IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) NO. 7/2011

In the matter between:

MILLENIUM TRAVEL AND TOURS (PTY) LTD — First Appellant

and

JAYAKRISHNAN APPUKUTTAN NAIR — Second Appellant

and

THE CROWN — Respondent

Heard : 11 April 2012
Delivered: 27 April 2012

CORAM: SMALBERGER JA
SCOTT JA
FARLAM JA

SUMMARY

Criminal law – fraud – whether misrepresentations alleged proved - bribery – whether amounts paid to officials bribes or genuine loans – sentence – whether sentences imposed by trial court appropriate.

JUDGMENT

FARLAM JA

[1] The first appellant, Millenium Travel and Tours (Pty) Ltd, the second appellant, Jayakrishnan Appukuttan Nair, and 'Mamolise Mary Kamohi were arraigned in the High Court before Mofolo AJ and an assessor on 280 counts of fraud relating to the supply of tickets for air travel and the transportation of luggage and cargo to the Lesotho Government, three counts of fraud relating to the purchase of foreign exchange, one count of fraud relating to the understatement to the Receiver of Revenue of the taxable income of the first appellant and four counts of bribery.

[2] At the end of the trial Mrs. Kamohi was acquitted on all the counts. The two appellants were acquitted on the fraud counts relating to the purchase of foreign exchange and the four bribery counts but convicted on all the other

counts. The trial court sentenced the first appellant on what I shall call the air ticket counts to a fine of M651,349 and sentenced the second appellant to a fine of M3,000,000 or ten years' imprisonment. On what I shall call the tax fraud count the first appellant was sentenced to a fine of M230,781 and the second appellant to a fine of M1,000,000 or 5 years' imprisonment. The appellants have appealed against their convictions and sentences. The Crown has cross-appealed against the acquittals of the appellants on the bribery counts and the sentences imposed in respect of the counts on which the appellants were convicted.

[3] On what I have called the air ticket counts the Crown alleged that the appellants had misrepresented the cost of the tickets which the first appellant had supplied to the Government by submitting invoices which reflected what

was stated to be the cost of the air ticket or transportation of luggage and cargo for the passenger for whom the ticket was supplied, whereas to the knowledge of the appellants the actual costs of the ticket, transportation of the luggage and cargo concerned was a lower amount which had been paid to the travel agent, airline or cargo company. In consequence of these misrepresentations, so the Crown alleged, the Government was induced to its prejudice to pay the higher amounts set forth in the invoices.

[4] The appellants were alleged to have defrauded the Government by fraudulently overcharging it in the manner described over a period of three years and the total amount by which it was over charged was M4,236,127.

[5] The tax fraud count related to the 2002 tax year. It was alleged by the Crown that the appellants fraudulently

understated the first appellant's taxable income by at least M1,2 million.

[6] On the bribery counts, on which the appellants were acquitted, they were alleged to have corruptly made payments to four officials, Machesa, a chief accountant in the Department of Health (who received in total M70,060 from the appellants), Rasethuntśa, an accountant in the Ministry of Finance (who received in total M17,620 from the appellants), Kholoane, a lieutenant colonel in the Defence Force (who received a total of M20 000 from the appellants) and Mahase, a captain in the Defence Force (who received M89,468 from the appellants).

[7] The Crown case against the appellants was based to a substantial extent on documents the Crown had obtained from the premises of the first appellant pursuant to the

execution of a search warrant. Copies of the documents seized were supplied to the appellants' attorneys before the trial began and in terms of an agreement between counsel for the Crown and the appellants the documents were placed before the court without proof. The agreement reserved to both sides the right to object to the production of any particular document, in which event the document would have to be proved in the ordinary way but neither side availed itself of this right in respect of any document. During the opening address by counsel for the Crown reference was made to this agreement that all the documentary evidence would be placed before the court by consent, and counsel for the defence confirmed that this was so.

[8] Discussions took place between counsel for the Crown and the appellants in January 2005 and again in July

2006. After the January 2005 meeting the attorneys acting at that stage for the appellants made written representations to the Crown in which they set out the appellants' defence on the air ticket counts. What they said included the following:

> 'The accused are charged with fraudulently misrepresenting to the Government that the cost of the air ticket/accommodation/transportation of luggage and cargo for the different passengers was the amount indicated on the corresponding invoices. Significantly, on none of the relevant invoices is it indicated that the amount represented the cost of the air ticket/accommodation or transportation of luggage and cargo. We therefore respectfully submit that the accusation has no substance in law.
>
> ……
>
> We are instructed that the fees charged by our clients did not only include the cost of travel, accommodation and luggage. It also included compensation for their time spent, for telephone calls, for their expertise and for their professional services, amongst others.
>
> In the final analysis, it should be common cause that overcharging per se does not constitute a crime, neither by statute nor in common law.'

