

CHAPTER 4

THE SPECIALISED COMMERCIAL CRIME COURT

Emerging from a partnership between the SAPS, the National Prosecuting Authority, the Department of Justice and Business Against Crime (BAC), the Specialised Commercial Crime Court was established in November 1999. Situated in a drab, bureaucratic building in Pretoria, the court consists of two regional courts with a mandate to hear the cases brought to trial by the Specialised Commercial Crime Unit (SCCU).

The court itself can be understood primarily as institutionalised and dedicated court time reserved for the hearing of commercial crime cases brought by a dedicated group of around 20 prosecutors. However, as we shall see, the innovation associated with the SCCU is related not so much to the existence of this dedicated court. It lies in the nature of the working relationship and procedural integration between the prosecutors attached to this court, and the police officers investigating the matters brought before it. Before looking at this, however, it is important to understand the range of matters that the SCCU is responsible for prosecuting.

The SCCU is responsible for prosecuting all cases of commercial crime and fraud committed in the jurisdiction of the Pretoria magistrates' courts, but which are too serious to be prosecuted in the district courts. At the same time such cases should not be so serious that they require investigation and prosecution by the Scorpions, or the Directorate of Special Operations. Although these boundaries are somewhat unclear, in practice the SCCU takes:

- All fraud cases except for relatively small, straightforward frauds, apparently committed by a single individual—unless it is alleged that she has committed numerous such crimes. For instance, if a person pays with a cheque while the funds in her account are insufficient to cover the transaction, she will most probably not be prosecuted by the SCCU. However, if the amount in question is very large, or the suspect is believed either to be part of a syndicate committing this crime repeatedly or to have passed a series of these cheques, the likelihood increases. On the other hand, some of the most complex and high value frauds will also probably not be prosecuted

by this unit, being within the remit of the Scorpions, who cover all crimes committed by organised criminal groups.

- In addition to these frauds, some forms of theft (such as embezzling money from a company's pension fund) also qualify for prosecution by the SCCU. Again the decision whether or not a case should go to the district court may depend on to what extent it involves organised criminality.
- The prosecution of a wide variety of statutory offences associated with the establishment and running of businesses, will also be prosecuted by the unit. Such offences include those created by the Companies Act, the Closed Corporations Act, the Insolvency Act, the Banks Act, etc. In all about 60 pieces of legislation create statutory commercial crimes which might be prosecuted by the SCCU. Once again, however, particularly minor or particularly major infractions of the law may fall outside of the remit of the unit.

Given this brief, the SCCU is involved in the prosecution of a very wide range of cases. Moreover, within each of these categories of offence, there is a wide range of actual and potential *modus operandi*. Indeed, compared to the more limited range of methodologies deployed by those who have committed violent crimes or property crimes, where deception and misrepresentation are not core elements, prosecuting commercial crimes is, as one prosecutor said, "an endless lesson in the many ways people have invented to screw each other". Obviously this creates practical difficulties for the investigation and prosecution of offences, difficulties which we will explore more fully below. For the moment, however, let us look at the procedure followed by the SCCU.

Processing cases through the Specialised Commercial Crime Court

The most profound innovation associated with the Specialised Commercial Crime Court is not that such a court exists to hear such cases. In most large courts one is likely to find that the control prosecutor has assigned some of her staff to the more-or-less exclusive prosecution of commercial criminal matters, and that these cases will often be concentrated in the same court. Thus, the mere existence of a dedicated court is not the key innovation associated with this court. What is key, however, is the way in which the work of the investigating officer and the prosecutor is integrated. This process is documented in the official 'Procedural Guidelines for the Specialised Commercial Crime Unit' which might be summarised as follows:

- A complaint falling within the remit of the SCCU is laid at a police station by the complainant, or may be lodged directly at the SCCU or the Commercial Branch.
- The commander of the detectives at the police station identifies the case as 'belonging' to the Commercial Branch (see text box on page 38), and forwards the docket to the commanding officer of the Pretoria Commercial Branch.
- On receipt of the case by the Commercial Branch, it is booked out to an investigator for preliminary investigation, to be completed within 14 days. This investigation consists of making sure that the offence falls within the mandate of the Branch, and obtaining whatever evidence already exists, including the possible retaking of the complainant's statement. In addition, the investigator completes a draft investigation plan, setting out what evidence is to be collected, and the timeframes within which this will be done.
- Within 14 days the commanding officer reviews the docket and investigation plan with the investigator, and hands it on to the workflow administrator of the SCCU who will allocate the work to the appropriate prosecutor.
- Once the prosecutor has received the docket, she is required to meet with the investigator within 14 days in order to review the information already in hand and the draft investigation plan which sets out responsibilities and timeframes for accumulating evidence. This plan, once completed, is affixed to the docket, forming a point of reference and accountability.
- The investigator then completes the investigation, reporting to her commanding officer. In addition, where appropriate, the investigator and the prosecutor may meet to follow up progress in the investigation of the case, particularly in complex matters or where new information comes to light that necessitates a reformulation of either the charges or the investigation plan.
- Upon completion of the investigation the investigator will either arrest the suspect, or summons him to appear at court. Ordinary trial procedures follow. One final requirement of SCCU policy, however, is that prior to the trial, the investigation/prosecution team is required to meet defence counsel and other relevant role-players, in order to ensure that

