

IN THE HIGH COURT OF LESOTHO

In the matter of :

R E X

vs

MOITSUPELI JEFFERY LETSIE	ACCUSED 1
PUSETSO MOORE MAKOTOANE	ACCUSED 2
DANIEL NKANE MATEBESI	ACCUSED 3

J U D G M E N T

Delivered by the Hon. Mr. Justice M.L. Lehohla on
the 29th day of January, 1996

This is a summary trial. The three accused above are charged with theft by false pretences.

The amounts involved in four Counts preferred against the accused foot up to a sum in the region of M2.2 million (Maluti).

Count 1 sets out that the accused are charged with the crime of theft by false pretences :

"In 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 or 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 authority to the Central Bank of Lesotho to pay Lesotho Landscaping(Pty)Ltd aforesaid the sum of M579,500-00, 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."

Count 2 charges the accused with the crime preferred and sets out its commission as follows :

"In that upon or about the 21st day of June 1993, and at or near Maseru in the district of Maseru, the said accused, each or the others or 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 M576,798-49 (Five Hundred and Seventy Six Thousand Seven Hundred and Ninety Eight Maloti and Forty Nine Cents) 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 authority to the Central Bank of Lesotho to pay Lesotho Landscaping (Pty) Ltd. aforesaid the sum of M576,798-49, and did by means of the said misrepresentation obtain a cheque for M576,798-49, 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 M576,798-49, 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."

Count 3 sets out the commission of the crime and charges the accused therewith;

"in that upon or about the 25th day of January, 1994 and at or near Maseru in the district of Maseru, the

said accused, each or the others or 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 M563,809-73 (Five Hundred and Sixty Three Thousand eight Hundred and Nine Maloti and Seventy Three Lisente) 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 authority to the Central Bank of Lesotho to pay Lesotho Landscaping (Pty) Ltd. aforesaid the sum of M563,8-9-73 and did by means of the said misrepresentation obtain a cheque for M563,809-73 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 M563,809-73 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."

In Count 4 the accused are alleged to have committed the crime set out therein :

"In that upon or about the 25th day of January, 1994 and at or near Maseru district of Maseru, the said accused, each or the others or 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 M487,692-28 (Four Hundred and Eighty Seven Thousand Six Hundred and Ninety Two Maluti and Twenty Eight Lisente) 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 authority to the Central Bank of Lesotho to pay Lesotho Landscaping (Pty)Ltd. aforesaid the sum of M487,692-28 and did by means of the said misrepresentation obtain a cheque for M487,692-28 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 M487,692-28 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."

To all these counts each and everyone of the accused pleaded not guilty.

Afterwards the Director of Public Prosecutions, Mr. Mdhluli appearing for the Crown with Mr. Sakoane who assisted him in this trial, gave an opening address relying on provisions of our Criminal Procedure and Evidence Act No.7 of 1981 Section 175(1) which says -

"The prosecutor may, in any trial before any evidence is given, address the Court for the purpose of explaining and opening the evidence intended to be adduced for the prosecutor without commenting thereon".

It is important to indicate especially where the Court sits with Assessors that such opening address is not evidence. Its usefulness relates to areas to be covered by evidence to be led.

The thrust of the charges against the three accused in each of the four Counts above seeks to indicate that theft by false pretences arose from four cheques issued by the Central Bank of Lesotho in favour of an entity known as Lesotho Landscaping(Pty)Ltd during the period extending from March, 1993 to January, 1994.

Lesotho Landscaping (Pty)Ltd was a payee in respect of these cheques which were drawn on the Central Bank in the following amounts on following days :

- (a) a cheque for M579,500-00 on 23-03-1993;

(b) a cheque for M576,798-49 on 22-06-1993;

(c) two further cheques:

(i) one for M563,809-73

(ii) the other for M487,692-28.

Both these cheques were drawn on 25-01-1994.

All the above four cheques were presented for payment and duly met on presentation for payment. It is beyond dispute at the Lesotho Government account held at the Central Bank of Lesotho was depleted to the extent of the value reflected in those four cheques.

The prosecution alleges that the three accused acting in concert, each or the other or all of them, stole the money which was paid out when the four cheques were presented for payment.

The Crown led evidence relying on the following witnesses :

PW1 Mahlomola Makhupane
PW2 Stella Phate
PW3 'Mamotheba Lekatsa
PW4 Sehlot's'oana Nts'ala
PW5 Pulane Pelea
PW6 Moeketsi Palime
PW7 'Malebohang Morakabi
Court Witness 1 : Sebatana Russell
PW8 Alfred Motang
PW9 Johannes Kemp

In their defence only accused 2 Pusetso Moore Makotoane and accused 3 Daniel Nkane Matebesi gave evidence while accused 1 as in law he was entitled to do, if he so chose, refrained from

giving evidence. Thus accused 1 left it to the Crown to prove, if it could successfully manage, its case against him beyond doubt.

Further evidence relied on by the Crown was in the form of affidavits furnished by two Bank employees, namely, Danie Marais of Volkskas Bank Limited, Ladybrand Branch, and Roelof Johannes Roodt of First National Bank of Southern Africa Limited, so Ladybrand Branch.

It appears from the depositions of Marais that accused 1 and 2 jointly opened a current account with Volkskas Bank Limited, Ladybrand branch on 10th April 1991. This current account described as a partnership by the two accused who constituted its partners was known as Lesotho Landscaping and allocated account number 2020-142-661. This will be referred to as 661 for short.

It is important to note that accused 2 also maintains a current account in the same Bank and that in respect of this account 2020-142-688 he is the sole signatory. This account was also opened on 10-04-1991. Though the account retains the original account number 2020-142-688 (to be referred to as 688 for short) it was later transferred from P.M. Makotoane to Puma Investments(Pty)Ltd on 21-08-1995.

From the depositions of Roelof Roodt it appears that accused 3 Daniel N. Matebesi holds a cheque (current) account

with the Ladybrand Branch of the First National Bank of Southern Africa Limited (FNB for short). His account number is 5000017574. This account was opened on 25-03-1993 according to Roodt's deposition at paragraph 3 of his affidavit.

In the oral evidence given by PW1 the court learnt that Mahlomola Makhupane is an employee of the Central Bank of Lesotho holding the position of Head of Operations. He has been so employed in that Bank since January, 1980. Before then he had been employed by Lesotho Bank for a period of three years following a further period he had previously spent in the employ of the Standard Bank.

As Head of Operations he was responsible for supervision of all activities in the Operations Department. He told the Court that the Central Bank is a banker to the Government of Lesotho (GOL for short).

This witness informed the court that GOL has supplied the Central Bank with a list of persons who are authorised to issue instructions to the Bank to make payments against the Government accounts maintained at the Bank.

The document which lists the persons who are authorised to issue instructions is dated 5th March, 1993. The then Accountant General Mr. Zwane who preceded accused 3 in that capacity signed that document. So did the Financial Controller - Mrs Motsamai. The names of accused 2 and 3 appear in that

list. See "IDA" handed in on 11-9-95 during the course of this proceeding. My notes reflect at page 3 that there was no insistence by defence counsel on originals of "IDA" being produced. In "IDA" accused 3's name appears in 2nd position while accused 2 appears in 3rd position.

PW1 stated that the list has since been amended though he is unable to remember the exact date of the amendment. This witness testified that when the Bank receives instructions from the Treasury to make payments, the Bank has to check whether the persons who have signed the instructing letter are the authorised signatories. If the Bank is satisfied that the letter is signed by the authorised signatories then the Bank issues a cheque.

As at the time the instant charges were preferred against the accused before Court accused 2 and 3 were Deputy Accountant General and Accountant General respectively.

PW1 told the court that it is normal practice that the Treasury would come to the Bank to collect cheques from there. He said that the Bank assumed that the Treasury knew who the payees were in respect of cheques collected by the Treasury. On collecting the cheques the person who came to fetch a cheque or cheques from the Bank had to sign a cheque register kept at the Bank. After the collection of a cheque preceded by the formality of signing the cheque register by a person from the Treasury, then the Central Bank would have nothing further to do with the cheque until it came back through the clearing procedures.

PW1 stated that the Central Bank issued many cheques to individuals pursuant to instructions received from the Treasury. He stated that as Bankers the Central Bank has no obligation to find out what the underlying reason for payment is. From the totality of the evidence led the court has observed that persons authorised to issue instructions to the Central Bank to issue cheques to named persons - human or juristic - are senior officials employed by the Treasury.

Where the letter authorising payment appears correct and regular on the face of it, the Bank complies with the instructions without requiring production of any supporting documents to accompany the letter of instructions. All the Bank satisfies itself with is that the letter has been signed by authorised persons - normally a minimum of two.

The court has before it a photocopy of letter dated 23rd March, 1993 addressed to the Operations Manager Central Bank signed by Assistant Accountant General (the position then held by accused 2) and countersigned by Matebesi. This letter was handed in marked "Exhibit B" during the course of this proceeding on 11-9-95.

This letter instructed the Bank to pay Lesotho Landscaping (Pty)Ltd the sum of M579,500-00. The letter stated that :

"This amount represents settlement of Invoice Numbers B2, B3 and B4".

The letter was placed before court and it speaks for itself. PW1 reiterated that it was not necessary for the Bank to know the information relating to the invoices. Thus after receiving the letter, it was passed on to the division which handles payments for purposes of implementing the instructions.

A cheque was subsequently drawn in favour of Lesotho Landscaping (Pty)Ltd. The cheque was crossed and marked "Not negotiable". The amount of the cheque was M579,500-00. Its number is 045 242-549805. The cheque bears the signatures of PW2 Miss Stella Phate and Mr. Borotho who was then the Director of Research. The domicile of the cheque is Maseru. The Government account was debited in the amount of the cheque. This cheque was deposited in Ladybrand with Volkskas Bank. The cheque also bears the date stamp of the Central Bank, signifying that it was received by the Bank through the clearing system. PW1 testified that the amount of the cheque had already been deducted from the GAL account. This cheque was handed in in evidence marked "Exhibit C".

PW1 further testified that on 21st June, 1993 a letter was addressed to the Central Bank by the Treasury. This letter was signed by accused 2 and PW3 'Mamotheba Lekatsa. The letter instructed the Bank to pay M576,798-49 to Lesotho Landscaping (Pty)Ltd. The letter was handed in in evidence marked "Exhibit D" during the course of this proceeding on 11th September, 1995.

Subsequently a cheque for M576,798-49 was issued on

22-06-93 in favour of Lesotho Landscaping(Pty)Ltd marked "Not Negotiable" and numbered 049 116-549805. The cheque was signed by both PW1 and PW2. GOL account was debited in the amount of M576,798-49 after this cheque had been issued. The cheque was deposited in an account at Volkskas Bank branch in Ladybrand. The cheque was returned to the Central Bank on 14-07-93 after it had gone through the clearing system. This cheque was handed in in evidence marked "Exhibit E" on 11-9-1995.

"Exhibit F" handed in on 11-9-95 is a letter of instructions signed by accused 2 and 3 bearing the date "24 January, 1994". It is addressed to the Operations Manager Central Bank.

The letter instructed the Operations Manager to issue two cheques in the respective amounts of :

(a) M563,809-73

and (b) M487,692-28.

The letter specifically orders that the amounts stated be drawn "out of our No.1 Account". It also directs that "Payment should be made to Lesotho Landscaping(Pty)Ltd". The underlining is by the authors of "Exhibit F". Payment is apparently for services rendered or goods supplied in respect of contract certificates number B14 and number B9.

The cheque for M563,809-73 bears the number 053518 while the one for M487,692-28 bears the number 053517. Both cheques were crossed and marked "Not Negotiable". The two

cheques were signed on behalf of the Central Bank by PW1 and 2. The cheques were deposited at Volkskas Bank in its Ladybrand branch. Cheques 053517 and 053518 were marked "Exhibit G and H" respectively on the day (i.e. 11-9-95) they were handed in in evidence during the course of this proceeding.

Both cheques were returned as paid to the Central Bank. The GOL account which had been debited when the cheques were issued remained debited with the amounts of the cheques when these cheques were returned. It is PW1's evidence that to date GOL account remains debited with the amounts in question.

PW1 further stated that if payment was to be effected overseas, this would be shown by the address given in the letter of instruction and the currency in which payment is to be made. He said that the amendment of the letter providing the authorised signatories was made on 6th and 7th February, 1995. The amendment relating to 6th February, 1995 served the purpose to delete the names of accused 2 and 3 from the list of authorised signatories while the amendment of 7th February, 1995 served the purpose to introduce the names of PW4 Sehlotsoana Nts'ala and one Rathaba as Acting Accountant-General and Acting Deputy Accountant-General respectively. The same letter temporarily suspended the signatures of accused 2 and 3 supplied earlier on from the list of authorised signatories. The letter was from the Principal Secretary, Finance.

PW1 stated that all cheques that were drawn in favour

of Lesotho Landscaping (Pty)Ltd were marked "Not Negotiable". According to banking laws and practice such cheques should not have been paid into any account other than payees'.

PW1 said on 24-1-94 he received a letter addressed from the Treasury to the Operations Manager Central Bank signed by accused 2 and 3. The letter instructed him to issue two cheques in the amounts of M563,809-73 and M487,692-28. He referred to these as huge amounts totalling M1,051,502-01. The payee was Lesotho Landscaping(Pty)Ltd. PW2 also referred to amounts of this magnitude as huge. Not so accused 2.

Mr. Sello in cross-examining PW1 stated that in the past a Government cheque was equivalent to a guilt-edged security before the country went over its head. To this PW1 said he was not sure.

A clarification was made for the witness's benefit that in the past a Government cheque was unimpeachable, to which PW1 responded as reflected in question and answer below :

"if everything else in the cheque was correct unfortunately these days Government cheques are forged and Banks are worried.....? True".

PW1 conceded that when a cheque is marked "Not Negotiable" it means it is non-transferable - meaning it cannot be paid to someone other than payee. Paying to someone other than payee is contrary to instructions on the face of the cheque.

The witness stated he was not able to answer or respond to the invitation by Mr. Sello appearing for accused 1 that what the Bank in Ladybrand did could be described by PW1 as unusual or that it is what happens sometimes.

However the witness responded positively to the invitation that he "never knew of such a thing". See page 17 of my notes.

Mr. Sello went further to say to the witness :

"I am concerned with the name of the account. I give the name of an account. No one queries it, for some reason or other an account by different name is credited. Learned friend says the Bank may have been guided by number.....? Possibly. It is possible the Teller didn't care to match the account number and the name of the account.

For a million Rand.....? This is what happened.

What do you mean it is possible the account didn't match the name.....? Possibly when punching the computer account number appeared but the teller didn't care to see if the name matched the account number".

I take a special note of this reply by PW1.

Mr. Sello brought to PW1's attention that his client accused 1 is concerned with Lesotho Landscaping only and not Lesotho Landscaping(Pty)Ltd. He further sought to impress upon PW1 that it is common knowledge that syndicates operating white collar crime always have an insider in the Bank. the witness's response was only "I see".

"Have you never heard of that.....? I have heard of insider".

PW1 was cross examined by Mr. Phafane for accused 2. The cross-examiner took PW1 to task on whether it is not true that a cheque marked "not negotiable" is rendered negotiable by endorsement of payee.

He further developed this trend by saying at page 28 of my notes :

"It would seem that starting with "Exhibit E" this cheque appears to have been negotiated. It seems to have been deposited into account other than payee's.....? The cheque is marked not negotiable. So it shouldn't be paid into other than payee's account.

But does it not seem to have been negotiated....? I can't say it was negotiated for it is written not negotiable. What happened is what I can't say.

If it should appear it was paid into an account other than that of Lesotho Landscaping(Pty)Ltd it would have been negotiated.....? I would say there was an error on the part of its receiver.

What would be the effect. Would it not have done away with the restriction "not negotiable".....? He wouldn't have had the right to do so.

Would it not have purported to do so.....? He would not have had the right to do so.

He would have not right to do so. But a payee holding a cheque saying not negotiable, tries to remove that and the teller deposits it.....? I never heard of that.

It never happens.....? I can't say it happens or it does not".

Mr. Nthethe for accused 3 elicited from the witness the information earlier given that the Central Bank has to verify the signatures of authorised signatories on receiving instructions from Treasury to pay.

He referred the witness to what he referred to as a transaction irregularly made that related to ABHUDABI. He elicited from the witness that when instruction was received from the Treasury relating to this transaction the Central Bank as "was customary had no suspicion".

"Am I correct you came to know you effected an irregular transfer, (for) you were informed by the Treasury.....? Yes....."

The Treasury solicited your good offices to trace this irregularity.....? Yes they relied on me.

How....? We succeeded in tracing those funds as Bank.

In your capacity as Head of Operations did you succeed in retrieving these funds....? Yes.

At this time accused 3 was already Accountant General.....? Yes.

I learn even accused 2 was already holding his present position.....? Yes.

So you agree that had it not been for their assistance you would not have retrieved those moneys.....? What assistance.

That Treasury said to Central Bank send a chaser.....? The funds were already in beneficiary's account in DUBAI. Central Bank took upon itself to retrieve those funds. Treasury had alerted us to the fact that beneficiaries had been overpaid".

PW1 indicated that in circumstances where payee's address is not given the Central Bank sends the cheque to Treasury for the latter to forward it to the proper address.

PW1 agreed that his evidence is that once the Central Bank issues a cheque to a payee the client's account is debited.

"Even before the cheque is cleared....? Yes.

Does it mean that when the account has been debited

some money is taken out.....? That is so.

So money is taken out even before.....? When instruction is received by us and we carry it out an account is to be debited. That will be the account of a person giving instructions i.e. GOL. the question of when the cheque will come back in the clearing process does not stop us taking money out of the account when we issue the cheque.

You take out money from the account even before the cheque is cleared.....? We can't issue a cheque against nothing.

So it wouldn't matter much if this Bank cheque comes back dishonoured.....? I have never heard of a situation where a Bank draft can be dishonoured".

Following on the cross-examination centred on irregularities pointed at by accused 2's counsel to PW1 concerning the Abudabi instructions the DPP on re-examining PW1 highlighted the following as appears in the handwritten text of my notes at page 41:

"On specifics regarding instructions on Exhibits B,D and F. It was suggested that regarding Abudabi instructions there were irregularities.....? Yes.

Was it suggested by the gentleman from Treasury that there was an irregularity in Exhibit B.....? There was none.

Concerning Exhibit D.....? There was none.

Concerning Exhibit F.....? As well there was none.

Exhibit B was issued on authority of accused 2 and 3.....? Yes.

Exhibit D was issued on the authority of accused 2 and Mrs Lekatsa(PW3).....? Yes.

Exhibit F was issued on the authority of accused 2 and 3.....? Yes.

This was before the Abudabi connection.....? Yes.

No suggestion these were irregular.....? None".

Asked if he could envisage a situation where a cheque issued by a Bank can be irregular PW1 stated that such would perhaps relate to dates, year, words and figures. But he was quick to indicate that such irregularity would not happen, short of fraud or forgery. The Court underscores this reply for its pertinence to the instant enquiry.

Regarding absence of Bank stamp on "Exhibit E" PW1 stated that the absence does not mean the cheque didn't go through the clearing process.

He regarded it as an impossibility that a cheque can be deposited into a payee's account and come back to the drawer without going through the clearing process.

PW1 further stated that absence of the word "PAID" on any of the cheques before court does not mean they were not paid. He was quick and emphatic to state that they were all paid. He buttressed his statement by saying that "placing of the word PAID is optional".

PW1 stated that notwithstanding the absence of the word PAID on the cheque referred to; the fact remains that GOL was put out of pocket to the extent of the amount reflected on that cheque.

Regarding the question of Negotiation the learned DPP in re-examining PW1 stated and was replied to as follows :

"It was said that those cheques were paid into the account of Lesotho Landscaping(Pty)Ltd.....? Yes

Does the fact that it was into Lesotho Landscaping and not (Pty)Ltd have any bearing regarding diminution or impoverishment of your client's account.....? No. Client is impoverished by that amount.

Mr Sello realising that these answers by PW1 might hold disastrous consequences for his client asked leave of Court to once more cross-examine PW1 on a specific issue even though the learned DPP had completed his re-examination. Leave was granted not in an endeavour to let in abuse of proceeding before Court.

He accordingly said

"The fact that money was deposited into a particular account does not mean it has gone into the pocket of the holder of that account. Take me as an attorney. I receive money but it doesn't go to me.....? But you are in control of that"

was PW1's simple reply.

PW1 however conceded that the mere fact that money has been paid into a certain account does not mean the owner of that account has to benefit. This was a fair answer to a cagily circumscribed question.

The cross-examination on behalf of accused 2 and 3 did not seek to refute earlier evidence as regards the preparation of the cheques and their subsequent clearance and return to the bank. In answer to questions put to him under cross-examination PW1 testified that the cheques issued by the Central Bank could not be dishonoured and that in fact they were paid on presentation for payment.

Yet the question that remains crying out for an answer is whether a man who purportedly stands not to benefit from moneys channelled into his account commits no wrong if he knowingly allows such moneys to be so channelled. More of that later.

PW2 Stella Phate testified that she is an employee of the Central Bank of Lesotho and is employed as a Senior Banking Officer. She has been in the employ of the Bank for upwards of sixteen years. She has done courses both locally and overseas. She testified that she knew all the accused before Court. However she has had a working relationship with accused 2 and 3 only. She knew accused 3 as head of the treasury. Accused 3 was authorised to sign GOL cheques. Accused 2 was accused 3's deputy. The names of both accused 2 and 3 appeared on a list of persons authorised to give instructions to the Central Bank to effect payments on behalf of GOL.

On 23-03-1993, she received instructions to pay Lesotho Landscaping (Pty)Ltd. She personally dealt with that letter of instructions "Exhibit B". She was satisfied that the signatures on the letter were those of accused 2 and 3. She checked the signatures before she could pay in accordance with the instructions. Upon receipt of the letter from Treasury she would pass it on to someone to prepare a voucher and a cheque. She would counter-check after the voucher and the cheque had been prepared. The voucher would show the name of the payee. The

person whose account was to be debited would also be shown on the voucher. the voucher indicates the name of the account to be debited, namely a/c 100016-LSM-1140-01. This was Government account number one (1). The contra-entry indicates the account which was to be credited with the amount of the cheque. The voucher shows that the amount was to be paid to Lesotho Landscaping(Pty)Ltd by order of Treasury dated 23-03-93. The voucher bears the signature of the witness. The signature of PW2 appears on "Exhibit C" as well as that of Mr. Borotho.