The issue between the parties on the air ticket counts was defined at the July 2006 meeting as being 'whether the

claims by the [appellants] were fraudulent as alleged by the Crown or genuine claims for services rendered as alleged by the [appellants].'

[9] The signatures and handwriting of the second appellant and Mrs. Kamohi (who it was agreed was at all relevant times in the employ of the appellants and acted in the course of such employment) as appearing on the documents in the prosecution bundle were admitted. It was also admitted that the first nine paragraphs of the General Preamble to the Indictment were not in dispute. They read as follows:

> '1. Accused No. 1 is Millenium Travel and Tours (Pty) Ltd (hereinafter referred to as Millenium Travel) a duly registered company incorporated on 11 May 2000 in terms of the Company Laws of the Kingdom of Lesotho, with its principal place of business at Ground Floor, Agric Bank Building, Kingsway, Maseru. The directors of Millenium Travel are JAYAKRISHNAN APPUKUTTAN NAIR and BEENA JAYAKRISHNAN NAIR. Millenium Travel operated at least two bank accounts in their name in Lesotho:

Nedbank	Account No. 021000021838
Standard Bank	Account No. 400975219004

2. Accused 1 is represented herein by JAYAKRISHNAN APPUKUTTAN NAIR, its Director, in his representative capacity for the purposes of Section 338 (2) of Act 9 of 1981.

3. Accused No. 2 is JAYAKRISHNAN APPUKUTTAN NAIR, an adult male, citizen of the Republic of India, holding Indian passport number A1263106 permanently resident in Trivandrum, India and presently residing at 123 Maluti Road, Maseru, in his personal capacity.

4. Accused No. 3 is MAMOLISE MARY KAMOHI, an adult female, citizen of Lesotho, holding Lesotho passport number N213888, and South African passport number 437943976, an employee of Millenium Travel.

5. Millenium Travel, conducted business as a travel agent, and acted at all times through Accused No. 2, and/or Accused No. 3, and/or BEENA NAIR.

6. Prior to the incorporation of Millenium Travel, Accused No. 2 was during the period 7 January 2000 to 30 April 2000 a director and shareholder of East West Travel and Tours (Pty) Ltd, a duly registered company incorporated on 26 May 1977 in terms of the Company Laws of Lesotho and trading from Ground Floor, Agric Bank Building, Kings Way Street, Lesotho. The other director of East West Travel and Tours (Pty) Ltd was V.D.G. NAIR. Accused No. 3 was employed by East West Travel and Tours. Prior to being appointed as a director on

7 January 2000 Accused No.2 was employed by East West Travel and Tours (Pty) Ltd.

7. Millenium Travel facilitated the travel arrangements of various government officials, by booking and procuring and/or the conveyance of freight and/or personal effects tickets for travel by air, whereupon they would in turn, and for these services, invoice the relevant departments within the Government of Lesotho, for payment.

8. Millenium Travel was not registered with the International Association of Travel Agents (IATA), and could not issue these tickets for air travel themselves. The air tickets were obtained from various travel agents situated within the Republic of South Africa. The particular travel agent in South Africa who issued the ticket, would invoice Millenium Travel for the cost of the air ticket less the amount of any commission due to Millenium Travel, who would pay to the South African travel agent, the amount reflected on the said invoice. Some of these payments were effected by SWIFT transfers from the abovementioned bank accounts of Millenium Travel to the South African travel agent. Other payments were made by debiting an American Express Card, Account No. 3768011196 21008 7643 in the name of Accused No. 2.

9. Millenium Travel would in turn issue an invoice for the air ticket to the relevant department within the Government of Lesotho, which department would authorize and cause to be issued a cheque as payment of the amount reflected in the invoice in some instances less 5% source tax. The invoices were authorized by Accused No. 2 and/or Accused No. 3. The amounts reflected on the invoices of Millenium Travel to the relevant department of the Government of Lesotho were higher than those

> amounts reflected on the invoices of the South African travel agents as being the cost of the air ticket.'

