issued by your office". This fax, Exh "D20", bears the date-stamp of "Ass Deputy Master of the High Court, Mmabatho: 09/07/2001".

47. Ms Le Masson furthermore testified that on 12 July 2001 she received telephonic confirmation that the cheque was fraudulent. It is curious why the Master's office did so only telephonically. Nevertheless, the communicator had intimate (personal) knowledge and/or had gleaned the information from Exh "D23" and other relevant documents because the report to Ms Le Masson was accurate that the cheque was fraudulent. Based on this information the fake accounts of both Hlatswayo and Lebopo were closed forthwith (on 12/07/2001) by the witness.

48. On 04 October 2001 the Master wrote to: "Attention: Ian Graaf, ABSA Bank, Mafikeng," that:

*"**RE: INDEMNITY LETTER: ACCOUNT NO: 908-------* TRANSFER OF BALANCE INTO THE GUARDIAN'S FUND TRUST ACCOUNT NO. 404 ----*.***

1. *The above matter refers.*
2. *You are hereby formally requested to note that your office is indemnified in respect of the loss which occurred regarding the fraudulent inheritance amounting R122 884.58 (one hundred and twenty two thousand eight hundred and eighty four rand fifty eight cents).*
3. *The matter has been referred to the police for fraud investigation.*
4. *You are also kindly requested to transfer the balance of the Guardian Fund Trust Account.*

I hope and trust that you will find this to be in order".

This letter is Exh "D21A". (* The omission is mine)

49. It is common cause that an amount of R80 247.87 was refunded to the "Guardian Fund: Mmabatho" on 11 October 2001. This is evidenced by Ms Le Masson and the Master Office's ABSA cheque account Exh "D28". What is significant to note from this account is that it had a credit balance of R71 909 531.91 (in other words over R71 million) as at 11 October 2001. Messrs Horn, Smit *et al* testified that this seeming bottomless reserve enabled the miscreants to

evade early detection because the cheques would not be referred to drawer for lack of funds.

50. A sequel to these machinations by the fraudsters had an unfortunate adverse impact on innocent and unsuspecting Victoria Lebopo. While she was doing her Bachelor of Optometry at Durban-Westville University she used the First National Bank (FNB). Upon the completion of her degree she worked in Gauteng. She attempted to open an account as a first-time client of ABSA in 2002 but was told she already had an account which was opened in Hammanskraal, North of Pretoria. She then discovered that her identity and that of her guardian (James Lebopo) were cloned.

51. Ms Lebopo testified further:

"Tell the Court more about that?.... M'Lady, I think it maybe took a month before the account could be opened because some investigation had to be conducted first. Pretoria was phoned and because they had to get hold of the ID book of the person who opened the account and the copy of the ID was found as well as the signature samples of the person who opened the account. I was then called to come and identify the ID copy to see whether or not it was mine. I went there. The particulars of the ID copy were all mine except for the face on the copy. The signature was also not the same because the person had printed my initials and surname and that is not my signature. I do not print. In that way I was then able to open an account because then there was proof that I was not the person who had opened the initial account."

52. During her testimony Ms Lebopo was shown all the documents involving the fraudulent transaction. She denied any complicity in them. No suggestion was made that she was complicit.

53. The Master was not merely devious but he was an unmitigated liar:

53.1 He wrote vaguely in Exhibit "D21A" to ABSA Bank on 04 October 2001 that the matter has been referred to the police for fraud investigations when he knew that to be false;

53.2 He also claimed that he reported the Lebopo fraud to Jonas and Innes, the government internal auditors; that was untrue;

53.3 He further claimed to have reported the Lebopo fraud to one Mark Pearce of the South African Police Service (SAPS) when he knew he was lying through his teeth;

53.4 Just about the lowest that he sunk was to implicate a vulnerable young intern (Audrey Rakoi) falsely. Ms Rakoi could never have been able to negotiate such an intricate webb to defraud the Guardian Fund. To do so she would have been constrained to involve the Master and Assistant Master and whoever countersigned the cheque to execute the elaborate scheme. Having regard to Ms Le Masson's evidence a bank employee must have been a turncoat. The finger inexorably points to the Master and accused 4 (Ms Grace Mooketsi).

In the premises, the first appellant and accused 4 were correctly convicted.

<u>COUNT 4: THE ESTATE LATE MALATSE/AFRICAN BANK MATTER</u>

54. This conviction relates to the theft on 19 October 2001 in the amount of R113 138.22 in respect of Estate Late Malatse which amount represented a portion only of what the deceased owed to African

Bank. It will be noted that the transaction took place two months after the theft in Count 3 relating to Estate Late Shadi, that was carried out on 28 August 2001. It must further be borne in mind that the Estate Late Malatse/African Bank payment took place six months after the Bop IGI theft, discussed in respect of Count 1. The accused in respect of this count, Count 4, were the first and second appellants and accused 4. A clear pattern has been established by now and the *dramatis personae* are more or less the same, with the Master the mastermind.

