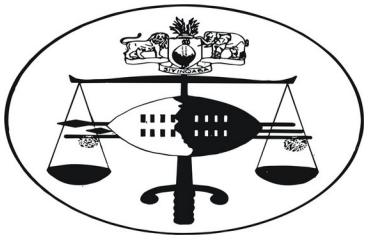

IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 25/2012

In the matter between

QHAWE MAMBA **Appellant**

and

REX **Respondent**

Neutral citation: *Qhawe Mamba v Rex* (25/12) [2012] SZSC 72 (30 November 2012)

Coram: MOORE JA, DR TWUM JA and M.C.B. MAPHALALA JA.

Heard: **20 November 2012**

Delivered: **30 November 2012**

Summary: Criminal appeal; appeal against conviction, power of Court of Appeal to set aside sentence of court a quo and substitute more severe punishment – courts to aim at similarity of sentences for appellants similarly circumstanced.

DR S. TWUM J.A.

[1] This is an appeal from the judgment of Levinsohn J.A given on 9th July 2012 whereby he convicted the appellant of counts 1 and 6 of the charges against him and sentenced him to eight (8) years imprisonment, 4 of which were suspended for 3 years. The appellant was charged as follows:-

> **"Count 1 – Fraud by false representations**
> **Count 2 and 3 – Theft by false pretences**
> **Count 4 – Contravention of the Financial Institutions Act, 2005**
> **Count 5 – Unlawful deposit taking with respect to the collective investment scheme.**
> **Counts 6 and 7 – money laundering and contravention of the Prevention of Corruption Act, respectively."**

[2] The appellant, being aggrieved and dissatisfied with the judgment appealed against his conviction and sentence to this court on 10th July 2012.

[3] The grounds of appeal were particularized as follows:-

"AD CONVICTION

1. **The Court a quo erred in fact and in law in holding that the crown had proved beyond any reasonable doubt the commission of the crime of fraud by the appellant/accused.**
2. **The court a quo erred in fact and in law in holding that the accused made a misrepresentation to the members of the public which was an existing fact on the accused mind at the time the representation was made.**
3. **The court a quo erred in fact and in law in holding that the amounts received from the members of the public were to the sum of E17,729,529.86.**

4. The court a quo erred in fact and in law in holding that the crown witnesses namely Nkosingiphile Mbhamali and Nomcebo Mngometulu were credible witnesses."

[4] On 11th July 2012, the appellant filed Notice of Abandonment of his Appeal against sentence.

[5] In 2008, the Central Bank of Swaziland had information that a number of illegal pyramid schemes were being operated in the country. Three such schemes were investigated by the Central Bank after it had received enquiries from members of the public about entities requesting and receiving deposits from members of the public. One such scheme investigated was operated under the name of Channel S Club by the appellant, Mr Qhawe Mamba.

[6] The Central Bank, (hereinafter, "the Bank") published notice in the press warning members of the public about illegal deposit taking and allied pyramid schemes.

[7] Mr Wellington Motsa who later testified as P.w.1 in the appellant's prosecution, described himself as a professional Accountant who had worked at KPMG as an auditor for 4 years before joining the Central Bank. He then worked for the Supervision Division in the Financial Regulation

Department. Among his many duties, he was an examiner for the institutions licensed by the Central Bank. This Division also monitored money laundering and exchange control issues. When this matter broke, his outfit investigated the following three schemes: Aloe Funds, Diamond Africa and Channel S Club. He explained that such schemes normally require would-be investors to pay membership fee and make investments of specific amount. Members were also required to recruit other members, each of whom would be required to do the same. He said members were led to believe that they would eventually get a return of 100% on whatever monies they invested in the scheme. He said it should have been obvious to members of the public that the higher the promised return, the higher the risk. A lot of people suffered losses.

[8] Mr Motsa said losses were not limited to the individual members themselves. Their losses could be substantial. The ripple effect trickled down to their families and, more importantly, the whole society. Further, it was a fact that those involved in recruiting others would also be guilty as they would be spreading the virus of the pyramid schemes to other members of the public. Mr Motsa said pyramid schemes were illegal because they contravened section 9 of the Financial Institutions Act, 2005. He said that section prohibited illegal banking business which could simply be described as taking deposits from the public without being licensed by

the Central Bank. In sum, it was Mr Motsa's warning that nobody was allowed to receive, accept or take deposits from the public without being registered as a banking business.

