

**IN THE REGIONAL COURT
FOR THE REGIONAL DIVISION OF GAUTENG
(HELD AT THE SPECIALISED COMMERCIAL CRIME COURT:
JOHANNESBURG)**

CASE NO: SCC284/2007

In the matter between:

THE STATE

and

ROWLAND EDWARD BAILEY	First Accused
SHIRLEY ANN BAILEY	Second Accused
ADRIAN EDWARD BAILEY	Third Accused

**PLEA AND SENTENCE AGREEMENT IN TERMS OF
SECTION 105A OF THE CRIMINAL PROCEDURE ACT,
51 OF 1977 (AS AMENDED)
(AS BETWEEN THE STATE AND THE ACCUSED)**

A. PARTIES TO THIS AGREEMENT

- 1.1. Rowland Edward Bailey ("the first accused");
- 1.2. Shirley Ann Bailey ("the second accused");
- 1.3. Adrian Edward Bailey ("the third accused");

all duly represented by Edward Stanley Classen; and

- 1.4. The State as represented by Johannes Lodewyk Wolfaardt ("the prosecutor") duly authorized by the National Director of Public Prosecutions in terms of section 105A(1)(a) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), to negotiate and enter into plea and sentencing agreements

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hereby enter into an agreement in respect of :

(a) A plea of guilty in terms of Section 105A (1) (a) (i) of the Criminal Procedure Act 51 of 1977 ("the Act") ("the conviction agreement");
and

(b) A sentence in terms of Section 105A (1) (a) (ii) of the Act ("the sentence agreement"),

to secure the conviction of the first and second accused on the counts referred to herein, and to be sentenced to punishment as provided for in this agreement. And further to withdraw the charges against the third accused.

B. PREAMBLE

2. **WHEREAS** the Accused have been informed that they have the right to :

2.1. be presumed innocent until proven guilty beyond a reasonable doubt;

2.2. remain silent and not to testify during the proceedings; and

2.3. not to be compelled to give any self-incriminating evidence whatsoever.

3. **AND WHEREAS** the Accused have been informed that this agreement cannot bind the court not to exercise its discretion to make a specific order or conduct a specific enquiry, in which event the Accused will be entitled to follow any direction(s) given by the court or abandon the agreement.

4. **AND WHEREAS** the State has consulted with the police official charged with the investigation of the case (Annexure "A" hereto).

5. **AND WHEREAS** the State has given due regard to the nature and circumstances relating to the offences, the Accuseds' personal circumstances including the fact that they have no previous convictions, and the interests of the community.
6. **AND WHEREAS** the State has afforded the complainant, the Financial Services Board through its representative, Mr RJG Barrow, and the Liquidator of the Mitchell Cotts Pension Fund, Mr Antony Louis Mostert , who represents the interest of the Pensioners of the Mitchell Cotts Pension Fund, the opportunity to make representations in writing (see Annexure "B" and "C" hereto), and to ask for a compensation order
7. **NOW THEREFORE** in this agreement we, the undersigned, set out the terms of the agreement, the substantial facts of the matter and all other facts relevant to the agreed sentence as well as certain admissions made by the Accused.

C. THE TERMS OF THE AGREEMENT

1. THE CHARGES

1.1. With reference to the Charge Sheet attached hereto as Annexure "D" :-

1.1.1. The first Accused pleads GUILTY to:-

1.1.1.1. COUNT 1: Fraud;

1.1.1.2. COUNT 2: Contravening section 2 read with sections 9(1), 9(2) and 1 of the Financial Institutions (Investment of Funds Act) 39 of

1984 and further read with the provisions of The Adjustments of Fines Act, Act 101 of 1991;

1.1.1.3. COUNT 3: MONEY LAUNDERING IN CONTRAVENTION OF (Part I) Section 28 read with Sections 33, 34, 1 and 8 to 12 of the Proceeds of Crime Act, No 76 of 1996 and (Part II) Section 4 read with Sections 8, 1 and 76 of the Prevention of Organized Crime Act, No 121 of 1998.