55. Mr Nicolaas Bekker was the sole trustee of Nicolaas Bekker Trustees. He was appointed liquidator in the insolvent estate of Taolo Saul Malatse. One of three creditors who proved a claim against Estate Late Malatse was African Bank. Two payments were made to African Bank for R103 869.71 and R9 268.51 = R113 138.22. These cheques were dispatched to African Bank but were returned unclaimed. Mr Bekker then wrote the following letter to the Master, Mmabatho, for the attention of "Mr Mogapi: Guardian Fund" on 24 May 2001:

"INSOLVENT ESTATE: T S MALATSE: Y35/90

Attached please find two cheques to be paid into the Guardian's Fund. The cheques came back with the post. We made several efforts to trace the creditors to whom the cheques are payable, without any success. Particulars of the cheques are as follows:-

1. *Cheque No. 0099 – Dividend Receipt No. 1 to African Bank: R103 869.71*
2. *Cheque No. 0100 – dividend Receipt No.1 to African Bank: R9268.51".*

56. After more than a year that the R113 138.22 had been paid to the Guardian Fund, Mr Bekker wrote to the Master to claim the refund in

accordance with Section 95(3) of the Insolvency Act No 24 of 1936. If the creditor has not been traced the liquidator was entitled to claim the refund to distribute amongst other unpaid creditors. Ms Jane Ramothibe of the Master's office responded on 03 February 2005 that Mr Bekker's request could not be met because the file containing the relevant information has gone missing. By now not surprising. This lends further credence to Ms Shadi's evidence. Whereas the Master and attorney Ahmed were already charged in February 2005 they nevertheless were aware of Ms Ramothibe's letter at the latest during the inception of the trial. If they had an innocent explanation to proffer they could have jointly reverted to Mr Bekker and informed him that attorney Ahmed was mandated by African Bank to deal with the matter, as they claimed, and he has done so. *Cadit quaestio*. They could have managed that even with their purported unfaithful memories.

57. Ms Petronella Ahlers testified that she was a Legal Officer for a company called Unique Finance. During the 1990's African Bank ran into financial trouble and was bailed out by Government. The book debts were sold to Unique Finance. Overseas investors bought the name "African Bank" and transacted micro-lending under that name. Because the book debts and the ring-fenced bail-out money advanced by Government were not substantial Unique Finance used only three firms of attorneys throughout South Africa: One firm in the Eastern Cape, one in Pretoria and Dino Tsartsekes in Johannesburg. It gave these firms a general Power of Attorney and specific instructions from time to time as the need arose. These firms did the debt-collection. The firm AK Ahmed Attorneys of second appellant was unknown to Unique Finance. The evidence of Mr Dino Tsartsekes eliminates AK

Ahmed Attorneys as their correspondent in Estate Late Malatse/African Bank/Unique Finance.

58. During 2001 the book debts of African Bank were already sold to Unique Finance, this included a mortgage bond on the property of Estate Late Malatse. Unique Finance has not received any payment from any quarter (be it the Master's office or AK Ahmed Attorneys). Unique Finance only became aware that Nicolaas Bekker Trustees paid the disappeared money to the Master when the Master's office (the Justice Department) in Pretoria briefed them on the occurrences many years later, when the theft was discovered.

59. The reason why Mr Bekker did not receive the refund he requested and why Unique Finance was not paid the money in respect of Estate Late Motsepe is the following. On 19 October 2001 the Master's office received a letter signed personally by AK Ahmed, second appellant, on his official letterhead. It reads:

"re: OUR CLIENT: AFRICAN BANK: INSOLVENT ESTATE: T.S MALATSE YOUR REFER: Y35/90

We refer to the aforementioned matter.

We act on the instruction of our clients the African Bank. Our instructions are to request payment in the abovementioned matter in the sum of R113 138.22.

Our instructions are that payment is in respect of a claim against the abovementioned insolvent estate.

We await payment in due course.

SIGNED: Abdul Kader Ahmed".

60. The Master wrote in his hand, this is common cause, on the same letter: "Approved, 19/10/2001, R113 138.22" and signed. The

reference number "Y35/90" is the same as that quoted in Mr Bekker's letter of 24 May 2001. Mr Ahmed issued a receipt to "Dept of Justice" on the same date reflecting the above amount. It is also common cause that he wrote out a deposit slip on the same date (19/10/2001) and signed it. His defence? You have guessed it. He does not know what happened to the money. The late Mogorosi dealt with the matter. Yes, he signed the letter to the Master. But: "No", he just signed without reading. It boggles the mind how an officer of the court can make such utter ridiculous excuses which not even the most gullible newsmonger would swallow. His and the Master's fingerprints are all over the place in this matter.

61. The Master testified, as was his refrain, that: He had all relevant documents before him when he approved the payment and signed the cheque. His evidence must be juxtaposed to that of Accused 4. She testified that after she had satisfied herself through the records that a nil-balance was the result after she had written out the cheque in this respect, she closed the file. This is a reference to the closed file that the Master would have looked at when he signed off, as pointed out.

62. **To sum up**. The letter by Mr Bekker, ironically, served to signal to the now corrupt Master that the R113 138.22 should be the conspirators' next target. When the time was ripe he invited attorney Ahmed who then knew nothing about the remittance to the Master. Ahmed also had no instructions from African Bank, which was in dire financial straits and was to all intents and purposes non-existent. The Master sucked in his subordinate, Accused 4, who could not resist the allure. In one fell swoop, on the same day, 19 October 2001, the creditor's account was cleaned out corruptly. This inference is irresistible. See **R vs Blom 1939 AD 188** at 202-203; **R vs De Villiers 1944 AD 493**

at 508-509 and **S vs Reddy and Others 1996 (2) SACR 1(A)** at 8b-10d.

On Count 4: The conviction of first and second appellants must stand. The appeal fails.

