C. OF A. (CRI) NO.1 OF 1996.

IN THE COURT OF APPEAL OF LESOTHO

In the Appeal of :

MOITSUPELI LETSIE	1st Appellant
MOORE PUSETSO MAKOTOANE	2nd Appellant
DANIEL NKANE MATEBESI	3rd Appellant

vs

THE CROWN

HELD AT : MASERU

CORAM:

BROWDE, J.A.
LEON, J.A.
v.d. HEEVER, A.J.A.

J U D G M E N T

v.d. HEEVER A.J.A.

In a marathon trial, three men appeared on four counts of theft by false pretences. They were Mr. Letsie, an engineer who, during the period relevant to the charges, was employed by the Lesotho Ministry of

Home Affairs: Mr. Makotoane, the then Deputy Accountant - General of the Treasury; and his superior, Mr. Matebesi, the Accountant-General. The latter two were the government officials primarily responsible for the administration of the finances of the country. I refer to them in what follows as A1, A2 and A3 respectively.

The dates and amounts in the counts differ, but the pattern of the remaining charges follows that of the first, which alleges that:

> "... upon or about 23rd day of March, 1993, and at or near Maseru in the district of Maseru, the said accused, each or the others of all of them, did unlawfully with intent to defraud and to steal, misrepresent to the Operations Manager, Central Bank of Lesotho, Maseru that the Government of Lesotho was under obligation to pay Lesotho Landscaping (Pty) Limited a sum of M579,500-00 (Five Hundred and Seventy Nine Thousand Five Hundred Maloti) as consideration for either goods supplied and/or services rendered by the said Lesotho Landscaping (Pty) Ltd to the Government of Lesotho, which representation was as authority to the Central Bank to pay Lesotho Landscaping (Pty) Ltd aforesaid the sum of M579,500, and did by means of the said misrepresentation obtain a cheque for M579,500-00 from the Central Bank, drawn in favour of Lesotho Landscaping (Pty) Ltd against Government Account No.1, which cheque was subsequently encashed thus resulting in the loss to the Government of Lesotho in the sum of M579,500-00, the property of the Government of Lesotho and in the lawful possession of the Central Bank of Lesotho, which amount the accused did steal; and thus the accused did commit the crime of Theft by False Pretences"

The dates and amounts alleged in the remaining counts are respectively

2. 21 June 1993 and M576,787-49
3. 25 January 1994 and M563,809-73; and
4. also 25 January 1994, but M487,692-28.

The three pleaded not guilty. At the close of the Crown case, A1 chose not to testify, the others did so. All three were convicted and sentenced. All three appealed : A1 against both his conviction and sentence, the other two against conviction only.

The evidence presented by the Crown which is not in dispute, may be summarized as follows.

The procedure at the Treasury when effecting payment on behalf of the Government, differs depending on whether Treasury does so directly by its own cheque drawn on the Central Bank of Lesotho ("the Bank"), which it usually does, and almost invariably does in respect of claims in respect of goods sold or work done, or -rarely - requests the Bank to make payment on its behalf. The Bank is not a department of Treasury but an independent concern, where the Lesotho government has its account. When the Bank makes out a cheque in favour of payees in South Africa, it issues payment against an account it holds in that country.

Normally, when an invoice is received by government, a payment voucher is prepared, after the invoice has been checked with whoever issued the original order, to ensure that the goods have in fact been received or service rendered. Supporting documents are annexed to the payment voucher: the relevant order, the invoice, perhaps a contract, depending on the circumstances. This bundle is taken to the examination department at Treasury to be checked. The examiner satisfies himself that the department which ordered the goods or services still has funds available from those which Parliament voted to it. An entry is then made in the vote book against that department. The examiner initials the payment voucher which then goes back to the authorising officer for his signature. Thereafter it goes back to the Examination Section, where the information on the voucher is punched into a computer and comes out as a cheque. This is sent to Dispatch, and payment is effected by Treasury itself, from funds voted to the relevant department, not from Treasury's own voted funds.

The Bank is asked to issue its own cheque only in urgent matters, for example when it unexpectedly becomes necessary for senior government officials to travel elsewhere. The only treasury officials with power to authorise the issue of Bank cheques, are the

Accountant-General and his Deputy. In such cases, the payment voucher is prepared at the Ministry of Finance, is submitted with its supporting documents to one of these two officials who, if satisfied that the claim is in order, signs a letter requesting the Bank to issue a cheque in favour of the claimant named in the letter. He submits the letter and the documentation on the strength of which it was written, to one of a short list of persons authorised to co-sign it in order for the Bank to act upon it. (The Bank has a list of the authorised signatories and samples of their signatures. This included the names of A2 and A3, and Mrs. Lekatsa). The Accountant-General is supposed to ensure that the letter is copied to the Bank Reconciliation section to ensure that the correct department is debited. On receipt of the letter, the Bank issues the cheque and debits the No.1 account of the government. The cheque is collected by Treasury from the Bank, which keeps a register of such cheques which the person collecting one is required to sign. The cheque is then sent within Treasury to Dispatch, where it is recorded, for the particular Ministry seeking these funds to collect.