[9] On or about 14th May 2008, Mr Motsa, as has been stated above, was responsible for monitoring operations under the Financial Institutions Act 2005. He had consultations with the appellant. He explained to him the nature of illegal deposit taking activities. He further warned him that the activities carried out by him contravened the provision of the Financial Institutions Act and requested him to cease and desist from taking deposits from members of the public. The appellant later lied that he was not warned of the illegal nature of pyramid banking.

[10] The Governor of the Central Bank wrote to the appellant on 16th May, 2008. In that letter, the Governor referred to the discussions held on 14th May 2008 at the Central Bank with him. In it, he advised the appellant that the business partnerships between Channel Swazi Club, SDL and Whole Trade were illegal and contravened the provisions of the Financial Institutions Act. It concluded by saying that the said Act expressly forbade the receiving of deposits from members of the public without appropriate licence. There was no response to that letter.

[11] On 5th June 2008, the Central Bank wrote another letter to the appellant, giving him notice that investigations were being carried out under the Act in respect of his participation in the sale of SDL products and Channel S membership products. These days, particularly in financial businesses such as banks, "products" means services provided by the bank to its customers for profit. He was requested to furnish the Bank in writing with certain information to assist the Bank in its investigations. On 23rd June, the appellant, as Chief Executive Officer of Channel S Club wrote to the Bank without providing the required information. On the same 23rd June, the Deputy Governor wrote to the appellant. The appellant failed or willfully refused to answer the Deputy Governor's letter.

[12] Meanwhile, Mr Motsa, who had responsibility to monitor the investigations, obtained from Nedbank (Swaziland) Ltd, a number of documents relating to bank accounts operated by the appellant. One of these documents was a resolution of the Board of Ultimate Productions (Pty) Ltd dated 26th June 2008. It authorized the Bank to open a bank account in the name of Ultimate Productions t/a Channel Swazi Club. It appointed and athourised the appellant as the sole signatory to that account.

[13] The investigations revealed important information which was tabulated in great detail in various appendices. The information contained transactions

conducted on the various accounts opened, operated and utilised by the appellant. In those appendices were recorded, inter alia, details of each deposit paid into which account, the names of the depositors and transactions carried out utilising the account. Mr Motsa's colleague, Mr Themba Busika, prepared a summary setting out details of the transactions contained in the appendices.

[14] In one of his discussions with the appellant, he, the appellant, wanted to know from Mr Motsa if there was any legal way of conducting a savings and credit business. Mr Motsa suggested that a Co-operative Society could be formed which would not come under the aegis of the Central Bank, but under the Co-operative Society Act. The Co-operative would have to be strictly a savings and credit enterprise. The appellant went and discussed the matter with Mrs N. Mnisi (P.w.6) Commissioner of Co-operatives. He managed to cajole some official in Mrs Mnisi's office to give him a letter to open a bank account in the name of a Co-operative Society on the ground that the money was already in hand and had to be saved in a bank account.

[15] The appellant never registered a Co-operative Society as he was advised he could do, under the Co-operative Society Act. Rather, members of the public were then invited to deposit their investments into this new account. He was the sole signatory and the account therefore was under his control.

In his defence, the appellant claimed that he was authorised by that letter to run a Co-operative Society.

[16] Mr Motsa and his colleague, Mr Busika, meticulously traced how monies which were received into the various accounts and managed and controlled by the appellant were withdrawn by the appellant to finance his lavish life-style. He purchased expensive cars for himself, his wife and the mother of his children. He paid his sister substantial sums even though she had made no contributions to the funds. Indeed, there was evidence that people who had not paid any money into the fund at all were also paid large sums of money. What was worse, there is evidence on record that the appellant instructed that his relatives should be placed at the top of the list of contributors so that they could be paid large amounts, first. There is a summary of these payments at pages 12-21 Vol.1 and I will not repeat it here. Suffice it to say that the court a quo fully considered the appendices and the summary and factored his conclusions into the ultimate decision to convict.