COUNT 5: THE ESTATE LATE SEHOONE THEFT: THE LAST CHARGE

63. The accused persons who faced this charge were the Master (first appellant), attorney AK Ahmed (second appellant) and accused 4. It was alleged that they were in cahoots in siphoning off R400 000.00 from the Guardian Fund coffers on 04 April 2002. The audacity with which this offence was committed points to an attitude of naked impunity because the investigations-cum-inspections in the Mmabatho Master's Office were already in progress in April 2002

64. The deceased, Mr Abner Sehoone, was a member of the Defence Force. He died on 13 September 1998 leaving three minor sons: Glen who was born in March 1982 and benefitted R61 802.63; Komey born in May 1984 and Clinton born in July 1986 who each benefitted R59 984.89. The three amounts add up to R181 772.41. This latter amount was received by the Master's Office via the Remittance Register on 30 June 1999. The remittance was recorded by the ever reliable Mr Tebogo Matsose. He opened a blue card for each of the three boys as indicated above. Clinton's card is Exh "D135", Komey's "D136" and Glen's "D137".

65. It is common cause that in respect of Clinton's card (D135) the amount of R59 984.89 was fraudulently altered to "R259 984.89"

prefixing a "2", thus inflating it by R200 000.00. The same was done to Komey's card (D136). The joint inflation was therefore R400 000.00. In the case of Glen (D137) a "1" numeral was prefixed to R61 802.63 which altered the amount to "R161 802.63". This inflated the account by R100 000.00. The combined three inflated amounts totalled R500 000.00 (half-a-million rand).

66. Mr Matsose stated that the alterations were not done by him. He does not know who was behind them. It must have been done after he was unceremoniously dumped in the Examinations Section of the Master's Office in May 2000. Mr Matsose's explanation carries with it a lot of credence having regard to the fact that the R400 000.00 fraud/theft was committed on 04 April 2002, about two years after his removal from the Guardian Fund.

67. Exhibits "D135", D136" and "D137" reflect that in respect of each boy equal withdrawals were genuinely made as follows:

(a) 14/07/1999: cheque No 7157: R3000 x 3:R 9000
(b) 06/01/2000: cheque No 7739: R5000 x 3 :R15 000
(c) 09/01/2001: cheque No 9645: R7000 x 3 :R21 000
(d) 17/07/2001: cheque No 2862: R4000 x 3 :R12 000
(e) 08/01/2002: cheque No 3483: R7000 x 3 :R21 000

Subtotal R78 000

68. On 03 April 2002, therefore a day before the fraudulent transactions of 04 April 2002, two of the boys were credited with R4000 each and one of them with R5000. This amounts to R13 000 (cheque 4318). The total regular or proper withdrawals in para 67 and this one (68) adds up to R91 000. Excluding the compounded interest the balance

that remained for the credit of the boys was R181 772.41 less R91 000 = R90 772.41. It is significant to note that except in 2001 and 2002 (see para 67 above) the withdrawals were made once annually. In 2001 the withdrawals were six months apart and in 2002 three months. The fraudulent payment took place a day after the regular one.

69. Alphonia Titis, the widow of the deceased Mr Sehoone (she retained her maiden surname), testified in connection with the correctness of the proper withdrawals up to 03 April 2002. What is of particular moment is that she explained that on each occasion that she made the regular six withdrawals she was taken to the Master, first appellant, who interviewed her to establish how the money would be employed. Ms Titis knew nothing concerning the theft of the R400 000.00 on 04 April 2002. In other words she was not interviewed in respect of this inflated amount as happened previously nor was she paid, on behalf of her sons, anything from the R400 000.00. She had one encounter with the Master in Pretoria after the theft was discovered. I revert in due course to that aspect which was the subject of Count 6.

70. The theft of the R400 000.00 was discovered by the Horn/Smit team in the process of inspecting the Mmabatho Master's office. The entries on Exhibits "D135", "D136" and "D137" reflected that on 04 April 2002 per cheque 4322 payments of R100 000.00 was purportedly made to Clinton and Komey each and R200 000.00 to Glen: R400 000.00. However, there was no High Court authorisation as required, nor would a court have sanctioned a fraudulent payment.

71. I wish to state in anticipation that I am convinced that the learned trial Judge erred in acquitting attorney AK Ahmed, second appellant, on Count 5. The evidence against him is deadly. The only reason why I traverse the entire evidence is to determine whether the Master, the only one who was convicted on this charge, was correctly convicted. There is overwhelming jurisprudence to the effect that there is no warrant for excluding admissible evidence. In **S vs Nomzaza 1996 (2) SACR 14 (A)** at 16h Viviers JA stated"

" *Verder is die algemene reël dat enige relevante getuienis by strafregtelike verrigtinge toelaatbaar is tensy dit deur 'n bepaalde reël van die bewysreg uitgesluit word (S v Lwane 1966 (2) SA 433 (A) op 437G-H)."*

In ***S vs Dlamini; S vs Dladla and Others; S vs Joubert, S vs Schietekat 1999 (2) SACR 51 (CC)*** *at* 98d-f Kriegler J writing for unanimous Constitutional Court stated:

"Under the Constitution the more pervasive and important question is whether the admission of the resultant evidentiary material would impair the fairness of the trial. If it would, the evidence ought generally to be excluded. If not, there is no basis for excluding it. There is no warrant for creating a general rule which would exclude cogent evidence against which no just objection can be levelled. The trial court must decide whether it is a valid objection, based on all the peculiar circumstances of the particular case, not according to a blanket rule that would throw out good and fair evidence together with the bad."

