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# AN ASSESSMENT OF SENTENCING APPROACHES TO PERSONS CONVICTED OF WHITE-COLLAR CRIME IN SOUTH AFRICA

## SUMMARY

Assessing court sentencing approaches to persons convicted of white-collar crime is a complex task. For the purposes of this article, this research task involved assessing the appropriateness of sentences imposed within the proportionality principle during the period 2016 to 2021 in South Africa. This further involved the empirical use of both qualitative and quantitative methodologies, in order to determine how commercial courts – in this case, the Bellville Commercial (Regional) Court – impose a sentence on white-collar criminals. The article establishes that, in South Africa, categories of white-collar crime such as corruption, racketeering, fraud and money laundering are increasingly reported by the media, independent institutions and government. There is a public perception that courts are generally lenient in sentencing white-collar offenders. This article aims to determine the appropriateness of a sentence, within the principle of proportionality, for white-collar criminals, in order to deter this type of crime.

## 1. INTRODUCTION

White-collar crime as a concept was first coined by Edwin H. Sutherland in 1939 during his presidential address to the American Sociological Society.<sup>1</sup> According to Sutherland, a white-collar crime is a crime committed by a person of respectability and high social status in the course of his or her occupation.<sup>2</sup> Criticism has been levelled against this conceptualisation. The debate that surrounds this subject is not the focus of this article. In the South African context, however, this conceptualisation is useful, as it points to various categories of white-collar crime, including fraud, forgery, corruption, money laundering, racketeering and tax evasion, perpetrated by businesses, the political elite, or people of high status.

This article aims to assess how criminal courts impose sentences on white-collar crime offenders. Interviews



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1 Coleman 1982:2.

2 Coleman 1982:2, fn. 1.

and reading of court cases, as part of empirical research, were conducted between 2019 and 2021 in the Bellville Commercial (Regional) Court in the Western Cape, where commercial crimes are tried and sentenced.<sup>3</sup>

The research study applied both qualitative and quantitative methodologies because of the nature of the research problem.<sup>4</sup> The data was collected in the form of published sentencing statistics, reading Bellville court cases, and interviews with magistrates. Empirically, the amount of harm caused by white collar-crime and court sentencing decisions could be distilled from court sentencing judgments, sentencing statistics and the views of judicial officers, as well as various reports. A purposive sample was applied to select all magistrates to respond to both qualitative and quantitative questions in a questionnaire in 2019 to 2021.<sup>5</sup> Subsequently, a simple random sampling was applied to select decided cases in the Bellville Commercial (Regional) Court from the period 2016 to 2021.

The aim of this article is informed by the current prevalence of white-collar crime in South Africa.<sup>6</sup> It is also informed by the public perception that courts tend to impose disproportionately lenient sentences on financial crimes when compared to those meted out in cases of violent crime or common street crime. This article does not intend to compare sentencing of conventional criminals and white-collar criminals, due to differences in the nature of these crimes and the focus of the study.

## 2. SENTENCING THEORIES

The court applies various sentencing theories when imposing a sentence.<sup>7</sup> These are regarded as sentencing justifications for punishing both white-collar and conventional criminals.<sup>8</sup> The existing differences between white collar crime offenders and their conventional criminal counterparts may also mean that the application of sentencing theories or principles may be different, particularly in relation to organised crime.<sup>9</sup> For example, organisations cannot be sentenced to imprisonment.<sup>10</sup> Corporations or companies should be viewed as collectives of individuals with elements of social, moral and legal standing in society, and as juristic persons with rights – and blameworthy.<sup>11</sup> Sec. 332(2) of the *Criminal Procedure Act* (hereafter, “CPA”)<sup>12</sup> provides that

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3 Permission to conduct this study was obtained in October 2019 from the Magistrates Commission, and all relevant documentation in this regard is on file with the author. It was also submitted as Annexure A-E to the journal editor as part of verifiable scientific validity required for the initial assessment of the applied methodology in the study.

4 Garbers 1996:284.

5 See methodology section for discussions below in this article.

6 See section 4 in this article.

7 Von Hirsh 1976:88.

8 Rabie & Mare 1994:19.

9 Croall 1992:147.

10 Croall 2001:123.

11 Du Toit 2012:236-240.

12 *Criminal Procedure Act* 5/1977.

in any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited, may, as such representative, be dealt with as if he were the person accused of having committed the offence in question.

