IN THE COURT OF APPEAL OF LESOTHO

C of A (CRI) 13/2007

In the matter between:

CITY CENTRE MASERU TRAVEL AGENCY (PTY) LTD
Appellant

And

THE CROWN **Respondent**

CORAM: RAMODIBEDI P
MELUNSKY JA
NOMNGCONGO JA

HEARD: 6 OCTOBER 2008
DELIVERED: 17 OCTOBER 2008

SUMMARY

Criminal Law – fraud – appellant issuing air tickets for travel by government ministers and officials between Maseru and other destinations – invoices forwarded to the department of government not limited to price of tickets but containing extra charges and commissions including a 5% levy to off-set a withholding tax (source tax). Government officials in Treasury effected payment

of amount reflected on invoice without knowledge of increased charges. Appellant convicted in High Court on 1801 counts of fraud but only in respect of the addition of 5% in respect of source tax and sentenced to a substantial fine.

On appeal, held:

1. *There is in general a duty on the trier of fact to weigh up the evidence of Crown witnesses against that of the witnesses for the defence;*

2. *In casu the only defence witness was unsatisfactory, and her evidence contradictory and evasive. She nevertheless emphasized her belief that as government had received both the tickets and the invoices in all cases, the responsible officers, in making payment of the amount reflected on the invoices, had accepted that the appellant was entitled to receive payment of the additional charges;*

3. *The Court a quo failed to consider the evidence of the defence witness in detail and, in particular, failed to have proper regard to her belief that the officials in government had accepted the charges. No finding was made on these aspects;*

4. *In the circumstances, and taking into account all the facts, this Court held on appeal that there was a reasonable possibility that the defence witness might have entertained the aforesaid belief and, if so, that the appellant might not have had the intent to defraud the government.*

   Appeal accordingly allowed and conviction and sentence set aside.

JUDGMENT

MELUNSKY, JA

[1] The appellant, a company incorporated in Lesotho, carries on business as a travel agent in Maseru. Among its customers is the government of Lesotho whose ministers and officials frequently require return air tickets between Maseru and destinations in Africa and elsewhere. During the period covered by the charge sheet (referred to in para [3] below), when air travel was required by a functionary of the government the usual practice was for the ministry concerned to submit a passage requisition to the appellant which would then make a suitable booking with an airline. Once the booking was secured the appellant would deliver the ticket to the passenger or a government employee and subsequently submit an invoice to the relevant department. The government, through the Treasury, paid the appellant the amount reflected on the invoice, albeit that payment was invariably made a number of months later.

[2] The criminal litigation which culminated in this appeal arose out of the fact that the amount claimed on each invoice was not limited to

the ticket price. Unbeknown to the Treasury officials who authorized payment, the globular figure that appeared on each invoice covered not only the price of the ticket but additional amounts alleged by the appellant to represent fees, commissions and/or charges to which it claimed to be entitled.

[3] After carrying out an investigation and becoming aware of the facts, the Crown caused the appellant, represented in the proceedings by its managing director, Ms Mampe Khaebane, to be indicted in the High Court on 1956 counts of fraud, some of which, however, turned out to be duplications. The essence of each of the remaining 1801 counts was the same, namely that the appellant unlawfully and with intent to defraud, represented to various government departments and/or the government of Lesotho that the cost of each air ticket was the amount appearing on each invoice. This, according to the indictment, induced the relevant department and/or the government to pay the appellant amounts in excess of the cost of each ticket. The total of the alleged overcharges, which were duly paid to the appellant, amounted to M1 634 157.50. Two aspects of the indictment which should be noted are the following: first, that in each case the misrepresentation was alleged to have been

made "by submitting the invoices …. to the [relevant] department for payment"; and, second, that the appellant when it made each misrepresentation, knew full well what the price of each air ticket was.

[4] The appellant pleaded not guilty to all counts but after a lengthy trial was convicted by the Court *a quo* (Majara J and an assessor), apparently on all counts, but only to the extent of M1 481 136.30. It was sentenced to pay a fine of M2 000 000. The appellant appeals to this Court against both conviction and sentence. There is also a cross-appeal by the Crown on the basis that the trial Court erred in finding that the total amount by which the government had been defrauded was only M1 481 136.30 and not of M1 634 157.50.

[5] Apart from arguing the case on the merits, counsel for the appellant submitted that various irregularities had occurred prior to and during the course of the trial and that these had "tainted" the evidence placed before the trial court. Similar submissions were indeed put forward in the Court *a quo* but were rejected. I will deal with certain of the alleged irregularities later in this judgment as I consider it desirable to consider the merits first. Each alleged fraud in this case was

committed by means of a misrepresentation, viz. by submitting an invoice to the government department concerned. On the appellant's behalf it was submitted that each invoice reflected nothing more than the appellant's charge to the Lesotho government. If this is so the Crown case must obviously fail because, in the absence of a false representation as alleged in the indictment, the Crown will not have established an essential element of the case which it sought to make. Equally important is whether the Crown has established that the alleged misrepresentations were made with intent to defraud.