PW2 told the Court that "Exhibit C" was collected on 23-03-93 by accused 2. She testified that this is a bank cheque and is unimpeachable and that it went through. She further said she saw the letter dated 21-06-93 addressed to the Central Bank by the Treasury. She dealt personally with that letter. The letter was signed by accused 2 and Mrs Lekatsa requesting the Bank to issue a cheque for the sum of M576,798-49 in favour of Lesotho Landscaping(Pty)Ltd. Acting on instructions borne in the letter she directed that a cheque be prepared. This was done. The payee was Lesotho Landscaping(Pty)Ltd. GOL Account Number One (1) was debited. A voucher had been prepared by someone other than PW2. Having satisfied herself that the signatures were those of authorised persons PW2 then signed the voucher that was followed by preparation of a cheque for the amount reflected in the voucher. PW2 and 1 then signed the cheque.

On 24-01-94 the Central Bank was instructed to make payments to Lesotho Landscaping(Pty)Ltd. These payments were two

in number. The letter of instruction was signed by accused 2 and 3. The first cheque was in the amount of M563,809-73 and the second one was for M487,692-28. PW2 said that she acted on this letter after she had satisfied herself that the letter was signed by proper authorities. Vouchers were prepared for processing of the two cheques. These vouchers indicated to whom payment was to be made. After preparation of the cheques, GOL Account No.1 was debited. Payments account was credited in respect of both amounts. After the vouchers were prepared PW2 states that she satisfied herself that they were in order. Thereupon "Exhibit H" was then drawn in favour of Lesotho Landscaping(Pty)Ltd. "Exhibit H" was signed by both PW2 and 1. "Exhibit G" was also drawn in favour of Lesotho Landscaping(Pty)Ltd. It was signed by both PW2 and 1 also. Both cheques were dated 25-01-94.

The witness further stated that cheques prepared from the Central Bank are collected from her office. She kept a record of the cheques issued by the Bank as well as the names of persons who collected the cheques and the dates when the cheques were collected. Unlike "Exhibit C" which PW2 said was collected by accused 2 who even signed for it within her view "Exhibit E" was collected by Miss Peleha PW5 who testified to what she did on the given day.

PW2 emphatically stated that "Exhibits G and H" were collected from her at the Central Bank by accused 2. She said that every payment is authorised by her as long as payment originates from Banking Section.

This witness said that if there was anything she queried in respect of the letters addressed to the Central Bank by the Treasury she would have consulted her superiors. However she felt somewhat unsettled regarding the last two cheques for she felt these presented to her "some red lights" and thereupon she phoned accused 3 to find out whether he had signed the letter dated 24-01-94.

The actual text goes as follows :

"I am not in the course of my duties required to go behind the instructions to find what underpins them.

We receive a few requests per day from Treasury.

We wouldn't have the means or manpower to cope with investigating requests. But we can find out. But then it would send me to the very persons who gave instructions.

If I were inquisitive I would have to inquire from accused 2 and 3 and that would make me look stupid.

If there are some red lights I take that to my Superiors.

In respect of the 2 cheques for a Million Maluti I phoned accused 3 and told him the amount appears to be excessive. He inquired if he had signed it and I said yes. So, he said I should carry on. It was on the phone. I had spoken to him before. Thus I am familiar with his voice. I was satisfied that I was speaking to him the Accountant General".

PW2 testified that "Exhibits C E G and H" had been paid. she said these are Bank cheques issued by the Central Bank and as such are as dependable as or equivalent to the Bank of England or South African Reserve Bank thus she couldn't envisage a situation where a cheque issued by central Bank would "bounce". See pages 54 to 55 of my notes.

Having satisfied herself that she was speaking to accused 3 on the phone as the text above indicates PW2 said that she carried out the instructions which culminated in the preparation of "Exhibits G and H".

Under cross-examination PW2 stated that she remembered clearly that on two occasions that cheques drawn in favour of Lesotho Landscaping(Pty)Ltd they were personally collected by accused 2. Asked if she had any particular reason to remember the occasions when accused 2 collected the cheques she answered

"Yes, it is because accused 2 never collects cheques usually, and the amounts on the cheques were very big. And I was very happy when he personally fetched them."

In a flow of emotion that I can scarcely forget or overlook PW2, in reference to the fate of the cheques that she testified she saw accused sign for in her presence, said

"I had trusted him, but now here it is he has disappointed me".

She was referred to transactions that took place on 25-01-94 and she was asked whether she would accept that there were occasions when accused 2 collected cheques other than the ones she spoke about. She answered -

"No, he would come to fetch cheques of which Lesotho Landscaping(Pty)Ltd was payee and hence when he came I said he should also collect these other cheques of Mr. Baholo and others".

She was emphatic that accused 2 never came to collect

cheques as a rule. She was adamant that accused 2 signed for the cheques in her presence and that she knows it was accused 2 who signed the cheque register before her. This was on 25-01-94.

A point of great significance is that PW2 was not taken to task regarding her allegation that accused 2 came to the Central Bank and signed for all the cheques he collected therefrom. More of that later. For the moment I should indicate my acceptance of her statement that accused 2 collected "G" and "H" and signed for them in her presence.

The third witness for the Crown was PW3 'Mamotheba Lekatsa. She is a civil servant holding the position of Financial Controller in the Ministry of Defence where she assumed duties around 1st June, 1994. Before then she was employed at the Treasury as a Principal Accountant. Thus accused 2 and 3 were her colleagues at the Treasury at that stage. At some stage accused 2 was Assistant Accountant General. He eventually became the Deputy Accountant General.

When PW3 left the Treasury accused 2 was then Accountant-General. She does not remember when exactly he became Accountant General though. PW3 led the Court through procedures which have to be followed before payment is made at the Treasury. She elaborated also on the procedure to be followed when payment by the Central Bank is effected. For a period spanning no less than 18 years PW3 has been in the accounting cadre to date. For the first 5 years of her career

she was doing Revenue collecting in the Ministry of Agriculture before being transferred to the Treasury where she started off as an Accounts Clerk. Despite her demeanour that struck me as somewhat of a shrinking lily she indeed for a passing moment suspended her diffidence and boldly stated she is familiar with procedures relating to disbursement of public funds.

She indicated that in order for payment to be effected at the Treasury there has to first of all be an order for work to be done or goods to be purchased. After completion of the work the contractor would issue an invoice in respect of the work done. When there is satisfaction with the quality of service rendered then the Treasury prepares a voucher. This voucher is referred to the Examinations Department to be checked. She indicated that a voucher may be prepared within the Ministry that received the service. Nonetheless it is checked at Treasury. She stated that the rules provide that the person preparing the voucher should be different from the one checking

After being passed to Examinations Section for correctness, then if correct it is passed over for payment. All this occurs after being checked, passed for correction and entered into a Vote Book. The Vote Book is consulted to see if funds are available from which to effect payment. If so then payment is effected.

PW3 indicated that a voucher should be prepared and

checked for correctness. Referring to instances making it necessary for the Central Bank to effect payments she stated that it does so in circumstances where there is urgency, such as where senior officials of Government are travelling outside the country.

PW3 emphasised that even when payment is to be made by the Central Bank a voucher still has to be prepared to make sure that figures on order correspond with those on the voucher.

She stated that it would not be herself directing that payment be through the Central Bank. She stated that it is not normal for Government Contracts to be paid through the Central Bank in respect of services rendered or goods supplied.

She stated that in instances where payment is through Central Bank usually a messenger would collect the cheque. This cheque then goes to the Treasury where it is entered into the Dispatch Book and the payee collects it from the Dispatch section.

She emphasised it would not be normal for the cheque to be collected from the Central Bank and not be entered into "our books". She actually said

"If a cheque is collected from the Central Bank and not entered into the Books at Treasury that would be a mystery".

Outlining further how to proceed in relation to where

Treasury requests the Central Bank to pay PW3 stated that at Treasury it is the Deputy Accountant General or the Accountant General who decides that the Central Bank is to be requested. She stated that it never occurs that any other senior officer except the Accountant General, his deputy or Assistant Accountant General should make such a request. In fact in respect of any need for urgency that is observed by PW3 and those of her rank or below the procedure is that she or they approach anyone of the three categories of senior officers referred to above and bring to their attention that a matter in question requires urgent attention.

Where payment is requested by a Ministry a voucher originating from that Ministry together with its supporting documents or attachments like the order, invoice, tender board authority and or the contract itself would be submitted to the Treasury. There is space on the order where the storeman signs that a job has been done or goods received. The invoice is a document evidencing the price of goods received or the monetary value of work done or services rendered. The Head of Treasury is the one who decides that payment should be made by the Central Bank. He does this if he considers that the transaction is urgent. The voucher is given to the Head himself to satisfy himself that everything is in order. Thereupon he gives instructions to the Central Bank to pay. The letter instructing Central Bank to pay is signed by two people. PW3 said "this requirement is rigid". She also said people who sign the letter of instruction are required to satisfy themselves of the contents

of the letter. The letter is written by the head and after satisfying himself that the document is in order he requests the co-signatory to sign.

The letter can be written by the Accountant General or the Deputy Accountant General. Sometimes the Head could instruct the Financial Controller to write the letter. Head means the Accountant General or the Deputy Accountant General. The letter would then be sent to the Central Bank by a messenger. Having been collected from the Central Bank the cheque comes back to Treasury. On arrival at Treasury it goes to the Dispatch Section where it is recorded and the Ministry concerned can collect it from there.

If on the other hand payment is made by Treasury itself the cheque is collected at the "Vote Control" which collected it from the Dispatch section and hands it over to the suppliers.

PW3 said she was one of the authorised signatories - a position she described as very responsible and carrying with it very onerous duties.

She was shown "Exhibit D" before Court and readily indicated that this is a letter addressed by the Treasury to the Central Bank on 21-06-93 signed by accused 2 and herself.

She stated that in that letter she and accused 2 instructed the Central Bank to pay an amount of M576,798-49 to

Lesotho Landscaping(Pty)Ltd. She said the letter reflects an invoice number.

On the face of it the invoice shows that payment was in settlement of Invoice No.2 of Contract II for services rendered or goods supplied.

The letter also thanks the Central Bank for usual and customary urgent service.

PW3 drew the Court's attention to the fact that this letter should have been copied to the Bank Reconciliation Section. She pointed out that it was not proper that the letter was not copied to Bank Reconciliation Section.

PW3 emphasised that the letter was drafted and signed by accused 2. PW3 acknowledged that "Exhibit D" bears her signature apart from accused 2's. She stated that she recalled that accused 2 came to her office bearing this letter telling her that the letter is urgent so she should sign and she obliged. However she brought to accused 2's attention that this letter had not been copied to the Bank Reconciliation Section for posting purposes, whereupon accused 2's response was that it would seem his secretary had forgotten or omitted that and therefore he would take it back to her to set it right.

PW3 was given an opportunity to have a look once more at "Exhibit D" and she responded as follows :

"There is no indication that it has been copied to Bank Reconciliation".

See page 79 of my notes.

PW3 stated that the letter to the Central Bank is different from a payment Voucher in that the letter is automatically posted. If a letter is not entered in the records at the Treasury the Reconciliation section would not be able to know that such payment has been made. This would have an adverse effect on the reconciliation and balancing of accounts.

In regard to the unwholesome role that she played in all this PW3 was not hesitant in saying that she ought to have seen the voucher authorising payment before she signed the letter "Exhibit D". She also stated that she should have seen other supporting documents before signing. However, she candidly admitted that she signed the letter without seeing these documents. She believed that her senior i.e. accused 2 would have seen the documents and thus she reposed her faith on the "honesty" of her senior; or relied on the latter's good faith.

Before this particular incident she would normally see supporting documents attached to a letter addressed to the Central Bank. When she signed "Exhibit D" she had not heard about a company known as Lesotho Landscaping (Pty)Ltd.

Under cross-examination PW3 mentioned that vouchers are sometimes posted late: the process of posting can be slow, hence the need to copy a letter addressed to the Central Bank to the

Bank Reconciliation Section situated at the Treasury. She was adamant that the letter should have been copied to the Bank Reconciliation Section. She admitted that sometimes Treasury works under tremendous pressure. She reiterated that she did not check whether attachments to "Exhibit D" were there in the office.

It was put to her that she would not quarrel with accused 2 when he says that there were attachments in his office. Her answer was a clear no, she would not have any quarrel with that. From the question put it is clear that PW3 did not get sight of the alleged voucher and attachments. There was no suggestion that she was invited, at any stage, to see for herself any of the alleged voucher or attachments. It seems to me that it would take a person of far greater moral courage than PW3 to go a step further and point out that vouchers are not there either after what she had done already immediately before by pointing to her senior that the letter "Exhibit D" had not been copied to the Bank Reconciliation Section. It may well have taken a lot of mettle on her part to say to her senior "look your slip is showing" without at once also having to say "your trouser flies have come apart too". It is one of the most important functions of the Court to observe witnesses' demeanour. In this regard I have already referred to PW3's self-defacing character. Compare and contrast this with accused 2's overweening self-assurance. That the Court had at some stage to intervene for the sake of its own assessor speaks volumes for the off-hand manner accused 2 had responded to the question put by saying "We are

speaking here about big money not petty cash". It is thus not unimaginable that PW3 could find it hard to easily break out of her cocoon of shyness and stand up to accused 2 who is her senior; to try conclusions with him at a game for which he has, so to speak, a natural flair.

Coming now to the evidence of PW4 Sehlot's'wana Nts'ala I would borrow the description assigned to him by the Crown at age 13 of its heads that he was the trouble-shooter in that he is the one who, going about his duties as an Auditor, picked up what appeared to be irregular transactions, that took place at the Treasury.

Mr. Mdhluli for the Crown submits at the outset that it is preposterous to suggest that what PW4 picked up or observed, he did so because he had an axe to grind with anyone. I accept this submission.

PW4 testified that before he took up his present appointment he had been in the Audit office since 1965. He was the Controller of Audits in the department of the Auditor General before he was appointed acting Accountant General.

I have no doubt that PW4's position as Controller of Audits placed him in a coign of vantage regarding what proper procedures are to be followed at the treasury. I would therefore find no merit in the suggestion that the brief period he spent at the Treasury as the Treasury Head should disqualify him as

knowledgeable regarding procedures that obtain at the Treasury and that should be observed. The controls that he exercised at Audit should be such that they harmonise with procedures laid down at Treasury. Such harmony cannot be achieved unless the Controller of Audits has sufficient and working knowledge of procedures that have to be followed by the Treasury. Thus the brevity of his service as Treasury Head cannot disqualify him as a mere tiro in that regard. The Audit department in my view is the examiner of systems operating at the Treasury.

PW4 knew accused 2 and 3 as colleagues. He had good working relations with both of them. Asked if his relations with either of them were warm he insisted and confined himself to their description as good. One could only imagine that, taking logic to absurdity, he feared that if he said that he felt the warmth of his colleagues he would by necessary implication mean that his own temperature towards them was low.

PW4's training included attendance of overseas courses and in-service training in the country.

He described in detail the procedure to be followed before payment is made by the Treasury. What is basic according to his evidence is that before payment is made there should be a payment voucher originating from a Ministry requesting payment. The voucher goes through the examination section to be checked for correctness in all respects. This would consist in finding out whether payment has been authorised, whether the authority

of the Central Tender Board has been obtained in cases of payments exceeding M3000-00; whether the voucher has been authorised by the right person checking the correctness of figures and whether the amount in figures tallies with the amount in words.

PW4 came across the subject matter of these proceedings while he was investigating a matter relating to the Deposit Accountant Sundries, A\C 503-001-00117. He was tracing monies which appeared to have gone in and out of that account. At that stage his investigations did not concern the matter now before court.

He testifies that in January 1994, while he was investigating certain transactions which appeared in A\C 503-001-00117 he observed that a company called Lesotho Landscaping(Pty)Ltd had been paid out of that account. This set his mind on enquiry. He asked himself whether monies were paid into that account before payments were made out of the account. It is a requirement that there should be monies paid into the account before payment could be made out of it. This is a rigid requirement.

In the course of his investigations he established that no money had been paid into this account. He then sought to establish how payment was made out of that account. The Bank Reconciliation Section produced a letter dated January 1994, "Exhibit F". The letter did not indicate which Ministry had paid

for services allegedly rendered by Lesotho Landscaping(Pty)Ltd. He then looked for other similar payments. He went through a computer print-out, but his endeavours were to no avail. He went through the flimsies file in which he picked up another payment made in June, 1993. From the copy of the letter, "Exhibit D", he realised that it had not been copied to the Bank Reconciliation Section. The significance of this omission was the resultant absence of this payment from the financial reports and the computer print-out. He then took "Exhibit D" to the Bank Reconciliation Section and asked the section to find the vote charged for the payment. No such information was available from the section.

He then initiated enquiries at the Central Bank to find all payments that could have been made to Lesotho Landscaping(Pty)Ltd. The Central Bank provided him with a copy of "Exhibit B", a letter dated 23rd March, 1993.

PW4 says he had discussions with PW2 and asked for photocopies of cheques paid to Lesotho Landscaping(Pty)Ltd. PW2 told him about the March, 1993 payment. Eventually he had in his possession four cheques paid pursuant to instructions given in "Exhibit 'B' 'D' and 'F' ". The four cheques in question were "Exhibits 'C' 'E' 'G' and 'H' ". He then set about looking for vouchers relating to these payments. None could be found at the Treasury. He looked in the Treasury storeroom without success. Having failed to find any vouchers in the storeroom, he went to check the Dispatch Register to ascertain which Ministry collected

the cheques. When he found no trace of the cheques in the Dispatch Section he then went to the Central Tender Board (CTB for short) to find out whether it had awarded any contracts to Lesotho Landscaping(Pty)Ltd, and to which Ministry goods had either been supplied or services rendered. He went to the Central Tender Board because amounts paid exceeded M3,000-00 by far.

PW4 testified that from CTB he caused a search to be made at the Ministry of Finance to find out whether there was any ministerial waiver in respect of the transaction that relates to Lesotho Landscaping(Pty)Ltd. He also caused a search to be made at Lesotho Highlands Development Authority - LHDA in order to ascertain whether Lesotho Landscaping(Pty)Ltd had any dealings with LHDA. There was no trace of any request emanating from LHDA for such payments. PW4 further made enquiries at the Ministry of Home Affairs and was advised that there was no record of such requests. As at the time PW4 gave evidence he testified that he was still in the dark as to which Ministry services had been rendered or goods supplied. He further states that the payments that were made to Lesotho Landscaping(Pty)Ltd were not regular because there was no indication that services had been rendered or goods supplied. With reference to payments made in January 1994, PW4 stated that payments should have been made from voted expenditure and not from a deposit account.

PW4 testified that A\C 503-001-00117 is a deposit account that belongs to Treasury. He further said that the

payments that were made to Lesotho Landscaping(Pty)Ltd ought to have appeared in the Treasury Vote Book, but they didn't. His story is that if a Ministry had funds in the said account and wanted to utilise them, the Ministry would have had to prepare a voucher and present it to the Treasury for payment. The funds would then be committed in the Treasury Vote Book.

PW4 pointed out that the procedure regarding payment t of A\C503-001-00117 ought to have been known to all people employed at the Treasury. He remarked that accused 2 and 3 were the ones who were supposed to be more knowledgeable about the operation of A\C 503-001-00117. I am inclined to the view that their very elevated station at the Treasury tends to suggest that PW4's remark is not ill-founded. I would even at this early stage in my judgment venture to say the word "supposed" seems to understate things. The proper view would be expressed by use of the word "required".

PW4 made further enquiries about the existence of a company known as Lesotho Landscaping(Pty)Ltd. He enquired at the Law Office whether any such company was registered in the Register of Companies. He was advised that it was not registered. He also made enquiries at the Income Tax Office because it was a requirement of the law that 10% withholding tax should have been deducted from the payments made to Lesotho Landscaping(Pty)Ltd. There was not a trace of any tax having been deducted from payments made to Lesotho Landscaping(Pty)Ltd.

At the time when PW4 made these enquiries both accused 2 and 3 were no longer at work. He testified that assuming that the four payments made to Lesotho Landscaping(Pty)Ltd were regular, the following pre-requisites would have had to be satisfied or existence of proof that they were satisfied would avail:

- (a) authorisation of the CTB or a ministerial waiver;
- (b) payments would have appeared in the Treasury Vote Book and in the cheque Dispatch Register;
- (c) there should also have been payment vouchers prepared by the Ministries requesting payment;
- (d) 10% withholding tax should have been deducted from these payments;
- (e) the relevant Ministries should have kept records of copies of payment vouchers;
- (f) every local payment should have been supported by a payment voucher.

PW4 further testified that he had with him the Vote Books for the period 1992\93 and 1993\94. He was unable to trace the March 1993 payment from any Vote Book. In any event the letter "Exhibit B" does not even specify the vote from which funds should have been paid. He was also not able to trace the June 1993 payment in the Vote Book. The same was the case in respect of the January 1994 payments.

Truly speaking there is a Cheque Register for all cheques received from the Central Bank by the Treasury. Yet none of the four cheques made to Lesotho Landscaping(Pty)Ltd is

recorded in the Cheque Register. On 25th January, 1994 certain cheques other than "Exhibits 'G' and 'H' ", were collected from the Central Bank. These were cheques which were payable to the deceased Honourable Baholo, Messrs Nkuebe and Tshola. The cheques payable to the three persons mentioned shortly in the foregoing passage were recorded in the Cheque Register. Not so "Exhibits 'G' and 'H' " yet they were collected along with these three others on the same day at the same time by the same person. How strange!

To take up the threads of PW4's story again: This witness further states that he had examined bank statements relating to Government Account No.1. These statements are supplied by the Central Bank. The bank statements reflect that a payment to Lesotho Landscaping(Pty)Ltd in the sum of M576,748-49 was debited against Government Account No.1. This happened on 22nd June, 1993. The payment was made to Lesotho Landscaping(Pty)Ltd in the amounts reflected on "Exhibits 'G' and 'H' " on 25th January, 1994. The amounts paid to Lesotho Landscaping(Pty)Ltd were debited against Government No.1. The witness indicated that he did not know of this company. Other than the payments in question there were no other payments made to Lesotho Landscaping(Pty)Ltd.

It was PW4's testimony that urgent payment can be made by the Treasury itself if the claim is submitted to the Treasury before noon. He explained that if a claim came after 12 midday then the Treasury could write to the Central Bank to issue a bank

cheque. One of the senior officers would have decided on the urgency of the payment requested. The Accountant-General would then tell the Examinations Section about the urgency of the payment.

PW4 informed the Court that other than the bank statements obtained from the Central Bank, the Treasury receives a debit Voucher. Sometimes a copy of a letter may accompany a debit voucher and the bank statement. These would be received by the Bank Reconciliation Section so that necessary particulars and contents thereof could be entered in the Treasury accounting system. He conceded that there is a backlog in the Bank Reconciliation Section. He stated that there was reconciliation only in respect of "Exhibits 'G' and 'H' ". With regard to "Exhibits 'C' and 'E' ", he indicated that these do not feature at all in the Government accounts.