Similarly, sec. 81(e)(i) of the *Companies Act*<sup>13</sup> provides some sanction-related measures involving wind-up of solvent companies by a court order, and a stakeholder may apply for leave, of the court, to wind up the company on the basis that the directors, prescribed officers, or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal. This explains the differences between the sentences imposed on companies, for which a fine seems to be the only option, and those imposed on individual offenders, who can be imprisoned. Different sentences can be combined while they serve independent purposes, and each can be appropriate.<sup>14</sup>

In this regard, sentencing theories can be grouped into two broad categories, namely 'just desert' or 'retribution', and as backward-looking or deontological theories of sentencing.<sup>15</sup> Their point of departure seeks to understand the gravity of harm caused by the crime.<sup>16</sup> Von Hirsch and Duff<sup>17</sup> argue that deontological theories of sentencing are also forward-looking, as punishment seeks to prevent future offending. The preventive aspect suggests a somewhat consequentialist or forward-looking sentencing perspective.

Consequentialist sentencing theories consist of deterrence, rehabilitation, and incapacitation, which have preventive goals.<sup>18</sup> These are also known as the utilitarian theories of punishment, whose justification for punishment is to prevent future crimes.

## 2.1 Deontological sentencing theories

The 'just desert' sentencing theory regards culpability or blameworthiness of criminal behaviour as the proper determinant of the severity of punishment.<sup>19</sup> It is argued that individuals who render themselves blameworthy deserve punishment, but there must be a proportional relation between the gravity of the white-collar crime and the severity of punishment.<sup>20</sup> This principle reduces excessive punishment or imposing severe sentence on trivial crimes. For 'just desert' sentencing, rational culpability should be considered in proportion to the gravity of the crime, in order to ensure equity and justice.<sup>21</sup>

For 'just desert' or deontological theories, equality in criminal sentencing recognises differentiation or individualisation of cases, and treating like cases

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13 *Companies Act* 71/2008.

14 Terblanche 2016:7.

15 Von Hirsch & Ashworth 1998:161.

16 Lombard 2003:298.

17 Von Hirsch & Ashworth 1998:161.

18 Terblanche 2016:189. See also Von Hirsch & Ashworth 1998:44.

19 Von Hirsch 1982:162.

20 Von Hirsch 1976:66. See also Andenaes 1974:23.

21 Croall 1992:146.

alike.<sup>22</sup> Individualisation or personal circumstances relate to an accused's own circumstances that lead to his or her committing the crime, and how the proposed sentence will affect the accused as a person, while keeping the future in mind.<sup>23</sup> In this regard, individualisation requires a sentencing court to have a close look at the specific case and specific personal circumstances of the accused, because it is the individual who is sentenced, and not the nature and type of crime.<sup>24</sup> The individualised approach is in tension with the social interest and equality treatment, and this tension becomes acute when dealing with white-collar criminality.<sup>25</sup> The deontological justifications for punishment argue that certain white-collar crimes deserve more severe punishment, compared to street crime.<sup>26</sup> Offenders with a wealthy lifestyle have more to lose compared to offenders who are unemployed.<sup>27</sup> This suggests that individuals do not experience punishment in the same way.

Similarly, research studies have identified various difficulties in comparing the punishment meted out to white-collar crime offenders with those convicted of common crimes, due to crime differences.<sup>28</sup>

Von Hirsch<sup>29</sup> argues that both deontological and utilitarian theories share the same considerations, but the differences seem to be in their points of departure and weight. For example, 'just desert' considers the circumstances of the individual offender for seriousness of crime and sentence severity, while the utilitarian approach considers individualised sentencing for rehabilitative considerations.<sup>30</sup>

## 2.2 Utilitarian sentencing theories

Mann *et al.*<sup>31</sup> found that judicial officers tend to rely predominantly on general deterrence as a rationale for sentencing in cases of white-collar crime, in order to prevent future crimes.<sup>32</sup> It is argued that deterrence is more effective for white-collar offenders than for conventional offenders, because their crimes are often assumed to be rationally motivated with money making and greed.<sup>33</sup> They are likely to weigh the benefits of committing a crime against the costs of being caught and punished.<sup>34</sup> Similarly, rehabilitative theory could also be useful for small businesses, where offences are often associated with ignorance, rather than deliberate intent.<sup>35</sup>

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22 Nagel & Hagan 1982:1428.

23 Hiemstra 1987:587.

24 Du Toit 1988:122.

25 Von Hirsch 1982:162.

26 Von Hirsch 1978:79.

27 Croall 2001:131.

28 Nagel & Hagan 1982:1427.

29 Von Hirsch 1982:91.

30 Croall 1992:146.

31 Mann *et al.* 1980:479.

32 Benson & Cullen 1998:289.

33 Croall 2001:133.

34 Schlegel *et al.* 1992:289.

35 Croall 2001:135.

The dominant use of utilitarian theory is despite the fact that white-collar crime offenders present hardly any risk of recidivism and often no prior conviction, as this theory is concerned about future offending or predictions and for public protection and morality.<sup>36</sup> Similarly, some sentences against white-collar offenders are primarily incapacitating, such as disqualifications, withdrawing licences, or ordering a business to cease trading.<sup>37</sup> White-collar criminals are more likely to be first-time offenders who fear the prospect of incarceration.<sup>38</sup>

