IN THE COURT OF APPEAL OF LESOTHO

In the matter between

RAKOLITSOE MARIUS MAHASE **Appellant**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **Respondents**

CORAM:

STEYN, P
GROSSKOPF, JA
MELUNSKY, JA

DATE OF HEARING : 19 OCTOBER 2007
DATE OF JUDGMENT: 24 OCTOBER 2007

SUMMARY

Criminal law – bribery – officer in LDF received M91 168.49 as bribe money in 30 separate payments over more than two years – sentenced to 6 years imprisonment.

The appellant, a captain in the Lesotho Defence Force was paid amounts totaling M91 168.49 in all over a lengthy period. He persistently involved himself in arranging travel

for members of the LDF despite the fact that this was outside the scope of his duties. During the period over which the payments were made, the travel agency concerned received the lion's share of the LDF travel business. The appellant's explanations for receiving the money were not reasonably possibly true.

Held: *(1)* *The appellant was correctly convicted of bribery.*

(2) *There were no grounds for interfering with the sentence. The seriousness of bribery emphasized.*

JUDGMENT

MELUNSKY JA:

[1] The appellant became a member of the Lesotho Defence Force ("the LDF") in 1978. After completing his training he was employed in the Registry Department at the Ratjomose base with the rank of private. He was stationed at that base in the same department throughout his military career. He eventually attained the rank of captain.

[2] On 21 February 2005 the appellant appeared before Monapathi J and assessors in the High Court on a charge of bribery, alternatively with contravening section 22(1) of the Prevention of Corruption and Economic Offences Act, 1999. The essence of both charges was that the appellant, being a public official and a public officer, wrongfully, intentionally and corruptly accepted payments totaling M102 868.49 from Millenium Travel and Tours (Pty) Ltd ("Millenium") and East-West Travel and Tours (Pty) Ltd ("East-West") in return for rendering assistance to the said companies to enable them to obtain business from the LDF. The appellant pleaded not guilty to both charges. After a lengthy trial he was convicted on the main count of having accepted and received bribes totaling M91 168.49 and was sentenced to six years imprisonment. This is an appeal against the conviction and sentence.

[3] By way of background it may be noted that East-West was incorporated on 26

May 1997 and Millenium on 11 May 2000 and that Mr. G.A. Nair ("Nair") was a director of both companies at all relevant times. The evidence in the Court *a quo* related to Millenium only and nothing further needs to be said about East-West. Millenium carried on business as a travel agent in Maseru but was not an accredited IATA travel agent. In consequence, and while it could make reservations for flights, it was not entitled to issue air tickets for its clientele. These had to be obtained either from the airline concerned or from an accredited IATA travel agent.

[4] That the appellant received M91 168.49 from Millenium during the period September 2000 to July 2003 is not in dispute. The payments were made by means of 30 cheques of varying amounts drawn by Millenium on the Standard Bank or Nedbank. One of the cheques was paid into the appellant's bank account and the rest were cashed by the appellant over the counter at the drawee bank and the proceeds paid to him. All of the cheques were signed by Nair on behalf of Millenium.

[5] The crucial question on the merits of the conviction is whether the Crown established beyond reasonable doubt that the money was paid to the appellant in consideration for his efforts in advancing Millenium's business interests. In deciding this we have to weigh up the evidence of the Crown witnesses against that of the appellant (who was the only defence witness) and to consider whether, on the totality of the evidence, the appellant's explanations for having received the money could reasonably possibly be true.

[6] Counsel for the appellant limited his attack on the conviction to three or four main points in his written heads of argument but advanced no oral submissions in support thereof. This enables us to deal with the facts more economically than might otherwise have been the case but it is nevertheless necessary to set out a reasonably detailed resuméof the evidence, not only because of its relevance to the conviction but also due to its significance on sentence.

[7] From time to time officers and members of the LDF are required to travel to other

countries, usually by invitation of the country concerned. The appellant's duties were confined to the Registry Department where he was responsible for the correct filing and custody of all documents held in that Department. It was not part of his function to liaise with any travel agent or to make arrangements for travel by LDF members, apart from obtaining visas for members who were to travel abroad. It was the responsibility of the accounts section to see to the travel arrangements in conjunction with the training officer of military personnel, a Colonel Kholoane.

[8] During the period covered by the indictment, five travel agents were used by the Ratjomose barracks to make flight reservations and provide air tickets for travel outside Lesotho by military personnel. Millenium was used by the base on 74 occasions and the other four travel agents on only 50 occasions. There is no rational reason for Millenium to have received 60% of the business, particularly if regard is had to that company's enormous mark-up of 120% on average compared to the normal commission of about 7% charged by IATA travel agents. What is more, Government Departments were required to obtain three quotations if the cost of travel tickets exceeded M3000 but this procedure was rarely followed in respect of tickets purchased by the Ratjomose base.