72. Ms Mildred Nzama testified that she is a typist-cum-personal-assistant to Mr Ayoob Kaka of Ayoob Kaka Attorneys of Mayfair, Johannesburg. She stated that during the morning of 04 April 2001

she received a telephone call from Mr Ahmed, whom she knew very well, having spoken to him on numerous occasions and who has visited their office many times.

73. Ms Nzama's evidence is backed up by a statement made in terms of s212(1) of the CPA prepared by Mr Martinus Botha a specialist technician with Telkom SA. This statement is to the effect that the detailed billing record reflect that on 04 April 2001 at 09:36:35 a call lasting 46 seconds was made from telephone numbers (018) 381 7404 allocated to AK Ahmed (ID 611201-------*) at Number 1 Hurwitz House, 14 Main Street, Mahikeng, and was made to (011) 839 2676 allocated to Mr Ayoob Kaka with ID 60081-----* and installed at Number 57, Third Avenue, Mayfair, Johannesburg. (* the omission is mine).

74. According to Ms Nzama Mr Ahmed asked her to transpose a draft that he faxed to her on the letterhead of Ayoob Kaka Attorneys and transmit it forthwith to the furnished fax number of the Mmabatho Master's office. He assured her that he cleared the matter with Mr Kaka. She took his word for it as Kaka and Ahmed were like brothers. She was told not to change anything from the draft. She did as she was told.

75. The draft is Exh "D122". The transmission inscription on the fax reads: "From: AK Ahmed: Phone 018 381 7404: Apr 04 2002: 09:29am: P1" The draft reads (the address is omitted).

"Per Telefax (018) 384 2815 [written in by hand]

Re: <u>CLAIM FROM THE GUARDIAN'S FUND</u>
<u>ESTATE LATE: N.A SEHOONE</u>

We refer to the aforementioned matter and confirm that we act on behalf of our client, Ms A. Titis, in addressing this letter.
Our aforementioned client is the guardian of the minor children, CLINTON TITIS, KOMEY KEVN TITIS, GLEN CHARLES TITIS, who are the heirs in the abovementioned estate.
Our aforementioned client has instructed us to make an application to your office for a withdrawal of R400 000-00 (FOUR HUNDRED THOUSAND RANDS) from the Guardian fund, being their share from the pension benefits of their late father.
Since our client is employed at a Commercial Bank, she intends investing the said funds in order to earn greater interest on the money.
We submit with respect that the interest of the minor children will not be prejudiced in any manner whatsoever.
Please make out the cheque in the name of AYOOB KAKA ATTORNEYS.
Yours faithfully
Ayoob KAKA"

76. The letter faxed to the Master at (018) 384 2815, Exh "D121A", is a replica of the draft, Exh "D122", except that Kaka's reference is furnished as Mr Kaka/mdn (the initials of Ms Nzama) and typed on the Ayoob Kaka Attorneys letterhead. On this very letter, Exh "D121", the Master personally wrote: *"Approved. Four hundred thousand only. Signed: A Masoanganye: 04/04/2002. From Kevin R200 000 + R100 000 from the other two(2) children. Cheque No 4322. Signed: A Masoanganye 04/04/2001".*

"Kevin" above is in fact the same boy as "Komey" in para 64 (above).

77. It is common cause that the allocations of R200 000, plus R100 000 X2 were ostensibly made from Exh's "D135", "D136" and "D137" as the Master directed. It is also common cause that Accused 4 wrote out the cheque for R400 000 and countersigned it. Accused 4 testified that she acted innocently as instructed by the Master. Regard being had to her previous criminal involvement in Count 2 on 15 May 2001 her exculpatory evidence is patently false.

78. Mr Kaka testified that AK Ahmed phoned him on his cellphone on the afternoon of 03 April 2002. The same date that the three boys were jointly paid R13 000.00. AK Ahmed informed Kaka that he wanted him to act as correspondent in an urgent matter. The money was paid into his Trust Account on 04 April 2002 by a P Ramantsi (who nobody conveniently knew).

79. On the instructions of AK Ahmed Mr Kaka withdrew the money on 11 April 2002 in four instalment of R100 000.00 (Exh "D131"). Mr Ahmed collected the money from him on the same day in Johannesburg, minus R2500.00 which Mr Kaka say he debited as his fee for services rendered and receipted it (receipt 2766, Exh "M").

80. On account of self-preservation Mr Kaka may not have been wholly truthful because he was neither used as a 204 of the CPA witness nor did he apply for indemnity. There is a lot that makes evidential sense of what he stated. Mr Kaka was not within the same circle of devious operators of the appellants. It is doubtful that the Master would have approached him directly. There is sufficient evidence that AK Ahmed approached him and Ms Nzama with the scheme. That the scheme was fraudulent was evident even to Mr Kaka. The court a quo ought to have seen through this money laundering. Mr Kaka was a willing agent who facilitated the round-tripping of the money for the Master and A K Ahmed, first and second appellants, to obfuscate its source. The paper trail looms large.

81. Attorney Ahmed had a lucky escape. He may not even have shared in the R400 000.00 to fall foul of the theft conviction. He composed the fraudulent letter. Mr Kaka on the other hand may have escaped

because his statement was prepared by a senior counsel. This is most unfortunate. Corruption cannot be combatted in this manner. We are not surprised that the court a quo remarked: "I will urge the state to consider taking criminal action against Mr Kaka". I say no more.