PW4 says that the role or responsibility of the Accountant-General is to see to it that proper books of accounts are maintained. The same goes for his Deputy. Accused 3 and 2 played no role in ensuring that payments relating to Lesotho Landscaping(Pty)Ltd were properly recorded. The witness indicated that it was an irregularity that "Exhibits 'B' and 'D' " were never copied to the Bank Reconciliation Section. When PW4 took over as Acting Accountant-General accused 2 and 3 had proceeded on leave. A few days after taking over, PW4 asked accused 3 to meet him at the office for a proper handing-over. Accused 3 introduced PW4 to the Treasury staff. The witness does

not remember accused 3 mentioning anything about missing records. Accused 3 did not say anything about the four cheques which are the subject matter of this case.

PW4 was cross-examined in relation to a file which contained correspondence relating to payments that Treasury would ask the Central Bank to make. This is file T\BNK\15. It was put to PW4 that when accused 2 wrote to the Central Bank, he made sure that among other things the copies of vouchers and attachments in relation to the payments were kept in that file. PW4 responded that he did not find any vouchers and attachments. He only found copies of some of the letters in the flimsies file. It was suggested to the witness that two files were used when the payments at issue were made and these, it was suggested, were an open file and a confidential file. The witness' response was that there was no way two files could be used in respect of one subject matter. In fact in response to the Court's question on the subject referred to, the witness indicated that one of the dangers and risks of keeping two files was that such a practice would lead to "double payment". See page 119 of my notes.

PW4 insisted that even if payment is effected by telegraphic transfer there would still have to be a payment voucher. Not even the Minister of Finance is exempted from this basic requirement. This requirement applies to all without exception.

It was suggested to PW4 that T\BNK\15 contained all

vouchers relating to all the payments made to Lesotho Landscaping(Pty)Ltd. He was adamant that that could not be so: the vouchers were kept in the storeroom. A week before giving evidence he had seen this T\BNK\15 and there were no vouchers in it. In any case the file that was in use at the time letters were written was the one he brought before court i.e. T\BNK\7. He was unable to secure T\BNK\15 for production before court.

Assuming that it was true that at the time he examined T\BNK\15 there were no vouchers in it it would seem obvious that when he was dared to fetch that file he was being sent on pigeon's milk. In any case, seeing that he had much earlier taken it upon himself to look for the supporting documents to justify these huge payments effected in favour of Lesotho Landscaping(Pty)Ltd I see no reason why he should be doubted in his assertion that no such vouchers were in that file. Supposing that such vouchers had been there why would proof be lacking that 10% withholding tax was deducted at Income Tax office where PW4 went for the specific purpose to find out if it had been deducted? Why would there be no proof that authorisation of the CTB or ministerial waiver was invoked? Why; yet the amounts are by far in excess of the M3,000-00 subminimum requirement?

It was further put to PW4 that payments made from the suspense account would not appear in the Treasury Vote Book. He was emphatic that as the account in question belonged to the Treasury, payments made from that account should have appeared in the Vote Book.

In response to a suggestion that it was not the responsibility of accused 2 to make entries in the Vote Book, PW4 replied that, that was so. This response, however did not exclude the requirement that whoever authorised payment should have seen to it that appropriate entries were made in the Vote Book. In response to the suggestion that it was not necessary to copy "Exhibits 'B' and 'D' " to the Bank Reconciliation Section because the vouchers contained all information relating to the payments PW4 stated categorically that, that was not the case. He did not agree with the suggestion that it was not necessary to copy "Exhibits 'B' and 'D' " to the Bank Reconciliation Section because this section would eventually receive the relevant vouchers. It was suggested to him that in respect of the payments made in January 1994 there would be evidence of vouchers having been presented and deposits being made by Ministries. The witness replied that it ought so to be but that did not happen at all.

At page 125 of my notes the text goes :

"My instructions are that in respect of the 1994 payments there would certainly have been receipts evidencing payment into suspense account from the Ministry concerned.....? That should have been like that but it is not like that. We don't even know the Ministry which was given service by Lesotho Landscaping (sic) as a result of which this payment is supposed to be made".

An attempt was made to bring to PW4's attention that due to lack of systematic filing coupled with pressure of work at the Treasury occasioned by

"so many vouchers and so many requests from different Ministries accused 2 cannot by merely looking at a letter remember (who was the supplier or from which Ministry request was made).....? I don't believe that if by January 1994 a Million (Maluti) is paid to Lesotho Landscaping(sic) I can forget that.

The concern of accused is whether payments which were made are proper. Not so.....? That is so.

He says as far as he can recall all payments he made were supported by documentation relating thereto....? Relating to this payment?

Yes.....? I don't agree that it is so.

You said you also checked the storeroom. Did you do so or did you instruct your staff to do that.....? I instructed my staff.

The filing is not systematic. It is not alphabetical. There are piles of old records.....? It never happened that when I wanted a voucher from Treasury I am not provided with it.

Answer the question.....? I am trying to show that the situation is not as bad as your instructions suggest.

I suggest to you that either what you were told is incorrect i.e. records are not in the storeroom, or if correct those records would be in the Treasury somewhere not in the storeroom.....? In the form of payment vouchers those records are not in the Treasury".

If the complaint by accused 2 is that this proceeding has been precipitated by the fact that the filing is not systematic at Treasury, I would hasten to say that to my observation there has been a systematic omission to enter into the accounting system the information relating exclusively and specifically to Lesotho Landscaping(Pty)Ltd payments. What is further amazing is what appears to be a pattern relating to all the four cheques paid to Lesotho Landscaping(Pty)Ltd that whenever the GOL account held at Central Bank is debited, the partnership account number 661 held jointly by accused 1 and 2

at Volkskas Bank Ladybrand branch is credited by the same amount on the same day and never before. That is what is systematic. More of that later.

Before summing up the tail-end of PW4's evidence it would be fruitful to quote verbatim the cross-examination and replies thereto as follows :

"Accused 2 when suddenly told to go on leave says he had seen those vouchers. You know he was suddenly asked to go on leave.....? I know. But he doesn't say where they were.

You don't expect him to know or remember where they were now.....? I expect him to say he left them in his office or in a certain file.

It is not the responsibility of the Deputy Accountant-General to file vouchers.....? His responsibility is to ensure that they are correctly filed.

After payment has been authorised vouchers giving rise to these letters are sent to Financial Controller's Section.....? No. That is not correct. After these letters have been written they (i.e. vouchers) go to Cheque Dispatch Section to await arrival of cheques from Central Bank.

I am told this was the system before you came along.....? That is not like that where a letter is written.This transaction is made by Bank Reconciliation Section not any other section for punching or otherwise.

I understand that in cases of emergency payees collect cheques from the Treasury and not from the Ministries. Can you dispute that.....? I dispute it.

I learn at times they collect them from the Central Bank.....? That would be within Central Bank's knowledge.

There is nothing wrong with the system.....? That system is wrong for here it has given rise to a situation where we don't know from which Ministry payment originates and whether any service was rendered.

Nothing wrong though.....? I deny that for there is

a Register in the Treasury Dispatch Section where entries are made by the Central Bank. And these cheques in question don't appear i.e. the whole lot of cheques before court"

Be it remembered that PW2 who was not taxed on the issue was adamant that accused 2 collected three of the cheques in question. Yet these cheques found their way into an account i.e. 661 held jointly by him and accused 1 at Volkskas Bank in Ladybrand. More of that later.

The cross-examination however proceeded :

"The Register in the Cheque Dispatch Section; which people make entries in there.....? The staff working in there

Accused 2 is not working in there, not so.....? Obviously not.

As Accountant General you place confidence on your clerical staff that this would be done.....? True.

Until things are brought to your attention you would expect that they are properly done in the normal course of events as Accountant General or Deputy Accountant General.....? (Reluctantly) yes.

In this particular case you didn't call accused 3 or accused 2 when you noticed irregularities in relation to these payments.....? I never.

Despite the fact that they had undertaken to assist in case of need.....? Quite so.

If you had been sincere in your investigations you would have called accused 2 and 3. That's common practice in the civil service.....? I had left that with the Principal Secretary Finance, the Chief Accounting officer.

He didn't assist you.....? I don't know the steps he took but I find myself sitting here".

Mr.Nthethe for accused 3 stated that he associated

himself with the defence advanced on behalf of accused 2 and indicated that the stories of the two accused in question are basically the same.

He however sought to indicate and was able to elicit from PW4 that accused 3 as the Accountant General is not required to physically go and check if goods have been supplied or services rendered pursuant to letters of instructions he might have written to authorise payment. The person who might do so is the Ministry's Principal Secretary.

PW4 indicated that it is the responsibility of the Chief Accounting Officer and the Accountant General to check whether payment has been made for a specific task rendered.

"How do they do this.....? The Chief Accounting Officer where payments originated (does this) by authorising those payments takes the responsibility.

How would the two check that this payment has been effected in respect of work done.....? There has to be a Certificate attached to the voucher from the Ministry where services were rendered.

You don't mean he would physically go and check.....? True. I am talking about the Certificate.

By satisfying themselves you didn't mean they should go and physically check.....? The Chief Accounting Officer may go not the Accountant General.

PW4 said he was aware that accused 3 discouraged the practice of Ministries operating their deposit accounts. This operation of Ministerial accounts was discouraged "because they are too many and control is weak. Ministries no longer reconcile

records with the Treasury". See page 134 of my notes.

PW4 indicated that the only occasion he sought accused 3's assistance after the latter had been sent on abrupt leave was when PW4 had forgotten how to open the safe in accused 3's office.

He answered affirmatively to the suggestion that audit ought to be done in the presence of an officer concerned.

"If audit is conducted in the absence of the accused that is not proper.....? True. But I was not conducting an audit.

You were carrying out an investigation.....? In a way it was an investigation but a limited one.

Meaning if you conduct an investigation the officer hasn't to be present.....? This investigation I did so as to report to P.S. Finance.

Meaning the officer's presence is immaterial.....? It didn't matter. I had placed the matter in the hands of P.S. Finance.

So whether your relations were good or even very good with accused 3 you would have no moral obligation to say to him come and help.....? I found it unnecessary.

One would have expected you to have called accused 3.....? May be that would have spoilt relations".

The re-examination by the DPP on the relevant issues revealed the following in the following verbatim account :

"When you called accused 3 to help you with opening the safe was any money in the safe.....? No.

None had gone missing.....? No.

Were there documents in there.....? There are documents but they are not related to this case.

Did the documents in there yield anything connected with this case.....? No.

Lets come to investigations: When making investigation had you any particular person in mind when investigating or was the investigation in regard to an issue irregularly made.....? True. I was investigating funds which seemed to have gone in and out of an account in an irregular manner.

When investigating that manner did you consider it necessary to call accused 2 and 3.....? No.

If it turned out these were people who you were investigating would it have been prudent to call them.....? No. It would foul relations.

Or result in a punch in the eye.....? (silence).

There is this question relating to a Register kept (at Treasury) when collecting cheques from the Central Bank. Three cheques were collected by accused 2 (according to undisputed evidence).....? True.

Whose responsibility was it to enter the cheques in the Register.....? The person who collects the cheque.

who else.....? Even the Accountant General; to ensure systems go on well.

Two accused were signatories in respect of letters going to the Central Bank.....? Yes.

As signatories directing Central Bank to (pay a) juristic person had they responsibility to ensure the cheque was collected and entries made.....? Yes.

Regarding the Deputy Accountant-General; you said it is not his job to write up the Vote Book. If he authorised payment what would be his responsibility.....? To initial the Vote Book.

He had to have the Vote Book before him.....? Yes.

To ensure the funds were available....? Yes.

Then commit voucher for payment.....? Yes.

So it is not correct that he would be just not interested.....? True.

Regarding Vouchers: It was put to you for accused 2 that accused 2 would say that copies of vouchers were kept in TB 15. Comment.....? I said the confidential file I have here contains some of the documents from

TB 15, those of January 1994. The copy of 24th January, 1994 is not contained in the file. Three cheques in respect of which on 24-1-94 a letter was written to Central Bank its copy is there. Further that copies of payment vouchers for these three cheques are not in there to show that payment vouchers are not kept in this file.

How many copies of Vouchers are received at Treasury including the original.....? I can't remember for they would be the original and some three or four copies.

It goes to the Examinations Section of Treasury....? Yes.

They keep a copy.....? I can't remember. But the cheque goes along with another copy.

Regarding the Bank Reconciliation Section:

It was suggested that a voucher at one stage would go to Bank Reconciliation Section.....? No payment voucher can go to Bank Reconciliation Section. It is a mistake if I said so.

It was put to you whether it would matter if "Exhibits 'B' and 'D' " were not copied for they would learn the information from the payment vouchers.....? The only way they can know about these transactions would be if they are supplied with copies of the letters of instruction.

That's according to procedure.....? True.

Were you approached by accused 3 manifesting his willingness to assist after he had been charged.....? No".

See page 145 and 144 of my notes backwards.

PW4 in response to my assessors questions indicated that it is his evidence that Government funds were paid out of Account No.1 in excess of Two Million Maluti, and that this amount has not been replaced. He stated that in paying this amount regular steps were not followed.

He explained and reiterated that the payments were

irregular for they failed to meet the requirements relating to Central Tender Board procedures; they didn't comply with the Income Tax law (51 of 1986) requiring 10% withholding tax deduction what is more the witness despite his rigorous and diligent search failed to find whether Lesotho Landscaping (sic) rendered services to any Ministry to warrant payment that was effected.

PW4 further stated that the account he called the Deposit Accountant and Sundries is Treasury and that in the event of negligence the buck ends with the Treasury Head. Asked why, he indicated that : "there are no Government payments for services to be made from Deposit Accounts but rather from Voted Expenditure Heads".

PW4 stated that it behoved the Accountant General, his Deputy and the Assistant Accountant General to know procedures requiring the initialling of the Vote Book once satisfied that Funds are available because they are not only top officials but it is a requirement of Financial Regulations 1973 that they do so. These Regulations require the Accountant-General to put in place all systems in his department to ensure the safeguarding of public funds. PW4 stated that during the period of irregular transactions the systems referred to above were not followed.

To the question that it had been put in cross-examination that accused 2 had seen the vouchers in question before proceeding on leave, PW4 was adamant and replied as

follows -

"It does not happen that such documents are kept in file. I have got the confidential file having in it information relating to T\BNK\15 and....."

The questioning proceeded :

"When Ministries bring vouchers for payment, evidence says, they also bring Registers along. But for record purposes how do you trace that it is Ministry 'X' that submitted payment.....? It is possible.

Where do I get that information.....? From the Examination Section.

Is that a book or what.....? I don't remember well but I think they use a Pre-listing Form".

Following on the answers elicited from the above questioning Mr. Mdhluli sought to get a further opportunity to re-examine his witness and proceeded as follows according to the text appearing at page 145 of my recorded notes :

"Is there anyone to supervise the Accountant General when all is set and done.....? No.

Who is he representing at Treasury in the Ministry of Finance. To whom is he accountable.....? To Principal Secretary Finance.

Is P.S. Finance always there or is he expected to always be there to see to it that the Accountant General is doing his work properly.....? No."

From the above it would seem that an Accountant General does well if he complies strictly, in the performance of his duties, with provisions of Financial Regulations, 1973 Chapters 4, 5 and 6 in particular.

Chapter 6 Clause 607 casts strict duty and responsibility on an authorising officer to

- (a) ensure that he has authority to sign against the vote or account to be debited;
- (b) ensure that the voucher has been entered in the Vote Book and the Vote Book folio number is entered in the space provided on the voucher. The entry in the Vote Book will also be initialled by the authorising officer; (my underlining)
- (c) ensure that there are sufficient funds in the vote to cover the charge;
- (d) satisfy himself that the charge is a correct debit to Government funds and has been correctly classified; (my underlining)
- (e) satisfy himself that the voucher has been properly completed in all respects and that all appropriate certificates have been correctly signed."

Clause 506 stresses the importance of maintenance by the Accountant General of reconciliation of Vote Books on a monthly basis; and that a certificate of reconciled accounts is forwarded promptly to the Accountant General by Chief Accounting Officers.

Clause 602(1) in Chapter 6 stipulates that :

"The signature of an authorising officer on any voucher involving expenditure certifies to the accuracy of every detail on the voucher. He is, therefore, responsible for ensuring that the required funds are available, that the services specified have been duly performed, that the prices charged are either according to contracts or approved scales, are fair and reasonable according to current local rates, that authority has been obtained as quoted, that the computations and castings have been verified and are arithmetically correct, and that the persons named in the vouchers are those entitled to receive payment, and that the stores purchased have been taken on charge or correctly issued if they are expendable or consumable and are for immediate use."
(my underlining)

Clause 604(c) lays stress in ensuring that details pertaining to the name and address of payee are covered.

Harking back to Clause 602(1) read in conjunction with Accused 2's evidence that the amounts reflected in "Exhibits 'B' 'D' and 'F'" represent nett amount paid to Lesotho Landscaping(Pty)Ltd i.e. after deduction of 10% withholding tax, it stands to reason that the contract price would exceed the cheque amount which is equal to 90%. Therefore the sum of the tax deducted and the cheque amount would be equal to the contract price. This is arrived at by simple arithmetic calculation. "Exhibit B" translates into "Exhibit C" a paid cheque for the amount of M579,500-00.

"Exhibit D" translates into "Exhibit E" a paid cheque for the amount of M576,798-49;

"Exhibit F" translates or converts into "Exhibits 'H' and 'G' " two paid cheques for the sums of M563,809-73 and M487,692-28 respectively.

Because of total absence of records at Income Tax office and also at the Treasury to furnish proof that there was any trace at all of payment to Income Tax office of the 10% withholding tax in respect of Lesotho Landscaping(Pty)Ltd despite accused 2's insistence that such records should have been there in those respective offices notwithstanding PW4's diligent search, and the fact that relevant books were produced by the DPP

from those offices and questions put to the defence during cross-examination, it leaves the Court with no option but to job backwards in an endeavour to see if accused 2's statement and its implications are reconcilable with practicality. I shall do so on the basis of his sworn testimony and gratuitous assertion that "Exhibits B D and F" represent nett amount.

If M579,500-00 in "Exhibit B" represents 90%, it would mean the contract price should have been M643 888.888.... ad infinitum the 10% would have been M64 388.888.... ad infinitum.

For a comprehensive picture I wish to adopt the following table below :

EX.NO & CORRESPONDING CHEQ EXBT IN BRACKETS	CHEQ AMOUNT 90%	CONTRACT PRICE	WITHHOLDING TAX 10%
B(C)	579,500-00	643 888.888...	64 388,888..
D(E)	576,798-49	640 887.211...	64 088.721..
F(H & G)	563,809-73	626 455.255...	62 645.255..
	<u>487,692-28</u>	<u>541 880.311...</u>	<u>54 188.0311..</u>
TOTALS	2207,800-50	2453 111.667...	245 311.166..

The above table shows that the contract price is indefinite i.e the amount leaves a continuous fraction in each and every instance. Thus the contract is at best ambiguous and therefore dubious or at worst nugatory. Indeed accused 3 when confronted with this somewhat fourfold cord of evidence and the absurdity of results reflected in samples picked at random concerning these figures admitted that they reflect an unusual state of affairs. True enough accused 2 who initiated the

proposition that B D and F represent nett amounts was not cross-examined on the absurd implication of his statement in a direct way. But figures don't tell lies, do they? The silent language of figures shown above constitute a deafening charge against the canvassed notion that a contract based on the dubious prices referred to did in fact exist. It is to be wondered how this absurdity complies with the requirement in Clause 602(1) of the Financial Regulations imposing a duty on authorising officers "to sure that the prices charged accord to the contracts..... and that computations and castings have been verified and are arithmetically correct...."

What I am here concerned with is not whether the contract that accused 2 and 3 allege must have existed, purports to be valid, but whether it purported to exist at all.

The language of the above figures inclines me to the view that this so-called contract is nothing else but a chimera - a horrible creature of the imagination. Suffice it to say it remains then to be seen what the position is regarding the existence or otherwise of one of the parties to the contract, namely, the Lesotho Landscaping(Pty)Ltd for all the juristic personality it is masquerading in on papers before me.

Indeed the sheer grotesquery of the contract price that I would be bound to accept if I am to believe the version of accused 2 and 3 as to the existence of the contract between GOL and Lesotho Landscaping(Pty)Ltd would amount to this : should I

have occasion to go to a sales store in Kingsway Maseru to buy my Standard V daughter a ruler I shouldn't think it odd if the store keeper tells me the ruler costs M2 and of one (M1-00) luti a fraction of a fraction of a fraction of a fraction of a fraction.....ad infinitum. That surely would be unacceptable. (More of that later)

To return to the final text of PW4's evidence: To the question asked whether it is correct that listing form is used only for payments that are to be processed by Treasury he stated that vouchers received by Examination Section are processed for payment.

In sum then PW4's evidence indicated that he expected accused 2 to remember the Ministries from which the alleged vouchers originated, moreso, because large amounts were involved. He denied that after payment have been authorised the voucher and attachments are sent to the Financial Controller's office so that they can be entered in the accounting system. He also disputed that there are instances where payees may personally collect cheques from the Treasury. He was not able to comment on whether payees could collect their cheques from the Central Bank direct. Asked if there would be anything particularly wrong if payees were to collect cheques themselves he replied that, that would be wrong. In the case of the four cheques, there is the odd situation that Treasury does not know to which Ministry services were rendered or goods supplied. I find PW4's evidence truthful and satisfactory.

PW5 Pulane Peleha testified that she is a messenger employed at the Treasury and has been working for Government since 1987. She knows accused 3 and 2 and has been working with them. The learned DPP referred her to Central Bank tattered register book. In it she acknowledged seeing an entry for 22-6-93. Thanks to the cooperation of all the defence Counsel the DPP was allowed to lead this witness who appeared much flustered and afraid to tell the Court anything save being preoccupied with the ~~set~~ of her doek on her head.

It was her evidence that on 22-6-93 she collected a cheque from the Central Bank payable to Lesotho Landscaping(Pty)Ltd. The cheque was in the amount of M576 798-49. She signed the Register at the Central Bank and took the cheque which she handed to accused 2's secretary at accused 2's office. She said it was not unusual for messengers to collect cheques. The cheque number was 049116. This is the cheque that was handed in earlier marked "Exhibit E".

PW6 was Moeketsi Palime a civil servant employed in the Ministry of Law and Constitutional Affairs. He is attached to the Registrar General's department. He is a Senior Trademarks and Patents Examiner. He has access to books and documents kept in the Registrar General's office. He examines documents submitted to the office for registration of companies. He has access to the Register of Companies incorporated in Lesotho.

PW6 was approached in August 1995 and asked to make a

search to find if a company called Lesotho Landscaping(Pty)Ltd was recorded in the Registers. He found no trace of any such company. He asserted that there is no company known as Lesotho Landscaping(Pty)Ltd registered in Lesotho.