[10] On the bribery charges it was agreed that the payments as alleged were not in dispute and that what was in issue was 'whether the payments were corrupt, as alleged by the Crown, or genuine loans, as alleged by the [appellants].'

[11] During the course of the Crown case counsel appearing for the appellants largely based his cross-examination on the documents seized at the first appellant's premises pursuant to the search warrant.

[12] During the evidence of the second appellant his counsel handed in the search warrant and started questioning him on it. Counsel for the Crown then placed it on record, as he put it, that the documents before the

court were there in terms of an agreement between the parties. The appellants' counsel then said: '. . . my learned friend is correct that the documents they have placed before court are there by agreement.'

[13] On appeal counsel for the appellants contended (a) that the search warrant had not been lawfully issued and (b) that it had not been lawfully executed because the first appellant's premises had not been searched and the documents seized by peace officers, to whom the warrant was addressed, but by officials of the Directorate on Corruption and Economic Affairs who are not peace officers, as this Court held in Directorate on Corruption and Economic Offences and Others v Dlamini (C of A (CIV) 21/2009), an as yet unreported decision of this Court delivered on 23 October 2009. Counsel submitted that in the circumstances the documents seized should not have

been admitted in evidence and that the appeal should accordingly be allowed on this point alone.

[14] I do not think that this submission should be upheld, in view of the agreement to which I have referred. In unambiguous terms it was agreed that the documents could be placed before the court. Counsel for the appellants cross-examined the main witness for the Crown Mr. White, the forensic accountant whose report was based on them, on the strength of the documents. No basis accordingly exists for holding that they should have been excluded at the trial.

[15] Counsel for the appellants also relied on the defence foreshadowed in the written representations made by the appellants' attorneys to the prosecution after the January 2005 meeting, namely that as the Crown had failed to

prove the allegation in the indictment that by submitting the invoices the appellants had represented that the amounts set out therein were the costs of the tickets. I do not think that that submission can be upheld either. It is true that the invoices did not say in terms that the amounts set out therein were the costs of the tickets but that is what they conveyed to those to whom they were addressed and the second appellant knew this. A similar point arose for consideration in City Center Maseru Travel Agency (Pty) Ltd v The Crown LAC (2007-2008) 393. In that case the travel agency concerned also sent invoices to the Government, containing amounts claimed in respect of air tickets supplied to the Government, which amounts were higher than the ticket price but were alleged to represent 'fees, commissions and/ or charges to which the agency claimed to be entitled.' The defence raised here was also raised by the appellant in that case and was dealt with

as follows by Melunsky JA in para 7 of the judgment of the Court (at 396 H – 397 C), as follows:

> '[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 540G. 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.'

[16] In this case the evidence reveals that the appellants received payment vouchers from the Government together with each payment. In most cases the payment was described as being for 'payment of air tickets'. It was accordingly clear to the second appellant that the Government thought it was paying the price of the tickets; that was what can be described, to use Melunsky JA's language, as the 'reasonable expectation' of the Government. The second appellant did nothing to remove the Government's expectation in this regard. He clearly intended it to continue to believe that the amounts reflected on the invoices it received were in respect of the cost of the tickets. It follows that the Crown's allegation that the appellants misrepresented the cost of the tickets was established.

[17] It is furthermore clear that no amounts were honestly included to cover 'compensation for time spent, for telephone calls, for .... expertise and for professional services'. I agree with counsel for the Crown's submission that there were no such charges and that 'this whole issue of so-called additional charges was an afterthought when the second [appellant] was confronted by claims which would otherwise clearly be fraudulent.'

[18] That this is so appears, for example, from a consideration of the facts relating to count 25. In this count the Government order for air travel was dated 8 August 2000. The appellants' invoice for M32,827 is dated the same day. The ticket was issued on 10 August 2000. The invoice from Sure Travel (who made the booking on behalf of the appellants) is dated 15 August 2000 and reflects the price of the ticket as M20,633-70. The

overcharge was M12,193-70 for 'work' carried out within one day, i.e. 8 August 2000.

[19] White's analysis of the overcharges showed a range of between 5 and 280 percent and that there was no consistent basis on which the mark up was arrived at. When the second appellant was pressed in cross-examination on the topic of the amounts charged he claimed that he kept a worksheet in respect of each ticket at the relevant time and that the worksheet was invariably attached to the first appellant's copy of each invoice. When asked to explain what happened to these worksheets he said they were among the documents seized by the officials of the Directorate on Corruption and Economic Offences and that the documents seized were tampered with in that the worksheets were removed by those who took part in the search.