[17] One other important matter. It was explained by Mr Motsa to the appellant that the entire scheme was fraudulent and unlawful under the Financial Institutions Act since his businesses of deposit taking were not registered under the Act. He said they escaped the scrutiny of the Central Bank.

When the alarm bells rang, some E17 million had been collected from unsuspecting members of the public and a substantial part thereof spent by the appellant. The criminality in the whole scheme was the fact of collecting those monies. This was done by powerful TV adverts extolling false representations, of future prosperity. The adverts preyed on the gullibility of poor people in the society who were made to think that the scheme provided them with a life-line to escape poverty. It merely deepened their gloom and misery. There were even fairly educated people who were caught in the vice. For example, Miss Lydia Mkhonta P.w.5, borrowed the sum of E22,000.00 on 7th October 2008 and deposited it into the account of Channel S Club. She lost her money and remained in debt. So did others!

[18] It was suggested by counsel for the appellant that certain people had been repaid about E10 million. The prosecution witness, Mr Motsa, replied by saying that there was no evidence that such was the case. That claim was false, he opined. Indeed, it was later confirmed by Mr Busika that the total monies paid out to registered contributors actually came to E5, 898,070, leaving some E11.0 million adrift and squandered by the appellant. Mr Busika pointed out that the fraud was not undone by creating other equally fraudulent schemes to solicit contributions which could then be used to repay unpaid members. He said as the funds did not themselves generate

income, there was no possibility that all the contributors would get their promised "dividends" which the adverts promised them. This is because the accounts were current accounts which earned no interest but had to be serviced by the payment of the usual bank charges. Curiously, counsel for the appellant submitted before the court, apparently seriously, that the said bank charges must have caused the short-fall in the club's finances. This indeed supported the prosecution's case. The scheme was inherently illegal and unsustainable. Hence it threatened the financial system.

[19] It was also suggested by counsel for the appellant that the figures bandied about by the prosecution were not authentic since there was no proper audit of all the monies going into the various accounts. Consequently he argued that there was no telling how much really belonged to the appellant and how much was "trust" monies held in the various accounts for contributors to the illegal scheme.

[20] I am aware of the auditing principle that a mere shortage in an account was not necessarily evidence of theft by the Accountant. But in the instant case the reason for the shortage was not in doubt. The appellant had systematically withdrawn the monies in the many accounts for his own use. That was clinically demonstrated by Mr Busika in the appendices prepared by him. Mr Busika explained that the original moneys in the various

accounts controlled by the appellant were isolated and recorded. He said there was not much in those accounts then. He said, from the figures picked up only a small amount of money was being generated from the appellant's TV adverts on behalf of the Club. With the application of modern information technology accounting systems, Mr Busika demonstrated convincingly that the moneys that the appellant spent on himself and on his cohorts came from the bulk of the contributions made by members of the Channel S. Club. This he concluded, was how the deficit came about.

[21] As the learned trial Judge correctly pointed out, when counsel for the appellant challenged the figures given by Mr Motsa and suggested that over E11.0 million had been paid out to members of the Club, this was challenged by Mr Motsa. Defence counsel then promised to provide a list of those payments. That list was never provided. Counsel submitted that the appellant was under no duty to prove his innocence. In my view, it is no answer for counsel for the appellant to submit that the appellant was under no duty to prove his innocence. I agree with the learned trial Judge that at that juncture, the appellant assumed the burden of persuasion and by his failure to provide the list, the court a quo was entitled to accept the submission by the prosecution that out of the E17 million collected, only about E5.8 had been repaid to contributors. Indeed, Mr Busika confirmed

by his own independent calculations that the figure at large and not accounted for was about E11 million.

[22] In my opinion, it was also disingenuous for counsel for the appellant to submit that part of the shortfall was due to bank charges levied against the current accounts. It did not lie in the mouth of the appellant to make that submission. That is exactly the crux of the prosecution's case, i.e. that the contributions were bound to dry up sooner or later since no substantial monies were being paid into the various accounts and payments were being made thereout for some members as well as paying bank charges and of course, servicing the appellant's extravagant life-style. This scheme was no perpetual time machine. It was bound to dry up for lack of lubrication, i.e. legitimate income.