[6] Now it is clear that the content of each invoice submitted to the government department in question is of considerable importance. In the appellant's invoice book, each customer transaction was reflected on an original invoice (referred to in evidence as "the white copy"), and two duplicates, a yellow copy and a green copy used by the appellant to monitor payment. The white copy was sent to the customer for payment and it is mainly this copy with which we are now concerned. A typical white copy was addressed to the government department and the details written thereon recorded the name of the passenger, the ticket number, details of the route, the dates of travel and, to use a neutral expression,

the amount payable to the appellant. The right hand side of each invoice contained a printed schedule which was for the purpose of enabling the appellant to insert any additional charges but this portion of the white copy was detached from the original invoice that was submitted to the line ministry. Ms Khaebane, who was the only defence witness, told the Court *a quo* that the right hand side of all of the white copies should have been blank and that the insertion of the printed schedule on the copies which formed the basis of the charges was due to a printer's error. However that may be, the Crown's complaint is that the amount reflected on each invoice was in excess of the ticket price and that the government made payment on the strength of the invoice and in ignorance of the additional charges.

[7] Now counsel for the appellant submitted that the word "cost" does not appear on any of the invoices; that the Crown case was based on the terms of the invoices; that the misrepresentations relied upon in the indictment had therefore not been established. It is, of course, quite clear that the Crown is bound by the misrepresentation upon which it relies in the indictment (see **S v Hugo** 1976 (4)SA 536(A) at 540 G). It also seems to me that the invoices submitted by the appellant are

somewhat ambiguous. Although it is not stated on any invoice that the amount payable to the appellant represented the cost of the air ticket referred to therein, there is also no indication that the amount claimed included charges over and above the ticket price. It does not appear to me, however, that the prosecution case is to be limited solely to the invoices themselves without regard to background and surrounding circumstances. The invoices were, after all, merely one aspect of business transactions between a supplier of services and a customer. Consequently this Court might properly have regard to the reasonable expectations of the government and to the intentions of the appellant, while by no means ignoring the contents of the invoices which, of course, are of considerable importance. But what has to be decided on a conspectus of all the evidence is whether the Crown established the appellant's guilt beyond reasonable doubt.

[8] Before proceeding further I should perhaps refer to an additional submission by counsel for the appellant. She contended that in counsel for the respondent's opening, he indicated that the invoices "speak for themselves". What Crown counsel in fact said in opening was that "the document says something simply that isn't true and that is your fraud"

but he also added that the government relied on the invoices because of the "unusual situation of these being travel agents". And travel agents during the entire period covered by the indictment, received their commission from the airline and all other customers of the appellant save for the government, were not charged any extra commissions.

[9] The Crown evidence established that three documents were required before payment is made to a supplier: the government's passage requisition (in the nature of a purchase order), the supplier's invoice and a payment voucher. The payment voucher prepared by the line ministry was not an authorization for payment but a document prepared by the ministry verifying that correct procedures had been followed and that the goods or services had been supplied. The three documents were forwarded to the Treasury where they were checked by officials in the examination centre. If certified for payment in that section, the certification was referred to the payment section where the cheque was printed for delivery to the supplier.

[10] Mr. Letsoela, the Deputy Accountant General in the Treasury testified that payment to the appellant was authorized on the basis of the

documents referred to above and that the amount paid to the appellant in respect of each transaction was the amount reflected on the invoice because it was assumed "that what appears on the invoice is the cost of the ticket". He added: "that was our assumption" and told the Court *a quo* that the Treasury relied upon the honesty of the appellant to furnish it with the correct information.

[11] Evidence was also given by four senior officials in the Treasury's examination section. These witnesses received the documents mentioned by Mr. Letsoela and they authorized the payments to the appellant. In each case the amount authorised was the figure appearing on the invoice.

[12] In 2000 the government imposed a withholding tax, referred to in the evidence as a "source tax", which authorized it to deduct 5% from the invoice amount due to certain suppliers of goods and services. The deductions were credited to the supplier's income tax account, thus reducing its tax liability at the end of each financial year. The source tax was a controversial measure. Coupled with the government's habitual late payments, the tax caused the appellant severe financial

embarrassment as it had to pay the airline within two weeks of the issue of the ticket and failure to make payment on time could have cost it the IATA licence which, in turn, would have meant the closure of its business.