[20] This explanation is patently unacceptable. Copies of the documents seized were given to the defence years before the trial began and even before the representations to which I have referred were made to the prosecution. At no stage before the second appellant gave evidence was it suggested that worksheets which should have been attached to the invoices and thus part of the records seized and which clearly would have been important for the appellants' defence had not been made available. Furthermore the existence of these worksheets was not part of the defence case until the second appellant testified. No questions based on their existence were put to the witnesses who testified in support of the Crown case. It is clear in my view that no worksheets ever existed and that the alleged extra charges to which the second appellant referred were figments of his imagination.

[21] I am accordingly satisfied that the appellants were correctly convicted on the air ticket counts.

[22] I turn now to deal with the tax fraud count. Here the facts were not in dispute. It was not disputed that the first appellant under-declared its income for the financial year ended 31 March 2002 by at least M1,230,781. In the circumstances of this case an under-declaration to that extent could not have occurred honestly. I say this because the financial statements submitted to the Receiver for the year in question declared an income of M348,970-00 while operating expenses of M311,495-00 were claimed, resulting in a net profit of M37,475-00, which was amended after correspondence with the Receiver to M51,053-00. The assessment raised on that figure was tax payable in an amount of M5,172-30. On the additional

M1.2 million income the additional tax would have amounted to approximately M430,000-00.

[23] Counsel for the appellants submitted that the appellants should not have been convicted on this count. He referred to the fact that when the Crown instituted proceedings against the appellants the Lesotho Revenue Authority (what I shall call in what follows 'the LRA') was in the process of assessing the appellants, who still had to react to the LRA's amended assessment. He contended further that the Crown could not properly institute criminal proceedings against the appellants based purely on what he called 'their preliminary self-assessment submissions to the LRA'.

[24] I do not agree. A taxpayer's tax return cannot be regarded as an opening offer in a process of negotiation

with the revenue authorities, aimed at arriving at the amount of tax payable by the taxpayer. The statement made in the return was clearly false and dishonestly made with the intent of defrauding the revenue authorities by inducing them to make an assessment of the income tax payable by the first appellant on the basis of the under-declared chargeable income of the first appellant. The under-declaration was indeed calculated to prejudice the revenue authorities.

[25] It was not necessary for the Crown to adduce evidence from any official from the LRA because, as counsel for the Crown correctly submitted, the making of the misrepresentation completed the fraud: see R v Kruse 1946 A.D. 524. In the circumstances it is clear that the appellants were correctly convicted on the tax fraud count.

[26] I turn now to the four bribery counts on which the appellants were acquitted. The duties of the four officials who, the Crown alleges, were bribed by the appellants all involved interacting in some way or other with the appellants. Machesa, who was the recipient of the payments referred to in the first bribery count (count 428) was the chief accountant in the Department of Health, who worked with travel agents such as the first appellant. Rasethuntśa, who was the recipient of the payment referred to in the second bribery count (count 429), was an accountant in the Ministry of Finance, whose duties encompassed arranging travel abroad for members of the Ministry and the receipt and payment of the first appellant's invoices. Kholoane, the recipient of the payments referred to in the third bribery count (count 430), was attached to the Defence Force headquarters. His duties included arranging for travel for members going

abroad for training. The recipient of the payments referred to in the fourth bribery count (count 431), Mahase, was a captain in the Defence Force whose duties included ensuring that members travelling abroad had the correct visas.

[27] It will be recalled that in the discussions between counsel for the Crown and the appellants before the trial began it was agreed that the issue between the parties was whether the payments made to the four persons mentioned in the bribery counts were corrupt, as alleged by the Crown, or genuine loans, as alleged by the appellants. In my opinion it is clear that unless the payments (which were not in dispute) were genuine loans there is no escape from the conclusion that they were corrupt as no other basis for their being made has been suggested. For the reasons that follow I am satisfied that they were not genuine loans.