there are no unnecessary delays during the trial. In particular, the meeting must ensure that the defence will be ready to proceed on the date on which the trial is scheduled to begin.

In an effort to enhance the management of cases and the work of members of the SCCU, work procedures have been designed in order to facilitate a rather more detailed monitoring of the flow of cases. Thus, at every stage of the process progress reports are completed and data are inputted into a management system. This system helps managers of the SCCU and the Commercial Branch to, individually and collectively, assess the performance of staff and the outputs of their units as a whole. While most prosecutors seemed to think that some of the reporting requirements were bureaucratic, in general they could all see the value in having these data, and the impact that they had made in identifying blockages and ensuring that these were overcome.

The (changing) mandate of the SAPS Commercial Branch

Prior to the restructuring of the Commercial Branch, it consisted of little more than national and provincial commanders of three distinct units: the Fraud Unit, the Syndicate Fraud Unit, and the Commercial Crimes Unit.

The Fraud Unit investigated simple frauds, usually committed by a single offender and often involving no suspicion of repeat offences, focusing primarily on the simpler cases of cheque and credit card fraud. The Syndicate Fraud Unit, on the other hand, was responsible for investigating more organised cheque and credit card frauds. These included the 'skimming' of credit card data from one card to another; the creation of forged cheques and credit cards; the use of a large batch of stolen cheques and credit cards; and cases where offenders used numerous cards or one card frequently. In addition, this unit was responsible for investigating more sophisticated frauds such as 'kite-flying' schemes; advance fee frauds including so-called West African 419 scams; and 'black dollar' cons. Finally, the Commercial Crime Units were responsible for investigating offences allegedly committed by businesses and, in particular, crimes committed by directors of companies in their official capacity. These units would have been responsible for investigating most of the statutory offences now prosecuted by the SCCU.

Following a decision in early 2002, the SAPS has restructured the commercial branches and redefined their mandate. From now, it seems, com-

mercial branches will exist in different centres. Made up of the vast majority of the detectives who worked in the three distinct units, they will be tasked with investigating all the matters that were previously investigated by the Syndicate Fraud and the Commercial Crimes Units. The simpler frauds, previously investigated by the Fraud Unit, have become the responsibility of the general detective units of police stations.

In addition to these commercial branches, which will have distinct geographical jurisdictions, the SAPS is setting up a small unit tasked with investigating serious economic offences with a nation-wide jurisdiction. This unit will be responsible for investigating only the most serious of cases, and is to have the resources to pursue extremely complicated matters.

Naturally, views on the desirability or otherwise of these changes differ depending on who it is offering their opinion. As a general rule, it seems that detectives at police station level are unhappy that their workload will increase without being given additional resources. Detectives in the Commercial Branch, however, are relieved to have rid themselves of the more petty cases—of which there is a high volume—because it will allow them to focus on more serious and difficult cases.

What is commercial crime?

Perhaps one of the most common opinions expressed in the course of this research was that the varied and complex nature of commercial crime necessitated the establishment of the SCCU. It was felt that the available skills, systems and resources in the non-specialised criminal justice environment were unable to ensure the successful investigation and prosecution of these cases. As we shall see, there is much merit in this argument. Indeed, the results of the unit suggest that its special procedures do, in fact, result in high levels of success (see the following chapter). But before we get there, it is important to understand why it is that commercial crime is believed to be harder to investigate and prosecute successfully than other forms of criminality. To do this, however, we need to develop a working definition of commercial crime.

As has already been pointed out, the SCCU prosecutes cases that fall into two broad categories: statutory offences defined in terms of the numerous pieces of legislation regulating the conducting of business activity, and various forms of fraud and theft. This suggests that, in practice at least, an operational definition

of commercial crime is being developed, and that it revolves around the commission of fraud and the violation of statutes regulating businesses and transactions. Naturally, in law and in practice, the character of the common law crime of fraud (as well as its baby brother, forgery and uttering) is very different to the numerous statutory offences.