[13] At some uncertain time, apparently during 2003 or 2004, an invoice from the appellant was brought to the attention of Mrs. Tladi, a chief accountant in the Lesotho Revenue Authority ("the LRA"). The LRA handles its own financial affairs and operates independently of the Treasury in this respect. Apparently the price of air tickets appears on the LRA's purchase order. As a result she met with Ms Khaebane who explained that the appellant had added 5% to each invoice to off-set the effect of the source tax deduction. Mrs. Tladi explained that this could not be done and the appellant thereafter submitted an amended invoice which excluded the additional 5%.

[14] Now it is clear from Mr. Letsoela's evidence that the government would not have made payment of the amounts charged by the appellant had it known of the appellant's additional charges which appeared only on the right-hand side of the invoices. The evidence of the officials in

the Treasury's examination section who authorized the payment was to the same effect. What is quite certain, according to the Crown evidence, is that the Treasury paid the appellant's invoices in ignorance of the appellant's practice of adding what amounted to a 5% surcharge to compensate it for the deductions made in respect of source tax. But it is not certain from the Crown evidence apart, possibly, from that of Mr. Letsoela, that the payments were effected on the assumption that the amount appearing on each invoice was the actual cost of the air ticket.

[15] The Court *a quo* concluded that the appellant was not entitled to add the 5% charge to the cost of each ticket but that there was a reasonable doubt as to whether it could mark-up its cost by adding the other commission to the ticket price. It further held that the failure to disclose the additional 5% charges amounted to a fraudulent non-disclosure and that the concealment of the charges was to be equated with an active misrepresentation. These conclusions resulted in the trial Court holding that the government had been defrauded to the extent of M1 481 136.30 and not in the amount of M 1 634 157.50, the sum referred to in the indictment.

[16] What appears to me to be of fundamental importance in this appeal is whether the Crown established that the appellant had the intent to defraud, which is an essential element of the offence. If this intention is found to be present, the conclusions arrived at by the trial Court might well have been correct. Assuming, as I do, that the existence of an intention to defraud has been proved *prima facie* on the Crown evidence, proof beyond reasonable doubt is dependent on all of the evidence, including that of the defence. In an able address before us, and with reference to his full heads of argument, counsel for the Crown detailed the many respects in which Ms Khaebane's evidence was unsatisfactory and unconvincing. There is no doubt that her evidence was contradictory in various respects and that her answers to questions in cross-examination were often evasive.

[17] It is also to be noted that Ms Khaebane's evidence on the critical question of source tax was far from satisfactory. At one point in her evidence she testified that the government knew that the appellant had added source tax and that the person in government who had been informed of this was the Minister of Finance. She later watered down her evidence by saying that the Minister knew that the appellant had a

problem and that it had added a "handling fee" but not specifically source tax to its invoices. These and other unsatisfactory and evasive replies under cross-examination were also drawn to our attention by counsel for the Crown. And while on the topic of source tax, it may be noted that, according to Ms Tladi, Ms Khaebane was told that the appellant could not add on source tax. We do not know when this occurred but following a meeting of the appellant's board of directors in the latter part of 2004, the appellant's practice of adding the 5% to the amount as source tax came to an end. From then on it was called a "handling fee".

[18] Despite the demerits of Ms Khaebane's evidence, it should not necessarily be rejected in its entirety. To do so would amount to the application of the maxim *falsum in uno falsum in omnibus*, an adage which, it has been pointed out, is both unreliable and illogical (see **S v Mokonto** 1971 (2) SA 319 (A) at 322 H-323A). There is one important aspect in which her evidence is confirmed by that of the Crown witnesses, namely, that government had in its possession both the air ticket and the invoice relating to the same journey. Throughout her evidence Ms Khaebane emphasized this point which, as I have indicated,

was factually correct as the ticket was indeed received by the Treasury, either before or after the journey, for the purpose of calculating the amount of the per diem allowance to which the passenger was entitled.

[19] At the material times it was not the practice in Treasury to collate the ticket with the invoice in order to compare the figures on each document. Although they were held in the same department, the ticket and the invoice were in different sections, they arrived at different times and for different purposes. I accept that they were simply never compared with each other. Ms Khaebane did not know of the internal workings of the government and she said as much. As far as she was concerned a line ministry of the Lesotho Government received the invoice and the passenger, who was an official in the same department, received the ticket. Moreover the ticket number was reflected on the invoice and the department concerned could easily have compared the two and observed the difference. The tenor and purport of Ms Khaebane's evidence was that such comparisons must have been made. In substance, therefore, her evidence was to the effect that the government knew at least that the amount appearing on the invoice

exceeded the price of the ticket and despite this the invoices were paid in full and, save on very rare occasions, without query or demur.