[9] It should also be noted that all mail intended for the LDF was sent to the Registry Department where it was attended to by the appellant. He, in turn, directed the correspondence to the relevant sections of the Defence Force. Thus it was the appellant who would receive letters inviting members of the LDF to travel abroad. He delivered such invitations to the office of the Commander which was in the same base. Although it was in the discretion of the Commander to authorize military personnel to travel overseas, he and the appellant apparently had a friendly relationship. As it was also one of the appellant's functions to obtain the necessary visas for overseas travel he would generally have to be kept informed about the proposed travel arrangements and the itineraries. All that needs to be stated at this stage is the obvious fact that the appellant was in a unique position to know when and to what destinations military personnel were to travel abroad.

[10] This is the appropriate stage to deal with the appellant's activities concerning travel matters in the LDF. A considerable amount of evidence in this regard was given by employees of the Department of Defence and, in particular, by Major-General Thibeli, the Deputy-Commander at the Ratjomose base at the relevant time. It is clear from the testimony of these witnesses that the appellant did indeed involve himself in matters relating to travel and, moreover, in efforts to advance the interests of Millenium. The Crown evidence in this regard was not specifically attacked by the appellant's counsel – and rightly so – and it is therefore not necessary for me to deal therewith at length. All that needs to be said is that the appellant frequently procured itineraries and air tickets from Millenium; that he sometimes even supplied tickets to the persons who were to travel; that on occasions he brought Millenium invoices to the accounts office for processing; and that on one occasion he enquired about payment of a Millenium account. All of these matters were outside the scope of the appellant's duties. The evidence of Mrs. Selio, who was employed as an accountant at the Ratjomose base is particularly revealing. She testified that appellant often handed invitations to travel and itineraries from Millenium to the financial controller. These were passed on to her so that she could prepare an order for Millenium to issue the tickets. When Mrs. Selio became the acting financial controller she required the appellant to obtain the Commander's authority before she was willing to prepare such orders based on the aforesaid documents. The appellant subsequently supplied her with the Commander's written authority.

[11] It is also of some significance that three letters by the appellant in connection with visa applications had been produced on Millenium's typewriter. The appellant conceded that he personally typed at least one of the letters in Millenium's premises. Despite this the appellant denied that Nair, with whom he had admittedly formed a close relationship, had asked him for any assistance in connection with Millenium's business.

[12] The appellant told the trial Court that he had met Nair in 1996 and that they had become friends. He denied that Nair, acting on behalf of Millenium, had paid him any money for him to advance the company's business interests. He testified that M46 400 of the money received by him from Millenium represented cheques that he had cashed for

Nair as Nair was afraid to do so himself; that M14 768.49 was given to the appellant to enable him to make purchases for Nair in Pretoria and Bloemfontein; and that the balance of M30 000 represented payments made by Nair for meat (pork and mutton) which he had allegedly purchased from the appellant.

[13] The Court a quoaccepted the evidence of the Crown witnesses. It held that the appellant did indeed promote Millenium's business, that the appellant's explanations for receiving the M91 168.49 was false and that the only reasonable inference to be drawn from the proved facts was that the money was paid and accepted as bribes.

[14] On the appellant's behalf it was submitted before us that the trial Court erred in finding that the version of the appellant was not disclosed timeously and, secondly, that the Court erred in drawing an adverse inference against the appellant due to his failure to furnish an explanation to the police. While I am not convinced that the Court erred in the respects alleged, the aforesaid findings did not seem to play a significant part in its decision. Moreover, and if we are at large to re-assess the credibility of the appellant, as his counsel submitted, we would have no reason to interfere with the verdict having regard to our own assessment of the evidence which is dealt with in pars [15] – [17] below.

[15] Counsel for the respondent submitted that the evidence of the appellant showed that he was not a credible witness and that the Court a quohad good reason to reject his version. Counsel pointed to the fact that the appellant was frequently evasive and argumentative under cross-examination; that he was patently untruthful in numerous respects; and that he contradicted himself on many matters. The large number of instances cited by counsel were, quite correctly, not challenged on the appellant's behalf and it is therefore not necessary to say anything further in this regard, other than to emphasise that the appellant was indeed a most unsatisfactory witness.

[16] The appellant's counsel put forward the argument that the appellant's evidence did not warrant rejection on various grounds, firstly that Nair and the appellant were friends;

that there was a "total disregard of the financial regulations by all concerned"; and that the evidence did not exclude the possibility that other officials might have mandated Millenium to arrange flight reservations. The fact that Treasury was unsuccessful in attempting to enforce compliance with certain financial regulations hardly assists the appellant: he was certainly a significant culprit in this regard and it does not affect the appellant's guilt if other officials also ignored the regulations. Similarly the possible involvement of other officials in advancing the business interests of Millenium does not excuse the appellant's conduct. I add that the appellant never suggested that he was mandated by other officials to promote Millenium and there was no other evidence to support this contention.