He said he also registers Partnerships. He stated that there is no Partnership in Lesotho registered as Lesotho Landscaping.

Under cross-examination by Mr Phafane PW6 said he has been in the section dealing with registration of companies for four years. He conceded that occasionally one sees companies registered in Lesotho not bearing Lesotho names but names such as Taiwan Construction. He also conceded that this suggests that the mere fact that a Company is called Lesotho Landscaping or Lesotho Textile doesn't necessarily mean it is registered in Lesotho.

In re-examination by the learned DPP the witness responded as follows to the following questions :

"If a foreign company comes to work in Lesotho has it to register in Lesotho....? Yes..

Is that in terms of the laws of Lesotho.....? Yes

In terms of what.....? Companies Act.

Ct: Were any of the pages of your records missing.....?
No"

To my mind the answer to the first question in re-examination effectively demolishes the suggestion that a company

though surviving under a name suggesting it is a Lesotho Company may well be a foreign company therefore registered in a foreign country and thus not necessarily in Lesotho. The crucial thing about the instant case is that Lesotho Landscaping(Pty)Ltd, to the extent that accused 2 and 3 insist there should be or have been such a company which rendered services to Government, would have been registered in Lesotho in terms of the Companies Act of Lesotho.

PW7 'Malebohang Morakabi testified that she is employed in the civil service as personal secretary to the Deputy Accountant-General. She started working at the Treasury in 1986 when she was promoted to the position referred above. She started working with accused 2 when the latter was still Assistant Accountant General. She continued working with him when accused 2 was later promoted to the position of Deputy Accountant General.

Asked about her relations with accused 2 i.e. if they were good she said they were the sort of relations obtaining between boss and secretary. Asked the same question again she said she and accused 2 related well because they were working. The final answer to the same question was "I can't say we disliked each other but we were working".

PW7 testified that she knew the file T\BNK\15. Correspondence to the Central Bank was kept in that file which

was an open file. She is aware that this particular file was converted to a confidential file in March 1994 at accused 2's instance or behest. This file was kept in the office of accused 2 together with all previous T\BNK\15 the use of which came to a stop when Treasury stopped banking with the Standard Bank. After being so converted it was kept with all closed records relating to it.

She said that she typed correspondence to the Central Bank. "Exhibit D" was typed by her. When she typed "Exhibit D" she hadn't seen any attachments accompanying the draft which was prepared by accused 2. It was unusual to see a letter like "Exhibit D" without attachments. She also said she was responsible for filing copies of letters in the file. Other than copies of letters, there were requests from other Ministries for transfer of their monies through the Central Bank. See page 152 of my hand written notes.

Letters from Ministries would be accompanied by attachments such as, for an example, a letter from Civil Aviation requesting Treasury to make payments would be accompanied by invoices. Such attachments would be in T\BNK\15. She had access to the confidential file kept in accused 2's office because she referred to the file when giving assistance to Ministries concerning their enquiries.

She was shown T\BNK\7 and said this file is now closed. She said it contains correspondent up to 24-10-94. It dates from

14-12-93.

Under re-examination by Mr. Mdhluli PW7 after being referred to a series of folios, nine in all spanning the period between 6th December, 1993 and 11th January, 1994, stated that looking at those folios and the dates it seemed "we didn't close T\BNK\15 correspondence but transferred it to T\BNK\7." This in a sense corroborates the evidence of PW4 who stated that the file ~~in~~ use when he conducted his investigations was T\BNK\7 and further that it contained all that was relevant for purposes of this case that had once been in T\BNK\15. I accept this evidence and reject any that counters it.

She further corroborates PW4's evidence that no vouchers were in there. I accept this also.

The text will reveal from page 158 of my handwritten notes -

"You said T\BNK\15 was closed for reasons privy to you and the boss(accused 2).....? That is correct.

Take the Court into your confidence and say reasons which were privy.....? In March it appeared there was a letter that transferred money from Treasury through the Central Bank by means that were weird. So the boss decided a file he would control be used.

Were there vouchers in the correspondence you transferred.....? No. They were not there.

It was said by Counsel for accused 2 that accused 2 was better positioned to know if there were vouchers before he could write a letter authorising that an entity Lesotho Landscaping (sic) be paid.....? I heard that.

You said the only letter you typed is "Exhibit

D".....? Yes.

Did you see any voucher in that file.....? I don't remember seeing any voucher in there.

Had you access to the file.....? Yes.....

You stated under cross-examination that there was a Confidential file which you opened.....? True.

How is it handled as Confidential. Where is it kept.....? In the Accountant General's office.

And this one.....? It was kept in the office of the Deputy Accountant General.

So he could look after it.....? That's what I think.

And control it.....? I think so."

After this Mr Mdhluli proposed to hand in affidavits of Roodt and Marais. Mr. Sello raised no objection to that. But Mr. Nthethe, in association with Mr. Phafane indicated that the affidavits might be handed in but that "we are not consenting".

Mr. Sello went further to state

"By saying I admit the affidavit I mean I have no right to object to it for it is evidence. By that I don't mean I am precluded from objecting or excepting to the obvious mistakes".

Mr. Mdhluli formally made an application for admission of these affidavits relying on Section 245 of the Criminal Procedure and Evidence referred to earlier and formulated principles of law in support thereof. Mr. Nthethe raised counter-arguments relying on authorities cited. At the end of those counter-arguments Mr. Phafane expressed his association with them. The ruling was granted in favour of the Crown. However at the closure of all the evidence heard and perused Mr. Nthethe

and Mr. Phafane, as they were entitled to do, vigorously argued about the misapplication of the law concerning admission in evidence of documents relied on by the Crown in terms, purportedly, of Section 245 instead of 246. See my handwritten notes at pages 159-161. More of that later.

The affidavits were accordingly admitted in terms of the Criminal Procedure and Evidence Act No.7 of 1981 section 245.

The affidavit of Danie Marais who is an employee of the Volkskas Bank Ltd, Ladybrand, holding the position of Acting Accountant stated the following, among others :

- (a) Accused 2 maintains a current account with Volkskas Bank Ladybrand Branch. His current account number is 2020-142-688. He is the sole signatory in respect of that current account. This account was transferred to Puma Investments(Pty)Ltd on 21st August, 1995;
- (b) Lesotho Landscaping holds a current account with the Ladybrand Branch of the Volkskas Bank and the account was opened on 10th April, 1991. The account number is 2020-142-661. In the bank books the said account is described as a partnership account. There are two partners to this account, namely accused 1 and 2. The two partners are joint signatories in respect of the said account.
- (c) The following transactions relevant to the instant case took place in respect of the Lesotho Landscaping's current account -
 - (i) On 23rd March, 1993 a cheque deposit of R579,500-00 was made. (I may just indicate in parenthesis, that the currency in Lesotho is at par with that in South Africa on (M1-00) one

Maluti equals (R1-00) one Rand basis.)

To return to the text :

- (ii) On 30th June, 1993 a cheque deposit of R576,798-49 was made;
- (iii) On 25th January, 1994 two cheques were deposited in the account, i.e. a cheque for R563,809-73 and a cheque for R487,692-28;
- (iv) On 24th March, 1993 a cheque for R309,750-00 was drawn against the Lesotho Landscaping account. The said cheque was then deposited in accused 2's current account at the same bank;
- (v) A further cheque in the sum of R249,750-00 was drawn against the Lesotho Landscaping account. This cheque was subsequently debited to the same account on 25th March, 1993;
- (vi) Account number 2020-142-661 also shows that on 1st July, 1993 the account was debited with the sum of R570,000 which was drawn by cheque on the same day. The cheque drawn against Lesotho Landscaping account was deposited in the account of accused 2 i.e. account number 2020-142-688;
- (vii) On 5th July, 1993, accused 2's account was debited with the sum of R268,239-50. The affidavit states that the amount that was debited against the account was a cheque withdrawal. It is to be observed that on the affidavit fifty cents is omitted from the amount that was debited against the account of accused 2 on 5th July, 1993;
- (viii) The account also shows that on 26th January, 1994 a cheque withdrawal of R1,040,000-00 was made from the account held by Lesotho Landscaping i.e. account

Number 2020-142-661. The cheque for the said amount was drawn by Lesotho Landscaping in favour of accused 2 and was deposited in his account i.e. account number 2020-142-688 on 26th January, 1994.

- (ix) On 2nd February, 1994 a cheque withdrawal of R500,000-00 was made from the account of accused 2 i.e. account number 2020-142-688. The date of the withdrawal of the said amount is the date when the cheque was debited against accused 2's account, i.e. the date when it was actually received by the bank.

In each instance where withdrawals were made in any of the accounts above the deponent indicates that the cheque in respect thereof is not available "as it would have obviously returned to the holder of the account, the drawer of the cheque" thus casting the onus of evidential burden on the drawer of such cheque or, holder of the account as the case may be. What does accused 1 do, though in this posture of affairs. He maintains dead silence, as he is entitled to do and dare the prosecution to prove the case against him, even though his joint account number 661 is implicated in the repeated and continual receiving of what appear to be ill-gotten gains. A fuller discussion of that will come later.

An official of the FNB Ladybrand Branch, Roelof Roodt also deposed to an affidavit in respect of an account held by accused 3 with the branch.

Salient issues in the affidavit are as follows:

- (i) Accused 3 holds a cheque(current) account with the bank. His account number is 50000 17574, which was opened on 25th March, 1993,
- (ii) Accused 3 also maintains a call account with FNB, Ladybrand Branch: the call account was also opened on 25th March, 1993. The account number is 280 907004 955.
- (iii) According to the entries in the bank books accused 3's cheque account was opened with a cash deposit of R9,750-00 on 25th March, 1993. The opening deposit in his call account was R40,000-00. On the same day accused 3 instructed FNB to issue a Bank Draft for the sum of R200,000-00 in favour of Sanlam Insurance Company. The total sum of the transactions that accused 3 conducted on 25th March, 1993 is R249,750-00 made up as follows :
 - (a) R9,750-00 deposited in his cheque account
 - (b) R40,000-00 deposited in his call account
 - (c) R200,000-00 in respect of the Bank Draft which he directed the bank to issue in favour of Sanlam Insurance Company.
- (iv) Accused 3's cheque account statement indicates that on 1st July, 1993, he made a deposit of R133,317-87. On the same day accused 3 deposited the sum of 134,921-63 in his call account. The sum total of the amounts deposited in both accounts was R268,239-50.
- (v) Further entries in the bank books relating to accused 3's account disclose that accused 3's call account was credited with an amount of R500,000-00 on 1st February, 1994. The deponent states that the cheque for

R500,000-00 was a Volkskas Bank
Cheque.

After the affidavits from the two banks were handed in, the Crown indicated that it was closing its case. Thereafter it was up to the accused to decide if they wished to give evidence in their defence or not. The first accused chose to close his case without giving evidence in his defence nor calling any witnesses. Accused 2 and 3 gave evidence in their defence but one of them called any witnesses.

In brief accused 2 said he wrote the letter "Exhibit B" and that letter was countersigned by accused 3. He said that when he gave instructions to the Central Bank to pay on 23rd March, 1993 he had before him a voucher emanating from a certain Ministry requesting Treasury to pay Lesotho Landscaping(Pty)Ltd the sum of M579,500-00. The letter indicated that the amount that was payable represented settlement of invoice numbers B2, B3 and B4. He cannot remember what the payment was in aid of or all about, unless he refers to file T\BNK\15, that is the open file relating to correspondence addressed to the Central Bank. He says that the confidential file that was opened later does not pertain to the period during which the letters "Exhibits 'B' 'D' and 'F' " were written. That file according to him was opened in March, 1994. He cannot remember from which Ministries the requests for payment originated, unless he were to refer to the file T\BNK\15.

Accused 2 testified that when "Exhibit 'B' " was

prepared, there should have been a payment voucher. I take it by this he meant there must have been a payment voucher. He indicated that similarly this situation applied to both "Exhibits 'D' and 'F' ". He says that vouchers should (meaning according to context must) have been passed for payment by the Examination Section. He commented that he should have satisfied himself that vouchers were true and correct in their entirety : these are vouchers that he alleges were submitted by whoever claimed payment at the Treasury.

In respect of transactions relating to "Exhibit 'F' " it is accused 2's evidence that there must have been receipts attached to the vouchers which quoted Vote 503\001\00117 as the vote to be charged for the payment. He adds that the amount that was to be paid out may have been deposited earlier in the same account. The account should have been credited with an amount of not less than the amount to be paid out, prior to payment being made. Accused 2 further informs the court that monies are deposited in the suspense account 503=001\00117 either because the Treasury is still investigating the origin of the amount or because the Ministry concerned could not open its own account, treasury having denied the Ministry the privilege to open its own account. Accused 2 says he cannot remember off-hand which Ministries had complained that they had been denied operation of the suspense account.

With reference to "Exhibits 'B' 'D' and 'F' " he reiterates that invoices should have been attached to payment

vouchers. Put in the context he uttered this the court understood that accused 2 meant that invoices must have been attached to payment vouchers. He says it would be impossible for him to sign letters instructing the bank without seeing accompanying documents. This expression clearly illustrates the context in which accused 2 should be understood to speak when repeatedly employing the word "should" instead of "must". He goes further to say that he cannot recall which Ministries requested payment, for among other reasons he has been out of office since February, 1995, therefore the sequence of events has undergone a snarl-up in his head.

He says he heard PW4's evidence that no copies of vouchers were kept in the T\BNK\15 file. He made so bold as to assert that what PW4 said was a lie; the truth being according to him, that copies of vouchers were kept in that file. He ventured to state that it is his obligation as head of operations to see that things are done correctly. He adds for good measure that "If I have to see to this then I would do that myself". He further said that payments made out of the suspense account 503\001\00117 would be made at Ministerial level of the department concerned. Vouchers would originate there and payment would be committed in the Ministry or department concerned hence when vouchers were brought to the Treasury they would be accompanied by receipts and the Vote Book. Such payments would never be committed in the Treasury Vote Book.

Accused 2 says he is surprised that copies of relevant

vouchers were not found at the Treasury. According to him, "they should still be there, unless there could be other motive for destroying or hiding the vouchers". It is significant that at this stage the disappearance of vouchers should be attributable to possible motive for their destruction or concealment, contrary to what was suggested to PW4 on accused 2's behalf that the deplorable filing system at the Treasury could account for disappearance of documents there. The clear answer by PW4 to that suggestion was that the situation was not that bad and that it never occurred that when he wanted a voucher there would be total failure to have it retrieved. It would seem then that at this stage of the case confronting him accused 2 is embarking on a ride on two horses at the same time. It has often happened that people who try that find themselves fallen between two stools as the saying goes.

Accused 2 stated that because the Treasury storeroom very small the authorities at the Treasury were in the process of trying to put up a proper filing system there. He told the Court that there was a backlog of documents to be filed relating to previous transactions. He could therefore say the filing system was not up to standard.

He said accounting officers normally collect cheques from the Treasury. They sometimes come accompanied by suppliers. Payees sometimes collect cheques themselves. Accused 2 dubbed this practice improper for it causes a lot of inconvenience to the Treasury.

Turning to the cheques that PW2 says accused 2 collected from the central Bank: the accused says he cannot recall collecting such cheques from the Central Bank. He indicated that if he did so he would have in the normal course of things given the cheques to his secretary to take to the relevant departments.

He however indicated that he didn't frequently collect cheques from the Central Bank. His actual words were: "I didn't fetch cheques on high frequency side but low".

He said he would often copy to Bank Reconciliation Section letters addressed to Central Bank; and further said

"But at a stage where I have received a voucher which I have to pay I need not copy to Bank Reconciliation Section because the payment voucher would still go back to Financial Controller for processing.

Like in the first instance where I pay Foreign Affairs I copy a letter to Bank Reconciliation Section as well as where I receive Certificate from Civil Aviation. I'd copy such to Bank Reconciliation Section.

At the stage when the letter is sent to Central Bank I'd pick up a phone to talk to Central Bank usually to Miss Phate (PW2) informing her to expect that urgent request.

Once a cheque is ready they'd sound us and we would in turn send a messenger if he is there to pick up the cheque. If I don't get anybody to go I do myself go and pick up the cheque."

Accused 2 admits that he operated account number 2020-142-661 with the Volkskas Bank, Ladybrand. He says accused 1 is a co-signatory in that account and that the name of this account is Lesotho Landscaping. The account was opened in 1991. When

it was opened he and accused 1 had a joint venture to do some garden landscaping. The joint venture didn't really take off. So the account stayed dormant.

It so happened round about late 1992 that, as head of operations at the Treasury, he was approached by John Marthinus Kemp (a Ficksburg businessman). Kemp requested accused that Treasury should assist him to make payments pertaining to acquisition of mining equipment, so the story goes. The court further learnt from accused 2 that Kemp had documents showing that his company had authority to operate a mine in Lesotho. Thus accused 3 after considering their request felt that Kemp and his group should be assisted. Kemp and his group were assured of assistance and left. Asked by the Court who else in the Treasury or in position of seniority in Government it was who knew this a ready and unrestrained response of accused 2 was that only he and accused 3 were privy to this arrangement. At a much later stage when questions kept popping up concerning the wisdom of taking upon themselves the decision to involve government accounts and machinery in facilitating the running of the business of someone who did not belong to government without the knowledge of government or any senior member of government accused 2 suddenly saw in this question an instant opportunity to make the best of a situation which was becoming worse and worse and said "perhaps accused 3 told Mr Zwane". It was made plain for his own benefit that accused 2's first and possibly truthful response did not even remotely hint at Mr Zwane having had any involvement in this bewildering scheme. Yet when it was

pointed out to accused 3 that accused 2 said only the two of them were privy to Kemp's scheme he sought to take the cue from accused 2's belated suggestion and improved on it by saying actually Mr Zwane knew about it. When it was brought to accused 3's attention that it was brought to accused 2's attention that he wouldn't be doing himself any good if out of desperation he maintained that he could make do with purveying what appeared to be afterthoughts, and that accused 3 should be mindful lest he fall into the same trap accused 3 was clearly in a cleft stick and seemed to regret that his singing the same song as accused 2 could not fetch applause.

Denouncing the tendency in people to imitate others even to their own detriment Alfred Tennyson in the first publication, (in 1960) of his book titled The Deathless Country page 141 lines 298 to 301, in exasperation says

"But ye, that follow but the leader's bell.....
Taliessen is our fullest throat of song,
And one hath sung and all the dumb will sing."

Two to three weeks later, so accused 2's story goes, Kemp came back indicating that he had experienced difficulties while trying to acquire mining equipment overseas, thus solicited accused 2's personal assistance this time. First Kemp wanted to know whether accused 2 had a personal banking account in the Republic of South Africa. Accused 2 told him that he had. Here accused 2 was referring to account number 2020-142-688. Thereupon Kemp explained that he and his group wanted to use accused 2's personal account to keep their money in hold for

their use if and when they so wanted. Kemp would give accused 2 instructions and the latter would dispatch the money to Kemp. Accused 2 says he told Kemp that he was agreeable to Kemp using account 688 for the purpose proposed.

Accused 2 gave Kemp details of his personal account. The story further goes that three weeks later Kemp deposited money in accused 2's account and his credit balance swelled and shot up to millions. The money deposited in this account was Kemp's money, so was the Court told. Accused 2 says that he got nervous or uneasy when he realised that millions of rands were being deposited in his account in Ladybrand. This worried him so much so that he went back to Kemp and suggested to him that he could rather make use of account number 2020-142-661. Accused 2 discussed the question of the use of account 2020-142-661 by Kemp with accused 1. The two agreed that Kemp could make use of their joint account to deposit his money. They then both signed blank deposit slips and all the cheque leaves in their cheque book in blank. The blank deposit slips and their cheque book were then given to Kemp. The story goes further that accused 2 after giving Kemp the deposit slips and cheque book, that was the last time he and accused 1 operated the Lesotho Landscaping account number 2020-142-661.

Accused 2 says that he and accused 1 would never have known if money was deposited or withdrawn from their account. He says he was not aware of the deposits made in that account in March and June, 1993. He was also not aware of the deposits made

in January, 1994. He suggests and believes that it was possible for Kemp to make deposits and withdrawals without reference to joint partners of the account because accused 2 and his partner accused 1 had already given him blank deposit slips and a cheque book both signed in blank. He was also not aware that in March, 1993 a sum of R309,750-00 was withdrawn from the Lesotho Landscaping account. Similarly he was not aware that R249,750-00 was also withdrawn from the same account. In June, 1993, he could not have known that R570,000-00 was withdrawn from that account. In respect of R1,040,000-00 withdrawn in January 1994, he could not have known that such an amount was withdrawn from that account.

Apparently when accused 2 told the court that the deposit slips and a cheque book signed by him and accused 1 were given to Kemp; and that this was the last time they operated account 661, he was not aware that the learned DPP through his ingenuity would secure an unsigned and unused cheque book belonging to the company and bearing accused 1's address, to cross-examine him on. He suggested though that when a previous cheque book is three quarters or 75% used then the Bank automatically replenishes fresh supply of a new cheque book to replace the old one. The DPP accepted this proposition after satisfying himself of its validity. But looking at the total number of withdrawals hardly four in all from the account number of the partnership, one wonders whether the cheque book given to Kemp consisted of hardly six leaves in all! How can that be so when the court was told that Kemp was such a busy man, thus

creating the impression that he would make do with a cheque book consisting of leaves the number of the one used by the DPP to cross-examine accused? That cheque book consisted of 40 leaves. Is it possible that the four leaves used to exhaust an amount equal to the amount lost to Government of Lesotho less +\- M38,000 constituted three quarters of the cheque leaves given to Kemp such that the new cheque book used to cross-examine accused 2 was due already? In fact he referred to cheque books not just cheque leaves which were given to Kemp. Shown a Cheque Book -

"Whose cheque book is it.....? It is written Lesotho Landscaping.

Whose is it.....? It belongs to Lesotho Landscaping.

The account number on it? 2020-142-661.

Was that cheque book given to Mr. Kemp.....? I don't know where it comes from for we had given Mr Kemp all cheque books.

What address is on that cheque book.....? Box 7242 Maseru 100. Telephone 050 325459.

Whose phone number is that.....? Probably accused 1's. I don't know his phone number by heart.

According to this when was last cheque stamp issued.....? 28-7-94

Whats the amount.....? M867-00

Look a this statement and see if this cheque No: 00162 was presented for payment.....? It was presented.

This cheque book was signed a long time after the alleged day when it is said accused 1 and 2 handed signed documents to Kemp. Accused 2 said he and accused 1 had lost interest long before June 1994 yet on 28-7-94 it appears they were operating account 661. See page 225 of my notes.

Another strange thing about the evidence given by accused 2 in this connection is that where in the beginning he categorically said after signing all the cheque books in blank he and accused 1 handed them to Kemp and had no subsequent dealings or contact with Kemp, he later improves or changes his version when improbabilities are pointed out at his story and says when a previous cheque was finished Kemp would come "to let us sign a new one in blank".