Although there are a very large number of statutory offences, each with its own elements, in general the core difference between these crimes and the crime of fraud is that they establish a set of responsibilities which it is criminal to fail to perform. Thus, the Companies Act creates numerous offences in terms of which directors of companies can be prosecuted if they fail to provide oversight, even if they do not necessarily have the intention to defraud, or do not steal/misuse company funds themselves.

In addition, some statutory offences—usually relatively minor and technical in character—have been created. These can be proved almost exclusively on the basis of irrefutable facts, requiring little evidence relating to the person's intention. For example, in terms of the Closed Corporations Act, it is an offence to conduct business under the name of a closed corporation unless such a corporation has been duly registered and the person concerned is a member of that cc.

In general, however, the common thread linking these crimes is the need to ensure that accountability for shady business practices is vested in an identifiable person against whom the state can proceed for acts and omissions that prejudiced, or may have prejudiced, others.

Thus, despite the fact that there are numerous potential crimes which members of the SCCU might investigate and prosecute, most detectives and prosecutors insist that it is the shady business practices that are almost equivalent to, or associated with, acts of fraud which form the core of their mandate. For that reason, they say, almost every case brought to the Specialised Commercial Crime Court alleges fraud in the first instance. Many, however, also deal with alternative statutory offences, including violations of the tax code.³²

It appears, therefore, that the SCCU has adopted an offence-based definition of a commercial crime. This puts the emphasis on the non-violent character of the deeds committed by the offender, and her targeting of financial gain through acts of deception. Alternatively, however, the SCCU will prosecute offenders under the relevant statutory offences, where proving the intent of the offender and her use of a misrepresentation is difficult.³³

Given the emphasis on illegal acts of this nature, it is inevitable that the work of the SCCU is extremely varied and that this variety can make the investigation and prosecution of these crimes very difficult.

Consider, for instance, the difference between crimes of deception and crimes of violence. Prosecuting the latter generally involves proving a relatively simple set of causally connected elements. Murder, for instance, requires showing that the victim died as a result of the intentional actions of another person. Although there are any number of reasons why such cases are not successfully investigated—generally because there is no way to identify the murderer—the elements required to prove a case are reasonably easy to list. You need evidence that the victim died, that her death was because of the actions of another (e.g. she was shot or stabbed or pushed under a bus), and that the person arrested was the person who committed the act which led to the victim's death.

Compared to this, the nature of many crimes of deception, as well as the fact that many of the methods used are very similar to legitimate business transactions, means that it is often much more difficult to determine whether a crime has, in fact, been committed, and by whom. It is not always easy to establish, for instance, whether an investor who loses money in a business deal has been consciously and deliberately defrauded, or whether it was simply a risky venture that went wrong.

In any event, the defrauding of investors—lucrative as it may be and consisting of as many strategies as it does—is only one of the very large number of potential commercial frauds. Think about insurance-related frauds committed by policyholders against insurance companies, or by dishonest brokers against policyholders. Consider medical aid fraud and pension fund fraud, cheque, credit card and tax fraud. Consider the many ways in which employees defraud the organisations for which they work, and the equally numerous ways in which a company's clients or suppliers may defraud it. Commercial crime is, it seems, a form of crime of almost infinite breadth.

Typical forms of fraud

South Africa's common law defines the crime of fraud as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.³⁴ This definition of the elements of fraud immediately suggests that the core components of the crime of fraud

are (i) the making of misrepresentations that (ii) can or do cause prejudice to the recipient of the misrepresentation, or to a third party.

Given this definition of the crime, it is immediately obvious that there is any number of potential forms of fraud, since any misrepresentation that causes any actual or even potential prejudice to any person qualifies. Nevertheless, from the point of view of practical policing and law enforcement, the most important forms of fraud are all variations on a rather smaller number of themes. These include:

- Cheque frauds, which involve the theft and/or alteration of otherwise legitimate cheques, the theft of blank cheque forms and their fraudulent use, the forging of cheques, or the recycling of already used cheques back through the banking system. Perhaps the most common type of fraud committed is the signing of a cheque in the knowledge that the drawer does not have sufficient funds available.
- Credit card frauds include the use of stolen/lost credit cards, the 'skimming' of the electronic data stored on a card's magnetic strip and copying it onto another card, or the use of the number of the card belonging to another person in the electronic or telephonic purchase of goods.
- Advance fee frauds, including the so-called Nigerian Letters (or 419 scams), are premised on offering the victim a role in a legitimate or illegitimate business deal. All that the victim need do is provide some start-up capital or to contribute to the initial costs of the venture. Of course, nothing ever comes of the deal and the victim loses her contribution.
- Kite-flying frauds, in which a series of transactions are entered into with a bank or banks in order to induce the bank to believe that real funds have been deposited into an account and to have the balance cleared prior to the validation of the original deposits. The funds are then removed from the account before the bank realises that no real deposit was made.
- Other very typical frauds include a variety of frauds committed by individuals against their employers (e.g. by massaging expense accounts, embezzling funds or colluding with the organisation's suppliers) or by individuals against medical aids and insurance companies by over-claiming, sometimes colluding with service providers to do so.