It is clear that the procedures put in place are carefully designed to ensure that neither outsiders nor underlings can readily misappropriate government

funds. It is also clear that no system is inviolable if those trusted as shepherds prove to be wolves. Qui custodiet ipsos custodes? Mr. Nts'ala, referred to below, testified that A3 as the head of Treasury, was himself the ultimate scrutineer: representing, in Treasury, the Principal Secretary in the Department of Finance under which Treasury falls.

According to the evidence tendered, on three occasions the Bank issued cheques in favour of "Lesotho Landscaping (Pty) Limited or bearer" ("LL Co.") and crossed "Not negotiable" (There were two on the last occasion)

On 23.3. 1995 the Bank received a letter (exh B) from Treasury signed by A2 and A3 instructing issue of a cheque in favour of LL Co. "being settlement of invoices B2, 3 and 4," which elaboration was as far as the Bank was concerned, an unnecessary addition totally meaningless to the Bank. No copy of exhibit B was posted to the Bank Reconciliation section, as it should have been. Exhibit C, a cheque for M579, 500, was issued and the Lesotho Government debited with the amount. It was collected on the same day by A2.

21.6.1993 is the date of a letter to the Bank signed by A2 and Mrs Lekatsa (Exh D) requesting issue of a cheque for M576,798-49 "being in respect of

invoice 2 of contract 2". Mrs. Lekatsa testified that A2 brought the letter to her, said the matter was urgent and that she should co-sign. She pointed out that it had not been copied to bank reconciliation, to which he commented that his secretary must have forgotten, he would take it to her to have that done. This was however never done. Because Mrs Lekatsa trusted "my Head", she signed the letter without seeing, as she should have done, the relevant payment voucher with its supporting documents. The resultant cheque dated 22 June 1993 by the Bank in favour of LL Co. (Exh. E) and debited against the Lesotho Government, was collected by a Miss Pelea, who signed the Bank's register and gave the cheque to A2's secretary.

On 24th January, 1994, the Bank received a letter (Exh F) from Treasury signed by appellant 2 and 3 instructing the issue of two cheques in favour of LL Co. for M563,809-73 in respect of "contract certificate B9 dated 14th December, 1993". Because of the facts that two cheques in favour of the same concern were sought simultaneously and that the amount involved was considerable, Ms Phate, a senior banking officer at the Bank, contacted A3 to query the instruction. He asked whether his signature appeared on the relevant letter. When she replied in the positive, he confirmed the instruction. On the 25th

January, 1994, the cheques were issued (exhibits G and H) and collected by A2 himself, which he had never done before to Ms Phate's knowledge, and at her suggestion also three others for smaller amounts. There was a record at Treasury of the receipt of the latter three, but no record relating to those in favour of LL Co. The amounts were debited against Government Account No.1.

Irregularities came to light after this. A2 and A3 went on (compulsory) leave and Mr. Nts'ala took over as Acting Accountant-General on 3rd February, 1995. He found inter alia that the bank reconciliation section of Treasury had a copy of the letter, F, authorising the last two payments to LL Co. without showing which Ministry was supposed to have received the services for which payment was intended. When he came across this anomaly, Mr. Nts'ala looked to see whether there had been other such payments, and found that there had. The relevant cheques had not been recorded in the cheque dispatch registry, nor could he find any supporting vouchers, where they would normally have been, or record in the Tender Board files of any contract with LL Co. or indeed any record of any government department having received either goods or services from a company by that name. There is no such company registered in Lesotho, as it was required to be even if it were a foreign company

but wished to do business in Lesotho, nor is it reflected in the office of the Commissioner for Inland Revenue, as it should have been if it in fact did business in Lesotho, for purposes of recovery of the 10% so-called "withholding tax" for which it would have been liable. Mr. Nts'ala could find no record anywhere of the payment effected by exhibits C and E. A3 had failed in his basic duty to see that proper books of account were kept and checked.

After the bulk of what I have referred to as the common-cause evidence had been led, Crown Counsel presumably towards or at the end of one week - the record unfortunately is more often than not silent on the actual days and dates on which particular witnesses testified - announced his intention to hand in what apparently were amended or rectified copies of affidavits by Messrs Marais and Roodt which had been made available to counsel for A2 and A3 "on Friday last", but with flaws of some kind. Counsel for A1 made it clear that he had no objection to the affidavits. Counsel for A3 (not in so many words) reserved the right to argue whether they were admissible, and the court adjourned " until Monday" of the following week).

On the Monday the question of the admissibility of the affidavits was not dealt with. The evidence of

the witness still in the box continued and three more were called.