Weisburd *et al.*'s research study found that women are less likely to be sentenced to prison than men, and those who are young and old are less likely to be imprisoned than those of middle age.<sup>39</sup> Lighter sentences based on the characteristics of white-collar offenders and predictions<sup>40</sup> may raise perceptions of class bias and unequal treatment.<sup>41</sup> In a sentencing study by Mann *et al.*, one judge was asked how he reacted to the apparent public perception that white-collar offenders 'get off easy or unwarranted leniency'. He stated as follows: "Well, as I said to you earlier, I do not think a sentencing procedure should be very much concerned with what the public perception would be."<sup>42</sup>

In this regard, Sutherland, the founder of the concept of white-collar crime, for example, commented in 1949 on the lack of significant public sentiment to white-collar crime.<sup>43</sup> In 1987, as cited by Croall<sup>44</sup> in his study, Levi suggested that lenient sentences for fraud were as a result of lack of public hysteria about such sentences. It is argued that those convicted of anti-trust offences are most likely to receive fines than other white-collar crimes, including those with the most money, in order to pay back stolen or looted money or resources.<sup>45</sup> This is to prevent the commercial offender of ill-gotten gains<sup>46</sup> and to teach the offender that crime does not pay.<sup>47</sup> The use of a community service sentence could be appropriate for offenders whose talents and resources would be better used by serving the community, rather than imprisonment.<sup>48</sup>

Similarly, naming and shaming is regarded as carrying preventive value, because companies and individuals are concerned about their reputation, as they have an investment in respectability, and may be worried about the effects of publicity.<sup>49</sup> Suspended and postponed sentences can serve the purpose of individual deterrence, while possible prison-conducive conditions

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36 Devlin 1970:7.

37 Croall 2001:135.

38 Schlegel *et al.* 1992:290.

39 Weisburd *et al.* 1991:151.

40 Croall 1992:119.

41 Croall 1992:119.

42 Mann *et al.* 1980:479.

43 Croall 1992:121.

44 Croall 1992:121.

45 Weisburd *et al.* 1991:156.

46 Mollema & Terblanche 2017:207.

47 Joubert 2020:427.a.

48 Croall 2001:139.

49 Croall 2001:139.

can promote rehabilitation of the offender.<sup>50</sup> This education process requires a good working environment.<sup>51</sup> Similarly, forfeiture under the *Prevention of Organised Crime Act* (hereafter, “POCA”)<sup>52</sup> operates as a preventive measure by taking illegal property away from the offender.<sup>53</sup>

### 3. ASSESSING HARM CAUSED BY WHITE-COLLAR CRIME IN SENTENCING DECISIONS

Von Hirsch<sup>54</sup> argues that the assessment of harm depends on individual judgments of the consequences and risks of the conduct, and interests that have been adversely affected through those consequences and risks. In the same breath, Coleman<sup>55</sup> is of the opinion that white-collar crime is a crime of the privileged and the powerful, causing subtle damage to the social fabric, which is not easy to measure in specific, quantitative terms. However, among others, it has strong economic dimensions.<sup>56</sup> Corruption adds another immeasurable element to the harm, in the sense of reputation and the economic damage.<sup>57</sup> Sec. 3 of the *Prevention and Combating of Corrupt Activities* (hereafter “PCCA”) Act provides for the framework, in order to assess the impact of the offence of corruption, for the appropriate sentence.<sup>58</sup>

In this regard, Braithwaite concludes that the harm caused by white-collar crime is vast, due to huge financial losses involved.<sup>59</sup> Hence, an imprisonment sentence is deserved, because of the higher level of culpability than that of common criminals. Similarly, Standing calls for appropriate sanctions against organised criminals who are involved in racketeering, money laundering and economic crime, which will lead to disinvestments in South Africa.<sup>60</sup> In *Prinsloo and Others v S*,<sup>61</sup> the Supreme Court of Appeal reduced some of the long imprisonment sentences imposed by the court *a quo* on the grounds of being disproportionately severe to the offence involving a pattern of racketeering activity in contravention of secs. 2(1)(b), 2(1)(e), 2(1)(f) and 4 of the POCA.<sup>62</sup> This is despite the fact that the appellants court agreed with the trial court on

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50 Terblanche 2016:406-407. See also Kruger 2016:43.

51 Muto 2014:36.

52 *Prevention of Organised Crime Act* 121/1998. Chapter 6 of the Act provides for the forfeiture of the proceeds of unlawful activities.