[23] In my opinion, it was a complete red-herring for counsel for the appellant to submit that had the Central Bank not intervened and closed the accounts everybody would have been paid their due. Mr Motsa answered this by saying that the Central Bank had a duty to protect the public and had to intervene on behalf of unsuspecting members of the public once its became aware of what was going on to ensure that no further illegal collections were made.

[24] The truth of the matter was that at the time the accounts were frozen or closed, there was not enough money in them to repay all the contributors. In my view, the claim by the appellant that he had plans to set up and run lotteries to repay all the money due to contributors was another scam.

CONVICTION:

[25] After a very careful consideration of all the evidence, and applying the correct principles for deciding guilt in a criminal trial, i.e. proof beyond reasonable doubt; (not proof beyond all fanciful doubt) I have no doubt whatsoever in my mind that the learned trial Judge correctly convicted the appellant on the two counts, i.e. 1 and 6. The evidence was overwhelming that the appellant was the originator of the illegal scheme; he monitored and sometimes even personally spoke on his TV to persuade people to come and invest in the scheme and double or treble their money. There is overwhelming evidence that he was the sole signatory to all the accounts into which "club" monies were designated to be paid and the evidence is equally overwhelming that he withdrew or caused to be withdrawn the sums of money he used to purchase expensive motor vehicles and land; paid for his children's school fees, paid some of his trusted workers and generally had a good time on the money of the poor people of this country he advertised to help.

[26] I am absolutely sure that there is no merit in any one of the grounds of appeal. Indeed I am unable to divine any real defence, put up by the appellant in the court a quo which was inadvertently overlooked by the learned trial judge. Where there was the slightest hint of a possible doubt the benefit of that doubt went to the appellant. This is how come counts 2,3,4 and 5 were dismissed by the learned trial Judge. It is unfortunate that counsel singled out crown witnesses Mbhamali and Mngometulu for attack that they were not credible witnesses. The learned trial Judge heard and saw all the witnesses, including Miss Nomsa Dlamini, D.W.7, who persistently told the court that if she found out that the appellant was using club moneys to buy expensive cars for himself she would be happy. He had the opportunity to observe their demeanour and formed a fair opinion on their credibility.

[27] I am persuaded that on the totality of the evidence the learned trial Judge was entitled to conclude that the prosecution had proved its case against the appellant beyond reasonable doubt. He correctly convicted the appellant on the two counts. I support that conclusion. The appeal is completely unemetorious and I hereby dismiss it.

THE SENTENCE

[28] The learned trial Judge sentenced the appellant as follows:-

"Taking counts 1 and 6 together, the accused is sentenced to 8 years imprisonment of which 4 years are suspended, for a period of 3 years."

It is my view that the sentence was overly lenient particularly the suspension of half of it and should have been reconsidered by this court.

There are two statutory provisions on sentencing:-

One regulates appeals against sentence; the other, appeals against conviction.

(a) Section 5(3) of the Court of Appeal Act provides:-

"On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case dismiss the appeal."

(b) Section 327 of the Criminal Procedure and Evidence Act provides:

"that in any appeal against conviction, the Court of Appeal may without prejudice to the exercise by such court of its powers under section 82 of the Subordinate Court Proclamation (Cap 20) and under section 5 of the High Court Act No 20 of 1954."

(a) …

(b) …

(c) give such judgment as ought to have been given at the trial; or impose such punishment (whether more or less severe than or of a different nature from the punishment imposed by the court below) as ought to have been imposed at the trial; or

(d) make such other order as justice may require."

For the present purpose s.5 (3) of the Court of Appeal Act is not applicable.

It is section 327 of the Criminal Procedure and Evidence Act that applies.