[17] I conclude this part of the judgment by dealing with the submission that the appellant's evidence did not warrant rejection. Quite apart from the fact that the trial Court accepted the evidence of the Crown witnesses and rejected that of the appellant having regard *inter alia*to the unsatisfactory features of his evidence set out in par [15] above, the appellant admittedly accepted M91 168.49 from Nair over a lengthy period and at the time when Millenium was receiving huge benefits from the LDF. There was, of course, no onus on the appellant to satisfy the court that his explanations for receiving the money were true. The test is simply whether, on a consideration of all the evidence, his version is reasonably possibly true. There is no doubt in my mind that not only is his evidence not reasonably possibly true but it is so improbable as to lead to the conclusion that it is palpably false. For instance, the fact that he kept a written record of the favours he did for Nair; that he wrote the cheque number of the cheques he received from Nair on a piece of paper and later transposed these into his diary; that Nair would have agreed to buy meat from the appellant at inflated prices; and that Nair asked him to cash Millenium cheques because he was too afraid to do so when Nair himself cashed a cheque of M100 000. Moreover, when weighed up against the acceptable evidence that the appellant involved himself in Millenium's affairs, contrary to his functions and duties in the LDF, the only reasonable inference to be drawn is that the money which was paid to him constituted bribe payments. This conclusion is consistent with all the proved facts and the proved facts exclude any other reasonable inference.

[18] It follows that the appellant was correctly convicted of bribery and that his appeal against the conviction must fail. The question of sentence now requires attention. Although the appeal was noted on the grounds that the sentence of 6 years causes a sense of shock and is startlingly inappropriate, the main submission that was argued was that the learned judge exercised his discretion improperly by, in the words of Howie AJA in S v Sobandla1992 (2) SACR 613 (A) at 617 g-h, sacrificing the appellant "on the altar of deterrence, thus resulting in his receiving an unduly severe sentence". In the circumstances of this case, however, we considered it proper to permit counsel for the appellant to argue the question of sentence on all aspects and he did so.

[19] The appellant is 48 years of age. He is married with three children who are dependent on him and he also supports six children of his deceased brothers. His wife is a teacher but is said to suffer from ill-health. The appellant himself injured his back in an accident some years ago and he still endures pain from time to time as a result. The most weighty considerations in the appellant's favour, however, are his clean record and his excellent employment record until he started taking bribes in 2000. He is clearly a man of some intelligence and might still be able to make a useful contribution to society. It is of some significance that he was continuously employed in the Department of Defence for 22 years and that he worked his way through the ranks and eventually achieved the position of captain.

[20] Unfortunately for the appellant, the factors mentioned above are not the only criteria that need to be taken into account in determining a proper sentence. It is well-established that a court should also have regard to two other vital considerations – the nature of the crime, including the perpetrator's participation, and the interests of the community.

[21] It is important not to under-estimate the gravity of the offence of bribery. It impacts adversely not only on the moral fibre of society but on the economic growth of the country. It discourages investment, leads to a loss of respect for authority and

government and is inimical to public administration. It is vital for the public to have complete confidence in the integrity and efficiency of public servants but bribery emasculates that very trust and confidence. All of this has been emphasised in a number of recent judgments of this Court and is clearly of relevance when the question of sentence is in issue.

[22] The appellant's conduct is to be deplored. He did not succumb to sudden temptation and then resist from further involvement. He participated in the offence in a cynical manner for more than two years and on thirty separate occasions and showed no remorse whatsoever. Treasury's demands that the financial regulations be complied with were simply ignored. Moreover his conduct enabled Millenium to make enormous profits from the Department of Defence to the ultimate detriment of the people of this Kingdom. It is true that there is no evidence that the appellant knew of the extent of Millenium's mark-up but he must have realized that Millenium's charges were substantially higher than those of other travel agents.

[23] While the sentence imposed by the trial judge was not lenient, it was certainly not startlingly inappropriate or so unreasonably severe that we are at large to disturb it. The further argument advanced on the appellant's behalf by his counsel – that the learned judge misdirected himself by paying too little regard to the appellant's personal circumstances and over-emphasising the deterrent effect of sentence – is without merit. On a careful analysis of the judgment it is apparent that he weighed up all relevant factors in a balanced manner. There were no misdirections in his approach to sentence and there is no reason for us to interfere with his decision.

[24] The result is that the appeal is dismissed.

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L S MELUNSKY
JUDGE OF APPEAL

I agree:

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J H STEYN

PRESIDENT OF THE COURT OF APPEAL

I agree:

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F H GROSSKOPF

JUDGE OF APPEAL

For the Appellant : J. Engelbrecht

For the Respondent : H H T Woker