In regard to R570,000 deposited in accused 2's account the court was told by accused 2 that this sum had been deposited by Kemp. It is Kemp who gave him instructions on how to utilise the money. It was Kemp's instructions that he should withdraw R268,239-50 from his account although he cannot recall the exact nature of instructions given. He goes on to say that he is aware that R500,000-00 was withdrawn from his personal account in February 1994. He explains that the withdrawal of the said sum was in accordance with instructions from Kemp. He cannot recall precisely who the payee was in respect of that amount.

Accused 2 says he recalls at some stage being approached by accused 3 who informed him that he, accused 3 was in financial difficulties. He (accused 3) had an overdraft with the Lesotho Bank and he was apprehensive that he would be sequestered if he did not pay the amount owing to Lesotho Bank. Accused 2 advised accused 3 to approach Kemp. He says he presumes accused 3 approached Kemp because shortly afterwards he got instructions to pay accused 3 an amount of R65,000-00. He

complied with the instructions. This amount was paid out of accused 2's personal account, so went the story. The money belonged to Kemp and this happened sometime in June or July 1993.

Accused 2 was referred to "Exhibits E, G and H". He stated that he did not know anything shown at the back of the three cheques. He was last in touch with Kemp round about June\July 1994. He stopped assisting Kemp when a query was raised by the Audit Department concerning the assistance he had given to Kemp. He informed Kemp that he would stop assisting him. He has not been in contact with Kemp although Kemp kept on coming in and out of the country. He tried to trace him but to no avail when the case started because he believed Kemp would be the right person to save him from his predicament. He produced a document purporting to be an affidavit from the Republic of South African Police in Ficksburg in which they stated that Kemp was untraceable. The police knew who Kemp was because they even provided an address of his previous residence 45 Kloof Str. Ficksburg.

Under cross-examination accused 2 was asked what arrangements he had with Kemp and he replied that Kemp could use his personal account 2020-142-688. Kemp deposited monies in that account. This was late in 1992. Kemp would give further instructions. The money in respect of which Kemp would give instructions was money that Kemp would request accused 2 to transfer to beneficiaries overseas. Asked whether he knew that Kemp had a banking account in Lesotho, he replied that he didn't.

When told that Kemp had a company called Lesotho Mining Management(Pty)Ltd, he said he seems to recall that. It was also suggested that Kemp had associates from South Africa such as Ashley Stevens, he replied that in fact he had met Stevens. He reiterated that Kemp was given Carte blanche regarding the operation of the Lesotho Landscaping account.

Accused 2 agreed that there was an uncanny similarity between Lesotho Landscaping and the payee in respect of the four cheques i.e. "C,E,G and H". He had assisted Kemp with transferring monies overseas with accused 3's concurrence. Accused 2 says he had a very intimate business relationship with Kemp, yet it is his evidence that Kemp never mentioned to him that he had a company named Lesotho Landscaping(Pty)Ltd. He goes on to say that besides his mining activities, Kemp had other business interests in Lesotho. He didn't discuss Kemp's other business interests other than the one relating to the transfer of monies overseas.

He agreed that a cheque deposit was made in his account on 24-3-93. He answered that although he did not have a statement, there was a deposit of R309,750-00 that was made into his account. Yet he cannot recall having met Kemp at any time between 23rd and 24th March, 1993.

With regard to the cheque for R579,500-00 accused 2 says that he does not recall collecting such a cheque from the Central Bank, and therefore it follows that he would not recall

anything that concerning that cheque. He cannot recall how instructions were conveyed to him from Kemp as to how the sum of R309,750-00 should be disbursed. It was pointed out to accused 2 that as at 28th July, 1994 the Lesotho Landscaping account appears to have been in operation and he replied "it is not so, Kemp might have requested us to sign the cheques on his behalf". Accused 2 agreed that the unused cheque leaves in the cheque book that was placed before him during cross-examination were not signed in blank. It was further suggested to him that one would have expected those cheque leaves to have been signed in blank. He replied that he supposed Kemp would have come and requested him and accused 1 to sign the cheques for him. He was cagey in explaining how it came about that there was a cheque book that wasn't signed in blank long after the period when he alleges they ceased operating the Lesotho Landscaping.

Quizzed as to who the recipient of R249,750-00 was he said he didn't know anything about that. He said it was a incidence that an amount similar to the one withdrawn from his account was deposited in accused 3's account at FNB. He confirmed that the amount R579,500-00 was deposited in the account of Lesotho Landscaping on 23rd March, 1993 and that on 24th March the sum of R309,750-00 was deposited in his account.

Asked whether he made enquiries regarding the origins of the said amounts accused 2 said that he would normally get instructions from Kemp. Confronted with the bank statement that showed accused 3's account at FNB was augmented by R249,750-00

on the same day, he said he didn't know since he was not operating that account. It is bewildering though that an invitation to observe a certain state of affairs as reflected would warrant that accused 2 should operate accused 3's account first. Suffice it to say the answer given to this question is an evasion of the highest magnitude.

It was further pointed out to him that the sum of R570,000-00 was deposited in his account, his account was R25-82 in the red. He replied, "I would have to check the original statements; I don't remember such bizarre situation". He couldn't produce the originals of his statements saying that he would "probably" have to go to the bank to get the originals of his statements. He agreed that on 15th April, 1993 he withdrew R10,000-00 from his account in Ladybrand. It was pointed out to him that on 27th April, 1993, a sum of R5,000-00 was withdrawn from his account in Ladybrand and he admitted that. When it was pointed out to him that again on 3rd June, 1993, his statement

flected that the sum of R10,000-00 was withdrawn by cheque, he agreed. He also agreed that on the same day his Lesotho Bank account benefitted to the tune of M10,000-00. Asked to comment on this obviously striking coincidence he said the two transactions were unrelated. He said that he could probably have deposited M10,000-00 in his Lesotho Bank account before he made the withdrawal in Ladybrand.

It was pointed out that in respect of yet another transaction a cheque withdrawal was made on 8th July, 1993 from

his Ladybrand account and his Lesotho Bank account benefitted by the same amount. Again he replied that the two transactions were not related to each other. Again on 20th July, 1993 a cheque withdrawal of R15,000-00 was made from his Ladybrand account and on 22nd July, 1993, M15,000-00 was deposited in his Lesotho Bank account. Asked to say how this came about he replied that there was no relationship between the two transactions. It was put to him that on 20th September, 1993 he withdrew R15,000-00 from his Ladybrand account and that on the same day his Lesotho Bank account benefitted by M12,000-00 deposited in cash. He agreed but explained that there was no relationship between the two transactions.

When it was put to him that on 1st February 1994, a sum of R500,000-00 was deposited in accused 3's account at FNB and that the cheque deposited in accused 3's account was a Volkskas Bank cheque, he replied that he never paid Mr. Matebesi. When it was pointed out that his bank account was debited in the sum of R500,000-00 on 2nd February, 1994, his reply again was that this was a mere coincidence. Questioned on when he made payment of the R65,000-00, ostensibly at Kemp's instructions, to accused 3, he stated that it was around June\July, 1993. In reply to a question that there was no evidence of such payment having been made to accused 3, his disarming but curious reply was "I don't remember how I made that payment, but this was made pursuant to instructions from Kemp".

Regarding the vouchers and matters arising from

treatment of Exhibits "B D and F" including the witness's reaction to the suggestion that he signed the Register at Central Bank when collecting related cheques it would be fruitful to quote the interchange verbatim from page 264 of my notes :

"Even in respect of letters B D and F there were vouchers according to you.....? They should have been.

And would have shown the Vote debited.....? They should have reflected the vote.

You have the Dispatch Register(before you). In it none of these "Exhibits C, E, G and H" is reflected. Exhibit "C" of 23-3-93 is not reflected. That's the one said to have been collected by you. It doesn't appear. Would you say it is an omission.....? I am surprised it does not appear.

'Exhibit E' dated 22-6-93 doesn't appear in the Dispatch Register though the lady messenger says she gave it to your secretary....? I am surprised it doesn't appear.

Similarly with regard to 'Exhibits G and H' dated 25-1-94 those cheques don't appear in that Dispatch Register. Is it an omission....? I am surprised they don't.

According to PW2 Stella the lady who gave evidence the cheques were collected by you not Kemp.....? I said I don't recall doing so. I don't maintain this Register.

You said you had occasion on low and not high frequency side to collect cheques from Central Bank.....? I recall saying that.

On this Register the cheques in respect of payees Babolo, Tshola and Nkuebe appear in it.....? Yes they do.

I have looked at this Central Bank Register too. From 1992 nowhere have you signed for a cheque.....? Does it matter, does it matter.

Nowhere have you collected a cheque in 1992.....? Most probably.

You see, the cheques you are reported to have collected in 1993 on 23-3-93 were those during the only occasions when someone says you signed and you

are saying it is not your signature.....? Thats not my signature.

Even in 1994 nowhere; where your signature appears on Central Bank Register where it is alleged you collected cheques on 25-1-94.....? It appears in front of Baholo, Tshola and Nkuebe.

Yes.....? This book is big.

This side is for cheques collected.....? (Court directs that witness be given 10 minutes or more to peruse the book which he says is too big).

(After the break) Other than cheques you are alleged to have collected from Central Bank are there cheques you are shown as having collected. I know about Tshola, Nkuebe and Baholo's.....? Nowhere.

From the period 1992 to 1994.....? Correct.

You confirm that a cheque for R579,500-00 was deposited in the account of Lesotho Landscaping on 23-3-93.....? I saw that.

You have no quarrel with that.....? No. I saw the deposit slip.

On 24-3-93 a sum of R309,750-00 was deposited in your account from Lesotho Landscaping account.....? I saw that but didn't know it was from Lesotho Landscaping account.

Court: In respect of entries in that Central Bank Register opposite the names Baholo, Tshola and Nkuebe are those your signatures.....? Yes"

The Court having observed striking similarity between these and the signature opposite Lesotho Landscaping (Pty)Ltd proceeded :

"Wouldn't you think whoever made signatures below i.e. in respect of Landscaping was trying his or her best to imitate your signature....? I don't see how.

Don't you think these squiggles in respect of four characters imitate yours with regard even to full-stops interspersing those....? No similarity"

see page 267 of my notes.

On page 272 of my notes accused 2 clearly indicates he knew of Kemp's association with SS & M Company. The text goes:

"Then he has an account held by SS & M Company(Pty)Ltd. Do you know anything about it....? He would ask me to issue receipts in this name".

Apart from the fact that Kemp was associated with SS & M Investments(Pty)Ltd, he knew that Kemp is an associate of Ashley Stevens and that he was resident in Ficksburg. There was no suggestion whatever in his evidence that he knew more Kemps than one meeting all the categories above. No suggestion that there was another Kemp who like the Kemp I was told of had a son who handled his father's business during brief periods when the father had travelled overseas.

It was put to accused 3 that information goes into the accounting system by going through the Bank Reconciliation Section. He said

"according to me it is not so. The information is punched by the Financial Controller.

Court: But was the witness contradicted when he stated that information goes into the system through being processed by Bank Reconciliation Section.....? I can't recall"

see page 513

Despite his insistence that he paid accused 3 M65,000-00 accused 2 when confronted with proof that there couldn't have been such a thing appeared baffled and sought to improvise.

Here is the text :

"You said you paid accused 3 M65,000-00.....? Yes.

There is no such payment. Look, how could you have.....? I don't remember. Maybe accused 3 can".

When asked to say why PW2 would say accused 2 signed the Register when collecting the cheques when he didn't he suggested that it could be due to some ill-motive. But one has to bear in mind that while PW2 was giving evidence there was no suggestion put to her even remotely that she was motivated by ill-will against accused 2. I accept PW2's story then that accused 2 collected "Exhibit C" from her as well.

The way accused 2 and 3 indulge in this sort of behaviour leads me to an observation appearing at page 533 in Chronicles of Basutoland relating to events of the years 1830-1902 assembled and translated by Robert C. Germond.

Referring to a Mosotho the observer says

"There is no one in the world who slips and escapes with greater ease from the hands of his would-be captor.....This shrewdness"

is comparable

"to the cunning of an animal which concerns itself with little else than the immediate danger or the present peril; but in this very cunning, there is an instinct so sure and so subtle, it brings such delicate springs into play; in its every movement it has something so swift, so spontaneous and so unpredictable, that its processes baffle analysis and it repeatedly foils the most skilful calculations....."

Let a Mosuto be surprised in a dangerous or compromising situation, there is little likelihood of his being caught unawares. He will immediately find the most natural and the most plausible reasons to explain what may appear suspicious in his behaviour

and, if need be, will invent as unlikely and circumstantial a story as those which we find exemplified in the comedy of The Liar".

In his cross-examination of accused 2 Mr Sello relying on the principle that there is honour even among thieves sought to elicit from that witness that accused 1 was an innocent party in the scheme or arrangement that he and accused 2 embarked upon.

Thus he objected vigorously each time when the tenor of cross-examination of accused 2 by the learned DPP tended to implicate accused 1. His argument if I understood it well was that accused 1 had closed his case at the end of the Crown case, therefore it wouldn't be proper that his guilt, if any, should arise from the evidence of a fellow accused.

It is to be wondered though whether this type of approach does not render nugatory the importance of the principle laying down the rule that it is incumbent upon the Court to consider the totality of evidence given in a case in order to finally determine the guilt or otherwise of an accused person who chose not to give evidence in his defence. Furthermore there is a strong suggestion by the authorities that an accused person who gives no explanation of the conduct complained of on his part is running a risk in the event that prima facie evidence has been established against him. Again it is to be wondered whether an attempt by a co-accused to show that another accused is innocent, if proved false and therefore worthy of rejection improves the fortunes of an accused who gave no evidence himself. Accused 2 said he and accused 1 signed in blank cheques and slips relating

to account 661 and handed those to Kemp. If this proves false where does it place accused 1? Indeed if a man rides on the crest of a strong wave at sea secure in the hope that it would carry him to shore, and discovers to his horror that the wave breaks and disintegrates at full force on impact with sharp spurs hidden under water, what hope has he of survival. More of that later.

Accused 3 in giving evidence in his defence said his role as the Accountant-General was to lead and manage the Treasury Department in terms of Chapter 2 of the Financial Regulations. He gave evidence in regard to the procedures to be followed before Treasury makes payment to any person claiming such either for services rendered or goods supplied. He stressed that a voucher must be prepared and submitted to the Treasury together with supporting documents; that CTB authority must be obtained in respect of payments exceeding M3,000-00; that whoever the payee is ought to receive the payment cheque from the ministry which received services or supply of goods.

He stated that he cannot say what Lesotho Landscaping(Pty)Ltd is. He would not have known about "Exhibit C" because after signing the letter "Exhibit B" a cheque would not come to him, it would be delivered to the Dispatch Section. The same would apply with respect to "Exhibits E, G and H". He said he cannot find anything wrong regarding "Exhibits G and H" because when he signed the relevant letters, documents were there. Payments that were made were in order.

PW4's search was not thorough, his search was superficial and he rushed to conclusions. If documents cannot be found or traced (accused 3) he is not accountable for their disappearance. He did not handle the relevant file concerning the subject matter of charges preferred against him and two others because the file was dealt with entirely by accused 2.

He says he knows John Kemp. He knew him when Kemp came for assistance at the Treasury and was introduced to him by accused 2. He also met him when he (accused 3) wanted to borrow money from him. Kemp and his colleagues came to his office with accused 2. He approved of their request for assistance. He met Kemp on several occasions when Kemp came to Maseru. On a number of occasions when he came to Maseru, Kemp went via accused 3's office.

Accused 3 says he was a member of CTB. He was appointed such a member in 1990. CTB only sits during the absence of the Chairman and two other members. CTB has more than eight members. He did not always attend meetings of the CTB. He would only attend if there was no quorum. If he was busy during the sitting of CTB he would send accused 2 to represent him. He never attended meetings on a regular basis.

Referring to the affidavit of Roodt, he stated that R9,750-00 deposited in account number 50000 175 74 was a cash deposit. He also stated that he has seen a deposit slip dated 25 August, 1993. The date is hand written. He also referred to

a date stamp which bore the date 25-3-93. He further referred to the sum of R200,000-00 which featured in his transactions with FNB on 25th March, 1993. The money was given to him by Sebatana William Russell, a maternal cousin of his, to invest on behalf of the latter. The R40,000-00 which was deposited in his call account on 25th March, 1993 also came from Russell. It was to be used to pay for spare parts which Russell needed for his transport business.

Accused 3 referred to two transactions which were made at FNB on 1st July, 1993. He said that part of the money that was deposited on 1st July, 1993 was money which was given to him by Russell. The R65,078-37 was money he had borrowed from Kemp and had intended to pay his debt with it at Lesotho Bank. He added that he thought the money was lent to him per arrangements between Kemp and accused 2. The R68,239-50 was money that came from his cousin Russell. He states that no bank can allow a split deposit of one cheque. According to him the total amount at was deposited in his cheque account was R133,317-87. The other amount of R134,921-63 deposited in his call account on 1st July, 1993 was money that came from Russell.

He states that in respect of the amount R500,000-00 deposited in his call account on 1st February 1994, this was money that came from Russell's account at the Trust Bank. He further said that there is no relationship between R249,750-00 in Marais's affidavit and that in Roodt's affidavit. He went on to say there is no relationship between the amount in paragraph

10 of Marais's affidavit and that in paragraph 6 of Roodt's affidavit.

He explained what a Deposit Accountant Sundries account is: that it is a suspense account. Its purpose is to deposit monies there temporarily while enquiries are being made concerning their origin.

When he alleges he borrowed money from Kemp accused 3 says he knew him very well. Kemp was a person who made substantial investments in Lesotho, he said. By the time when he borrowed M65,000-00 from Kemp, he had known him for a considerable length of time. Kemp never mentioned the name Lesotho Landscaping(Pty)Ltd. Neither did accused 2 mention that name ever. When he signed "Exhibit B" accused 3 had never heard of Lesotho Landscaping(Pty)Ltd.

Under cross-examination accused 3 reiterated that the 00,000-00 that was invested in March, 1993 was not his money: he says the investment was made on behalf of Russell. The same was the case in respect of the R40,000-00 that was deposited in his call account. He was made aware that Russell had been on the air over Radio Lesotho denying that he knew anything about monies which accused 3 claimed belonged to him (Russell). Accused 3's response was that he would be most surprised because he had been with Russell on the Friday before: Sebatane Russell had said nothing of the sort to him. Knowing Russell very intimately he could state emphatically that Russell would not have hesitated

to reveal that to him when they met just the previous Friday.

It was put to accused 3 that Russell said that when he first heard of accused 3's evidence, he wanted to meet him and his lawyer but failed to meet them, hence he Russell went on air to refute what accused 3 had said in court. Accused 3's response was that he was most surprised because Russell was someone who would not shy away from airing his grievances or objections. In reply to a question whether he had told Russell that he would mention Russell's name when giving evidence, accused 3 said that he had told Russell that the monies mentioned in the affidavit deposed to by Roodt belonged to him. He was quite categorical that he had told Russell that the latter's name would come up in Court.

The gist of accused 3's evidence was that when he signed "Exhibits B, D and F" he had seen the vouchers which had been prepared by the relevant Ministries; that the vouchers had been properly prepared; that they complied with the Financial Regulations; that they had been examined by the Examination Section; and that they were accompanied by the necessary documents. He said that the monies that were deposited in his account at FNB on dates that coincided with withdrawals of similar amounts from the account of accused 2 were monies which were given to him by Russell. The only sum that went into his account which did not belong to Russell was that which he alleged he had borrowed from Kemp.

After both the prosecution and the defence had closed their cases Sebatane william Russell was called as court's witness and in the interests of justice as the amount of R500,000-00 alleged by accused 3 to have originated from him constituted a crucial part of the indictment. Thus the purpose for calling him was not solely that he should come and contradict accused 3. If he happens to do so it is merely incidental to the main purpose for which he was called.

Russell said he never gave any money to accused 3 to invest on his behalf. He further said it is not true that accused 3 is his cousin. He confirmed that it was he who had given an interview on Radio Lesotho and that he had intimated to accused 2 and 3 and their lawyers that he intended to approach Radio Lesotho to clear his name. He stated that he had never approached accused 3 for his assistance when he was in financial difficulties.

Under cross-examination Russell said he was aggrieved by what accused 3 had said before court, and in his understanding, it was accused 3's lawyer who had come up with the suggestion that accused 3 should say that the monies that went into his account belonged to him.

The crown called PWS Alfred Matang to give evidence in rebuttal. He said he was a sergeant in the SAPS, stationed at Ficksburg, where he had been stationed since 1990 when he first joined the police service.

He was referred to "Exhibit J" a document handed in and referred to as an affidavit on behalf of accused 2.

PW8 acknowledged that he had handled "Exhibit J" prior to his giving evidence. The date stamp on "Exhibit J" is that of the South African Police Service (SAPS). He is the one who stamped this document.

He was on duty at Ficksburg Police Station on 4th October, 1995, when he saw "Exhibit J". On that day a white man came into his office; saying he wanted to swear to a statement. The document had already been signed when the white man brought it before him. As a sergeant PW8 is a Commissioner of Oaths. He asked the white man who had signed the document and the latter said it had been signed by himself. The document was not signed in PW8's presence. He accepted the signature on "Exhibit J" as that of the white man on the latter's say so.

PW8 did not observe that the date on the document was October 5th. Being "satisfied" that the signature on the document was that of the white man, he made him swear to the truthfulness and correctness of the document. The stamp shows that the document was sworn to and signed on 4th October, 1995 at 4.00 p.m. He attested the document as Commissioner of Oaths.

When PW8 first saw the document at the Charge Office, the name W\O Grobler was not on the document. PW8 testified that

he had nothing to do with preparation of the document. The SAPS does not have letter heads at Ficksburg. There is no W\O Grobler at Ficksburg. He did not know the white man who came with "Exhibit J". PW8 does not know John Kemp, nor where he resided at Ficksburg.

PW9 Johannes Martinus Kemp testified that he was a businessman resident in RSA. He had business dealings with Ashley Stevens. In the past he had business interest in SS & M Investments(Pty)Ltd. This company was registered in Lesotho. He operated a bank account at Lesotho Bank in Leribe. see page 564 of my notes.

Of all the accused PW9 knew only accused 2 whom he had met once or twice when he was together with Mr. Stevens. The other two accused he did not know. Accused 2 was introduced to him as Putsi. He met him at government offices. Mr. Stevens introduced accused 2 as someone who had something to do with finances. He has never advanced accused 3 with monies. He does not know any company known as Lesotho Landscaping(Pty)Ltd. He does not even own such a company.