The investigation of these inter-personal frauds differs depending on the specific facts of the case. In general, the greatest challenge is to show that at the

time that representations were made to the victim, the fraudster intended to mislead the victim, with the notion of 'intention' interpreted very widely. This is obviously fairly easy in the case of many forms of cheque and credit card frauds: anyone who signs a cheque form or credit card slip in the name of another person knows very well that she is misrepresenting her identity. Similarly, when false or exaggerated claims are submitted to an insurance company or into one's employer's payment system, a magistrate will generally assume that the offender knew that what she was signing did not accurately reflect the true extent of her rights. In the same way, in kite-flying scams, the courts will accept that the offender knew that funds she withdrew on the basis of a fictitious deposit did not exist, and that she had no rights to them.

On the other hand, in cases where the initial representations to the victim seemed to suggest an honest business venture, it can be quite difficult to show that the offender intended to defraud the victim. In these cases, however, if the offender fails to use the funds in pursuit of the presumed business deal, the courts will infer that she had intended to defraud the victim.

Thus, in some of these cases it is often much easier to identify the offender than it is to prove that she had formed the necessary intention to defraud. This is not to say that fraudsters are always easy to identify. Indeed, misrepresentations regarding one's identity are very common, and include various cheque and credit card frauds. However, having identified and caught the offender in these cases, proving guilt can be quite simple, particularly if there is signed documentary evidence.

Identifying a serial credit card fraudster

In early May 2002 an investigator for one of the large banks arrested a woman in a liquor store in Pretoria after watching her sign a credit card slip after tendering a stolen credit card. He had been following her for most of the day and had seen her sign a number of slips in a number of stores. It later transpired that the card she had been using, which had been stolen only a few weeks before, had been used in over R95,000 worth of fraudulent transactions after its rightful owner had reported its loss.

The investigator—a former detective—had begun to tail the woman he subsequently arrested, following her being photographed at a petrol station while signing a slip for a credit card that turned out to have been stolen. Using the photograph, investigators at the bank were able to put a name to

the photograph of the woman because she was already on trial in a separate matter in Johannesburg and her identifying characteristics were stored in the bank's database of known fraudsters. Knowing that she was still committing these crimes, it was a simple matter to find her home address and follow her until an arrest could be effected. Because he was a private investigator, such an arrest could only take place if a crime was committed in his presence—hence his following her into the liquor store.

Clearly there were many links in the chain that led to the identification and arrest of the suspect, many of which were somewhat fortuitous. She obviously knew many of the security procedures used by the bank and their limits, allowing her to avoid arrest when presenting stolen cards. Had there been no photograph, nor her name and description on file, she may never have been arrested.

Typical commercial crime matters

In general, the fraudulent crimes described above are committed by individuals against other individuals, or by individuals against businesses. Commercial crimes, on the other hand, are generally committed by businesses, or by their directors. In many of these cases fraud overlaps with theft, because there may not have been any misrepresentations made. The variety of potential scams include:

- 'Investment' schemes in which individual investors are persuaded to have a company invest funds on their behalf. These funds are then stolen by the staff or directors of the investment company. Another version of this crime is when insurance brokers fail to pay the insurance premiums of their clients/victims over to the underwriter. Some investment frauds evoke shades of pyramid schemes.
- Ponzi or pyramid schemes offer high returns to investors by transferring funds from new recruits to existing recruits. The new recruits then have to go out and recruit more 'investors' to recover their original payment and make a return. These schemes are illegal because they inevitably run out of recruits, bringing the scheme to a grinding and traumatic close.
- Trading schemes involve at least two colluding 'investment companies'. Here, instead of running off with the clients' capital, the two companies transact unnecessarily, each earning unnecessary commissions.