Then Crown Counsel asked for an adjournment to enable him to have the affidavits amplified by the insertion of "certain averments" that were missing from them, to which defence counsel had drawn his attention. The latter did not object. At the adjourned hearing, on 26th September, 1995, Crown Counsel handed in two affidavits. Counsel for A1 expressly consented to their going in, with annexures and all, making it clear that he accepted that he would be entitled to challenge the correctness of the information reflected in the documents by tendering rebutting testimony, should this be deemed necessary.

Crown counsel argued in essence that both affidavits complied with the requirements of sec. 245 of the Act, that 246(1) did not require a copy of the affidavit itself to be served on the defence; that the accused had long been aware of the facts reflected in the affidavits which he intended laying before the court in this form and that he accepted that they could constitute no more than prima facie evidence which the accused were at liberty to rebut.

Counsel for A3 was ambivalent in the reasons

advanced for his objection to admission of what Crown Counsel wanted to put before the court. He seems to have accepted that the annexures to the affidavits were admissible by reason of the provisions of S.245. His quarrel was with the "the elaborate affidavit introducing these documents" Counsel for A2 merely adopted the argument of his colleague representing A3. Neither pointed out which portions of the affidavit they regarded as offensive, i.e. neither argued that specific portions of the affidavits, still less any annexures, should be struck out, despite the interesting development that counsel for A1 seems to have associated himself with the complaint of Crown Counsel that he did not know what it was that the other two were complaining about.

The trial judge ruled that the affidavits be admitted. They were read into the record. The Crown closed its case. This was on the Tuesday before Monday the 3rd of October 1995, therefore on 27th September. The matter was postponed until Thursday the 5th, i.e. eight days later.

The affidavits to which defence counsel had objected, related to three accounts. Mr. Marais, then acting accountant at Volkskas in Ladybrand, deposed that as such he had access to the bank's ordinary books, in its custody and control, in which entries

had been made in the ordinary course of business of the bank.

The account of Lesotho Landscaping, ("LL"), and of A2, appear in those ordinary books. The former was opened on 10th April, 1991 and was allocated the number 2020-142-66 ("661"). It is described as a partnership account, the partners being Jeffery Letsie and Pusetso Moore Makotoane, and both having to sign for all transactions relating to the account. The current account of Mr. Pusetso Moore Makotoane bears the number 20202-142-688 ("688"). He is the sole signatory.

The bank statement of LL reflects that among transactions it made, were the following:

1. On 23 March, 1993 a cheque deposit of R579,500-00 was made.

2. On 30 June a cheque deposit of R576,798-49 was made.

3. On 25th January, 1994 two cheques were deposited into 661, namely for R563,809-73 and R487,692-28.

The affidavit however goes further, and annexes documentation which does not accord with the description, in sections 245 and 246 of the Criminal Procedure and Evidence Act No. 7 of 1981 ("The Act"), of the type of documents which, containing hearsay evidence, are nevertheless admissible as <u>prima facie</u>

evidence. Section 245 and 246(1) bear quoting :

245 "The entries in ledgers, day-books, cash-books and other account books of any bank shall be admissible as prima facie evidence of the matters, transaction and accounts recorded therein, on proof being given by the affidavit in writing of a director, manager or an officer of that bank or by other evidence-

(a) that the ledgers, day-books, cash-books or other account books-

(i) are or have been the ordinary books of that bank;

(ii) are in or come immediately from the custody or control of that bank; and

(b) the entries have been made in the usual and ordinary course of business

246 (1) Copies of all entries in any ledgers, day-books, cash-books or other account books used by any bank may be proved in any criminal proceeding as evidence of any such entries without production of the originals by means of the affidavit of a person who has examined them, stating the fact of the examination and that the copies sought to be put in evidence are correct except that -

(a) no ledger, day-book, cash-book or other account book of any such bank and no copies of entries therein contained, shall be adduced or received in evidence under this Act, unless 10 days' notice in writing or such other notice as may beordered by the court or a magistrate holding a

> preparatory examination, containing a copy of the entries proposed to be adduced, and stating the intention to adduce the same in evidence has been given by the party proposing to adduce the same in evidence to the other party; and
>
> (b) the other party is at liberty to inspect the original entries and the account of which such entries form a part".

Clearly neither the certified true copy of the deposit slip which Mr. Marais annexed ("CAD 1") and the information it contained, nor the certified true copy of the Central Bank of Lesotho ("CB") cheque (CBLC 1) referred to in the deposit slip, were either "ledgers, day-books, cash books or other account books" of Volkskas, nor entries in such books. Yet Marais annexed these to his affidavit in both corroboration and elaboration of his testimony based on his examination of the bank statement of LL and statement that that contained an entry that on 23rd March 1993 a cheque deposit of R579,500-00 was made.

He adopted the same procedure in relation to the entries of the deposits made on 30th June, 1993 and 25th January, 1994, set out earlier.