1.1.2. The second accused pleads GUILTY to THE ALTERNATIVE TO COUNT 3: (Part I) Contravening Section 30 read with Sections 33, 34, 1 and 8 to 12 of the Proceeds of Crime Act, No 76 of 1996 and (Part II) Section 6 read with sections 8, 1 and 76 of the Prevention of Organised Crime Act, No 121 of 1998.

1.2. The charges against the third Accused are WITHDRAWN.

1.3. The following counts against the second Accused are WITHDRAWN:

1.3.1. Counts 1 and its alternative; and

1.3.2. Count 2.

1.4. It is recorded that the State agrees and undertakes not to commence with or re-institute any further prosecution with regards to the conduct of the accused arising out of their involvement with the Mitchell Cotts Group of Companies and the Mitchell Cotts Pension Funds. and the Langridge Trust and its entities.

2. THE SUBSTANTIAL FACTS

The facts are contained in the PREAMBLE to the Charge sheet and are to be regarded as being incorporated herein. (See Annexure "D").

3. **ADMISSIONS BY THE ACCUSED**

- 3.1. **THE ACCUSED ADMIT** that they have been informed that this agreement cannot bind the court not to exercise its discretion to make a specific order or conduct a specific enquiry.
- 3.2. **THE ACCUSED ADMIT** that they understand the terms unlawfulness, knowledge of unlawfulness, intent (including constructive intent), intent to defraud, prejudice and potential prejudice, utmost good faith, proper care and diligence, improper advantage, proceeds of crime and of unlawful activities, knowledge, reasonable grounds to believe and reasonably to have known, and the duty of good faith of employer-companies and their directors, in that the said terms were explained to them by their legal representative.
- 3.3. **THE ACCUSED ADMIT** the facts pertaining to them as contained in the summary of substantial facts incorporated in the PREAMBLE.
- 3.4. **THE ACCUSED DO NOT DENY** the facts pertaining to the **LIFECARE FUND, LIFECARE COMPANY, ALEXANDER FORBES** and **GHAVALAS's** arrangements with the said entities and their representatives.
- 3.5. **THE ACCUSED ADMIT** that this agreement was entered into freely and voluntarily in each's sound and sober senses and without having been unduly influenced.

4. **THE SUBSTANTIAL FACTS AND ADMISSIONS MADE BY THE ACCUSED FOR THE PURPOSE OF THIS SENTENCE AGREEMENT:**

The parties agree that the substantial facts and admissions recorded above are to be accepted and taken into account for the purpose of deciding on an appropriate sentence.

5. **The parties record the following facts by way of mitigation.**

5.1. The first accused is 64 years of age. The second accused is 63 years of age.

5.2. After accused became aware that their son Accused 3 had been arrested in connection with this matter, that the Registrar had applied to the High Court for curatorship of the Pension Fund and that the curator was applying for the liquidation of both COTTS and the Fund, and also aware that criminal charges would be proffered against them, they voluntarily returned from their country of residence and citizenship, Australia, to South Africa, for the purpose of contesting both civil and criminal proceedings. They were arrested and released on bail of R900,000.00 and R100,000.00 respectively with stringent reporting circumstances. Since their arrival in South Africa they have fully complied with their bail conditions.

5.3. The accused were summonsed to and participated in an Inquiry in terms of Section 417 read together with Section 418 of the Companies Act, 1973. Faced with the uncovering by the authorities of their offshore entities and other evidence, they acknowledged their conduct and decided to take full responsibility for it. In the course of the Inquiry they provided information and evidence to the liquidator concerning the transactions, in question and furthermore:-

5.3.1. agreed to give, and have given, their full and complete cooperation to the liquidator of the Fund in providing evidence and facts pertaining to this transaction and any other information which the liquidator might require and which they could provide;

5.3.2. agreed to transfer, make over, cede and assign all of the their worldwide assets, including the funds in the Langridge Trust and Cotts Investments Limited (now known as Aventurine Investments Limited), together with the balances of all other bank accounts and investments, as set out in the settlement agreement with the liquidator of the Fund, annexed hereto marked "E".