53 Terblanche 2016:454

54 Von Hirsch 1982:167.

55 Coleman 1982:5.

56 Mellon 2009:331.

57 Rabie & Mare 1994:353.

58 Prevention and Combating of Corrupt Activities Act 12/2004.

59 Braithwaite 1982:732.

60 Standing 2006:155.

61 *Prinsloo & Others v S* (2015) ZASCA 207; [2016] 1 All SA 390 (SCA). Similarly, in *Tiry & Others v S* [2020] ZASCA 137; [2021] 1 All SA 80 (SCA), the Supreme Court of Appeal tended to reduce the long imprisonment sentences imposed by the trial court on the basis that it is excessive against the crime involving a pattern of racketeering activities in terms of sec. 2(1)(f) of the *Prevention of Organised Crime Act* 121/1998.

62 *Prevention of Organised Crime Act* 121/1998.

the serious gravity and financial impact of racketeering involving fraud, money laundering and theft.

The sentencing court has to assess the proportionality of its sentence not in a vacuum, but it must take all the relevant factors and circumstances into account.<sup>63</sup> It is also argued that the court must assess the harm or damage magnitude caused, and the prevalence of specific offences, for the purposes of imposing an appropriate sentence.<sup>64</sup>

Fines can be considered lenient when considering the vast resources of the company concerned. Imposing fines on companies found guilty of causing pollution of water or dumping of waste is difficult to determine, given the degree of harm caused, while injuries and dangers to health are taken seriously.<sup>65</sup> In this instance, the breach of occupational trust and responsibility by senior business executives and politicians to uphold regulations carries more blame.

Similarly, in sentencing a train driver, following a rail crash, in which six people died and 85 were injured, the sentencing judge of the United States stated that those who provide services to the public should do so carefully, because passengers themselves are in the hands of the driver, and they trust him.<sup>66</sup> The gravity of harm caused as the result of public trust is enormous.

#### 4. RESEARCH PROBLEM: THE IMPACT OF WHITE-COLLAR CRIME IN SOUTH AFRICA

South Africa is ranked 73<sup>rd</sup> out of 180 countries that participated in a Transparency International (TI) survey, as per the country's perceived levels of corruption in the public sector.<sup>67</sup> According to the Minister of Economic Development, the Honourable Mr Ebrahim Patel, corruption costs South Africa's Gross Domestic Product (GDP) at least R27 billion annually and loses 76,000 jobs.<sup>68</sup>

Corruption Watch reveals that, in 1996, roughly R1.5 billion was lost annually through corruption and maladministration in delivery of social grants.<sup>69</sup> The Report of the Public Protector<sup>70</sup> into 'state capture' reveals that criminal accumulation of state resources resulted in the establishment of the Zondo Commission by the State President. The economic damage is difficult

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63 Terblanche 2016:79.

64 Rabie & Mare 1994:307, 322.

65 Croall 1992:116.

66 Croall 2001:130.

67 Transparency International Survey <https://tradingeconomics.com> (accessed on 30 January 2019).

68 Business Tech <https://businesstech.co.za/news/government/196116/corruption-costssa-gdp-at-least-r27-billion-annually-and-76-000-jobs/> (accessed on 7 December 2018).

69 Corruption Watch <https://www.corruptionwatch.org.za/the-real-costs-of-corruption-part-two/corruptionwatch> (accessed on 7 December 2018).

70 South African Public Protector 2017: A Report of the Public Protector. 'State Capture', Report No. 6 of 14 October 2016/2017.

to quantify. The impact of this illegal behaviour could change the environment and the conditions, and, in return, give rise to people who are prone to crime.<sup>71</sup>

It could only be presumed that it will perpetuate underdevelopment, lawlessness, and poverty in communities. It is hoped that the law-enforcement agencies will prosecute individuals and companies who are implicated in wrongdoing, once the Zondo Commission of Inquiry is finalised. Some economists estimate the cost to be in the range of R100 billion; others estimate that the figure is much higher.<sup>72</sup> Another example of the white-collar crime category was published in a report by the South African Reserve Bank, where it was found that close to R2 billion had been looted from the VBS Bank by over fifty individuals who were in positions of power and trust.<sup>73</sup>

Secs. 2(1) and 3(1) of *POCA* provide various offences and penalties relating to racketeering activity which covers a wide range as listed in Schedule 1 offences, and seems to uncover the nature of the problem to be addressed.<sup>74</sup> The South African state rapidly developed legislation, specialised law-enforcement agencies and specialised commercial courts, in order to combat organised criminal activities.<sup>75</sup>

There are few research studies on white-collar crime in South Africa<sup>76</sup> and internationally, as cited by Weisburd *et al.*,<sup>77</sup> Croall,<sup>78</sup> Benson, and Cullen.<sup>79</sup>

## 5. METHODOLOGY

In accordance with the aim of this article, the empirical phase of the research was conducted in the Bellville Commercial (Regional) Court in the Western Cape, from 2019 to 2021.<sup>80</sup> This is a specialised court dedicated to economic- or finance-related crimes. For the purposes of this article, commercial crimes are part of white-collar crime, committed through the use of fraud, racketeering, forgery, extortion, theft, money laundering, and corruption.