82. Sight should not be lost that the Master and the Assistant Master approached Ms Shadi in respect of Count 3 not to cooperate with the criminal investigation and promised to cover her fees. In respect of Count 5 (the Sehoone matter) the Master was at it again. He traced Ms Alphonia Titis, the late Mr Sehoone's widow, to her place of employment in Pretoria and attempted to influence her not to cooperate with the investigators. A clear attempt to obstruct the course of justice was established. An inexperienced Audrey Rakoi just about escaped from his clutches as he tried to compel her to take the blame. How mean.

First appellant's conviction must stand. Attorney Ahmed, second appellant, should have been convicted as well. Mr Ayoob Kaka should have been charged.

IN RESPECT OF ALL 5 COUNTS

83. On a conspectus of the entire evidence a core rhetorical question arises. How come that a Master, an Assistant Master and a senior attorney (the three appellants), if they were honest, responsible and accountable officials failed to detect such patent criminality taking place in their respective offices if their subordinates were involved. The transactions literally went through their hands. The argument that their respective counsel presented and would have us accept in summary is that their clients were blissfully unaware and ignorant of what they are being accused of. The correct approach which a court

should adopt in evaluating evidence has been lucidly enunciated as follows in **S vs Chabalala 2003 (1) SACR 134 (SCA)** at 139i-140b para 15:

"(15) The trial court's approach to the case was, however, holistic and in this it was undoubtedly right: S v Van Aswegen 2001(2) SACR 97 (SCA). The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an ex post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. Once that approach is applied to the evidence in the present matter the solution becomes clear".

It is on this basis that the appeal of all the appellants on the merits must fail.

ON SENTENCE

84. A Master and Assistant Master (first and third appellants) are high ranking officials and occupy responsible positions, which are also positions of trust. They deal with the assets of vulnerable people whose interests must be protected and entities which are in financial doldrums. They handle matters relating to the liquidation and

administration of the estates of deceased persons, the property of minors and persons under curatorship and of derelict estates, they deal with the affairs of persons who are mentally disturbed or who lack legal capacity. They are in control of huge sums of money and assets of considerable value. They ought to be people of integrity.

85. The responsibilities of the second appellant, an officer of the Court, are well-documented in our jurisprudence. In **Vassen vs Law Society of the Cape of Good Hope** 1998 (4) SA 532 (SCA) at 538G – 539C Eksteen JA stated:

"In this regard it must be borne in mind that the profession of an attorney, as of any other officer of the Court, is an honourable profession which demands complete honesty, reliability and integrity from its members; and it is the duty of the respondent Society to ensure, as far as it is able, that its members measure up to the high standards demanded of them. A client who entrusts his affairs to an attorney must be able to rest assured that that attorney is an honourable man who can be trusted to manage his affairs meticulously and honestly. When money is entrusted to an attorney or when money comes to an attorney to be held in trust, the general public is entitled to expect that that money will not be used for any other purpose that than for which it is being held, and that it will be available to be paid to the persons on whose behalf it is held whenever it is required. Here once again the respondent Society has been created to ensure that the reputation of this honourable profession is upheld by all its members so that all members of the public may continue to have every confidence and trust in the profession as a whole. The fact that an attorney may be regarded as a pillar of society who serves the community in civic or political

spheres, or works indefatigably for the upliftment of the poor and defenceless members of society, cannot in respect of his profession, be seen as a substitute for that honesty, reliability and integrity which one is entitled to expect of an attorney. One does not entrust money to a person because of his good deeds in the community, but because he is an attorney who can be trusted and on whom one can rely. However commendable appellant's community service may have been it can never be seen as an excuse for his failure to live up to those qualities which should characterise an attorney. The theft of money held by him in trust, and his persistence in trying to rationalise his conduct and to deny that he acted dishonestly or that he brought his profession into disrepute by his actions, reflects adversely on his character and is, in my view, indeed a weighty consideration militating against any lesser stricture than his removal from the roll."
This speaks directly to Attorney Ahmed.

86. The Master deserved nothing less than 15 years imprisonment and the others an effective minimum sentence of 10 years. The court *a quo* was extremely lenient in dealing with the appellants' corrupt activities and maladministration stretching over a period of a year. In **South African Association of Personal Injury Lawyers vs Heath and Others 2001 (1) SA 883 (CC)** at para 4 the Constitutional Court stated:

"*Corruption and maladministration are inconsistent with the rule of law and the fundamental values of our Constitution. They undermine the constitutional commitment to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable, democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic State.*"

87. The State applied for the sentence of all the appellants to be increased. But for the decision of the Constitutional Court in **S vs Nabolisa** 2013 (2) SACR 221 (CC) in particular at para 77-83, I would not have spent a moment's hesitation to oblige. In the circumstances, it is a bit foolhardy of Mr Venter, for the third appellant (the Assistant Master) to advance an argument that his client's sentence be reduced and/or wholly suspended so that she remains in the employment in the Bloemfontein Master's Office. I reject the argument on the following grounds:

87.1 It was made from the bar (with no authority cited) and the state, obviously, opposes it and wanted her current sentence increased;

87.2 Third appellant should have been convicted on Count 3 (the Estate Late Shadi matter). She had a lucky escape.

87.3 Keeping third appellant out of prison would be to reward corruption. She still holds on to her ill-begotten gains.

87.4 She has not met the criterion set out in **S vs Karolia** 2006 (2) SACR 75 (SCA) at 93b-h (para 36) whereat the Court held:

"[36] The general rule is that an appeal Court must decide the question of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards (R v Verster 1952 (2) SA 231 (A) at 236A - C and R v Hobson 1953 (4) SA 464 (A) at 466A). However, the general rule is not necessarily invariable (S v Immelman 1978 (3) SA 726 (A) at 730H; S v V en 'n Ander 1989 (1) SA 532 (A) at 544H - 545C; Thomson v S [1997] 2 All SA 127 (A) at 138a-c and Attorney-General, Free