[20] The fact that the Treasury officials who effected payment did not know of the differences is of no consequence in so far as the witness's belief is concerned. This being a criminal matter the question is whether Ms Khaebane's explanation might reasonably possibly be true: in other words is it reasonably possible that the appellant, in the person of its managing director, believed that the government knew all along that the amount reflected on the invoice was more than the cost of ticket. If the answer is in the affirmative, it would be right to conclude that the Crown failed to establish that the appellant had the intention to defraud the government.

[21] Now it appears to me that in the circumstances of this case, the Court *a quo*, being the trier of fact ought to have weighed up the evidence of the Crown witnesses against that of the witness for the defence (see **Mahase** v **DPP** (C of A) 11 of 2006 at para [5]). This, of course, requires the trial Court to consider the evidence of the defence witness critically and, in particular, to assess and determine whether her

belief that officials in the government had accepted the appellant's charges was reasonably possibly true. A close reading of the reasons for judgment, however, indicates that this approach was not properly adopted by the trial Court. It is significant that the Court *a quo* held that it was "almost persuaded" by the defence submission that as the government had both the ticket and the invoice in its possession the information contained in the two documents was available to both the appellant and the government. Nevertheless the trial Court went on to hold that the fact that the appellant detached the right hand side of the white copy justified the inference that it "did not want government to see this information at the time the invoice was submitted" and this fact meant that there was only one inference that could be drawn, namely that the appellant did not want the government to "be privy to this information thereby representing a perversion and/or distortion of the truth".

[22] What the trial Court did, therefore, was to hold that the detachment of the right side of the white copy was decisive. What it should have done, in my view, was to have considered the reasons advanced by Ms Khaebane for detaching that part of the white copy

before sending the invoice to the government. It should also have weighed those explanations against the admitted fact that the government was in possession of both the ticket and the invoice and that Ms Khaebane apparently believed that the government had accepted the appellant's charges. However, the Court simply considered that the detachment of part of the white copy was the overriding factor and, moreover, did not furnish reasons for doing so. This is not to say that it is the duty of a trial Court to consider and deal with each and every justification or pretext raised by an accused, however fanciful it might be. But this is a special case as the Court was almost persuaded to acquit the appellant because the complainant had both documents available to it: but it nevertheless convicted, possibly with justification, but without furnishing adequate reasons for doing so, an unfortunate omission from a judgment that is in other respects well-considered.

[23] In all the circumstances I am not persuaded that the Crown has established beyond reasonable doubt that the appellant had the intention to defraud the government and on this ground this Court is obliged to give the appellant the benefit of the doubt and to set aside the conviction.

[24] It only remains to deal briefly with two of the preliminary points raised on the appellant's behalf. The first is that the search warrant that led to the seizure of all of the appellant's documents did not comply with the provisions of section 46 of the Criminal Procedure and Evidence Act 1981 as the warrant refers to no offence and the affidavits on which it was granted were not proved. In view of the conclusion at which I have arrived, it is unnecessary to decide whether these shortcomings amounted to an irregularity of such a nature that all the documents obtained thereunder were inadmissible at the hearing. It is, however, necessary to emphasise that the consequences of a search and seizure are serious, amounting to an invasion of privacy and the elimination of the right not to have one's property seized. In this regard I need say nothing more than that all of the statutory requirements and safeguards relating to both the issue and execution of a search warrant should be scrupulously observed.

[25] The second preliminary point relates to a meeting held between the Crown's investigating auditors and legal representative on the one hand and representatives of the appellant on the other. Leaving aside questions concerning alleged irregularities of the meeting and the

possible doubt concerning the admissibility of what was said by the appellants' representatives, it is a matter of concern that no proper record of the meeting was kept. All that needs to be said in this regard is that formal meetings between a suspect and representatives of the law-enforcement agencies are important events and the failure to keep a proper record as to what was said and what explanations were furnished might result in endless disputes of fact at a subsequent trial or even in the whole exercise becoming valueless.

[26] For reasons given the following order is made:

1. The appeal succeeds and the cross-appeal is dismissed;

2. The convictions and sentence are set aside and are replaced with the following:

> "The accused is found not guilty on all counts and is discharged".

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L.S. MELUNSKY
JUSTICE OF APPEAL

I agree:

_____
M.M. RAMODIBEDI
PRESIDENT OF THE
COURT OF APPEAL

I agree:

_____
T. NOMNGCONGO
JUSTICE OF APPEAL

COUNSEL FOR THE APPELLANT: ADV. M. KOLBE SC

COUNSEL FOR THE RESPONDENT: ADV. G.H. PENZHORN SC