The researcher was also granted permission to access and study twelve court cases, in order to assess the reasoning of the court and the appropriateness of the sentences imposed from 2016 to 2021. The selection of this number of cases was based on the use of simple random sampling, which consists of a target number with an equal likelihood of being selected.<sup>81</sup>

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71 MacLean 1990:263.

72 Business Live <https://www.businesslive.co.za/fm/features/2018-09-06-country-the-cost-of-state-capture/> (accessed on 7 December 2018).

73 See <https://businesstech.co.za/news/banking/53-people-exposed-in-South-Africa-great-bank-heist-full-report/> (accessed on 7 December 2018).

74 *Prevention of Organised Crime Act* 121/1998.

75 Standing 2006:45.

76 Mellon 2009:327.

77 Weisburd *et al.* 1991:166.

78 Croall 2001:124.

79 Benson & Cullen 1998:290-291.

80 This date refers to the actual interviews with the respondents and reading of case files in court.

81 Babbie & Rubin 1997:251.



Interviews were conducted with all the judicial officers in this court – which comprised 3 respondents, as per the permission granted by the Magistrates Commission of the Department of Justice and Constitutional Development. A closed and open-ended questionnaire was used to gather the views of judicial officers, who were selected based on purposive sampling, to respond to the specific questions. A purposive sample has a few key respondents who might provide useful information to be generalised to a sentencing population in respect of the same laws applied in a particular jurisdiction.<sup>82</sup> The validity and reliability<sup>83</sup> of the questionnaire was tested with the respondents, to comment on its accuracy and relevancy, before the actual interviews.

Both respondents' responses and the read Bellville Commercial Court cases constitute primary sources (including published cases and legislation). These primary sources have authoritative and binding force.<sup>84</sup> Textbooks, reports on sentencing statistics, and journals constitute part of secondary sources, with a persuasive force.

A request was made for sentencing statistics of the categories of white-collar crime, with the Department of Justice and Constitutional Development. The data was received, reflecting case outcomes of the district and regional courts in South Africa via the Integrated Justice System (hereafter, "IJS") Transversal for the period 1 April 2016 to 13 August 2019. The data was processed and analysed in the categories of economic crime, corruption, and common-law crime (common-law crime accounts for crimes of forgery, theft, fraud, and uttering, including attempts). This was to assess sentencing trends in the period under review, as per the figures given below.

## 6. RESEARCH FINDINGS AND DISCUSSION

**Table 1:** Sentences on commercial crimes for the period 1 April 2016 to 13 August 2019 in South African regional and district courts.

Sentence type totals	2016 to 2019 sentences on commercial crimes category (percentage)			
	Common-law crime	Corruption	Economic crime	Grand total
Cautioned	6.28	2.29	1.85	5.88
Community service	0.07	0.16	0.10	0.08
Compensation order	0.02	0.08	0.00	0.02
Correctional supervision	1.03	1.97	1.15	1.05
Court fine	6.00	7.50	4.01	5.86
Deferred fine	0.23	1.03	0.44	0.26
Diversion	0.15	0.63	0.43	0.18

82 Babbie & Rubin 1997:266. See also Grinnell 1997:162.

83 Grinnell 1997:181. This refers to the degree of precision regarding the consistency of answers to the questions.

84 McConville & Chui 2014:4.

Sentence type totals	2016 to 2019 sentences on commercial crimes category (percentage)			
	Common-law crime	Corruption	Economic crime	Grand total
Fine option	20.66	21.01	17.12	20.38
Habitual criminal	0.07	0.00	0.09	0.07
Imprisonment	17.90	20.30	28.34	18.76
Life imprisonment	0.02	0.00	0.07	0.03
Periodical imprisonment	0.05	0.08	0.08	0.05
Provisionally suspended	0.07	0.16	0.13	0.08
Reform school	0.01	0.00	0.02	0.01
Rehabilitation centre	0.07	0.00	0.03	0.06
Reserve judgment	0.00	0.00	0.00	0.00
Sentence postponed	0.53	0.32	0.41	0.52
Set aside	0.01	0.00	0.02	0.01
State patient	0.04	0.08	0.02	0.04
Suspended partially	4.61	7.42	5.61	4.73
Suspended wholly	42.81	38.07	41.71	42.69
<b>Grand total</b>	<b>100.62</b>	<b>101.11</b>	<b>101.64</b>	<b>100.74</b>

**Source:** IJS Transversal, Department of Justice and Constitutional Development.

Table 1 shows that there is very little difference between the types of sentences imposed among the three types of crime categories, namely common-law crime, corruption, and economic crime. Different types of sentences are imposed, from non-imprisonment sentences, which seem to be dominant, compared to imprisonment in all three categories of crime. This picture is compatible with the above literature study and the Bellville Commercial Court findings below. The fine option indicates a higher percentage of use across the three categories of crime. This result is not surprising, as per the findings of other studies, as described earlier.