He does not know if there is another J.M. Kemp who has had business dealings with Mr. Stevens. To the best of his knowledge, he knows of no other Kemp who has had business dealings with Stevens. He has never used accused 1's and 2's banking account at Volkskas in Ladybrand. He does not even know where Volkskas in Ladybrand is situated. He has never rendered

services to GOL nor has he ever held a GOL cheque. He has never collected a cheque from the Treasury for payment to a company known as Lesotho Landscaping(Pty)Ltd.

When referred to "Exhibits C, E, G and H" he stated that he had never handled nor seen any of the cheques in question. He had never received proceeds from those cheques. He does not know any of the signatures on the back of the four cheques. He knows roughly where the Central Bank is, but he has never gone inside that bank. Although he knows where accused 2 worked he didn't go inside his office and he didn't have any dealings with Lesotho Landscaping(Pty)Ltd.

PW9 stated that he had no signing powers in respect of the account which accused 2 maintained at the Volkskas Bank in Ladybrand : in fact he stated that he had no arrangements whatsoever with or concerning accused 2's account and that of Lesotho Landscaping. He was never given blank cheque leaves by accused 2. This is the first time that he hears that he had authorised accused 2 to make payments on his behalf. He has previously met accused 2 but there was no business relationship between the two of them. It was suggested to PW9 that he was not the Johannes Marthinus Kemp who dealt with accused 2 and accused 3. He stated that indeed he was no such person. He clearly stated however that he was a business associate of Stevens and that his son handles his business affairs on occasions when he himself has travelled abroad and that he did stay at Ficksburg at some stage but he is no longer staying there. He did have

business interests in SS & M Investment Company in the past.

This finally brought to a close the evidence that the Crown had wished to bring before Court.

All Counsel made their concluding submissions at the closure of their clients' respective cases.

In his submissions in answer to the Crown's submissions Mr Sello indicated that in response to accused 1's request for further particulars to the indictment the crown stated that the case against accused 1 was based on a conspiracy between accused 1 and his co-accused to misrepresent to the Central Bank that the sums reflected on the cheques were due; and that the false pretences allegedly made by accused 2 and 3 were made with accused 1's knowledge and that accused 1 received the alleged stolen property, presumably the cheques or money, well knowing it to be stolen which constitutes the crime of theft.

He submitted that the indictment is defective in equating the crime of "receiving" with that of "theft" inasmuch as "receiving" is a separate and distinct offence and is so treated by the Criminal Procedure and Evidence Act No. 7 of 1981 which goes on to provide that it is a competent verdict to a charge of theft. This, he submitted, is apart from the fact that money can hardly be defined as property.

He submitted that it is common cause that no evidence

of a conspiracy of any kind involving accused 1 has been adduced by the Crown, that in like manner no evidence has been led that accused 1 had knowledge of the alleged misrepresentation by his co-accused to the Central Bank.

He submitted further that the learned DPP didn't ask the court to infer this conspiracy for he wouldn't be able to provide facts from which to infer that. Having gone this far Mr Sello submitted that the above submissions would suffice to dispose of the indictment.

Mr Sello submitted further that the only fact proved relating to accuse 1 is that the four cheques were credited to an account at the Volkskas Bank, Ladybrand, operated jointly by him and accused 2 and bearing the name "Lesotho Landscaping". He said that no evidence has been adduced by the crown as to why and how these cheques came to be so credited when, according to the exhibits, they were all paid into an account bearing the name "Lesotho Landscaping(Pty)Ltd". He referred the court to the learned DPP's opening address and stated that this address gave the impression that this money was paid into the account Lesotho Landscaping. He strained to establish a distinction between paying into an account and crediting an account.

I propose to deal with the foregoing queries advanced on behalf of accused 1. Regardless of reference, in the indictment, to money as property, an admittedly inelegant reference I should say; there is nonetheless evidence before

court that proceeds from four cheques were stolen.

There is evidence that all the cheques that are the subject matter of the charge preferred against the accused were deposited in the joint account of accused 1 and accused 2 over a period extending from 23rd March, to 25th January, 1994.

- (a) The first cheque was deposited on 23rd March, 1993;
- (b) The second one on 30th June, 1993;
- (c) The last two on 25th January, 1994.

There was no legitimate cause why these cheques were deposited there. Thus at the time these cheques were deposited accused 1 the joint account holder knew that accused 2 had not rendered any services nor supplied goods to GOL as a result of which payment was warranted to be made to accused 2 or to a company with which he was associated. Accused 1 must have known that the so-called partnership Lesotho Landscaping was not entitled to receive any payment from GOL.

Further submissions by Mr Sello were a development of his original theme save that he sought to persuade the court that it would appear the Bank was party in the unlawful dealing. But there is no evidence of this, thus this submission amounts to speculation or even conjecture. In R. vs Mlambo 1957(4) SA 727 at 738 E to F, (an Appellate Division case) Malan J.A's noteworthy dictum lays down that

".....it would be unrealistic to have recourse to

the realm of conjecture when there is ready at hand material which furnishes a perfectly sound, rational, common-sense solution to the problem".

Moreover the learned Judge also had to say at A:

"In my opinion, there is no obligation upon the crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused".

In oral response to the learned DPP's submissions
r Sello submitted -

"My learned friend asks why accused 1 didn't apply for the discharge at the close of the Crown case. But, because the accused wanted to prove to the public not just to the court that he is acquitted (on merit) not just because he has a clever lawyer"

he adopted this attitude.

"Moreover accused 2 said we know nothing about this case. So there is no hitching of waggons to some star or other".

The difficulty that this submission presents to me is that it seems to blow hot and cold and is in a sense self-contradictory. Earlier on it had been urged on me that the court should guard against convicting accused 1 on the evidence of a co-accused. But now I am asked to rely on the evidence of a co-accused to effect accused 1's acquittal. How if such evidence merits rejection: Surely anyone pinning his faith to it is most likely to fall between two stools.

Apart from the fact that this submission tends to turn on its head the principle enunciated by Mlambo above that if the court, after mature consideration, comes to a conclusion that evidence exists to warrant conviction, there is often an element of risk if an accused does not give an explanation regarding evidence that suggests his complicity in the crime charged. Mature consideration, in my view, is not confined to the position immediately obtaining upon the closure of the Crown case; because while at that stage a court may be of the view that there does exist evidence on the basis of which, it might and not should convict, a further consideration comes into play when the respective parties have closed their cases, namely whether the crown has proved its case beyond reasonable doubt. If there was evidence on the basis of which the court might convict and there is no attempt to explain factors warranting contrary attitude then the prima facie evidence becomes conclusive.

As I stated earlier on regarding the element of risk attendant on failure to come into the box in a case where prima facie evidence has been established, reference to the invaluable works of S.E. van der Merwe et al styled Evidence at page 417 would prove fruitful. The stimulating passage cited in CRI\T\1\92 Rex vs Masupha Seeiso at p.11 in an unreported Ruling of this Court says :

"The State will have established a prima facie case; an evidential burden (or duty to adduce evidence to combat a prima facie case made by his opponent.....) will have come into existence i.e. it will have shifted, or been transferred, to the accused. In other words, a risk of failure will have been cast upon him. The onus still rests on the State; but, if

the risk of losing is not to turn into the actuality of losing, the accused will have the duty to adduce evidence, if he wishes to be acquitted, so that, at the end of the case, the Court is left with a reasonable doubt.....?

It is indeed common cause that the account in question was opened in April 1991.

It was argued that there is no way accused 1 would have known that the account of Lesotho Landscaping of which he was a partner and co-signatory with accused 2 was being abused. But in my view because what is common between Lesotho Landscaping and Lesotho Landscaping(Pty)Ltd is the account number 2020-142-661 short of his explanation concerning the claim made on his behalf, accused 1 must have known what was taking place in account 661.

There is evidence in Marais's depositions that funds moved from this account number to accused 2's personal account number 2020-142-688. In my view there could have been no way such funds moved without the two partners' authority. I reject the myth sought to be advanced by accused 2 and 3 as to the identity of PW9 Johannes Marthinus Kemp. Therefore I take the view that the Kemp that was introduced into this proceeding by accused 2 is the Kemp who gave evidence in this Court. To the extent that PW9 exposed as false the allegation that he had any dealings with accused 2 regarding payment of GOL's funds in favour of Lesotho Landscaping(Pty)Ltd, the discredit attaching to accused 2's version has been brought to light that he and accused 1 left the operation of account 661 to PW9's use by facilitating such use by handing Kemp blank cheque books and

deposit slips signed beforehand. The rational and common-sense approach advocated by Malan J.A. above dictates against accepting such a comical and fanciful notion.

I take the view that the fact that the payee of all the cheques in question was Lesotho Landscaping(Pty)Ltd should have set accused 1 on enquiry. I say so relying on the oft-repeated principle that a man who places himself away from affairs which personally affect him or his interests does not win the Court's favour if he suppressed the natural curiosity to find out what obviously was odd about them. Accused 1 knew well that his and accused 2's so called partnership was not the same as Lesotho Landscaping(Pty)Ltd. When the four cheques were deposited, on a continuous basis, in account 661 surely accused 1 should have suspected that the cheques that were paid into their account were tainted with irregularities of some sort: he ought to have found out what the payments were for, but there is no indication that he did that.

The basic and central point is that GOL was deprived of its funds by unlawful means.

The name of the payee in respect of all the cheques bore a striking similarity to the name of the so-called partnership of which accused 1 and 2 were reputed to be partners. Common sense dictates that the submission be viewed with favour, that the similarity between the names of the two entities Lesotho Landscaping and Lesotho Landscaping(Pty)Ltd suggests that there

was a conspiracy from the outset to obtain cheques from GOL and deposit them into the Lesotho Landscaping account without raising eyebrows because the names of the two entities were almost similar.

The fanciful notion that all cheques and deposit slips belonging to account 661 were signed in blank and handed to Kemp beforehand is rendered nugatory by the fact that a blank cheque used in the cross-examination of accused 2 by the learned DPP, though belonging to account 661 was nevertheless not signed by accused 1 and 2.

If there had been only one transaction regarding the cheques deposited in account 661 one could reasonably say that accused 1 had been caught unawares and therefore been a victim of circumstances. But there were four such instances involving deposits of cheques fraudulently obtained from Government. There is no evidence to suggest that accused 1 distanced himself from the deposits made into account 661. Instead the evidence suggests that he assisted in moving funds from account 661 into accused 2's account 688. Thus he became instrumental in moving monies unlawfully obtained from Government into account 688. The means employed in so moving these funds cannot be otherwise but unlawful. Accused 1 must have known this.

The instances in which accused 1 assisted in the moving of these monies were first in respect of a cheque for the sum of R309,750-00. There is evidence to show that this cheque was

drawn against account 661 and in favour of accused 2. Thus the submission is well-grounded that the cheque could only have been issued if accused 1 signed the cheque as well. Next, there is also the cheque for R249,750-00 which the Crown sought to prove was deposited into accused 3's account. That cheque could only have been issued if both accused 1 and 2 signed that cheque. There is no explanation before court about the circumstances under which accused 1 signed the two cheques.

Regarding the cheque that was deposited in account 661 on 30th June, 1993 there is evidence that after "Exhibit E" had been deposited in 661 a cheque for R570,000-00 was issued by Lesotho Landscaping in favour of accused 2. Again, in respect of that cheque, it could only have been issued if both accused 1 and 2 had signed the cheque. But other than the fact that the deposit slip "CAD5" which lodged the cheque on 1st July, 1993 indicates that it was signed by accused 1 there is no explanation by him saying what the circumstances were in which he signed the cheque for R570,000-00 and actually saw to it that it was deposited into accused 2's account.

While on this, I should point out that I feel at large to refer freely to documents attached to the affidavits with regard to accused 1 because his counsel very properly submitted that it would not make sense on the one hand that a cross-examiner should use them in cross-questioning and on the other hand to say they should be rejected as not being properly before the Court. Relevant treatment of the propriety or otherwise of

the inclusion of these documents will be embarked upon later with respect to the case against accused 2 and 3 whose counsel made submissions against their admission.

Harking back to accused 1: With respect to the cheques that were deposited in account 661 on 25th January, 1994, accused 1 is linked with that transaction as well in that subsequent to the deposit of the two cheques a cheque for R1,040,000-00 was sued against account 661 in favour of accused 2. The bmission seems to me legitimate that this cheque could not have been properly issued without the signature of accused 1. But the matter does not end there. It goes further in that the lodgement document i.e. cheque account deposit slip "CAD6" is signed by accused 1 and some other person. The DPP submits that the identity of this other person doesn't matter; and that what matters is the fact that accused 1 signed "CAD6". But he gives no explanation regarding the circumstances in which he signed the cheque that was deposited into accused 2's account in January 1994. No explanation is given to the Court either as to how his signature appears on "CAD6". Isn't this rather like a situation where a gun explodes, and a man drops dead: Five paces therefrom stands another with a smoking gun. If the gun holder maintains his innocence with regard to the shooting doesn't it behove him to say what the smoking gun was doing in his hand when the other man dropped dead?

In the instant case money that is alleged to have been stolen was in all instances deposited in the joint account of

accused 1 and 2. From that account it was then distributed to accused 2 and 3. On the basis of what has been cited earlier in Evidence by Van der Merwe et al the accused had an obligation to explain how that money initially got into the joint account of accused 1 and 2. But no such explanation has been given.

In his submissions on behalf of accused 2 Mr Phafane referred the Court to the evidence of PW1 and 2 and stated that their evidence outlined the function of a banker; namely to effect payments if so instructed by persons having authority to so. The banker's function with regard to instant proceedings dn't go beyond verifying the correctness of signatures on "Exhibits A, B, D and F". Following these instructions the banker issued cheques i.e. "Exhibits C, E, G and H to effect payments.

Learned counsel submitted that these witnesses did not advance the prosecution case on the four counts regard being had to the fact that signatures on "Exhibits A, B, D. and F" are not i dispute. If one can pause here for a moment and reflect on a least the evidence and the demeanour of PW2 one would be justified in holding the view that the significance of her evidence against accused 2 did not in my humble view end within the parameters set by accused 2's Counsel's submission.

I recall distinctly that for a good measure PW2 like a skittish horse, would not budge except with constant prodding by the DPP. But a moment occurred in her evidence when after

answering just what she was asked to answer, she gave a deep and pregnant pause after which, spontaneously and unprodded she said with regard to accused 2 "I had trusted him but here it is, he has disappointed me". Saying this she had fixed a penetrating gaze of revulsion in the direction of accused 2 from which the latter momentarily quailed and squirmed with discomfort. This is one of the factors going a long way in the assessment of the value to attach to a witness' evidence by a trial Court.

It was questioned why PW3 who is a senior person should sign "Exhibit D" in the absence of accompanying documents. I am satisfied that as she claimed she brought to the attention of accused 2 the fact that the letter had not been copied to Bank Reconciliation Section and the accused gave her his word that this would be taken care of. The question of PW3 being senior does not make her more senior than accused 2. The entire manner in which accused 2 went about his role in this affair was to pretend that everything either was in order or would be taken care of later. In any event it would knock the stuffing out of theft by false pretences if the element of pretence was eliminated at every turn.

It was submitted that PW3 was contradicted by PW7 on the issue where PW3 said accused 2 came waving the letter before her to sign it while PW7 says she is the one who brought the letter before PW3 to sign. The essential point however that the attachments or supporting documents were absent is shared by these witnesses when the signing took place. Moreover I formed

the impression that PW7 hasn't as sharp a memory as PW3. PW7 was rather impressionable and tended to be amenable to cajoling under cross-examination in instances where her recollection of events was hazy. In any event what is important is that there is the signature of PW3 on the document.

It was submitted that PW3's evidence is unreliable on the issue that there were no accompanying vouchers. But to date spite the vigorous search no such documents have been found.

any case supporting information in other departments like Income Tax office or Ministries concerned would have revealed supporting evidence presupposing the existence of such documents even if they have been lost for good, provided they ever existed in the first place. In sum then there is that apparent contradiction as pointed out by Learned counsel but nothing turns on that in my humble view.

It was submitted that PW4's search was unreliable. First because he searched only three Ministries out of more than ten in all. Next because he said his search was not exhaustive.

It in my view he searched the most relevant Ministries. Next, cross-examination brought to the accused's attention the various Vote Books and relevant Books of account which were in use at the time in various Ministries and nothing of what the accused contended was given substance to.

It was contended on behalf of accused 2 and 3 that the annexures to the affidavits being copies of entries in the

ledgers, day-books, cash books and other books of account in a bank placed a requirement on the Crown to have given notice to the 2 accused in terms of Section 246 but this was not done. As earlier stated it is to be noted that Counsel for accused 1 parted company with counsel for the other two accused on this issue.

I do indeed recall that counsel for accused 2 and 3 placed it on record during proceedings that it was not with their respective clients' consent that these documents were placed in evidence. Both counsel contended that these documents are not receivable in evidence and that the prosecution's failure to comply with the law was fatal to the case for the Crown. Reliance was in this regard reposed on S. vs Volschenk 1970(3) SA 502.

The headnote in the above case reads :

"The prescribed notice of ten days provided in Section 265(1) of Act 56 of 1955 where the State wishes to use extracts of bank statements against an accused charged with fraud, and where cheques issued by him have not been met, applies whether the State adduces in evidence the original entries under Section 264 of the Act or copies thereof in terms of Section 265(1)".

Sections 264 and 265 of South Africa above are almost an exact replica of Sections 245 and 246 (respectively) of our C.P. & E Act 7 of 1981.

Section 245 reads :

"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, transactions 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".

Section 246(1) reads :

"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 ten(10) days' notice in writing or such other notice as may (be) ordered by the Court or a magistrate holding 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 accounts of which such entries form a part".

2.

3.

The passage relied on by two counsel for accused 2 and

3 starts from page 505 of S. vs Volachenk above. In it Boshoff

J says :

"The argument for the State was that Section 264 renders original entries in bank books admissible as prima facie evidence in criminal proceedings and can, as such, be used without qualification, whereas Section 265(1) deals with copies of such entries and only when such copies are used in evidence is the prescribed notice necessary to enable the party to whom notice is given to check the copies with the original entries. This argument overlooks the language used in sub-section (1) of section 265 and the respective purposes of section 264 and sub-section(1) of 265.

The purpose of section 264 is to render entries in bankers' books, which would be inadmissible, admissible as evidence in criminal proceedings. Sub-section (1) of section 265 is inelegantly drawn and may properly be divided into two parts. The first part renders examined copies of all entries in bankers' books admissible as evidence, and the second part provides when bankers' books and examined copies of entries therein may be used in evidence against a particular party in criminal proceedings. The second part in terms deals with both bankers' books and copies of entries therein.....

.....It would seem that the prescribed ten days' notice is necessary whether the original entries or copies of such entries are adduced in evidence. Having come to this conclusion, the contentions advanced on behalf of the State must be rejected. In the instant case the prescribed notice was not given to the appellant before the bank-statement was put in as evidence and used against him. It was on this score not receivable as evidence with the result that the State was unable to establish the misrepresentation alleged.....".

Basing himself on the above authority Mr Nthethe gallantly submitted to me that it would seem that the requirement of 10 days' notice provided in Section 246 of the C.P. & E applies also in Section 245 - a matter that I must confess, caused me a great deal of anxiety and I indicated to him as much for the view I took was that because the two sections are independent of each

other, noway can specific provisions in one which are absent in the other apply in that other. In other words Section 246 requires of one party that 10 days' notice be given to the other party. But section 245 does not.

However, reacting to the onslaught Mr Mdhluli stated that Section 245 does not make provision that an accused should be provided with notice of intention to invoke provision of that section, whereas section 246 provides that an accused person must be given notice of the prosecution's intention to use copies of documents in evidence. Further section 246 provides that an accused person should be given an opportunity to examine the documents which the prosecution intends to adduce in evidence. I accept these submissions.

The learned DPP submitted that the interpretation of both sections 264 and 265 in South Africa applies to our sections 245 and 246 respectively. He further submitted that there is no need for an official of any bank who makes an affidavit in terms of section 245, to annex copies of the documents on which he relies when he refers to entries to be found in the bank books. He indicated that it might very well be that the annexures to the affidavits deposed to by Marais and Roodt shouldn't have been attached to the affidavits because the evidence, on its own, of an official of the bank relating to entries in the books is prima facie evidence in regard to the contents of such entries.

Indeed the learned writers Hoffman and Zeffertt in

their invaluable book The South African Law of Evidence 4 Ed at p.147 say concerning Bankers' books,

"In criminal proceedings entries in an account book (including any ledger, day-book or cash-book) of a bank are prima facie proof of their contents upon the mere production of an affidavit that states that deponent is in the service of the bank, that the book is or has been one of the bank's ordinary books, that the entries have been made in ordinary and usual course of business and that the book is in the custody or control of the bank.... A bank cannot be compelled to produce its account books unless the court orders production.....".

Colin Tapper in Cross on Evidence (7th Ed) p.688-9

deals with Bankers' Books and says :

"At common law, bankers' books, other than those of the Bank of England, are private documents; but the inconvenience which would have been occasioned by the necessity of producing the originals as and when required for purposes of any litigation has been avoided by the Bankers' Books Evidence Act 1879. Provided that this is one of the ordinary ones of the bank, the entry was made in the ordinary course of business, the book is custody of the bank, and the copy has been examined against the original (all of which matters can be proved by the affidavit or the testimony of an officer of the bank), a copy of an entry in a banker's book shall, in all legal proceedings, be received as prima facie evidence of such entry, and of the matters, transactions and accounts therein recorded. The application of these provisions has been very sensibly extended to modern forms of book-keeping such as microfilmed and computerised records. This reform does not, however, extend beyond the form of the records to their substance, and it seems that copies of letters sent by the bank, of cheques and paying-in slip, would still not be covered by the provisions".

The learned DPP accordingly submitted that reference to letters, cheques and paying-in slips is to instances where the documents in question are introduced in evidence to prove their contents. He pointed out that in the instant case it was never

the intention of the prosecution to prove the contents of the annexures to the affidavits. He drew attention to the fact that section 246 refers to examination of copies of entries in bank books and provides that notice should be given in writing to the party affected if the prosecution intends to adduce such evidence. Further the section gives the affected party the right to examine the documents in issue if he or she so desires. Thus, it was submitted, that if the requirements of the section are not complied with such an omission is fatal to the case for the prosecution. See Swift - The South African Law of Criminal Procedure (1st Ed) pp 401-403 at 403.

The learned DPP further urged in respect of annexures attached to the affidavits of Marais and Roodt that the Court should regard such evidence as being purely illustrative and that those were annexed to the affidavits for the benefit of the accused. He indicated that these annexures may indeed be superfluous and shouldn't have been annexed to the affidavits.

However their being annexed, he said, cannot prejudice the accused in any way. In fact the annexures were referred to extensively by the entire defence both during cross-examination and when two of the accused gave their evidence-in-chief. I agree.