- Companies sometimes obtain loans or attract investors on the basis of misleading or false financial statements, or on the basis of non-existent or valueless collateral, or raise multiple loans using the same collateral. Indeed, in some cases, forged letters of credit are used to secure funds.
- Again, companies are often involved in numerous other kinds of fraud including insurance fraud, making fraudulent deductions from employees' salaries, as well as tax and tax rebate frauds.
- The non-payment of suppliers is also a common source of commercial crime, and, while there have been instances in which the business was established in order to profit from unpaid supplier credits, generally these cases begin when businesses begin to go under and the directors try to postpone the inevitable.
- Various cross-border frauds are also a growing problem. These include transfer pricing and exchange control violations, the misstatement of the value of imports to avoid customs taxes, and money laundering.

According to senior detectives, most matters that come to their attention emerge when a company either begins to fail to pay its accounts, or after liquidation has taken place and the liquidators uncover suspicious transactions. The creditors—be they investors or suppliers—lay charges of fraud or theft against the directors, alleging that they misused the company's funds for their own benefit to the prejudice of creditors. Using the Companies and Insolvency Acts, together with the common law crimes of fraud and theft, investigators then pursue evidence that the directors or staff of the company concerned enriched themselves at the ultimate expense of the company and its creditors.

To do this, the investigators obtain the financial records of the company as well as the personal financial records of the directors, and look for transactions that imply wrongdoing or a failure to exercise the fiduciary duties of a director. Detectives say that generally it is reasonably straightforward to identify such transactions from bank records. However, if much of the business is conducted using cash, it can be much more difficult to show how funds were used and where they went.

Statutory commercial crimes, many of which may be committed in the course of any of these frauds, also include a variety of more technical violations, some of which can be particularly difficult to investigate and prosecute. One

example of these are the offences created by the Counterfeit Goods Act—offences, it should be noted, that fall squarely into our definition of commercial crimes since they involve no violence but do seek to profit from misrepresentations of fact.

The basic import and intention of the Counterfeit Goods Act, passed in 1997, is fairly clear: it criminalises the importing, exporting, manufacture, trading, distributing or displaying of ‘counterfeit goods’. These goods are defined as goods, manufactured in South Africa or elsewhere, which closely imitate goods to which intellectual property rights are attached or which have a registered trademark.³⁵

Detectives and prosecutors alike regard this act as somewhat ‘over-engineered’ because it provides a very elaborate and highly regulated series of steps to be completed in the course of an investigation. Some of these requirements have meant that cases have been very difficult to bring to court. For instance, the act provides that confiscated goods are to be kept in specific depots designated for the task. No depots were so designated until December 2000, three full years after the law was passed. This meant that there was no legal way to store suspect goods in order to use them as evidence.

The technical nature of the legislation is also borne out by the fact that it sets precise timeframes for prosecutors and investigating officers to inform suspects and other interested parties about their intention to pursue a prosecution after the goods have been seized. Indeed, given that these requirements are unique to cases brought under this act, there have been instances where cases have fallen apart because the prosecutor concerned has been unsure of what was required of her. One prosecutor in Johannesburg, for instance, apparently refused to issue notices to suspects in terms of section 7 of the act, claiming that he required the authority of the Director of Public Prosecutions to do so.

These procedural technicalities complicate the bringing of charges and necessitate having reasonably well trained officials. They are compounded by the technical and legal difficulties associated with determining if a particular item is a counterfeit copy of a protected original. In one case, for instance, the imitation of a very common cheap pen was so close that only scientific tests on the ink carried out at the French manufacturer’s laboratories proved them to be counterfeit. The refusal of the scientists to come to South Africa to testify meant that the case could not proceed.

Conclusion

This chapter has sought to explain the unique functioning of the Specialised Commercial Crime Court, but it has done so with barely any reference to the court itself. While the reason for this was not initially self-evident, it has become clear in the course of this research that what is truly unique about the manner in which this court works is almost unrelated to the court itself. In point of fact, the court is identical to other regional courts, but its time and personnel have been dedicated to hearing cases investigated by Pretoria's Commercial Branch and prosecuted by the SCCU. This is what is novel about the court, and should be considered when any assessment is made of the impact of the innovation that is the Specialised Commercial Crime Court.

Because the key to understanding this court lies in the integration of the investigative and prosecutorial functions in Pretoria, we have spent a fair amount of time reviewing the nature of that integration and the character of the cases confronted by the joint investigation-prosecution teams. Here we have seen that commercial crime is, by its nature, somewhat more complex and variable than are other forms of criminality. It is this characteristic that is often used to justify the existence of this dedicated court and the peculiar relationship of investigators and prosecutors. It is now time to turn to an assessment of the impact that these innovations have had on the administration of justice in commercial crime cases in Pretoria. The next chapter attempts to do exactly this.