## 6.1 Bellville Commercial Court respondents and accessed decided cases

As indicated in the previous sections, the interviews with the judicial officers took place from 2019 to 2021. The selected sample consists of decided cases from 2016 to 2021. This period broadly includes sentencing statistics, as presented in Table 1.

### 6.1.1 Court-decided cases from 2016 to 2021

One of the selected and decided cases from this court was that of *Jantjies*,<sup>85</sup> a 52-year-old man who was sentenced for the count of forgery, fraud in the amount of R50,000, and further offences of fraud and theft in the total amount of R185,000, defrauding complainants, misrepresenting the complainants that he was a retired colonel in the South African Police Service. He was then sentenced to twelve years' imprisonment, of which six years were suspended for five years on condition that the accused is not convicted of forgery, fraud, or theft during the period of suspension. Another three more serious cases were those of *Philander*,<sup>86</sup> *Louw*<sup>87</sup> and *Greater Force Investments 154 (Pty) Ltd T/a Stokvel Homes*.<sup>88</sup> It appears from the facts of the three cases in the footnote below that white-collar offenders often breach their occupational position of trust; they are middle aged, and their sentences of imprisonment are partly, if not wholly suspended. The sentencing court emphasised protection of

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85 S v Michael Jantjies case No: SH7/39/2017.

86 S v *Jannifer Philander* Case No. SH7/43/16, aged 52, female, charged for fraud alternatively theft, money laundering, contravention of sec. 4 of the POCA 121/1998. The accused was a financial controller for eighteen years with Kemklean (Pty) Ltd Co. From 2005 to 2015, she unlawfully received money from the company for a total amount of R8,469,666.01. On count 1 involving a fraud charge, she was sentenced to fourteen years' imprisonment on account of the charge of fraud, half of which was suspended for five years. On count 2 involving money laundering, the court decided to impose a sentence of five years' imprisonment, to run concurrently with the sentence imposed on count 1.

87 S v *Petrus Louw* Case No. SH7/44/2020. He was a 67-year-old man, acted as accountant and financial advisor for several investors, and was sentenced to twelve years' imprisonment on counts of fraud and theft, two years' imprisonment on counts of forgery and uttering, and three years' imprisonment for money laundering, all to run concurrently. The accused committed these unlawful transactions from 2009 to 2018, worth a total amount of R60,638,485.

88 S v *Greater Force Investments 154 (Pty) Ltd T/a Stokvel Homes* Case No. SH7/119 2016. This company was represented by Siyabonga Fusa with four directors as other accused who were duly sentenced for fraud and money laundering perpetrated against the South African Homeless People's Forum through intentionally and unlawfully receiving R438,000,00 during the period 2009 to 2010.

society. In *S v Galant*,<sup>89</sup> *Bonzaaier*,<sup>90</sup> *Niemand*,<sup>91</sup> *Chakamera*,<sup>92</sup> *Le Brun*<sup>93</sup> and *de Bruyn*,<sup>94</sup> the court pronounced on the need to deter crime, in order to protect society, while recognising the proportionality principle in sentencing.

Another judgment on an Internet fraud case<sup>95</sup> shows that the court emphasises the harm caused by this crime, in terms of South Africa's reputation and foreign investment. This judgment concurs with the respondents' statements, in terms of the negative effects commercial crime has on investments and development. It emphasises 'just desert' and the deterrence sentencing theory as sentencing justifications, in order to protect the community. In this regard, the court imposed a nine-year direct imprisonment sentence, and twelve months' imprisonment was wholly suspended for five years.

In another read judgment,<sup>96</sup> the court reasoned that the prior record is also considered, in order to assess whether the offender was rehabilitated or not, for the purposes of an appropriate sentence. The court imposed a six-year imprisonment sentence on the basis of general deterrence, in order to protect the community.