As regards withdrawals from LL account 661, Marais records that the bank statement reflects the following:-

1. On 24th March, 1993, R309,750 was withdrawn by cheque.

2. On 25th March, 1993 a further R249,750 was withdrawn by cheque.

3. On 1st July, 1993 a cheque withdrawal of R570,000 was made.

4. On 26th January, 1994 a cheque withdrawal of R1,040,000 was made.

Here again he goes further than testifying to the entries in the bank statement of LL. He annexes a deposit slip dated 24th March, 1993 (CAD 4) to link withdrawal 1 above, to a deposit of R309,750 made on the same date into the account 668 of Mr. Makotoane. So too he links withdrawal 3 by way of a deposit slip (CAD 5) to a deposit of R570,000 on the same day into account 668; and withdrawal 4 with the deposit of the same amount into account 668, pointing out that the relevant deposit slip (CAD 6) "purports to bear what appears to be the signatures of both Mr. Makotoane and Mr. Letsie."

The annexures here too clearly do not fall within the parameters of the benefit conferred on both the prosecution and bank officials by sections 245 and 246(1) of the Act.

Subject to what is said below, there is no problem in regard to his setting out of the entries relating to withdrawals from account 668, in the sense

that no corroboratory document was annexed relevant to those. The withdrawals are listed as being -

1. R268,239.00, by cheque, on 5th July, 1993

2. R500,000.00, by cheque, on 2nd February, 1994.

The affidavit of Mr. Roodt relates to a current cheque account, number 5000017574, opened on 25th March, 1993 with First National Bank at its Ladybrand branch ("FNB"), by Daniel N. Matebesi by means of a cash deposit of R9,750. Mr. Roodt annexes a deposit slip (CAD S1), unnecessarily and so harmlessly,in corroboration of the date which must obviously have appeared in the statement itself. He says that on the same date a call account was opened with a deposit of R40,000, annexing (CAS 1) a certified true copy of the relevant statement. He testifies further:

> " on the same day, that is 25th March, 1993, he instructed the bank to issue a Bank Draft for the sum of R200,000 in favour of Sanlam Insurance Company. I annex a copy of a document which reflects that a Bank Draft in the sum of R200,000 was made out to Sanlam Insurance Company and that the name of the applicant was D.N Matebesi. It is marked RC1. The total sum of the transactions that Mr. Matebesi made at the bank on the 25th March, 1993 is R249,750.00 made up as follows - R9,750 deposited in his cheque account, R40,000 deposited in his call account and R200,000 in respect of the draft which he directed the bank to issue in favour of Sanlam."

The affidavit then continues to record entries in the bank statements, as follows:

> On 1st July, 1993, R133,317-87 was deposited into the cheque account. On the same day R134,921-63 was deposited in the call account - a total, therefore, of R268,239-50. On 1st February, 1994, R500,000-00 was deposited in the call account. He adds the information (which does not appear from the statement itself, a copy of which is annexed) that this deposit was effected by way of a Volkskas bank cheque.

In his judgment ultimately, the trial judge seems to have held that he was prepared to ignore the "illustrative annexures" to the affidavits. He stated that "the essential averments in those affidavits established a prima facie case against the accused regarding the entries mentioned in the affidavits". He also held, as a matter of law, that no notice as provided for in section 246(1) of the Act was required if the prosecution tendered the relevant affidavits in terms of section 245.

The second ruling was in my view clearly wrong. Section 245 merely sets out prerequisites to proof by affidavit of hearsay upon hearsay evidence of facts that would, were direct evidence be required, be virtually impossible to prove : the teller who received a cheque among hundreds if not thousands of others, would be required to testify that on a specific day a specific person handed a cheque (or

cash) to him for deposit into that client's account. It provides for common sense safeguards against unreliable hearsay, based on the assumption that in the ordinary course of a bank's business mistakes in recording transactions in which both a bank and its clients have a vital interest, are correctly recorded and accepted by both parties as being correct - scil. since statements and returned cheques are sent to clients who can therefore control the correctness of the records kept by the bank and copied by a responsible person in the employ of the bank. Section 246(1) provides that notice is required where

1) "any ledger, day-book, cash book or other account books of any bank" is sought to be produced; which as a matter of conjecture would rarely happen, since the bank's books are in constant use; and

2) "<u>copies</u> of entries therein contained" - my underlining.

In other words, notice to the defence is always required when the Crown intends to produce hearsay evidence, whether in the form of original documents (reflecting hearsay evidence) in the possession of the bank, or copies of those.

Of importance is that a ten-day period of written notice as provided, is not regarded by the legislature as an absolute, in view of the alternative provided, of "such other notice as may be ordered by the court...."etc.

The court a quo was however, correct in the first of the two findings set out above. Quite apart from the other viva voce evidence tendered by the Crown as summarized above, the "essential averments in (the) affidavits ... regarding the entries mentioned in the affidavits" and the documentary evidence already before the trial judge (including the original CB cheques with date stamps of particular banks) revealed the following, listed in chronological order. I refer in what follows to the account holders by their capacity at the trial. It was never suggested at the trial, that there could possibly, by some rare coincidence have been other individuals who fortuitously had the same names as A2 and A3, who had the dealings to which the relevant bank accounts, and entries in those, referred. And the evidence that Maloti and Rand are interchangeable, was not challenged.