[28] To start with, if one has regard to the total amounts lent as compared with the salaries earned by the first three recipients it was unlikely that the amounts paid, if loans, could have been repaid. Machesa, who received amounts totalling M70 000 from January 1999 to August 2001 was earning M6,640 per month in July 2004. Rasethuntśa, who received M17,620 between April 1999 and October 2001 was earning M3,137 per month in July 2004. Kholoane, who received M20 000 between April 2002 and April 2003, was earning M3,061 per month in February 2005. (The fourth recipient, Mahase, who received M89,468 between October 2000 and July 2003, was earning M2,440 per month in February 1995 but no evidence was put before the court as to what he earned at the time he received the payments referred to.)

[29] Among the documents seized at the first appellant's premises were payment vouchers reflecting amounts as loans to various persons. On the vouchers where the names of the recipients on the bribery counts appear there is no indication of the payment being loans. As counsel for the Crown correctly submitted, 'if such detailed notes were kept of loans made in small amounts, then surely if the payments in respect of the bribery counts were indeed loans, then they would similarly have been recorded on the payment vouchers as loans, particularly bearing in mind the total amount involved, M220,048-49.' The total amounts allegedly lent were also not reflected as loans in the first appellant's taxation and financial records, which is something one would have expected if they had been loans.

[30] Furthermore the third accused testified that on a number of occasions the four persons mentioned in the

bribery counts came to the office, went into the second appellant's office and later the second appellant came out with them and instructed her to pay them money, after which the relevant payment vouchers had to be endorsed 'BP'. According to the second appellant the letters 'BP' stood for 'business programme', though he conceded that they might have stood for 'business promotion'.

[31] The second appellant alleged that the advances made to Machesa were all repaid. He said he kept a careful record of these payments and their repayment. This record which is dated 21 February 2005 was handed in as Exhibit BB. The last two alleged repayments, which were said to have been made by Machesa after he retired, were allegedly made by way of two Standard Bank cheques of which the numbers were stated. The second appellant was unable to explain why his bank records do not reflect these

payments. The representations made by his attorneys on 1 March 2005, eight days after the date on Exhibit BB, do not refer to these repayments, another aspect the second appellant could not explain. According to the second appellant the amounts paid to Machesa were loans in respect of his son's studies at the University of Cape Town. But the amounts ranged from M50 to M100 to M1,000 to M5,000. As counsel for the Crown submitted they were clearly petty cash advances, which moreover were marked 'BP' on the appellants' cash payment vouchers. Machesa testified for the Crown and said that one of the amounts he received was M30,000 which he repaid after two or three days. The purpose of the payment was so that Machesa could prove to the university that he had sufficient funds to finance his son's studies. No trace of any repayments from Machesa was found in the appellants' records.

[32] Machesa said the second appellant gave him sums of money, apart from the M30,000, as presents. When asked why he thought the second appellant gave him these presents he said he thought it was to treat him well and that he did treat him well, by paying his invoices timeously. He added that he did the same for other agents as well. It is of course trite law that it is a crime to bribe an official to do his duty. See R v Patel 1944 AD 511 at 522 and S v Van der Westhuizen 1974 (4) SA 61 (C) at 63 D-F.

[33] As I have said, it was not disputed that the second appellant paid some M89,000 to Mahase over a period of three years. The second appellant, departing from the agreement between his counsel and counsel for the Crown that the issue on this count as on the other bribery counts was whether the amounts he paid were 'genuine loans', said the amounts he paid to Mahase could be for various

reasons, some of which he could not recall. Among the amounts he gave Mahase were for purchases of African wooden handicraft items in Pretoria and for pigs and sheep for braais and office parties. It is difficult, if not impossible, to reconcile this evidence with the payment vouchers in respect of Mahase which describe the payments to him as being in respect of BP (whether those letters stood for 'business programme' or 'business promotion'). In respect of this count also the second appellant claimed that he had had documents in his records which explained what each payment was for. These documents, like the worksheets I have mentioned above, had mysteriously disappeared from the documents seized from the first appellant's offices, something which was only mentioned by him in his evidence.

[34] I am satisfied on this count also that the appellants should have been convicted. It follows from what I have said that the Crown's cross-appeal in respect of the bribery counts must be upheld.

SENTENCE

[35] I turn now to consider the appeals against the sentences imposed brought by the appellants, who allege that the sentences imposed by the trial court are excessive, and by the prosecution, which contends that those sentences were disturbingly inadequate. In view of the fact that I have found that the appellants should also have been convicted on the bribery counts it is necessary to consider what sentences should be imposed on those counts.