The learned DPP argued in the alternative that the offending annexures may be disregarded by the Court; and further that such a step would not result in prejudice to any of the parties. In this regard I understood this argument to present

an acknowledgement of the fact that the affidavits when taken along with the annexures present something of a curate's egg. In situations where this is the case Courts have adopted a remedial approach of excising the bad from the good and in the result preserving the good. But where the good and the bad are so inextricably intermingled as to make it impossible to remove one from the other without the resultant destruction of the product as in the case of trying to unscramble an omelette then ~~the~~ the entire product is discarded thread and thrum.

The case where this operation was undertaken with success in the sense of preserving the good after excision of the bad therefrom is Edward Hae Phoofolo vs Rex C. of A(CRI) No.1 of 1988 (unreported) at pages 12 and 13 where Mahomed J.A. as he then was had this to say :

"The classical case on the test of 'severability' is the decision in Johannesburg City Council vs Chesterfield House(Pty)Ltd 1952(3) SA 809 in which it was stated that :

'where it is possible to separate the good from the bad in a statute and the good is not dependent on the bad, then that part of the statute which is good must be given effect to, provided that what remains carries out the main object of the statute.

Where however, the task of separating the bad from the good is of such complication that it is impracticable to do so, the whole statute must be declared ultra vires ' ".

Having outlined the two parts, that the learned Judge said the authority given by the Minister to an incumbent contained, he proceeded as follows :

"Notionally, these parts are two separate matters. In my view, they are conceptually and notionally severable. (Baines Motors vs Piek 1955(1) SA 534; S. vs Prefabricated Housing Corporation(Pty)Ltd and Another 1974(1) SA 535(A); S. vs Ockers & Another, 1974(2) SA 523; S. vs O'Malley & Another 1976(1) SA 469).

If the excision of the second part of the written authority left undefined what the purpose of Mr Von Staden's appointment would be, there might be some merit in resisting the notional severance because there might be some doubt as to whether, in its truncated form, the authority would give effect to the intention of the Minister or enable the main object of the appointment to be carried out.....".

I am inclined to follow the approach adopted in the above authority. In doing so I find it compelling to state that it is to be observed that the essential averments in the affidavits still establish a prima facie case against the accused regarding the entries mentioned in the affidavits. To that extent the essence and purpose of the affidavits remain intact notwithstanding severance of the illustrative annexures. The learned DPP had urged that should reference to the annexure, be omitted, then reference to them by both the prosecution and the defence either in chief or cross-examination should be disregarded.

Responding to the submission by Mr Nthethe that S. vs Volkschenk above is authority for the proposition that notice should be given if the prosecution wants to invoke provisions of section 245 Mr Mdhluli submitted that the above case is no authority for such a proposition and accordingly elaborated as follows : namely, that in that case the Court dealt with a situation where the prosecution wanted to put in evidence

originals of documents and it argued that provisions of section 265 of the S.A. Act did not apply.

The court held that provisions of section 265 applied even though the prosecution wished to tender in evidence originals of bank documents.. It was argued that the Court held that as long as the documents sought to be tendered in evidence were intended to prove the documents, notice should have been given to the accused. There is no suggestion in the judgment that sections 264 and 265 of the Act should be read jointly. The court was not called upon to decide on such issue nor did it purport to do so. Thus it was submitted that no notice is required if the prosecution relies on the provisions of section 245. I agree with this submission.

It was further reiterated in regard to evidence tendered by way of affidavits that the Act provides in section 245 that such evidence is prima facie evidence of the entries at are referred to in the affidavits. In order then to rebut such evidence, the accused have to place some credible evidence before court to contradict the prima facie evidence. It was pointed out that the affidavits referred to accounts which were held by the accused at the banks in question. The original of the bank statements referred to in the affidavits would in the normal course of things be sent to the holders of the accounts. It was submitted that the accused, where they sought to contradict some of the statements made in the affidavits did not produce any document whatsoever to show that the entries referred

to by the bank officials were incorrect. Thus they are criticised for merely making bold statements that the entries referred to were in certain respects incorrect. Yet in the same breath, they didn't hesitate to rely on those very same entries when it suited them to do so. The learned DPP accordingly submitted that the accused had to give an explanation which could be accepted as being reasonably possibly true on a balance of probabilities : but this, he said, they failed to do.

With regard to the case specifically relating to accused 1 the DPP crossed swords with Mr Sello's submission that reference to "all transactions" in paragraph three of Marais' affidavit includes deposit slips or paying in slips. He moved that transactions should be understood to mean movement of funds out of the account and signature of all documents regarding the movement of such funds. Thus the learned Counsel for the Crown submitted that deposits into a holder's account need not necessarily be signed by the holder of that account. He invited the court and Assessors to take judicial notice that any person may make a deposit in the account of the holder.

In reacting to this invitation I felt I should articulate Mr Sello's submission in greater detail to provide sufficient background for my decision in that connection.

The way I understood it Mr Sello argued that the affidavit of Marais of the Volkskas Bank, Ladybrand branch, cannot be relied upon insofar as he states that the signatures

of the two partners i.e. accused 1 and 2 in respect of account 661 were required for all transactions relating to that account. He contends that this statement by Marais is contradicted by some deposit slips which were annexed to Marais' statement that the signatures of both partners were required in respect of all transactions relating to account 661 is misleading and that no reliance can be placed on such a statement.

He contends that since out of choice the Crown decided tread along the path of affidavits as against calling oral evidence of the deponent, then because an affidavit cannot be cross-examined the crown should not seek to have it interpreted. Thus the Crown out of choice is hoist on its own petard and should not seek relief from such situation or corner into which it has painted itself willingly.

Mr Sello contends further that if Marais' statement is rejected then there is no evidence that accused 1 signed any of cheques which were either payable to accused 2 or accused 3. He firmly contends that accused 1 did not know of the deposits made into account 661 and any subsequent cheque withdrawals made therefrom.

I propose to deal with Mr Sello's submission in two legs. First I would say application of common sense advocated in Mlambo above once more dictates that reference to "all transactions" in Marais affidavit should be construed as reference to all transactions that would in normal banking

practice require the holder of the account to sign in respect of such transactions. In normal banking practice the holder of the account could, of course, authorise or empower someone else to sign on his or her behalf. In that case the signature of the authorised agent is deemed to be that of the holder of the account. There are, however, certain transactions that would not normally require the holder of the account to sign for such transactions that confer rights or benefits on the holder of the account as opposed to those transactions that impose obligations

the holder of the account. Thus for instance the signature of the holder is not necessarily a requirement before a deposit can be made into an account. I don't have to be an expert in banking to know this. In further illustration of this point I would refer to the fact that the signature of a civil servant whose salary is deposited into his bank account is not a prerequisite before such a deposit can be made by his employer, the Government. This also is the case where someone is aware where I bank he need not obtain my consent or signature if he
nts to make a donation to me or give me a gift by depositing
money in my account.

The second leg is that where there is evidence that a person is the holder of a cheque account the only inference that may be drawn, in the absence of an explanation to the contrary from the holder of the account, is that the account holder is the signatory in respect of that account. In respect of an account jointly held by two persons, in the absence of an explanation from the joint account holders, it would be proper to infer that

the account holders may sign jointly or individually in regard to that account. The question as to whether the joint account holders may sign jointly or individually would be a matter that would be within the peculiar knowledge of the joint account holders. If any of the joint holders of an account did not sign any document, that particular joint holder may simply say so. There is no need to speculate who signed a document or instrument where one or both of the holders is or are available to explain which of the two account holders signed a particular document or instrument relating to the joint account.

In regard to the joint account of accused 1 and 2 there is the uncontradicted evidence of Marais that account 661 was held jointly by those two. Thus even supposing that Marais had said nothing about both of them being required to sign, an inference could legitimately be drawn that one or both of them were required to sign. Indeed accused 2 gave evidence and explained that both he and accused 1 were joint signatories in respect of account 661. But accused 2, sought however to explain their signing of cheques paying himself or accused 3 by saying that he (accused 2) and accused 1 signed blank cheque leaves. So it is not in dispute that both accused 1 and accused 2 signed; what is in dispute is when they signed and in what form they signed the cheques in question. The proposition however that accused 1 and 2 signed any blank cheques and deposit slips and handed them to Kemp to operate account 661, in the light of credible evidence adduced by the Crown, deserves rejection on the score of absurdity.

Turning briefly to the absurdity of failure to put one's case to relevant witnesses available and subsequently wishing the court to accept one's evidence as true and reject the opponents' evidence as false I shall refer to the incident where accused 3 at page 512-513 of my notes suggests that his and not PW4's uncontradicted evidence be accepted :

"So the person who wrote letter of instruction had no duty to ensure that the transaction reflected in the voucher went into the (accounting) system.....? Financial Controller in his position is entrusted with (duty of) updating the records by punching the information.

You heard PW4.....? He said many things.

About the fact that information goes into the system by going through Bank Reconciliation Section.....? According to me it is not so. The information is punched by F.C.

Court: But was he contradicted when he stated that information goes into system through being processed by Bank Reconciliation Section.....? I don't recall"

Likewise accused 2 ultimately suggested that PW2 was lying when she said he came to collect some of the cheques, the subject matter in this case from the Central Bank.

Barring the question and submission by the DPP seeking to show that Kemp was first mentioned when accused 2 was giving evidence in his defence; needless to say the issue in that aspect was resolved by Court in favour of accused 2 because none of the Crown witnesses who gave oral evidence would relate to this aspect of the matter, the record reveals that time and again accused 2 and 3 didn't give a good account of themselves when asked if the particular aspect was put to crown witnesses, and

if not, why not.

Concerning this aspect of the matter the position in law is :

"It is in my opinion elementary and standard practice for a party to put to each opposing witness so much of his own case or defence as concerns that witness, and if need be, to inform him, if he has not been given notice thereof, that other witnesses will contradict him, so as to give him fair warning and an opportunity of explaining the contradiction and defending his own character. It is grossly unfair and improper to let a witness's evidence go unchallenged in cross-examination and afterwards argue that he must be disbelieved". See Small vs Smith 1954(3) SA at 434.

In the same vein the authority of Phaloane vs Rex 1981(2) LLR at 246, per Maisels P, lays down that :

"It is generally accepted that the function of counsel is to put the defence case to the crown witnesses, not only to avoid the suspicion that the defence is fabricating, but to provide the witnesses with the opportunity of denying or confirming the case for the accused. Moreover, even making due allowances for certain latitude that may be afforded in criminal cases for a failure to put the defence case to the crown witnesses, it is important for the defence to put its case to the prosecution witnesses as the trial court is entitled to see and hear the reaction of the witness to every important allegation".

In saying this I am not unmindful of the words of Schutz, J.A., as he then was, in C. of A. (CRI) No.2 of 1983 Letsosa Hanyane vs. Rex (unreported) at p.7 that :

"But when at least one instance seems to have been shown to be the fault of counsel, I think that it would be dangerous to embark on the hip and thigh smiting of the appellant that the trial court embarked upon".

In the instant trial I am satisfied that none of the

defence counsel can be blamed for failure to put what was relevant to the opposing side's witnesses. The upshot of this then is that the two accused, in each instance where it was revealed that relevant evidence was not challenged by putting the accused's version to the opposite side, were fabricating and indulging in afterthoughts.

Turning now to aspects of the evidence of accused 2 and accused 3 that in their own words amount to strange coincidences.

It was put to accused 2 that a cheque which had the same amount as the cheque "Exhibit E" was thrown into accused 2's personal account and his answer was "I never made that deposit".
 Asked further -

"What happened to that cheque.....? Payments were made from it.

No. It was reversed in your account.....? It was reversed.

Know why.....? No.

I suggest it was reversed because that cheque which was deposited in your account was found to be Lesotho Landscaping(Pty)Ltd and marked 'not negotiable'.....? May be.

Shortly following day after this cheque was deposited into Lesotho Landscaping account a sum of M570,000-00 is withdrawn from Lesotho Landscaping account on 1-7-93.....? I saw in affidavits.

The minute it is deposited into your account on 3-7-93 things start happening. Then there is a cheque drawn for R268,239-50 on 5-7-93 which is the day it was presented for payment at Volkskas Bank. Then you find on 1-7-93 accused 3's two accounts one in the sum of R133,317-87 is deposited in his current account.....? I don't know about that.

And on the same day R134,921-63 is deposited in his

call account. The sum of those to the last cent foots up to R268,239-50. Strange isn't it.....? It is a strange coincidence.

Another coincidence of an amount similar to an amount in your account is drawn by accused 3.....? If so it is strange"

See page 278 of my notes.

".....on 20-7-93 your Lesotho account benefits to the tune of M15,000 cash.....? No relationship.

On 20-9-93 you withdraw R15,000 from your account 688.....? Yes.

True to form on same day your Lesotho account benefits to the tune of M12,000 in cash.....? No relationship"

Taking samples at random the learned DPP proceeded in his cross-examination -

".....The amount to be deposited was a cheque for R1,051,502-01 deposited on 25-1-94 consisting of two cheques. Don't dispute.....? I saw copies.

On following day a sum of M1,040,000-00 was withdrawn from Lesotho Landscaping. Then this amount is received in your account on 26-1-94.....? Let me have a look (SHOWN DOCUMENT).....? Yes I see that.

Then things started. We see action now. The amount cannot be allowed to warm the account. Then on 1-2-94 accused 3 gets a deposit of half a million i.e. R500,000-00. We are told this was a Volkskas Bank cheque.....? Not from my account. I never gave accused 3 money.

Your account is then debited on 2-2-94 also in the sum of R500,000-00. It gets there when presented for payment. Wonder.....? Thats' a coincidence".

See page 282 of my notes.

"Immediately a sum of R268,239-50 was withdrawn.....? Yes, per Kemp's instructions.

Your friend accused 3 deals with R268,239-50.....? I saw that in the affidavits.

He receives this money because he deposits R134,921-63 in his call account R133,371-87 in his cheque account footing up to R268,239-50.....? I hear you.

Then you say your R268,239-50 was paid to whoever per Kemp's instructions. Who was that.....? I paid so many people per Kemp's instructions. I can't remember.

It is a coincidence your friend deals with similar amounts.....? It is a miracle.

On 25-1-94 it is alleged you received two cheques from the Central Bank.....? I said I couldn't recall and there would be nothing wrong if I did.

Those two cheques are received by Kemp.....? If they landed in his account yes.

Like "Exhibit E" don't appear in the Register at Treasury? It is a miracle". See page 295 of my notes.

My record reveals that the evidence of accused is bristling with coincidences and miracles.

"The cheques are deposited at Volkskas Bank Ladybrand into account 661 the same day.....? I hear you.

On the same day 26-1-94 withdrawal is made from 661 of R1,040,000-00? I hear you.

Did you see Kemp that time....? I might have.

Did you give him the cheque.....? No.

When your account was credited with R1,040,000-00 you find on 1-2-94 the account of accused 3 is R500,000-00 fatter.....? I don't know.

That is a cheque in regard to which your account is debited by R500,000-00 on 2-2-94? That is a coincidence".

See page 296 of my notes.

"You have this situation that these cheques are not registered in the Dispatch Register.....? I notice that. I am not the one registering cheques.

Very redolent of the saying "I am not my brother's

keeper, one might say".

The strangeness that characterises accused 2's story does not relent though. It keeps coming up like a bad penny as the saying goes.

"But on the same day that those cheques are collected some are registered except the ones relating to Lesotho Landscaping(Pty)Ltd.....? Thats very strange".

I may point out that in my view coincidences, miracles and strangeness attested to by accused 2: between all these and an acknowledgement that some clumsy attempt is being made to conceal the truth runs a very thin line indeed. Hence the remarks made in CRI\T\58\90 Rex vs Monyamane Libete Mohola at pp 8 and 9 that :

"Because of the extent to which this case is bristling with strange coincidences the accused was not to be behindhand in professing his own observation of some strange coincidence in reply to a question intended to highlight his tendency to create false situations and refer to them as strange coincidences".

At page 9 the summary in that judgment went:

"Sooner rather than later his imagination should be awakened to the tough and uncompromising reality that the strange coincidences and the dreamland which he wishes to pin his faith on point..... not to some strange coincidence....." but a well planned and carefully structured scheme to do mischief.

With regard to accused 3 I wish merely to highlight the scant attention he gave to the requirement that he should observe and enforce the Financial Regulations 1973. This comes to surface through cross-examination. It goes as follows :

"Mr Matebesi before we proceed you will recall that we spoke about this question of channelling private funds through Government accounts. You recall that....? I do recall that.

You recall that it was put to you that Government Financial Regulations do not permit that private funds should be channelled through Government accounts, do you.....? I do recall that.

Are you aware that there is a special prohibition against that situation, that occurrence - against that transaction taking place.....? Yes I am aware. I became aware when Audit raised a query.

And Chapter 16 Regulation 1603 of the Financial Regulations of 1973provides :

'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'

Are you aware of that.....? Yes, I am aware of that.

And these were the Regulations that you were required to enforce as the Accountant-General. Not so.....? Definitely so.

And this is what you did not do when you are dealing with moneys from Kemp - which you were channelling overseas.....? Not only about Kemp's monies.

I am talking about Kemp.....? We were following the procedure.

Sir, listen carefully. This is what you did not do in regard to moneys from Kemp - which you were channelling overseas. Answer that question and I will ask it ten times and you will answer it.....? As the law says I agree with you that that law was never followed....."

In his submissions Mr Nthethe pointed out that the Crown does not associate accused 3 with "Exhibit D".

Referring to the crown evidence from officers at the Treasury, Mr Nthethe stated that PW4 took over as Acting Accountant-General after accused 3 had been ordered out of his

office. Further that PW4 discovered what he referred to as irregular payments at the Treasury. He summed up the position as related by PW4 in evidence. He articulated the point that accused 3 had explained that if payment emanated from Ministries, then such payment would be traceable in the vote books of the Ministry concerned and not Treasury. He reiterated that as was pointed out in evidence for the defence it was not compulsory for a writer of letters such as "Exhibit B" to copy it to Bank Reconciliation Section of the Treasury as the whole information would be found on the payment voucher or Bank Statement from the Central Bank which in fact was made available weekly.

He found it significant if strange that PW4 says he could not trace the January, 1994 payments in the Treasury vote book and attributes this failure to what he expresses as "for similar reasons", yet "Exhibit F" was clearly copied to Bank Reconciliation Department of Treasury.

Mr Nthethe finds fault with PW4 for failure to give a balanced view of his statements to Court. For instance it is being charged that the witness having said payments forming the subject matter of this case have not been recorded in the Register, the witness does not say that these are the only payments ever made which are not registered in the register. I hardly find any need that PW4 should say what is complained of, in view of the fact that in regard to all four cheques relating to Lesotho Landscaping(Pty)Ltd none was recorded.

Mr Nthethe further contended that the question of registering cheques at the Treasury was not accused 3's business. Learned counsel stated that had these factors been brought to accused 3's attention, he surely would have set them right.

I must regretfully express my inability to make out the purport and meaning of submissions made in paragraph 6.9.

Learned counsel further pointed out that PW4 conducted investigations in three places only i.e. Ministry of Works, Highlands and Home Affairs. He submits that in the manifest sort of hurry PW4 was conducting his investigation it was unwarranted for PW4 to conclude that Lesotho Landscaping(Pty)Ltd is non-existent.

Learned Counsel also addressed the Court on law relating to the calling of witnesses before Court.

He submitted in relation to Russell that a Court should not call a witness whose evidence would not ordinarily be admissible. I was referred to R. vs Zakeyu 1957(3) SA 198 in this regard.

It was further submitted that a witness should not be called on a point that is not directly relevant to the issue before Court, but one which is for purposes of simply rebutting or confirming what another witness has said. I was referred to R vs Hendricks 1952(1) SA 138(C).

The Court was further urged to have regard to the fact that in cases where the power of the Court to call a witness was directly under consideration, it has been held that a witness whose evidence is purely on a question of credibility not relevant to the points in issue should not be called. I was referred to Scheepers vs R 1933(2) PH. H 118.

It was submitted that it is improper for a Court to call a witness to contradict an accused's evidence on a side issue for the purpose of testing credibility. It was pointed out that this constitutes an irregularity that is fatal to conviction. See R vs Garamukunwa 1963(3) SA 91.

Regarding accused 3's story learned counsel raised a rhetorical question whether Russell's denial of accused 3's story means accused 3 is a thief.

The court was then addressed on the law and great stress was laid on the justification and necessity to acquit the accused at least on grounds of reasonable doubt.

Before dealing with this aspect of the matter as applicable to all the accused I must consider the submissions made on behalf of the Crown.

Mr Mdhluli in summing up articulated the crown case by submitting that evidence led by the prosecution proved among other things the following :

- (a) that the government paid four cheques to Lesotho Landscaping(Pty)Ltd, a fictitious entity, the four cheques being Exhibits C E G and H
- (b) the said cheques were collected from the Central Bank either by accused 2 or a messenger from the Treasury
- (c) the cheques in question were issued pursuant to instructions given either by one or both accused 2 and 3
- (d) all the cheques that were issued by the Central Bank against Government account No.1 were deposited in an account held by Lesotho Landscaping at Volkskas Bank in Ladybrand
- (e) that the holders of the account into which the cheques were deposited, that is account number 661 were accused 1 and 2. They were joint signatories in respect of that account : they both had to sign any cheque drawn on the account
- (f) no services were rendered nor goods supplied to government by an entity known as Lesotho Landscaping(Pty)Ltd. In fact the evidence led by the prosecution clearly shows that there was no justification for any payment being made by GOL to Lesotho Landscaping (Pty)Ltd.
- (g) The government account which it maintains with the Central Bank was debited with the amounts which were paid out to the payee of the four cheques.

I agree with the well stated exposition set out above.

The learned DPP accordingly submitted that GOL lost the money which was paid to Lesotho Landscaping(Pty)Ltd in respect of the four cheques.

Mr Mdbluli submitted that evidence adduced by the prosecution implicated all three accused in the commission of the offence of theft.

Dealing with accused 3, he pointed out that the prosecution proved the following :

- (i) Of the three letters that were addressed by the Treasury to the Central Bank, he countersigned two i.e. "Exhibits B and F"
- (ii) Although he did not countersign "Exhibit D" he received part of the proceeds paid out when the cheque issued in response to "Exhibit D" was presented for payment and honoured;
- (iii) Dealing with each payment made to the fictitious company, accused 3 received proceeds from "Exhibit C" dated 23rd March 1993. It is not disputed that "Exhibit C" was deposited at Volkskas Bank in Ladybrand on 23rd March, 1993, in account 2020-142-661. On 25th March, 1993 a cheque for R249,750-00 drawn against the joint account of accused 1 and 2 was deposited into an account held by accused 3 at FNB Ladybrand. The cheque issued from the joint account of accused 1 and 2 was apparently cleared by special clearance procedure on 25th March, 1993. A document which was put to accused 3 in cross-examination indicates that the Volkskas Bank Ladybrand was holding at the disposal of FNB the sum of R249,750-00 in respect of Lesotho Landscaping(S.Ntatebest) for settlement. The document is described as clearance certificate. The clearance certificate has the same effect as a cash payment made by the drawer of the cheque to the payee.