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- 89 *S v Galant* Case No. SH7/69/18. The offender was ordered to pay back the amount of R447,683 to the complainant within five years and to ensure that he pays R1,700 per every consecutive month. This sentence accounts for fraud, theft and forgery committed by the accused against Leap Science and Maths School, a non-profit organisation. The accused was a 44-year-old man who was employed as a credit controller at the Leap school. His crimes occurred between March 2015 and August 2015, costing a total loss of R447,683.60.
- 90 *S v Bonzaaier* Case No. SH7/30/17. The offender was a 53-year-old female who received a suspended imprisonment sentence for five years, with the option of a fine and imposition of correctional supervision. She was sentenced for fraud, theft, forgery, and uttering; the total loss by the victim was R36,249,00.
- 91 *S v Niemand* Case No. SH7/65/17. The court decided to impose a sentence of three years to correctional supervision, on condition of house arrest for fraud and forgery which occurred between December 2016 and April 2017, while acting as a salesperson for the company.
- 92 *S v Chakamera* Case No. SH7/23/17. This is another fraud case committed by a 24-year-old male, involving various bank transactions to a total amount of R339,725. He received a non-custodial sentence and was required to pay back the money to his employer.
- 93 *S v Carlo le Brun* Case No. SH7/2/19. He was a 36-year-old man sentenced to two years for fraud, which was wholly suspended, but he had to pay the complainant back, and serve a correctional supervision sentence. Le Brun was a Sanlam financial advisor on 16 November 2007, who later defrauded and committed theft. The court also raised breach of trust as an aggravating factor that required deterrence.
- 94 *S v Elizabeth de Bruyn* Case No. SH7/84/16. This 50-year-old female was sentenced to five years' imprisonment, which was suspended on condition that she does not commit fraud and theft during the period of suspension. Her unlawful transactions ran from 2009 to 2010, worth a total amount of R1,108,189.65 with Standard Bank, and R167,124.25 with ABSA Bank.
- 95 *S v Muyiwa Obufeni* Case No. SH7/04/15.
- 96 *S v Shelto Edwin* Case No. SH7/24/2017.

### 6.1.2 Court respondents

The reasoning of all three regional magistrates' responses on 'why they impose a sentence on the white-collar criminal' is that they apply the same justifications of punishment as in any crime, without undue leniency. They reason that both the law and the community, including the victims of white-collar crime, require the courts to impose a sentence on the white-collar offender, in order to prevent crime. Similarly, they do not believe that their court is lenient towards the white-collar criminal. The fact that it is a crime of the rich and powerful makes no difference to the court.

On the degree of seriousness of the white-collar crime compared to the violent crime, the respondents stated that these types of crimes are different and cannot be compared exactly. The respondents emphasised the seriousness of white-collar crime, which affects the fiscus or financial interest of the victim, causes both damage to the country's economy and disinvestment – unlike physical injuries. To illustrate this point, one magistrate referred to sec. 22 of the *Constitution*,<sup>97</sup> which states that every citizen has the right to freely choose his or her trade, occupation, or profession.

Respondents to the questionnaire opined that deterrence and 'just desert' sentencing justifications are mostly applied, due to the nature of the crime and the character of the offenders before them in the Commercial Court. All the respondents and the read judgments emphasise the principle of proportionality, and cite the *Zinn* case,<sup>98</sup> namely that the sentence must fit "the crime, the offender, and the interest of society". These three elements should be weighed against one another, in order to arrive at an appropriate sentence. Respondents also cited another factor, namely that sentencing must have a certain degree of mercy,<sup>99</sup> but mercy refers to the element of justice<sup>100</sup> rather than subjective pity or mere sympathy. They also selected restorative justice as a sentence option, in order to encourage the offender to pay back the money to the victim. The interests of the victim of crime should be placed at the centre during sentencing decisions.<sup>101</sup>

All the magistrates agreed that prevalent crimes in their court involved corruption and money laundering, fraud, forgery and uttering, but differed in the extent of tax fraud, tax evasion, bribery, and theft of company assets by directors or employees. On the types of sentences imposed, the respondents reasoned that, depending on the circumstances, the sentences imposed on average did not exceed fifteen years' imprisonment, except in exceptional circumstances. This is compatible with sec. 26(1)(a)(ii) of the *PCCA Act* 12 of 2004, which states that "any person who is convicted of an offence referred to in Chapter 2, is liable, in the case of a sentence to be imposed by a regional court, to a fine or to imprisonment for a period not exceeding 18 years".

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97 *The Constitution of the Republic of South Africa* 108/1996:sec. 22.

98 *S v Zinn* 1969 (2) SA 537 (AD).

99 *S v Kumalo* 1973 3 SA 697 (A).

100 *S v Rabie* 1975 4 SA 855 (A).

101 *S v Dyantyi* 2011 (1) SACR 540.