State v Ramakhosi 1999 (3) SA 588 (SCA) para [8] 593D - F). Schreiner JA put the matter as follows in Goodrich v Botha and Others 1954 (2) SA 540 (A) 546A - D:

'In general there is no doubt that this Court in deciding an appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards. It was so stated in Rex v Verster 1952 (2) SA 231 (A), and in R v Hobson 1953 (4) SA 464 (A). Those cases dealt with appeals against the severity of a sentence; it was sought, in each case unsuccessfully, to prove subsequent happenings to support the contention that the sentence should be reduced. But the language used in the judgments appears to be general. In the absence of express provision, therefore, it is very doubtful, to put it no higher, whether this Court could in any circumstances admit evidence of events subsequent to the judgment under appeal, in order to decide the appeal.

It is, however, unnecessary to exclude the possibility that in an exceptional case this Court might be able to take cognisance of such subsequent events, where, for example, their existence was unquestionable or the parties consented to the evidence being so used. For here the foundations for any such exceptional exercise of jurisdiction were clearly wanting. The respondents did not consent to the use of the second report and, if its terms were to be taken into account, it would clearly have been necessary to provide an opportunity for the respondents to lead any rebutting or explanatory evidence that they might wish to. The proceedings have already been very lengthy and no consideration of convenience supports their further prolongation.'

(This is also true where sentence is concerned.)"

See also **S vs EB** 2010 (2) SACR 524 (SCA) at 528e – 529e (para 5).

The appeal on sentence in respect of all appellants must fail.

ON THE RECUSAL APPLICATION

88. The appeal pertaining to the recusal is persisted in only by the first appellant, the Master. Therefore a successful appeal on this aspect would not have affected the convictions of Attorney Ahmed, the second appellant, and the Assistant Master, the third appellant. We are in agreement on the recusal aspect that the appeal must fail as well. Hence I deal with it only at this stage.

89. Mr Skibi, for the first appellant, argued that the trial Judge should have recused herself by reason of her alleged failure to accord the first appellant, the Master, a fair trial. He advanced the following factors: That the trial Judge trammelled the appellant's cross-examination unduly; curtailed counsel's address to Court; prevented counsel from raising legitimate objections; was discourteous and derisive of the appellants' counsel; displayed demonstrable favouritism towards state counsel but did not exhibit the same attitude towards the appellants; that the trial Judge accorded the state indulgences without much ado but denied the appellant's counsel the same and, on the contrary, gave him a hard time; and that the Judge descended into the arena by questioning first appellant at length and even cross-examined him.

90. In my estimation the passages abstracted or referenced by counsel for the Master have not been properly contextualised. I nevertheless prefer to deal only briefly with points of criticism lest the judgment be heavily overburdened.

91. Perhaps a good starting point is how a Judge and justice are defined in Webster's 1913 Dictionary www.webster-dictionary.org:
"A public officer who is invested with authority to hear and determine litigated causes, and to administer justice between parties in courts held for that purpose. The parts of a judge in hearing are four: to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select and collate the material points of that which has been said; and to give the rule or sentence - Bacon".

The same dictionary defines justice as:
"The quality of being just; conformity to the principles of righteousness and rectitude in all things; strict performance of moral obligations, practical conformity to human or divine law; integrity in the dealings of men with each other; rectitude; equity; uprightness".

92. With this preamble, I now refer to the principles fashioned by the Constitutional Court and the Supreme Court of Appeal on how to approach an application for the recusal of a presiding judicial officer:

In **the President of the Republic of South Africa and Others vs South African Rugby Football Union and Others** 1999 (4) SA 147 (CC) at para [35] the court said the following:
"A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes."

In **Bernert v Absa Bank Ltd** 2011 (3) SA 92 (CC) at para 35 the court said the following about the presumption of impartially:

"The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."

93. **The first criticism is really a non-issue:** It was in fact the first appellant's counsel who interrupted the Judge when she asked elucidatory questions and not the other way round. This first incident appears in Vol 4 at p 367(16) – (20). State counsel asked his witness (Mr Smit) during examination-in-chief whether he was present when a search of the office of attorney Ahmed was conducted. Why Adv Booysen SC stood up to answer that Mr Smit was not present is beyond me. Mr Smit contradicted Mr Booysen and stated that he was indeed present. A "ticking off" by the Judge was fully deserved.

94. **Concerning the second aspect:** The trial Judge merely pointed out to counsel that he (Adv Booysen) had dealt with the point ad nauseam

and enquired "why do you have to keep on repeating things and you have asked the same question?" The extract appears at Vol 11 p970(22)–971(1). What is not contextualised is that at p970(21) state counsel, Mr Ndimande, raised an objection by stating that: "The witness has answered the question". The trial Judge merely upheld the objection. It is not as if the Judge curtailed the cross-examination. It was a ruling which she was constrained to make.

95. **The third passage cited appears at Vol 11 p 971(1)–(19)**: There was no need to sever this passage from the one dealt with in para 94 (above) because it is part and parcel of the uninterrupted establishment of the same issue. To depict it as a further aberration unfairly portrays the Judge in a bad light.