5.4. The total amount paid over to the liquidator of the Pension Fund is the sum of R20,648,990. This is a substantial and meaningful restitution to the pension fund, and has been accepted as such by the liquidator of the Fund, in the context of the following circumstances:

5.4.1. the pensioners of this pension fund have always received their technical entitlement under the Fund and its Rules, including an on aggregate annual increase of at least 100% of all items CPI. At present there should be a substantial surplus of at least R30,000,000.00 in the pension fund;

5.4.2. the contributing employer, Mitchell Cotts, would as a rule of thumb be entitled to half of that surplus viz. an amount of approximately R15,000,000.00. This amount has been foregone in the settlement arrangements and should be considered as be "added" to the R20 million paid to the liquidator of the fund;

- 5.4.3. The accused, as pensioners, in terms of the present surplus distribution legislation, and in addition to the pensions they would otherwise be entitled to receive, but for the settlement reached with the Liquidator of the Pension Fund, would have been entitled to a further portion of the surplus arising out of the surplus apportionment exercise. They have also foregone this amount and it should be considered as "added" to the amount paid to the liquidator of the fund;
- 5.4.4. all of their children have foregone their pension fund membership and their withdrawal benefits as members of the pension fund. None of the children of the accused ever received payment of any pension;
- 5.4.5. the actual amount derived in 1992 from the Lifecare transaction by Cotts Investments and Mitchell Cotts was the sum of R18,898,179.20 (this after the payment to Finansbank and the Lifecare company of R2,000,000.00 each). If, instead of selling the shares in Swainswick Magnetics (Pty) Ltd at the time, the company had been liquidated and the surplus distributed in terms of the rules, the shareholders of Mitchell Cotts were in line to have acquired a little over half of those proceeds in any event. There were no pensioners on the Swainswick Magnetics Pension Fund (MCMPPF) as opposed to the MCPF. The balance would have been paid to the members who were effectively the three accused.(It is conceded that this presupposes that a liquidator would not have unravelled the splitting of the MCPF);
- 5.4.6. if in 1991, the contributing employer, Mitchell Cotts, had been wound up and the surplus apportioned in accordance with the law and practice then in existence, and depending on the liquidator and the actuarial input given to him, virtually the entire surplus would have devolved upon the

contributing employer and the active members, being the accused. Under that scenario, there would have been no substantive loss to the pensioners;

5.4.7. if the present apportionment legislation is considered, where the intention in general is to allow pensioners half of a surplus, the R9 million "loss" to the pensioners in 1991 has been replaced by an acquisition of a substantially greater value, admittedly for those who still survive. If purely economic considerations are brought to bear, this also represents a substantial sacrifice on the accuseds' part.

5.5. The accused have pleaded guilty and not wasted the time and resources of the Court. A full trial would in all likelihood have taken many months.

5.6. The accused have shown remorse in relation to the offences committed by them and exhibit a clear intention of not committing same again.

5.7. The accused's involvement in the Mitchell Cotts Pension Fund, as one of the funds in a broadly described "pension fund surplus stripping scheme", received wide media coverage and other publicity which has had a severely adverse effect upon the first accused's credibility in the financial sector and upon his standing therein.

5.8. The accused have no previous convictions.

5.9. The accused have since 2001 been aware of the investigation into the affairs of the Mitchell Cotts Pension Fund by the Financial Services Board which has caused first Accused directly and second Accused indirectly considerable stress.

- 5.10. The first Accused hereby makes himself available to testify in criminal proceedings against other persons and entities involved in the so-called surplus stripping schemes. His testimony will assist the State and the liquidators and curators of those funds to shorten proceedings and strengthen the State's case(s) against the other accused on the docket.
- 5.11. His assistance will also facilitate the recovery by the curators of the other funds of the outstanding monies which can be then distributed to their members in terms of the surplus apportionment legislation currently applicable.
- 5.12. The second Accused is available to assist the State and the liquidator where she can with the little direct knowledge of the present matter that she has.
- 5.13. The first Accused suffers from ill health, and in particular, from Coronary Heart Disease, Hypertension, and Chronic Extensive Oesophagitis. All of these conditions require daily medication and monitoring. The second Accused has had a Left Nephrectomy and a partial Right Nephrectomy. As a consequence she requires regular medical monitoring. Her kidney condition has a direct effect on her blood pressure, and she has been diagnosed with innovated hypertension. This also requires specialist treatment.