23.3.1993 is the date of the letter, B, by A2 and A3 asking the CB to pay LL. Co M579,500-00.

23,3,1993 CB cheque, C, for M579,5000-00 issued and collected at CB by A2.

The original cheque bears on its obverse side, a date stamp of the same date, of Volkskas, Ladybrand.

23.3.1993 A cheque deposit of R579,500 made into the account of LL.

24.3.1993 R309,750 withdrawn from the account of LL.

24.3.1993 R309,750 paid into the account of A2.

25.3.1993 R249,750 withdrawn from the account of LL.

25.3.1993 A3 opened accounts with FNB, Ladybrand, with deposits totalling R49,750.

and instructed payment of R200,000 to Sanlam. True, the annexure annexed in corroboration is inadmissible, but section 245 refers in the widest terms to "other books" in the possession of and used by a bank; and it is highly unlikely that the instruction would not be recorded in some such book.

21.6.1993 is the date of the letter, D, signed by A2 and Mrs Lekatsa, asking C.B for a cheque in favour of LL Co. in the sum of R576,795-49.

22.6.1993 C.B issued the cheque in this sum, E, which was handed to the Secretary of A2. It has a Volkskas, Ladybrand date stamp of 23.6.1993 on the back.

30.6.1993 R576,795-49 deposited into the account of LL.

1.7.1993 R570,000 withdrawn from this account, No. 661.

1.7.1993 570,000 deposited into the account of A2, No.668

1.7.1993 R133,317-98 and R134,921-63 deposited into the F.N.B. account of A3, therefore a total ofR268,239-50.

5.7.1993 R268,239 withdrawn from Volkskas account 668 of A2.

24.1.1994 is the date of letter F signed by A2 and A3 asking C.B. for two cheques for LL Co., the authenticity of the letter being queried because of the amount involved.

25.1.1994 Cheques G and H were issued in the sums of M563,809-71 and M487,692-28. They were collected by A2. Treasury had no record of receiving them, although three others cheques simultaneously taken by him at the request of C.B. were so recorded.

25.1.1994 Two cheques in the sum of R563,809-73 and R487,692-28 were deposited into the account of LL.

26.1.1994 R1,040,000-00 was withdrawn from the account of LL.

26.1.1994 R,1,040,000-00 was deposited into Volkskas account 668 of A2.

1.2.1994 R500,000-00 was deposited into the F.N.B call account of A3.

2.2.1994 R500,000-00 was withdrawn from account 668 of A2.

The evidence of both A2 and A3 may be politely termed romancing, and did not merit the detailed cross-examination to which both were subjected by Crown Counsel.

Both are skilled and seasoned money-men, not naive illiterate peasants. That is why they were elevated to the responsible positions they held in Treasury. The story offered by A2 is, in a nutshell, the following (I recount only the skeleton, not the

imaginative detail with which the fable was embroidered) He could not remember the instances in which he authorised the issue of cheques by the Bank in favour of LL Co. because he deals with too many such matters. (This is already improbable. The Crown evidence that it was unusual for the Bank to be asked to pay for goods or services, was not seriously challenged, and the coincidence that it was a concern with a name virtually identical with that he and A1 used, must have struck him). The supporting documentation should all still be in Treasury possession "unless there are other motives of hiding them or destroying them" - a nonsensical suggestion, bearing in mind the detailed selective process that some unknown enemy? beneficiary? would have had to undertake under the very nose of A2 himself and others in the various places where Treasury documents are kept. As regards the LL account, he invents a Mr. Kemp who approached him, because he was a Treasury official, for assistance in making payments abroad because Kemp was experiencing difficulty in doing so through the proper channels, i.e. doing so himself, presumably through Treasury to obtain foreign exchange.

He and A3 permitted this. Kemp paid money into the Lesotho government account (an allegation which had not been put to any of the Crown witnesses) which

Treasury would then transfer out of the country, Treasury itself not being constrained by foreign exchange restrictions. Then Kemp asked to be permitted to use the personal account of A2, to enable Kemp to instruct A2 to make payments on his behalf when Kemp, overseas perhaps, was unable to do so himself. Apart from the fact that the propriety of these arrangements by a Treasury official is at the least questionable, there was no reason advanced why payments should not have been made into an account in South Africa in Kemp's own name with authority - or blank cheques! - to someone to operate on that. Be that as it may, A2 says he became nervous when he became aware of the large sums moving into his own account - "people might think I am dealing in mandrax or something". So he spoke to A1 and the two of them agreed that Kemp could use their dormant LL account, and for this purpose handed over to Kemp the LL cheque book and deposit book with all the leaves of both signed by themselves in blank. (The cheque book was subsequently produced and proved him a liar on this point, as he was on so many others, since it still contained unsigned cheque forms). Only Kemp used that account thereafter, but he also still used A2's personal account on occasion, ("so that we could effect transfers in his absence") giving A2 instructions how to dispose of the Treasury money paid into that. There is no written record of any

instructions given him by Kemp, they communicated verbally but constantly; their relationship coming to an end and Kemp apparently disappearing off the face of the earth when "there came up a query from audit regarding the payments that we were helping him with and I told him we were going to stop assisting him in that manner". He tells that A3 - his superior, the man in ultimate charge of the till - at some stage feared sequestration because of his overdraft. A2 suggested he ask Kemp to assist him, and he, A2, did get instructions from Kemp to pay "about M65,000 plus" into the account of A3.