96. **The fourth extract appears at Vol 2 p 156(2)–(5) of the record**: For the proper context the reading has to start at p147(5) and end at p159(24). In essence the issue involved the withdrawal by a previous counsel from the case and the transcription of the record for the use by the newly instituted counsel, Mr Booysen. Mr Booysen complained that state counsel was not helpful in having witnesses subpoenaed. Counsel asked the Court's intervention. The Court ruled that the Registrar, and not state counsel, must be approached. To isolate the five lines alluded to by counsel from such a lengthy exchange, with Mr Booysen not coming to the nub of the issue and seemingly reluctant to accept the course charted by the Judge, presents a distorted picture. The complaint has no merit.

97. **The fifth passage is located at Vol 2 p 157(2) – (20) of the record**: Having regard to my para 96 immediate above which refers to pp 147(5)–159 (24) for a proper perspective, it follows that the

impugned extract is subsumed in that text. Only one ruling was therefore made by the trial Judge, with which I can see nothing to merit special attention. This is once more an impermissible fragmentation by counsel in respect of the same ruling.

98. **The sixth complaint is to be found in Vol 2 p158(15)–(25) of the record:** Looking at the page and line numbers and the ruling made, it is noted that counsel for the Master is dealing piece meal with the issue I have already addressed in paras 96 and 97 above. He is unmindful of the requirement that "context is everything". See in a different context **KPMG Chartered Accountants (SA) vs Securefin Ltd and Another** 2009 (4) SA 399 (SCA) para 39.

99. **The seventh issue dealt with occupies five lines in Vol 2 p 164(21)–(25):** A reading of the same volume at p164(19)–165(4) shows this to have been a sideshow full of light banter by the speakers. This should have been omitted as a non sequitur.

100. **The eighth passage to which exception is taken is located at Vol 16 pp1464(18) – 1465(3)**: The context is that there seemed to have been some confusion concerning the facts in the Estate Late Shadi charge and the Estate Late Malatse/African Bank matter. The trial Judge was clarifying these aspects with the Master (first appellant) who was testifying. Adv Booysen answered several questions posed by the Judge. The record does not show that the Court called upon counsel to refresh her memory. I assume that the Judge must have looked in his direction, resulting in his response. The Judge thereafter re-directed the question to Mr Booysen's client, the

Master. Mr Booysen was unaware of the shift of focus. So the following transpired:

"Adv Booysen: Well you asked me what the evidence was and that is the evidence.
Court*: No, I just wanted him…(intervenes).*
Adv Booysen*: As Your Ladyship pleases.*
Court*: Didn't (intervene).*
Adv Booysen*: The evidence was that Shadi was going to open a shopping outlet.*
Court*: Yes*
Adv Booysen*: That is what I …(intervene).*
Court*: I want to get it from him now.*
Adv Booysen*: Yes".*

This is the full picture. To stop the exchange where counsel did (see introductory bold type above), skews the picture. In the circumstances, no party must feel or should have felt aggrieved.

101. **The ninth grievance is taken from Vol 2 p145(7) – (25) of the record**: Once more this is a non-issue. The trial Judge suggested that the court-sitting start at 09h00. Adv Vermeulen SC, the consummate professional that he is, agreed but intimated the attendant inconvenience as he would depart from Johannesburg to Mahikeng on the Monday morning. The Judge reverted to 10h00."Fortune favours the brave!" Mr Vermuelen happily exclaimed. Mr Skibi misdiagnosed the situation.

102. **The tenth complaint is extracted from Vol 6 p520(15)-521(4)**: Here Adv Kolbe SC asked a question which the Judge did not follow. Counsel explained, but the Judge enquired what the clarified question now was to the witness. The Judge and counsel were at cross-purposes because counsel kept on explaining what she meant. The judge on the other hand wanted the rephrased question put to the witness. All ended well. This also, is a non-issue.

103. **The eleventh grievance is to be found at Vol 6 p530(16)-(19) of the record**: Counsel has only alluded to the portion in bold type below. When that quote is read in context, which I now provide, it will be seen that Mr Rootman's error has nothing to do with the trial Judge. I quote from Vol 6 p530(9)-531(4):

"Mr Roothman: Does that make sense? --- Still not, M'Lady, because this letter does not refer to any late estate where inheritances is involved.

I apologise, M'Lady, for the whole line of questioning and that is why nobody, because I confused count 2 and count 4. So that is why nobody could understand what I was talking about.

Court: Who does not understand what you are talking about?

Mr Roothman: That is why I say, M'Lady, I realised. So I will again start …[intervenes]

Court: You know … [indistinct] what you are asking now. Do you need some time to get your act together?

Mr Roothman: No, M'Lady, I just opened the version of the accused at the wrong count.

Court: Yes.

Mr Roothman: That is what happened. I had the count and I started with count 4.

Court: So where are we now?

Mr Roothman: Count 4, M'Lady.

Court: Are you withdrawing this question?

Mr Roothman: Yes, definitely. Thank you, M'Lady. Let me start again. Those documents obviously pertained to count 4 --- Ja."

On what conceivable grounds can the trial Judge be castigated?

104. **The twelfth and thirteenth complaints** are redundant because they are repetitions of what has already been dealt with hereinbefore. They do not contribute anything to the debate.

105. **The fifteenth and last issue** which is suggested as evincing bias is an overkill. The interaction is to be found in Vol 16 pp1441(5)-1453(16). Granted, the questioning spans some 12 pages. However, it is the Master testifying after a long trial. The record, inclusive of the exhibits, occupies 33 volumes. The scheme devised by the Master and his accomplices was intricate. This was not some straightforward theft, but can be more appropriately characterised as five fraud/corruption charges, as this judgment on the merits amply demonstrates. The questions were clearly for elucidatory purposes in respect of most, if not all counts. Sometimes the Master would ask for the questions to be repeated and on other occasions the trial Judge did not understand the answer and, as she was enjoined to do, ensured that her and the Master's minds met. There was nothing adversarial in the questions. On the contrary they facilitated comprehension.