6. Aggravating Circumstances

- 6.1. The assets of a pension fund constitute trust property requiring of the person in control of or administering such fund that he should observe the utmost good faith and exercise proper care and diligence in stewardship.

6.1.1 The first Accused occupied such a position of trust.

6.1.2 He is an intelligent person of considerable commercial and pensions experience.

6.2 A participating employer stands in an intimate relationship with the pension fund and is the directing mind and will of the fund. The relationship places a heavy responsibility on the employer to avoid the temptation to abuse the fund for selfish purposes. The directors of the employer must at all times act in good faith.

6.2.1 First and Second Accused were at all relevant times the directors of the employer.

6.3 The sum of money involved in the fraudulent transaction was very large.

6.4 Notwithstanding any technical compliance with the formal Rules of the defined benefit fund in question, the First Accused appreciated that the transaction was to accomplish in substance that which the Registrar was unlikely to have approved had he been aware of the full ramifications thereof.

6.5 The transaction did remove a substantial value from the pension fund which the pensioners could have, and were likely to have, obtained some benefit from, whether by further increased benefits or in the event of a dissolution of the fund.

6.6 Apart from legal considerations, it was morally egregious to have effected the removal of a substantial value to pensioners who, having worked and contributed the fund, depended on it for their livelihood in their post-working life which was made more difficult by the ravages of inflation. It was equally wrong of First and Second Accused to have enjoyed benefits which to any reasonable mind must have been suspect.

6.7 The pensioners are now well advanced in age and many have died since the time of the transaction.

6.8 The shrewd creation of complex offshore structures to receive millions of Rand removed from South Africa as well as the maintenance until this year of the façade of an overseas investor whilst all along managing and enjoying the proceeds of unlawful activities constitute factors aggravating the conduct of the Accused.

6.9 Although not legally blameworthy for the perpetration of the original transaction, the Second Accused did *ex post facto* not conduct herself as a reasonable person would have done in the face of an absolute windfall against a paltry outlay of R1000.00. The gravity of accepting and enjoying the proceeds of what to any reasonable person must have been suspect is enhanced by a failure to carry out her responsibilities as a director of the employer company.

6.10 The conduct of the Accused disabled the Registrar from performing his duties and functions in the public interest, in particular from controlling the management of the pension fund and from protecting its membership. The results of inspections into the fund left the Registrar with no option but to engage in legal process to have a Curator appointed and so incur legal expenses.

7. The agreed Sentence

7.1. It is recorded that the State and the legal representatives of the accused have had extensive negotiations and discussions with regard to the charges against the accused and have considered the following factors:-

- 7.1.1. the aggravating circumstances present in the case;
- 7.1.2. the mitigating circumstances present in the case;
- 7.1.3. the interest that the State has in securing a conviction on all of the charges laid against the accused balanced together with the interest the State has in achieving a number of additional purposes which are:
 - 7.1.3.1. the effect that the fact of a conviction of commercial crime perpetrated by the accused and their sentences have on the community as a whole and the business community in the Republic of South Africa in particular; and
 - 7.1.3.2. the interest that the complainants have in respect of the offences, and the interests of the public at large, in securing a conviction in respect of the charges against the accused and other further convictions of other persons that stand accused of wrongdoing in relation to Pension Funds.

NOW THEREFORE THE PARTIES have agreed in terms of Section 105A of the CPA, and that an appropriate sentence will be the following:-

- 1. In respect of the Accused ROWLAND EDWARD BAILEY:-
 - 1.1 COUNT 1 – Ten (10) years' Imprisonment, wholly suspended for a period of five (5) years on the following conditions:
 - (1) that the accused is not convicted of the crimes of Fraud or Theft or of any other offence of which dishonesty is an element, committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine; and

(2) that the accused comply fully with the Settlement Agreement concluded on 8 February 2007 with the Liquidator of the Mitchell Cotts Pension Fund (Annexure 'D')

1.2 COUNT 2 – a Fine of R~~7~~²00 000. 00 or Three(3) years' Imprisonment, wholly suspended for a period of five(5) years on the following conditions:

(1) that the accused is not convicted of the offence of contravening Section 2 of the Financial Institutions (Investment of Funds) Act, 39 of 1984 or of Section 2 of the Financial Institutions (Protection of Funds) Act, 28 of 2001 or of any offence of which the breach of a fiduciary duty owed to a corporate body is an element, committed during the period of suspension; and

(2) that the accused, in lieu of a fine, pay to the Liquidator of the Mitchell Cotts Fund for the direct benefit of the existing registered pensioners the amount of R300 00.00 within 15 days of the date of this sentence such amount to be paid from the accuseds' bail bonds.