This glaringly improbable tale, that the second most senior official in the Treasury of Lesotho would after lengthy discussion with his partner have agreed to hand over an entire book of signed blank cheques to Kemp, who could have ruined them both is of further interest only because A2 implicates A1 in his activities, though doing his best to protect this "very good friend" of his.

The evidence of A3, the man at the financial helm of Treasury but teetering on the brink of insolvency until the mythical Kemp came to his rescue, did not assist any of the appellants. His testimony starts off with a rambling account of irrelevancies by which he seeks to imply that someone out there must bear him

a grudge - ergo, that the entire case against him is a devious plot. That is of course nonsense. The undisputed documents placed before court, and the absence of every one of the documents or entries that would have been there had he done his work, are damning unless some credible explanation were forthcoming. I confess that seek as I may, I can think of none such. The story A3 offered to the court, like that of A2, received far more attention from everyone in court than it merited, which only prolonged an overly-long trial. His explanation of the large sums that were paid into his FNB account is as wildly improbable as that of A2 to explain away the figures which implicate him and A1. It boils down to this: the R249,000 odd with which he opened accounts with First National Bank in Ladybrand, and obtained a draft in favour of Sanlam Insurance Company was the property of a cousin of his, one Russell. Russell had money in various current accounts which did not yield interest, a bus business with which he was having problems because he had received a summons in respect of an unpaid account - we do not know in what amount - and R200,000 in the Standard Bank at Mohale's Hoek. A2 offered to help him manage his money. For this purpose, he persuaded Russell to put his money into the name of A3 (he says under cross-examination that this was before he himself was threatened with insolvency which was averted only by a debt to Kemp

being substituted for one to his bank) and arranged with Russell's creditors that he would attend to payment of Russell's debts. What happened to the summons we do not know, nor why Russell with as much as R200,000 at his disposal could not pay his own accounts; but this sum was invested in a policy from Sanlam which would give "better interest", and R40,000 went into a call account in the name of A3 which also earned interest, from which payment could be made for things like spare parts. No reason is offered as to why Russell could not have taken all these steps in his own name, even assuming that they made sense, nor why Russell made further payments into his account, (which could hardly have been in a healthy state since it thereafter required the rescue operation by Kemp) instead of paying his - Russell's - debts...

Under cross-examination by Crown counsel, his lack of morality shines through even this imaginative account - it has to, since he is stuck with the story: he says that he did not think it improper to channel money from Kemp through a government account, despite the provisions of Chapter 16 of the Financial Regulations that "Persons who wish to remit money other than public money from one place to another shall not be allowed to do so through government accounts". And being stuck with the story, it became ever more unbelievable when tested, and he is shown up

time and again to have lied. It was quite unnecessary for the trial court to have called, as it did, Russell to deny his tale, or to permit Crown counsel to call Kemp in rebuttal of the story A2 had told.

Although counsel for A2 and A3 did not at the trial clearly voice the grounds of their objection to the admissibility of the affidavits, or portions of or annexures to those, their legal representatives before us did. They argued -

1) that the affidavits were inadmissible because there had been non-compliance with the provision that it was a pre-condition to admissibility that 10 days notice in writing should have been given;

2) that no bank documents, or copies of documents, were in fact submitted, duly verified by affidavits alleging that such documents fell within the category defined in section 245 of the Act.

3) that sections 245 and 246 have to be read with the two sections that follow, which make it clear that the former intends to refer only to banks in Lesotho: the sections have no extra - territorial application.

4) that the fact that the court a quo decided to exclude the annexures from consideration at the judgment stage, was too late. It had had sight of the entire documents. Moreover A2 and A3 had been cross-examined extensively on those annexures (and on the inferences Marais and Roodt had drawn from them and had

> each voiced in the body of his affidavit). This must have coloured its assessment of the credibility of the appellants, and so constituted a fatal irregularity entitling the appellants to an acquittal.