[36] Counsel for second appellant submitted that the court *a quo* erred in sentencing the second appellant in his

personal capacity to the fines imposed upon him because, so it was argued, to do so is contrary to section 338 (2) (c) of the Criminal Procedure and Evidence Act 9 of 1981, as amended. Section 338 (2) (c), as far as is material, provides:

> '(2) In any criminal proceedings [against a company] .... a director or servant of a corporate body shall be cited as a representative of that corporate body, as the offender and thereupon, the person so cited may, as such a representative, be dealt with as if he were the person accused of having committed the offence in question; Provided that –
>
> (c) If the person representing the corporate body is convicted, the court convicting him shall not impose upon him *in his representative capacity* any punishment, whether direct or as alternative, other than a fine, even if the relevant law makes no provision for the imposition of a fine in respect of the offence in question and such fine shall be payable by the body corporate and may be [recovered] by attachment and sale of property of the corporate body.' (The italics are mine.)

(The word I have placed in square brackets is the word used in the corresponding South African section, on which

the Lesotho section is modelled. The word used in the Lesotho section is 'recorded', which is obviously a misprint.)

[37] It is clear that the second appellant's contention in this regard is not correct. The subsection deals with the sentence which may be imposed in effect on the company by imposing it on the person representing it in his representative capacity. It does not apply to a director or servant of the company, who is also an accused, in his personal capacity.

[38] In view of the fact that I have come to the conclusion that the Crown's cross-appeal against the sentences imposed on the second appellant must succeed I do not propose dealing separately with the rest of the appellants' grounds of appeal against the sentences imposed.

[39] As was pointed out in Ranthithi and Another v R; R v Ranthithi and Others LAC (2007 2008) 245 at para 34, sentence being a matter which pre-eminently lies at the discretion of the trial court, a court of appeal will not ordinarily interfere in the absence of a misdirection resulting in a miscarriage of justice. This Court is empowered to quash the sentence imposed at the trial and to substitute such other sentence warranted in law (whether more or less severe) as it thinks ought to have been passed: see s 9 (4) of the Court of Appeal Act 10 of 1978, as amended.

[40] In determining a proper sentence it is necessary, as this Court has repeatedly held, to have regard to the triad consisting of the offence, the offender and the interests of society: see Ranthithi's case, *supra*, at 255 D–F; Lebeta v R LAC (2007-2008) 220 at 236 I–J; R v Thejane LAC (2007-

2008) 420 at 423 B-C. The offences of which the appellants have been convicted, fraud and bribery, are very serious. They were committed for reasons of personal gain; they were premeditated and the air ticket frauds and bribery offences were committed over an extended period of time. The harm done to Lesotho by offences of bribery has been extensively considered in numerous judgments of this Court, many of which are mentioned in The Crown v Reatile Thabo Mochebelele and Another, C of A (CRI) 12/2009, an as yet unreported judgment of this Court delivered on 10 December 2009 at para 7. See also paras 8 and 9 of the judgment in that case where reference is made to two South African cases on the seriousness of corruption and so-called 'white collar' crimes (such as the frauds of which the appellants have been convicted).

[41] Before I consider the circumstances of the second appellant I shall deal with the position of the first appellant, where there are no personal circumstances to be considered and the interests of society are clear. The first appellant being a company can only be sentenced to fines. Counsel for the Crown submitted that the fines imposed by the trial court were disturbingly inadequate and inappropriate, because, so counsel argued, the first appellant 'is still substantially benefiting from its crimes'. This argument overlooks the fact that the first appellant was in effect a one-man company run by and for the second appellant. At the end of the 2003 financial year, i.e., on 31 March 2003, it had current assets according to its balance sheet of M560 720. The Crown did not suggest that this figure was not correct and it was presumably verified by the first appellant's accountants. The bank balance must have been less than that figure. All the

indications therefore are that the first appellant did not retain the fruits of its crimes. The probabilities are overwhelming that they were taken by the second appellant, who must be made to disgorge them. In the circumstances I do not think that a basis exists to disturb the sentence imposed on the first appellant by the trial court in respect of the air ticket fraud counts.

[42] In respect of the tax fraud, which in the event failed in its object because the first appellant did not succeed in obtaining an assessment based on the low amount of taxable income declared, I do not think it necessary to increase the fine imposed by the trial court. In this regard I am mindful of the fact that the LRA will, if so minded, be able to impose additional tax on the first appellant in terms of Division II of Part XI of Chapter IV of the Income Tax Act 9 of 1993, as amended.