106. Sight should not be lost of the fact that the three appellants are experienced lawyers as distinct from laypersons. They are hardly "fragile flowers that will wither in the hot heat" of a court cauldron. In addition they were represented by very experienced counsel who would have dispelled from their suspicious minds any notion that the trial Judge was antagonistic towards them. In **Take and Save Trading CC and Others vs Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA) paras 3 and 4 Harms JA stated:

"A Judge is not simply a 'silent umpire'. A Judge 'is not a mere umpire to answer the question ''How's that?''' Lord Denning once said. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is

not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right.

[4] A balancing act by the judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray. Should the line on occasion be overstepped, it does not mean that a recusal has to follow or the proceedings have to be set aside. If it is, the evidence can usually be reassessed on appeal, taking into account the degree of the trial court's aberration. In any event, an appeal in medias res in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed."

107. Counsel for the Master sought to persuade us that the court *a quo* was so biased as to have predetermined the outcome of the case against the appellants. Where this perception emanates from is hard to discern. A cursory reading of this judgment displays the opposite. I have in the course of this judgment criticised the learned trial Judge for acquitting some of the appellants on charges where their guilt was

manifest. See paras 22–25; 71; 80–82; 86 and 87 (above). Furthermore if the Judge sought desperately to punish them it is doubtful that they would have escaped being convicted as aforesaid or have been treated so leniently.

108. The argument that the trial Judge should have recused herself is devoid of any merit. If any criticism is to be levelled at the manner in which she conducted the proceedings I would cite the fact that she did not always phrase her questions as lucidly as she would have liked to. Her mannerism to say: "no, no, no" may create the wrong impression, but nothing more. This insignificant blemish cannot be equated with a perception of bias.

The recusal argument must fail. Ironically, if it succeeded the first appellant would be worse off in a retrial, having regard to the fact that the convictions are sound and the sentences imposed lenient.

THE SEPERATION OF TRIALS

109. With the wisdom of hindsight provided by the perusal of the record I am surprised that the issue of the separation of trials is still being persisted in by counsel for the second appellant, Mr Nkhahle. He submitted that the trial of the second appellant should have been separated from that of his co-accused in terms of the provisions of s157 of the Act. The basis for the application, so it was contended, was that the second appellant would sit throughout a lengthy trial listening to evidence that has no bearing on him and that he would also be deprived of the opportunity of calling his co-accused as witnesses on material aspects. The counts not preferred against

second appellant were counts 3 and 6. He was charged with and tried on four of the six counts mentioned in the indictment.

110. As far as s157(2) of the CPA is concerned it is trite that the decision as to whether to grant a separation of trials is a discretionary matter and that the principles set out in **R vs Bagas** 1952(1) SA 437(A) at 441F-G must be satisfied. There Van Heerden JA stated:
"It has been pointed out more than once that the decision whether or not a separation of trials should be ordered is a matter of discretion committed to the presiding Judge. It is expedient that persons charged with the same offence should be tried together and a Court of appeal will not lightly interfere with an order made by a presiding judicial officer that they be so tried. To succeed an appellant will have to show that in some manner the dice were loaded against him by reason of the joint trial; that he suffered, or probably suffered prejudice to which he should not have been made subject. Such prejudice is not presumed. He must show therefore that the order of which he complains was not a judicial exercise of discretion. To my mind appellant in this case has failed to indicate what prejudice he did suffer or could have suffered as a result of the joint trial." See also **R vs Nzuza & Another** 1952(4) SA 376(A) at 379H-381E.

111. Mr Mkhahle could not point to any prejudice suffered by second appellant. I have not found any. If second appellant meant to suggest that he would have called anyone or all his four co-accused then it is a matter of record that they all testified and either sang from the same hymn-sheet as him or exhibited no hostility against him. The finding of the court *a quo* refusing to order the separation of trials cannot be faulted. She is vindicated by the record.

ORDER

1. **The appeal in respect of all the appellants (Andries J Masoanganye: No1; Abdul K Ahmed: No2; and Tlaleng A Mhlekwa: No3) pertaining to all the counts (charges) is dismissed in respect of the conviction and sentence.**

2. **The appeal by first appellant (Masoanganye) in respect of the recusal is dismissed.**

3. **The appeal by the second appellant (Ahmed) in respect of the separation of trial is dismissed.**

4. **The second appellant (Abdul K Ahmed) and the third appellant (Tlaleng A Mhlekwa) who have been on bail are to present themselves to Correctional Services in Mahikeng within seven (7) days of this order to serve their sentences.**

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F DIALE KGOMO

Judge President

I concur

_____

M H RAMPAI

Acting Judge President

I concur

_____

R D HENDRICKS

Judge

On behalf of the first appellant:	**Adv. N. L. Skibi**
Instructed by:	Justice Centre, MAHIKENG
On behalf of second appellant:	**Adv. R.J. Nkhahle**
Instructed by:	Justice Centre, MAHIKENG
On behalf of the third appellant:	**Adv. P. Venter**
Instructed by:	Phatshoane Henney Inc., BLOEMFONTEIN
On behalf of the respondent:	**Adv. N.J. Carpenter**
Instructed by:	The Director: Public Prosecutions MAHIKENG