Mr. Kuny who appeared for A1, was faced with his client's unequivocal consent at the trial to the admission of the affidavits, with annexures and all. One of those annexures was a photostatic and certified correct copy of the deposit slip (CAD 6) which ralated to the R1040,000 deposited into the account of A2 on 26th January, 1994. Mr. Marais not only annexed this to his affidavit but voiced his opinion that "The deposit slip purports to bear what appears to be the signatures of both Mr. Makotoane and Mr. Letsie". His client having waived the right to the notice required by section 246(1) of the Act, his argument as to admissibility went no further than that, if the affidavits were held to be totally inadmissible with annexures and all, that must enure to the advantage of A1 also. The main thrust of his argument was, however, on the facts: whether or not A1 and A2 had acted in concert to steal money from the government, there must be a reasonable doubt whether A1 had not, trusting his long-time friend, A2, been persuaded by the latter to accept that making their dormant joint account available for use by a third party, was innocuous. In short he contended that the mens rea of A1 had not been established beyond reasonable doubt.

Section 246(1) itself makes it clear that the requirement of ten days' notice in writing is not immutable. The purpose of notice is to forewarn the accused that the prosecution proposes tendering otherwise inadmissible hearsay evidence, to enable the accused to decide whether to challenge the content of that and give him a reasonable opportunity, if he decides to do so to gird his loins for that skirmish. The section in stating that a court may determine a different mode, and different period, of notice, makes it clear that the object is to be fair to the accused. One can conceive of circumstances where ten days would be totally inadequate for example should an accused have problems in being able to examine the books himself or obtain the ammunition with which to attack the reliability of the entries within that time. And the opportunity may obviously be waived, if an accused decides that he has no reason to quarrel with the entries.

The cases referred to in argument, in which it was said that the South African equivalent of sections 245 and 246(1) must be strictly construed, are ones in which the prosecution sought to prove, not that money had been paid into or withdrawn from a particular account on a specified date but that the <u>state</u> of that account showed that the accused knew that cheques he issued would not be met: in short, that the

obtained money or goods or services by false pretences when tendering in payment a negotiable instrument which he knew to be worthless. In none of those cases was any notice at all given to the accused; which was clearly prejudicial in each instance. R. v. Uys, 1938 OPD 59 R. v. Pieterse 1950(4) S.A. 21 (where not only was the accused given no notice, but a selective extract from his bank statement tendered); R. v. Bhoola 1960(4) S.A. 895(T); and S. v Volschenk, 1970(3) S.A. 502 (T) all relate to cheques referred to drawer, and are matters in which the prosecution was required to prove that the accused had acted dolo, not merely negligently when tendering those cheques as payment.

I have set out the history prior to the affidavits being accepted by the trial court. Crown counsel had made the documents he proposed tendering by means of depositions available to the defence early on in the trial. It was the fact that formalities required were missing, that held up this part of his case. It was not suggested after the eight-day postponement, that the accused required more time to prepare their respective defences. At no stage was there a suggestion that evidence beyond that of the accused themselves was required to challenge the correctness of any of the entries in the books of either Volkskas or FNB at Ladybrand. Were the

objection at this stage to the admissibility of the affidavits on the grounds of alleged non-compliance with the provisions of section 246(1), to be upheld, form would triumph over substance, which was clearly not the intention of the legislature.

The second ground of objection is equally without merit.

Section 245 makes entries in certain books admissible, if those books are in the custody of defined persons, who depose to the use to which those books are put. An entry is merely a written record of an alleged act which is not more or less weighty testimony merely by reason of the fact that it is recorded in writing. Nor must one accept that the legislature, when ruling copies of entries admissible, had photostatic copies in mind. (Even those may in any event be falsified). When one accepts - as counsel reluctantly agreed should be done - that Marais could have copied the entries in the bank's books in his own handwriting, insistence that he should have done so on a separate piece of paper and annexed this to his affidavit, is pointless and serves the interests only of stationers. The allegations Marais makes as to the entries he saw in the books under his control, constitute prima facie evidence that those entries were made, as valid or vulnerable

as any other hearsay evidence tendered in terms of these sections would be.

The third ground advanced was based on the presumption against legislation having extra territorial effect. We were referred to Le Roux v Provincial Administration (OFS), 1934 OPD 1 at p.4 and Lenders & Co. v. Lourenco Marques Wharf Co., 1904 TH 176 at 180-1; and urged to hold that the banks referred to in sections 245 and 246, were only banks within the jurisdiction of the court in Lesotho. The motivation for this proposed inferential amendment to the wording of the Act was that section 247(1) allows for the compelling of a bank to produce records in certain circumstances; Section 247(2) authorises certain police officers to demand the production of bank documents in certain circumstances; and Section 248 in turn excludes the provisions of section 245, 246 and 247 from proceedings in which the bank itself is a party. Since a bank in the R.S.A. cannot be compelled to produce documents in Lesotho any more than a police officer from Lesotho may seize documents from a bank in the R.S.A., we are asked to conclude that sections 247 and 248 clearly refer only to banks in Lesotho, that is, banks over which the courts here have control.