[43] The bribery counts were clearly closely linked to the frauds. The officials were obviously bribed to enable the moneys overcharged under the invoices to be paid over to the first appellant. In the circumstances the most sensible way to deal with these counts as far as the first appellant is concerned is to impose a fine approximately equal to the amounts of the bribes paid, i.e. M220 000 on the four bribery counts taken together.

[44] I turn now to deal with the sentences which should be imposed on the second appellant. The crimes have been considered above. According to his counsel, his personal circumstances were the following:

(a) he was a first offender;

(b) the case was pending for seven years and he was thus subjected to what amounts to the ordeal of having charges of this kind hanging over his head for a lengthy period;

(c) he is the breadwinner of his wife (who does not work) and a minor child;

(d) he is sickly (he has a heart problem) and because of the stringent nature of his bail conditions he was not allowed to consult doctors as required. (I assume this refers to doctors outside Lesotho);

(e) he was subject to stringent bail conditions which required him to report to the anti-corruption offices on a daily basis for seven years and as a result he could not leave Lesotho to visit his elderly and ailing parents in India.

[45] The third factor in the Zinn triad is the interests of society. I think that it is clear that it is necessary in the interests of this country, and indeed in the interests of consistency, that the message sent out by the previous judgments to which I have referred (which, as I have said, are collected in the Mochebelele case) should not be diluted

or cancelled out by the sentences imposed on the second appellant in this case as would happen if the sentences imposed by the trial court were upheld. The cases in question have made it clear that offences of the seriousness of those in respect of which the second appellant has been convicted call for custodial sentences, coupled with heavy fines so as to ensure as far as possible that the money which the second appellant made as a result of these offences should be disgorged. We do not know how much he personally gained from the offences he committed. But as I have said it is overwhelmingly probable that the fruits of the air ticket fraud counts were taken out of the first appellant by the second appellant. We do not know how much the Crown will be able to recover of the fines imposed on the first appellant or indeed whether any amount at all will be recovered. Nor do we know what fine the second appellant can afford to pay. This is because he has

refrained from placing the necessary information before the Court.

[46] Counsel for the second appellant submitted that the court *a quo*'s failure to consider the second appellant's capacity to pay the fines imposed constituted a misdirection. I do not agree. There is plenty of authority for the proposition that a judicial officer having decided to impose a fine ought to enquire as to the means of the accused. But that is the case where the purpose of the fine is to keep the accused out of prison: cf R v Nhlapo 1954 (4) SA 56 (T) at 58 G-H. But in my opinion that does not apply where the purpose of the fine is not to keep the accused out of prison but to encourage him to disgorge some or all of his ill-gotten gains. As I have said I do not agree with the trial court's approach as far as the sentences imposed on the second appellant are concerned. I do not think that

this is a case where one should strive to keep him out of prison. But this is a case where one should give him an incentive to pay back to the Crown the proceeds of his criminal activity.

[47] In my view the appropriate sentences to impose on the second appellant in respect of the offences of which he has been convicted are those set out in the order to be made.

[48] The following order is made:

1. The appeals brought by the first and second appellants are dismissed.

2. The cross-appeal brought by the Crown is allowed save as regards the appeal in respect of the sentences imposed on the first appellant.

3. The acquittals of the first and second appellants on counts 428 to 431 are set aside and substituted in their stead is the following order:

> 'The first and second accused are convicted on counts 428 to 431 and are sentenced thereon as follows:
>
> A The first accused is sentenced to a fine of M220 000 on counts 428 to 431 taken together.
>
> B The second accused is sentenced to eight years imprisonment on counts 428 to 431 taken together, such sentence to be served concurrently with the imprisonment imposed on counts 1 – 233 and 457-503.'

[49] The sentences imposed by the trial court on the second appellant are set aside and replaced with the following:

(A) On counts 1–233 and 457-503 taken together, 8 years imprisonment and in addition a fine of M3 million or four years imprisonment;

(B) On count 457A 3 years imprisonment to be served concurrently with the sentence of imprisonment imposed on counts 1-233 and 457-503.

I.G. FARLAM
JUSTICE OF APPEAL

I agree:

J.W. SMALBERGER
JUSTICE OF APPEAL

I agree:

D.G. SCOTT
JUSTICE OF APPEAL

For the appellants	:	Dr. K.E. Mosito KC and Adv M. Rafoneke
For the respondent	:	Adv G.H. Penzhorn