The views of the respondents on these cases are also in accordance with secs. 2(1) and 3(1) of the *POCA*, which provide various offences and penalties relating to racketeering activity that covers a wide range, as listed in Schedule 1 offences.<sup>102</sup> According to the respondents, other sentences such as fines, correctional supervision, community service, and suspended sentences are commonly imposed. This view is supported by Table 1. One respondent expressed difficulties in ranking the seriousness of white-collar crimes, due to different circumstances, gravity, involving emotional and reputational harm, or a prejudicial effect on the economy.

However, two respondents ranked white-collar crime categories as serious, but selected an imprisonment sentence for bribery, fraud, corruption, and money laundering. They indicated that it depends on the circumstances of each case, and selected non-imprisonment, a fine, and a suspended sentence for uttering, forgery, and theft. This broadly agrees with the dominant literature, which suggests that the amount of damage or harm caused could serve as a measure of seriousness.

In terms of the profile of the white-collar offender, the regional magistrates highlighted that they often sentence middle-aged offenders, the majority being males. The prior record of the white-collar offender is considered if it is relevant and if it could be an aggravating factor. According to the views of the respondents, “many white-collar crime offenders will often show the trend of committing the crime over time”.

Among the regional magistrates, there was no consensus on their experience of the previous conviction of the accused before them. The court-analysed cases above confirm this view. One magistrate stated:

In my court, it is not often to see a first-time offender, and two magistrates slightly disagreed, and stated that, in their experience, the majority of the accused are first-time offenders, but often a group of accused involved in a pattern of racketeering.

The magistrates emphasised the fact that the accused will come before them, having committed commercial crimes for a long time without conviction. This is supported by the *Prinsloo*<sup>103</sup> and *Tiry*<sup>104</sup> cases, who had dozens of underlying offences related to the scheme.

Respondents mentioned that the interests of victims, including how the crime was executed, are relevant in decision-making, and that the latter could serve as an aggravating factor. One magistrate argued that these factors are not necessarily considered automatically as either aggravating or mitigating, as they are often considered as a whole. She mentioned that there are exceptions which involve the medical condition of the white-collar offender that serves as a mitigating factor.

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102 *Prevention of Organised Crime Act* 121/1998.

103 *Prinsloo & Others v S* (2015) ZASCA 207; [2016] 1 All SA 390 (SCA).

104 *Tiry & Others v S* [2020] ZASCA 137; [2021] 1 All SA 80 (SCA).

The respondents further argued that, in their court, they often preside over cases involving “accused who are in positions of trust or higher class, and these are aggravating factors because of the breach of trust, and the crime was not out of need, but rather out of greed”.

The social status and occupation of the white-collar offender is considered aggravating, as revealed by the literature in this study. This is consistent with the general definition of the offence of corruption, as contained in sec. 3(a)(b) (i)(ii)(iii) and (iv) of the *PCCA Act*.<sup>105</sup>

Bargaric<sup>106</sup> suggests that white-collar crime is distinguished from other types of crime by the fact that they involve a breach of trust, are well planned, are often committed over a long period of time, harm or damage is extended to the financial institutions and markets, offenders are not from socially deprived backgrounds, and often have no prior record. According to Nelken,<sup>107</sup> offenders who are in higher social positions and who violate the position of trust will have greater blameworthiness or culpability and warrant a severe sentence.

## 7. CONCLUSIONS AND RECOMMENDATIONS

The vast majority of the respondents, the decided court cases and the literature suggested that general deterrence is relevant to deter white-collar criminals, in order to protect the community. Both utilitarian and deontological justifications of punishment uphold the principle of community protection, but their points of departure are different. According to their view, the vast majority of white-collar criminals tend to plan their criminality, and it often occurs over a period of time. Empirical data, as shown in Table 1, the court cases and the views of the respondents all suggest that regional courts mostly apply different types of non-imprisonment sentences, with the dominant use of fines. Imprisonment is also dominant, partly, or wholly suspended with the non-custodial sentence, particularly in cases such as fraud, forgery, theft, money laundering, and corruption. This portrayal of the period 2016 to 2021 is supported by other studies.

Almost all of the respondents did not believe that courts are generally lenient towards white-collar offenders. They believed that this crime has a long-term, devastating effect on both the individual victim and the economy. In this regard, the common aggravating factors for this type of crime are that they are often motivated by greed, breach of trust, and the abuse of power, which call for a severe sentence.

The aim that the study seems to achieve is that white-collar crime is perceived as serious, and the deterrence sentencing is dominant; however, the findings are less conclusive on appropriateness, due to the limited data, the eclectic sentencing views of the judicial officers, and court-sentencing decisions. Be that as it may, this study shed some light on such complexities.

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105 *Prevention and Combating of Corrupt Activities Act 12/2004*:sec. 3.

106 Bagaric & Alexander 2013:318-319.

107 Nelken 1994:493.

It is recommended that other research studies be undertaken with more data and larger samples.

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