Mr Mdhluli submitted that reference to "S.Ntatebest" in the document is in fact reference to Matebesi accused 3.

The evidence placed before this Court court by way of an affidavit of Roodt an employee of FNB shows that a current account No.50000 175 74 was opened by accused 3 on 25th March, 1993 with an opening balance of R9,750-00. The deposit in the said account was described as cash. Another transaction on the

same day relating to accused 3 was that in respect of a call account No. 280907001955. The said account was opened with a deposit of R40,000-00. The third transaction made by accused 3 at FNB on the same day relates to the sum of R200,000-00 which accused 3 instructed the bank to pay to Sanlam Insurance Company. The total sum of transactions that accused 3 made at the bank was R249,750-00. A journal was shown to accused 3 during cross-examination showing that on 26th March, 1993, there was an amount of R249,750-00 which was cleared by Volkskas Bank. Only one sum of R249,750-00 appears in the said journal entry.

There is evidence that the account of Lesotho Landscaping held by accused 1 and 2 was debited with an amount of R249,750-00 on 25th March, 1993. The entry relating to the said amount appears in paragraph 8(b) of Marais' affidavit. It is referred to in the affidavit as a cheque withdrawal. Mr Mdhluli submitted that there is no doubt that the sum of R249,750-00 dealt with by accused 3 on 25th March, 1993, is actually the same amount which was withdrawn from the joint account held by accused 1 and 2 on the same date. It cannot be a coincidence that account number 661 was debited with an amount strikingly similar to an amount which was deposited in accused 3's accounts at FNB on the same date. There is also a clearance certificate and a journal entry relating to the same amount in respect of the transactions which took place between the Volkskas Bank and the FNB on the same date.

Accused 3's explanation regarding the source of R9,750-

00 and the date on which it was deposited, cannot be true in that Russell denies any knowledge of that amount coming from him. Furthermore accused 3's statement shows that the money was deposited not in August, 1993, but in March, 1993. He alleges that his own bank statement which shows that the sum of R9,750-00 was deposited on 25th March, 1993 cannot be relied on because it is a copy, yet he is the only person who can produce the original of the bank statement that must have been sent to him by the bank. In fact in August, 1993 his bank statement does not reflect that there was ever a transaction relating to the sum of R9,750-00. Conveniently, accused 3 seeks refuge in the same statement when it suits him. If accused 3 seriously wanted to question the entry relating to the sum of R9,750-00 he could easily have obtained that information from his own bank.

There is also a high degree of untruthfulness regarding the sums of R40,000-00 and R200,000-00 which he alleges he obtained from Russell. Russell denounces this allegation by accused 3 as devoid of all truth. Russell categorically denies having given any money to accused 3 on the date in question or at all. No attempt was made to challenge Russell when he stated that he gave no money to accused 3.

- (iv) Coming to the sum of M268,239-50, there is evidence of Roodt in his affidavit which indicates that accused 3 deposited amounts totalling R268,239-50 on 1st July, 1993.

According to paragraph 6 of the same affidavit, accused 3 made a deposit of R133,317-87 in his cheque account. On the

same day accused 3 deposited the sum of R134,921-63 in his call account. Marais in his affidavit refers to a cheque withdrawal of the sum of R268,239-50 from accused 2's account on 5th July 1993. Mr Mdhuli submitted that a cheque withdrawal refers to the date when accused 2's account was debited with the same amount. This is actually borne out in accused 2's bank statement which was put to him that his account was debited with the same amount of R268,239-50 on 5th July, 1993. Mr Mdhuli thus submitted that clearly there was typographical error in paragraph 10 of Marais' affidavit which omitted reference to 50 cents which makes the amount debited in accused 2's account correspond with that deposited by accused 3 at FNB on 1st July, 1993. I accept that.

The learned DPP further submitted that the difference between the dates 1st July, 1993 and 5th July, 1993 was occasioned by the period which elapsed between the date when the cheque was deposited and the date when it was actually cleared

Volkskas Bank. He indicated that there is a journal entry relating to inter-bank transactions between FNB and Volkskas Bank which shows that there was a journal entry referring to a sum of R268,239-50 which was sent for clearance by FNB to Volkskas Bank. But regrettably the date of this journal entry otherwise known as a fanfold does not come out clearly in the certified copy of the original. This document was brought to the attention of accused 3 while under cross-examination. Accused 3's call account statement to which he was referred during cross-examination reflects that a deposit of R134,921-63 was made on

1st July, 1993. His cheque account statement also reflects that the sum of R133,317-87 was deposited in that account on 1st July, 1993. He was also referred to this statement in cross-examination: he found nothing wrong with that statement.

Mr Mdhuli accordingly submitted that there is a clear connection between the amount that was debited against accused 2's account on 5th July 1993 and the amounts credited to accused 3's two accounts on 1st July, 1993. In any event, the DPP pointed out that there is accused 3's lie that he obtained the monies in question from Russell and PW9 Kemp. Both Russell and PW9 vehemently deny that they gave him any money during that time or at all. Accused 3 quibbles about the date when the sum in question was credited to this account and the date when it was debited against accused 2's account. In response to this Mr Mdhuli submits that it is a redherring being drawn across the trail; and says it can be easily explained in terms of the time it took to clear the cheque that was deposited by accused 3 at

B. He pointed out that interestingly enough the evidence of Russell that he never gave any money to accused 3 was in this instance never challenged. In respect of these two amounts, although accused 3 had nothing to do with the letter that instructed the Central Bank to pay M576,798-49 to Lesotho Landscaping(Pty)Ltd, it turns out that he received a benefit from the amount that was deposited in accused 2's account on 1st July, 1993: the source of the amount deposited in accused 3's account being the joint account of accused 1 and 2. I endorse the well articulated manner in which this submission has been made.

Thus the learned DPP submitted that it is therefore clear that Lesotho Landscaping issued a cheque for R570,000-00 in favour of accused 2 who then deposited the same cheque in his Volkskas Bank account No.688. Accused 2 then in turn issued a cheque on 1st July 1993 in the sum of R268,239-50 in favour of accused 3. Then accused 3 deposited R134,921-63 in his FNB call account and R133,317-87 in his current account. The sum total of the cheques deposited in accused 3's account corresponds with the cheque that was drawn against accused 2's account on 1st July, 1993.

In respect of the sum of R500,000-00 which was deposited in accused 3's account on 1st February, 1994, the learned DPP submitted that the said sum came by way of a cheque from the current account of accused 2 i.e. (a/c no.688). Accused 3 signed together with accused 2 the letter instructing the Central Bank "Exhibit F" to make two payments to Lesotho Landscaping(Pty)Ltd. On 25th January, 1994, the Central Bank issued two cheques i.e. "Exhibits G and H" in favour of Lesotho Landscaping(Pty)Ltd. On the same day the two cheques were deposited in the joint account of accused 1 and accused 2 i.e. account No. 661. The total sum deposited in that account was R1,501,502-01. Subsequently, on 26th January, 1994, a sum of R1,040,000-00 was deposited in accused 2's account, i.e. 688. The deposit was a cheque drawn against accused 1's and 2's joint account. On 1st February, 1994, a cheque deposit of R500,000-00 was made in the call account of accused 3 at FNB. It is of significance that the cheque for the said amount was a Volkskas

Bank Cheque (see paragraph 7 of Roodt's affidavit). Further, it is important to observe that a cheque withdrawal of the same amount was made from accused 2's account 688 at Volkskas Bank. The learned DPP submitted therefore that a cheque withdrawal as referred to in Marais' affidavit (para. 12) simply refers to the date when accused 2's account was debited with the said amount. I agree.

There is also a journal entry by FNB which refers to a Clearance of R500,000-00 on 2nd February, 1994. This sought to clear a cheque that had obviously been deposited before 2nd February at FNB. This document was put to accused 3 during cross-examination. Accused 3 lied regarding the source of this amount deposited in his account on 1st February, 1994, and said the amount in question came from Russell in the form of a cheque drawn by Russell against his Trust Bank in Bloemfontein. Russell vigorously denies this. His denial went unchallenged. In fact Russell was quick to point out that he had no such money in his account. This is confirmed by his Trust Bank statement.

Thus the learned DPP submitted that it is clear that R500,000-00 deposited in accused 3's call account came from accused 2.

With respect to accused 2 learned counsel for the Crown submitted that accused 2's complicity in the theft of the amounts in question was also proved beyond all reasonable doubt. He stated that pertinent to accused 2's guilt are the following :

- (i) Accused 2 prepared letters of instruction from Treasury to Central Bank: he was the author and signatory of all the letters.
- (ii) He collected three of the cheques from the Central Bank. One other cheque was collected by a messenger from Treasury who handed it to accused 2's secretary. All four cheques collected from the Central Bank were not entered in the Dispatch Register contrary to normal practice. What is clear however is that all four cheques found their way to the Bank and into the joint account held by accused 1 and 2 on the same dates they were collected.
- (iii) Concerning "Exhibit C" it was deposited in the joint account of accused 1 and accused 2 on 23rd March, 1993. The amount of the cheque was R579,500-00 (see para. 7(d) of Marais' affidavit). After the said amount had been deposited in account 661 a cheque in the sum of R309,750-00 was drawn against account No. 661. The same cheque was deposited in accused 2's account No.688.
- (iv) On 30th June, 1993 a cheque deposit in the sum of R576,798-49 was made in account No.661. This was a cheque issued by the Central Bank on 22nd June, 1993 (see para 7(b) of Marais' affidavit). On 1st July, 1993 a cheque withdrawal of R570,000-00 was made from account No.661. On the same day the cheque drawn against account No.661 was deposited in account No.688 which is accused 2's account.
- (v) On 25th January, 1994 two cheques were deposited in account No.661 i.e. a cheque for M563,809-73 "Exhibit H" as well as a cheque for M487,692-28 "Exhibit G". The backs of both cheques show that they were deposited in account No.661. Both were Central Bank cheques of whom Lesotho Landscaping(Pty)Ltd was payee. On 26th January, 1994 a cheque in the sum of R1,040,000,00 was drawn against account 661. The cheque was drawn in favour of accused 2. It was deposited in his account 688 on the same date.
- (vi) Accused 2's explanation regarding the source of the money that was deposited in their joint account with accused 1 is that the money was deposited by John Kemp. He goes further to say that the time when he

instructed the Central Bank to make the four cheques in issue, he saw the relevant vouchers together with attachments.

As far as the joint account is concerned, it is his evidence that the said Kemp was given a free hand to operate the account 661 and therefore he, accused 2 would not be in a position to know the source of monies that Kemp deposited in account 661. He also contends that any monies which moved from account 661 to account 688 did so as a result of instructions given by Kemp to him.

The learned DPP submitted that accused 2 is not being honest with this Court in that the monies that moved into the joint account were monies which came from the cheques that he himself collected from the Central Bank. It cannot therefore be true that those monies belonged to Kemp. In any event he has failed to explain how those monies found their way into his personal account from the joint account. I agree with submissions in this paragraph.

The learned DPP submitted that accused 2's evidence was riddled with improbabilities. It was a medley of half-truths, lies and distortions. He tended to remember what he preferred to remember and pretend he didn't remember what he felt he should rather forget. He remembered only those things which suited him regarding the transactions in respect of the cheques in question. But he could not remember what the payments were all about. In fact it is not true that he dealt with many payments which the

Treasury instructed the Central Bank to make. Further it was PW2's evidence that it was unusual for accused 2 to collect cheques himself. The learned DPP therefore submitted that accused 2 should have been able to remember on whose behalf he collected cheques on the few occasions when he collected those cheques at the Central Bank.

It is significant to note that payments made by the Central Bank had to be authorised either by accused 2 or 3 and that whoever authorised payments would, of necessity, have to be approached by the Ministry concerned indicating that the payments were urgently required. If that were the case, then, he should have been able to recall, at the very least, the name or names of person or persons requesting urgent payment. It is inconceivable that accused 2 would not be able to remember or to have an idea as to which Ministry requested Treasury to make payment.

There again is the evidence which came out during the trial that in fact it was very rare and unusual for the Central Bank to be requested to make payments involving such substantial amounts to individuals. During the period relating to the four cheques, there was only one instance where a cheque exceeding M200,000-00 was drawn by the Central Bank in favour of a payee. Surely, so it was submitted for the Crown, that accused 2 is misleading the court, and deliberately so, when he pretends that cheques for such substantial amounts were made by the Central Bank to payees on a regular basis. The fact of the matter is

that the four cheques in issue were the only cheques involving payments of sums exceeding M400,000-00, that is other than cheques involving payment of salaries to the commercial banks.

The cheques in issue were unique both in respect of the substantial amounts involved and in the interest personally shown in them by accused 2 and 1.

If the cheques in question were properly and genuinely paid to Lesotho Landscaping(Pty)Ltd then there should have been records somewhere relating to payments which were made. It is strange and beggars description that accused 2 feigns complete ignorance as to who requested payments to be made to this fictitious company. Other than talking glibly about having seen non-existent vouchers and attachments in his office before he was interdicted he does not have the faintest idea regarding the Ministry which requested payment. The same is true also of accused 3.

In respect of the four cheques everything was tainted with irregularity. Compare and contrast for instance this absurdity with the fact that three cheques which were collected by accused 2 together with "Exhibits G and H" can be traced at the Treasury. But "Exhibits G and H" cannot be traced at the Treasury. Yet it is known that "Exhibits G and H" were deposited into the joint account of accused 2 and 1 on the same day on which they were collected.

The vouchers relating to the three cheques paid to the late Baholo, Mr. Nkuebe, and Mr. Tshola were easily traced in the store-room at Treasury. But not so, the vouchers relating to "Exhibits G and H". The learned DPP submitted therefore that this is so because there were no such vouchers in relation to "Exhibits G and H", So also is the case in respect of Exhibits C and E". I agree.

If proper procedures had been followed in respect of all these payments, records of the transactions could have been found at the office of the CTB, Income Tax Department and copies of relevant contracts should also have been filed with the Treasury itself. The learned DPP submitted that this case has attracted so much attention that indeed if there had been any Ministry which requested Treasury to make any payment, someone somewhere would have come forward to say which goods or to whom services were rendered by Lesotho Landscaping(Pty)Ltd.

Again the learned DPP baffled by the bewilderment and perplexity caused by this state of affairs submitted that unless there was a grand conspiracy, it is not easy to imagine how the transactions relating to Lesotho Landscaping(Pty)Ltd cannot be traced in any Ministry or Government department. Yet the evidence clearly shows who siphoned monies paid out from the four cheques. He reiterated that it is bizarre and naive to suggest that there is this grand conspiracy against accused 2 and 3. In any event accused 2 and 3 stand discredited by PW9 and Russell respectively. But even barring those witnesses enough is

contained in the record that they are facile liars.

The learned DPP submitted that once the evidence of PW9 is accepted the whole charade that has been purveyed would, like Prince Rupert's drops, disintegrate at a mere touching. He also stated that accused 2 stole the money from Government pursuant to a conspiracy he had with all his co-accused. He was responsible for the distribution and shunting the stolen money from account to account with the aid of accused 1. He pointed out that accused 3's defence was dealt a fatal blow the minute Russell testified before Court. That is true.

Dealing now with authorities relevant to the arguments by the defence that the accused be given benefit of doubt and be acquitted as the Crown has failed to prove its case beyond doubt, I was referred to the case: CRI\T\19\74 R. vs Julius Setha Kopo (unreported) at pages 18-21 where Cotran J. as he then was said

"No onus of course rests on the accused to prove anything, and Mr. Olivier submits that the accused had given an explanation as to what happened to the magistrate. The explanation is not unreasonable nor is it improbable, and it has not been proved to be false. No adverse inference can be drawn from his failure to go into the witness box".

Citing the authority in R. vs Difford 1937 AD p.370 by Greenberg J the learned Judge said :

"no onus rests on the accused to convince the court of the truth of any explanation which he gives. If he gives an explanation, even if that explanation is improbable, the court is not entitled to convict unless it is satisfied, not only that the explanation

is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal"

In R. vs M 1946(AD 1023 at 1027 Davis AJA said likewise

".....the court does not have to believe the defence story, still less does it have to believe it in all its details; it is sufficient if it thinks that there is a reasonable possibility that it may substantially be true".

Cotran J. referring to the above exposition of the law said :

"This is in fact my understanding of the law. It is not, however, my understanding of the law that any explanation given however improbable or unreasonable or fanciful or remote, must be accepted, and a fortiori, if such explanation has not been put to the test".

I agree entirely with this exposition of the law.

In an attempt to illustrate the exposition of the standard applicable to criminal cases reference was made to ller vs Minister of Pensions (1947) 1 All E.R. 372 at p 373

re Lord Denning said :

"It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence 'of course it's possible but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice".

Mr Mdhluli in submitting that in respect of all the accused the court has not been given benefit of reasonably

possibly true explanation in order to enable the Court to come to the conclusion that in fact favourable inferences should be drawn in their respective cases referred me to Clement Kobedi Gofamodimo vs The State Appeal Case No. 4\1984 at p.8 where Maisels P sitting in Botswana said :

"It is, of course, clear that where the accused person gives an explanation found to be reasonable then unless this explanation is negatived by the prosecution (or it can be said that it cannot reasonably be true) the inference of guilt cannot, of course, be drawn. C F R vs Khumalo 1930 AD 193 at 213, R vs Difford 1937 AD 370 at 373 and R vs Omyfrejczyk (supra), at 395. If, however, the explanation is negatived by the State, then ordinarily the Court will not investigate the possibility of other inferences not mentioned by the accused. Thus in R vs Bhardu 1945 AD 813 at 822\3 in a passage referred to.....at 325 Davis AJA says :

'It must not be overlooked that the accused has given an explanation which has been rejected - which cannot even possibly be true..... the court should not, as it seems to me, find on his behalf some explanation which if given might perhaps have been true but which he himself has not given' "

I heartily accept this statement of the law and supportive authorities thereof.

In line with this approach are the remarks of Malan JA in R. vs Mlambo above at 738 which remarks have been approved in S. vs Nkomo 1966(1) SA 831(A) at 833 D-F, in R. vs Rama 1966(2) SA 395 (A) at 401 B-C and S vs Sauls 1981(3) SA 172 (A) at 182 H To 183 B :

"Moreover, if an accused takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to

be false and irreconcilable with proved facts a court will, in suitable cases be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate gravity of the offence, he should nevertheless receive the same benefits as if he had done so".

Accused 2 has been shown to have lied in a number of instances including where he stated that all cheques signed in blank were handed to Kemp yet a blank cheque belonging to account 661 was neither sent to Kemp nor was it signed by the holders of the account. It was thus by token of this fact conclusively established that it cannot be put past him to give false testimony if he thinks the falsity cannot be discovered. The same applies to accused 3 who lied that the money he had in his account originated from Russell and Kemp.

In this regard the words of Lord Devlin in Broadhurst vs Rex are worthy of note :

"It is very important that the jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness".

It would perhaps be fruitful when dealing with this question of accused's entitlement to benefit of doubt on which I was addressed at length to refer to Malan AJ's dictum in Mlambo at 738 A. The learned Judge stated that :

"An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or out weighed by, the proved facts of the case".

Regarding the question that an accused cannot and should not be convicted merely because he has been shown to be a liar I was referred to S. vs Jaffer 1988(2) SA at p.88 where Tebbutt J dealt with and analysed a number of authorities which indicate that :

"It is, of course, always permissible to consider probabilities of a case when deciding whether an accused's story may reasonably possibly be true....."

The story may be so improbable that it cannot reasonably be true. It is not, however, the correct approach in a criminal case to weigh up the State's version against the version of the accused and then accept or reject one or the other on the probabilities.

In S. vs Munyai 1986(4) SA 712 at p. 716 B-C Van der Spuy said :

"The fact that the Court looks at the probabilities of a case to determine whether an accused's version is reasonably possibly true is something which is permissible. If on all the probabilities the version made by the accused is so improbable that it cannot be

supposed to be the truth, then it is inherently false and should be rejected.....". I agree.

I was also referred to S. vs Kubeka 1982(1) SA 534 at 537 where in regard to an accused story Slomowitz AJ said :

"Whether I subjectively disbelieve him is, however, not the text. I need not even reject the State case in order to acquit him. I am bound to acquit him if there exists a reasonable possibility that his evidence may be true. Such is the nature of the onus on the State". I agree.

At 715 G Van der Spuy AJ said in highlighting the breath-taking application of the test said :

"In other words, even if the State case stood as a completely acceptable and unshaken edifice, a court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false".

I have considered the demeanour and testimony of all witnesses who testified. While in respect of crown witnesses the relevant aspects I have where relevant, devoted attention to air assessment as borne out in this judgment and the overall impression was that they were unexceptionable, contrariwise the demeanour and testimony of the accused who testified was unfavourable. At best they were evasive. Otherwise they told outright lies. Time and again the Court brought to accused 3's attention that his evasiveness would come into scale in the overall assessment of the case at the end of this trial. That he fetched this unfavourable comment should serve as an indicator to the type of witness he was.

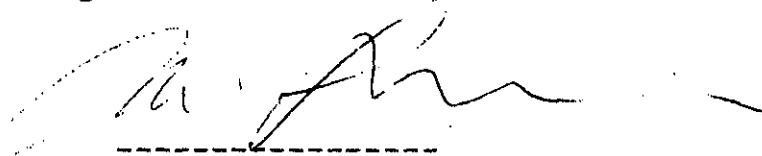
For purposes of certainty regarding annexures attached

to Marais' and Roodt's affidavits I rule these annexures excised from the affidavits and reference to them superfluous thus leaving the affidavits themselves intact as evidence.

I must also indicate that proper evaluation of the evidence led before me makes it irresistible to conclude that Lesotho Landscaping(Pty)Ltd to which government funds were paid in the amounts reflected in "Exhibits C E G and H " is a fictitious entity. Any impression given and actions created at treating with it as a juristic person, by the accused was a ludicrous pretence.

On the basis of the account I have taken of the evidence as a whole in this case including the authorities and principles involved, I have no hesitation in coming to the conclusion that the versions given by accused 2 and 3 are not only improbable but beyond all reasonable doubt false and ought to be rejected. The state has also succeeded in proving accused a guilt beyond doubt. All the accused are found guilty as charged on all four counts.

My Assessors agree.



J U D G E
7th February, 1996

For Crown : Mr Mdhluli assisted by Mr Sakoane
For Defence : Mr Sello for Accused 1
Mr Phafane for Accused 2
Mr Nthethe for Accused 3