1.3 COUNT 3 – (Both parts of this Count are taken together for purposes of sentence) : a Fine of R3 Million Rand (R3 000 000 .00) or six (6) years' Imprisonment wholly suspended for a period of five (5) years on the following conditions:

(1) that the accused is not convicted of a contravention of Sections 4, 5 or 6 of the Prevention of Organized Crime Act, 121 of 1998 committed during the period of suspension; and

(2) that the accused, in lieu of a fine pay to the Liquidator of the Mitchell Cotts Pension Fund for the direct benefit of the existing registered pensioners the

amount of Five hundred thousand Rand (R 500 000. 00) within 15 days of the date of this sentence, such amount to be paid from the accuseds' bail bonds.

2. In respect of the Accused Shirley Ann Bailey:-

Both Parts I and II of the ALTERNATIVE TO COUNT 3 are taken together for purposes of sentence-

a Fine of One Million Rand (R 1 Million) or five (5) years' imprisonment wholly suspended for a period of five (5) years on the following conditions:

(1) that the accused is not convicted of a contravention of Sections 4, 5 or 6 of the Prevention of Organized Crime Act, 121 of 1998 ;

(2) that the accused, in lieu of a fine, pay to the Liquidator of the Mitchell Cotts Pension Fund for the direct benefit of the existing registered pensioners the amount of Two hundred thousand Rand (R 200 000.00) within 15 days of the date of this sentence, such amount to be paid from the accuseds' bail bonds.

THEREFORE I, Johannes Lodewyk Wolfaardt, duly authorized by the National Director of Public Prosecutions in terms of Section 105A (1) (a) Act 51 of 1977 to negotiate and enter into a plea and sentence agreement, hereby declare in terms of Section 105A of Act 51 of 1977 that I have entered into the above mentioned plea and sentence agreement.

DATED AND SIGNED AT JOHANNESBURG THIS ____ DAY OF AUGUST
2007.

Adv J L Wolfaardt

ROWLAND EDWARD BAILEY
The First Accused

SHIRLEY ANN BAILEY
The second accused

Edward Stanley Classen
Attorney for the Accused

IT IS RECORDED THAT THE COURT FINDS THAT THE PLEA AND SENTENCE AGREEMENT IS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 105A OF ACT 51 OF 1977 AS AMENDED AND THAT THE SENTENCE AGREED UPON IS A JUST SENTENCE. THE SENTENCE AGREED UPON IS FURTHERMORE MADE AN ORDER OF THIS COURT ON THIS ____ DAY OF _____ 2007.

PRESIDING REGIONAL MAGISTRATE

I

Jan Hendrik Judeel certify as follows:

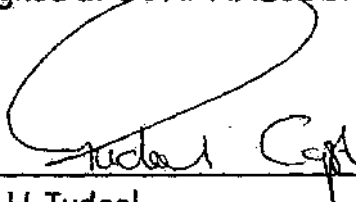
I am a Detective Captain in the South African Police Service, stationed at the Johannesburg Commercial Branch, 64 Eloff street Johannesburg Central. (011) 870-5338.

I am the Investigating Officer in Rosebank CAS 289/05/2002 in which Rowland Edward Bailey, Shirley Ann Bailey and Adrian Edward Bailey are the three of the accused persons.

The Prosecutor has consulted with me in regard to the disposal of the case against the said three accused in terms of section 105 A of Act No 51 of 1977, particularly in terms of subsection (1) (b) (i) thereof.

I support the finalization of the matter in terms of the said section 105 A.

Signed at JOHANNESBURG on this the 15 day of August 2007.



A handwritten signature in black ink, appearing to read 'Judeel Capt', is written over a horizontal line.

J H Judeel.
Detective Captain
South African Police Service.