This argument ignores the basic purpose behind

the passage of these sections; to ease the burden and cost to the Crown or perhaps a complainant, of establishing facts which more often than not are not challenged by an accused, and would necessitate the calling of a string of minor witnesses to give evidence usually of a purely formal nature. On counsel's argument, even were a bank at the ends of the earth quite happy to assist with a particular prosecution : to send even its original books under cover of an affidavit or under the arm of a bank official to testify viva voce in Lesotho, the evidence would be inadmissible. Tellers and clerks would have to travel to testify in person.

The purpose behind sections 247 and 248 is clearly to enable compliance with the second condition in favour of an accused to which admission of the hearsay evidence is made subject: that the accused be at liberty to inspect the original entries and the accounts of which such entries form a part (sec. 246(1)(b).

If compliance with that pre-condition cannot be achieved, the Crown cannot proffer the evidence. But the accused is only to be at liberty to inspect. If he does not wish to do so, the question whether the particular bank would permit him to do so or not is irrelevant. It was never suggested that any of the

appellants were not at liberty to inspect their own bank accounts, or wished to check on the accounts of the others but were denied access. The fact that section 247 has no extra-territorial validity is accordingly no ground for limiting the word "bank" in sections 245 and 246 to mean by necessary implication "bank in Lesotho".

The fourth ground is similarly without merit. Inadmissible evidence was indeed tendered. I t , however, happens daily that a court holds a trial-within-a trial in which damaging evidence is elicited but ultimately ruled to be inadmissible. Courts must, can and do disabuse their minds of that evidence in weighing the totality of the admissible evidence when ultimately determining whether the guilt of the accused has been established. Our attention was not drawn to any passages where appellants were cross-examined on the inadmissible annexures or passages in the affidavits, on which the court a quo relied for arriving at the conclusion that the appellants were guilty. Even had he done so, he would merely have been piling Ossa on Pelion. The guilt of A2 and A3 is so clearly established, their stories are so wildly improbable, that in my view although the court a quo permitted Crown Counsel inordinate leeway to shred stories that did not merit such attention, no failure of justice has occurred, despite the fact that that

cross-examination related also to inadmissible evidence contained in both the affidavits and the annexures; which should not have been permitted. (Hoffman and Zeffert, Evidence, 4th ed p. 458 and cases referred to in notes 70 and 71; R. v. Schoeman, 1959(4) S.A. 89 (c), 93B). The argument that the search by Mr. Nts'ala himself was cursory and his evidence of what his underlings had reported was inadmissible hearsay, presupposes that his evidence was tendered to prove the impossible: a negative. His evidence went no further than that he had searched and caused search to be made in all the places where documentary evidence would in the ordinary course be expected, to indicate who the government was supposed to be paying and what for, and had drawn a total blank - something that had not happened to him before. That merely added another coincidence to the vast array that the court is asked to accept as a reasonable possibility. The totality of the evidence adduced against them was damning. The lies they told merely made their situation worse. It is unnecessary to further belabour detail. No failure of justice has occurred.

The position of A1 is different. He was not an active party to the theft by means of misrepresentations, perpetrated by the other two. He was not shown to have benefitted in any way from the

stolen money. Whether his guilt on the four counts charged was proved, (it could be only as an accessory) depends on whether there may not be a doubt whether A2 had not pulled the wool over the eyes of A1, to enable A2 to launder the money he and A3 had stolen, through the account of the joint venture. In terms of the test laid down in R. v Difford, 1937 AD 370 , it is insufficient that it is improbable that A1 would have been so stupid as to sign blank cheques and make them available to A2; but in the light of the fact that the account was dormant and, more importantly that A1 trusted A2 who was a highly regarded senior official in Treasury, I cannot say that it is so highly improbable that one can exclude it as a possibility. Mrs Lekatsa also trusted A2 sufficiently to default in her duty on the strength of his assurances.

Mr. Mdhluli referred the court to a portion of the evidence of A2 which seemed to reveal that the joint account had in fact not been dormant before Bank cheques were deposited into and large sums withdrawn from that. It had contained a healthy credit balance which A2 testified was the property of A1, who operated the account for his own benefit. The LL account was only dormant "for our joint business". That evidence might perhaps alter one's assessment of the likelihood that A1 would have been bluffed by his

friend into making available the use of not only their joint account but his own money, to a Mr. Kemp whom he had never met.

The bank statement which Crown counsel put to A2, in eliciting this evidence from A2, was however not dealt with in or annexed to the affidavit of Marais at all, nor was any notice given to any of the appellants that this statement would be produced. In terms of the authorities referred to above it was, therefore, inadmissible against all the appellants, and cross-examination based on it not permissible. As regards A1, it cannot in my view be said that no failure of justice has resulted despite the admission of this evidence.

In the result the appeal of A1 is allowed. His conviction and sentence are set aside. The appeals of A2 and A3 are dismissed.

L.V.D. HEEVER
ACTING JUDGE OF APPEAL

I agree Sgd
J. BROWDE
JUDGE OF APPEAL

I agree Sgd
R.N. LEON
JUDGE OF APPEAL

Delivered this 29th day of June, 1996.