[29 In the case of Magalela Nkomonde and The King, Criminal Appeal Case No. 04/2009, the court a quo convicted the accused, a security guard, for stealing two sums – E20,000.00 and E100,000.00, respectively from his employers on different dates. He pleaded guilty to the two charges and all the money which was stolen was recovered. The trial court sentenced him to 6 years imprisonment on the first count and 16 years imprisonment on the second charge. The court further ordered that the two sentences should run consecutively. Again, in the case of The King v Thembela E. Simelane Criminal Case No. 01/2010, the accused was an attorney. He stole the sum of E600,000. This was trust money he held on behalf of his client. He was sentenced to an effective term of 5 years in prison by the trial court. He appealed to the Supreme Court. That court increased the sentence by a further 12 months in prison or the payment of a fine of E50,000.00. In all the circumstances, the Supreme Court considered that the sentence of 5 years imprisonment was inadequate.

[30] In the present appeal before this Court the appellant was convicted by the court a quo on two counts – count (1) fraud and count (2), money laundering. The appellant was sentenced to a total of 8 years in prison; four (4) years of which were suspended for 3 years. The sum said to have been stolen as a result of those fraudulent machinations of the appellant came to

some E11.0 million. It has not been recovered. If ever there was evidence of lack of a measure of uniformity in sentencing, these case-scenarios exemplify it. I know that sentencing is pre-eminently within the discretion of the trial court but after a very careful and anxious consideration of the three cases, I am driven to the irresistible conclusion that the sentence imposed by the court a quo in this appeal was overly on the low side. It almost amounts to a failure of justice by non-exercise of a judicial discretion; particularly the suspension of half of the 8 years sentence. In my view, it is for such situations that the two statutory provisions mentioned above were enacted. The courts must aim at imposing possible parity of effective sentences so as not to create manifest feelings of outrage and injustice which could be felt by right-minded members of this country, when all the facts and circumstances of the cases are taken into account. As Lord Coulsfield J.A. put it in the Botswana case of Ntesong v The State (2007) 1 BLR 387 at 390:

> **"It has always been recognized that it is salitary for the courts to aim at a measure of uniformity in sentencing whenever this can reasonably be done."**

[31] In my opinion s 5 (3) of the Court of Appeal Act and section 327 of the Criminal Procedure and Evidence Act are intended to ensure that the streams of justice are kept pure and sanitized against the slightest feeling of bias and injustice in the broader sense. Let me hasten to enter a caveat. It

is the cardinal principle of the criminal justice system that a sentencing court should aim at similarity of sentences for accused persons or appellants, similarly circumstanced, that I have in mind. My view of the three cases compared above is that all the appellants were similarly circumstanced.

[32] It is important that for the end result I should also mention these other matters. I have no record anywhere in these proceedings that the appellant (ie Mamba) has shown or expressed any remorse for what has happened to over 2437 people who petitioned the Police for redress. These were mostly ordinary folk who eked out a living, farming or doing some petty trading. As I have mentioned above, a very substantial sum – E11.0 million – has not been recovered. The appellant blamed other people, including the Central Bank, for the misfortunes that have befallen those hapless citizens of this Kingdom. Even when the High Court made an order in the civil case for the appellant's mobile TV station to be attached so that it could be sold and the proceeds used to alleviate the hardships of these victims of his pyramid businesses, the appellant contrived to remove and take it out of the jurisdiction. It is said to be somewhere in the Republic of South Africa.

[33] It was my opinion that a more condign punishment will be to quash the order for suspension of half of the 8 year sentence. However, I am not unaware of the principle that a court has no duty to be astute to find ways of evading constitutional provisions in the course of adjudication. In all fairness, I believe the appellant should have been invited to comment on the possible escalation of his sentence. This did not happen. Two wrongs do not make one right. The appellant was entitled to fair hearing.

In the circumstances, the sentence of the court a quo is confirmed. Let practitioners take note of the concerns expressed above.

_____
DR. SETH TWUM
JUSTICE OF APPEAL

I agree.

_____
S.A. MOORE
JUSTICE OF APPEAL

I also agree.

_____
M.C.B. MAPHALALA
JUSTICE OF APPEAL

COUNSEL:

For Appellant:	**Mr. S. Mamba**
For Respondent:	**Advocate F. Joubert and Mr. S. Fakudze**